



**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

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| Licensee: | Grand Trunk Inn 2351 Church Street Vanderhoof, BC V0J 3A0 |
| Case: | EH07-099 |
| For the Licensee: | Michael Brise |
| For the Branch: | Shahid Noorani |
| Enforcement Hearing Adjudicator: | Sheldon M. Seigel |
| Date of Hearing: | November 29, 2007 |
| Place of Hearing: | Prince George, BC |
| Date of Decision | December 18, 2007 |

INTRODUCTION

The licensee operates an establishment with a liquor primary licence in Vanderhoof, BC. The hours of operation indicated on Liquor Primary Licence No. 019556 are 11:30 a.m. to 1:00 a.m. Monday through Thursday, noon to 2:00 a.m. Friday and Saturday, and 11:00 a.m. to midnight on Sunday.

On the business day of June 23, 2007, two liquor inspectors witnessed a patron in a bar (belonging to someone other than the licensee) who appeared to be intoxicated. The inspectors retired to their vehicle to make notes. Thereafter, the inspectors travelled to the licensee's establishment and observed the same patron they had observed earlier.

The inspectors issued a contravention notice for permitting an intoxicated patron to remain in the redlined area of a licensed establishment.

ALLEGED CONTRAVENTION

The Liquor Control and Licensing Branch (Branch) made an allegation and recommended enforcement action as set out in the Notice of Enforcement Action dated October 12, 2007. The branch alleges that:

On June 23, 2007, the licensee contravened s. 43(2)(b) of the *Act* by permitting an intoxicated person to remain in the licensed establishment.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, RSBC 1996 Chapter 267

Drunkenness

43 (2) A licensee or the licensee's employee must not permit

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the licensee permit an intoxicated patron to remain in the establishment, in contravention of s. 43(2)(b) of the *Act*?
2. If so, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit No. 1: Book of documents
- Exhibit No. 2: Correspondence dated Nov 14, 2007
- Exhibit No. 3: Correspondence dated Nov 8, 2007; Branch GM/Attendees at PG Licensee meeting.
- Exhibit No. 4: Transaction list for June 23, 2007
- Exhibit No. 5: Correspondences - 3pp dated Nov 28, 2007, signed "WJ"
- Exhibit No. 6: Correspondence - dated Nov 27, 2007, signed "SR"
- Exhibit No. 7: Overnight stay invoice re: "SR"

EVIDENCE

The two liquor inspectors provided consistent and corroborative testimony relevant to the alleged contravention as follows:

They are experienced and well trained in identifying intoxicated persons.

The inspectors attended at a licensed bar in the city of Vanderhoof. While in that bar, they noticed a male patron who appeared to be intoxicated. The patron was with a female companion. The inspectors observed the patron for approximately forty minutes. As a result of their observations the inspectors concluded that the patron was highly intoxicated. They left the bar at approximately 11:30 p.m. They returned to their vehicle and prepared notes of their observations.

The inspectors then drove to the nearby Grand Trunk Inn to do another licensed premise check. They entered the establishment at approximately 11:45 p.m.

On entering the establishment the inspectors immediately noticed the same allegedly intoxicated patron and female companion whom they had observed at the bar they visited earlier in the evening. The patron and his companion were on the dance floor attempting to waltz. The establishment was otherwise remarkably empty, as there were only one or two other patrons present.

The patron was clearly exhibiting signs of gross intoxication, including an inability to stand or walk without relying on his companion. One of the inspectors said: "This was one of the most highly intoxicated persons I have ever seen in my enforcement career - who was still standing."

The inspectors indicated that the licensee's staff, including a bartender and a disc jockey, closely observed the patron.

The inspectors testified that they watched the patron and his companion in the establishment for approximately 15-20 minutes, during which time the patron was on the dance floor for at least three songs. At one point, the disc jockey passed by the patron and said something to him, and shortly thereafter the patron moved to the end of the bar, where he remained for several more minutes. The disc jockey and the bartender conversed and appeared to be looking at and talking about the patron.

At some time after that, the patron and his companion left the establishment. The inspectors were conversing with each other and did not see the patron leave. The inspectors left the establishment at approximately 12:15 a.m.

The patron's girlfriend testified that she and the patron attended several bars and the Grand Trunk Inn on June 23, 2007. She said that the patron was certainly intoxicated at first bar, and that they smoked marijuana on the way to the Grand Trunk Inn.

She said that they arrived at the establishment just before midnight, and her boyfriend was grossly intoxicated and having trouble walking. She confirmed that he would have stood out as grossly intoxicated for anyone that cared to look at him. She testified that she was holding him up on the dance floor and that the disc jockey asked her boyfriend to please keep his shirt on, and when her boyfriend continued to lift up his shirt, the disc jockey "hollered at us that it was time to go."

The patron's girlfriend also said that the DJ asked them to leave one or two times and that her boyfriend was not cooperating. She testified that they were in the establishment for "however long it takes for a dance and then to leave - five or six minutes tops." She said that she had consumed six beers herself that night, as well as the marijuana.

The DJ testified that she asked the allegedly intoxicated patron to leave two or three times and that after she asked them to leave, the couple finished their dance and left immediately. She clarified that the couple came in at the middle of a dance, were asked to leave during the dance, and then left at the end of the same dance.

The licensee testified that although he was not at the establishment on June 23, 2007, he has debriefed his staff and is knowledgeable about the events relating to this patron.

He testified that he was made aware that the disc jockey asked the patron to leave, that the bartender asked the patron to leave, that the patron did not sit down and was served no liquor. He also testified that the patron had reserved a room in the hotel and did stay the night at the Grand Trunk Inn after he left the licensed area of the establishment.

In support of his evidence, he provided a daily transaction list for June 23, 2007, showing that the inspectors paid for their drinks at 23:56 p.m. (Exhibit 4), a hotel room invoice showing that the patron "SR" paid for a room at the Inn on June 23, 2007 (Exhibit 7), and written statements from the bartender (Exhibit 5), and the patron "SR" (Exhibit 6).

The bartender's statement indicates that the patron and his girlfriend arrived at about midnight and started to dance. It also indicates that he observed the DJ speak to the patron and ask the patron to leave, and that the disc jockey advised him that she told the patron and his girlfriend to leave.

The patron's statement indicates that he was intoxicated and was asked to leave the establishment two or three times before retiring to his reserved room. There is no indication of who asked him to leave or how long he was in the establishment.

SUBMISSIONS

The licensee submitted that the disc jockey told the patron to leave. He argued that his staff should allow an intoxicated patron a reasonable time to leave without a confrontation.

He said that he treats his patrons with dignity and that the staff followed *Serving It Right* guidelines by using tact and avoiding confrontation. He quoted from the *Guide*: “do not corner your patrons, ask them privately and discretely, letting them take a few minutes, do not rush the patron.”

The licensee also submitted that the patron had a room upstairs, “so we knew his safety was no problem because we knew he was going to go upstairs when he left - so we did not have to get a taxi or anything else like that.”

The licensee presented a previous decision of the branch in support of his position. He quoted from page 13 of *Lescan Enterprises Ltd. dba Beaufort Hotel* EH05-083 (Beaufort Hotel) as follows:

Section 43(2)(b) does not require the expulsion of an intoxicated patron, but rather requires that the licensee or the licensee’s employee must not permit an intoxicated person to remain.

In order to find a contravention, I must determine on the facts that a person was *intoxicated*, that the person did *remain* in the licensed area, and that the licensee or its employee did *permit* an intoxicated patron to remain.

DECISION

I find the evidence that the patron was intoxicated to be uncontroverted and conclusive.

I find the evidence that the licensee's staff observed the patron and recognized that he was intoxicated is also uncontroverted.

The remaining issue is whether or not the patron was permitted to remain.

The licensee quotes a passage from *Beaufort Hotel* that distinguishes between *expulsion* and *permit to remain*. He stops short, however, of reciting the critical conclusion reached in that case, that eventual expulsion does not necessarily fulfil the obligations imposed by s. 43(2)(b):

The elapsed time between the moment the patrons were determined by the licensee's employee to be intoxicated and the moment of expulsion must be reasonable in the circumstances. In the event that an employee has difficulty removing a patron, there must be continuity of effort to satisfy this requirement of the *Act*.

Beaufort, p.15

In this case, if the disc jockey asked the patron to leave, the patron did not immediately comply. The disc jockey and the bartender watched the patron for some time before he did eventually leave the redlined area.

I find the evidence of the liquor inspectors to be the best evidence of the events of June 23, 2007.

The disc jockey said that she asked the patron to leave two or three times, and that he was cooperative. She also said that the patron arrived in the middle of a dance, was asked to leave during the dance, and left after the dance. She testified that the patron was in the establishment for the duration of one half of a single song.

I find this evidence incredible. When the witness was asked why she had to invite the patron to leave two or three times in a single song, she had no answer. I give this testimony very little weight.

The bartender provided only an un-sworn statement and he was not available to have the veracity of his evidence tested. His statement points to only a single request for the patron to leave and it makes no reference to how long the patron was in the establishment.

The patron's girlfriend testified that the patron was asked to leave three or four times and once to keep his shirt on. She said that the patron was not cooperative and that she had to drag him off the dance floor. She indicated that this all occurred in the course of five or six minutes. She also testified that she had consumed six beer and smoked marijuana just prior to entering the establishment.

The bartender, the disc jockey, and the patron, each provided evidence inconsistent with one another with respect to significant matters including: the number of times the patron was asked to leave, his level of cooperation, and the duration of his stay. I find that to the extent that any of this testimony is contrary to the sworn testimony of the liquor inspectors, I prefer the evidence of the inspectors.

I find that the only conversation between any of the licensee's staff and the patron while the patron was in the establishment on June 23, 2007, was a brief one initiated by the disc jockey.

I am unable to determine from the evidence if the DJ asked the patron to leave at that time. Whether or not she did so ask, however is not critical to my determination.

I find that the patron entered the establishment in an extremely intoxicated state. Two staff members clearly saw the patron. The staff members were able to ascertain that the patron was intoxicated.

Either the staff took no steps to remove the patron from the establishment, or the DJ made a single request for the patron to leave.

If the DJ made the request, no follow-up action was taken.

I find on the facts that the patron was in the establishment long enough that the staff had an obligation to ensure that the patron was removed from the area in which liquor is served. Any action that the staff may have taken was inadequate to comply with s. 43(2)(b) of the *Act*.

Permit in the context used in this section constitutes a range of actions or non-actions that is variable according to the fact pattern. I find that the patron was so intoxicated as to represent a danger to himself and others in the establishment. He should have been denied entry. If for whatever reason he did gain entry, he should have been physically helped out of the establishment at the first notice to any staff member that he was so intoxicated.

I find the intoxicated patron was in the establishment for fifteen to twenty minutes, and that under the circumstances, the licensee or his staff did permit the patron to remain for that period of time.

I find the contravention occurred as alleged.

The licensee's submissions are effectively a claim that the licensee and/or its staff were duly diligent and this should work as a complete defence to the finding. I have considered this defence and find that it fails.

Due diligence is a complete defence if established. The onus of establishing it is on the licensee. The legal test is on the balance of probabilities.

The licensee provided very little evidence of training or other systems in place that would have worked to prevent the contravention from occurring. The only evidence presented was from employees who attested that they had authority to expel intoxicated patrons. I find that this evidence falls well short of establishing on the balance of probabilities, that the licensee had adequate training or other systems in place to avoid such contraventions.

Based on the evidence, the directing mind could be the disc jockey, or the bartender, but I find neither of them took adequate steps to prevent the contravention, or to ensure the operation of any system that may have been in place to prevent contraventions of this nature.

The conduct of the licensee and its staff were not reasonable under the circumstances. The intoxicated patron was permitted to remain in the licensed establishment beyond the amount of time it would have been reasonable to take to assess the situation and act effectively to remove the patron.

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 the discretion to order one or more of the following enforcement actions:

- Impose a suspension of the liquor licence for a period of time
- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *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 penalty proposed in the Notice of Enforcement Action.

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 the establishment where liquor is served. To ensure their safety, intoxicated persons may remain in unlicensed areas of an establishment while waiting for assistance or a ride home. In this case, the patron was observed to be intoxicated and openly demonstrated clear symptoms of intoxication in plain view of the licensee's staff. A member of the staff may or may not have asked the patron to leave, and if she did, no action was taken to enforce or ensure that the patron did leave in a timely fashion.

I find that a penalty is warranted.

For the contravention of section 43(2)(b) relating to June 23, 2007, the branch recommended a fourteen (14) day suspension.

The licensee has a contravention history including a finding of contravention for the same section of the *Act* on June 23, 2007, and an allegation of selling liquor to an intoxicated person on January 20, 2007.

The range of penalty for a second contravention of section 43(2)(b) of the *Act* in accordance with item 11 of Schedule 4 of the *Regulation* is ten (10) to fourteen (14) days suspension and/or a monetary penalty of \$5,000-\$7,000.

The establishment had only a few patrons in it at the time of the contravention, and the staff appeared to be watching the patron very closely. The intoxicated patron was known to the staff, and was spending the night in a reserved room in the hotel portion of the Grand Trunk Inn. As a result, I find that the danger presented by allowing the intoxicated patron to remain, though present, was not so great as to require the maximum penalty prescribed for a second contravention of this type, as was recommended by the branch.

I find that a twelve (12) day suspension is reasonable under the circumstances.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 019556 for a period of twelve (12) days to commence at the close of business on Friday, January 11, 2008, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulations*).

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 18, 2007

cc: RCMP Port Coquitlam

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Shahid Noorani, Branch Advocate