



**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:	Blue Water Cafe Enterprises Ltd. dba Blue Water Cafe & Raw Bar 1095 Hamilton Street Vancouver, BC V6B 5T4
Case:	EH10-088
For the Licensee:	Andrew Gay
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator	Edward Owsianski
Date of Hearing:	January 14 & 24, 2011
Date of Decision:	March 3, 2011

INTRODUCTION

Blue Water Cafe Enterprises Ltd. operates the Blue Water Cafe and Raw Bar located in Vancouver, British Columbia. The licensee holds Food Primary Licence 205992 for the operation of a restaurant with a lounge and patio. The hours of sale are 9:00 a.m. to 1:30 a.m. Monday through Saturday and 9:00 a.m. to 1:00 a.m. on Sunday. The licensed capacity is 228 persons in the main dining area, 18 in the lounge and 85 on the patio. The licence is, as are all food primary licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Terms and Conditions, A Guide for Liquor Licensees in British Columbia* (the Guide). The licence is endorsed with several terms and conditions including: "Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB."

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 August 10, 2010. The branch alleges that on June 12, 2010, the licensee contravened section 42(4) of the *Liquor Control and Licensing Regulation* (the *Regulation*) by allowing liquor to be taken from the licensed establishment. The proposed enforcement action is a one (1) day suspension of the liquor licence (item 29, Schedule 4 of the *Regulation*).

Item 29 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type; a licence suspension of 1 - 3 days, and/or a monetary penalty of \$1000 to \$3000.

The licensee disputes the contravention and the proposed penalty.

RELEVANT REGULATORY PROVISION***Liquor Control and Licensing Regulation, B.C. Reg. 244/2002*****Consumption of liquor in licensed establishments**

42 (4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit 1: The Branch's Book of Documents #1, tabs 1 – 18.

Exhibit 2: Photographs 1 – 10 submitted by the licensee.

Exhibit 3: LCLB Compliance and Enforcement Policy and Procedures Manual, Desk Reference.

Exhibit 4: Excerpts from the Serving It Right: Responsible Beverage Service Manual.

Exhibit 5: Licensee document "Argument of the Licensee", pages 1 - 3.

Exhibit 6: Affidavit of liquor licensing industry consultant.

Exhibit 7: Letter of January 13, 2011 from licensee principal.

Exhibit 8: Written submission of Licensee.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Inspector A testified that he has been a liquor inspector for approximately four years and was working in that capacity during the evening hours of June 12, 2010, checking licensed establishments in the Vancouver area in company with three other liquor inspectors. At approximately 10:15 p.m. they were outside the Blue Water Cafe when he observed four males standing on the sidewalk outside of the patio area of the restaurant, as depicted in photographs 8 and 9 of exhibit 2. Two of the males were holding wineglasses and drinking what appeared to be red wine. The inspector entered the restaurant. He noted that the establishment did not employ a doorman although some of the other restaurants in the area did so. He asked to speak with the manager (witness B) and accompanied him outside the restaurant where he pointed out the four males. The manager at first denied that they were restaurant patrons, but admitted that they were patrons when the inspector advised him that he would ask the patrons himself. The inspector spoke with two of the patrons who advised him that they were patrons of the restaurant and the contents of the glasses from which they were consuming was red wine. The manager had the patrons move back into the restaurant. The inspectors proceeded onto other duties. Inspector A and two of the other inspectors made notes of their observations (exhibit 1, tab 9).

In his testimony the inspector referred to copies of documents from the Branch file:

- Exhibit 1, tab 1: NOEA letter of August 10, 2010.
- Exhibit 1, tab 2: Contravention Notice issued to the licensee for “Liquor removed from the establishment”.
- Exhibit 1, tab 3: the food primary licence issued to the Blue Water Cafe and in effect at the time of the alleged contravention.
- Exhibit 1, tab 4: floor plan outlining the red-lined licensed area of the establishment.
- Exhibit 1, tab 5: Inspection and Interview Information documents outlining the license issuance and change application processes. The licensee principal has signed the documents acknowledging the terms and conditions of the licence and agreeing to abide by them.
- Exhibit 1, tab 6: Compliance meeting documents completed by the area inspector on August 20, 2009 after meeting with the licensee and discussing issues related to permitting liquor to be removed from the red-lined area licensed area on to an unlicensed patio. The licensee made commitments to operate in compliance with the requirements and to apply for a licensed patio area. No enforcement action was taken by the branch.
- Exhibit 1, tab 7: A copy of the Guide in effect at the time of the alleged contravention.
- Exhibit 1, tab 8: Excerpts from the “Serving It Right: Responsible Beverage Service Program” (“SIR”) manual. The manual provides educational and reference materials for a licensee and staff for compliance with liquor license requirements.

The inspector testified that enforcement action was taken in this instance as this was the second incident wherein liquor was removed from the red-lined licensed area. The previous incident occurred in August 2009 and is the subject of the documents in exhibit 1, tab 6. The contravention subject of this hearing is considered serious in that liquor was removed from the establishment and was being consumed on a public sidewalk area that was not being monitored by staff of the licence establishment. The inspector

agreed that he did not see the liquor being removed from the restaurant and was unaware of the circumstances leading to its removal or how long the patrons had been outside of the licensed area upon his arrival. He did not conduct any further investigation into the incident. He agreed that he was not familiar with the circumstances surrounding the previous incident leading to the compliance meeting noted in the documents at exhibit 1, tab 6. He noted that although it was termed a breach of the terms and conditions of the liquor licence it related to the same contravention of liquor being removed from the redlined licensed area. He testified that he was not aware that the licensee had now closed off the exit from the patio thus making it impossible for this type of incident to occur again in the future.

Licensee motion to dismiss

The licensee submitted a written submission (exhibit 5) and made an oral submission. The licensee's submission is summarized as follows:

For the branch to make its case it must prove not only that liquor was removed from the red-lined licensed area but that it was "permitted" or "allowed" by the licensee to be removed. The Supreme Court of Canada in *R. v. Sault Ste. Marie (city)*, [1978] S.C.J. No. 59 at page 19 held that for these type of offences [contraventions] there must be a passive lack of interference or a failure to prevent an occurrence that ought to have been foreseen. The branch must prove a passive lack of interference that the licensee failed to prevent an occurrence that it ought to have foreseen. Here the liquor inspector did not conduct any investigation into the occurrence and how or why it occurred. Thus the branch is unable to prove that the licensee ought to have foreseen that liquor would be removed from the red-lined licensed area and failed to prevent it from occurring.

Following a short adjournment during which the evidence presented was considered, a determination was made that there was evidence upon which a finding could be made that the licensee allowed or permitted the contravention. The licensee had been made aware through various means including the terms and conditions endorsed on the face of the licence, the initial interview and inspection process, the contents of the "Guide" and the compliance meeting process and documentation that liquor was not to be removed by patrons from the red-lined area. At the time of the inspection the liquor inspector located two patrons on the public sidewalk area consuming liquor brought out by the patrons from the licensed establishment. The management and staff of the establishment were unaware that this had occurred until notified by the inspector. The inspector determined that the establishment did not have a doorman present to prevent such occurrences.

EVIDENCE - THE LICENSEE

Counsel for the licensee presented into evidence an **affidavit sworn by a liquor licensing consultant** with extensive experience in the industry and who has done work for the licensee (exhibit 6). The consultant attests that it would be unusual and unnecessary for a "fine dining" establishment such as the Blue Water Cafe to have an in-house policy manual for the purpose of addressing liquor laws generally or the rule against permitting liquor to be taken from the red-lined licensed area specifically. Staff in such establishments are trained to know the liquor laws. It is not reasonable to have staff permanently posted to monitor patrons on a patio.

The consultant attests that he was present during the compliance meeting between the licensee and the liquor inspector in August 2009. [This is the subject of the documents found at exhibit 1, tab 6.] The compliance meeting was held after the area liquor inspector had observed restaurant patrons consuming wine on an unlicensed patio. It was determined that the licensee had recently expanded the restaurant into previously used retail space and inadvertently failed to apply and receive branch approval for the change to the licensed area. The issue arose from an oversight on the part of the

licensee and was not due to the lack of control by the licensee and its staff or poor staff training. The application and approval process was subsequently completed and the red-lined licensed area amended to bring the establishment into compliance. The change allowed for a direct entrance/exit to the patio from the street. This was immediately closed by the licensee following the June 12th incident, the subject of this hearing.

Counsel for the licensee presented into evidence a **letter signed by the principal of the corporate licensee** dated January 13, 2011 (exhibit 7). The licensee principal advises that the Blue Water Cafe has existed for 10 years and operates as a “fine dining restaurant”. It has been the recipient of several awards. The incident of patrons removing liquor from the establishment has never occurred before and the patio entrance/exit has been closed to prevent a recurrence. If a contravention is found and a penalty deemed necessary, a liquor licence suspension would represent a very significant penalty to the business and staff.

Licensee Witness B testified that he has been the manager of the Blue Water Cafe for the past 10 years and oversees the day to day operations of the restaurant. He has, as well, extensive experience at several other “fine dining restaurants”. The restaurant hires only staff with previous experience at fine dining restaurants. All service staff have “SIR” certificates and are familiar with the liquor laws. Staff meetings are held on a regular basis. The restaurant has a Service Procedures Manual. The manual does not specifically deal with the removal of liquor from the red-lined licensed area.

He was working the night of June 12, 2010. There were approximately 50 management and staff members working and the restaurant was relatively busy with approximately 180 – 190 patrons. Two hostesses greet patrons arriving at the main entrance. It has never been necessary to have a door control person for the patio entrance/exit. At approximately 10:15 p.m. he met with the liquor inspector inside the restaurant and was told that there were some people consuming liquor outside the patio area. He and

the inspector walked outside where he saw the people referred to by the inspector. He did not immediately recognize them as patrons but upon moving closer recognized that they were patrons from a group in the private dining room. He was surprised at this occurrence; it had never happened previously. He recognized the urgency in dealing with the situation and immediately escorted the patrons back into their patio area. The patrons expressed concern that they may have created a problem for the restaurant and made apologies to himself and the inspector. One said that they had been told by staff to stay on the patio. The inspector advised the manager that he would be writing a report on the incident and he then departed.

The manager recorded the incident in his manager's log for the night and it was discussed at a subsequent staff meeting. Changes were made to the patio entrance/exit to the public sidewalk area. Previously a rope and stanchion system was used to control the patio entrance/exit. This allowed private parties to enter and leave without having to transit the main dining area of the restaurant. This has now been changed with large concrete planters placed to prevent entrance to or exit from the patio area (see exhibit 2, photos 2, 3 & 10).

Licensee witness C testified that she has been employed as a server at the Blue Water Cafe for the past one and one-half years. She has a total of 13 – 14 years experience as a server in restaurants or pubs. She holds a "SIR" certificate.

She was working the night of June 12, 2010, with responsibility for a group of about 12 patrons in the private dining room who spent approximately three hours in the restaurant. They were a mature and respectful group. After finishing their meal some of the guests asked to use the patio area adjacent to the dining room. She opened the doors separating the two areas. Some of the guests asked if they could smoke on the patio. They were told that smoking was not permitted on the patio; they could leave the patio to smoke but must leave their drinks on the patio. Some of the guests were from different geographical areas and there was a discussion about the different laws in

different jurisdictions. Six to eight of the guests took their drinks onto the patio. Two who wished to smoke placed their drinks on a table and stepped over the rope barrier to smoke on the sidewalk area off the patio. At this point she was summoned by means of an electronic buzzer to assist in delivering meals to a table in another area of the restaurant. She left the private dining room and was thus engaged when within a few minutes, less than five, she was approached by the manager (witness B) and told that the liquor inspector had observed patrons from the restaurant with drinks on the sidewalk area. She returned to the private dining area, the guests had returned. Two of the guests apologized to her and said that they had advised the manager that it was not her fault; they had been advised not to take drinks from the patio onto the sidewalk area.

She testified that the restaurant does not have house policies regarding liquor laws nor did she receive any training specific to liquor law requirements. She is experienced and understands the law. Further training would not have prevented this incident from occurring. The restaurant has hostesses at the main entrance; it does not have a doorman. It is not necessary to have a doorman controlling exits at this or other restaurants and she has never seen a doorman working at a restaurant. They are commonly employed at nightclubs. The restaurant has regular staff meetings and the matter was discussed at the next staff meeting.

SUBMISSIONS – BRANCH

The branch's submission is summarized as follows:

Section 42 (4) of the *Regulations* requires all liquor served in a licensed establishment must be consumed there and a licensee cannot permit such liquor to be taken from the licensed establishment unless otherwise authorized. It is also a term and condition of the licence that liquor may only be consumed within the red-lined licensed area.

The evidence is clear that on June 12, 2010 patrons removed and consumed liquor outside of the red-lined licensed area of the establishment. The licensee did not employ a doorman and knew or ought to have known that in the absence of staff, liquor could be removed by patrons from the patio. The licensee was not duly diligent, there was inadequate training of staff, and no written policies or systems were in place to prevent the occurrence. The area liquor inspector had conducted a compliance meeting following a previous incident where liquor was removed and consumed out of the red-lined area. Although the establishment is described as a “fine dining” establishment it must comply with the requirements of its food primary liquor licence. A one day liquor licence suspension is warranted to re-enforce the need for voluntary compliance.

SUBMISSIONS – LICENSEE

The licensee submitted a written submission (exhibit 8) and made an oral submission. The licensee’s submission is summarized as follows:

Permit or Allow

For the branch to make its case it must prove not only that liquor was removed from the red-lined licensed area but that it was “permitted” or “allowed” by the licensee to be removed. The Supreme Court of Canada in *R. v. Sault Ste. Marie (city)*, [1978] S.C.J. No. 59 at page 19 held that for these type of offences (contraventions) there must be a passive lack of interference or a failure to prevent an occurrence that ought to have been foreseen. The branch must prove a passive lack of interference that the licensee failed to prevent an occurrence that it ought to have foreseen. Here the liquor inspector did not conduct any investigation into the occurrence and how or why it occurred. Thus the branch is unable to prove that the licensee ought to have foreseen that liquor would be removed from the red-lined licensed area and failed to prevent it from occurring.

Counsel presented authorities dealing with the issue of foreseeability in circumstances analogous to this case: *R. v. Dan Gamache Trucking Inc.* [2005] B.C.J. No. 2288 (S.C.)

R. v. Hoyles (c.o.b. Buddy's lounge), [2001]N.J. No. 298 (P.C.)

R. v. Kidco Construction Ltd. [2009] A.J. No. 743 (P.C.)

Counsel submitted that the act must not only be foreseeable but be foreseeable at the time of occurrence. There is no evidence to support that that is the case here. Nor was there a passive lack of interference per the Supreme Court's decision in *Sault Ste Marie*. The server told the patrons that liquor was not to be removed from the patio.

In conclusion, the licensee cannot be said to have permitted or allowed the liquor to be removed from the red-lined licensed area.

Due Diligence

Counsel submitted that the leading case is *Sault Ste. Marie*. The court described due diligence as a defence of reasonable care. The test is one of reasonableness and not perfection. What is reasonable depends upon the circumstances. Here the evidence is that this type of incident had never occurred at this establishment previously. Fine dining establishments do not typically have policy manuals addressing liquor laws and in any case a policy manual would not have prevented the occurrence. The server did all that was reasonable in the circumstances. She told the patrons they were not allowed to take liquor from the patio. It was not reasonable that she stay with the patrons all of the time. Other duties took her away for short periods of time. It is not reasonable nor is it the norm of the industry that a fine dining establishment employ a doorman. In conclusion, the licensee was duly diligent in that the server did what was reasonable in the circumstances.

Penalty

The evidence of the inspector is that the branch is seeking a penalty in this case because of the previous contravention. The inspector did not know the circumstances of the previous contravention and made the assumption that it was another case of inadequate control of the patrons. That is not the evidence presented. The previous contravention arose because the licensee expanded into adjacent unlicensed space without the authority of the branch. There is no need for a penalty to bring this licensee into voluntary compliance. The licensee on its own initiative closed off the entrance/exit to the patio. The incident did not create a public safety or community nuisance issue.

In conclusion, if a contravention is found and a penalty deemed necessary, the circumstances do not require a licence suspension which would create a considerable financial cost to the licensee and its employees. The minimum \$1000 monetary penalty would be appropriate.

REASONS AND DECISION

The evidence here is straightforward and uncontested on the main points. Liquor was taken from the red-lined licensed area of the patio by two patrons of the restaurant and consumed on the public sidewalk area. There were no circumstances pursuant to paragraphs a and b of subsection 42 (4) that would have authorized the occurrence. The patrons had been told by their server that liquor could not be removed from the patio. The server absented herself for a short period of time to attend to other duties. It was during this time that the patrons stepped over a rope barrier onto the sidewalk area with their glasses of liquor.

The licensee has argued that the removal of the liquor was not permitted or allowed in that the occurrence was not foreseeable at the time and there was not a lack of interference on the part of the employee responsible. The server told the patrons that liquor was not to be removed from the patio.

With respect, I cannot agree. The licensee has been made aware through various means including the terms and conditions endorsed on the face of the licence, the initial interview and inspection process, the contents of the "Guide", and the compliance meeting process and documentation that liquor was not to be removed by patrons from the red-lined licensed area. Staff employed by the licensee are experienced and understand the liquor laws. Here an experienced employee of the licensee was aware that some of the patrons under her responsibility would prefer to take their liquor from the patio to have a smoke outside the patio of the sidewalk area. She advised them that it was not permitted. The patrons left their liquor glasses on the patio table and proceeded off the patio for a smoke. The employee was summoned to other duties and left that area for a short period of time during which two of the patrons took their liquor from the patio to the sidewalk area. While it would be preferable in our society if we could reasonably assume that all persons being advised of the rules would follow them, that unfortunately is not the case. The server could have decided that it was necessary to stay with the party in the private area to ensure that liquor was not removed from the patio onto the public area.

In conclusion, I find that the licensee may be said to have allowed or permitted liquor to be taken from the licensed establishment.

Due Diligence

The licensee is entitled to a defence to the allegation of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

Counsel has submitted that the licensee was duly diligent in that the server did what was reasonable in the circumstances. She told the patrons they were not allowed to take liquor from the patio. This type of incident had never occurred at this establishment previously. It was not reasonable that she stay with the patrons all of the time. Other duties took her away for short periods of time. Fine dining establishments do not typically have policy manuals addressing liquor laws and in any case a policy manual would not have prevented the occurrence. It is not reasonable nor is the norm of the industry that a fine dining establishment employ a doorman.

For the licensee to be duly diligent 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 appropriately dealt with. Here we have an experienced manager in charge of the establishment at the time of the alleged contravention and an experienced server with the responsibility for overseeing a party of patrons in the private dining area. The licensee does not have a manual addressing specific liquor laws and outlining the processes of dealing with related problems. There is no training program for employees regarding their knowledge of the liquor laws and ability to deal with liquor related problems. All staff are hired on the basis of previous experience and the requirement of holding a "SIR" certificate. Their knowledge of the liquor laws is assumed. While no evidence was lead as to what constitutes a "fine dining" establishment, I am satisfied that it refers to a restaurant where the quality of fare, service, surroundings and ambience is of the highest calibre and which is reflected in

the prices charged. While such establishments may experience many fewer contraventions of liquor law requirements than other types of licensed establishments, I am not convinced that they are entirely immune. As such it is incumbent for a licensee of such an establishment to ensure that it reasonably anticipates problems and has the policy and procedures in place to prevent and deal with them. This requires an adequately informed and supervised staff. There was clearly more they could have done to prevent a contravention and they admittedly did it right afterwards - they put up more solid barriers (i.e. cement planters) instead of the rope/stanchions.

On the whole of the evidence, I find that the licensee did not take sufficient measures to prevent the contravention and that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on June 12, 2010, the licensee contravened section 42(4) of *the Liquor Control and Licensing Regulation* by allowing liquor to be taken from the licensed establishment.

PENALTY

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

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

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

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

There is no previous proven contravention of the same type for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegation as a first contravention. The range for first contravention of this type is a licence suspension for one to three days and/or a monetary penalty of \$1000-\$3000.

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance. While the licensee quickly changed the entrance/exit of the patio to prevent a recurrence of the contravention it did not put proactive measures in place to prevent this contravention. I am concerned that there is an undercurrent of attitude within the operation of this establishment that liquor licence contraventions cannot occur within its operation. In the circumstances, I find that a penalty is necessary to achieve future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. I am not satisfied that a liquor licence suspension is necessary in the overall circumstances of this case. The minimum one thousand-dollar (\$1000) monetary penalty for this type of contravention is appropriate and reasonable.

ORDER

Pursuant to Section 20 (2) of the *Act*, I order the payment of a One Thousand Dollar (\$1000) monetary penalty by the licensee to the general manager on or before April 4, 2011.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 20, 2011

cc: Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

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