



**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: 436319 B.C. Ltd.
dba Landing Pub & Grill
5449 48th Avenue
Delta, BC V4K 1W6

Case: EH12-051

For the Licensee: Andrew D. Gay

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: December 12, 2012

Place of Hearing: Surrey, BC

Date of Decision: January 25, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

436319 B.C. Ltd., dba the Landing Pub & Grill is a liquor primary establishment operating in Delta, B.C. under Liquor Primary Licence No. 030805.

The hours of sale for the liquor primary licence are from 11:00 a.m. to midnight from Monday to Thursday, from 11:00 a.m. to 1:00 a.m. on Friday and Saturday, and from 10:00 a.m. to 11:00 p.m. on Sunday.

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

Mr. Allan William Arbuthnot appeared as the principal and witness for the licensee at the hearing. Mr. Andrew Gay was the licensee's counsel at the hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated March 26, 2012 (the "NOEA"). The branch alleges that on February 17, 2012, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a four (4) day suspension of the liquor primary licence in accordance with item 11 of Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation").

The licensee has admitted that the contravention occurred but argues that a penalty is not warranted on the facts of this case. In the alternative, if I find that a penalty is warranted, the licensee submits that the minimum monetary penalty is more appropriate.

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

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

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

EXHIBITS

Exhibit 1: Branch's Book of Documents, tabs 1 to 12

Exhibit 2: Licensee's Book of Documents, tabs 1 to 12

Exhibit 3: Affidavit of Employee A, sworn December 4, 2012

Exhibit 4: Affidavit of Employee B, sworn December 6, 2012

Exhibit 5: Affidavit of Employee C, sworn December 10, 2012

Exhibit 6: CD video from licensee, dated February 18, 2012, 00:30 to 01:00 a.m.

EVIDENCE

Witness for the branch

Liquor inspector A testified for the branch. He reviewed the NOEA and the branch's documents at exhibit 1. On February 17, 2012, the branch conducted a covert inspection of the Landing Pub & Grill. Prior to the inspection, liquor inspector A gave a short briefing to liquor inspector B and a member of the Delta police force at Delta Police headquarters. The two liquor inspectors and the Delta police constable then attended at the establishment. Liquor inspector A remained outside, while liquor inspector B and the Delta police constable entered just before 10:30 p.m. Liquor Inspector B remained in contact with liquor inspector A through text messaging. On the basis of the notes of the Delta police officer and the text messages sent by liquor inspector B, liquor inspector A decided to issue the contravention notice. The Delta police officer's notes, the transcript of text messages and the contravention notice are included in the branch's book of documents, exhibit 1.

According to the transcript of the text messages, at 11:14 p.m., liquor inspector B reported observing a young female, about 22 years old, wearing jeans, a pink top, and black leather jacket. She was unsteady on her feet and bumped into three other patrons' chairs as she walked through the bar. At 11:23 p.m. liquor inspector B reported that he had lost sight of this female.

Liquor inspector B reported that there were about 45 patrons when they first entered the establishment at 10:30 p.m. and by 11:00 p.m. there were about 70 patrons. This increased to about 107 by the time they left at 12:30 a.m. The interior licensed capacity of the establishment is 120 persons.

At 12:15 a.m. liquor inspector B reported that he again spotted the same female patron who was now leaning against the bar appearing to have very unsteady balance and to be obviously intoxicated. At this time, he noted that she was in full view of three bartenders and the doorman for about three to four minutes. According to the report in the NOEA, liquor inspector B observed her with a server paying her bill. He reported that when she finished paying her bill, she turned toward him, stared drunkenly at him and then collided with him. He noted her eyes were glassy and that her facial features were droopy and extremely relaxed. She then lurched her way to the patio area. All her movements were exaggerated, deliberate, and somewhat jerky.

The notes of the Delta police constable corroborate those of liquor inspector B. At about 11:12 p.m. he first observed this same female. He then observed her apparently being escorted out by a male but noted her in the establishment about ten minutes later. According to the NOEA, the constable noted she was stumbling into chairs with unbalanced steps and lurching into tables. She had a wide stance walk, was weaving as she walked past him and walked directly into a male patron.

Liquor inspector B and the constable left at 12:30 a.m. and reviewed their observations with liquor inspector A outside the establishment. On February 20, 2012, liquor inspector A met with Mr. Arbuthnot's son, who works at the Landing Pub & Grill, and issued the contravention notice. The branch requested and received the video records from the evening in question. Liquor inspector A reviewed the video records and found the majority of them to be of poor quality, which made it difficult to identify individuals. None of the video files provided by the licensee had any date or time stamp on them.

Liquor inspector A testified about a previous branch covert inspection of the Landing Pub & Grill on December 3, 2011. During his interviews with the branch members who were involved in this inspection, he concluded there was insufficient evidence to proceed with any enforcement action. On December 6, 2011, he held a compliance meeting with the licensee to discuss the incident, which dealt with an allegation of permitting an intoxicated person to remain in the establishment contrary to section 43(2)(b) of the Act. The record of this meeting (tab 10, exhibit 1) states:

“A covert compliance inspection was conducted on Saturday, December 3, 2011 between 7:00 PM and 10:20 PM by members of LCLB and Delta Police. Contraventions of intoxication were observed however evidence does not support proceeding to a Notice of Enforcement Action at this time.”

According to liquor inspector A, Mr. Arbuthnot and his manager of the establishment at the time attended the compliance meeting. The purpose of this meeting was: to bring to the licensee's attention the observations made during the covert inspection on December 3, 2011, to discuss strategies that could be taken to deal with this type of issue, to ensure the licensee understood his responsibilities, and to gain commitments from the licensee to take certain measures and implement actions. Following the December 6, 2011 compliance meeting, Mr. Arbuthnot agreed to and signed off on the following commitments:

- To develop and present staff training relating to the physical and mental signs of intoxication and how to recognize and identify intoxication;
- To implement written policies and staff training to ensure patrons do not become intoxicated while in your establishment;
- To develop and implement procedures supporting your staff in removing intoxicated patrons from your establishment;
- To **immediately** [bolded in meeting record] remove from the licensed area any intoxicated patrons;

- To maintain an incident log and develop and implement policies and training to ensure all incidents of intoxicated patrons and the action you or your staff took in relation to intoxicated patrons is recorded in the incident log;
- To deliver copies of policies and training materials relating to intoxication to the LCLB by December 31, 2011;
- To fully comply with Liquor Primary Licence Terms & Conditions relating to drink sizes of distilled liquor, draught beer, bottled beer, and wine.

(exhibit 1, tab 10)

Liquor Inspector A testified that the branch is pursuing enforcement action on the February 17, 2012, incident because the branch considers intoxication to be one of the significant public safety contraventions. This alleged contravention follows the previous allegation of a contravention on December 3, 2011, that was followed up with the compliance meeting in which the licensee undertook to implement specific procedures and policies regarding dealing with intoxicated persons.

In these circumstances, liquor inspector A maintains a four (4) day licence suspension is an appropriate penalty in order to impress on the licensee the significance of this particular contravention. Liquor inspector A stated that the licensee had not complied with the agreement or commitments made at the December 6, 2011, compliance meeting and that the licensee had not fully understood the significance of this particular contravention.

On cross-examination, liquor inspector A agreed that, following the compliance meeting of December 6, 2011, the licensee provided the documents that had been requested at that meeting. Counsel for the licensee referred liquor inspector A to the letter from the former manager of the licensee addressed to liquor inspector A (tab 11, exhibit 2), enclosing:

- A copy of a memo to staff regarding intoxication (tab 6 of exhibit 2);
- A copy of the business card size “signs of intoxication” (tab 12 of exhibit 2);
- A copy of the pertinent section of the Act, signed by each staff member, with their Serving It Right (SIR) certificate number (sample at tab 7 of exhibit 2, signed by Employee A);
- Random copies from the licensee’s incident log where all problems are to be recorded, especially any time an intoxicated patron is removed (tab 10 of exhibit 2).

Liquor inspector A agreed that he did not send any further correspondence to the manager or Mr. Arbuthnot after receiving this letter with attachments. He agreed further that both the manager and Mr. Arbuthnot demonstrated a willingness to work with their staff to ensure compliance. Liquor inspector A was also aware that there had been some management changes since the February 17, 2012 incident.

Witness for the Licensee

Mr. Arbuthnot testified as principal of the licensee. He stated that he has been involved in the liquor industry since 1975 and that he took over ownership of the Landing Pub & Grill in 1998. From 1975 to 1988, he was general manager of the Richmond Inn and as such was responsible for the management and operation of three Liquor Primary licences and one Food Primary licence. He owned a Boston Pizza from 1988 to 1990 and in 1991 he purchased the Fireside pub in New Westminster. This was his first pub

ownership and he has been in the pub business since then. He has also owned pubs in Surrey, Coquitlam and Maple Ridge.

He currently owns the Landing Pub & Grill in Delta and the South Point Pub in Surrey. He owns a 65 seat lounge called Drink, the Hops pub, and a Licensee Retail Store called the Queensborough, all in New Westminster. Mr. Arbuthnot testified that he has a clean record at the Queensborough, Drink and South Point and had a few historical violations in the Hops pub but nothing in the last few years. He has had only one contravention at the Landing Pub & Grill in his 14 years of ownership.

In February of 2012, after the contravention at the Landing Pub & Grill, he dismissed the manager who had been with him for 30 years. He felt that, because of the February incident and the steps that they had put in place after the December compliance meeting, this manager was not managing the staff as well as he should have to ensure all steps were implemented.

With respect to the December 3, 2011, incident that gave rise to the compliance meeting, he explained that a customer who appeared intoxicated was no longer being served but was sitting at the bar waiting for the taxi to arrive to take him home safely. He had no liquor in front of him. Mr. Arbuthnot explained that the pub has an account with a taxi company to ensure any people who may need it get a safe ride home. The pub has had an account with a taxi company for three years. They will pick up passengers as requested by the pub staff. The company then sends the bill to the pub for them to pay. Prior to having the account, the pub had taxi vouchers that were given to the bartenders to hand out to any customers needing them.

Mr. Arbuthnot reviewed the licensee's documents in Exhibit 2 and testified that the documents at tabs 1 and 2 were in place prior to the compliance meeting in December of 2011. Tab 1 includes a Tags Do's and Don'ts of Liquor Service dated August 2007, with 15 tips on how to deal with intoxicated persons and how to explain to customers that staff will no longer serve them. Another document is titled TAG Pub House Rules. They ask new employees to initial each rule and to discuss the rules with management. Most of the 36 rules relate to employee conduct, behaviour and performance. Rules 14 and 29 deal with alcohol selling specifically in relation to asking for identification. The documents further note that failure to comply with the rules may result in suspension or termination.

Tab 10, exhibit 2, includes excerpts from the daily log or journal that is kept in all their pubs. These are used for communication purposes amongst staff and to report any incidents. All excerpts pre-date the incident of February 2012. Most excerpts highlighted in Mr. Arbuthnot's testimony deal with removing patrons who appeared intoxicated. He stated they continue to keep a log book and that staff continue to make entries indicating when they are refusing service.

Mr. Arbuthnot testified that the memo at tab 6 of exhibit 2, date stamped December 15, 2011, was handed out to all staff, who were asked to read it, sign it and return it to the office. This memo explains that the management had just attended a compliance meeting at the branch about serving intoxicated persons. The memo emphasizes to staff just how serious overservice is and how important it is for the licensee and its staff to comply with the law in this area. The memo highlights a number of points with respect to ensuring intoxicated persons are not served nor permitted to remain. The memo notes that a copy of the pertinent laws for each staff member to review and sign is attached to the staff sign-in sheet.

Attached to the memo is the business card sized "signs of intoxication" (tab 12, exhibit 2). Mr. Arbuthnot said that the business card size reminders about intoxication are given to all staff who work in the pubs and that they are required to have them at all times. They issue them to all staff every two to three months and ask staff to keep them in their wallets for reference. He stated that they have been doing this for a number of years. The front of the card deals with Tags Do's and Don'ts of Liquor Service Refusal Tips:

Do: Be Courteous but Firm – Count Drinks
Consumed – Slow the Frequency of Service
-Chat briefly to check Sobriety Level
- Suggest Food and Non-Alcoholic Beverages
Be Courteous but Firm - Count Drinks

Don't: Confront, Bargain or Back Down
Embarrass or Accuse Customer of being Drunk – Tell him or her
that you know what's best

A final tip is to walk away after telling a customer you cannot serve him or her another drink. They cannot argue with themselves.

On the back of the card are noted the Signs of Intoxication to watch for, relating to physical coordination, behaviour changes, and speech patterns.

The manager also states in the December 15, 2011, memo that he will be talking with each staff member over the next few days about the matter. The memo refers to the test that employees will be required to take four times a year to ensure they clearly understand their responsibilities. Mr. Arbuthnot explained the purpose of the Serving It Right test: to continue to reinforce the need to watch for overservice and intoxicated persons and to remind staff what to look for. Management asks staff to take these tests

every two to three months. Copies of these Serving It Right tests are included at tab 9 of exhibit 2 and are signed off by seven employees, seven with date stamp of December 21, 2011, and seven with date stamp of March 17, 2012.

Mr. Arbuthnot stated that, after they sent off the materials requested by Liquor Inspector A at the December 6, 2011, compliance meeting, they heard nothing further from the branch about this. They heard nothing suggesting they were not doing enough to implement preventive measures. Mr. Arbuthnot emphasized that the policy of the pub is to remove any intoxicated persons immediately.

At tab 5 of exhibit 2 is a short paragraph titled "Pre-weekend discussion" with two statements signed by employees B and C. Mr. Arbuthnot stated they initiated this measure after the December compliance meeting with the branch. The memo states:

Every Friday since Dec.15, 2011, our manager, [name deleted], went over with us what was expected during the busy hours ahead. This took place every Friday at 5:30 p.m. at the start of the night shift. We were told to be careful to not overserve, and watch patrons closely, especially the younger ones, as many of them drink before they come to the bar. We were told if we see anyone intoxicated, to remove them as quickly and safely as possible, looking out for their safety, offering them a free cab if necessary.

After the December incident, Mr. Arbuthnot testified that the pub voluntarily stopped serving jugs of beer because of the potential for these to contribute to intoxication (letter to liquor inspector A noting this at tab 11 of exhibit 2).

Mr. Arbuthnot testified about the document at tab 7 of exhibit 2, an excerpt from the branch's December 6, 2011, compliance meeting notes with the licensee, showing the key sections from the Guide relating to drink sizes and overservice. Employee A signed off this one, with date written in "Dec. 2011." On same document is a copy of Employee A's Serving It Right certificate. Management asked all staff, including any new staff, to sign off on a copy of this document.

Mr. Arbuthnot said they have had a secret shopper program in place for a number of years, which is used to assess staff for compliance with the laws relating to intoxication and to minors.

He stated further that they regularly post notices relating to compliance issues in the pub staff room. As an example, he said they posted the notice from the General Manager of the branch, relating to service to minors and the penalty of \$7,500. Every employee receives these notices as an attachment to their paycheques. They ask employees to sign that they have read the notice which is placed into their files.

Mr. Arbuthnot testified about the minutes of the formal staff meetings at tab 8 of exhibit 2, all with post February 2012 dates. Management continually emphasizes dangers of overservice to staff. Mr. Arbuthnot regularly discusses this issue with the new manager, emphasizing that this is a number one priority.

Mr. Arbuthnot referred to the hiring of a consultant, after February 2012, who is tasked with reviewing all the information they currently use to ensure compliance with liquor laws and to put this information into a more formal document. They will use this for a one day course for managers who will then impart the information to all staff.

On cross-examination, Mr. Arbuthnot stated that they may occasionally employ doormen, especially if they have live entertainment, but not on a regular basis, as this establishment in a small community like Ladner is not the kind of place that usually employs doormen. He stated doormen are more common in nightclubs than in neighbourhood pubs. On the evening of February 17, 2012, door staff were working. Their normal duties are checking for identification and watching for signs of intoxication as patrons enter. He stated that removal of patrons would be a cooperative effort with other staff as it would not be the person at the door who would notice someone intoxicated inside the pub. He agreed that the affidavit of Employee B leaves it somewhat ambiguous as to whether the doorman showed out the female. He agreed that he had looked at video footage from 11:00 to 11:30 p.m. but it was difficult to identify individuals. He stated that liquor inspector A reviewed the video and agreed that it was hard to see anything conclusive regarding this issue. They were unable to see on the video whether the doorman actually escorted out a female. He further stated that doormen, when employed, are treated like other staff with respect to training and policy implementation.

Mr. Arbuthnot was asked why the female patron would be paying a bill at 12:15 a.m. if she had already been barred from the establishment. Mr. Arbuthnot surmised that the server thought the female had left. He said it is not uncommon for someone to leave a credit card when running a tab. He then stated that he had spoken with the server and was sure that is what she said about the credit card being left. Mr. Arbuthnot did not record this conversation with the server.

Mr. Arbuthnot stated there are two entrances to the pub, one from the parking area and one from the street. He said the hostess working the door may have other duties cleaning tables and that sometimes someone will sneak in. He explained that unfortunately, without locking one door and forcing everyone through one door or having a door person assigned to each door, this can happen.

When asked about whether or not he had considered creating an area of the establishment specifically designated for people waiting for cabs, away from the licensed area, he responded that it would only be possible to have them stand in the area between the two sets of doors entering the establishment and that this would probably be in the way of people coming and going. He agreed that they might consider how to do this.

Affidavit Evidence submitted by Licensee

The licensee submitted three affidavits (exhibits 3, 4 and 5) from employees A, B and C, all of whom were working on February 17, 2012.

Employee A was the server on the evening of February 17, 2012. Mr. Arbuthnot explained the video scene, copy marked as exhibit 6, showing Employee A at 12:30 a.m., escorting a young female to the door of the pub.

Employee A has worked at the Landing Pub & Grill since 2007 and has worked as a server since 2009. She obtained her Serving It Right certificate in 2009. After the incident on February 17, 2012, her manager asked her to write down what she recalled of the evening (her statement attached to exhibit 3 bears her signature). She states in her affidavit that she was aware that it was against the law to allow an intoxicated person to remain in the establishment. She states that, at approximately 12:30 a.m. at night, she escorted the young woman out of the pub. The young woman followed her out the door at the time. The events described in her statement occurred between midnight and 12:30 a.m.

In her statement, Employee A says she observed an overly intoxicated individual in the establishment on the night of February 17, 2012. She notified the other staff members of this individual and asked them not to provide her with any alcoholic drinks. She then asked one of the doormen to ask the young woman to leave. When Employee A returned to the patio area, she noted the young woman was still there. She kindly asked her to leave, stating that she was too intoxicated and would not be served. She asked the people she was with to see that she got out of the pub safely and also asked whether they needed to call for a ride or if she (the server) could call her a taxi. The others with her replied that it was okay and they would leave. Employee A came back to the patio after about 20 minutes and the young woman was still there. She again asked her to leave, insisting that she could not be in the establishment anymore and again told her friends that she would have to leave. The individual proceeded to move to the exit. When the server returned, the young woman was inside once more. She then told her that she was to have already left and because she had not done so, she would be escorting her out. She asked her to come with her and took her to the exit. She advised her that if she were to come back inside, she would be calling the police and she would be barred from the pub. The server notified the doorman that she was not allowed back in to the establishment. After that, she did not observe this individual again inside the establishment.

Employees B and C swore the affidavits marked as exhibits 4 and 5. Employee B is a bartender employed by the Landing Pub & Grill. He has been employed with the Landing since 2010 and has been a bartender for 16 years, mostly in Alberta. He obtained his Alberta "Pro Serve" which is equivalent to Serving It Right in B.C. Employee C is also a bartender employed by the Landing Pub and Grill. He has been employed with the Landing since 2009 and has been a bartender for 12 years. He obtained his Serving It Right certificate in 2000.

According to their statements, both employees B and C, who were working together at the bar on the evening of February 17, 2012, report that there was a point in the evening when the young woman began to show signs of intoxication. Both employees first observed her to be intoxicated at sometime between 11:00 and 11:30 in the evening. The female had come to the bar where they were working and asked for a drink from Employee B. Employee B refused to serve her on the basis of his observation that she was intoxicated and then told her she would have to leave. Employee C confirms in his affidavit that this occurred. Employee B asked a doorman to escort her to the exit. He saw the young woman head toward the exit but did not actually see her leave. Employee C says he saw her leave the establishment. Both employees were aware that it was against the law to serve an intoxicated person or allow them to remain in the establishment. Other members of the staff later advised them that the young woman got back into the pub sometime after being sent out. However, neither of these employees had any further dealings with her.

The branch reviewed these three affidavits prior to the date of the hearing and did not ask to cross-examine any of the three employees, given the admission of the licensee to the contravention.

SUBMISSIONS

The branch says there is no dispute that the contravention occurred on February 17, 2012. The licensee has admitted to the contravention and has asked for a hearing on penalty only. The branch says a penalty is warranted on the facts of this case. A compliance meeting with the licensee, on the issue of intoxication, occurred only two and a half months prior to this incident. At that meeting, the licensee made commitments to **immediately** remove intoxicated patrons (as bolded in tab 10 of exhibit 1). The staff did not take the necessary steps to deal with the intoxicated female and immediately remove her and thus the licensee failed to meet the standards expected of it.

The branch submits that I should make an adverse inference from the fact that there is no affidavit from the doormen who were on duty on the night in question. If the female patron did leave and return later, one would have expected an affidavit from the doorman to verify this. Her leaving at 12:30 a.m. (as shown on video and agreed to by the affidavit of Employee A) is consistent with the branch's evidence that she left at 12:30 a.m. The branch stated that it is only hearsay evidence that she was only collecting her credit card. There is nothing in Employee A's evidence to suggest the female patron was collecting her credit card. It is logical to assume that, if she was being removed, she would have settled her bill prior to 11:30 p.m. The branch's position is that she was permitted to remain in the pub and that the proposed penalty of a four day suspension is appropriate.

The licensee provided a written submission and added to it at the hearing. The licensee has admitted to the contravention of section 43(2)(b). However, the licensee submits that the NOEA does not provide a balanced picture of what happened on the evening in question.

The licensee says that, on all of the evidence, there is no basis for a penalty or that, in the alternative; a monetary penalty should be imposed instead of a suspension. The licensee sets out its argument under separate headings, which I outline below.

The Events of the Night in Question

The licensee submits that the evidence is clear that the staff fully knew the law and acted on it, albeit too slowly. The licensee says this is not a situation where there is evidence of a systemic problem in the establishment. Therefore a suspension is not needed to send a message to this licensee or its staff about the need to comply with the law.

The licensee says that the affidavits of the three employees demonstrate that the pub refused service to the intoxicated patron and did not allow her to remain in the establishment. Initially, the bartender told her to leave but later, she somehow gained entry into the bar and was then told she had to leave by Employee A. After several requests that the patron leave, Employee A escorted her out. The licensee accepts there was a period of 30 minutes between midnight and 12:30 a.m., during which the intoxicated patron was allowed to remain and accepts that 30 minutes, is too long.

The licensee relies on this evidence from the affidavits of the three employees to support its position that a suspension is not necessary to “send a message” to this licensee as the licensee says that the culture in the establishment is “one of compliance or attempted compliance”.

Voluntary Compliance

The licensee cites several decisions from the branch that have held that the central purpose of penalties is to secure “voluntary compliance” from the licensee:

- *Blue Water Café Enterprises Ltd.*, EH10-088 at p. 16
- *Silver Dollar Cabaret Ltd.*, EH10-067 at p.8
- *Commodore Ventures Ltd.*, EH 10-059 at p. 11

The licensee submits that on the facts of this case, the licensee’s actions demonstrate that a penalty is not necessary to secure voluntary compliance. The licensee reviews the evidence that shows: a) the policies that the licensee had in place before the December 6, 2011 compliance meeting; b) actions the licensee took after the December 6, 2011 compliance meeting but before the February 17, 2012 contravention; and, c) actions taken after the February 17, 2012 contravention.

a) The policies that the licensee had in place before the December 6, 2011 compliance meeting:

- The use of secret shoppers to ensure compliance by staff
- The emphasis placed on taxi vouchers and later the use of a taxi account to ensure any intoxicated patrons were sent home safely
- The daily log that contains references to other evenings when staff removed intoxicated persons
- Introduction of business card size reminders re: intoxication for staff to carry in their wallets (tab 12 of exhibit 2)

b) Actions the licensee took after the December 6, 2011 compliance meeting but before the February 17, 2012 contravention:

- A written policy sheet dated December 15, 2011, referring to the compliance meeting of December 6, 2011, which addresses, amongst other things, the need to pay attention to signs of intoxication and the need to remove patrons immediately (tab 6 of exhibit 2)
- Small group staff meetings every Friday with the manager to go over the rules concerning overservice and the removal of intoxicated patrons (tab 5 of exhibit 2, with statement showing these began December 15, 2011)
- Sign-off sheet for employees to sign, dated December 2011, reflecting the Liquor Primary Terms and Conditions, including physical signs of intoxication and reproducing section 43 of the Act (tab 7 of exhibit 2)
- Regular written Serving It Right quizzes of staff (tab 9 of exhibit 2)
- Termination of sales of jugs of beer

c) Actions taken after the February 17, 2012 contravention:

- Replacement of the manager of 30 years
- Formal staff meetings addressing refusal of service and intoxicated patrons (tab 8 of exhibit 2)
- Hiring of a new consultant to prepare a detailed, formal written policy package for training of managers and staff

The licensee says that all of the above demonstrate the voluntary compliance from the licensee, and thus a penalty is not warranted.

Public Safety

The licensee says there is no evidence that this case raises issues of public safety or issues relating to the wellbeing of the community.

Compliance History

The licensee refers to the evidence given by Mr. Arbuthnot of his extensive history in the liquor industry and the almost spotless record he has kept over a period of decades. The NOEA shows only one previous contravention, which is of a different kind (service of liquor to minors).

Monetary Penalty versus Suspension

In the alternative, if I determine that a penalty is warranted, the licensee says that a monetary penalty is more appropriate than a suspension and relies on the same points made with respect to no penalty.

In addition, the licensee refers to the statement in the NOEA that a suspension will “reinforce” to staff their responsibility and will achieve a “direct economic impact” on staff of the licensee. With respect to reinforcing their responsibilities to staff, the licensee says that this is not supported by the evidence which shows that staff is aware of the rules and routinely enforce them.

The licensee says the second statement in the NOEA with respect to direct economic impact on the staff is legally impermissible, as there is nothing in the branch policy manual that supports penalties against licensees for the purposes of causing financial hardship to employees. The licensee argues this is a form of abuse of process. Further the licensee submits that this basis for imposing a suspension is logically flawed as the branch has no knowledge as to whether the licensee will compensate staff for the

period of the suspension nor does the branch have knowledge as to whether the staff employed on the night in question remain in the licensee's employ. For example, Employee A is no longer employed at the Landing Pub & Grill.

The licensee says that the need for a suspension is based on the "fact" that the staff took no action on the night in question to prevent consumption or remove the patron. The licensee says this has been proven incorrect. The inspectors did not interview any of the staff to obtain a complete picture of what happened on the night in question.

The licensee summarizes its written argument by stating that this is a case which calls out for a minimum penalty, if any penalty at all, and that the minimum in this case would be the minimum monetary penalty of \$5,000.

In its oral argument, the licensee added that there is no public policy rationale here that requires a penalty in this particular case. And further, the licensee submits that in admitting the contravention, the licensee is demonstrating its conscientiousness and that I should take this into account when determining penalty, in the same way as a guilty plea may result in leniency to an offender in criminal actions.

REASONS AND DECISION

The licensee has admitted to the contravention of permitting an intoxicated person to remain, and requested a hearing on penalty only.

The evidence presented from both the branch and the licensee demonstrates that an intoxicated young female patron was permitted to remain in the pub from 11:00 p.m. or soon thereafter on the evening of February 17, 2012. The evidence is unclear as to whether the intoxicated patron was permitted to remain in the pub from 11:00 p.m. to 12:30 a.m. or whether she left around 11:25 p.m. and was then allowed re-entry somewhere around midnight and finally removed at 12:30 a.m.

I find that, given the admission of the licensee, I do not have to make a finding on whether or not the intoxicated patron was present in the pub the whole time (but hidden from the liquor inspectors and the staff) or whether she left and gained re-entry later. The licensee has admitted that the intoxicated patron was permitted to remain, and that the licensee contravened section 43(2)(b) of the Act on February 17, 2012. Because of this admission by the licensee, I find that I do not need to draw an adverse inference, as suggested by the branch advocate from the fact the licensee presented no evidence from the doormen at the establishment. For the same reason (i.e. the licensee's admission to the contravention), I do not need to determine whether the intoxicated female was retrieving her credit card or paying her bill just prior to finally being removed. I note, however, that this is an issue that could have been resolved by Employee A in her affidavit but was not done so.

In its argument for no penalty, the licensee raises some questions about the facts surrounding the incident on February 17, 2012 as well as the evidence about the voluntary compliance of the licensee. I consider these arguments in my discussion of and conclusions on penalty in the section below.

Due Diligence

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

The licensee indicated to the branch that it wished to proceed on a 'penalty only' hearing and that evidence and submissions would be presented on this issue alone. In indicating this to the branch and admitting to the facts of the contravention, the licensee chose not to present a defence of due diligence. The licensee did this with advice from its experienced legal counsel.

Based on the admission of the licensee and the facts as set out in the NOEA, I find that the licensee contravened section 43(2)(b) of the Act on February 17, 2012.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a 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.

Is a Penalty Warranted?

The branch says a penalty is warranted because of the failure of the staff to implement the commitments made at the earlier compliance meeting in December and because of the serious nature of this public safety contravention.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. In addition to this primary goal, the branch lists four other program goals in its Compliance and Enforcement Reference Manual:

- Focus enforcement on public safety issues
- Speedy application of consequences for non-compliance
- Effective penalties consistently applied
- Fair and equitable decision making

The licensee relies on four main points to argue that a penalty is not warranted: 1) The Events of the Night in Question; 2) Voluntary Compliance; 3) Public Safety; and, 4) Compliance History.

1) The Events of the Night in Question

I have difficulty with the licensee's attempts to "recraft" the facts of the incident when the licensee has admitted that the contravention occurred and has asked for a 'penalty only' hearing. As I note above, I can only presume the licensee was fully advised of the consequences of this admission by its legal counsel.

In its written submission, at paragraph 5, the licensee states that the affidavits of its three employees "demonstrate that, in fact, the employees of the pub did refuse service to the patron in question and did not allow her to remain in the establishment." This contradicts the earlier admission to the contravention by the licensee in paragraph 1 of its submission, and its request for a hearing on penalty only. The licensee submits further that the NOEA "does not provide a balanced picture of what happened on the evening in question."

I respond to this apparent contradiction in the licensee's submission by pointing out that, if the licensee took issue with the facts of the NOEA and felt that it did not provide a balanced picture with respect to the events of the night in question, the licensee should have requested a full hearing on the contravention. This would have allowed the branch to present its full evidence of the incident and to cross-examine the licensee's witnesses on those facts.

The branch proceeded with the hearing on the basis of the licensee's admission to the contravention. The branch advocate did not ask to cross-examine the employees on their affidavit evidence as this evidence related to the facts surrounding the incident and the licensee had admitted to the contravention. The branch advocate, quite rightly in my view, concluded that "the events of the night in question" were not in issue in this 'penalty only' hearing.

Nevertheless, I have considered the three affidavits in my determination on penalty as the licensee relies on this evidence to support its position that a suspension is not necessary to "send a message." The licensee says that the culture in the establishment is "one of compliance or attempted compliance."

The licensee says the employees were aware of the law as is shown by several attempts to remove the intoxicated patron. However, the affidavit evidence also shows a clear failure in the implementation of this understanding – to ensure the patron was actually removed from the establishment and, if she was removed at some point prior to midnight, to ensure that she did not return to the establishment. Employee B states in his affidavit that he asked a doorman to show the intoxicated patron to the exit at sometime before 11:30 p.m. He did not follow up with the doorman to ensure she had left or, if she did leave, we do not know how she re-entered. Liquor inspector B's notes indicate that the intoxicated patron was in full view of three bartenders and a doorman at 12:15 a.m. Between midnight and 12:30 a.m., Employee A made four attempts to remove the intoxicated patron and was only successful on the fourth attempt.

These actions, by the licensee's admission, were not immediate and raise questions about the staff's implementation of the commitment to immediate removal. The staff should have followed up with the door persons to ensure the young woman had left the premises and to ensure she did not return. Mr. Arbuthnot in his testimony recognized that removal of patrons would require a cooperative effort with other staff, as the person at the door would not notice someone intoxicated inside the pub. On the evening in question, I find that staff failed completely in making any cooperative effort to ensure the immediate removal of an intoxicated patron.

I wish to comment here on the business-size card wording that instructs staff on how to deal with intoxicated persons. The recommendation to staff is that a server "walk away" after telling a patron he/she should leave if the patron does not immediately comply. No doubt the reason for this is not to involve one staff member in an open confrontation with a difficult and resistant intoxicated patron. The licensee should however instruct its employees to obtain assistance from its manager or other staff if no manager is present. "Walking away" leads to the situation here – where the intoxicated person was allowed to remain for an extended period of time, despite several requests for her to leave.

The licensee admitted the problems inherent with two entry points to the pub and the difficulty with monitoring these. The licensee should review this incident with staff to ensure that measures are in place to ensure a patron who is asked to leave actually leaves and does not return.

In addition, I recommend that the licensee review its video camera technology to ensure, in future, that observations can be made to accurately determine the facts of an incident such as this, and to ensure the videos are accurately identified with date and time stamps.

I conclude that the actions of the staff indicate an awareness of the law but a failure in its implementation as a result of the lack of communication amongst staff and lack of support from the manager to fully implement the commitment to immediate removal of an intoxicated patron. I therefore do not agree with the licensee that a penalty is not necessary to “send a message” to the licensee and its staff. Neither do I agree with the licensee’s submission that the inspectors should have interviewed staff to obtain a complete picture of what happened. The duty of liquor inspectors is to compile their observations during inspections, not to interview staff to assess if there is a possible defence to an observed contravention. This is the duty of a licensee once a contravention has been alleged by the branch.

2) Voluntary Compliance

The licensee reviewed the evidence of policies and procedures that were in place PRIOR to the date of the contravention. Some of them were put in place after the December 6, 2011, compliance meeting, but before the contravention, while others had been in place for some time.

The licensee says it presents this evidence to demonstrate that the branch’s goal of achieving voluntary compliance has been met and was met before the contravention occurred, with many of the procedures introduced as a result of the December 6 compliance meeting. The licensee says this evidence shows that a penalty is not warranted to achieve this goal. I agree with the licensee that much of this evidence showing the steps taken as a result of the December 6 compliance meeting demonstrate that the licensee was attempting to comply with the Act, particularly on the question of removal of intoxicated patrons.

However, I do not agree with the licensee that these steps absolve the licensee of a penalty. Yes, the licensee introduced a number of new policies and procedures – a written policy sheet addressing the importance of removing intoxicated patrons immediately, small group staff meetings every Friday to review the rules about overservice and intoxication, a sign-off sheet for employees to sign pointing out the physical signs of intoxication and section 43(2)(b) of the Act, regular Serving It Right quizzes. I find that the licensee responded to the branch's request for specific items as noted at the December 6, 2011 compliance meeting. However, by the licensee's own testimony through Mr. Arbuthnot as principal of the licensee, he agreed that he was not satisfied with the implementation of these new steps and therefore decided to terminate his long term manager after the events of February 17, 2012.

During cross-examination, Mr. Arbuthnot was asked about the possibility of creating an area of the establishment specifically designated for people waiting for taxis. He agreed that they might consider how to do this, but at the date of the hearing had not yet done so.

With respect to the evidence of the steps taken post-contravention, I note that post-contravention actions are what the branch expects from a licensee when faced with an allegation of a contravention but they do not absolve the licensee of the imposition of a penalty.

On the issue of voluntary compliance, I find that the licensee took a number of steps to respond to the commitments made at the December 6, 2011 and thus to attempt to comply with the Act on the issue of intoxication, but that these steps were not properly implemented to prevent the contravention on February 17, 2012. I agree with the licensee that voluntary compliance is a primary goal of enforcement action but I emphasize and discuss below that it is not the only factor when determining if a penalty is warranted.

3) Public Safety

The licensee says there is no evidence that this case raises issues of public safety or issues relating to the well being of the community. I do not agree with this statement. As noted above, public safety is one of the goals of the branch in taking enforcement action. The branch has made the decision to ensure contraventions of the Act relating to intoxication and service to minors, amongst others, are promptly and efficiently addressed, as both of these raise issues of public safety. Intoxicated individuals can cause harm to themselves as well as to others. The evidence of the state of intoxication of this female patron indicated an individual who had clearly consumed well over her safe limit of alcohol.

4) Compliance History

With respect to the licensee's compliance history, in the 14 years the licensee has owned the Landing Pub & Grill, the branch notes the licensee paid a monetary penalty in February 11, 2010 for contravening section 33(1)(a) of the Act (selling liquor to a minor). Selling liquor to minors is a significant public safety contravention as is intoxication. The branch notes two compliance meetings held with the licensee: the one referred to on December 6, 2011 and another in December of 2009 relating to the terms and conditions of the licence.

As noted above, I have discretion under section 20 of the Act, to determine if a penalty is warranted after a finding of a contravention. I find that a penalty is warranted here because of the seriousness of this contravention, the fact of the previous public safety contravention in 2010, and the failure of the licensee to ensure implementation of the commitments made at a compliance meeting with the branch on the same issue just over two months earlier. I do not agree with the licensee that the fact of the licensee's admission to the contravention should absolve the licensee of a penalty. This is a regulatory proceeding and analogies to criminal law proceedings do not apply.

If a penalty is warranted, what is the appropriate penalty?

The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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 branch is recommending a four (4) day licence suspension as a penalty for the contravention. In the circumstances as described in the NOEA, liquor inspector A maintains it is an appropriate penalty in order to impress on the licensee and its staff the significance of this particular contravention.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 11 in Schedule 4 provides a range of penalties for a first contravention of section 43(2)(b) of the Act: a four (4) to seven (7) day licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

The licensee relies on the same points made above in arguing for no penalty and submits that, if a penalty is warranted, a monetary penalty is more appropriate.

I have reviewed the three branch decisions submitted by the licensee. In all three decisions, the enforcement hearing adjudicators (as delegates were described) ordered a monetary penalty instead of the branch recommended suspension. In *Blue Water Café Enterprises Ltd.* EH10-088, the adjudicator chose a monetary penalty over the suspension, stating that he was not satisfied that a suspension was necessary in the overall circumstances of the case. The adjudicator found that the licensee reacted immediately to prevent any further contraventions of the same type. In *Silver Dollar Cabaret Ltd.*, EH10-067, the licensee was cooperative with the branch, had a relatively good track record and put in place policies to achieve voluntary compliance, albeit after

the contravention occurred. In *Commodore Ventures Ltd.*, EH10-059, the adjudicator pointed out that the branch's witness was unable to provide any reason why a suspension was more appropriate than a monetary fine.

Previous branch decisions are not binding on me as the delegate of the General Manager. However, two of the key goals in taking enforcement action, as mentioned above, are consistent application of penalties and fair and equitable decision making. In the present case, I am satisfied that the goals of the branch are achieved with a monetary penalty rather than a suspension. I say this for the following reasons.

Liquor inspector A testified that he had known Mr. Arbuthnot professionally since 1998 and found him generally to be responsible and cooperative with the branch. He also agreed that the licensee had provided the documents as requested at the December 6, 2011 compliance meeting and that Mr. Arbuthnot communicated regularly with the branch. Licensee's counsel asked Liquor inspector A if he would agree that a monetary penalty might be one of the possible reasonable outcomes, assuming the evidence presented at the hearing established all the steps taken by the licensee as a result of the December 6, 2011 compliance meeting, and in consideration of only one contravention in the licensee's 14 years' history with this establishment. Liquor inspector A agreed that a monetary penalty would be a possible reasonable outcome.

I have found that the licensee took a number of steps to achieve the goal of voluntary compliance, steps that were taken as a result of the December 6, 2011 compliance meeting and before the contravention on February 17, 2012. As noted above, management failed to ensure the instructions to staff were properly implemented on the night in question and thus the contravention occurred. Nevertheless, the licensee introduced a number of policies and practices to try to ensure intoxicated patrons were removed in a timely manner.

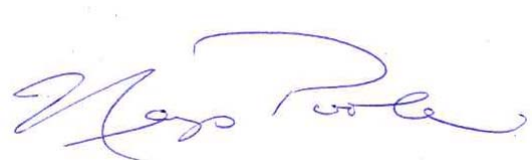
I also agree with the licensee that the economic impact of a suspension on staff is not an inevitable outcome of a suspension nor necessarily a desirable one. A licensee may choose to compensate staff for lost time or staff who were involved in the contravention may have left or been terminated.

In the present case, I am satisfied that the minimum monetary penalty is reasonable and appropriate and will serve as a reminder to the licensee to ensure proper training of its staff and implementation of its policies and procedures with respect to its commitment to immediately remove an intoxicated patron.

ORDER

Pursuant to section 20(2) of the Act, I order that the licensee pay a monetary penalty in the sum of \$5,000 to the general manager of the Liquor Control and Licensing Branch on or before March 1, 2013.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.



Nerys Poole
Enforcement Hearing Adjudicator

Date: January 25, 2013

cc: Liquor Control and Licensing Branch, Surrey Office
Attn: Michael Clark, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate