



**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: 0897951 B.C. LTD.
dba Club 535
535 Main Street
Penticton, BC V2A 5C6

Case: EH11-124

For the Licensee: Spencer Tonkinson

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: March 8, 2012

Place of Hearing: Kelowna, BC

Date of Decision: March 20, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, 0897951 B.C. LTD. operates Club 535 located in Penticton, BC. and holds Liquor Primary Licence No. 050287 for the operation of the establishment with liquor sales from 7:00 p.m. to 2:00 am seven days per week. 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*" (the "*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (NOEA) dated December 20, 2011. The branch alleges that on July 30, 2011, the licensee contravened section 43(1) of the *Liquor Control & Licensing Act* (Act) by selling or giving liquor to an intoxicated person. The proposed penalty is a \$5,000 monetary penalty (in accordance with Schedule 4 of the *Liquor Control and Licensing Regulation* (Regulation)). Item 9 of that schedule provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5000 - \$7,000 monetary penalty.

In the alternative, the Branch alleges that on July 30, 2011, the Licensee contravened section 43(2)(b) of 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 for this alleged contravention is a \$5,000 monetary penalty in accordance with item 11 of Schedule 4, of the Regulation. Item 11 of that schedule provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5000 - \$7,000 monetary penalty.

The licensee disputes the contravention.

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, what penalty, if any, is warranted?

EXHIBITS

Exhibit No. 1: The branch book of documents

Exhibit No. 2: Licensee's policies and procedures for support and bartending staff

Exhibit No. 3: Licensees policies and procedures for security staff

Exhibit No. 4: Licensee's pre-shift meeting protocol

EVIDENCE

Inspector 1

Liquor Inspector 1 testified that he attended the establishment in the early morning of July 30, 2011 (business day of July 29) with a partner in a covert capacity. He said that at approximately 02:17 a.m. he noticed a male with a light blue shirt and jeans stagger up to the bar and that he noticed the patron had bloodshot eyes. He described the

patron's movement as very irregular, swaying back and forth, and unsteady. He said the patron zig-zagged toward the bar.

At the bar, the patron apparently tried to communicate with the bartender. The inspector described a female bartender standing directly across the bar from the identified patron as having difficulty understanding the patron. She leaned forward and then appeared to give up on understanding him. The patron used the bar to support himself and swayed back and forth apparently trying to maintain his composure. The inspector said that the patron then removed some currency from his pocket and waved it around. The bartender remained in front of the patron but her attention was elsewhere. Another male patron approached the identified patron and took the money from the first patron's hand and said something to the bartender. The bartender acknowledged him and took the currency.

The inspector testified that two female patrons then approached the males, and the bartender poured four Smirnoff drinks. The bartender placed one of the four drinks directly in front of each of the four patrons including the identified patron in the blue shirt, and she proceeded to add mix to the drinks in front of each patron. The mix appeared to be the colour of bitter lemon. The inspector continued to watch the identified patron, who took up the drink and began to walk back toward the inspector before veering off and going elsewhere in the bar. The inspector said the patron had difficulty walking in a straight line, and stumbled.

The inspector added that when he first began to observe the patron they were approximately three feet apart. When the patron proceeded to the bar, he travelled five or more feet and was therefore approximately eight feet from the inspector. The inspector did not follow the patron to the bar, but observed from his original vantage point. The inspector lost sight of the patron at approximately 02:25 a.m. He identified his notes in Exhibit No.1.

Inspector 2

Inspector 2 testified that he and Inspector 1 attended at the establishment in the early morning of July 30 in a covert capacity. He said that the establishment was not particularly busy, though there was a crowd at the side where the dance floor was located. The inspector said that he and his partner proceeded to the opposite side of the establishment where there was a lot of room, and as there were few people there, the sight lines were good. He said that he observed a patron in a blue shirt standing at the bar. He said that Inspector 1 was apparently watching that patron from a distance of eight to ten feet.

Inspector 2 moved up to the bar beside the patron in the blue shirt in order to observe him from close quarters. He said the patron fumbled to get something out of his pocket and eventually produced a bank note that he waved in front of the server. At the time, Inspector 2 was within two feet of the patron and to the patron's left. The patron said something to the server but although the Inspector could hear the patron's voice, he could not understand what the patron said. He said the server also did not understand the patron. Inspector 2 said that another male approached on the patron's right, took the bank note and spoke to the bartender. It appeared that he was speaking on behalf of the patron with the blue shirt.

The server took the money and two females joined the two male patrons at the bar as the server placed four glasses on the bar, one before each of the four patrons including the patron with the blue shirt. The inspector testified that the server added mix to the drinks in front of each patron as the patron with the blue shirt swayed and struggled to first pick up and then to hold his glass. Inspector 2 said that he then retreated from the bar for unrelated reasons, but noticed that the patron with the blue shirt left the bar with great unsteadiness and walked a serpentine path from the bar, while struggling to hold on to his drink.

The inspector said that he first approached the male patron at 02:17 a.m., watched him intently for approximately three minutes, and then retreated from the bar. The inspector also testified that he last noted the patron at 02:27 a.m., before leaving the area. Inspector 2 described the patron as having a dishevelled look, a flushed face, bloodshot eyes, a lack of competent motor skills, and that he had difficulty communicating and walking.

Inspector 2 identified his notes as well as all of the other relevant documents in Exhibit No. 1, and said that it is his understanding that the Licensee has terminated operations at the establishment for the time being and for that reason the penalty recommended is a monetary one, rather than a suspension.

The Licensee

The Licensee testified that the establishment has been closed for some time because of economic concerns. The licensee testified that although he was present at the time indicated in the NOEA, he does not know the identity of the patron in the blue shirt or the bartender who allegedly served him. He said he is unable to provide any evidence as to what actually happened that night. The licensee did testify that the lighting is so low in the establishment that it is impossible for the inspectors to have noticed with the detail that they did; the indicia of intoxication that they testified to seeing. He also testified that he personally removed between twenty and two-dozen patrons that night for being intoxicated. He said the establishment was busy, but indeed the patrons were all bunched up at the dance floor side of the establishment away from where the service to the allegedly intoxicated patron allegedly took place.

The licensee also submitted Exhibit No. 2 and Exhibit No. 3 as documents that he provides to respective staff members to sign indicating his establishment's policies and procedures, and Exhibit No. 4, which is a representative list of issues that he typically addresses at pre-shift meetings every day.

SUBMISSIONS

The branch submits that the elements of the contravention have been made out and the monetary penalty, being the lowest of the range provided for a first contravention of this type within the scope of the Regulation, is a reasonable one.

The Licensee submits that the credibility of the inspectors must be called into question because the lighting makes identification of symptoms of intoxication as described by the inspectors impossible, and because the inspectors were in the establishment for such a short period of time. The licensee also submits that the patron was not subjected to a breathalyser test, which would have established with certainty if the patron was intoxicated, and that noticing some symptoms of intoxication is not the same as determining conclusively that a patron is intoxicated. Finally, the licensee submits that the inspectors' evidence demonstrates that someone other than the allegedly intoxicated patron bought the drinks, and the bartender placed the drinks on the bar, not in the hands of the allegedly intoxicated patron and therefore did not sell or give liquor to that patron.

REASONS AND DECISION

I find that the symptoms of intoxication described by the inspectors are sufficient to establish to my satisfaction that the patron in the blue shirt was intoxicated. The inspectors' testimony with respect to their observations of the patron's behaviour to be consistent with each other and not contradicted by any other evidence. The licensee argues that the inspectors could not have seen what they saw because of the lack of adequate lighting in the establishment. He also indicates that he removed twenty to two-dozen patrons for being intoxicated that same night. He can not answer how he could determine those patrons were intoxicated when it is his view that the liquor inspectors could not do so in the same lighting conditions. The Licensee also can not explain how the bartender would normally be able to ascertain whether a patron displayed symptoms of intoxication in the lighting as he described it. I find the lighting to

be adequate for the observations made by the inspectors and I find the licensee's evidence with respect to the lighting to be unreliable.

The test to determine whether a patron is intoxicated or not is on the balance of probabilities, not beyond a reasonable doubt as would be the case in a criminal proceeding. Therefore, a device such as a breathalyser is not required in order to be certain that a person is intoxicated, but rather the evidence must be weighed to ascertain if it is more likely than not that the individual was intoxicated. If it is, then the burden of proof has been satisfied.

As the corroborating evidence of two liquor inspectors that the bartender sold or gave liquor to the patron was not contradicted by any evidence, I find that it did occur as described. I note that it is not a requirement of the contravention that the patron pay for the liquor, or that he specifically ordered it. It is sufficient for the finding of the contravention that the bartender placed the drink before the patron in a manner that one would reasonably expect would indicate that the drink was for that patron. I find that the patron was displaying signs of intoxication that the bartender did see or ought to have seen. She should have recognized the symptoms of intoxication and refused to serve the patron. Accordingly I find that the elements of the contravention have been established. The bartender did sell or give liquor to an intoxicated patron.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention 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 provides three exhibits to establish that it has policies and procedures to address this issue. Exhibits No. 2 and No. 3 are each one-page documents that he says he presents to his respective employees to sign. Neither of these documents contains any reference whatsoever to refusing service to intoxicated patrons or to how to identify intoxicated patrons. The licensee highlights one passage as dealing with this issue. That passage, present on each of the two exhibits reads: "Will alert any security or management to any concerns." I am not certain what this passage means, but I find it does not adequately address the need to require staff to refuse service to intoxicated patrons. Exhibit No. 4 is a document prepared for the hearing that highlights the issues that the licensee says that he raises with his staff in daily pre-shift meetings. This exhibit includes the following passage: "Watch for intoxicated patrons and alert security (its not only my wallet, its yours if we get a suspension)." The licensee provides no indication that he trains or tests his staff for compliance with this provision or that he reviews the staff's knowledge of how to identify signs of intoxication that they may have obtained in the Serving it Right program. I find that the licensee has failed to establish that he has adequate policies and procedures in place that would ensure compliance with the relevant provisions and that such policies and procedures are consistently acted upon, to establish a defence of due diligence.

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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. The range of penalties for a first contravention of section 43(1) of the Act pursuant to the Regulation, Schedule 4, item 9 is a four to seven day licence suspension and/or a \$5,000 - \$7,000 penalty.

I find a penalty is appropriate for the contravention in order to impress upon the licensee the seriousness of serving liquor to intoxicated individuals. As the establishment is not currently operating, a suspension would not be an appropriate penalty, and therefore I find a monetary penalty is warranted. \$5,000 is the minimum monetary penalty in accordance with the Regulation. I find this reasonable.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of Five Thousand Dollars (\$5,000) to the general manager of the Liquor Control and Licensing Branch on or before April 18, 2012.

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.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 20, 2012

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate