



**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: Sanoor Investments Ltd.
dba Executive Plaza Coquitlam
405 North Road
Coquitlam, BC V3K 3V9

Case: EH14-111

For the Licensee: Dennis Coates, Legal Counsel
Roger Gibson & John Teti, Licensee
Representatives

For the Branch: Cristal Scheer

Enforcement Hearing Adjudicator: Dianne Flood

Date of Hearing: May 14, 2015

Date of Decision: June 26, 2015

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

Sanoor Investments Ltd. dba Executive Plaza Coquitlam (the "licensee") owns the Foggy Dew Pub at 405 North Road, Coquitlam, BC. The licensee holds Liquor Primary Licence number 010354 (the "licence"). The Foggy Dew Irish Pub Coquitlam Inc. (the "third party operator") operates the Foggy Dew Pub. Mr. Roger Gibson and Mr. John Teti are principals of the third party operator and appeared as the licensee's representatives at the hearing.

According to the terms of its licence, the licensee may sell liquor from 11:30 a.m. to 1:30 a.m., Monday through Thursday, and from noon to 2 a.m. on Friday through Sunday. The premises have a licensed capacity of 56 for Patio 1 and of 388 for Person 01.

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" (the "Guide").

The licensee is alleged to have contravened the Liquor Control and Licensing Act (the "Act") on September 5, 2014, by serving liquor in excess of the maximum drink size set by the Guide.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated October 23, 2014 (the "NOEA") (Tab 1, Exhibit 1).

The Branch alleges that on September 5, 2014, the licensee contravened section 12 of the Act by contravening a term and condition of the licence, that is, by serving liquor in excess of the maximum drink size set by the Guide. The range of penalties for a first contravention of this type is a 1 to 3 day licence suspension and/or a \$1,000 to \$3,000 monetary penalty (item 46, Appendix 1, the Guide). The branch proposes a monetary penalty of \$1,000.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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).

ISSUES

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

EXHIBITS

Exhibit 1: Branch's Book of Documents, Tabs 1 to 11

WITNESSES

The Branch called one witness, the liquor inspector who attended at the premises on September 5, 2014 (the Inspector).

The Licensee called four witnesses: the two principles of the third party operator, Mr. Gibson and Mr. Teti, the bartender who sold the liquor ("the Bartender") and the manager on duty at the premises on the night in question (the "Manager").

THE BRANCH'S EVIDENCE

The Inspector

The Inspector testified that she has seven and a half years experience as a liquor inspector. She attended at the premises on September 5, 2014 as part of a routine inspection. The premises were busy, with a line-up of about 60 to 70 people. She identified herself to the head doorman, who advised her the premises were at capacity and they were only allowing people in on a "one-for-one" entry, that is, only when one person left would another person be allowed in.

The Inspector's evidence was that she then proceeded into the premises, accompanied by the head doorman, and did a head count. She was familiar with the premises as she had inspected it often. The Inspector testified the premises were busy.

By her count, the premises were over capacity for the outside patio area. The head count for the patio was 71-73, when its maximum capacity is 56.

She then started her count inside and as she was doing that count she saw a patron carrying a tray of eight shooters ("Tray 1") walking toward the area of the pool table. She watched the patron and saw him distribute the shooters to his friends and drink one himself.

The Inspector testified that the head doorman saw her looking at this happen and asked her if it was permitted, to which she responded "not by the tray load". She said she then continued her count.

The Inspector testified she then saw another patron at the bar with a tray, and seven shooters being prepared by the bartender ("Tray 2"). The head doorman spoke to the bartender but she could not hear what was said. She said she observed what looked like the bartender giving the patron his money back. She said she told the patron she was sorry for the inconvenience, and he said it was ok, he knew it was not permitted as he was a bar owner too.

The Inspector marked the location where the first patron took Tray 1 with an "X" on the floor plan (Tab 6, Exhibit 1). She marked the location where the second patron stood to order Tray 2 with a "Y" on the same floor plan.

The Inspector said she finished her head count and spoke to the Manager about the overcrowding on the patio and about the two trays of shooters. She said he seemed frustrated and was going to shut the patio down. The Inspector told him that was not necessary.

The Inspector testified that the Manager called the Bartender into the office and asked him about serving the trays of drinks. She said the Bartender apologized, said he didn't mean to do it, and that it would not happen again. The Inspector asked the Bartender for the shooter ingredients and amounts and he wrote that information down (page B, Tab 5, Exhibit 1). Those notes indicate one of the shooters as a "pornstar" and the other as "beefcakes", with each of the shooters indicated to be one ounce of liquor, with a splash of juice.

The Inspector also asked for and got the sales receipts for the two trays of shooters. One receipt showed eight "pornstars" but the other only showed four shooters, not the seven she had observed. She said this did not make sense until she later saw the Bartender's statement (page A, Tab 5, Exhibit 1) that said he had "promo'd" three of the seven drinks.

The Inspector said she later met with Mr. Gibson and Mr. Teti, the principals of the third party operator, and with the Bartender. She took the Bartender's statement (page F, Tab 4, Exhibit 1). The Bartender told the Inspector that he knew that the drink limit was 3 ounces per person and that he made sure not to over-serve or to serve to intoxication. The Bartender told her that he had experience and had worked other places and had had some training at every place he worked. He said the licensee had asked if he had his SIR and if he knew the rules and he had answered yes.

The Inspector reviewed page 17 of the Branch Compliance and Enforcement Manual, "Liquor Pricing" (page I, Tab 4, Exhibit 1). She drew specific attention to paragraph 20.8.2, "Prohibition against using a sales strategy that is likely to promote or encourage intoxication". Under that paragraph, licensees are directed that that they must not use a sales strategy that is likely to promote or encourage intoxication. Prohibited sales strategies are stated to include serving drinks larger than the maximum drink size. The maximum drink size is set out and for distilled liquor the maximum drink size is three ounces (85 ml) per person.

The Inspector then referred to the Guide that applies to all licensees (Tab 8, Exhibit 1). At page 33, under Drink Sizes, licensees are directed to encourage moderate consumption at all times and to follow strict limits on maximum size of servings. For distilled liquor, the maximum drink size is set at three fluid ounces (85 ml). This limit is stated to apply regardless of whether the drink is served in one or more glass or container. The Guide goes on to permit drinks that one or more patron intend to share to be served in larger containers but cautions that the maximum of three fluid ounces per person must be maintained.

The Inspector also drew attention to page 34 of the Guide, still under the heading of Drink Prices, where licensees are directed to encourage moderate consumption. Licensees are instructed not to use a sales strategy that is likely to promote or encourage over consumption. Licensees are specifically directed that they "may not serve any drinks greater than the maximum drink sizes – by the "tray load" for example."

The Inspector testified that she did not proceed with the overcrowding issue.

In the NOEA (Tab 1, Exhibit 1) the Inspector set out her reasons for pursuing enforcement action. Maximum drink sizes are intended to encourage moderate consumption. A bartender serving a tray of shooters has no ability to monitor or control who the drinks are served to – whether they are consumed by minors, intoxicated patrons, or the consumption of all the shooters by one person.

She re-iterated that drink sizes more than the maximum was against public safety and could lead to other problems. The Inspector testified that staff are to serve the drinks to the person who is to consume them, so they can observe and determine if someone should not be served.

The Inspector testified that on the night of the contravention the Bartender told her that the table where Tray 1 was served was near the bar and he could monitor it, but in the Inspector's opinion the table was not near enough to the bar for the Bartender to monitor it.

The Inspector testified that when writing up the contravention notice, she considered the penalties under Appendix 1 of the Guide for using a sales strategy likely to promote or encourage intoxication (Item 30) and for a exceeding the maximum drink size as a general item under Item 46 of the Appendix. The penalties for a sales strategy (on a first offence - possible suspension for 4-7 days, and/or a monetary penalty of \$5,000- \$7,000) are higher than for a breach for exceeding maximum drink size (possible suspension of 1-3 days and/or a monetary penalty of \$1,000 - \$3,000), so she decided to write up the contravention as exceeding the maximum drink size because that was less onerous to the licensee.

She noted that there were no contraventions of a similar nature and referred to prior compliance meetings (Tab 11, Exhibit 1). She agreed that no enforcement action was taken on the earlier issues for which there had been compliance meetings.

The Inspector agreed that the issue of overcrowding on the patio was not proceeded with, that the patio had been used for smoking and not for liquor service.

The Inspector had not seen the Bartender's email about the drink ingredients and the revised amount of liquor in each shooter (Tab 5, Exhibit 1) because it had been forwarded to the Branch Advocate, not the Inspector.

The Inspector did not see Tray 2 being served, but she believed the Bartender returned the patron's money for it.

The Inspector had no knowledge of the prior actions or location of the patrons who were served the drinks on Tray 1, as she had only entered the pub prior to that.

The Inspector re-iterated that one patron was served more than the maximum, he took the tray of shooters to a table where in her opinion the Bartender could not see him and while the patron did not consume all the shooters, the patron could have consumed all of them.

The Inspector is trained to observe for intoxication but she did not pay attention to whether the persons who drank the shooters from Tray 1 were intoxicated, as she was focused on counting the drinks on the tray. While intoxication would be a significant issue, when conducting an inspection she looks for the capacity, for minors and for intoxication. She went through the premises twice, once with the head doorman and once with the Manager.

The Inspector agreed that she was aware of self-service of liquor by patrons, where the patron goes to the bar and gets a drink and then sits down. She agreed that was fairly common. She testified that self-service was a question of the quantity picked up at the bar. She agreed that self-service is permitted but said the size of the drink has to be consistent with the maximum size of drink permitted per person. The Inspector had never seen anyone walk away from the bar with a jug of beer. She did not believe there was anything specific in the Guide about self-service.

THE LICENSEE'S EVIDENCE

Mr. Roger Gibson

Mr. Gibson testified that he had been involved in the liquor industry for over 50 years, and during that time he had been involved in many establishments, both large and smaller. The only infraction he had ever had in that time, was an overcrowding issue in the mid -1980's. He is very active in industry advisory groups.

Mr. Gibson testified that he had been involved with the operation of the Foggy Dew since it opened in 2000. He was not present the night of the alleged contravention. The Manager and the Bartender had been employees for a number of years, the Manager since the opening of the premises.

Mr. Gibson gave evidence of how, in his opinion, a typical licensed premise operates. In a food primary he said the patrons are seated at a table for one to two hours. In a liquor primary establishment he said it is more fluid, with patrons moving about a lot.

His instructions to staff are to watch for over-service, service to minors, and capacity.

The Foggy Dew does not serve liquor on the patio after 11 p.m. because they are not allowed to. After 11 p.m. they use it for smoking only in order to avoid interference with the line up to get in.

He acknowledged over-consumption was a real problem because of drinking and driving and safety. He did not want to get anyone intoxicated because of the problems that can create for themselves and for other patrons. They had a handbook that was signed by employees and the Manager held staff meetings.

In his opinion, the problem here was the alleged inability to serve patrons with drinks for the patron and another patron. He used as an example, going into a crowded bar and getting a table, and then every patron having to go up to the bar to get served.

He disputed whether the shooters served that night each had more than one ounce of liquor. He thought they each had $\frac{2}{3}$ of an ounce, so that the total liquor for the eight shooters was five and one third ounces.

He testified that how the staff managed self-service was up to the server and the bartender on duty. Mr. Gibson said the servers do not wander around with a tray of shooters to sell. Patrons have to order from a server or a bartender.

He said in a pub like the Foggy Dew it was quite possible for a patron to go to various different bartenders, so what the licensee does is have security keep an eye on patrons and if they notice anything out of line, then the person is asked to leave or is given coffee.

In his opinion, the Bartender would be able to see the area where Tray 1 was taken and consumed, but he did not know if, in fact, the Bartender did see the tray delivered and the shooters consumed.

Mr. Gibson testified that he had a good relationship with the liquor inspectors. He was not concerned about the amount of the fine, it was the principle of the ability to permit self-service. He said that the sports clubs are all basically self-service. He also commented on how at banquets, a person may buy several bottles of wine for the table and carry them back to the table.

Mr. John Teti

Mr. Teti testified that he had been in the hospitality industry since 1967, and has operated licensed establishments since 1969. He had been in partnership with Mr. Gibson since 1982 and together they co-managed the Foggy Dew.

He is very involved in the industry, and was the chair and spokesperson for Bar Watch, a joint safety initiative between specific owners and Vancouver Police Department, which has won a national award for its public safety initiatives. He said he was among the first bar owners to install a scanner to limit criminal activity on the premises. He has worked with Crime Stoppers on initiatives like date drugs. He said that public safety is a primary initiative of his.

Mr. Teti testified that the three pillars of operating a licensed establishment were not to overcrowd, not to over-serve and not to serve minors. He had no intent to have intoxicated customers – they inevitably will be a problem, so he instructs staff on this. On over-service, he agreed he would never serve one patron eight shooters at one time.

Mr. Teti described the Foggy Dew as more like a nightclub than a restaurant. He described it as having four bartenders on duty, so on any given night a patron could get drinks from all four bartenders. He testified that security staff was there to look for problems, to avoid over-service, overcrowding or service to minors.

In discussing self-service, Mr. Teti said that he had been at many events where he had bought a bottle or two of wine for the table and was allowed to walk away from the bar with it, without any questions asked.

Mr. Teti testified that he agreed with the Inspector's concerns that if no one was to observe self-service that it could be a problem, but he said no bartender would serve eight shooters without knowing where they were going.

He testified that the ratio of sales by servers and bartenders would depend on the operation. At the Foggy Dew, a larger proportion of sales were by the bartenders.

Mr. Teti thought that if delivery of drinks by a patron on a tray is a problem, then the Branch ought to send out a notice to licensees directing them not to do that.

The Bartender

The Bartender testified that he had over 14 years experience in the industry, as a server, a bartender, and a bar manager. He has worked at the Foggy Dew since March 17, 2014. His job is to oversee the well-being of the customers. His duties include serving customers, servicing the servers and serving food orders. His work schedule varies from two to three days a week, generally on weekends.

The Bartender testified that he was familiar with the expectations of the Branch.

The Bartender had read the NOEA and recalled giving the statement at Tab 5, Exhibit 1, when requested to do so by the Inspector. He recollected the events of the night in question.

Respecting the service of the shooters on Tray 1, the Bartender testified that a group of customers had been standing around the bar. He said that this was not common but also was not unusual. He had served them some Coronas and rye and cokes and they had six "pornstar" shooters at the bar. They then ordered another eight "pornstars". By that time, the Bartender testified, they were being pressed against the bar and were irritated and asked for a tray. All of these customers were still hovering and then they walked away to a table. The Bartender said he could see the table they went to. It was about 20 to 25 feet away. It was the same group that had been at the bar. He saw them drink the shooters.

Respecting Tray 2, the Bartender testified that a "general regular" who he had seen a few times asked for shooters for him and his friends. The Bartender said he advised the customer that he, the Bartender, would serve them. He delivered the tray to the table and put one in front of each customer.

He denied that the order for the seven shooters had been cancelled as described in the NOEA. He said he did not give the patron his money back, as described. He testified that, instead, he simply gave the patron his change. The Bartender said he "promo'ed" three of the seven drinks because he liked the customer and to build clientele.

The Bartender said the Inspector had not spoken to him at that time; he only spoke to her later. It was after he delivered the drinks that he was pulled into the office and spoken to by the Manager.

The Bartender knew it was against the law to serve one person three or four drinks at a time. If a customer asked him to do that, he would refuse to do that.

With respect to self-service, he said he would permit it, if it was within the law.

The Bartender testified that if a patron orders shooters, in deciding how many to serve, the Bartender will consider if the patron is by themselves or with others. If by themselves, then it is limited. If the patron is with others, the limit "can be raised a bit". He used as an example, the patrons that ordered the "pornstars", saying they had been a group and stuck together.

The Bartender sent the April 2 email (page C, Tab 5, Exhibit 1) setting out the formulas for the drinks. It shows the shooters are each $\frac{2}{3}$ ounces. He agreed this would mean the eight "pornstar" shooters were a total of five and one third ounces. He said more often shooter ingredients were $\frac{2}{3}$ ounces, not a full ounce.

The Bartender said on the night in question he set out the ingredients and amounts for the shooters in his handwritten note (page B, Tab 5, Exhibit 1). He agreed that note shows each of the shooters to have one ounce of liquor, not the $\frac{2}{3}$ ounce showed in the April 2 email. He explained the difference in amounts by saying he was very nervous when interviewed by the Inspector on the night in question.

The Bartender testified that the shooters and their contents or the amount of liquor in each are not listed on a menu. He does not have instructions on how much liquor to use in each shooter. He testified that sometimes the amount of liquor in a shooter will be $\frac{2}{3}$ of an ounce; sometimes it is one ounce. He said each shooter is measured when ordered, not pre-poured.

The Bartender testified that the size of shooter glasses may be 1 ounce, 1 and $\frac{1}{2}$ ounces, or 2 ounces. He said bigger glasses were necessary for some drinks because once you shake them, foam forms.

The Bartender said he admitted to the Inspector that he had served more than the maximum number of drinks because he was nervous. He maintained that the patrons were a group that he was familiar with. He said he probably should not have let the patron take the tray himself and he, the Bartender, should have delivered it himself.

When shown the floor plan of the premises at Tab 6, Exhibit 1, the Bartender indicated where he was standing when Tray 1 was served and marked that on the floor plan with a "1" in a red circle. He said he thought the patrons were located at a table that he marked with a "2" in a red circle. He marked the table where he delivered the "beefcake" shooters to with a "3" in a red circle.

In the Bartender's opinion, the bar was busy that night. Three bartenders were on the one side of the bar, and another two or three on the other side, so there were about six bartenders on duty.

He testified that as a bartender he would monitor over-consumption and if a patron was intoxicated, the patron would be offered water, asked to leave or to be escorted out. The Bartender testified that security was going around the premises, observing customers.

In the Bartender's opinion, the bartenders serve about 60% of the drinks served in the premises; the servers serve about 40% of the drinks.

The Manager

The Manager testified he had overseen the entire operation of the Foggy Dew since it opened in February 1999. He worked at least 5 or 6 days a week with hours that varied but usually from noon to 1:30 or 2 a.m.

He recalled the night in question. He testified that it was busy and up to 25 staff were working – servers, bartenders, bussers, kitchen staff and security. He acknowledged that the premises were close to capacity on that night. He said that happens regularly.

The Manager testified that patio operations had ceased at 11 pm, and after that the patio was used as a smoking area. The patio can only be accessed from inside the premises. For service on the patio, he said there was a separate server who takes orders and delivers the drinks.

The Manager described the layout of the premises as shown on the floor plan, Tab 6, Exhibit 1. He said that that floor plan was reasonably current. According to the Manager, the central island bar serves the whole of the premises. The Manager said the bar is designed so that the bartenders are not often required to look down. They look up at screens for the drink orders. He said that when it's busy, there are six bartenders, six servers and generally six security personnel. Doormen work on Friday and Saturday nights and when there are events.

The Manager testified that security personnel check identification when patrons arrive and monitor the occupancy level and deal with any problems with over-service or any other behavioral issues.

The Manager thought service was about 60% by servers and 40% by bartenders on busy evenings. He testified that there was usually about a 50/50 split between patrons sitting and standing; on a busy night, the split could be 60/40 seated versus standing.

When asked about self-service, the Manager replied that it depended. If the patrons could be seen from the bar, and the sightline was good, then the bartenders could see where it was going, how many patrons there were and how many glasses were asked for.

When asked if the bartenders would have a hard time seeing who was drinking where, the Manager said he has been the general manager for 16 years and he could monitor the premises from anywhere. He did say there is one partition to the washrooms that impedes the sightlines. Generally, he said, there are about three or four locations where you cannot see all patrons. He said that if asked for more than the maximum drink per person, and the patrons could not be seen, then he would ask for the group to come to the bar or to wait for a server.

The Manager said the area by the poolroom could be seen from the bar.

The Manager agreed that on the night in question the premises were dimly lit and music was playing. He said some patrons were dancing in the area for that. He described the movement of people as "fluid". In his opinion, on that night the patrons in the area where Tray 1 was taken would generally be sitting; in the area where tray 2 was delivered people would be standing and milling about.

The Manager agreed that if a patron was not served directly it would be hard to monitor if there was "passing off" of liquor to minors and hard to monitor levels of intoxication.

On the maximum drink size per person, the Manager testified the shooters are one size and for a highball, it's a maximum two-ounce shots. He said the reason for the rule on maximum drink size is moderation. He disagreed that the maximum could be exceeded if the sightline was good. He said this was not a policy of the licensee, just common sense.

The Manager testified that the bartenders and servers have to have their SIR and that the SIR program teaches them to engage with patrons and how to avoid over-service. He agreed that patrons would not have that same training.

The Manager recalled meeting with the Inspector and said the Inspector was looking to find out what was in the drinks. He had a discussion with the Bartender about the shooters.

The Manager said staff meetings are held fairly regularly. The meetings are used to address overall operations, staffing, the state of the business, seasonal changes, other stuff that is in the employee manual, for example, service and over-service, service standards and grooming standards.

THE BRANCH'S SUBMISSION

The Branch Advocate submitted the evidence supported a finding of a contravention of section 12 of the Act and the Terms and Conditions limiting the maximum drink sizes. The maximum drink size per person for distilled liquor is three ounces per person.

The Inspector saw two instances of two trays of drinks being served to one patron. Each tray was over three ounces. One patron was sold and served eight one-ounce shooters, the other patron had been sold and was in the process of being served seven one-ounce shooters. The policy for the maximum drink sizes is to promote moderation and to avoid over-service. Licensees are prohibited from using sales strategies to encourage over-consumption.

The evidence is that the premises were at capacity. The environment was "fluid". Lighting was dim and music was on. The bartender was busy. A number of patrons were jammed up against the bar. In these circumstances it would have been very difficult for staff to monitor patrons across the room.

Bartenders and servers need to be in control and know who is being served and how much. In a fluid environment, drinks could be delivered to minors or persons who were intoxicated. Staff cannot monitor intoxication from across a room. Servers need to assess each patron, especially if they have been served by other staff. Staff need to communicate with each other about who has been served what.

Unlike servers and bartenders, patrons who are allowed to deliver drinks to others have no training in how to monitor for intoxication. They do not have the SIR training or have any responsibility for their friends' consumption of alcohol. Shooters in particular can be problematic. In two prior cases, death was a result of over-service of shooters.

The doorman who accompanied the Inspector was not called as a witness. He could have provided evidence of what happened. An adverse inference may be drawn from the failure to call him.

A penalty of \$1000 is appropriate and illustrates a measured approach.

THE LICENSEE'S SUBMISSION

The licensee submitted that the principle at issue is an important one for the industry and has significance beyond this case. It is for this reason the licensee has contested the issue, incurring costs greater than simply paying what is a relatively small fine of \$1,000.

Counsel for the licensee noted that section 12(2)(b) is very general, referring to the Terms and Conditions. The Terms and Conditions Penalty Schedule sets out 46 contraventions, with section 46, as a "catchall", being any breach of the Act, the Regulations or the Terms and Conditions, not specifically covered in the other 45 items. It is this catchall that the Branch has relied on.

The Terms and Conditions at page 33 sets out the drink sizes for distilled liquor. Counsel said it is confusing where it says: "Drinks that two or more patrons intend to share may be served in larger containers ...". He says this means that multiple containers may be used to serve drinks.

Counsel referred to Policy Directive #10-04 issued by the Branch on April 27, 2010, which is very similar to page 33, although the wording is slightly different. He says this was a precursor to the Terms and Conditions.

Counsel suggested that the Branch's description of the rules is exaggerated or distorted.

Counsel said that the eight shooters were not all served to one person. The eight patrons had been at and left the bar area as a group. He said one person from the group took all eight shooters for the group, on a tray. The eight shooters were consumed by eight persons, one shooter each. Counsel said this is what the Inspector observed and is what the Bartender thought would happen. The Bartender's evidence the group moved to a table was not contradicted, and it makes sense. The patrons were in sight and the one patron took the shooters to the others.

Respecting Tray 2, Counsel submitted that the Inspector said she objected to the tray going out and it was not served, but the Bartender said he did serve the tray and that he did it because they were going to different people and not to one person.

Simply because the Bartender told the Inspector he made a mistake does not mean that he did. The Bartender was nervous and wanted to appear respectful of the Inspector and the system. Counsel says in fact it was not wrong and simply saying it was wrong does not make it wrong.

Counsel said the Manager and the Bartender are consistent in their evidence – if the patrons are in an area that can't be seen, than a patron won't be allowed to have multiple drinks. He submitted it is simply a matter of common sense. Counsel said the evidence supports finding that almost every bar that operates on a common sense policy. He also referred to the taking of bottles of wine to a dinner table and a jug of

beer with friends and says this satisfies the test in the terms and conditions. So, he said, the word "served" has to be read and interpreted with common sense.

The operators have long expertise, with only one long ago contravention. They treat liquor service seriously, and as evidenced by their involvement in Bar Watch. The number of employees on duty goes to show the operators had care and concern for over-service and intoxication. Six servers, six bartenders and six security staff were all within the relatively small room. There is no evidence of over-service or intoxication of the patrons.

The Licensee says the doorman who accompanied the Inspector was not called as a witness because his duty was to check the door. He accompanied the Inspector for security reasons and his evidence was not critical. No adverse inference should be drawn by the Licensee not having called him as a witness.

It is the licensee's position that the actions do not constitute a contravention and so no due diligence defense is claimed.

FINDINGS:

Facts

With respect to the circumstances surrounding Tray 1, the evidence of the Inspector and the Bartender is, for the most part, uncontroverted. I make the following findings of fact on that evidence:

- the Bartender provided one patron with eight shooters
- the shooters were placed on a tray and the patron was allowed to leave the bar area with the tray of eight shooters
- the patron took the shooters to his seven friends
- the patron and each of his friends consumed one shooter
- the patron and his friends had been served earlier by the Bartender, in the immediate area of the bar and had only recently moved to the area in which the shooters were consumed.

I also find that the Bartender was able to see the patron and his friends from the bar. I find that there is no evidence that the patron or his friends were minors or intoxicated.

With respect to the circumstances surrounding Tray 2, the evidence of the Inspector and the Bartender conflicts on several points. They both testified that the Bartender gave this patron money. The Inspector said that she could not hear the conversation between the Bartender and this patron but she is of the opinion that the money was a refund for a tray of shooters that was cancelled. The Bartender said the money was the change from the payment for the shooters and that he, the Bartender, intended to and did deliver a tray of shooters to this patron and his friends. The Bartender provided the Inspector with a receipt for these shooters.

I make no adverse findings based on the fact the doorman was not called to confirm his conversation with the Bartender. In any event, the Inspector confirmed she could not hear that conversation, the Bartender's evidence was that the NOEA was incorrect about that conversation and he was not challenged on that or asked about the particulars of the conversation.

I find that because a receipt was produced to show that shooters were in fact served, the payment of the money was more likely to be the return of change. However, nothing turns on this point because, based on both witnesses' testimony, I find there is no evidence that a tray of shooters was in fact given to this patron. Simply because that might have happened does not support a finding that it did happen.

The amount of liquor in the shooters was also put at issue in the evidence. The Bartender's statement to the Inspector on the night in question was that the shooters contained one ounce of liquor per shooter. This differed from his later statement and his oral evidence that there was only 2/3 ounce of liquor per shooter. On this point, I find that the Bartender's statement on the night in question was more likely to be accurate than his later recollections. I find the amount of liquor in the shooters was one ounce per shooter. However, I find that nothing turns on this point.

Considering all of the above, I find as a fact that one patron was allowed to take a tray of eight one-ounce shooters away from the bar.

For completeness, I also make the following findings of fact:

- the atmosphere in the premises is more similar to that of a nightclub than a restaurant, with more patrons likely to be standing than seated
- at least five bartenders and six servers were on duty
- a patron could order a drink from any server or bartender
- six security staff were on duty to check for identification and to monitor the premises for intoxication and other issues
- there is no evidence of minors being present on the premises or patrons being intoxicated
- the premises were at or near capacity
- the door was being monitored and access controlled on a one-in, one-out basis.

Having made those findings of fact, I now turn to the analysis.

Analysis

The Act regulates the sale of liquor in order to protect the public from the harms that the consumption of liquor may cause. As part of that regulation, licensees are required to meet strict terms and conditions, to prevent such problems as under-age drinking, the over-consumption of alcohol, and overcrowding or unsafe conditions in restaurants, bars and pubs, and to minimize the potentially negative impact of liquor sales on neighbourhoods and communities.

Under section 12, the Act incorporates the Guide. The Guide is intended to provide licensees with further direction about their duties and obligations under the Act, set out in layperson's language. A contravention of the Guide is a contravention of the Act and, as such, a finding of a contravention of the Guide is a serious matter. A contravention has significant consequences for a licensee, not only in terms of a penalty and possible impact in subsequent circumstances (second contraventions) but also in terms of the licensee's reputation.

The Branch says the Guide, in the chapter "Providing a Safe and Responsible Service", directs licensees to encourage moderate consumption and to follow strict limits on the maximum size of drink servings. For distilled liquor, the limit for each drink is set at not more than three fluid ounces of distilled liquor per person. The Branch submits that here, the evidence is that one patron was served eight one-ounce shooters and that that is a contravention of the Guide.

The licensee agrees the Guide sets maximum drink sizes but says that the maximum drink size was not exceeded because the evidence is that the Bartender knew that eight patrons would be consuming the eight shooters. He could see where the drinks were going and to whom they were going. And, counsel says, the eight shooters were in fact consumed by eight patrons. The licensee says no contravention of the Act or the Guide has taken place. Nor is allowing a patron to deliver the shooters in these circumstances is a contravention of the Act or the Guide because there is no prohibition on that. For an activity to be a contravention, it must be clearly stated.

I agree and find that in order for a contravention to be found, the licensee must be able to clearly discern the responsibility to do, or not do, the activity alleged to be the basis for the contravention. Without a reasonably clear direction, an activity or a failure to do something ought not to constitute a contravention under the Act.

I have reviewed the Act, the Guide and Branch Policy Directives that speak to how the regulations are applied in different circumstances. I find while the Guide and the April 27, 2010 Policy Directive 10-04 (which is substantially the same as the Guide) clearly set maximum drink sizes, none of these clearly address who must deliver drinks to patrons.

The Guide, under drink prices, does prohibit the use of a sales strategy likely to promote or encourage over-consumption. Examples of prohibited activities include: selling drinks "two for one", allowing staff to circulate with trays of pre-mixed drinks such as shooters that are not pre-ordered, or serving drinks greater than the maximum drink size, by the "tray load", for example.

I have also reviewed the Liquor Primary Terms and Conditions, which say at page 19, under the heading "Dispensing liquor and mixing drinks" that licensees are permitted to pre-mix drinks by hand or by using devices such as a Bellini machine in anticipation of patrons ordering drinks, provided that the liquor comes from the original containers purchased from the Liquor Distribution Branch. Further direction is given against doing anything that makes the monitoring illicit liquor difficult. Licensees are told they are not permitted to circulate trays of pre-mixed or pre-poured drinks that have not been ordered. They are directed that drinks must be dispensed at a liquor service bar, in full view of customers, and that licensees must not permit the self-service of liquor by patrons.

I also reviewed the *Liquor Line, Issue 7, Summer, 2014* issued by the Branch General Manager, which speaks to "self-service" under the heading "Automatic beverage systems" stating: "The self-service of liquor by patrons is not permitted. If you are considering an automatic beverage system, please note that staff will still need to 'pour' and serve the liquor. This will enable you and your staff to prevent minors from accessing liquor and to ensure that your patrons do not become intoxicated."

I have found as a fact that the Bartender had served the patrons in this group earlier in the evening, that when the order for the drinks was placed he could see the patrons and that the number of drinks ordered corresponded to the number of patrons in the group. I have found that the patrons each consumed one shooter and the Bartender could see the group when they consumed the shooter. I have also found that each shooter was one ounce and as such I find that each of the shooters was well within the maximum drink size for one person. I am unable to find that the maximum drink size per person was exceeded.

There is no suggestion here the shooters here were sold at a reduced price or that staff was circulating with trays of pre-mixed drinks that were not pre-ordered. That leaves the prohibition against using a sales strategy of serving drinks greater than the maximum drink sizes by the tray load or the prohibition against self-service.

In making my decision, I note that in establishments like these premises, patrons do not have to be seated. Patrons may order from more than one server. The uncontroverted evidence is that the licensee had security staff inside checking the patrons for over-service or other problems, that drinks must be ordered from a bartender or a server, and that drinks are not pre-poured nor are trays of shooters offered for sale. Based on this, I do not find there was a sales strategy likely to promote or encourage over consumption by serving drinks larger than the maximum drink size by the tray load.

A sales strategy requires something more than simply responding to a request for a drink order. No offer was advertised or initiated by the licensee, no price reduction offered or made. If allowing patrons to order a drink at the bar for themselves and another patron is be found to constitute a sales strategy, then something more needs to be said to licensees, to give licensees notice of that. If the number of drinks that can be ordered at the bar is to make a difference in finding whether there was a sales strategy or not, or whether the activity is prohibited or not, then that needs to be communicated more directly.

I also find that the direction in Liquor Primary Terms and Conditions and the *Liquor Line, Issue 7* are not clear enough to support a contravention or to help assist in interpreting the Guide or the Act as they both seem to be directed to where a patron could pour his or her own drink directly from an automatic beverage machine, like a Bellini maker. So I do not find there was "self-service" here as that reference is made in either of those documents.

Having made these findings, I do wish to note that under the Act and Guide, licensees are clearly responsible to monitor the persons to whom drinks are being served and whether those persons are of legal age and not intoxicated. The Liquor Line News direction on self-service re-iterates that.

I appreciate that if patrons are allowed to take drinks to other patrons there may be potential over-service or service to minors, but there is no evidence that that happened here. If that should happen, where a patron delivers liquor to a person who is not of legal age or is intoxicated, or delivers a drink to a patron that is larger than the maximum size (for example, if only two of these patrons had drunk the eight shooters),

the licensee will clearly be responsible and in contravention of the Act and the Guide and subject to a penalty. A licensee, by allowing a patron to deliver drinks may run a high risk of a contravention, presumably much higher than if a server delivers the drinks. There would no doubt be a question of due diligence. However, simply because that might happen, that is not sufficient to find a contravention here.

Having found there not to be a contravention, I do not need to address the defense of due diligence.

I find that the evidence, taken as a whole, does not support the alleged contravention against the licensee.

Original signed by

Dianne Flood
General Manager's Delegate

Date: June 26, 2015

cc: Liquor Control and Licensing Branch, Surrey Office
Attention: Rupi Gill, Regional Manager

Liquor Control and Licensing Branch, Nanaimo Office
Attention: Cristal Scheer, Branch Advocate