



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267**

Licensee: The Bird of Paradise Pub Inc.
dba Bird of Paradise
4291 Glanford Avenue
Victoria, BC V8Z 4B9

Case: EH11-071

For the Licensee: David Houston
Crease Harman & Company

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: November 22-24, 2011

Place of Hearing: Victoria, BC

Date of Decision: December 15, 2011

INTRODUCTION

The Bird of Paradise Pub is located in Victoria, B.C. The hours of liquor service are 11 a.m. to midnight, seven days per week. The establishment operates under Liquor Primary Licence No.139491. The principal shareholder and officer is Diego Trozzo (the Licensee). The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*" ("*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

By the Notice of Enforcement Action (NOEA) dated July 6, 2011, the Branch alleged that on May 6, 2011 the Licensee contravened s. 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act) on May 6, 2011, by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served, or otherwise supplied.

Schedule 4 of the *Liquor Control and Licensing Regulation B.C. Reg. 244/2002* (Regulation) establishes prescribed penalties for contravention of the Act or Regulation. For a first contravention of this section, the range of penalty is four (4) to seven (7) days license suspension and/or \$5,000-\$7,000 monetary penalty. The Branch proposes a four (4) day suspension.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 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 contravene the Act as alleged?
2. If the contravention occurred, is a penalty required for that contravention under the circumstances of this case, and if so, what penalty is appropriate?

EXHIBITS

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| Exhibit No. 1: | Branch Book of Documents |
| Exhibit No. 2: | Compliance and Enforcement Desk Reference excerpt (provided by Licensee) |
| Exhibit No. 3: | Serving it Right Program Manual (provided by Licensee) |
| Exhibit No. 4: | Bird of Paradise Policies and Procedures Guide |
| Exhibit No. 5: | Receipt for order 299567 for \$41.63 from May 6, 2011 |
| Exhibit No. 6: | Statutory Declaration of NB |

PRELIMINARY MATTERS

The Licensee expressed its intention to call the allegedly intoxicated patron's medical doctor to support the licensee's position that the symptoms that the patron may have displayed on May 6, 2011, were the result of a disability or medical condition rather than of intoxication as alleged. The Branch objected to this witness being called as it says the witness is an expert and is being called to provide expert opinion. The Branch's position is based on the expectation for advance notice of an expert opinion in order that they can prepare for what they might be faced with in such an opinion.

The Licensee has in response to the Branch's objection that it is prepared to object to the Branch calling the liquor inspectors as they are going to provide an opinion as to whether the patron was intoxicated. The Licensee says that is tantamount to the evidence that would be provided by the patron's general practitioner.

In an administrative hearing, the strict rules of evidence used by the Supreme Court need not be followed. They do inform, however, as to the relevance and necessity of providing advance notice of opinion evidence. An adjudicator's objective is to get to the heart of the matter while allowing both the Branch and the Licensee to present evidence that will instruct him as to the findings he must make.

The licensee has indicated in its opening that the thrust of its defence of the allegation is that the patron who was alleged by the branch to be intoxicated was not intoxicated, and in support of that position they submit that the patron has a disability or medical condition that accounts for the symptoms observed by the liquor inspectors. The hearing would not be comprehensive without that evidence and the absence of a medical practitioner to substantiate the existence of such a condition would simply limit the resources that I have at my disposal to fairly adjudicate the issues before me.

I will allow the physician to appear as a witness. I caution counsel that the purpose of the physician's presence will be to establish through his past experience with the patron, any condition or propensity that would affect visible symptoms that may be addressed in this hearing. I would ask both counsel and the branch advocate to minimize the reference to opinion evidence and maximize the physician's eye-witness exposure to the patron. Effectively I am saying that the diagnosis is not as important to me as the manifestation of symptoms that the doctor has observed in his experience with the patron/patient.

I note for the benefit of future hearings, that disclosure makes a hearing run more smoothly, and I would ask that counsel in the future make every effort to provide as much disclosure as possible. It would have been useful in this instance for the doctor's qualifications to be before the adjudicator at least to confirm his identity, as he will be attending remotely.

The liquor inspectors are also a critical component of this hearing. The documents suggest that they are the driving force behind the allegation and without them I expect I would have little evidence on which to determine whether or not the patron was intoxicated. The inspectors will undoubtedly offer their opinion as to whether the patron was intoxicated. The inspector's opinions of intoxication however, are not critical to the decision I have to make as it is my job as hearing adjudicator to determine whether the patron was or was not intoxicated.

The inspectors and the general practitioner will be heard. Also, I understand that the physician is available by telephone at 10:30 a.m. and that the Branch has no objection to allowing that irregularity in scheduling, so I will allow that variation in our schedule of witnesses.

The Licensee objected to the inclusion of a previous decision of the General Manager under tab 12 of Exhibit No. 1 as the alleged contravention adjudicated upon was with respect to the same section of the act, 43(2)(b), and the licensee and the patron were the same. The Licensee's concern is that the decision might colour my interpretation of the facts prior to making a determination.

As the General Manager's delegate I technically have knowledge of the history of the Licensee, and s. 20 of the Act specifically provides that past compliance history is properly before me in the adjudication. I will not exclude the document from the hearing but I note that it is in Exhibit No. 1 and an exhibit is technically evidence. Traditionally, the Branch's book of documents does include copies of the Act and sometimes cases. This is an appropriate time to say that the Exhibit book should be restricted to documents that are evidence, while argument and authorities should be provided in another volume.

EVIDENCE

Inspector 1

The inspector testified that she and another inspector arrived at the establishment in a covert capacity at approximately 8:10 p.m. on May 6, 2011. The establishment was less than half full to capacity and the lighting was good. She and the other inspector sat at a table that provided a good vantage point of the patrons at tables and of the bar service area. They ordered drinks (not consumed) and observed the patrons for approximately ten minutes when a patron "became of concern." The patron, who had been seated in plain view at the bar arose from his seat and made his way to the washroom by holding on to the bar and leaning on the chairs around the bar for support. The patron was no more than three feet from the bartender and fifteen feet from the observing inspector when he was initially seated.

The inspector said that because of his staggering, she waited for him to emerge from the washroom and watched him make his way to outside to “the smoking porch.” The inspector said she and the other inspector followed the patron to the porch and struck up a conversation with him “in order to gauge his level of intoxication.” She said the conversation lasted between ten and fifteen minutes and she decided that the patron was intoxicated because he displayed lack of coordination in his movement, slurred speech, and exhibited odd arm movements. Following the conversation, she observed the patron return to his seat at the bar. She said the patron demonstrated physical symptoms of intoxication including staggering and “having to hang onto the bar as he walked around. He appeared significantly impaired as to his mobility.”

She also said the patron was clumsy with his jacket, had trouble putting it on, and “If he was not intoxicated, his body language and movement would have been different.” The inspector added that the patron had bloodshot eyes and some of his comments to her indicated a degree of lack of inhibition that she associated with intoxication. She also indicated that the patron told her he “was off the boat,” which she interpreted as “an admission of intoxication.” She clarified that his lack of inhibition was obvious because he said he was “our friend and would protect us.”

The inspector identified her notes at tab 9 of Exhibit No. 1. She also said that any evidence of relevance that she observed would be in her notes “but the NOEA is more cohesive.”

Inspector 2

Inspector 2 confirmed that she attended the establishment in a covert capacity with inspector 1 on May 6, 2011 at approximately 8:10 pm, sat at a table near the entrance where they had a good view of the bar and the patrons in the establishment, and observed patrons for about ten minutes before noticing the patron arise from his seat to go to the washroom. She said the patron was in plain view of her but she didn't have her attention drawn to him until he got up:

Because he was not the most steady on his feet. That is what drew our attention to him. He was staggering and holding onto furniture on the way to the washroom. He would go to hold on but it would take him a few minutes, he did not have a good grasp.

She said the two inspectors followed the patron out of the pub to the smoking porch, where they made an assessment of him. She said the patron's speech was slow and slurred and sometimes loud and he had trouble negotiating his cigarette to his mouth. She said he smelled of liquor and his eyes were glassy and bloodshot and he moved his arms with exaggerated movements indicative of intoxication. She said she watched him make his way back to the bar and he had "a fight getting his jacket on to the back of his seat."

Inspector 2 said that a different patron approached her twice and each time asked her to dance. She said that the patron "told the guy he was our friend, and told us he would protect us from the other patron's advances. It was all jolly and amicable. Protecting us from the guy who wanted to dance was reasonable in light of our outside conversation."

Inspector 2 identified her notes at Exhibit No. 1, tab 9. She said her notes are complete but serve to refresh her memory of what happened and are a form of shorthand. She acknowledged that her notes do not have any reference to bloodshot eyes or odour of alcohol. She also said that an odour of alcohol is not unusual in a pub and does not itself indicate intoxication.

Patron's Friend

This witness attended by telephone conference. He testified that he knows the patron personally and was in the establishment when the patron was there on May 6, 2011. He said:

[The patron] has a bit of a disability. He is unsteady on his feet and it is getting progressively worse. I've helped him to his house and picked him up from his job at [] before. The unsteadiness is consistent. He always uses three points to get around. He bought two 'Burt Reynolds' shooters for my wife and I when we were at the pub [sitting at a different table]. He did that because I gave him some eggs from our farm a while ago. I drank both of [the shooters] as my wife doesn't like them... [The patron] was not slurring his words, his eyes were not bloodshot, and he was not impaired. I went over to thank him when the drinks came over.

And:

His arm movements are animated and exaggerated. He's loud and animated because that's who he is. He always hugs the staff members. He's a regular there.

Licensee

The Licensee testified that he owns the pub and has been there for 21 years. He said he was present on the evening of May 6, 2011. He said he knows the patron very well. He said of the patron:

He talks a bit oddly, he's philosophical and his speech is a bit odd...He laughs and is loud and gets along really well with the staff. I have taken him home before, and picked him up to take him to the pub when our

shuttle is not operating. Not because he is intoxicated but because he has a lot of pain and balance problems.

The Licensee testified that the patron's physical ailments have gotten dramatically worse over time. He said the patron exhibits pain with a noticeable expression in his face and he shuffles to get around. His balance is off and his speech has become slurred. The Licensee said:

It takes a lot of time to get in and out of his chair and stool. He has to hang on for the first steps for sure. More times than not he is hanging on. When we shuttle him it is a real job for him to get into the van. The driver usually has to help him get into and out of the vehicle. Difficulty with coat he generally has trouble with it. I have helped him many times and the staff often helps him. The shuttle driver does too. His coordination is not good either. When he goes for his glass of beer, he stops and has to figure out where it is and when he goes to his face, he is shaky. I sometimes think he is going to knock his teeth out with his beer.

He said on May 6, there was a country-western band for the pub's anniversary celebration and the patron was more animated than usual because he was having a good time. He said although he was present, he has no idea what the patron drank that night (from personal recollection) though he has seen the invoice as a result of this enforcement action. He said the patron usually has three or four drinks and then buys some food to take home and catches the [Bird of Paradise] shuttle bus home. He said that the patron's invoice (Exhibit 5) shows that the patron had four small sleeves of beer and ordered a burger and fries meal in about four hours.

Server

The server testified that she has been a server at the Bird of Paradise Pub since February 2009 and has known the patron since she started. She said the patron walks with a lot of pain and that he hardly walks without holding on to something. She said he mumbles sometimes, and it's normal. It's how he talks. She said she sees the patron five or six times per week and so has probably seen him several hundred times in the pub since she started working there. She said that although she was working on May 6, 2011, she doesn't remember anything specific about the patron from that night.

Physician

The patron's doctor testified by telephone. He indicated that the patron is a patient and has "definite problems with balance and motor coordination and is unsteady on his feet." He also said the patron's hands twitch "a bit" and he walks very slowly, and has "slightly slurred speech." The doctor said that these descriptions apply to the patron all of the time, represent his physical observations of his patient, and "that is how [the patron] typically presents."

Bartender

The bartender testified that he is a bartender at the Bird of Paradise Pub and that he was present and working on May 6, 2011, when the patron was in the establishment. He said he has known the patron for approximately one year and seven months since he has worked at the pub. He said that the patron is: "very slow moving, sometimes stops for a moment and grasps his back or will use a table or a chair as a respite for him. His mobility is not smooth."

He said that on May 6, the patron was sitting at the bar in front of him, and that they were talking on and off for the whole time the patron was present. He said his recollection of the night is good because he remembers the band and it was the pub's anniversary. He testified that he was working behind the bar when the patron first came

into the pub and that he served up two Burt Reynolds shooters that the patron bought for another pair of regular patrons (named) and were delivered to those other patrons by the server, and that the patron consumed four sleeves of Black Label beer between approximately 6:00 p.m. and 10:00 p.m. He described sleeves as being smaller than pints, a small glass, and that the patron showed no signs of having had anything to drink when he arrived.

He added that the patron never drinks more than he did that night and that the patron was not intoxicated when he left, and that after ordering food to take home, the patron left with the shuttle bus driver. He said the patron is very friendly, often interacts with other patrons and always with the staff, and is quite outgoing and sometimes loud and happy. The bartender said he has served the patron at least three times per week for more than a year and a half, that he remembers watching the patron go to the washroom and out for a smoke on May 6, and that the patron didn't move in any manner that is unusual for him that night, and that his eyes were not bloodshot. The bartender said that on May 6, 2011, the patron spoke the way the patron always speaks.

Shuttle Bus Driver

The shuttle bus driver testified that he is the shuttle bus driver employed by the Bird of Paradise Pub. He said he has been so employed for about a year and has come to know the patron as a patron of the pub and as a friend. He said of May 6, 2011:

I had occasion to take him home and pick him up in my shuttle bus. May 6. I saw him between 5:50 and 6:00 at []. He phoned the shuttle number and said he's finished work and could I pick him up. He called for a ride. He came directly from work to the shuttle. I drove from the door to the door. I saw him come out of the door of [] where he works. He did not smell of alcohol and showed no signs of impairment. He took the seat in the front, two feet away from me. There was nothing out of the ordinary.

And:

He moves very slowly. His right leg is slow and unsteady. A lot of times if his back is bad, he'd walk with both of his arms behind his hips until he found a railing or a chair or something to lean on to hold him steady. When I pick him up and drop him off, I sometimes have to assist him but he's a proud man. I'll open up the door for him. When I drive him home, he has two steps to go down and I usually help him down the steps.... I took him home that night. There was nobody else in the van. He sat in the front seat. Nothing seemed out of the ordinary. He was in a lot of pain. It was Friday and by the end of the week his back was pretty bad. That was normal. He had trouble struggling with his jacket. I have seen him struggle with his jacket many times. I've helped him take his jacket off and on. I helped him put his vest and his jacket on that night. He's proud and doesn't want anyone to help. I know when his back is bothering him though. He's struggling with his jacket because his back is gone.

He said that on May 6, the patron was not intoxicated at any time between when he picked the patron up at work [], or when he drove the patron home from the pub.

Patron

He said that on the night in question, he called the pub's shuttle driver and was picked up from his work [] by the shuttle driver. He acknowledged that he uses the bar chairs to support himself when he goes from his normal seat at the bar to the washroom. He said: "That's normal for me to hold onto seats on my way there. It started with arthritis and I've been battling since I was 19 and now I have to go to a neurologist. I have to hold on to chairs and walls. It's getting worse." He said at [] he works at a desk in a common office with his boss sitting over his

shoulder. He laughed at the idea that he might have consumed liquor at work. He said he would be fired instantly. He said:

By the end of the week, I get extremely tired. Sometimes more than others. I have more than a thousand hours sick time banked. I have not used it. I manage my pain but by the end of the week sometimes, its bad. I don't take anything for pain. It's a neurological thing. It's like a bullet in my back and it attacks my hips and my nerves fire-up and I get muscle spasms. The doctor is sending me to a neurologist. I can't identify objects in my pockets. It is difficult to go to the bathroom when you can't feel your zipper. It's is a loss of sensation in my hands. I have to use two hands when I drink. I am not a great computer guy. I am a one-finger computer guy. I get through it. It takes me a while but I get through it.

As to his normal movement, he said:

My method of movement. That is the way I am. For a clear picture, I would use two hands or one hand. I collapse in my chair most of the time. I use both of my hands to get up. I have to steady my feet and if there is a chair or something close I will use it to go slow. Railings, even when I am home, I use the walls and railings.

He said that he must have finished his beers because he would not have wasted them. He remembered the band and that the shuttle driver drove him home and helped him down the stairs to his house. He said he was not intoxicated: "Maybe because of my physical ability to walk, they might have thought that. That probably would do it. Sometimes when I walk I'll shake or I walk bent over and don't look. They'd know something was wrong with me."

Patron's Supervisor

The patron's supervisor testified that he has known the patron for five years and two months. He said the patron used to work for him when he was a supervisor at [] where the patron works still. About the patron's physical movement he said:

It is quite normal for [the patron] to stumble along holding on to stools and a bar. When we met I was concerned about his health. He is a compassionate person and was my best worker at []. He opened up to me and told me some of his health issues and my initial relationship was to encourage him to seek medical health, because he would work like a dog through a lot of pain.

He testified that the patron and he go for beers at the Bird of Paradise sometimes and that every visit is identical. He said the patron drinks the same beer, the same number of beers (three or four) and orders food and takes the shuttle home. He said the two of them have done that perhaps fifty times. He said the patron interacts with the bar staff and they hug him and he is sometimes loud and jovial because the bar staff is like his family. He also said that the patron often talks with other patrons and is very kind and comforting. He said that the patron doesn't get drunk, and he's seen the patron intoxicated twice in five years.

He said of the patron's current health and presentation:

Coordination-fumbling with hands. That's' normal. He has physical health concerns. He fumbles with his hands. He drags his leg (demonstrates) and he holds on to things and he is not stable on his feet. My wife is also a supervisor at []. They're 25 feet away

from each other. He's in a trusted role. She sees him every day and the last couple of months she says I should check in on him. He's not eating, he's having a hard time moving around. She told me that one time, he was hunkered over. He was pulling his feet away and pawing at a coin because he can't feel it to pick it up. Something is wrong with his hands. He shook her hand a week ago and he couldn't let go. He didn't realize he was holding her hand still. That's been going on for a while and progressing and getting worse. You'd never know from talking to him because he won't tell you. He won't take a day off work. Has an incredible work ethic. We get more work out of him at [] than most able bodied people.

SUBMISSIONS

BRANCH

The Branch submits that the elements of the contravention have been proven and the contravention has therefore been made out.

LICENSEE

The Licensee submits that Inspector 2 provided evidence of alleged observations at the hearing that were not in her notes and not in the NOEA and accordingly were constructs of the intervening time lapse. The Licensee says if she had made such observations while doing a covert inspection, she certainly would have written down those facts that are critical to the purpose for which she was in the establishment.

The Licensee submits that although physical instability and trouble walking may be legitimately signs of intoxication in a statistical norm, there is nothing prohibiting a licensee from establishing that an individual does not fit that statistical norm. The doctor's testimony confirms that the patron has physical issues that the adjudicator may interpret as looking like symptoms of intoxication that are not so caused.

The Licensee submits that the onus on the branch to establish on a balance of probabilities that the patron was intoxicated has not been met.

REASONS AND DECISION

The notes of Inspector 1, at Exhibit No. 1, tab 9 describe the symptoms of intoxication that she observed in the patron as physical instability, lack of coordination, staggering, exaggerated arm movements, and slurred speech. She testified that the patron was uninhibited and hugged a server, and had bloodshot eyes. Neither her notes nor the NOEA makes reference to bloodshot eyes. She also said that he made some comments that she believed was a confession that he was intoxicated. I note that this inspector said that although she could see the patron quite clearly and was no more than 15 feet from him for more than ten minutes before he got up to go to the washroom, there was nothing in his behaviour that attracted her attention until he arose from his seat.

The inspector was conducting an inspection and observed a patron that she believed was intoxicated. She took notes describing the symptoms of intoxication that she observed. She made no notation of an observation of bloodshot eyes, and that symptom also does not appear on the NOEA. I cannot conclude that her recollection of this patron's bloodshot eyes is reliable. It was not in her notes or the NOEA and was disclosed for the first time some seven months after the alleged contravention. In the context of a regular patron at an anniversary celebration for the establishment, I find the evidence that this patron was uninhibited and hugged a server is not an indication of

intoxication. I find the patron's comments to the inspector that he was "off the boat" cannot be interpreted as an admission of intoxication. I note also that a patron's own statement as to whether or not he is intoxicated is not critical to any reasonable assessment of whether or not the patron is in fact intoxicated. The only remaining symptoms of intoxication observed by this witness relate to the patron's movement and slurred speech.

Inspector 2 corroborated the evidence of Inspector 1, that the patron was in plain sight of the inspectors and demonstrated no observable signs of intoxication during more than ten minutes of observation before he got out of his seat to go to the washroom. This inspector described the patron's actions that Inspector 1 thought were indicative of a lack of inhibition as appropriate and reasonable. Her notes (Exhibit No.1, tab 9) indicate that the patron staggered and was uncoordinated and had glassy eyes. She testified the patron had an odour of alcohol on his breath, had bloodshot eyes, and had trouble putting his jacket on due to lack of coordination. Her notes also do not make any reference to bloodshot eyes. I find her testimony relating to the patron's eyes unreliable for the reasons described above with respect to Inspector 1's testimony. I find that the smell of liquor on the breath of a patron in a bar who has consumed a number of beers is not an indication of intoxication. As with the testimony of Inspector 1, the only remaining symptoms intoxication observed by this witness relate to the patron's movement and slurred speech.

The server testified that she has observed the patron hundreds of times in the pub. She said that she has a good memory and although she was at work in the establishment on May 6, 2011, she remembers nothing unusual about the night as it relates to the patron. The inspectors described the patron's unusual physical movements as obvious and clearly observable. While this is not conclusive of anything, this evidence tends to support the Licensee's position that the patron's observable movements were not out of the ordinary for him.

The Licensee and the server, and the patron's friend all testified that the patron walks in pain, is unsteady on his feet, and uses objects to support him when moving from place to place. The bartender said that the patron walks slowly and often uses a chair or table as respite in aid of his movement and sometimes grasps at his back. He also said he remembers that night well, and testified that the patron did not have bloodshot eyes and his speech was as it normally is. He said the patron was not intoxicated.

The patron's doctor indicated that he has been the patron's physician for more than a year and describes poor balance, problems with motor coordination, and slurred speech, as the way the patron normally presents.

I was particularly interested in the evidence of the shuttle bus driver. He was credible and appeared to be forthright. He had very good knowledge and familiarity with the patron. He drove the patron from work at [] to the pub and from the pub to the patron's home, and as a result is uniquely situated to provide eyewitness evidence as to the patron's condition at the relevant time. He said he was alone with the patron in the van for both trips, and the patron sat in the front seat and conversed with him for both trips. He was adamant that the patron was not intoxicated during either the trip to the pub or the trip home, and described the patron's appearance, movements, and physical appearance as similar before the pub and after it. I find this to be strong evidence that the patron's unique physical movements and verbal characteristics that were observed by the liquor inspectors were not indicia of intoxication on that night.

The patron presented himself at the hearing. He had a difficult time hearing me, misinterpreted my words, and asked me to repeat myself on occasion. He shook somewhat, as though he has palsy. His hands tremble. His eyes were a little glassy with some redness. He had trouble handling his glasses. He was confident and emotional and seemed authentic in his efforts to remember things. He concluded: "I must have finished those beers, I wouldn't have wasted them." This appeared to be a genuine sentiment notwithstanding that it is effectively counter to his anticipated

interest. His memory was fragmented but consistent with the evidence of the events of May 6, 2011. I observed some odd body movements, and on one occasion I noted that the patron coughed and mistimed the “catch” into his hand.

The witness proudly professed that he does not need assistance putting his coat on. I believe otherwise and I accept the evidence of the other witnesses to that extent, and in particular that of the shuttle driver who said he often has to help the patron with his jacket. As the witness testified, he sometimes spoke clearly and sometimes had difficulty with pronunciation. I could imagine that in a different setting, he might be described as slurring his words.

The only observed indicia of intoxication noted of this patron on the date of the alleged contravention are explained away by the credible and consistent testimony of seven witnesses including the patron, the patron’s physician, and the shuttle bus driver that drove the patron to and from the establishment on the night in question. These witnesses describe the patron’s movements as often uncoordinated. They indicate that the patron customarily if not consistently uses chairs and tables where available to brace himself and to help him climb in and out of his seat. They say he often requires help moving about, that he balances himself with the aid of any available wall, that he suffers from difficulty controlling his arm movement, and that he has trouble getting his jacket on and off. My observations during the hearing corroborate this testimony. None of these observable features that statistically may be indicative of intoxication, necessarily relate to any level of intoxication in this patron. Although the patron’s unique characteristics of movement do not prohibit him from being intoxicated on any given occasion, without the contribution of his uncoordinated movement and use of structure to support him as observed on May 6, 2011, the only remaining indicia that this patron may have been intoxicated are the odour of liquor on his breath, which I have already described as a benign result of consuming beer, and slurred speech-observed by his physician as well as demonstrated at the hearing.

The Branch has not met the onus of establishing on the balance of probabilities that the patron the patron was intoxicated at the date and time of the alleged contravention.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 15, 2011

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

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