



**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: 372831 B.C. Ltd.
dba Arms Pub
3261 Coast Meridian Road
Port Coquitlam, BC V3B 3N3

Case: EH12-266

For the Licensee: Juanita Leach, Licensee representative
Andrew Gay, legal counsel for the Licensee

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: November 26 & 27 and December 12, 2013

Date of Decision: March 7, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, 372831 B.C. Ltd., operates a licensed establishment under the name of the Arms Pub, at 3261 Coast Meridian Road, Port Coquitlam B.C. (the "Pub") under Liquor Primary Licence Number 031065 (the "Licence"). Under the Licence, liquor sales are permitted from 11:00 a.m. to 1:00 a.m. from Monday to Saturday and from 10:00 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 *Guide for Liquor Licensees in British Columbia* (the "Guide").

Ms. Juanita Leach appeared at the hearing as the Licensee's representative.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations are contained in a Notice of Enforcement Action (NOEA) dated November 29, 2012. The alleged contraventions are:

- Permit an intoxicated person to remain in the Pub, contrary to section 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "Act"): A licensee or the licensee's employee must not permit... (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.
- Sell or give liquor to intoxicated person, contrary to section 43(1) of the Act: A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 sets the penalties for each alleged contravention as follows:

- Permit an intoxicated person to remain (section 43(2)(b) of the Act), the penalty range set out in item 11 for a first contravention of this type is a licence suspension of four to seven days and/or a monetary penalty of \$5,000 to \$7,000.

- Sell or give liquor to intoxicated person (section 43(1) of the Act), the penalty range set out in item 9 for a first contravention of this type is a licence suspension of four to seven days and/or a monetary penalty of \$5,000 to \$7,000.

The Branch proposes a five day suspension of the Licence for each contravention, to run consecutively.

ISSUES

1. Did the contraventions occur as alleged?
2. If so, has the Licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

The Licensee admits permitting an intoxicated person (the "Patron") to remain in the Pub, but says that with the Licensee's good compliance history a monetary penalty of \$5,000 is more appropriate than a suspension. Since the Licensee admits an intoxicated person was allowed to remain in the Pub, the evidence about the Patron's state of intoxication is set out only to the extent necessary to assess the penalty for this contravention.

The Licensee denies selling or giving liquor to the Patron as alleged in the NOEA. The Licensee says that if the allegation is found to be proven, then a monetary penalty of \$5,000 is more appropriate than a suspension.

EXHIBITS

- Exhibit 1:** The Branch's book of documents
- Exhibit 2:** An excerpt from the Branch's *Compliance and Enforcement Policy and Procedures Manual* (parts of section 10 and section 4)
- Exhibit 3:** An excerpt from the Branch's *Compliance and Enforcement Policy and Procedures Manual* (parts of sections 5, 8 and 15)
- Exhibit 4:** The Licensee's book of documents
- Exhibit 5:** A computer disk with a video clip taken at the Pub on November 17, 2012
- Exhibit 6:** A copy of personal identification of Person 1 (sealed)
- Exhibit 7:** A copy of a letter from the Mayor of Port Coquitlam

EVIDENCE –BRANCH

Four Inspectors gave evidence on behalf of the Branch.

Inspector 1

Inspector 1 is responsible for the area in which the Pub is located. She made a plan for the inspection of a number of establishments in her area on November 17, 2012. Because she is known to many of those licensees, Inspectors 2, 3 and 4 (who are from different areas) were asked to carry out the inspections.

After the inspection, the other Inspectors sent Inspector 1 their inspection notes (tabs 2-4, Exhibit 1). Inspector 1 attended at the Pub on November 19, 2012 and issued the contravention notice (tab 6, Exhibit 1).

Inspector 1 discussed the inspection with the Inspectors on November 20, 2012. Her notes of that meeting are at tab 5 of Exhibit 1. Those notes principally address the evidence of intoxication. At page 2 Inspector 1 noted “- shooter 2-3 amber liquid”, (Inspector 4) saw, (Inspector 3) saw consume” and later on page 4 “slender -> server brown hair”.

Inspector 1 prepared the NOEA. The evidentiary portion is based on the notes provided by the other Inspectors. Inspectors 3 and 4 reviewed the draft NOEA before it was issued, but Inspector 2 did not. Inspector 1 also had a conversation about the NOEA with the Inspectors to confirm the details in the NOEA, but did not keep notes of those discussions. Inspector 1 believed the NOEA was accurate.

Inspector 1 said she did not consider the prior reports of activities, set out in the NOEA, when making the penalty recommendation. Inspector 1 confirmed that compliance history is different from the contravention history and that these were first contraventions by the Licensee.

Inspector 2

Inspector 2 said that she and Inspectors 3 and 4 entered the Pub about 11:30 p.m. on November 17, 2012, and left at about 1:12 a.m. While in the Pub the Inspectors observed various activities that lead to the contravention notice being issued.

Inspector 2 testified that, almost immediately after entering the Pub, she and Inspector 4 had a short interaction with the Patron. She observed the Patron's glassy eyes, somewhat incoherent speech, and unsteady balance. Based on her observations and the interaction with the Patron, Inspector 2 concluded the Patron was intoxicated.

Inspector 2 then asked the Patron's male companion about the coffee type drink in front of the Patron. Inspector 2 wanted to know if the Patron was drinking straight coffee or coffee with alcohol. She was told that the drink was a Monte Cristo, which the Inspector understood to be a coffee drink with alcohol. She said inspectors are allowed to ask patrons questions and that to ask such questions is normal inspection practise.

Inspector 2 testified that the Inspectors continued to observe the room and described a lack of interaction between the Patron and any server, the bartender who could clearly see her, or by door or floor staff, other than the service of the shooter, described below.

Inspector 2 testified that she saw a waitress deliver a tray of shooters and put some of the shooters on the table where the Patron was seated. The Inspector saw the Patron with a shooter in her hand, but could not say if the Patron took it from the table or if the waitress gave it directly to her. Inspector 2 said the Patron was on the left of the server, about one foot away from the server. The event only took seconds.

Inspector 2's attention was focused on the Patron, not the others at the table. She said her view and line of sight to the Patron's table was clear, the lighting was comfortable and pleasant, not dark or dingy. The Inspectors' own table was elevated by two or three steps. She thought her table was about 12-14 feet away from the Patron's table.

The Inspector originally testified that the shooter was served to the Patron at table 4 as marked on page 2, tab 8, Exhibit 1. She later said her best recollection was that it was served at table 3 as marked on that Exhibit.

Inspector 2 said her recollection of the service of the shooter to the Patron is based on her memory of the event.

She said Inspector 4 used her smart phone to make notes while in the Pub, contemporaneously with the activities occurring. Inspector 2 said only one of them made notes at the time so as not to be too obvious. Inspector 2 made her own handwritten notes about the events in her car, right after leaving the Pub. She said her own notes do not address the service of the shooter because she made her observations about it to Inspector 4 who was making notes at the time. Inspector 2 presumed that those notes would be complete. When making her notes she concentrated on those things she had not specifically told to Inspector 4. She transcribed these notes on the following Monday or Tuesday and sent the transcribed version to Inspector 1 (tab 3, Exhibit 1).

Inspector 2 said that in her experience, non-alcoholic drinks were not served in shooter glasses.

Inspector 2 said that after the service of the shooter to the Patron, she then went out onto the patio and made additional observations that were set out in her notes. These included that the Patron came out, looked unwell, was unsteady on her feet, and was helped into a taxi. She also said the security staff nearby paid no attention to the Patron, nor did any other staff assist her to leave. Inspector 2 returned inside and reported her observations to Inspectors 3 and 4.

Inspector 2 attended the post-inspection debriefing by telephone as she was off sick that day. Inspector 4's notes were read to her at the time and she did not identify any inaccuracies in those notes. She glanced through Inspector 4's notes in the weeks before the hearing but did not read them thoroughly because she had again been ill and had lots of work to do. She recalled being asked for comments about the draft NOEA but she only glanced at it and did not read the details thoroughly because she was busy.

She said she read the NOEA more thoroughly a few weeks ago and did not note any significant details that were inaccurate or left out.

When asked, Inspector 2 did say she remembered what Inspector 4 had written in her notes about who had served the shooter. Her recollection was the server had brown hair, black skirt, was slender and of medium height. She could not remember if the server had a ponytail or not. Inspector 2 did say that she might make a note of a person's ethnicity if there was a need to recall it so if no note was made, then she presumed it was not an issue. Here, her best recollection was the server was Caucasian.

In her career with the Branch, Inspector 2 has undertaken about 5,000 to 6,000 inspections, with probably more than 100 inspections since November 17, 2012. She testified that despite that number of inspections and the lack of notes about the service of the shooter, she remembered the service of the shooter.

Inspector 2 said that this inspection was done covertly, that is the Inspectors did not identify themselves to the staff as Branch inspectors. Inspector 2 confirmed that at no time did she determine the type or brand of drink delivered to the Patron, nor did she ask to confirm that information with the server, or obtain a copy of the receipt for the service. Inspector 2 did not attempt to get the Patron's name or the server's name or ask to speak to the manager or otherwise put the manger on notice of the incident. Inspector 2 testified that she did not ask to interview any of the staff or to ask for the videotapes from the cameras on site.

Inspector 2 confirmed the Branch's *Compliance and Enforcement Policy and Procedures Reference Manual* (the "Policy Manual") applies to her work and that she is to comply with it as best she can. She confirmed that the policy for these procedures is to allow a Licensee to make their own observations and talk to their staff to confirm the inspector's observations and would also allow for the inspector to get a copy of the receipt for the table. Inspector 2 agreed that, despite paragraph 5.5.3 saying if a contravention is identified a Licensee should be put on notice, none of the Inspectors put this Licensee on notice that night. Inspector 2 also agreed that paragraph 5.5.4 (recommending that when dealing with a contravention, inspectors have discussions with the Licensee and put the Licensee on notice) this was not done in this case.

Inspector 2 was aware of her powers to interview and inspect documents as set out in Exhibit 3. She confirmed no such interviews were held or information gathered as additional evidence. Inspector 2 agreed that without some of this information, the Licensee would not have any way of knowing what occurred until the NOEA was issued and would have to try to figure out who the server was from the Inspectors' notes.

Inspector 2 said it is up to the inspectors to decide whether to make inquiries at the time or to remain undercover as a covert investigation. Here, the Licensee was notified two days later. She did agree that it was possible that questions could have been asked without changing the covert nature of the investigation, similar to the question asked earlier in the evening about the coffee drink. Inspector 2 testified that the Pub was their last inspection of the evening.

A young woman was brought into the hearing room and Inspector 2 was asked if she could identify the young woman as the person who had served the shooter. Inspector 2 said she could not say if the young woman was the person who served the shooter but that the young woman was similar in appearance, specifically referring to the person's hair and height. That young woman is referred to in this decision as Identification Person 1.

Inspector 3

Inspector 3 testified that shortly after entering the Pub he observed the Patron's behaviour and appearance. He also had a brief interaction with her. He said her speech was slurred, her eyes were unfocussed, her head was lolling about, and she was unsteady on her feet. He concluded her level of intoxication was significant and obvious from that short period of observation and interaction.

Inspector 3 said he sat at a table on the upper deck, facing the bar and the tables in front of it, including the table the Patron was seated at. He continued to pay attention to the Patron and what she was doing. He related what he saw to Inspector 4 who was making notes.

He said he saw the Patron move to another table of approximately five people, directly in front of him, and directly in front of the bar. He had a clear and unobstructed line of vision. Lighting was good. The table was about 12-15 feet way, possibly 18 feet. The Patron was at the table when a tray with shot glasses with a yellow liquid was delivered. He said that shortly after that he saw the Patron "shoot back one of the glasses". He testified that the server with the tray was on the other side of the table from the Patron. He could not recall how the Patron got her drink – if it was set on the table and she picked it up, or if it was handed to her.

From his recollection, he was facing the server, and the Patron was to the server's right. From his angle of view, he could not say how many drinks had been on the tray, perhaps four or five. He did not know who ordered the drinks or when. The Patron may have been at the table for five minutes before the drinks arrived.

Inspector 3 made his own notes after the event on the Monday following the Saturday night investigation, and sent them to Inspector 1 in an email on that date (tab 2, Exhibit 1).

His notes describe how intoxicated the Patron was, and that she was served a shooter glass "full of an amber fluid as are several others at her table". He observed her "to toss this shooter back". His notes do not include any description of the person who served the shooter. Inspector 3 said all he could remember about the server was that she was female and wearing black. He said he could not identify the server as he was focussed on the Patron and her actions.

Inspector 3 was unable to say what kind of liquor had been served. He could not recall if the liquid was clear or opaque. He was unable to say if the liquid was tequila, as there are many kinds of tequila.

In Inspector 3's opinion, the glass the drink was served in was a typical shooter glass. In his experience the only time a non-alcoholic drink might be served in a shooter glass was when a patron insisted on buying staff a drink, and the staff did not want to refuse and so put juice in a shooter glass instead. He said he did not know of serving patrons anything other than liquor in a shooter glass.

Inspector 3 remembered discussing the inspection with the other Inspectors shortly after the inspection, but could not recall when or where. He reviewed Inspector 4's notes at the time and also on the morning of the hearing.

He reviewed the draft NOEA for accuracy and believed he requested some minor changes to the timing set out in it. The practice is to review the NOEA for accuracy by sending it to the others involved. He did not note any inaccuracies with the NOEA issued to the Licensee.

Inspector 4

Inspector 4's evidence was that Inspector 1 requested the inspection of the Pub because of complaints of intoxication.

Inspector 4 testified that on entering the Pub she had a short interaction with the Patron and observed her appearance. From the Patron's slurred speech, bloodshot eyes, inappropriate comments and lack of balance, Inspector 4 concluded the Patron was intoxicated. Inspector 4 confirmed that she and Inspector 2 were told the Patron was drinking a Monte Cristo drink.

Inspector 4 joined Inspector 3 at a table and continued to watch the Patron. She made notes of her observation in her phone. She confirmed her notes (tab 4, Exhibit 1) were the entirety of the notes she made that evening. She personally made the observations recorded between 11:59 and 12:07. Although the other Inspectors may have told her, she looked up and verified the information personally.

She testified that the Patron's table was about 20 feet away. She had a good line of vision. Lighting was dim, not good enough to read, but enough to see. From the table, she observed the Patron attempt to interact with Inspector 3 when he went by her table. She said she subsequently observed the Patron go to the dance floor and the Inspector got up to observe her. The Patron was staggering. When seated, the Patron's head was bobbing. This was in the direct line of sight of the bartender.

Inspector 4 then observed the Patron leave her table, go to a table close by, fall onto a male patron, and then return to her own table. Inspector 4 said she then saw a tray of drinks being delivered, so she left her table and moved closer to observe. She was about six feet away and had a clean line of vision, although not close enough to hear any conversation. At that time, the Patron was seated facing the bathrooms. At least three people were standing around the table. The Inspector did not observe how many others were seated at the table. She first said the server was to the Patron's left and then later, on cross-examination, said the server was on the Patron's right.

Inspector 4 said the server set a shot glass with amber liquid down directly in front of the Patron. Inspector 4 concluded that the drink was liquor. She thought the amber liquid was clear, like tequila. Inspector 4 testified that there were other shot glasses on the tray when brought to the table. She did not count how many, but thought there were four. She could not recall what happened to those drinks.

Inspector 4 remembered the drink being placed in front of the Patron but did not observe or recall what the Patron then did. She said that when the drink was placed on the table, she returned to her table to make notes. Inspector 4 thought that her notes would have reflected if she had seen the Patron drink the shooter.

When asked if she got a good look at the server while observing the shooter being placed on the table, the Inspector said that she made her observations about what the server was wearing afterwards. At the time, she was more concerned about the server's actions. In her notes, Inspector 4 described the server as "a female waitress, dark hair pony tail, 5'5", tall black long sleeve shirt, and skirt. From her recollection Inspector 4 described the server as having brown hair in a pony tail, 5'5", slim, wearing a black skirt and a long sleeved top. Inspector 4 thought she could identify the server if she saw her.

Inspector 4 did recall that the Patron left the Pub shortly after, and made notes about what Inspector 2 saw when the Patron left.

Inspector 4 testified that she and the other Inspectors met to review the notes so that Inspector 1 could prepare the NOEA. Inspector 2 attended by phone, the others attended in person. Neither Inspector 2 nor 3 had any comments on her notes.

Inspector 4 also confirmed that none of the Inspectors determined the brand or type of liquor, obtained a copy of the receipt, or got the name of the Patron or the server. The Inspectors did not interview the server, the manager, the Licensee or any other staff. No attempt was made that night to obtain the video surveillance tapes, to put the Licensee on notice, or obtain the glass in which the drink was served.

The Licensee's counsel presented Identification Person 1 to Inspector 4 and Inspector 4 identified her as the server who served the shooter to the Patron, with an 80% degree of confidence. Counsel then presented Server A (who later gave evidence and is referred to below) and who is also of the same general description as Identification Person 1 to Inspector 4. Inspector 4 testified she was no longer sure of her earlier identification of Identification Person 1 as the server.

EVIDENCE—LICENSEE

Bar Manager

The Bar Manager testified that she has held that position for six years. Her responsibilities include overseeing staff, the service of food and liquor, and any complaints or issues that may arise (for example, security, signs of intoxication or looking for identification to ensure no underage patrons). She has almost daily discussion with Licensee's representative who the Bar Manager said was very concerned about ensuring over-service is not tolerated and that everyone on staff knows this.

The Bar Manager described the Pub as generally "blue collar" with lots of regulars who know each other well. The Pub and its regulars often support community events and other charitable activities through draws and other events.

The Bar Manager was working on November 17, 2012. She was bartending and was the senior staff on duty. She recalled that evening because there was a UFC fight on TV pay per view and one of the participants was a well-known Canadian fighter. The Pub was very busy as many people had reservations to watch the fight. The Bar Manager said the fight was from 6-10 p.m. and that after it was over many people left. By 11:30 there were about 70-80 patrons in the Pub.

The Bar Manager testified that she knew the Patron, who was a regular. The Bar Manager recalled the Patron had a reservation for the evening. She recalled the Patron arriving a bit later than her reservation due to difficulties getting a taxi because of high demand that night. She described the Patron as generally very social. She also said that the Patron often acts and dances in a manner that might appear intoxicated to people who don't know her.

The Bar Manager reviewed the floor plan of the Pub at tab 8 of Exhibit 1 and the Licensee's own hand drawn floor plan at tab 24 of Exhibit 4. She said the floor plan in Exhibit 1 was not entirely accurate as to the number of and where the tables were located, and the floor plan in Exhibit 4 was not to scale. The floor plan in Exhibit 4 did show the numbers assigned to the tables for the Licensee's purposes of assigning the tables to staff and for staff to record and bill food and liquor orders. She identified the table the Patron was seated at that evening as table 41 on that floor plan.

She said the Licensee's policy is that over-service is not tolerated. If one person at a table is intoxicated, then the whole table is cut off until the intoxicated person leaves the Pub. She testified that she personally tries to keep an eye on the patrons and watch for over-service. She considers their whole demeanour (how they are sitting, if excessively loud).

The Bar Manager said she did not recall the Patron having trouble walking that evening. She did not recall her sitting with her head nodding. She agreed that if the NOEA was accurate, then the Patron should have been cut off.

The Bar Manager said that since the alleged contravention they have been stricter in cutting off persons who show signs of intoxication. She said that, as a result, a lot of patrons no longer come back.

The Bar Manager testified that she first learned of the allegations on November 19, 2012 which was the following Monday, at about 4:00 p.m.

She said that the Licensee's then CCTV system only stored 48 hours of video. This meant that after 48 hours, it would begin to record over the earlier video. If not specifically saved within those 48 hours, the video would be erased. On learning of the events of November 17 on November 19, the Bar Manager began to try to save the video from all of the cameras on site. When saving video, the machine takes an hour to save an hour of video. This means to save 8 hours of video it takes 8 hours. She had never tried to save video from all the cameras before, and thought she was doing it correctly. She later learned that only a portion from earlier in the evening was saved. There was no video saved from the time of the alleged contravention.

The Bar Manager gave a copy of the video she was able to save to Inspector 1. She said if she had been notified of the alleged contravention on the Saturday night she would have had more time to save all of the video. She said the Licensee has now replaced that system with a new, better system that would allow that to be done.

The Bar Manager said that on an earlier occasion in 2012 Inspector 1 had asked to see videotapes. At that time Inspector 1 was told only 48 hours were kept and so Inspector 1 knew the limitations on the system and never raised an objection about the system or suggested they get a different one.

The Bar Manager testified that four servers were working after 11:00 p.m. that evening. They are referred to in this decision as Server A, Server B, Server C and Server D. She said that each server was assigned an area of tables. Server A had the area with tables numbered in the 20's according to the Licensee's floor plan. Server B had tables numbered in the 40's. Server C had tables numbered in the 30's and also tables 100 and 101 and Server D had the tables numbered in the teens. The bartenders had the

individually numbered bar stools and also cash sales to anyone who ordered directly from the bar.

The Bar Manager says that Server A served the Inspectors' table, table 27 and Server B served the Patron's table, table 41. This is confirmed by the Licensee's sales records (referred to below).

The Bar Manager described Servers A, B, C, and D and pointed them out on the video:

- Server A: She said Server A was a closer match to the Inspectors' description but she was not wearing a skirt or a black top and she was serving a different area of the bar—the one the Inspectors were seated at.
- Server B: She described Server B as blonde, 5'9" and heavier set. She said Server B was not wearing a skirt or a black top that evening. She said she knew the top Server B was wearing as she frequently wore it to work, and it was turquoise.
- Server C: She said Server C is a small Asian woman who is a competitive body builder. In the video she was wearing a sleeveless top and pants. In no aspect does she meet any of the descriptors of the person who served the shooter.
- Server D: She is a petite blond woman, who also does not in any way fit the Inspectors' description of the person who served the shooter.

In the Bar Manager's opinion, none of the servers matched the description given by the Inspectors of the person who is alleged to have served the shooter to the Patron.

The Bar Manager testified that she had reviewed the Licensee's records of the liquor and food served that evening. She produced all the records for food and liquor that were paid for after 11:30 p.m. (tabs 1-10, Exhibit 4). That time was selected because any bill paid before that time would have been for liquor served before the time of the alleged contravention.

She said that tabs 1-4 of Exhibit 4 are the records for each of the servers and tab 5 is for the bartenders jointly. Each of tabs 1-5 has two sets of records:

- The first page in each set shows:
 - The server by name
 - Sometimes shows the table number served according to the floor plan at tab 24
 - What was served and the quantity served listed sequentially by the Licensee's inventory number and not in the order in which it was served
 - The time the bill was paid for (cashed out)
- The second page in each set shows what was served and how many, in the order in which it was served, but no table numbers.

The Bar Manager said she matched up the two pages, looking to see if she could determine which server served the shooters.

The Bar Manager said it was common for people to come to the bar and order drinks. There were trays at the bar. The Bar Manager said it was possible for someone to order a round of drinks and put it on a tray, but she would have stopped them if she had seen that happening. Cash sales at the bar would be made within minutes of the time shown on the first page of the order under tab 5, Exhibit 4. She gave the example of the seven "Superman Shooters" shown under tab 5 as being sold just prior to 12:50 a.m.

The Bar Manager said the sales records did not show four or five amber coloured shooters of the same kind, served at the same time to either table 41 or table 31, which were the tables the Inspectors' said the Patron was sitting at when served the shooter.

The Bar Manager says the sales records show Server B served the Patron's table the following:

- Nine sleeves of beer, served 2, then each following one served singly
- Five other sleeves of beer with side orders of clamato, served 2, then 1, then 2
- Five shots of tequila, served 2, then 1 then 2
- Two cosmopolitan martinis, served together
- One monte cristo coffee
- One glass molson draft

The last two items would have been the last two served. During this time two meals were also ordered and served.

The Bar Manager said the policy is that before serving drinks bought for another table outside their assigned area, the server the drinks are ordered from is to check with the server whose table the drinks are ordered for. This is because the table's server will know what the prior consumption was and so prevent over-service.

She said the Licensee took steps to avoid over-service by speaking about its seriousness to the staff, having staff sign a sheet every year acknowledging their responsibilities not to over-serve, notices were posted reminding the staff not to over-serve and telling them they would be fired if they did so. Staff had been given notice of two particular patrons who were to be cut off in a timely manner.

Server A

Server A testified that she is an employee of the Licensee. Server A was one of the young women presented to Inspector 4 for identification, as referred to above. The Licensee voluntarily left the hearing while Server A gave her evidence due to concerns raised by the Branch advocate whether this witness might feel constrained in giving her evidence while her employer was present.

Server A said she had worked for the Licensee for about five years, with two years prior experience. She remembered working on the evening of November 17, 2012. She recalled serving the tables in her area. Her area did not include tables 41, 43 or 31. She did not recall serving any shooters or any other liquor to tables 41, 43 or 31. Server A said she knew the Patron and did not serve her on November 17, 2012.

Server A testified that the incident occurred over a year ago and she did not remember much. However, she said she was told about it two days after it happened when it was fresh in her mind and she knew then she had not served the shooters.

She said Server B was the server for tables 41 and 43 and that Server B was blonde and was taller (5'8") and heavier in build than Server A.

Server A said she could tell from the records that the Inspectors sat in her area. She would have taken the Inspectors' drink order and served it and taken payment from them. She also would likely have approached their table at least one or two more times while they were there.

She said if someone in her section bought drinks for another table, she would ring it in, but have the other server deliver the drinks. This was because the other server would know what the persons getting the drinks had had to drink. She would never simply deliver drinks that a customer had ordered and paid for at the bar.

When first shown the video from earlier in the evening (Exhibit 5), Server A did not recognize herself as the person delivering drinks to a table that was not in her area. When later re-shown the video, she then confirmed she had in fact done that. She said that if persons who ordered a drink in her section moved, only then would she deliver their drinks to the new seats. She presumed that is what the video recorded.

Server A said she had served juice in shooter glasses, together with liquor shots. She gave the example of serving pineapple juice with tequila. She acknowledged that juice chasers would have been shown on the Licensee's sales records and none of the tequila shooters ordered that night showed any juice chasers ordered with them.

Licensee's Representative

The Licensee's representative testified that she had a long history as a licensee, on her own and as a partner, and this was the first contravention of any kind as a licensee.

She said that when she took over the Pub she had concerns about problems of over-service. At that time, she directed staff to treat the regular patrons as any other patron and to cut them off if necessary. She also instituted a policy of cab rides home if needed (tab 14, Exhibit 4) and hired a floor person/doorman to keep an eye on the floor. She had staff annually sign off on their responsibilities (tabs 11, 12, 21 and 26, Exhibit 4). She said the sign off sheets for 2010/ 2011 were missing because she had given them to Inspector 1 who now could not find them.

The Licensee's representative gave examples of staff being disciplined for over-service (tabs 15 and 20, Exhibit 4). She posted staff notices of the policy against over-service and warnings of termination if that happened (tabs 17 and 19, Exhibit 4). She had identified certain "regulars" who staff were directed to cut off in a timely manner to avoid over-service (tab 18, Exhibit 4).

The Licensee's representative said she was not at the Pub on November 17, 2012. She was very upset when she heard about what had happened. She met with staff individually about it. She did not hold group staff meetings because of the small size of the staff.

Since then she has had a new camera system installed. She said that the new system keeps data longer and it is easier to make copies if required. She testified that she now has the doorman starting earlier so he can get a better feel for the patrons before it gets busy. She has directed the floor person walk about more and talk to people more.

The Licensee testified that Server B was fired about one month before the hearing. Server B had been fired before, for over-service. She said Server B had subsequently begged for her job back and was re-hired without any further over-service problems. There were a number of reasons for the recent termination; over-service was not one of them.

The Licensee's representative said Identification Person 1, who was presented to Inspectors 2 and 4 for identification (referred to above), was not and never had been an employee of the Licensee. A copy of the identification for Identification Person 1 was marked as Exhibit 6 (which has been sealed).

The Licensee's representative also referred to the support of the local mayor, who spoke highly of the Pub and confirmed a lack of issues with by-law enforcement or the police and the significant contributions made by the Pub and its patrons to local charities. (Exhibit 7 and see also tab 13, Exhibit 4).

The Patron

The Patron testified that she was at the Pub on the evening of November 17, 2012. She said she met a friend to watch the pay per view UFC fight at the Pub, as planned. Later, two other friends joined them and sat at their table for about two hours. Another friend joined for a period of time. She said the drinks listed in the Licensee's records were consumed by the four or five of them.

She said she always ordered a Monte Cristo coffee as her last drink of the evening—it was a “ritual” of hers. She had no recollection of consuming a shooter after her Monte Cristo coffee, or of a tray of shooters being delivered to their table. She did say that if a server had brought her a shooter bought by someone else, she might have consumed it, but that it rarely happened that someone else would buy her a drink.

She said she did not recall knowing the people at the next table. She did recall falling against one of the men seated at her table. She gave a different version of what happened.

She testified that she suffers from back pain due to an injury but does not always take her own medication for it. She said that on that night she was suffering from back pain. To ease her pain, she took pills a friend in the Pub offered to her. She said she loved to dance and would “skip to the dance floor”. She said that she probably was on the dance floor for four or five songs after the fights. She also said that after the fight she “floated around”, visiting and talking to other friends in the Pub. She also went out onto the patio because she is a smoker.

SUBMISSIONS – BRANCH

Permit intoxicated person to remain (section 43(2)(b) Act)

On the penalty for permitting an intoxicated person to remain, the Branch advocate said the Inspectors' evidence indicated the contravention was sufficiently egregious to warrant the proposed five day suspension. The Patron was moving around the premises and the signs of her intoxication were readily apparent to the Inspectors, yet

staff failed to take any action. They did not cut off the table or require or assist the Patron to leave.

Sell or give liquor to intoxicated person (section 43(1) Act)

On the second allegation, selling or giving liquor to an intoxicated person, the Branch advocate submitted that the Inspectors' evidence is credible and consistent. At least two of the Inspectors saw the drink delivered, held or consumed by the Patron. Their evidence was that liquor is served in shooter glasses, not juice. The Licensee's records do not support a finding that the liquid was juice.

The Branch advocate said it does not matter who served the drink and that the Inspectors did not need to identify the server. If the identity of the server is critical, then the Branch advocate said the person serving the liquor could have been Server A. She was on the video as serving drinks outside her area. She reasonably matches the Inspectors' notes and recollections. The Branch advocate suggested it is possible Server A served drinks in Server B's area. The Branch advocate acknowledged that Server A's clothing that evening does not match the Inspectors' description. However, he said it was the Licensee who suggested the server was slender, and that suggestion may have confused the Inspectors in their recollections and also Inspector 4 in her identification of Person 1 as the server.

If the suggestion the server was slender is disregarded, Server C would otherwise fit Inspector 4's description. Server C wore a sweater with mid-length to long black sleeves and her top over leggings might be considered by some to be a skirt. The Branch advocate said that, where the description varies, it does not do so in any significant way. There are more commonalities than discrepancies. He suggested the Licensee's records of the drinks sold to the Patron's table may not have been served in the sequence presented by the Licensee.

The Branch advocate also suggested that the service of the Monte Cristo earlier in the evening would be sufficient to support a finding that section 43(1) had been contravened.

The appropriate penalty would reflect that staff should have known she was intoxicated, and not only did not cut off her table, but served her another drink.

SUBMISSIONS – LICENSEE

Permit intoxicated person to remain (section 43(2)(b) Act)

The Licensee admitted the Patron was intoxicated and allowed to remain on the premises but said the penalty should be \$5,000, not a five day suspension as recommended.

The Licensee's counsel referred to the Policy Manual (Exhibit 2) that is intended to guide inspectors when making a recommendation for a penalty. He said the first step is to determine the contravention history and if this is a first or second and which range of penalties set by the Regulation applies. The next step is to consider where within the range the penalty ought to be set. To do this the Inspector needs to look at compliance history. The Policy Manual says if a licensee has no compliance history, depending on the nature and circumstances of the contravention, the penalty may be assessed at the lower of the range. He said that, based on the NOEA, Inspector 1 never considered the Licensee's clean 13 year compliance history when making her penalty recommendation.

Sell or give liquor to intoxicated person (section 43(1) Act)

On the second allegation, the Licensee's counsel submitted that there are two elements that must be proven:

1. the liquid sold or given was in fact liquor; and,
2. the person who sold or gave the liquor was a member of the Licensee's staff.

He said the evidence presented does not support a finding against the Licensee on either of these elements.

The Licensee is critical of the Inspectors' failure to obtain better evidence when it is clearly within the Branch's own best practises to do so, and there was nothing to prevent them from doing so. Counsel says that the failure to gather better evidence negatively impacted the Licensee's ability to respond to the allegations.

The Licensee agrees that the liquid allegedly served was not likely juice, but says the Inspectors failure to gather better evidence makes it impossible to rule that out.

The Licensee says that the Inspectors' description of the server, and the description in the NOEA, does not match the description of any of its servers. Counsel says the Inspectors' evidence not only lacked sufficient detail and was inconclusive, it lacked consistency. The Licensee says the Inspectors' evidence varied among them on critical matters.

The Licensee said it has responded to the Branch's evidence as best possible, given the timing of the notice to it, especially in relation to the ability to get all of the videotape saved.

The Licensee says that if the contravention is found to be proven, then a monetary penalty of \$5,000 is more appropriate than a suspension. Counsel refers to the Branch's Policy Manual. He again distinguishes between contravention history and compliance history and says the Licensee's compliance history has no violations, not just in this 12 month period, but in all her 13 years as a licensee supports a monetary penalty at the low end of the range.

Licensee's counsel says when determining penalty other relevant factors to be considered under the Policy Manual include promoting voluntary compliance. The Licensee has taken steps so that shows a large penalty is not required for voluntary compliance.

REASONS AND DECISION

Permit intoxicated person to remain (section 43(2)(b) Act)

As noted above, the Licensee admits it allowed an intoxicated person (the Patron) to remain in the Pub contrary to section 43(2)(b) of the Act. The Inspectors' oral and written evidence of this was not challenged. The Licensee's employees ought to have removed the Patron from the Pub but did nothing.

I find that the Patron was intoxicated and allowed to remain in the Pub and as such I find that the Licensee has contravened section 43(2)(b) of the Act.

Sell or give liquor to intoxicated person (section 43(1) Act)

Service of the Monte Cristo to the Patron

I do not accept the Branch's suggestion that evidence of the service of the Monte Carlo to the Patron earlier in the evening is sufficient to support the contravention in this case. The Licensee has a right to know the case to be made against it. The NOEA sets out the Branch's case: the alleged facts and the elements of the alleged contravention. When preparing for a hearing, the Licensee is entitled to rely on the NOEA as setting out the case against it. Here, the NOEA did not set out the service of the Monte Cristo as forming or supporting the contravention. The Branch did not raise the service of the Monte Cristo as evidence of the contravention until the end of the hearing. Applying the fairness requirement of reasonable notice of the case to be made, I find that at that stage of these proceedings it was too late for the Branch to rely on this different set of facts to support a finding of contravention of section 43(1).

Liquor was sold or given

I accept the evidence of the Inspectors that a shooter glass of amber liquid was placed in front of or given to the Patron. They were closely watching the Patron and paying attention to what she was doing, because they were of the opinion she was intoxicated. I accept that Inspector 4 saw the glass placed on the table that the Patron was seated at,

and that Inspectors 2 and 3 saw the contents of the glass being consumed by the Patron. Their notes and oral evidence on this point are reasonably consistent. I accept this evidence despite minor discrepancies between the Inspectors.

The Licensee pointed out that the NOEA says all three of the Inspectors saw the Patron consume the drink whereas in their oral testimony only two of them said they saw the Patron consume the liquor. In my view this difference between the oral evidence and what is alleged in the NOEA is not material. The Licensee is not put at any disadvantage by this minor discrepancy between the NOEA and the Inspectors' evidence. Nor does this discrepancy affect the reliability or the weight to be given to the Inspectors' oral evidence on this point. Further, I only need to find one of the Inspectors saw liquor being sold or given to the Patron to find this element of the contravention to be proved.

I prefer the Inspectors' evidence about the contents of the shooter glass to the evidence on that point from the Licensee's witnesses. I find on that evidence that shooter glasses are typically used to serve liquor, except in very unusual circumstances that do not apply here. Further, the Licensee's evidence that it could have been juice in the shooter glass is not supported by its own sales records. Those records show all items that are served to patrons - even water and other items for which a charge is not made. The records do not show any juice being served in this manner, despite the large number of shooters that were served that evening. For these reasons, I find the liquid served in the shooter glass to be liquor.

Intoxicated person

The Licensee had admitted the Patron was intoxicated. On this basis, I find that a shooter glass that contained liquor was placed in front of or given to the Patron, who was intoxicated.

Who sold or gave the liquor

The Licensee's counsel says I must find that the liquor was sold or given by a person who was employed by the Licensee in order for the Licensee to be held responsible. I find I am not so constrained, and the person who gave or sold the liquor does not need to be employed by the Licensee for the Licensee to be responsible. The Act as a whole is clear that a licensee is responsible for the operation of the licensed premises and the activities that go on within the premises. A licensee is responsible to cut off service to intoxicated persons. To allow a licensee to limit or escape that responsibility by simply saying another patron gave the liquor to the intoxicated person defeats the whole scheme of the Act.

However, in this case, the NOEA did not suggest that the shooter was served or given by anyone other than an employee of the Licensee, for whom the Licensee was responsible. As set out above, the Licensee has a right to know the case to be made against it. The NOEA sets out the facts alleged. This is not to say that a NOEA is to be strictly construed. Inspectors are not lawyers and some flexibility is necessary. However, the Licensee is entitled to rely on the NOEA as setting out substantially the case to be proven. Here, the NOEA did not suggest anyone but a server, who was specifically described in the NOEA, sold or gave the liquor.

The Branch did not raise the potential of the Licensee being responsible for another patron delivering the drink until the end of the hearing. Most of the evidence over the course of two days of hearing and much of the submissions were directed to establishing which server had served the liquor.

Applying the fairness requirement of reasonable notice of the case to be made, I find that at this stage of these proceedings the Branch cannot rely on a different version of the facts. To find a contravention in this case, with the facts set out in this NOEA, I need to consider if the evidence establishes that a server was the person who served the liquor.

The NOEA very specifically, describes the person as a server, female with dark hair in a ponytail, 5'5" in height and wearing a black long sleeve shirt and a skirt. Inspector 4's written notes refer to a female waitress, dark hair, pony tail 5'5" tall, black long sleeve shirt and skirt. Inspector 3's written notes refer to the service of the shooter but make no reference to the identity of the person who served it. Inspector 2 made no note of the service at all. Inspector 1's notes of the de-briefing session with the other inspectors after the event contain the notation "slender -> server brown hair".

From the evidence, four servers and two bartenders were on duty at the time. From all of the evidence, two of the servers and both bartenders can be ruled out as the person who sold or gave the liquor. This leaves the potential server as Server A or Server B.

In their oral evidence, both Inspector 2 and 3 relied on the written notes to support their recollection of the server. Neither had a good independent recollection of the server. Inspector 4 did have an independent recollection of the server and mentioned she was slim. She identified Identification Person 1 as the server, with 80% certainty. Identification Person 1 is a student who was not employed by the Licensee and had no connection with the Pub. However, she looked similar to Server A. When presented with Server A, Inspector 4 was not as certain on her identification of Identification Person 1 as the server and agreed Server A could be the person who sold or gave the shooter.

This would seem to be reasonably strong evidence that Server A served the shooter to the Patron. Even the Licensee agrees that of all the servers working that night, Server A most closely matched the physical attributes of the person the Inspectors say served the shooter. However, there are a number of problems with this identification.

The video evidence (Exhibit 5) clearly shows Server A was not wearing a long sleeved black shirt and a skirt. On that night she was wearing a large, almost over-sized beige or grey sweater, with a sleeveless or halter-necked top that was definitely not black. She was also wearing pants. So she does not match the clothing description of the person who sold or gave the shooter, as given by the Inspectors, at all.

Secondly, Server A was not the server for the area in which the Patron was seated. She was, however, the server where the Inspectors were seated. She took the Inspectors' drink order and served it and took payment from them. She also would likely have approached their table at least one or two more times while they were there.

Another server, Server B, was the server for the area in which the Patron was seated. She served the Patron earlier in the evening, but she does not fit the Inspectors' description of the person who served the shooters. She has blond hair and is heavy set. She is definitely not dark haired and slender. From the video, she was not wearing a long sleeved black shirt or a skirt. She was wearing an elbow length sweater over a turquoise or other coloured top, over tights.

If the Patron moved to and was served the drink at another table as Inspector 2 recollected, it would have had to be in Server C's area. Server C is a very short Asian woman who is a competitive body builder. In the video she was wearing a sleeveless top and pants. In no aspect does she meet any of the descriptors of the person who served the shooter.

Inspector 4 was the only one taking notes at the time. When she saw a person approaching the Patron's table with a tray of drinks, Inspector 4 left her table to get closer to make observations. She said her observations focussed on the Patron and the activity (the placing of the glass on the table), not the description of the server. She made her notes about the service of the shooter after she returned to the table. At that time the other inspectors were also "feeding" her their observations as well. So the observations about the server are either hers, but she acknowledges she did not focus on the server, or they are the other Inspectors who now have no recollection of what the server looked like, apart from the notes. This, with the videotape evidence, calls into question the accuracy of her notes and the accuracy of her recollections. The identification, with an 80% certainty, of Identification Person 1 (who did look similar to Server A) as the server, is also calls into question who served the liquor.

Server A's service of the Inspectors' own drinks may have had an influence on Inspector 4's description and recollections. While it is possible that Server A delivered drinks outside of her area contrary to the Pub's unwritten policies, she denies doing so and provided a reasonable explanation for seeming to have done this earlier on the video. Plus, as mentioned earlier, from the videotape, her clothing that night did not match the detailed description set out in the NOEA.

Importantly, the Licensee's sales records do not show either Server A or Server B with a sale of three or four amber coloured shooters during this critical time. The completeness of those records was not challenged in cross-examination.

The above raises concerns with the evidentiary basis for a contravention, and causes me to consider the Licensee's submission about the Inspectors' ability to obtain better evidence. In some situations inspectors may be limited in their ability to gather better evidence, and that limitation may be a factor in coming to a determination. Here, the Inspectors were able to gather and provide very thorough evidence of the Patron and her level of intoxication. They made inquires and detailed observations. Inspector 2 was able to determine that an alcoholic drink (the Monte Cristo) had been served to the Patron, without any concerns about compromising safety or the effectiveness of the inspection.

However, the evidence of who served the drink is not as thorough. For example, none of the three inspectors attempted to obtain the name of the server. There is no reason to think the Inspectors had any personal safety concerns about asking further questions. Neither the patrons nor the staff were reported to be unfriendly or suspicious of the identity of the Inspectors. It was the end of the evening and no further or other inspections were to be made and therefore possibly compromised. In this case, the Inspectors' ability to obtain better and clearer evidence was not unduly restricted. For these reasons, I am not satisfied that I have the best evidence of who served the shooter before me.

After considering all of the evidence that was put before me, I am unable to find that the Branch has established on a balance of probabilities that a server, as alleged and described in the NOEA, served the shooter. For this reason, I find that, the contravention has not been proven.

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 onus is on the Licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Respecting the contravention of section 43(2)(b), the evidence does not support a defence of due diligence and the Licensee did not claim the defence. As such, I find that the defence does not apply to the finding of a contravention of section 43(2)(b).

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened section 43(2)(b) of the Act, 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 factors that I have considered in determining the appropriate penalty in this case include consideration of 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licence. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 11 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5,000 to \$7,000 penalty.

The Licensee has a very long, clean compliance history, which would, without more, support a less severe penalty. However, the Inspectors determined the Patron to be significantly intoxicated, on just a very short interaction. The Patron was moving around a lot and in the clear line of vision of the Bar Manager, her own server and the doorman, plus other staff. None of them took any action to cut off the table or to remove the Patron from the premises despite very obvious signs of intoxication. Even if the Patron's signs of intoxication were exacerbated by her taking medication (about which I make no finding), this does not alleviate any responsibility for taking action. This is a significant failure of responsibilities by the Licensee's staff. For these reasons I find a penalty at the high end of the monetary range to be applicable and find a penalty of \$7,000 to be appropriate.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,000 to the general manager of the Liquor Control and Licensing Branch on or before April 7, 2014.

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.

Original signed by

Dianne Flood
Enforcement Hearing Adjudicator

Date: March 7, 2014

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Hugh Trenchard, Branch Advocate