



**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:	Fishpath Resorts Corporation dba Hawk's Nest Pub 226 Frigate Road Bamfield, BC
Case No.:	EH10-131
For the Licensee:	Victoria Delaney
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator	George C.E. Fuller
Place of Hearing:	Written Submissions
Date of Decision:	February 14, 2011

INTRODUCTION

The Corporate Licensee, Fishpath Resorts Corporation., (“the Licensee”) owns and operates an establishment known as the Hawk’s Nest Pub in Bamfield, BC. The licensee holds Liquor Primary Licence Number 129860. The authorized representative of the licensee is Victoria Delaney.

According to the terms of the liquor primary licence, the licensee may sell liquor from 11:00 AM to midnight, Monday to Sunday inclusive. The licence is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the publication, “*A Guide for Liquor Licensees in British Columbia*”. The liquor primary licence held by the licensee also contains a specific endorsement stating that the “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 LCB”.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch’s (the “Branch”) allegations and proposed penalties are set out in the Notice of Enforcement Action (the “NOEA”) dated November 19, 2010.

The Branch alleges that on September 4, 2010, the licensee contravened Section 12 of the *Liquor Control and Licensing Act* (“the “Act”) and the terms and conditions of the licence by allowing liquor to be removed from the redlined area. The proposed penalty is a two (2) day licence suspension. The range of penalties for a first contravention of this type is a one to three day licence suspension and/or a \$1,000 - \$3,000 penalty (item 46 of Schedule 4, *Liquor Control and Licensing Regulation*). The branch also alleges that on September 4, 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 is a four (4) day suspension of the liquor licence. The range of penalties for a first contravention of this type is a four to seven day licence suspension and/or a \$5,000 - \$7,000 penalty (Item 11, Schedule 4, of the *Liquor Control and Licensing Regulation*).

The licensee does not dispute that the two contraventions occurred. However, it disputes the proposed penalties. The branch and the licensee agreed that the hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

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

Licences

- 12(1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).
- (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (a) limit the type of liquor to be offered for sale,
 - (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,
 - (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
 - (d) designate the areas within an establishment where minors are permitted,
 - (e) approve, prohibit or restrict games and entertainment in an establishment,

- (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
 - (g) vary seating requirements in the dining area of an establishment,
 - (h) vary requirements with respect to the location of an establishment,
 - (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
 - (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
 - (k) specify requirements for reporting and record keeping, and
 - (l) control signs used in or for an establishment.
- (4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.
- (5) A licence expires on the date specified on it as the expiry date.
- (6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.
- (7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.

Drunkenness

- 43(2) A 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 contraventions occur?
2. If so, are penalties warranted under the circumstances?
3. If penalties are warranted, what are the appropriate penalties?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1: Letter dated December 16, 2010, from John (Jack) Purdy to the branch authorizing Victoria Delaney to act on behalf of the licensee with regard to all matters dealing with liquor primary licence No. 129860, as well as all matters arising out of branch File No. EH10-131.
- Exhibit 2: Letter dated December 22, 2010, from the branch advocate to Victoria Delaney attaching copies of the branch's reliance documents.
- Exhibit 3: Undated letter from Victoria Delaney to the branch, received by the branch on January 10, 2011, setting out the licensee's submission with regard to the alleged contraventions.

EVIDENCE

As previously noted, the licensee does not dispute that the contraventions occurred and, therefore, it is deemed to accept the facts as put forward by the branch with respect to the issue of whether the contraventions occurred. The licensee has, however, made submissions in respect to the appropriateness and fairness of the penalties which the branch has recommended.

In light of the above, the evidence can be summarized as follows:

The Hawk's Nest Pub is situated in the rural community of Bamfield, BC, which is located approximately one hour drive from the town of Port Alberni. In light of both the location of the premises and the resulting difficulty in enforcing Liquor Control legislation, the RCMP were approached by the branch to conduct inspections at the licensee's premises when appropriate occasions arose. As a result, on Saturday, September 4, 2010, at approximately 9:30 p.m., three RCMP members attended at the licensed premises in order to conduct an inspection.

As the three RCMP members approached the premises, they observed a large number of people outside the premises on the deck area. Upon their arrival, the members observed a number of persons disburse into the licensee's premises. The members entered the licensee's establishment and noted approximately 50 patrons inside the premises. The RCMP Corporal then spoke with the female in charge who was identified as Victoria Delaney and asked her if she had had any issues with the bar. Ms. Delaney indicated that she had not experienced any difficulties that evening.

While speaking with Ms. Delaney, the Corporal observed a male walk from the bar area directly out the front doors of the establishment carrying his drink in a glass. No member of staff made any attempt to stop him, nor was any member of the staff monitoring the door. The Corporal then went outside and requested that the patron return inside the premises with his drink, which the Corporal believed to be intoxicating liquor. The RCMP members then left the premises and continued their foot patrol duties in Bamfield.

Later that same evening, at approximately 10:35 p.m., the RCMP members became aware of loud yelling and swearing coming from the vicinity of the licensee's establishment. The members returned to the licensed premises and observed a male screaming through the bar window at a group of patrons playing pool. This individual showed visible signs of intoxication and when the RCMP members approached, he made his way back into the interior of the establishment.

Just as the members were about to re-enter the premises, another male came from the interior of the establishment carrying a bottle of beer in his hand. He walked out the main doors to the edge of the deck area and started urinating off the deck. It was noted that the licensed premises had neither a patio endorsement nor a licensed deck in order to legally allow the consumption of liquor outside the premises.

The RCMP Corporal approached the urinating patron and requested that he cease. The patron apologized, stating that he preferred urinating outside as the stench in the toilets was bad. The Corporal requested that the patron pour out his bottle of beer. He complied, placing the bottle on the railing on the deck area. It was noted that this deck rail had numerous empty bottles and glasses on it.

The RCMP Corporal entered the establishment and told Victoria Delaney that the male who had been yelling and screaming outside the pub was now inside the establishment and was showing visible signs of intoxication. The patron was dancing on his own, was unsteady on his feet and showed signs of poor balance and composure. Ms. Delaney said that she had stopped serving him. When the Corporal pointed out that he had observed the patron consuming from a glass of beer, she explained that he must have obtained it from someone other than staff. The Corporal also spoke to Ms. Delaney about the lack of door control and the fact that patrons were consuming liquor outside and urinating in public. Ms. Delaney responded that she only had two members, plus herself, and that she was over-worked.

While this conversation was occurring, the intoxicated patron was asked to leave the premises by staff. At the same time, one of the constables turned two other patrons away from the front doors as they also were attempting to leave with glasses of beer in hand. The RCMP Corporal then exited the establishment and saw the intoxicated patron was standing on the balcony. The Corporal observed that the patron was unsteady on his feet, his speech was slurred and he had the appearance of an intoxicated person. A short time later the RCMP members left the establishment and continued their duties.

Upon review of the file, the branch wrote to the licensee on September 16, 2010, enclosing contravention notice B008954 and requested that further information be provided to the branch within 10 days of the date of the letter. As that request for information was not delivered within that timeframe, it was necessary for the branch to issue a further contravention notice B008956 seeking compliance with the request for the production of documents. The branch eventually received all the required documentation from the licensee on October 7, 2010.

Submissions of the Branch:

With respect to the contravention of Section 12 of the *Act* and the terms and conditions of the licence by allowing liquor to be removed from the redlined area, the branch submits that the licensee and its staff have a duty and obligation to prevent liquor from being removed from the redlined area within the establishment. The removal of liquor to the exterior of the premises causes increased noise, broken glassware and patrons urinating in public. Furthermore, liquor removed from a redlined area can be passed on to intoxicated patrons, or minors, which is a serious public safety issue. By not monitoring entry and exit points, patrons may remove liquor, from, or perhaps bring liquor into, a licensed premises, which can also develop into a serious situation.

With regard to the reasons for the proposed penalty, the branch submits that the police officers had already conducted a licensed premises check and advised the directing mind of the establishment, Ms. Delaney, of her duties in monitoring liquor being taken from the redlined area. Ms. Delaney did not heed this information and continued to allow patrons to walk freely from the redlined area. The branch points out that upon their return, the RCMP members continued to observe that there was no door control and that patrons were attempting to walk out, even in the presence of the RCMP members. In the branch's view, this shows a distinct lack of judgment by the licensee, as Ms. Delaney clearly did not understand the rules, nor did not wish to follow them.

Accordingly, the branch submits that a suspension of the licence for two days will assist in reminding the licensee that all of the rules must be followed to ensure a safe environment for the community and the other patrons.

With respect to the contravention of Section 43(2)(b) of the *Act*, the branch says that, in order to avoid the possibility of further liquor consumption and avoid any harm to other patrons, or staff, a licensee must not permit a person who is intoxicated to remain in that part of an establishment where liquor is served. In order to ensure their own safety, an intoxicated person may remain in an unlicensed area of the establishment, while waiting for assistance, or a ride home. In the instant case, the intoxicated patron was observed returning inside the licensed establishment, after showing visible signs of intoxication outside. Although Ms. Delaney confirmed that she had cut off the patron, this was contradicted by the RCMP members observing the patron inside the premises and consuming a glass of beer. Furthermore, there was no effective door control in place, nor any effective monitoring of the physical state of the patrons. This exhibited poor judgment. The service of liquor to patrons showing signs of intoxication is a cause for concern and a serious public safety issue.

With regard to the appropriate penalty in this case, the branch points out that no action was taken to remove the patron from the bar until the RCMP members requested he be removed. It is apparent that allowing patrons to stay on the premises is a normal practice. The branch submits that due to the locality and issues raised in the community around noise and the day-to-day management of the establishment, a suspension of the liquor licence for four days is appropriate. According to the branch, this will be a visible deterrent and will send a strong message to the licensee that this type of behaviour will not be tolerated by the branch.

Submissions of the Licensee

The licensee requests a reduction of the combined six day total suspension to a maximum of a one to two day suspension. In support of this submission, the licensee says that it is a very small operation, in a very small town and that any reduction in customer traffic in these lean winter months will be detrimental to the establishment's

staff and the community. The hotel is currently experiencing higher than normal volume due to a construction project and the pub is the only food and liquor establishment that is currently open to serve guests of the hotel, as well as local residents. The pub is the only real means of getting a meal after a difficult drive on the road. Furthermore, due to the sale of the community hall last year, the pub is often used to double as a meeting place for various community events. Apparently there are three events scheduled for February and March, and the licensee submits that it would be devastating to the people who have put so much time and effort into these affairs to have to cancel for any reason. These are all weekend events and the pub is being relied upon to host the guests that are coming specifically for those events.

The licensee states that it has worked diligently to ensure that the contraventions which have been admitted will never happen again and furthermore, that much stricter policies have been put into place due to the contraventions which occurred on September 4, 2010. With that, the licensee thanks the branch, as such policies were obviously required.

ANALYSIS AND DECISION

The licensee has admitted to the contraventions. Having considered all of the evidence, I find that on September 4, 2010, the licensee contravened Section 12 of the *Act* and the terms and conditions of the licence by allowing liquor to be removed from the redlined area. Furthermore, I find that on September 4, 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.

DUE DELIGENCE

The licensee is entitled to a defence to the contraventions 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 the existence of procedures to identify and deal with problems, but must ensure that those procedures are consistently acted upon and that problems are dealt with.

Here, there is virtually no evidence upon which I can find that the licensee was duly diligent. In fact, the evidence is to the contrary. In this regard, I note that there was no effective control of patrons travelling within and without the redlined area, nor was there any attempt to remove an obviously intoxicated patron. Even a modicum of control exercised by a doorman would have had an impact on these transgressions. Clearly, there were no preventative measures in place. Although the licensee states that "much stricter policies have been put in place" since the contraventions, which is certainly laudable, it is, ironically, a clear acknowledgement by the licensee that such policies were not in place at the time of the contraventions.

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 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. I am not bound to order the penalties 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 types for this licensee within the year preceding these incidents. Schedule 4, Items 46 and 11 of the *Regulation*, sets out penalties for first contraventions of these kinds (a licence suspension of one to three days and/or a monetary penalty of \$1,000 - \$3,000 for breaches of Section 12 of the *Act*, and a licence suspension of four to seven days and/or a monetary penalty of \$5,000 to \$7,000 for a breach of Section 43(2)(b) of the *Act*). The branch has recommended a two day suspension of the licence for the breach of Section 12 of the *Act* and a four day suspension with respect to the breach of Section 43(2)(b) of the *Act*, for a combined six day suspension.

In its submission with respect to penalty, the licensee asks for leniency based upon the fact that patrons will be inconvenienced due to the relatively isolated location and the fact that there will be no alternatives for the dining and drinking public. Furthermore, the licensee pleads that because the pub has acted as a de facto community hall over the past year, the community will be further inconvenienced due to the pub's suspension.

I am not convinced at all that these concerns have any merit and, in fact, they appear to be an attempt to shift the blame for the unavailability of the licensed premises from the licensee to the branch. I am quite satisfied that the patrons of the pub, both local and transient, will find ways to satisfy their needs.

What is particularly disturbing about this case is the blatant nature of the contraventions. The RCMP Corporal had, initially, specifically warned the Manager regarding the apparent breaches of the *Act*, however, upon his return it was obvious that these observations and directions had not been heeded. Accordingly, this cavalier attitude should not be rewarded.

Furthermore, I note that the licensee was uncooperative with the branch in failing to provide documents when requested. In fact, in order to obtain these documents, it was necessary for the branch to issue a further Contravention Notice. Accordingly, such lack of cooperation should not be encouraged.

In any event, the branch has shown some leniency with respect to the proposed penalties in this case. The branch has proposed a suspension in the mid-range of the contravention of Section 12 of the *Act* and the minimum suspension with respect to the breach of Section 43(2)(b) of the *Act*. I find, therefore, that the combined penalty of a six day suspension is appropriate, necessary and reasonable in order to bring the licensee into compliance in this case.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 129860 for the combined period of six (6) consecutive days, to commence on the close of business on Friday, March 18, 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. To ensure that this Order is effective, I direct that the liquor licence be held by the Branch or the Port Alberni RCMP Detachment, from the close of business on Friday, March 18, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: February 14, 2011

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