



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: Delka Holding Enterprises Ltd.,
dba The Podium Sports Grill
531 Yates Street
Victoria, BC V8W 1K7

Case: EH13-014

For the Licensee: Mr. Melvin De Levie

For the Branch: Ms. Cristal Scheer

General Manager's Delegate: Mr. R. John Rogers

Date of Hearing: December 12, 2013

Date of Decision: March 18, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The corporate licensee, Delka Holding Enterprises Ltd. (the "Licensee"), owns the Podium Sports Grill at 531 Yates Street, Victoria, B.C. ("*The Podium Sports Grill*"). This establishment is operated under Food Primary Licence number 027499 (the "Licence") by Cadboro Bay Restaurant Corporation, as third party operator (the "Operator").

Under the Licence, liquor sales are permitted from Monday to Saturday, inclusive, between the hours of 11:00 a.m. and 2:00 a.m. and on Sunday between the hours of 11:00 a.m. and midnight. The permitted capacity for *The Podium Sports Grill* is 155 patrons allocated among a lower area, a split level middle area, and an upper area.

Mr. Melvin De Levie is a principal of the Licensee and represented the Licensee at the Hearing.

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")

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 April 19, 2013.

The Branch alleges that on January 19, 2013 the Licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") in that its employee permitted an intoxicated person to remain in that part of *The Podium Sports Grill* where liquor was being sold, served or otherwise supplied.

If this allegation is proven, the proposed enforcement action as outlined in the NOEA is a suspension of four days, as provided in item 11, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The penalty range for a contravention of section 43(2)(b) of the Act, where there has been no prior contravention in the preceding

12 months, is a four to seven day licence suspension and/or a \$5,000-\$7,000 monetary penalty.

The Licensee takes the position that the patron was not intoxicated as alleged by the Branch.

Pursuant to section 3 of the Regulation, the General Manager of the Branch has delegated to the undersigned the powers, duties and functions imposed upon the General Manager by, and referred to in, section 20 of the Act and section 65-69 of the Regulation for the purpose of this enforcement hearing.

RELEVANT STATUTORY PROVISIONS

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

Drunkennes

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

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Schedule 4 Enforcement Actions Intoxicated Patrons

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
11	A breach of 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 or served	4-7	10-14	18-20	\$5,000-\$7,000

ISSUES

1. Did the contravention occur?
2. If so, has the 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 13 inclusive.

EVIDENCE – BRANCH

The Branch called as its witnesses Liquor Inspector A ("Inspector A") and Liquor Inspector B ("Inspector B") (collectively the "Inspectors").

Onsite observations

Inspectors A and B testified that on Saturday, January 19, 2013 at approximately 6:00 p.m. they entered *The Podium Sports Grill* and, without identifying themselves, sat at a table in the middle area of the establishment where the service bar was located. The establishment was well lit and the Inspectors had no difficulty observing the other patrons sitting around them.

Shortly after sitting down, the Inspectors noted a male patron ("Patron") seated at a table approximately seven feet away. The Patron was 55-60 years old with short grey hair, slightly reddened eyes, and wearing a black long-sleeved shirt. He was drinking what the Inspectors believed to be a glass of beer. The Patron was accompanied by two other patrons, both of whom were younger than he was.

About an hour later, the Inspectors observed that the Patron ordered and received another glass of beer. Then, approximately 40 minutes after that, they noted that the Patron ordered and received a third glass of beer. In neither case did the Inspectors observe that the server who served these glasses of beer to the Patron attempt to monitor the Patron's level of intoxication.

Following the service of the third glass of beer, the Inspectors noted that the Patron:

- had reddened droopy eyes
- appeared to be speaking with loud, slurred and repetitive speech in a volume much louder than those people around him
- appeared to be having difficulty focusing on the conversations of his table mates
- moved in a very sluggish manner and was unsteady while sitting, and
- seemed to evidence a lack of concentration, at times staring out and looking at the other patrons of the establishment with a dazed, blank look on his face

Approximately 10 minutes after the service of the third glass of beer, the Patron made his way to the men's washroom. The Inspectors noted that he stumbled on a number of occasions during his journey.

Inspector B followed the Patron into the washroom. In the washroom, Inspector B struck up a conversation with the Patron and observed that the Patron:

- had bloodshot droopy eyes
- had a heavy odour of liquor on his breath, and
- spoke with slurred speech, while appearing to have difficulty with his memory and staying on the topic of their conversation

In addition, Inspector B noted that, as the Patron was experiencing impaired balance, the Patron had to lean against the washroom wall to steady himself.

As a result of their ongoing observations of the Patron while they were in *The Podium Sports Grill*, and, specifically, as a result of Inspector B's observations of the Patron in the men's washroom, the Inspectors concluded that the Patron was in an advanced state of intoxication.

The Inspectors left *The Podium Sports Grill* approximately 5 minutes after Inspector B had spoken with the Patron in the washroom.

At no time while they were in the establishment and observing the Patron did the Inspectors see the Patron order or consume food or the establishment's staff refuse to sell the Patron additional liquor.

The Contravention Notice

Inspector A identified the document at tab 3 of Exhibit 1 as a copy of the contravention notice number B018084 (the "Contravention Notice"). The Inspector had completed the Contravention Notice on January 21, 2013 and sent it by registered mail to the Licensee at the address on the Licence for *The Podium Sports Grill*. Inspector A confirmed that although the Contravention Notice dealt with three allegations, the NOEA and this hearing was limited to the alleged contravention dealing with section 43 (2)(b) of the Act.

The Guide

Inspector A identified the document at tab 6 of Exhibit 1 as a copy of the Guide. He noted that at pages 26 and 27 of the Guide, under the heading "Over-service and intoxicated patrons", the Guide confirmed the responsibility of the licensee:

- to ensure that its patrons do not become intoxicated while in the licensee's establishment
- not to permit a patron apparently under the influence of alcohol to remain in the establishment, to refuse such a patron service, to have such a patron removed from the establishment, and to see that this patron departs safely, and
- to keep an incident log in which must be recorded all incidents of intoxicated patrons and the action the licensee's staff took in dealing with this patron

The Guide sets out, as well, the following physical and mental signs of intoxication:

Physical Signs of Intoxication:

- red or bloodshot eyes
- disheveled appearance
- odour of liquor
- unsteadiness on feet
- staggering
- exaggerated care in walking
- slurred speech
- fumbling with small objects such as money

Mental Signs of Intoxication:

- lack of alertness
- exaggerated emotions
- aggression
- irrationally

Notice to Provide Records

Inspector A identified the document at tab 9 of Exhibit 1 as a copy of a notice to provide records, dated January 21, 2013 (the "Records Notice") issued pursuant to section 73(1)(a) of the Act and section 34 of the Regulation. He confirmed that he had prepared the Records Notice and sent a copy to the Licensee.

Inspector A noted that the Records Notice asked for six items, two of which were relevant to this hearing. Item 3 of the Records Notice asks for a copy of the CCTV camera footage for *The Podium Sports Grill* from 1800 to 2100 hours on January 19, 2013 and item 4 asks for an original copy of "any communications or incident logbook used" by *The Podium Sports Grill* which might refer to the allegation contained in the NOEA.

Inspector A testified that in response to the Records Notice he was advised by the Licensee that it did have an incident logbook, but that this book did not have any entry dealing with the incident referred to in the NOEA. With respect to the request for a copy of the CCTV footage, Inspector A testified that the Licensee had sent a copy of the CCTV footage for the evening of January 18, 2013 rather than the requested footage for January 19, 2013. By the time the mistake had been noticed, he stated, the relevant CCTV footage had been erased.

On cross-examination, Inspector A confirmed that the Branch views the delivery of the wrong CCTV footage by the Operator in response to the Records Notice as a simple mistake and attaches no malfeasance to this fact.

Penalty Recommendation

Inspector A was referred to the NOEA where it states:

This establishment's business model generates significant revenue from the sale of liquor. A monetary penalty would have little deterrent effect and may be seen as a cost of doing business.

Inspector A was asked on cross-examination why, as the author of the NOEA, he chose to recommend a four day suspension rather than a monetary penalty. Inspector A testified that he noted from the Branch's records that *The Podium Sports Grill* sells a considerable amount of alcohol so that a monetary fine of \$5,000 would not be as effective a deterrent to *The Podium Sports Grill* as a suspension. He stated that in his view a suspension would send a message to the Licensee while educating the public. Inspector A agreed that the fact that *The Podium Sports Grill* sells a fair amount of liquor doesn't take into account the costs associated with such sales.

Cross-examination of the Inspectors

On cross-examination, Inspector A testified that he had sent notice of the contravention to the address for the Licensee on the Licence. Rather than the Licensee's Vancouver address, this address was the Victoria address of *The Podium Sports Grill*. However, Inspector A testified, he had spoken on numerous occasions with the principal of the Operator concerning the contravention, so he was under the impression that the Licensee was well aware of the alleged contravention.

Inspector A confirmed that when he and Inspector B entered the establishment on January 19, 2013, *The Podium Sports Grill* was busy, as this date was the first broadcast of the National Hockey League games following the strike/lockout situation in the 2012/2013 season. He agreed that there were hockey games being broadcast over 14 television sets and that there was a lot of noise, including cheers, so that it was not unusual for a patron to be speaking loudly.

Both Inspectors A and B testified that, even though an additional five patrons subsequently joined the Patron at his table and that this might have required him to speak more loudly, they still believed the Patron was speaking much more loudly than all of the other people around him.

Both Inspector A and Inspector B agreed on cross-examination that neither had spoken with the Patron to determine whether or not the red eyes exhibited by the Patron might have been caused by a condition other than intoxication. However, Inspector A testified that he and Inspector B watched the Patron over a period of two hours as the symptoms of intoxication appeared to increase, during which time the Patron continued to consume alcohol.

Inspector A was asked if he believed that the consumption of two beers over a period of two hours was sufficient to cause the Patron to be intoxicated as the Inspectors had testified. Inspector A responded that as he was unaware of how much liquor the Patron had consumed prior to the Inspectors entering *The Podium Sports Grill*, so he had difficulty properly answering that question. When Inspector B was asked if he believed that the consumption of two beers over a two hour period was excessive drinking, he stated that it depended on the person drinking the beer.

When asked if it might be possible that a 55-60 year old man who had been sitting for four hours might be a bit unsteady on his feet when he got up due to the length of time he had been seated, Inspector B acknowledged that it was possible. Similarly, when asked if he believed that having red or pink eyes was confirmation of intoxication, Inspector B responded that this symptom was not sufficient confirmation standing alone, but that it had to be combined with other symptoms.

Inspector B confirmed that he included the odour of beer when he referred to the odour of liquor on a person's breath. When asked on cross-examination, he stated his belief as a non-drinker that the odour of liquor on a person's breath is similar to the odour of beer on a person's breath.

EVIDENCE – LICENSEE

The Licensee called as its witness the person who was the acting manager at *The Podium Sports Grill* (the “Manager”) on January 19, 2013. She had been working for *The Podium Sports Grill* for just over four years.

The Manager testified that on January 19, 2013 she started her shift early at about 3:00 p.m. as the Toronto/Montreal hockey game was being broadcast at that time and the establishment was busy, loud, good energy, and almost completely full of patrons. She ended her shift about 10:30 p.m. that evening.

She testified that all of the servers working for *The Podium Sports Grill* had their Serving It Right certificates.

She testified that she was not aware of the identity of the Patron that evening and, to this date, does not know who he is. Nor, she stated, was she aware of any patron who was intoxicated in *The Podium Sports Grill* on the evening of January 19, 2013.

She testified that she is not aware of the identity of the server who served the Patron that evening, and noted that no server had made any comment to her on that evening about an intoxicated patron.

The Manager testified that the hockey game started at 4:00 p.m. and, as a result a lot of food was served at *The Podium Sports Grill* that day. She confirmed that some of these patrons, after they had consumed their food, remained at their table watching the hockey game on television, socializing, and drinking their beer.

The Manager testified that, on a number of occasions, she had stopped serving a patron if she observed that this patron had a lack of eye contact, slurred speech, and balance issues. On January 19, 2013 she did not observe any patrons of *The Podium Sports Grill* who exhibited these symptoms and she did not have any members of her staff reporting a patron with these symptoms, so there were no red flags to her.

She testified that her procedure when she observed someone to be intoxicated was to: first discuss it with the server who was serving that patron; then go and ask the patron to pay the bill; and then have this patron leave the establishment making sure that they were getting home safely.

Cross-examination of the Manager

On cross-examination, the Manager confirmed that there were probably over 100 people in *The Podium Sports Grill* on January 19, 2013 and that she was very busy, even with a full complement of staff working.

The Manager testified that she started at *The Podium Sports Grill* as a server, then worked as a bartender, moving to a supervisory role, and then to her role as acting manager on January 19, 2013. As acting manager, she has the authority to work cooperatively with the Operator's representative to hire, train, conduct employment reviews, and to fire staff.

The Manager testified that *The Podium Sports Grill* does not have any written staff policies or manuals, but she does use a communications board to which she posts notifications in order to communicate with staff. Any staff policies she wishes to implement, she has to clear with the Operator's representative prior to their implementation. Most things she first clears with the Operator's representative.

When asked on cross-examination about the Licensee's instructions to the staff at *The Podium Sports Grill* for dealing with patron intoxication, she responded that they were to do the following:

- first discuss how many drinks a patron might have had
- then determine whether or not the patron had eaten
- if the patron is clearly intoxicated, the patron would be asked to leave the premises

The Manager confirmed on cross-examination that the Licensee had no employee manual and no written communications to staff apart from notices posted on the employee bulletin board.

The Manager acknowledged that she was aware of the Guide and that she had probably read it a few years ago.

When asked on cross-examination about meetings of staff at *The Podium Sports Grill*, the Manager stated that staff meetings are held at which staff issues are addressed and for the purpose of getting everyone back on the same page again. She testified that the last staff meeting was held approximately three months prior to the date of the alleged contravention. As well as herself and the staff, she stated, these meetings were attended by the Operator's representative and the establishment's chef. She acknowledged that a representative of the Licensee is not present at these meetings. She stated that for these staff meetings, there were no formal agendas, sign in sheets or minutes.

SUBMISSIONS – BRANCH

The Branch submitted that the evidence of two trained liquor inspectors is clear and not refuted.

The Branch noted that the Inspectors observed the Patron for a period of more than two hours, during which time they saw him consume three beers. Over that time period they observed his behaviour become more and more indicative of intoxication.

Their observations commenced with the Patron standing out by speaking louder than his neighbours when the Inspectors first came into the establishment at 6:00 p.m. Over a two hour period they observed his activities becoming more and more aggravated and indicative of intoxication, culminating with his trip to the washroom accompanied by Inspector B. By the time they left the establishment at 8:00 p.m., the Inspectors observed that the Patron was clearly intoxicated. During the time that the Inspectors were observing the Patron there was no evidence that a member of the staff of *The Podium Sports Grill* attempted to refuse service of alcohol to the Patron or to ask him to leave the premises.

The Branch submitted that it had proven on a balance of probabilities that the Patron was intoxicated and that the staff of *The Podium Sports Grill* permitted him to remain in the establishment contrary to section 43(2)(b) of the Act as alleged in the Contravention Notice.

The Branch submitted that a four day suspension as recommended by Inspector A in the NOEA was reasonable under the circumstances.

SUBMISSIONS – LICENSEE

The Licensee submitted that it was at a bit of a disadvantage as it did not know the identity of either the Patron or the server who purportedly served him and permitted him to remain in the establishment.

However, the Licensee referred to the evidence that the Patron drank two beers in two hours. He was not drinking quickly nor was he drinking alone as initially he had two people accompanying him, which number grew to five over the two hours the Inspectors were observing the Patron.

The evidence of Inspector B of what occurred between him and the Patron in the men's washroom was subject to interpretation, the Licensee submitted, especially as no one talks to another person in a washroom.

The Patron was between 55-60 years old and possibly the reason that he was unsteady in his walking to the washroom was that he had been sitting for a long period of time. The fact that he had red eyes should not be sufficient to indicate that the Patron was intoxicated.

The Podium Sports Grill is not a bar. Although the Licence permits it to do so, it does not remain open until 2:00 a.m. Neither the Licensee nor the Operator want intoxicated people on the premises.

All the servers at *The Podium Sports Grill* have their Serving It Right certificates and know that if a patron is intoxicated that he is to be asked to leave. The Licensee submitted that the Patron could not have shown the signs alleged by the Inspectors without being asked to leave by a member of the staff of *The Podium Sports Grill*.

REASONS AND DECISION

Contravention

To establish liability on the part of the Licensee for the allegation contained in the Contravention Notice, the Branch must demonstrate on a balance of probabilities that the Licensee permitted an intoxicated person to remain at *The Podium Sports Grill*.

I accept the unrefuted evidence of the Inspectors that the Patron displayed initial signs of intoxication when they first entered *The Podium Sports Grill* at 6:00 p.m. and that by 8:00 p.m. the Patron demonstrated many of the signs of intoxication exhibited by an intoxicated person as listed in the Guide. I also accept their unrefuted evidence that prior to them departing the premises, they did not observe a member of the staff of *The Podium Sports Grill* serving the Patron food, refusing to serve him liquor, or asking him to pay his bill and leave.

I find the evidence before me clearly shows on a balance of probabilities that by 8:00 p.m. on Saturday, January 19, 2013 the Patron was intoxicated and that the staff of *The Podium Sports Grill* permitted the Patron to remain on premises as alleged in the Contravention Notice. Therefore, I find that the Branch has proven on a balance of probabilities that the contravention as alleged in the Contravention Notice did occur.

The Licence by its terms and conditions incorporates the provisions of the Guide. As described in detail in the Guide, the Licensee is liable for the actions of the Operator and staff carried out at *The Podium Sports Grill*. Therefore, if the staff of *The Podium Sports Grill* have been found to have permitted an intoxicated person to remain on the premises contrary to section 43(2)(b) of the Act, the Licensee is liable for this contravention.

Due Diligence

Even though I have found that the Branch has proven the contravention alleged in the Contravention Notice, 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. To successfully establish such a due diligence defence, the Licensee must not only demonstrate that it has established procedures to identify and deal with ensuring that intoxicated persons are not permitted to remain in its establishment, it must also demonstrate that those procedures are consistently acted upon and that any problems arising therefrom are dealt with.

The evidence before me makes it abundantly clear that *The Podium Sports Grill* is not a bar and does not want intoxicated people on the premises. The Manager stated that she has, on a number of occasions, refused service to patrons who appeared to display the symptoms of becoming intoxicated. However, such intentions and actions are not sufficient to meet the onus of establishing a due diligence defence. Apart from a staff notice board and infrequent staff meetings, there is no evidence before me that either the Licensee or the Operator established procedures or staff training to ensure that intoxicated persons are not permitted to remain on site.

As I have found that the Licensee has not demonstrated a due diligence defence, I find that on Saturday, January 19, 2013 the Licensee contravened section 43 (2)(b) of the Act and the terms and conditions of the Licence by permitting an intoxicated person to remain at *The Podium Sports Grill*.

PENALTY

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the Licence, I may do 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 NOEA. However, if I find that a 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve this compliance. In addition, enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

The Branch has recommended a penalty of a four day suspension. This is the minimum suspension mandated by the Regulation for a first contravention of this nature. The rationale given by the Branch in the NOEA for a suspension rather than the minimum monetary penalty of \$5,000 is that it felt that a monetary penalty of \$5,000 would have little deterrent effect and might be seen by the Licensee as merely a cost of doing business.

The factors that I have considered in determining the appropriate penalty in this case 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.

As this is the first contravention involving the Licensee, it does not have a negative compliance history. Nor is there any evidence before me of a past history of warnings by the Branch and/or the police involving *The Podium Sports Grill*.

Although permitting an intoxicated person to remain on a licensed premises is a serious contravention of the License, there is no evidence before me that the Patron constituted a threat to public safety.

I have considered the reason that the Branch has recommended a suspension rather than a monetary penalty. I agree that the effect of the sanction on a licensee should be considered when determining an appropriate penalty. I also agree that, depending upon the volume of business being conducted by the licensee, a suspension might affect that licensee more severely than a monetary penalty and that this affect should be considered when determining an appropriate sanction.

As stated above, the Branch's primary goal in bringing an enforcement action such as this is to achieve compliance with the Act, the Regulation and the License. The Licensee appeared before me and defended itself against the allegation in the NOEA. I have found against the Licensee with respect to the contravention. However, in defending itself I was impressed with the professed concern both the Licensee and the Operator expressed in ensuring that they and the staff of *The Podium Sports Grill* operated in accordance with the best practices of the hospitality industry and in compliance with the rules and regulations they are subject to under the terms of the License. I believe this concern to be genuine and that the issuance of the NOEA and the holding of this enforcement action to have had a positive impact on all the parties involved with respect to ongoing compliance. Therefore, I do not find that the contravention for which I have found the Licensee responsible requires me to impose a suspension rather than a monetary penalty to ensure future compliance by way of deterrence.

The Patron was intoxicated and was permitted to remain in *The Podium Sports Grill*. I find that an appropriate sanction for this contravention is a fine of \$5,000.

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 Branch on or before April 18, 2014.

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 Branch inspector or a police officer.

Original signed by

R. John Rogers
General Manager's Delegate

Date: March 18, 2014

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

Liquor Control and Licensing Branch, Vancouver Office
Attn: Cristal Scheer, Branch Advocate