



**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: Areo Holdings Ltd.,
dba Croft Hotel
1168 Fourth Avenue
Prince George, BC V2L 5E3

Case: EH11-054

For the Licensee: Trevor Dungate

For the Branch: Bode Fagbamiye

General Manager's Delegate: Sheldon M. Seigel

Date of Hearing: November 3, 2011

Place of Hearing: Prince George

Date of Decision: November 30, 2011

**Ministry of Public
Safety & Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Croft Hotel is located in Prince George B.C. The hours of liquor service are 10:00 am to midnight, Monday to Sunday. The hotel has a liquor primary establishment that operates under Liquor Primary Licence 016665. The Licensee is Aero Holdings, Ltd. The principal shareholder and officer is Douglas Morrison. 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*" ("*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

By way of a Notice of Enforcement Action (the NOEA) dated May 9, 2011, the Branch alleged that the Licensee contravened s. 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act) on March 31, 2011, by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served, or otherwise supplied.

Schedule 4 of the *Liquor Control and Licensing Regulation B.C. Reg. 244/2002* (Regulation) establishes prescribed penalties for contraventions of the *Act* or *Regulation*. For a first contravention of this section, the range of penalty is four (4) to seven (7) days licence suspension and/or \$5000 to \$7000 monetary penalty. For a second contravention of this section, the range of penalty is ten (10) to fourteen (14) days suspension. The Branch is treating this contravention as a second for penalty purposes and proposes a 13-day licence suspension.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267*****Drunkenness**

- 43** (2) A licensee or the licensee's employee must not permit
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the Licensee contravene the *Act* as alleged?
2. If the contravention occurred, is a penalty required for that contravention under the circumstances of this case, and if so, what penalty is appropriate?

EXHIBITS

- Exhibit No. 1:** The Branch's Book of Documents (Branch),
- Exhibit No. 2:** Compliance and Enforcement Policy and Procedures Manual - Desk Reference (the C&E Manual) excerpt (s.8-gathering evidence, pp.11,12) (Licensee)
- Exhibit No. 3:** C&E Manual excerpt (s.8- gathering evidence, pp.1, 2) (Licensee)
- Exhibit No. 4:** Employee Rules and Regulations Code of Conduct (Licensee)

EVIDENCE

RCMP CONSTABLE

An RCMP Constable testified that he has considerable experience identifying intoxicated persons. He said he has conducted many licensed premise checks in which his task was to look for minors, intoxicated patrons, and other contraventions of the liquor laws. He has been trained in the use of roadside alcohol screening devices and has completed training on the symptoms of intoxication as well as having had considerable hands-on experience dealing with intoxicated persons.

The constable testified that he was working on March 31, 2011 and attended the Croft Hotel in order to accompany the liquor inspector on an inspection of the premises. He said he met with two other members of the RCMP outside the establishment and the three members and the liquor inspector entered the establishment together at approximately 11:00 pm. The constable testified that there were no door persons on duty and the establishment was not particularly busy. He checked the identification of a number of patrons but two patrons in particular stood out to him. He said that the two patrons appeared to be intoxicated. He engaged one of them in conversation and noted that the other one, a male he described as middle aged and of First Nations descent, was seated at the far end of the bar and appeared to be swaying in his seat. He said that the liquor inspector told him that she had a concern about the male's level of intoxication and asked the constable to assess the male patron with regard to that patron's level of intoxication.

The constable observed that the patron's eyes were watery and glassy and the patron seemed to be having a difficult time focusing his eyes. The constable said he was only a few feet away from the patron when he made those observations and the patron was in plain view and visible to the staff inside of the establishment. The constable said the patron was having a difficult time conversing, he had a strong odour of alcohol on his breath and clothing, and he was dishevelled. The constable said the patron's speech

was slurred and when asked to produce identification, he complied but with difficulty. The constable indicated that the patron's movement were not smooth and he had some difficulty with simple coordination. The constable concluded that the patron was intoxicated and he provided the inspector with his conclusion and a list of the indicia of intoxication that he had observed including the patron's basic behaviour, eyes, actions and movement, smell, and fumbling to produce ID.

The constable said that he felt the patron would not be able to care for himself in his current condition. He ascertained that the patron had someone at home to care for him and advised the patron that he should leave. He observed the patron as the patron got up and moved toward the exit. The constable said the patron demonstrated poor balance and swayed back and forth as he made his way toward the door. The constable indicated that he spent a total of approximately ten minutes with the intoxicated patron before another RCMP member contacted RCMP dispatch and requested a taxi be called for the patron.

The constable identified his notes at Exhibit #1, tab C, p.9C2. The inspector did not advise him that she had been told the patron had an eye infection. He testified that at no time was he advised that the patron might have been injured or had a significant medical condition. When questioned about his assessment, and in particular, whether some of the indicia of intoxication that he observed in the patron could have been the result of having been beaten or having infected eyes, the constable was equivocal but indicated that the listed indicia were part of a global assessment of facts that led up to his conclusion that the patron was intoxicated. The constable also said that if he had evidence that the patron was suffering from an eye infection, the information would change his mind about the patron's red eyes being a symptom of intoxication, but it would not rule out that the patron was intoxicated.

LIQUOR INSPECTOR

The liquor inspector testified that she has been so employed since 2006 and has a considerable geographical area to monitor. She said she has conducted more than a thousand liquor license inspections and that she is responsible for monitoring the Croft Hotel. She said she took a four-day RCMP field sobriety testing program, a course with a toxicologist on observation of the symptoms of intoxication, and she works with a partner who was an RCMP breathalyser technician and instructor. She said she attended the establishment on March 31, 2011 at approximately 11:00 pm with three constables including the one that testified before her at the hearing. She said she observed no door staff, the lighting inside was adequate, there were perhaps 20 patrons (of the Licensee's potential capacity of 80), and there was a clear line of sight throughout the establishment from which the staff could see all of the patrons during their routine service.

The inspector said that shortly after arriving in the establishment, she noticed a male in the middle of the room. His behaviour caught her attention. She said the male's head was bobbing back and forth and his eyes were red and closing. He was seated approximately six to eight feet away from where she stood and he would have been very visible to staff. She said there was a staff member standing beside the patron and another staff member ten feet away from him at the bar. She described the patron as being approximately 65 years old, wearing jeans and a jean jacket, with grey hair, and looking like he was a member of a First Nation.

The inspector testified that she watched the patron for signs of intoxication. She noted him nodding off. The inspector did not want to interact with the patron and asked one of the constables to assess him for intoxication. She advised that the constable reported back to her that he believed the patron was indeed intoxicated. She said:

I was not sure of the man's intoxication. I needed the constable to assist me by going closer to him and assisting me. He does assist and assesses and gets back to me. I asked him to make an assessment. I thought he might have heard what the server said to me about a possible fight or being beaten on one side of his face. I did not repeat that to the constable.

She watched as the patron walked across the floor using tables to help guide him to the door. The inspector said that after watching the patron for about ten minutes, she took up conversations with two of the establishment's staff members. She pointed out the intoxicated male patron. One of the staff members said that the patron had told her that he had an eye infection and was "beat up on one side of his face." The inspector said that the staff member told her that the patron had been told to leave "a while ago." Although the inspector also pointed out the intoxicated patron to the other staff member, that staff member did not indicate that the patron was cut off from alcohol service or that he was being monitored for intoxication.

The inspector testified that the next day, she spoke with the Licensee who advised her: "he has a hard time cutting off patrons because many of them come in with weapons and the girls are scared." The inspector also said the Licensee told her that particular patron has been cut off many times in the establishment."

The inspector said that since the Licensee took a position that the patron had an eye infection, she removed reference to that indicia of intoxication from her assessment in the NOEA.

The inspector identified all of the documents in Exhibit #1 and in particular, her notes at Tab 9. She also pointed out that two days earlier, on March 29, 2011, she held a compliance meeting for issues related to allowing intoxicated patrons to remain in the establishment on January 29, 2011. As a result of this contravention being within a year of the January 29, 2011 contravention, she proposes a penalty within the range specified for a second contravention of this type.

INSUFFICIENT EVIDENCE MOTION

The Licensee sought an order that the hearing be terminated and the enforcement action dismissed, as the Branch had not made out its case on the balance of probabilities. The Branch answered that it had made its case.

I ruled as follows:

At the conclusion of the Branch's case, counsel for the Licensee made an application that the matter be dismissed for lack of sufficient evidence. The Licensee's position is that on the evidence thus far proffered, the Branch has not made out its case on the balance of probabilities. The Licensee argues that the symptoms of intoxication observed by the constable and the liquor inspector are consistent with the person having both an eye infection and a head injury. Further, the Licensee says that the Branch must establish not only that the person was intoxicated but also that the Licensee allowed him to remain.

The Branch argues against the application. The Branch advocate says that there is no evidence before the adjudicator that the allegedly intoxicated patron had an eye infection or a head injury, no evidence that the person was involved in a fight or if he was in a fight of what the impact and results of that

fight were, and no medical evidence of any kind to support the existence of medical issues that allegedly affected the person in question. With respect to permitting an intoxicated person to remain, the Branch says the inspector was told the person was “asked to leave a while ago” and for approximately 14 minutes after she was so told the person remained and then left at the behest of the RCMP constable and only after the constable had prompted a taxi to be called. The Branch advocate says that the Licensee’s application is speculative and should be dismissed.

The Licensee says that certain symptoms observed by the constable and the liquor inspector, are consistent with an eye infection and a head injury. The constable testified that an eye infection could cause red eyes, but he was adamant that he has no knowledge of a head injury causing instability or balance problems. The liquor inspector testified that she excluded red or bloodshot eyes as a symptom of intoxication as a server told her that the person had an eye infection. The inspector was careful to testify that although she has some experience with head-injured persons, she has no personal experience that informs her as to whether this person’s physical movements are consistent with a head injury or concussion.

On the balance of probabilities at the end of the Branch’s case and not having heard any witnesses for the Licensee, I am inclined to find that the person in question was indeed intoxicated. In favour of such a finding is that an experienced RCMP constable who directed his attention to the issue and engaged the individual came to the conclusion that the person was intoxicated. I note that I have not disregarded that the inspector, having been told that the person had been beaten and had an eye infection, did not pass along that information to the constable when she asked him to evaluate the person for intoxication. Also in favour of such a finding is that the inspector had a reasonable belief that the person was intoxicated and so pursued this

avenue by asking the RCMP constable to investigate further. Finally, the person alleged to be intoxicated was sitting at a table, in a bar, after 11:00 pm, had consumed liquor in the bar and was observed to have breath that smelled of liquor. While this evidence on its own may not be proof of intoxication, in the face of only hearsay evidence of an eye infection, a beating, and no evidence of a head injury, this evidence is sufficient to lead one to a conclusion that among two possible explanations, intoxication is more likely than the combination of a head injury and eye infection. Without hearing the Licensee's case, I would conclude that the Branch has met its onus and established that the person was indeed intoxicated.

The Act, s. 43(2)(b) requires that the Licensee or the licensee's employee must not permit an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served, otherwise supplied. I agree with the Licensee that the Branch must prove not only that the individual was intoxicated, but also that the Licensee permitted him to remain, as those two elements are specified in this section of the Act. Having heard the Branch's case, and no witnesses for the Licensee, I find that the Branch has established this to the requisite onus. The inspector was told that the person had been advised to leave "a while ago," and the witnesses observed no activity leading to the conclusion that he was leaving other than the absence of any liquor at his table. He remained from the time that the inspector was so advised for approximately 14 more minutes until he was told to leave by the police constable and a taxi was called. Without further evidence from witnesses for the Licensee this would constitute "permitting to remain" as required by the Act.

The application for an order for dismissal for lack of evidence is denied. The Licensee is free to present its case should it so desire.

PATRON

The allegedly intoxicated patron testified that he has arthritis that affects his mobility, that hot showers make his eyes red, and that prior to attending the Croft Hotel on March 31, 2011, he was attacked by two or three young people who hit him in the eye. He said the hit didn't hurt him much, but that is why his eye was red. He also said that when he went to the Croft he went to the washroom to wash the blood off of his eye but the blood wouldn't go away. He said his speech was slurred because "that is normal when you get hit by three kids." He also testified that he was staggering because he was "hit by the three kids" and also that "it's hard to walk straight when the cops are walking past you," as was the case when he was leaving the Croft.

The patron testified that in the Croft that night he had a couple of beers "and then they told me to leave and I fell down. The cops tried to talk to me and I fell down. I fell over the high chair." When asked why he left the establishment, he said: "they told me it was closing time and I walked out." He said that he did not tell the staff that he had an eye infection or that he had a fight before coming to the Croft. He also said that he was not cut off from alcohol service, and he did not speak to the police.

LICENSEE

The manager and owner of the establishment testified that he actively cooperates with the liquor inspectors and received most of his training from obtaining his Serving It Right certificate. He said if he has a problem, he asks the liquor inspector, and he pointed out that he invited the inspector to talk to his staff in the meeting that occurred two days before alleged contravention. He testified that he has improved the establishment since taking over four and a half years ago, and he has been instrumental in helping to clean up the neighbourhood.

He said:

I've kicked out in excess of 50 people. I probably know more about it than anyone in terms of how to remove them gently. I learned the best way to do that. The book doesn't tell you how to do that. They're all different and you have to assess that and ask them politely to leave and if they don't, you nudge them along. Sometimes it might take 15 minutes to get them out but as long as the process is going on its okay, and it sounds like the process was going on that evening. It sounds like the process was in motion.

The Licensee said there was no incident report made out because there was no incident, and he has rules and regulations in place for his staff including the document they signed (exhibit 4). He also said that he has regular staff meetings to discuss problems and issues and he educates himself in part by speaking to the liquor inspector and sometimes he talks to other bar owners about how they do things.

The Licensee testified that he knows the patron who was allegedly intoxicated and the patron never drinks more than one beer per hour. He said he's served the patron many times and that because of the patron's genetic metabolism, the patron can appear drunk after having only one or two beers. The Licensee also said that the patron walks with a limp and has some kind of hip problem that makes him unstable on his feet. He added the patron has a speech issue that makes him hard to understand whether intoxicated or not.

The Licensee testified that the staff had cut off the patron before the police and liquor inspector arrived and the staff was in the process of removing him from the bar. He said: "Staff did not say they cut him off because he was exhibiting signs of intoxication. They thought he was on the verge of having too much so they cut him off. They didn't think he was intoxicated." He said that he learned this information from questioning his staff after the event.

The Licensee testified that the establishment has considerable written policies and procedures including guidance for the staff as to how to identify signs of intoxication. He said that he was not advised that these documents were required in preparation for the hearing and that is why he did not disclose them to the Branch, and he didn't know they would be required for the hearing and did not therefore produce them.

During the course of the Licensee's testimony, an issue arose with respect to the pre-hearing conference letter issued by the Branch, and included in Exhibit #1 at tab 14. The Licensee argued that the letter should be excluded from evidence. I considered the position of the Licensee and the Branch and ruled as follows:

The Licensee argued that he was advised at the pre-hearing conference that the discussion would not form part of the hearing. He therefore sought an application to have the record of that pre-hearing struck from the exhibit book. The Branch advocate had no answer to the evidence that the Licensee was so told as the Branch advocate was not present or involved in the early stages of this enforcement action and therefore not in attendance at the pre-hearing conference. The Licensee's evidence that he was told the pre-hearing conference was on a without prejudice basis is not controverted and I therefore accept that he was advised by the branch that the contents of the discussion would not form part of the enforcement hearing. The record of the pre-hearing conference therefore should not form part of this hearing. I note also that when Exhibit 1 was tendered as evidence, I reserved to counsel for the Licensee the right to challenge an inclusion of Exhibit #1 when that part became relevant. He has done so. I order that the pre-hearing conference letter at tab 14 shall be removed from Exhibit #1 and the Branch advocate shall not further examine or make submissions based on the document or matters resulting from the pre-hearing conference.

SUBMISSIONS

BRANCH

The Branch submits that the elements of the contravention have been proven and the contravention has therefore been made out. The Branch also submits that as this is a second contravention of this offence within a 12 month period, the recommended penalty is appropriate and within the requirements of Schedule 4 of the Regulations.

LICENSEE

The Licensee submits that the inspector did not comply with the directions provided for her in the C & E Manual. The Licensee says that failure casts doubt on the credibility of the inspector's observations, competence, experience as an inspector, and her ability to properly follow the rules of her employment.

Of the patron, the Licensee argues that the patron's symptoms as observed are consistent with an eye infection and a head injury and there is evidence of each of those things. Therefore, the Licensee says, conclusions that the patron was intoxicated are incorrect and the burden of proof is not satisfied. The evidence shows the cause of those symptoms result, as likely as not, from these medical issues.

The Licensee says the evidence is that the staff asked the patron to leave and he was on his way out. It says it takes some time to remove a patron and there is not a perfect way to do that, and it cannot be expected that removing a patron can happen instantaneously. The Licensee argues that the patron was observed with no liquor in his possession. He had been cut off from liquor service, he had been asked to leave, and he was not doing any harm and would have left soon.

The Licensee submitted that when a liquor inspector and three uniformed officers walked into his small establishment, the staff took notice and left the enforcement party alone. It said the process of removing the patron had already begun and it would have continued, but the staff was distracted by the police and stopped any process they had going. Then the staff saw the RCMP constable talk to the patron and the patron left. The Licensee argues that the police interrupted their process of removing the patron.

With respect to penalty, in the event the contravention is found, the Licensee submits the penalty should be minimal, if at all. The Licensee showed a positive attitude and diligence under the circumstances of the offence. The Licensee shows his interest in wanting to comply. He works with the Branch to do what he is supposed to do. He is interested in fulfilling the terms and conditions of his licence.

The Licensee acknowledges his responsibilities and demonstrates an attitude reflective of this atmosphere of responsibility, and he attempts to comply and abide by the licence requirements. Both the RCMP and the liquor inspector gave evidence that the Licensee was fully cooperative with their inspection on March 31, 2011.

If the contravention is found, this is not the strongest case of someone being intoxicated in a licensed premise. One could easily imagine the circumstances being far greater than this for a second contravention of this provision of the Act. Accordingly if there is a penalty, it should be at the lower end of the scale for a contravention of this type

REASONS AND DECISION

During the course of the hearing counsel for the Licensee made an insufficient evidence application. In deciding that application, I said: "I agree with the Licensee that the Branch must prove not only that the individual was intoxicated, but also that the Licensee permitted him to remain, as those two elements are specified in this section of the Act." That is incorrect. The Branch does not have the burden of proving that the Licensee permitted the intoxicated individual to remain. Contraventions under s. 43(2)(b) of the Act are strict liability offences. The Branch needs only to prove a *prima facie* case that an intoxicated patron was in that part of a licensed establishment where liquor is sold, served or otherwise supplied, and the onus switches to the Licensee to establish that it was duly diligent, or that it did all that it should reasonably have done to prevent the contravention from occurring. Suffice it to say, however, that my error does not affect the correctness of the decision on the insufficient evidence application as I found the Branch had established a *prima facie* case that the patron was intoxicated, and that is the correct test.

Counsel for the Licensee argues that the patron had an eye infection and a head injury. Neither of these medical issues prohibits an individual from becoming intoxicated. The Licensee argues that the symptoms of these medical conditions can mimic some of the observable symptoms of intoxication.

The only evidence of the existence of these medical issues is from the patron's live testimony. The patron presented his evidence in a reasonable fashion and did not by his attitude or mannerisms project any doubt on his credibility. His testimony however, was confusing: Of his eye, he indicated that he was hit, by one of two attackers and then subsequently he said by one of three attackers. He said his eye was red from the attack, that it bled as a result, and that he tried in vain to wash the blood off at the Croft. When asked from where he bled, he indicated a point on his forehead near his eyebrow. He also said that his eye was red because he had a shower and that the hot water from

a shower makes his eye red. He said he did not advise any member of the staff at the Croft that he had an eye infection. From this testimony I am unable to ascertain if any eye infection existed or if any observable damage to the patron's eye was caused by the attack. The patron also indicated that he slurred his words and walked in an unsteady fashion as a result of the attack. The patron also testified: "It's hard to walk straight when the cops are walking past you." I find the evidence of the patron inconsistent and lacking in credibility. I place no weight on the patron's evidence, including that he did not tell any staff that he had an eye infection and that he was not cut off from liquor service.

I find the inspector and the police constable to each possess a considerable wealth of experience in identifying indicia of intoxication and making conclusions relating to whether or not an individual is intoxicated. The inspector testified that she believed from her observation of indicia of intoxication demonstrated by the patron that he was intoxicated. She was not completely convinced and wanting further confirmation or otherwise, she sought the assistance of the RCMP officer.

The RCMP constable testified as to a number of indicia of intoxication that he observed and based on those observations he concluded that the patron was intoxicated. The inspector said that a staff member advised her that the patron had an eye infection and that the patron had been beaten on one side of his face. The inspector did not pass that information along to the constable. The constable testified that knowledge of an eye infection would not have changed his assessment that the patron was intoxicated.

There is no evidence before me of a head injury or any credible evidence that the patron had been beaten or that his observed behaviour was due to a beating. Based on the eye-witness evidence of indicia of intoxication, bloodshot eyes, swaying back and forth, nodding off, slurred speech, fumbling, lack of coordination, smell of liquor, and walking unsteadily, I find the patron was indeed intoxicated.

The Licensee made much of the language of the NOEA that excludes bloodshot eyes as an indication of intoxication that the inspector relied upon. The inspector testified that she thought the patron was intoxicated even without reference to that single indicia. The determination of intoxication is not a mathematical computation based on how many of the indicia of intoxication listed in the C&E Manual or the Guide have been noted. It is a global judgement based on evidence, facts, and experience, and considered in the context of the terms and conditions of the licence. The allegation, founded or otherwise, that the liquor inspector did not follow the guidelines specified in the C&E Manual for liquor inspectors, has no impact on whether the Licensee has contravened the Act. The Licensee argues that the inspector's failure to comply with the requirements of the C&E Manual cast doubt on her credibility. I find no evidence to support that proposition. Based on the testimony of the liquor inspector and the RCMP constable, and having no credible direct evidence to the contrary, I find the patron was intoxicated.

The Licensee submits that the staff had cut the patron off from liquor service and asked him to leave some time before the inspector and police constable arrived for the inspection. I have no direct evidence of that, only hearsay evidence provided by the liquor inspector (she was so advised by a server), and the Licensee (he was so advised by his staff). The Licensee says that the patron would have left pursuant to their request had enough time elapsed and had the inspection team not intervened with that process.

The Licensee was careful to indicate that the staff had not determined that the patron was intoxicated, but instead that he "was on the verge of having too much." I find it incredible that the patron was observed to be on the verge of having too much to drink and was cut off from liquor service but was not demonstrating signs of intoxication. This is inconsistent with what I find to be the more credible, and direct, evidence of both the RCMP constable and the liquor inspector about the patron's observable signs of intoxication. The Licensee's position that the patron was asked to leave is incompatible

with the fact that neither the Licensee nor its staff advised the RCMP constable or the liquor inspector that this is what had been done. I note that the evidence is uncontroverted that the inspector had at least two conversations with the Licensee's staff. There is no evidence that the patron was on his way out of the establishment and there is little credible evidence of him having been told to leave. On the contrary, I find that both the inspector and the constable found the patron sitting comfortably (the inspector observed him nodding off). I do not accept the implication of the Licensee's evidence about the difficult process that is required to get a patron safely out of the establishment, as it would apply to this patron. I do not accept the Licensee's assertion that safely removing this patron from the establishment would have been difficult or that he was displaying any indication that it would require a delicate touch.

There is no dispute that the patron was in the main service area of the establishment. The evidence establishes the Licensee's staff was aware of the patron's presence, and that there is nothing that would have prevented them from observing the patron's intoxicated state. I find that the Licensee permitted the intoxicated patron to remain in that part of the licensed establishment where liquor is sold, served or otherwise supplied. I find the contravention to have occurred as alleged.

DUE DILIGENCE

The Licensee is entitled to a defence of due diligence if it can establish that it did all that it should reasonably have done to put in place systems and policies and implement those systems and policies in order to ensure compliance with the Act, Regulation, and the terms of the licence.

There is insufficient evidence of specifics as to the policies and procedures in place at the establishment to assure compliance with the Act and Regulation, and insufficient evidence of actions intended to monitor the activities of the Licensee's employees to ensure the policies and procedures are acted upon. I cannot, on the evidence before me, conclude that the Licensee has been duly diligent. The Licensee says that he has more documents and evidence of systems and procedures in his control but that he was not advised that they would be required for the hearing. Accordingly, he did not produce them. Such evidence is not required for the hearing. If, however, a licensee wishes to avail itself of an available defence, it is for the Licensee to prove the facts that constitute that defence. In this case, the Licensee failed to do so. Further, the fact that the intoxicated patron was in the establishment and the staff had spoken to him is strong evidence absent proof to the contrary that the Licensee did not do all that it reasonably could to avoid the contravention.

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 may do any one or more of the following:

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

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

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

The Licensee served a four-day suspension for a contravention of the same section of the Act that occurred in January 2011. The contravention of March 31, 2011, came two months after the first one and is a second contravention in accordance with the Regulation. There was a meeting held at the establishment on March 29, 2011, two days before the contravention, at which time the liquor inspector spoke to the Licensee and his assembled staff about the importance of, and techniques for, identifying intoxicated patrons and the need to remove them from the area of the establishment where liquor is sold, served, or otherwise supplied. It is reasonable to conclude that the meeting did not accomplish its intended purpose. In considering the appropriateness of a penalty I note that the establishment has a lobby that is outside of the area in which liquor is sold, served, or otherwise supplied, and so there is a viable place to hold intoxicated patrons awaiting removal from the establishment by taxi or other means. Accordingly I find that a penalty is appropriate in this instance in order to stress the importance of compliance with the Act, Regulation, and terms and conditions of the liquor licence.

The Licensee argues that the conduct described by the Branch witnesses is less offensive than some imaginable conduct and accordingly the Licensee should be exposed only to the minimum penalty prescribed by Regulation. I find some of the licensee's argument for a minimum penalty to be persuasive: there was only one patron, he no longer had liquor, and he was more or less asleep at the time of the inspection. In the context of choosing from a range of prescribed penalties, this patron was not apparently a danger to himself or others and so a minimum suspension is reasonable. Schedule 4 of the Regulation provides a range of penalty for a second contravention of this section of the Act and I find the minimum suspension identified by that range is appropriate. A ten-day suspension is supported by the facts.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 016665 for a period of ten (10) days to commence at the close of business on Wednesday, January 4, 2012, 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 (section 67 of the Regulation).

To ensure this order is effective, I direct that Liquor Primary Licence No. 016665 be held by the branch or the Prince George detachment of the RCMP from the close of business on Wednesday, January 4, 2012, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

Signs satisfactory to the General Manager showing that the license 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

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 30, 2011

cc: Liquor Control and Licensing Branch, Surrey Office
 Attn: Michael Clark, Regional Manager
 Liquor Control and Licensing Branch, Victoria Office
 Attn: Bode Fagbamiye, Branch Advocate