



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
*The Liquor Control and Licensing Act RSBC c. 267***

Licensee:	Earl's Restaurant (The Bay Centre) Ltd. dba Earl's Restaurant and Bar 1199 Government Street Victoria, BC V8W 3M9
Case:	EH10-165
For the Licensee:	Cathy Humphrey
For the Branch:	Bode Fagbamiye
Enforcement Hearing Adjudicator:	George C.E. Fuller
Date of Hearing:	June 7 & 24, 2011
Place of Hearing:	Victoria, BC
Date of Decision:	September 19, 2011

INTRODUCTION

The Corporate Licensee, Earl's Restaurant (The Bay Centre) Ltd., dba Earl's Restaurant and Bar (the "the Licensee") owns and operates an establishment known as Earl's in downtown Victoria, BC. The establishment operates under Food Primary Licence Number 302087, and is open for business from 9:00 am to midnight, Sunday through Thursday and 9:00 am to 1:00 am on Friday and Saturday.

The Licensee is, as are all liquor licences, issued in the Province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated January 10, 2011.

The Branch alleges that on November 11, 2010, the Licensee contravened Section 43(2)(a) of the *Liquor Control and Licensing Act* (the "Act"), by permitting a person to become intoxicated. The proposed penalty is a ten day licence suspension (item 10 of Schedule 4, *Liquor Control and Licensing Regulation*) (the "Regulation").

In the alternative, if I do not find the above contravention occurred, the Branch will ask that I consider the alternative contravention of whether on November 11, 2010; the Licensee contravened Section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold, served or otherwise supplied.

The proposed penalty for that alternative contravention is also a ten day licence suspension (item 11 of Schedule 4, of the Regulation.)

The Licensee denies that the contravention occurred, but if it did, then the Licensee says that it is entitled to assert the defence of due diligence.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act [RSBC 1996] chapter 267

Drunkenness

43(2) Licensee or the Licensee's employee must not permit

- (a) a person to become intoxicated, or
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the contravention occur?
2. Was the Licensee duly diligent?
3. If the Licensee was not duly diligent, is a penalty warranted under the circumstances?
4. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted and were considered:

- **Exhibit 1** – the Branch's book of documents, Tabs 1 to 21.
- **Exhibit 2** – the Licensee's book of documents, Tabs 1 to 12.
- **Exhibit 3** – Victoria Police Department General Occurrence report.

- **Exhibit 4** – letter dated June 1, 2007 from the General Manager of the Liquor Control and Licensing Branch re: Serving It Right Program Changes.
- **Exhibit 5** – excerpt from the Food Primary Licence Terms and Conditions Guide.
- **Exhibit 6** - Excerpt from the document entitled "What is "Serving It Right™" – B.C.'s responsible beverage service program.
- **Exhibit 7** – Licensee's additional disclosure documents, Tabs A to D, inclusive.

EVIDENCE

The Branch called five witnesses.

Sergeant T

The first was a Victoria city police sergeant who was on duty at the date and time of the alleged contravention. Sergeant T had been a Victoria city police officer for 16 years at the time of this incident and had been on the police reserve for a period of four years prior. His duties included front line policing involving patrol and acting as a first responder. He had regularly attended licensed establishments, often after calls from the respective licensee.

Sergeant T advised that, for a period of approximately two years, the City of Victoria had funded a Late Night Liquor Task Force, for the purpose of keeping close enforcement eyes on licensees in the downtown Victoria area. This task force usually operated on Thursdays, Fridays and Saturdays from 9:30 pm until 3:00 am and Sergeant T participated as a front line officer and supervisor in that initiative. Under the auspices of that task force, Sergeant T had conducted hundreds of inspections. In that role, he looked for a variety of contraventions including over-service, service to minors, the efficacy of door control, as well as keeping an eye on the relationship between the amount of liquor sold and the amount of food consumed. With respect to his specific experience regarding intoxication, he advised that he had witnessed so many incidents

that he could not begin to estimate but that the number would be in the thousands. He has had numerous contacts with people regarding drug and alcohol issues.

Turning to the evening of the alleged contravention, Sergeant T advised that he was working the night shift from 6:00 pm to 6:00 am on November 11, 2010, and was on general patrol. He overheard a dispatch call from the Licensee's premises, requesting assistance with respect to an intoxicated person. The dispatcher indicated that there was a group of people, one of whom was intoxicated. He was aware that another city police member, Constable B, had been dispatched. Sergeant T chose to attend at the Licensee's establishment on his own initiative.

Sergeant T arrived by car and was aware that Constable B had been there for approximately five minutes. Upon arrival, he saw a police vehicle, as well as an ambulance. He stated that prior to this evening he had attended the Licensee's establishment many times.

He arrived at 11:47pm and headed to the back of the restaurant where he noticed that there were between five and eight patrons standing at the back of the room. One male (later determined to Patron A) seemed to be the problem and he noticed that he was pushing Constable B. Things were getting more hostile and he witnessed Constable B grab Patron A and turn him around and announce "you're under arrest". He determined that Patron A was actively resisting arrest. The ambulance attendant also tried to assist by grabbing Patron A's arm.

Patron A physically resisted arrest and Sergeant T had to restrain him and handcuff him. Sergeant T concluded Patron A was impaired as he smelled of alcohol and had a flushed face. Sergeant T requested that another unit attend and take Patron A. Patron A continually tried to get up and repeatedly apologized. Eventually, another unit arrived and Constable B and Sergeant T told Patron A to get up. At this time, he was very unstable on his feet, and reeked of alcohol. Patron A wouldn't walk with them and when

they tried to pull him, he deliberately pushed back. Eventually they had to push him out of the restaurant, where they turned him over to Constable S, who had just arrived. Constable S escorted the patron to the city police jail.

Once the patron had been removed, Sergeant T looked at the bigger picture. He saw two tables, numbers 51 and 52, pushed together to accommodate more people. He noted a number of empty shooter glasses and two appetizer plates. He then noted another male (later determined to be Patron B) unconscious on the floor. There was vomit everywhere, and Patron B had rolled in it.

Sergeant T spoke to the Night Manager and asked him what was going on. Sergeant T examined the bill for the table which only contained alcoholic drinks. That bill is found at Exhibit 1, tab 19(g). Sergeant T asked the Night Manager how many patrons were on that bill and was told eight to ten. Sergeant T noted that number directly on the bill. Sergeant T then asked why there was no food on that bill, and was told that people had recently moved to tables 51 and 52 after they had finished a meal. Sergeant T then asked for the receipt for that previous table and was told that the server who initially served the group for dinner was no longer on duty so the bill could not be produced. He stated that he would get back to Sergeant T with the bill for the group. He never did.

Sergeant T said that it was obvious to him that there had been over-service and Patron B was severely intoxicated to the point of unconsciousness. When asked to put that observation into perspective, Sergeant T said that in all his years he could not remember a person so intoxicated, even in a liquor primary bar – it was that out of the ordinary.

Sergeant T confirmed that the paramedics did not advise him that there were any other explanations for Patron B's condition.

Constable B

The second witness called by the Branch was Victoria police Constable B, who had been with the department since September 11, 2008. At the time of the alleged contravention, he was assigned to patrol in Victoria and Esquimalt. His purpose was to conduct licenced premises checks and respond to calls. While carrying out these duties, he looked for any signs of intoxication, such as over-service, or contraventions regarding serving minors. With respect to his experience with intoxication, Constable B took specific courses at the police academy and has dealt with many people exhibiting all different levels of intoxication.

On the evening of November 11, 2010, Constable B was dispatched to assist ambulance paramedics with a heavily intoxicated male inside the Licensee's establishment. He was further informed that the patron was unable to fend for himself. There were approximately six to eight other patrons in the group and the paramedics had asked for police assistance.

Inside he saw two paramedics providing medical aide to a male, who was intoxicated and lying on the floor. The male was in a semi-conscious state and the paramedics were trying to arouse him. He was lying in a pool of vomit between tables 51 and 52. There was a group of six to eight patrons watching the scene.

One of the female patrons gave him the unconscious male's driver's licence and he identified him as Patron B. He was informed by the paramedics that they would be taking him to hospital for treatment.

As the scene was being played out, Constable B noticed a male, Patron A, standing among the group who was exhibiting some gross signs of intoxication. The male reeked of alcohol, had red, bloodshot eyes, was unsteady on his feet, and was swaying. He was acting aggressively, trying to interfere with the paramedics. He was trying to pick up his friend Patron B and drag him out.

Constable B asked Patron A several times to get back and let the paramedics help his friend, but he kept trying to get back to where the paramedics were working. The paramedics were also telling him to get back. When he refused to get back, Constable B told him he was under arrest for intoxication in a public place. At this point, he tensed up, clenched his fist and pulled back aggressively. Constable B tried to restrain him and the paramedics jumped in, as did sergeant T, who had just arrived. They struggled with him, got him to the ground and put him in handcuffs.

Asked what he observed with regard to Patron A, Constable B indicated that he reeked of alcohol, had red watery eyes, and was unsteady on his feet and was actively and aggressively trying to resist. Constable B did not think that he would have been able to handcuff the patron by himself.

Constable B asked the Night Manager how much liquor had been served to the two males and was told that they had between four to six drinks each. Constable B then asked to see their bill and the Night Manager presented three receipts – one for liquor and two for food. When Constable B reviewed the liquor bill he was told that the group had eaten at another section before moving to the 51 and 52 seating area. A review of that liquor bill showed 85 tequilas, five B-52 shooters and 12 bazookas. When Constable B added the numbers he determined that there had been 102 liquor drinks served (later to be confirmed to be 124 drinks) to a group of eight to ten people. When he asked the Night Manager where the bill for the table where they ate was, he was told that it could not be provided at that time. Constable B said that the Night Manager agreed with him that the patrons had been over-served.

Both Patron A and B received tickets for being intoxicated in a public place.

Paramedic S

The next witness called by the Branch was Paramedic S, a paramedic with the BC Ambulance Service. He had been a paramedic for approximately 16 years and his duties at the time of the alleged contravention were to provide coverage for the downtown Victoria area. He had previously been dispatched to a few thousand scenes in that area and these types of calls occur on a daily basis. With regard to his experience with intoxication, he indicated that he dealt with it at different levels on a daily basis. He has taken formal training at the Justice Institute of B.C. and attends continuing para-legal education courses.

On the evening of November 11th, Paramedic S and his partner arrived at Earl's at 11:39 pm and were met by staff who advised that there was a concern with one individual at the back of the restaurant, who was down on the floor. The paramedics were escorted by the staff to Patron B on the floor near a large table covered with shooter glasses, but with no food on it. Paramedic S noticed a male, approximately 20 years old, who was drooling and was covered in vomit, as was the surrounding area. Paramedic S was not sure whether this was a medical emergency, or if the patron was intoxicated.

He enquired of the staff and was told that the patron had consumed a large amount of tequila. Paramedic S examined the patron and he determined that his vital signs were o.k., but not perfect, and he concluded that it was more than likely that the patron was impaired by alcohol. When asked how he made this determination he advised that his breath and clothing smelled of alcohol and the staff and friends of the patron said he had been over drinking. Paramedic S said that the patron looked intoxicated and that there were alcohol odours radiating from his clothing and pores. The staff all stated that he had too much to drink.

Paramedic S had difficulty clearing the patron's airway, as he was not able to care for himself. The patron's respiratory level was decreased and he did not have a regular pulse, although his blood/glucose level was fine and there were no signs of seizure activity.

Paramedic S observed that the group all seemed impaired to some degree, but one individual Patron A was very intoxicated and was verbally aggressive as he may have thought that the paramedics were trying to hurt his friend. Paramedic S detected that this individual had an alcoholic odour; his eyes were bloodshot, was exhibiting aggressive behaviour and was not making cognitive decisions. He tried to punch one of the police officers and they ended up on the floor with the two police officers handcuffing him and removing him from the scene. The patron who remained unconscious on the floor was loaded into an ambulance and taken to the Jubilee Hospital. On route, the patron's airway was maintained and he was placed on an IV. The ambulance left the scene at 11:58 pm.

Paramedic S identified a Patient Care Report regarding the paramedic's attendance at the scene being Exhibit 1, Tab 12(e) in these proceedings, which was prepared by Paramedic S, on the night of the call, on the way to the Jubilee Hospital. The witness referred to his notes and noted that his designation at Item 5 of the Report of "ETOH abuse" was utilized by the paramedics any time when someone is impaired. Also at item #5 of that Report, the paramedic noted "drink many shots of tequila at Earl's tonight. Found $\frac{3}{4}$ prone, vomit covered will respond to pain stimuli by spitting and punching randomly".

Paramedic S was questioned as to whether the individuals were on any medications or suffered from any allergies, to which he indicated that he did not know because he had not questioned them about those matters.

Paramedic S advised that paramedics did not check the blood alcohol level. That is done at the hospital.

A Toxicologist

The Branch then called a professional expert witness with respect to intoxication and his credentials were not challenged by the Licensee. He gave evidence of his opinion with respect to the state of intoxication of Patron B who ended up in the hospital. I will comment on his evidence later in this decision.

Liquor Inspector

The last witness called by the Branch was a liquor inspector who has been with the Branch for approximately three years. At the time of the alleged contravention, the inspector was responsible for the downtown Victoria area.

When conducting inspections, the Inspector looks for liquor activities concerning public safety, the serving of minors, over-crowding establishments, over-service, and community disturbances in and around licensed establishments. In the approximate three years that he had been with the Branch, he had conducted approximately 1000 inspections. With respect to his experience concerning intoxication of patrons, he stated that he had formal training with his two previous employers.

The inspector learned of the incident, which is the subject of these proceedings, when he received an email from the Licensee's general manager on November 12, 2010. He also received a voice mail message from the general manager. They had a discussion and he advised her that he was aware of the incident and she assured him that the establishment would be run in accordance with the rules. She also advised him that the staff member involved had been suspended for failure to take appropriate action.

The Inspector later discovered that neither Server 1, nor the Night Manager at the time of the alleged contravention, had a valid S.I.R. certificate and that these deficiencies were not rectified until November 19, 2010.

The Inspector then identified the calculations found at Exhibit 1, Tab 19, pages e1 and e2 as his own calculations which demonstrated that the patrons had imbibed a total of 124 drinks, for an average of 9.45 drinks per person, over the approximate three hours of consumption.

The Inspector also identified the violation tickets which had been issued by the police officers, one of which had been paid by Patron B and which the Branch considers to be a conviction.

When asked to explain why the Branch was proposing a ten day suspension of the Licensee's licence instead of the minimum seven day suspension in the penalty schedule range for a contravention of s. 43(2)(a) of the *Act*, the Inspector explained that there was a large amount of liquor consumed over a relatively short period of time which had made two patrons very, very intoxicated. As a result, one of the patrons had consumed alcohol to the point of unconsciousness and the other patron had become very aggressive. In the Inspector's view, the situation created a significant risk to first responders, and the diversion of first responders to deal with this scene had jeopardized responses to the community in general. This contravention had resulted in the hospitalization of one patron and the arrest and incarceration of the other patron, both of which are serious matters. Accordingly, serious contraventions must be responded to with serious penalties. Furthermore, the service of liquor was only stopped when patrons were intoxicated and the Night Manager did not even stick around to deal with the situation. The Inspector deemed this to be an irresponsible omission, particularly since the Night Manager was the only one with authority to cut off patrons.

The Inspector also stated that the Branch preferred a suspension in this case, as suspensions are very visible and this was a very visible incident, particularly since the police and ambulance vehicles attended at the scene. As this incident involved a food primary licence, the Licensee would still be allowed to operate under its primary focus, that being the service of food.

The Inspector agreed that his first contact with the general manager was at 7:00 am on the next day, November 12, 2010, and she advised that Server 1 had been suspended. He considered it to be an appropriate action on the part of the Licensee. He also agreed that Server 1 obtained her proper S.I.R. certification right away when discovered.

The Inspector has carried out approximately 50 inspections of the Licensee's premises which means that the establishment was inspected fairly regularly, and he acknowledged that there was no prior proven compliance history mentioned in the NOEA. However, in this case the manager had abdicated his duties, and the state of intoxication in this case was the biggest factor in the Inspector's decision to pursue enforcement and propose the penalty he did.

LICENSEE EVIDENCE

Night Manager

The Licensee called its Night Manager who has been with Earl's for approximately four years and has worked in the industry for seven or eight years. He had been in that position for approximately one year at the time of the alleged contravention.

The Night Manager recalled that he was told by the Licensee's General Manager that his S.I.R. certificate was defective on November 19, 2010. When he received that information, he immediately went through the employee list to determine whether anyone else was not complying. As it turned out, only he and Server 1 held a defective certificate.

With respect to training, he stated that upon their initial hire, each server was required to undergo a five day training program with the general manager and that prior to commencing training, the prospective employee needed to possess a S.I.R. number. Each of the five days is dedicated to the different levels of services offered. There is a full day dedicated to the service of liquor, wine and beer. When released on to the floor, each new employee is required to do a shadow shift with a Night Manager until it is felt that the employee can handle a full section of five tables. During this time (of between one and three weeks to a month) the employee gets on the spot feedback on their performance and if the standards are not met they will be held back. In addition, there are also development sessions which are done throughout an employee's career. Management is promoted from within and if the candidate is above and beyond the required standards, they are promoted to a management position. If a candidate has potential, they are introduced to "Leadership U", an online course created by the Licensee. In order to be considered, one must show that he or she can manage a shift. A variety of topics are covered, including the five day basic course; behind the scenes management of the restaurant; partner interaction; customer interaction; the financial aspects of a restaurant, basically covering everything which could be encountered on the floor. While an employee is completing the Leadership U course they are still on the floor practicing real life situations. After achieving the first level of leadership U (shift leadership level) an employee is allowed on the floor with an assistant or general manager to ensure that they are able to handle any issues which might arise. Managers also ensure that mistakes are corrected.

Turning to the events of November 11, 2010, the Night Manager stated that he had been asked by Server 1 to specifically check tables 51 and 52 with regard to alcohol consumption. His initial view when he walked to the table was that it was mellow, the patrons were speaking quietly, there were shot glasses on the table, there was no unruly or bad behaviour, and for a group that size, it was not loud. The patrons were chatting among themselves and there were no signs of intoxication. He spoke to the patrons about how they were doing, how their night was going. They responded "good" on both accounts. All in all, it was a very calm and quiet table and there was no cause for concern, in his opinion.

A short time later, the Night Manager noticed Patron B having difficulty walking to the washroom, and he deemed the patron to be unfit to continue to drink. He passed this information along to Server 1, who then billed the table.

Under cross examination, however, the Night Manager acknowledged that he did not ask Server 1 to go and speak with the patrons at tables 51 and 52, nor did he go and speak to them himself at this time. He acknowledged that in his incident report for that evening, he made no mention of having directed Server 1 to cut off liquor service to the table.

When the table was cut off, one individual became visibly aggressive. The table was then billed. He went downstairs, to initiate his closing procedures and there was no indication that there would be trouble. Before going downstairs he passed the responsibility of the restaurant to Server 2. Her duty as shift manager, when no other manager is on the floor, is to accept the whole responsibility for the restaurant and in this case he was confident that Server 2 was capable of accepting that responsibility.

When he came back upstairs he noted that Patron B was still seated in the chair but was semi-conscious and not fully functioning. He went to the table and his fellow patrons tried to make Patron B go. Patron B was unable to walk and had vomited. The Night Manager stated that he called the ambulance because Patron B could not function and based on the demeanor of others there was something setting him apart. He assumed that he must have been drinking something else. Patron B was so far over the edge that he checked all of the group for signs of intoxication and did not find any.

When the ambulance arrived, the group gathered around the paramedics. Patron A was crowding them and was asked repeatedly to move back but with no effect. Patron A was not angry at the time and was not being aggressive, he was just not giving the paramedics enough room.

Constable B sat Patron A down at table 34 and tried to explain to him that he needed to give the paramedics room to work. Patron A stood up and became belligerent and the police officers took him down to the ground, and then handcuffed him. Patron B had been taken care of by the paramedics and was on a stretcher. The ambulance and the police wagon departed and that was the end of the event.

In his view, he carried out the policy to a "t". After the bill was paid he offered safe transportation to the group. Other than Server 1 violating the policy of serving more than 3 ozs. of liquor to one patron at a time, he was of the view that both he and she followed all policies.

After the first two drinks it was the server's duty to check for intoxication and after that amount the responsibility was transferred to him, and that on this occasion he had only checked once.

The Night Manager advised that no one had told him that he had to have the next level in the S.I.R. certificate program and that he immediately wrote the exam when that was brought to his attention. At the time, he was not aware that he had an invalid S.I.R. certificate number.

The Night Manager also agreed that he had not reviewed his incident report with other staff of the Licensee, nor had he conducted or attended meetings regarding the incident report.

There were meetings with staff twice a day but minutes were not taken, as it would not be reasonable. He acknowledged that Server 1 was under his direct supervision when her violation of policy occurred.

General Manager

The Licensee's General Manager has been with Earl's for approximately 15 years, four of those years being in the Victoria area.

On November 10, 2010, she left the restaurant at 10:50 pm which was the normal practice on statutory holidays. She advised that she first heard of the incident as a result of a telephone call from the Night Manager at 12:30 pm on November 12, 2010. She immediately called the Inspector. She told him about the action that she had taken and sought his advice as to what she should do, as well as confirmation that what she had done was satisfactory. He stated that he thought she had things under control and that he appreciated the call. Furthermore, she told the Inspector that Server 1 had brought more than 3 oz per person to their table, which she knew was against Earl's policy and the LCB rule. She also told him that Server 1 received a suspension for one week and was taken off the floor as a server and put in a more controlled environment with someone beside her at all times. Server 1's shifts were also cut from four to two shifts per week and she would be behind the bar for four months. After that period of

time, she would be required to do shadow shifts with the Night Manager and then she would be allowed back on the floor as a server.

She explained that Server 1 correctly checked in with the Night Manager throughout the evening and had checked with other servers and another manager, Server 2. Specifically, Server 1 had asked those individuals to go to the table and look for signs of intoxication.

After the suspension was served, other employees were made aware of the breach and the consequences which had been implemented. This was done on pre-shifts twice a day and on post shifts as necessary. This communication was also made at leader meetings, which are held once a week on Tuesdays. Furthermore, the matter was canvassed at the monthly health and safety meeting. This incident was discussed extensively through notices in a newsletter, email and placed on the website for employees to read or post blogs.

She suspended Server 1 instead of terminating her employment because she felt that some of the responsibility for what took place rested with others, such as herself. Furthermore, she stated that she did not suspend the Night Manager because he was aware of what was happening, he supported Server 2 in cutting the table off, made attempts to get the party out of the building and took the right action in calling an ambulance. With regard to some customers being allowed to finish their drinks, she stated that it was the server's job to cut-off patrons before they reached intoxication. If other people were at the table and the server does not think safety is a problem, then the one person would not be permitted to finish their drink while the others could.

She also learned that Server 1 had her SIR certificate, but that her certificate number had got mixed up with a friend's. As soon as she became aware of the requirement to upgrade, she had Server 1 and the Night Manager upgrade their SIR certificates.

She stated that employees underwent initial training of four hours a day for six days. One day was dedicated to serving liquor, wine and beer and the first thing they now have to show her is their SIR card. They review all signs of intoxication and how to look for them. The topic is also discussed in pre shift meetings. There is ongoing training and it is mandatory for all staff, during the first 20 minutes of the shift to be advised of new roll outs. There have been further steps taken since the alleged contravention occurred, including expanding the Licensee's internal documentation, putting new assignments in the Leadership U program material and providing that information to new hires and managers.

The police usually attended the establishment every Friday night and on statutory holidays and hockey games. That equalled 104 visits per year and during that time the police have never pointed out any problems. Similarly liquor inspectors usually attend about once a week and difficulties have never been pointed out to the Licensee.

The General Manager agreed that the provisions to the Licensee's training manual regarding the physical signs of intoxication and the when and how of cutting customers off, in particular, as found at Exhibit 2, Tab 19, pages one and two in these proceedings, were created after the date of the alleged contravention. She also acknowledged that Server 1 breached the Licensee's policy and the regulations by serving patrons with more than 3 ozs. of liquor at a single serving and for that she was suspended right after the alleged contravention happened. Although the Licensee has an array of training programs, staff are not provided with written materials, nor are there any written tests. She stated, however, that most of the Branch's material regarding the S.I.R. program, found at Exhibit 2, Tab 1 in these proceedings, are incorporated into house policies. She was not aware of the revisions to the S.I.R. program certifications, notwithstanding the indication at page seven of the Guide, that revisions to the S.I.R. program are always available on the Branch's website.

She confirmed that, based upon the calculations provided by the Licensee to the Branch, as set out at Exhibit 1, Tab 19, pages e1 and e2 in these proceedings, the total number of drinks served to the subject group of patrons, both at tables 12 and 51 and 52, was 124.

She explained that when a standard alcoholic drink measure is applied, it would produce the number of drinks served to the patrons in question to 79.84, which amounted to two drinks per hour.

Server 2

The final witness for the Licensee was Server 2 who had worked at the Licensee's establishment since September, 2007 as a server and a shift leader. As a shift leader she would run the front and back ends of the restaurant and would supervise servers.

Server 1 had asked her to have a look at the group seated at tables 51 and 52 which she did up until the point the tables were cut off. She did not notice any odd behaviour. The group was normal and not loud or aggressive and she did not notice any change in that demeanor. When it was time to cut off the tables, Server 2 talked to the other people at the table and told them that they would have to leave. At that point, Server 2 did not detect any signs of intoxication in the rest of the group.

She had originally received five days of face to face instruction, one day for liquor issues and another training session for lounge servers. Furthermore, as a shift leader, another certificate was required. As a result of the breach, she was required to take retraining, participate in training at pre shift meetings and review the Licensee's liquor policies. She did not provide any direct service to the group at tables 51 and 52. Server 1 asked her to assess the group and not any one individual in that group. She stated that the incident log book had not been reviewed with her and that she did not make any entries in the log.

She agreed that she walked by the group a few times but did not make any assessment other than one patron was falling asleep. She also said that the Night Manager did not tell her of the observations which he had made.

SUBMISSIONS OF THE BRANCH

The Branch's submission is summarized as follows: the issue of intoxication is a serious contravention as it can cause unnecessary risk, not only for the patron, but also to other patrons, Licensee staff and property. In addition, first responder services are unnecessarily diverted away from more deserving circumstances.

In this case, the signs of intoxication displayed by two patrons were significant and were very clearly visible. The tables' server interacted with the patrons on several occasions; however, liquor service to the patrons was not cut off until directed by the manager of the Licensee. The Night Manager then left the area thus abdicating his responsibility to ensure the orderly removal of the patrons from the establishment.

In addition, a member of management and a staff member failed to possess valid S.I.R. certification. The Branch submits that this incident clearly demonstrated the consequences of failing to ensure adequately trained and certified staff. The Branch contends that this incident constituted a severe failure to ensure awareness and exercise due diligence regarding the responsibilities of patron care, supervision and prevention of patron intoxication.

The range of penalties for the contravention of permitting an intoxicated person to remain is a four to seven day liquor licence suspension and/or a \$5,000 to \$7,000 monetary penalty. In view of the seriousness of this contravention, the Branch submits that a licence suspension beyond the amount specified in the regulations is warranted.

In particular, one patron had become intoxicated to the point of unconsciousness requiring the aid of paramedics and hospitalization, while the other patron became aggressive requiring his removal from the establishment by police officers and being lodged in the City police jail. All of this could have been prevented through diligent observation and response to the patrons' behaviour.

Accordingly, the Branch submits that a liquor licence suspension is necessary in order to bring the Licensee into voluntary compliance. The Branch, therefore, says that a suspension penalty of ten days, which is greater than the penalty range set out in schedule four of the regulation, is justified in this case.

SUBMISSIONS OF THE LICENSEE

The Licensee does not deny that Server 1 violated policy and for that she was reprimanded. As neither the terms and conditions, nor the regulations, specify the level at which an intoxicated patron is to be cut off, judgment must be utilized and in such circumstances there is always room for error. The Licensee asserts that while there was testimony that Patrons A and B reeked of alcohol, there was also an acknowledgement that one cannot always tell how much someone has had to drink by the smell of liquor on their breath.

The Branch asserted that Patron B was in a drunken stupor but provided no further evidence to support that claim. Furthermore, there was no further evidence as to whether Patron B had consumed drugs, as well as alcohol.

The Licensee submits that although Server 1 advised the General Manager that each patron consumed approximately the same number of drinks, the Branch's expert witness assumed that Patron B must have consumed more. Furthermore, that expert admitted that he based his opinions solely on the symptoms shown by Patron B. The expert's evidence was also flawed in other ways.

The Licensee submits that although the Night Manager did not have the correct S.I.R., that requirement was not set out in the current Terms and Conditions, the *Regulations* or the *Act*. Accordingly, it is not reasonable for the Branch to expect that a Licensee would know of this requirement. Although the Branch has alleged that the Night Manager did not have his S.I.R. at all, a reasonable inquiry by the Branch would have shown that he had upgraded his S.I.R. certificate on November 19. The Licensee also noted that when the Inspector informed the General Manager that the Branch required upgraded S.I.R. certificates, this requirement was satisfied within a couple of days.

The Licensee asserts that the directing mind of the Licensee at the time of the incident in question was not the Night Manager, but rather was Server 1. The Licensee, therefore, is entitled to assert the defence of due diligence. Furthermore, the Licensee asserts that its witnesses described the Licensee's training program and policies in great detail and has demonstrated that the Licensee not only has a very comprehensive training program, but also that it supports and supervises that program. As part of that program, the Licensee's policy manual is kept in the office and is available to the shift leader or manager on duty at all times.

The Licensee denies that the Night Manager turned a blind eye to this alleged contravention. Requesting that Server 1 observe the table and report back to him demonstrated that the Licensee has systems in place to test employees, that the Night Manager was testing Server 1 on her knowledge, and that she was provided with supervision. Accordingly, the Licensee's policies regarding checking symptoms, asking for a second opinion and cutting the patron off were all followed in this case. The Licensee also asserts that, given the fact that more than 700 meetings are conducted a year with staff, this demonstrates that the Licensee has made out a due diligence claim.

With regard to the absence of an incident log, the Licensee points out that the Night Manager completed the detailed incident report which should suffice in the circumstances.

Prior to this incident, the Licensee points out that it required that all new hires provide their S.I.R. number and Server 1 provided a number which she believed to be correct. In the circumstances, the Licensee says that it was reasonable for the Licensee to believe that the number was correct.

Although the Licensee does not require staff to sign off, signalling completion of their training, it is made clear to each employee that they are required to demonstrate a full understanding of the training and to obey house policies, as a term and condition of employment.

The Licensee submits that given the plethora of inspections that have been conducted, by both liquor inspectors and police, without any mention of any difficulties with the regard to the operation of the establishment, the Licensee's policies appear to be working.

As the Licensee chose to pull Server 1 off the service floor and retrain her, instead of firing her, this has sent a clear message to other staff of the consequences of not following policy.

The Licensee feels that the detailed training program and policies in place at the time of the incident demonstrate that the Licensee took reasonable measures to avoid the alleged contravention. Also, the quick actions of the General Manager the next morning demonstrates a willingness to work with the Branch that goes beyond that which is required.

The Licensee submits that it is not reasonable for a Manager to review every drink order that is rung in or, every drink that is served.

The Licensee did conduct an assessment of the other patrons in the group and the Licensee's witnesses testified that the other patrons appeared to be coherent and in control.

The Licensee says that it did provide extensive trained staff to recognize, detect and act on the signs of intoxication and to promptly remove intoxicated patrons.

In regard to the proposed penalty, the Licensee notes that although the Branch relied on the circumstances of the alleged contravention and the Licensee's compliance history, these findings are not supported by the evidence. In this regard, the Licensee asserts that the Branch provided no blood or breathalyzer tests, did not secure an opinion of the estimated blood alcohol level of Patron B and failed to call Patron A as a witness. It also chose to ignore the importance of the drink recipes, serving size and alcohol content of the drinks that were consumed, and failed to consider how many standard drinks that the two patrons had likely consumed, or how much alcohol they had metabolized.

The Licensee submits that, based upon the Branch's policy of not taking into account prior compliance meetings or alleged contraventions that are more than 12 months old, this Licensee simply has no compliance history.

The Licensee also notes that the Branch chose not to proceed with two of the initial, alleged contraventions arising on November 11 due to the fact that the Licensee's general manager and staff had been co-operative, and had taken responsibility for the incident.

With regard to previous contravention notices B001099, B005318 and B013019, they were inconsequential and no enforcement action was recommended. Furthermore, the police did not issue a Licensed Premises Check.

The Licensee submits that it is unfair to impose a suspension that is higher than the suggested penalty, in a situation where this Licensee has fully co-operated with the Branch throughout the investigation of this alleged contravention.

The Licensee submits that it has taken reasonable steps to prevent the contravention by implementing a detailed training program and house policy which was implemented and enforced. Accordingly, the Licensee took all reasonable steps to prevent the contravention. If, however, the defence of due diligence is not proven in this case, then the Licensee requests that the penalty be brought in-line with the range in the penalty schedule, as there is no evidence that it should exceed it. As one of the goals of the Branch is to maintain consistency in penalties issued, the Licensee submits that if a penalty is deemed to be necessary in this case, then it submits that the minimum \$5,000 fine would be appropriate.

ANALYSIS AND DECISION

I have now had an opportunity to thoroughly review and consider all of the evidence, both oral and documentary, the exhaustive submissions of the parties, as well as the applicable law, and have, on a balance of probabilities, concluded that on the late evening of November 11, 2010, the Licensee contravened Section 43(2)(a) of the *Act* by permitting two persons to become intoxicated. Accordingly, it is not necessary for me to consider the alternate contravention of a breach of Section 43(2)(b) of the *Act*.

I have reached this conclusion based on a number of factors. To begin with, I have preferred the evidence of the first responders, with regard to the level of intoxication of the two patrons, over that of other witnesses, including that of the Toxicologist, for two reasons: First, the first responders and, in particular, Sergeant T and Paramedic S have had significant and long term experience with the effects of alcohol and the level of intoxication of individuals.

In Sergeant T's case, an individual with 16 years experience of front line policing, he described Patron A as reeking of alcohol, having a flushed face and he was very unstable on his feet. As to Patron B, he told the Night Manager that there was over-service and the Night Manager did not argue with him, in fact he agreed with him. It was obvious to him that Patron B was intoxicated to the point of unconsciousness and Sergeant T said that "in all his years he could not remember a person so intoxicated, even in a liquor primary bar – it was that out of the ordinary." Constable B observed that Patron A reeked of alcohol, had red bloodshot eyes, was unsteady on his feet and was aggressively trying to resist arrest. Paramedic S, who had been a paramedic attendant for approximately 16 years at the time of this incident, indicated that he had dealt with different levels of intoxication on a daily basis. He stated that he inquired of the staff of the Licensee as to Patron B's state and was told that he "had consumed a large amount of tequila". He stated that it was more likely that Patron B was impaired by alcohol based on the fact that his breath and clothing smelled of alcohol, and the staff and friends of Patron B stated that "he had been over drinking". Paramedic S stated that Patron B looked intoxicated and there were alcohol odours radiating from his clothing and pores. The staff all stated to him that "he had too much to drink". Paramedic S described Patron A as having an alcoholic odour, his eyes were bloodshot, and he was exhibiting aggressive behaviour, and was not making cognitive decisions.

The second reason why I prefer the evidence of the first responders over other witnesses is that it is truly independent in the sense that none of them report to, nor are they agents of, the Branch, nor for that matter of the Licensee. For this reason, their evidence is likely to be more objective and thus more reliable. That is not to say that any of the witnesses were untruthful; it is just that the first responders do not have a stake in the outcome of these proceedings.

Another factor in my decision that a contravention occurred here, is the existence of the inculpatory statements, against interest, offered by the staff of the Licensee to Paramedic S, as outlined above. I note that in particular, such statements were not challenged by the Licensee.

A final factor in reaching my decision that a contravention occurred, is the forthright acknowledgment by the General Manager that Server 1 breached the Licensee's policy of only serving 3 oz of liquor to a patron, at a single time, and her consequent discipline, as a result of that breach. Clearly, this acknowledgement is entirely consistent with a finding of a breach of Section 43(2)(a) of the *Act*.

The Branch and the Licensee devoted some considerable time during the hearing attempting to establish the level of intoxication of the patrons. In my view, the level of intoxication of an individual may not, necessarily, be precisely derived from the number of drinks which a patron has ingested. In fact, as the Toxicologist called for the Branch allowed, that in the absence of a blood alcohol analysis, he could only produce, "general approximations" and that, "this is not an exact science – everyone is slightly different." Given these rather vague parameters, I have not given any weight his evidence, but rather have preferred the evidence of the first responders. The best that can be said with regard to the Toxicologist's evidence is that is not inconsistent with that of the first responders. Similarly, I have not given any weight to the Licensee's submissions with respect to the utilization of a standard drink measure in this particular case. Clearly, these two patrons ingested a sufficient amount of alcohol, provided by the Licensee to

cause very serious consequences. Again, I prefer the evidence of the first responders with regard to the levels of intoxication of these two patrons.

DUE DILIGENCE

The Licensee is entitled to a defence to the allegations of the contravention, 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.

In the context of liquor enforcement in British Columbia, the B.C. Supreme Court in the case of ***Plaza Cabaret vs. General Manager, Liquor and Licensing Branch*** (2004) BCSC 248 (CanLII), sets out the criteria a Licensee must meet in order for it not to be found not responsible for a contravention under the *Act*.

"If a Licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 36 (2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the Licensee in relation to that part of the Licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who are, in fact, responsible for that part of the Licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities."

The Court in **Plaza Cabaret** clarified that the directing mind need not be an officer or director of the Licensee and:

"It would be the individual or individuals, perhaps the general manager or shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of "directing mind and will" of the Licensee." (emphasis added)

At the time in question in this case, the Night Manager described his position as a Night Shift Leader, which equated to an assistant manager. In this position, he stated that he accepted the responsibility for the whole operation of the restaurant. He handled everything and had full control. He also stated that when he pulled Server 2 from her serving position and went downstairs briefly, she became leader while he was away. Accordingly, I am, therefore, compelled to conclude that when he returned from downstairs he, once again, assumed responsibility for the entire restaurant and, thus, was the directing mind and will of the Licensee, except for this very brief period. It is important to note that this brief absence occurred after the Night Manager noticed Patron A having difficulty walking to the washroom.

Notwithstanding the impressive training regimen described, in particular, by the Night Manager and the extensive array of policies which the Licensee has created and implemented for employees to follow, I find that there were important omissions on the part of the Night Manager which undermined the Licensee's defence of due diligence. Specifically, I am of the firm view that when the Night Manager witnessed Patron A struggling to the washroom he, personally, should have immediately intervened and dealt with the matter himself. This is particularly so given the Inspector's unchallenged evidence that only a shift leader has the authority to cut patrons off in this establishment. I am also of the view that prior to these cumulating incidents regarding Patrons A and B, the Night Manager should have, clearly, been far more vigilant with

regard to the sheer volume of liquor that was being served to tables 51 and 52, particularly on a fairly quiet business night.

In this later regard, it should be remembered that it was a policy of the Licensee that, after the service of two drinks to a patron, the responsibility with respect to observing the intoxication level of that patron was transferred to a shift leader. The Night Manager agreed that this procedure did not occur in this case, as he only checked tables 51 and 52 once during the evening. Had this policy been followed, it is unlikely that this regrettable incident would have happened at all.

Accordingly, I find that the Licensee has not established the defence of due diligence.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulation* and or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- Impose a suspension of the liquor licence for a period of time;
- Cancel a liquor licence;
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions;
- Impose a monetary penalty;
- Order a Licensee to transfer a licence.

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

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, the *Regulation*, and the terms and conditions of the Licence. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to public safety and the well-being of the community.

There are no proven contraventions of the same type for this Licensee within the year preceding this incident. Furthermore, the disciplinary events set out in Appendix A of the Notice of Enforcement Action have, in relative terms been fairly minor compared to this contravention, and have all been resolved to the satisfaction of the Branch in a timely manner.

Schedule 4, Item 10 of the *Regulation*, sets out penalties for first contraventions of section 43(2)(a) of the *Act* (a licence suspension of four to seven days and/or a monetary penalty of between \$5,000 to \$10,000). The Branch has recommended a ten day suspension of the licence for this particular contravention.

There can be no doubt but that contraventions of section 43(2)(a) are at the high end of the seriousness scale. Incidents such as those which occurred in the instant case, have the obvious potential to quickly produce grave consequences for the offending patron, other patrons, first responders and other members of the community, and, therefore, should be dealt with accordingly from a penalty perspective.

On the other hand, however, the Licensee in this case has conducted its operations in such a fashion so as to largely avoid serious enforcement action, except for one incident of overcrowding, despite being regularly inspected by the Branch and the Victoria City Police. I note that all enforcement actions have been satisfactorily dealt with by way of contravention notices and compliance meetings. In addition, the Licensee has established a comprehensive training program, including the five day

program for new hires, one of which days is devoted entirely to liquor related service. The Licensee also administers tests to employees and has regular meetings with staff.

In consideration of all of the above, I am satisfied that the Licensee requires an additional penalty beyond the four day minimum suspension set out in the *Regulation* in order to bring home to the Licensee the seriousness of its omissions in this case, and thus, bring this Licensee into compliance.

ORDER

Pursuant to Section 20 of the *Act*, I order a suspension of Food Primary Licence 302087 for the period of eight (8) days, to commence at the closing of business on Wednesday, October 19, 2011, and to continue each succeeding "business day" until the suspension is completed. "Business day" means a day on which the Licensee's establishment would normally be open for business. In order to ensure that this order is effective, I direct that Food Primary Licence 302087 is to be held by the Branch or the Victoria City Police Department from the close of business on Wednesday, October 19, 2011, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: September 19, 2011

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

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Bode Fagbamiye, Branch Advocate