



**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:	The Cambie Malone's Corporation dba Esquimalt Inn 856 Esquimalt Road Esquimalt, BC V9A 3M4
Case:	EH13-015
For the Licensee:	Kevin McLean, Legal Counsel Sam Yehia, Licensee
For the Branch:	Cristal Scheer
General Manager's Delegate:	Dianne Flood
Date of Hearing:	May 6, 2014
Date of Decision:	May 23, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Cambie Malone's Corporation (the "Licensee") operates a licensed establishment called the Esquimalt Inn, located at 856 Esquimalt Road, Esquimalt, BC (the "Establishment"), under liquor primary licence 021261 (the "Licence").

Under the Licence, liquor sales are permitted from 9:00 a.m. to 11:00 p.m. on Monday and Tuesday, from 11:30 a.m. to 1:30 a.m. on Wednesday to Saturday, and from 11:00 a.m. to midnight on Sunday. The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the "Guide").

The Licensee's representative, Sam Yehia, gave evidence on behalf of the Licensee. Mr. Yehia is the principal, shareholder, director and owner of the Licensee.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The alleged contravention is to permit an intoxicated person to remain in the premises, contrary to section 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "Act").

Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "Regulation") sets the penalties for contraventions of the Act. The penalty range for a first contravention of section 43(2)(b) is a licence suspension of four to seven days or a monetary penalty of \$5,000 to \$7,000.

The Branch proposes a four day licence suspension for the contravention of the Act.

The Licensee disputes the contravention occurred.

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

Section 43(2)(b) of the Act provides:

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 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, including tab 4 (B).

PRELIMINARY MATTER**Admissibility of the Licensee's Surveillance Video:**

The Branch advocate advised that, at about 4:00 p.m. on the previous afternoon, May 5, 2014, she received an email from the Licensee's legal counsel. In that email, counsel advised that he intended to submit a copy of a portion of the Licensee's surveillance video at the hearing, for the purpose of establishing there was no evidence of any intoxicated person or any inspectors attending at the Establishment. He also asked if the Branch offices had the ability to play a flash drive of the video.

The Branch advocate said she responded to him that the time set for disclosure of documents was long since past. For that reason, she objected to the submission of the video as it was not disclosed within that time. She also advised that she believed the Branch would not be able to provide any "A.V." support as the Branch's computers are unique and do not typically support others' USB's.

Branch Submissions

At the hearing, the Branch advocate provided the reasons for her objection. She said the video ought to have been produced earlier in the process, as directed by the *Enforcement Hearing Rules* (the "Rules") and by the pre-hearing orders made by the Registrar in this matter.

The Branch advocate noted that one of the key purposes of the Rules is to ensure the fair and efficient adjudication of alleged contraventions. She pointed to Rule 10(1) that provides the branch advocate and the licensee must, at least 14 days before the hearing, exchange copies of anything they intend to submit as evidence at the hearing. Rule 11 provides for the Registrar to conduct pre-hearing conferences with the licensee and the branch advocate to, amongst other things, set out the requirements for pre-hearing disclosure of documents, including time limits on that disclosure, for the fair and efficient management of the hearing. She noted under Rule 12 the hearing delegate may make determinations regarding the admissibility of evidence and Rule 14 provides the hearing delegate with discretion to admit and consider evidence, whether admissible in court or not.

The Branch advocate then reviewed the pre-hearing process that was applied in this matter and a number of documents were marked exhibits:

1. Exhibit A is the initial email request, made to the advocate's colleague, yesterday afternoon at 3:40 p.m., which was subsequently re-sent to the Branch advocate.
2. Exhibit B is the subsequent email to her, and her reply, which is noted above.
3. Exhibit C is the Registrar's June 6, 2013 letter to legal counsel and the Branch advocate, confirming the pre-hearing conference held on June 4, 2013. In that letter, the Registrar confirmed legal counsel's advice that the Licensee had reviewed the video surveillance tape and was unable to identify the patron described in the NOEA and did not agree that a patron was intoxicated. The letter also discussed the requirement for a hearing date to be set and the considerations for that. The Registrar confirmed that a date would be set for

production of documents in advance of the hearing and that the failure to produce the documents as required could result in a document being ruled inadmissible at the hearing. The Registrar also noted as an action item that the Branch advocate had requested the production of the video and asked that it be produced to her as soon as possible. A hearing date was still to be set.

4. Exhibit D is the Registrar's February 19, 2014 letter to legal counsel, copied to the Branch advocate, in response to legal counsel's hearing postponement request. In that letter, the Registrar refers to the chronology of events, the difficulty in setting hearing dates in this matter, and noting the June 6, 2013 letter.
5. Exhibit E is the Registrar's August 14, 2013 letter to legal counsel, copied to the Branch advocate, setting the March 13, 2014 hearing date, with February 21, 2014 as the final date for disclosure of documents and witness list.
6. Exhibit F is the Registrar's letter to legal counsel, copied to the branch advocate, agreeing to set a new hearing date, setting the new hearing date of May 6, 2014 and the final date for disclosure of documents and witness list on April 4, 2014.
7. Exhibit G is an April 4, 2014 email from the legal counsel to the Branch advocate, attaching the Licensee's documents and its witness list. The video is not on the document list, nor was it produced at that time.

The Branch advocate says all of these documents show the Licensee was well aware of the obligation to produce the video as evidence in advance of the hearing, yet the Licensee failed to do that. The Licensee knew of the video and did not produce it by April 4, 2014 as required. To permit the Licensee to produce it now, without the advocate having seen it or having the opportunity to view it with her witnesses, would be unfair and prejudicial. The efficiency of the hearing would be impaired. The matter has been outstanding for over a year.

Further, the Branch advocate said the branch equipment and computers are not set up to operate the USB drive that counsel brought with him, so unless the Licensee brought the proper equipment, the video cannot be viewed in any event.

Licensee's Submissions

The Licensee's counsel agreed there was no question the production of the video is late. He had no reason for that, other than the Licensee had some difficulties in copying it. He submitted the issue was the identity of the alleged intoxicated patron. He said the problem with a covert inspection is that the Licensee has no basis on which to make a defense.

Counsel said they were only tendering three or four minutes of the video, to show that when the inspectors said they were there, there is no video recording of them. He said the prejudice to the Branch would not be great as it was only three or four minutes of video.

Counsel had brought a USB drive with the video on it. He had not brought any equipment to show the video. In response to the Branch advocate's advice that the equipment in the hearing room was not compatible with a USB drive, counsel suggested that as hearing delegate I could review the video later, on my own.

Decision

I declined to permit the Licensee to submit the video as evidence. Firstly, without any equipment available to show the video, it could not be viewed and questions could not be put to any of the witnesses about it. Legal counsel knew that the Branch did not have equipment to show the video and he should have come prepared for that. The witnesses needed to be able to view the video and be questioned about it. Without that opportunity, for me to view the video after the conclusion of the hearing would not be helpful. So, on a purely practical basis, the video could not be accepted into evidence.

More importantly, however, is the failure by the Licensee to disclose the video in a timely manner, as directed by the Rules and the Registrar's letters. The hearing process needs to be fair to all who participate in it. To be fair, participants need to know the case being made by the other participants, in advance. This is a fundamental principle of natural justice. The Rules are structured and the pre-hearing conferences are held to ensure that both the branch advocate and the licensee comply with that principle.

Pre-hearing production allows the parties to come to the hearing, prepared to address all issues, and so avoid any unnecessary adjournments. It also allows parties to weigh and assess the other parties' evidence in advance and may, in some cases, result in an outcome that does not require a hearing.

Failure to comply with a pre-hearing requirement for production of documents is serious and should not be treated lightly. The failure to produce the video within the time frame ordered is inexplicable, given its suggested importance. No reason was given for the reason not to produce the video within the time set, other than some technical difficulties in copying it.

The Licensee had ample opportunity to produce the video as required. He knew it existed and he had staff review it. It is referred to early in the pre-hearing process. The Licensee cannot simply ignore the Rules and the pre-hearing directions in such a blatant manner and expect to be able to enter evidence on the day of the hearing that was not produced in advance, in accordance with the Rules and the pre-hearing directions.

EVIDENCE – BRANCH

The Branch advocate called two liquor inspectors as witnesses, referred to in this decision as Inspector 1 and Inspector 2.

Inspector 1

Inspector 1 testified that he had been a liquor inspector for two years. Prior to that he had been a liquor investigator with the Branch for nine years, and prior to that he had been an investigator with the Human Rights Commission and with the Ministry of Labour. He had spent 13 years in law enforcement with the CPR Police Services.

Inspector 1's evidence was that on January 18, 2013, he and Inspector 2 conducted a covert inspection of the Establishment. At approximately 9:30 p.m., he and Inspector 2 entered the Establishment. They proceeded to the bar area. A band was playing. He paid the \$5.00 cover charge for each of them. He said the band went on a break shortly after the Inspectors entered the Establishment.

Inspector 1 said the lighting was typical pub lighting. The Establishment was not busy. He could move around easily without bumping into people.

He said the two Inspectors took up a position at the end of the bar. He ordered a diet coke. He testified that he immediately noticed a male patron, about one-half the way down the room, who appeared intoxicated and was sleeping. A glass of amber liquid with white foam on it was in front of the male patron, which Inspector 1 perceived to be a glass of beer. The male patron kept nodding off. The male patron was white, 50 to 60 years old, had on blue jeans and a tee shirt with a greyish green leather coat. Without checking his notes, Inspector 1 believed he had a beard.

Inspector 1 said he and Inspector 2 went over to the table and sat with the male patron. Inspector 1 sat right beside the patron, within arm's reach, and tried to strike up a conversation. He noticed a strong odour of liquor on the patron's breath. The patron was having difficulty concentrating on the conversation. He had blood shot eyes and was difficult to understand because of his slurred speech.

Inspector 1 said a waitress came by the table and picked up an empty glass. She walked away without saying anything to the male patron about his state of intoxication.

Inspector 1 testified that a younger male patron came to the table with a glass of amber liquid with a white foam head, which Inspector 1 determined was beer. The younger patron placed the glass in front of the older patron and then went back to the pool tables. The older male patron continued to nod off.

Inspector 1 testified that a woman approached and joined the table. She identified herself by her first name and as the wife of the older male patron. The older male patron's first name was also given. She later advised that the younger male patron, who had put the beer in front to the older male patron, was her son.

Inspector 1 said he asked her what her husband was drinking and she told him beer. She also told Inspector 1 that he gets drunk when they have had an argument. Inspector 1 did not believe her to be intoxicated. She spoke clearly and did not have an odour of alcohol on her breath.

Inspector 1 testified that the younger male patron then returned to the table. The younger male and the older male patron got up and went outside to have a smoke at the back door to the Establishment. As the older male patron got up, he was clearly having difficulty walking. Inspector 1 observed him stumbling into what he recollected was a potato chip vending machine. Inspector 1 said the older male patron needed assistance from the younger male patron to get to the back door.

The two inspectors remained at the table. Inspector 1 noted the older male patron returning a few minutes later. He observed him staggering, having difficulty walking. Inspector 1 said the older male patron required assistance to sit back down, by holding onto the post behind him.

Inspector 1's evidence was that at no time during any of this did any staff make any attempt to ask the older male patron to leave or advise him he was cut off. The older male patron continued to doze off at the table.

At approximately 10:18 p.m., the two inspectors left the Establishment. Inspector 1 made notes immediately after they left the Establishment. The notes were included at tab 2, Exhibit 1.

He concluded that the male patron was in an advanced state of intoxication and was allowed to remain in the Establishment because no attempt was made by staff to have him removed or cut off.

Inspector 1 issued the Contravention Notice, included as tab 3, Exhibit 1. Two contraventions were alleged: permit a person to become intoxicated and permit an intoxicated person to remain in the premises. The Contravention Notice was sent to the Licensee. He believed the Licensee then got hold of him.

Inspector 1 prepared the Notice of Enforcement Action, which only alleged one contravention – permit to remain – because they could not prove the patron had done all of his drinking there. The four day suspension was recommended because the contravention was a serious public safety issue. As an inspector and as an investigator he has seen patrons walk out of a bar and get seriously injured, including two who

were killed. A four day suspension would bring the importance of the issue to the attention of the Licensee and to the staff.

Inspector 1 said that an advanced state of intoxication is a public safety concern. The male patron may not have been able to take care of himself once he left.

Cross-examination

Inspector 1 admitted he could not remember the particulars of the conversation with the persons at the table. He said the event had happened about 18 months ago. He said they don't have a set script they use. In the 35 minutes they were at the table, there was about 10 to 15 minutes of conversation. Nothing in particular stood out, except for the comment by the older male patron's wife about him drinking when they argued. He did not recollect the wife saying that they had argued. Inspector 1 did not ask the patrons at the table for their last names, nor did he recollect asking them where they came from.

Inspector 1 saw the older male patron consume about the equivalent of a glass and a half of beer. He agreed that after drinking a beer a person could have a strong odour of alcohol. He disagreed that the lighting was so poor that he could not see if the patron's eyes were blood shot.

Inspector 1 testified that the Inspectors' expenses are reimbursed but that he did not get a receipt or submit a claim for the cover charge he paid. Inspector 1 could not recall the name of the band that was playing.

Inspector 1 confirmed that the reason he recommended a four day suspension was for public safety reasons and that in prior investigations two persons had been killed. Inspector 1 testified that he did not know if the persons seated at the table were driving, and that he did not ask about that. He did not think to call the police in case the older male patron was driving as he thought that the patron's wife was there and she could drive. Inspector 1 thought that the patron's wife would make sure the male patron got home safely.

When challenged about his concern for public safety, Inspector 1 said that inspectors do not call police. They get the licensees to do that. They will approach the bar manager to do that. It is the licensees' responsibility to make sure patrons get home safe.

Inspector 1 did not inform anyone on staff of the male patron's advanced state of intoxication, but he has taken those steps in the past, which has been followed by an enforcement hearing.

Inspector 1 said that in putting together the NOEA, he did not include the name of the older male patron because it is standard protocol not to do that.

Inspector 2

Inspector 2 has been a liquor inspector since October 2012. Prior to that, he had been a conservation officer for six years, and before that a county by-law officer and a corrections officer. He is also a nurse and continues with that work on a part-time basis.

Inspector 2 testified that, on January 18, 2013, he attended the Establishment with Inspector 1. His evidence was that at approximately 9:30 p.m. they entered the Establishment as a covert investigation, looking for compliance with the Act and Regulation.

He said they took a position by the service bar and saw a male patron, who looked like he was falling asleep. Inspector 2 described the male patron as about 50 to 60 years old, grey beard, jeans, tee shirt and a greenish brown leather jacket. They were at the service bar area for about five minutes.

Inspector 2 said he and Inspector 1 went over and sat down with the male patron. He said the male patron was there with a female patron and a younger male patron. Inspector 2 said he observed more signs and symptoms of intoxication. He said the male patron was sleeping, had a strong odour of liquor, he had blood shot eyes. He was struggling to sit up. He was drinking from a glass, and struggling to bring the glass to his mouth.

Inspector 2 said that, at one point, the male patron went to have a smoke and he had an unsteady gait and difficulty balancing. He almost fell over. Inspector 2 concluded that the patron was severely intoxicated. During the time they were at the table, about 45 minutes, the symptoms became more exaggerated. At no time did staff cut off the male patron or ask him to leave.

Inspector 2 testified that the lighting was good and not an issue - it was a typical pub atmosphere. The sound level at the table was not an issue, they could hear clearly that the male patron slurred his words. Inspector 2 had a good line of sight, with the male patron being about four feet away.

Inspector 2 said the male patron's wife was at the table. A younger male patron, the wife's son, was also around the table. He did not have any concerns about their level of intoxication.

He said he saw the younger male patron go to the bar, order a beer and drink about 1/8th of the beer. The younger male patron then passed the beer to the older male patron, who drank it. He said the staff could see this and took no action.

According to Inspector 2, the staff should have taken the older male patron out of the red-lined area. While Inspector 2 agreed that the staff might have taken no action because the patron had family to take care of him, he said that it was still staff's obligation to do something because the Act says you can't allow an intoxicated person to remain on the premises.

Inspector 2 said he and Inspector 1 left at about 10:13 p.m. He made notes immediately after leaving. A copy of the notes is at tab 2, Exhibit 1. He gave his notes to Inspector 1 who issued the Contravention Notice.

Inspector 2 reviewed tab 5, Exhibit 1 (the Licence) and noted that its terms and conditions include the terms and conditions set out in the Guide, which he described as a layperson's version of the Act and Regulation. He referred specifically to the following provisions of the Guide:

- Page 10 - Your Role as a Licensee
- Page 21 – Providing a Safe and Responsible Service, including Controlling Your Establishment
- Page 22 - Steps you can take to ensure responsible service
- Page 26 - Over-service and intoxicated patrons and the Physical and Mental signs of intoxication

Inspector 2 testified that the Branch conducts inspections for public safety reasons, to ensure licensees and their staff follow the Act and Regulation. He said that the staff should have cut off service to the male patron, removed him from the red-lined area, and made sure he got home safely by taxi or with family members.

Cross-examination

Inspector 2 confirmed that the lighting was typical of a pub, and his visibility was good. He also confirmed that Inspector 1 had paid the cover charge for both of them.

Inspector 2 testified that he could not remember the name of the older male patron. He thought the name would be in his notes, but did not refer to them.

He recollected talking to the older male patron's wife, having a general conversation, but could not recall the details of the conversation. He did recollect that the patrons were out to celebrate.

EVIDENCE—LICENSEE

Mr. Yehia

The Licensee's representative, Sam Yehia, gave evidence on behalf of the Licensee. Through the corporate entity, Mr. Yehia is the principal, shareholder, director and owner of the Establishment. He has been the owner since May 2000. Mr. Yehia has eight liquor licences, including food primary, liquor primary and licensed retail stores. Some of the establishments are on Vancouver Island and the remainder are in Vancouver. He has a manager of his Vancouver Island operations (the "Island Manager").

Mr. Yehia described the physical layout of the Establishment. He said they turn down the lights inside the Establishment as dusk falls because bright lights are not conducive to a pub atmosphere. If there is a band playing, the lights get turned down more, because that allows the focus to be on the band, so the ambient light is low.

Mr. Yehia testified that the Licensee had video surveillance installed about five years ago. He is not required to have it as part of his licence but he has it for his own benefit and purposes. The system records over the earlier tape, after about seven to ten days.

He said he remembered receiving the NOEA. Prior to that he had a telephone conversation with Inspector 1, where they spoke about the alleged contravention. Mr. Yehia testified that he had started his own investigation into that evening and the alleged events. He said no one had any recollection, not the staff or the manager on duty. That manager was no longer with the Licensee and Mr. Yehia could not recall his name with certainty.

Mr. Yehia said, immediately after hearing from Inspector 1 about the allegations, he directed the Island Manager to review the video and report what he found. They needed to immediately capture the tape so it would not be recorded over. The Island Manager reported that there was no evidence of anyone intoxicated or over-served. Mr. Yehia said he asked for the surveillance video footage to be sent to him.

He said that the video footage was subsequently transferred to a “thumb drive” and flown to Vancouver. There were problems in viewing the footage on the thumb drive because the platform necessary to view it was not on his computer, so he had to view it on another computer in the office. He concluded with the Island Manager that there was no evidence of over-service or intoxication, or of the inspectors inspecting the property on January 18, 2013.

Mr. Yehia said this surprised him because the contravention was alleged “on the heels” of another enforcement action respecting the Establishment, where the General Manager’s delegate found too many inconsistencies with the Branch’s evidence and did not find that contravention to have occurred. He said that the decision was at the beginning of 2012.

Mr. Yehia said that another inspector had showed prejudice to his properties and he was surprised that her colleagues were involved with this enforcement action.

Mr. Yehia testified that he has received other Notices of Contravention, but could not recall whether the Branch had ever not named the persons alleged to be intoxicated in those Notices. He said it was often the practice to identify the person so that management can take steps. He could not recall any prior time when they were not notified of the incident on the evening that it happened.

Cross-examination

Mr. Yehia testified that he and the Island Manager watched the video recorded from 9:25 to 9:35 p.m. that evening and they saw no evidence of the inspectors entering the Establishment. They did not know what the Inspectors looked like, but they knew the Inspectors were two males and they did not see two males coming in. No two men came in within that timeframe.

Mr. Yehia did not see any benefit to asking the Island Manager to attend the hearing to describe how he isolated and viewed the video or what he saw, because the Island Manager saw nothing. None of the other staff can access the video recordings, only the Island Manager can, which is part of their security system.

Mr. Yehia said a time lag on the video equipment was not possible. The date and time is stamped on the video and he said he found it very difficult to accept that the date would be wrong. He also said that the timing of the video would not be out for the reason of daylight savings time or any other reasons. He said all dates have been accurate whenever else they have looked at the video. They manage and monitor the equipment themselves.

Mr. Yehia said he took the Island Manager's information that there was no evidence of the two Inspectors or of anyone sleeping.

Mr. Yehia testified that he thinks the conduct of the Branch toward him has been biased and prejudicial over the years. He does not believe the facts as alleged. He was not on the premises on the night in question, so his knowledge is based on the records and personal conversations with employees and the video footage. The only record was the Incident Report, one page of which was sent with the April 4, 2014 email. That page of the Incident Report says it was "a non-incident evening".

Mr. Yehia reviewed the video himself for the first time on Friday, May 2, 2014.

SUBMISSIONS – BRANCH

The Branch advocate submitted that, based on the evidence, the contravention has been proven on a balance of probabilities. The advocate submitted the Inspectors were experienced and did not jump to a conclusion. They verified their initial observations made at the bar by going to sit with the patron.

She said the Inspectors' initial observations that the male patron was intoxicated were confirmed when they sat at the table with him. Their evidence was the patron had obvious signs of intoxication: blood shot eyes, slurred speech, and he was nodding off and having difficulty holding himself upright in his seat. When he left to go for a cigarette, he exhibited an unsteady gait and stumbled. A female staff person came by the table, but took no steps to cut him off or remove him from the red-lined area. The younger male gave the male patron beer.

The Branch advocate submitted that the Inspectors' evidence was consistent with each other. The observations were made in a period of over 35 minutes and the signs of intoxication increased during that time. The advocate submitted the evidence was that the lighting was good and the Establishment was not crowded.

She noted the Inspectors expressed public safety concerns, but as the patron had two family members with him who were not intoxicated, the Inspectors took no active steps to advise the bar manager. The inspection was covert for compliance.

The Branch advocate suggested that the date on the video viewed by Mr. Yehia may have been incorrect.

The advocate submitted that the contravention was serious. Other cases of intoxication have resulted in deaths.

The Licensee holds a number of licences. She suggested he seems to have disregarded his responsibility to his patrons, his staff and the community.

SUBMISSIONS – LICENSEE

Oral Submissions

Counsel submitted that the Inspectors' evidence lacked credibility. He suggested the Inspectors were subconsciously trying to tailor their evidence to find a contravention. Counsel also suggested the Branch's case failed due to the failure by Inspector 1 to notify the bar manager of the intoxicated person. He also submitted that the Licensee's ability to defend against the alleged contravention was compromised due to the Inspectors' failure to give notice of it on the evening of January 18, 2013. He said that, in a previous case against the Licensee, the evidence was stronger but the contravention was dismissed. He said for this reason, this contravention should be dismissed.

Counsel said the Inspectors' evidence on the lighting was not credible. He suggested the premises were not well lit as they claimed, and the Licensee's evidence was that the lights were low because the band was playing. He said to see blood shot eyes in a bar on a January evening would be difficult and it was not credible or reliable for the Inspectors to say that is what they saw.

Counsel submitted that because Inspector 2 could not recall the name of the older male patron and this called into serious question the credibility of his other evidence. Counsel suggested that in a criminal case a police officer's failure to remember the name of a person on cross-examination was found to be fatal to the overall evidence. Counsel also noted Inspector 2 forgot if they paid a cover charge.

He said Inspector 1 could not remember any particulars of the conversation with the older male patron and his wife, which counsel says is damning to his credibility. He said an inspector should be making assessments of intoxication from the conversation with the patron, assessing both the fluidity of the speech and the particulars of what was said. To fail to recollect the particulars of what was said, counsel said, calls into question the reliability of the assessment of intoxication.

Counsel said the evidence about the wife's comments about the male patron drinking too much when they have an argument is not evidence that the male patron was in fact drunk, because there is no evidence they had argued.

Counsel said it was Inspector 1's evidence that, in the past, even on a covert operation, if he thought a patron was intoxicated and there was a threat to public safety, on his way out, he has notified the bar manager. Because that is what Inspector 1 had done in the past, and he did not do that here, this goes to show that he did not think the patron was intoxicated. If Inspector 1 thought the male patron was so intoxicated as to be a public safety threat, he surely would have notified the establishment at the time, as he has done before. Counsel said he did not doubt Inspector 1's sincerity, but he did doubt whether Inspector 1 really thought the person was intoxicated.

Inspector 1's failure to inform the Licensee of the intoxicated person shows that he did not think the state of the patron was that serious. Inspector 1 could have approached the bar manager as a bystander, without identifying himself as a liquor inspector, and said something about the allegedly intoxicated patron. Inspector 1 gave no explanation for not doing so, other than the patron's wife and her son were taking care of him.

Counsel suggested that when the totality of the evidence is looked at, there were not too many indicators of intoxication. Combined with Inspector 1's decision not to notify the bar manager and Inspector 2's inability to remember the male patron's name, the finding of intoxication is not supported.

With respect to the Inspectors' notes, counsel questioned if they had an honest belief in the finding of intoxication. He suggested that the notes lack "an air of reality". He questioned if the notes were consistent with the Inspectors' conduct, especially the decision not to notify the bar manager at the time. He says that if the Inspectors had approached the bar manager, then the Licensee would have had the ability to call the bar manager and defend against the allegation.

Counsel said that because the Inspectors did not notify the bar manager, the Licensee has no ability to refute the allegation because it can't identify the person alleged to have been intoxicated. If the Branch's goal is for the Licensee to improve, the Licensee needs to be able to identify what staff were involved.

He submitted that the Inspectors may have been consciously or unconsciously looking for evidence that the patron was intoxicated. He suggested that sometimes inspectors may tailor their evidence to meet the findings, not maliciously but perhaps in terms of meeting a quota. Counsel agreed there was no evidence of any such quota.

Counsel specifically said that the Licensee is not saying the Inspectors were not at the Establishment on the night in question. Counsel said the Licensee's position was that the person was not in an advanced state of intoxication. The Inspectors may have seen the patron have a beer or two, but he said that is not evidence of intoxication under the Act.

Counsel said that there was acrimony between the Branch and the Licensee but agreed that there was no evidence to support that submission.

He says the evidence of intoxication is subjective and needs to be looked at in its totality. He says it falls short of the evidence necessary to find a contravention.

Counsel confirmed that no defense of due diligence was being made.

Written Submissions

Counsel requested the opportunity to make a written submission on the legal issues, which submission raised the following points.

Counsel submitted that the legal concept of *stare decisis* applies to the General Manager's delegate as a tribunal. He says this means I am bound to follow the decisions made by other delegates. He specifically refers to a decision in Case EH11-082 where he says the General Manager's delegate found the Branch had not proven an alleged contravention under this same section [43(2)(b) - allow an intoxicated person to remain], on evidence that counsel suggests was stronger than the evidence before me in this case.

Counsel questions what constitutes intoxication and suggests that the "only authentic way to determine if an individual is intoxicated is through a blood test, Breathalyzer or urine test" which were not performed on the night in question. He submits that, in the absence of evidence of such a "quantitative analysis", the only evidence is that of a "qualitative analysis" based on the Inspectors' testimony. Counsel says the judgment of an individual as intoxicated is merely speculation and particular to each situation. He lists a number of reasons he says why someone might appear intoxicated, but was not.

The balance of the submission is a re-iteration of counsel's oral arguments.

REASONS AND DECISION

Contravention

I have considered the totality of the evidence and based on the evidence I have accepted, and for the reasons set out below, I find on a balance of probabilities that the Licensee contravened section 43(2) (b) of the Act by permitting an intoxicated person to remain in the premises.

I will deal first with the submission made in legal counsel's written submission.

The legal principle of *stare decisis* applies to me as the General Manager's delegate only with respect to the decisions made by the courts. I am bound by those decisions, as they state the law. However, I am not bound by any decision of another delegate of the General Manager. While consistency between delegates' decisions is desirable in terms of legal principles and statutory interpretation, those decisions are not binding on me and, in particular, the findings on evidence cannot and should not be binding. In making my findings, I am not swayed by the findings of credibility or on the weight of the evidence made by another delegate on the evidence before him in another hearing. My duty, and the duty of every delegate, is to hear, assess and weigh the evidence before them. That is what I have done here.

With respect to the "test" for intoxication, I find there is no legal requirement for a quantitative test by way of a blood, breath or urine sample. I also find that to require that would simply set the evidentiary bar too high for these kinds of proceedings. It is impractical and not possible without legal authority to demand such samples. The police may only demand samples in certain criminal proceedings.

I find a "qualitative test" is set by the Act and is set out in the Guide, including at page 26 on over-service and intoxicated patrons and the physical and mental signs of intoxication. I find that test of intoxication is not merely speculation. I find the test is based on objective, observed behaviour.

Having addressed counsel's written submissions, I turn now to the evidence. With respect to the credibility of and weight to be given to the Inspector's evidence, I make the following findings.

The Licensee's counsel submitted that the whole of Inspector 2's evidence is tainted and should be given no weight because the Inspector could not recall the name of the older male patron without looking at his notes. In assessing the credibility of a witness for not recalling a particular item of evidence, I look at how that evidence relates to the whole of the evidence that is recalled, and how key that evidence is to finding of a contravention. In some cases, it is possible that the failure to recall a key piece of evidence may mean that the whole of the evidence is called into question. I do not find that to be the case here.

I find that the name of the male patron is not a key piece of evidence and the failure of Inspector 2 to recall it without referring to his notes is not fatal to the rest of his evidence. I find he recalled significant and sufficient details to support a contravention. I find that on the whole, the evidence given by Inspector 2 is credible and not tainted by his inability to recall the name of the older male patron without referring to his notes. I note that Mr. Yehia could not recall the name of his bar manager on duty that evening who no longer worked for him, but for the reasons given here, I did not draw any negative inferences from that or make a finding of a lack of credibility about the rest of his testimony on that basis.

The Licensee's counsel submitted that the whole of Inspector 1's evidence is tainted and should be given no weight for two reasons.

Firstly, counsel says due to Inspector 1's failure to recall more of the particulars of the conversation with the patrons, the Inspector did not make a reasonable assessment of the patron's level of intoxication. I have considered this submission in the same manner as I considered the allegation about Inspector 2's failure to recollect a piece of evidence. I looked at the whole of Inspector 1's evidence and how the evidence he could not recall related to the whole of that evidence and the contravention alleged. Having done that, I find that, given the lapse of time between the contravention and the hearing, it is not surprising that the Inspector did not recall more of the conversation. I also find it is

reasonable that the Inspector did not record more of the conversation in his notes. I further find that the particulars of the conversation are not critical to a finding of a contravention. Those particulars are only one way to assess whether the patron was intoxicated and, as noted below, the Inspectors noted several other key indicators. I find that, on the whole, the evidence given by Inspector 1 is credible and is not tainted by his inability to recall the particulars of a conversation held some 15 or more months ago.

Secondly, the Licensee's legal counsel submitted that Inspector 1's assessment of the male patron as intoxicated should be rejected because Inspector 1 failed to notify the bar manager that the male patron was intoxicated and a threat to public safety, as he had done in the past. Counsel said this could only mean that Inspector 1 did not reasonably hold the view that the male patron was intoxicated. I have considered this submission in the context of the whole of Inspector 1's evidence, and in particular in the context of his written notes made immediately after leaving the Establishment (tab 2, Exhibit 1). In those notes, Inspector 1 clearly recorded a number of signs of intoxication and from those signs he clearly formulated the opinion that the patron was intoxicated and that a "CN" (Contravention Notice) was to be issued for allowing intoxication and allowing an intoxicated person to remain. Whether it was his past practice to advise the bar manager or not, he is under no obligation to do so, and I do not find it to be "damning" to his evidence that he did not take that step on this occasion.

I accept the evidence of the Inspectors as truthful and their evidence as consistent, both within their own oral and written evidence and with each other's evidence. I do not find any evidence to support or even suggest any bias against the Licensee, as was suggested but for which no evidence was submitted.

With respect to whether the Inspectors were at the Establishment on January 18, 2013 between approximately 9:30 to 10:45 p.m., I find the Inspectors' oral evidence, their notes, the subsequent Contravention Notice, and the NOEA are all consistent with their being present on that date and at that time. Legal counsel confirmed that the Licensee was not claiming the Inspectors were not present.

Further, the Licensee did not produce any reliable evidence that they were not there. Specifically, the Licensee's only evidence was that Mr. Yehia and another person (the Island Manager) viewed surveillance video and they did not see the Inspectors enter in the 10 minutes before and after 9:30 p.m. Mr. Yehia's evidence about the video did not describe where the camera was located or what area of the Establishment it recorded.

Mr. Yehia did not personally view the video until May 2, 2014 yet he made this assertion many months earlier, apparently based on what the Island Manager reported to him. The Island Manager was not produced to be examined about his involvement in obtaining the video, viewing it, or keeping it safe, or how he made the conclusions that he did. The video itself was not accepted into evidence due to the inexplicable delay in its production. For all of these reasons, I find that the Inspectors were at the Establishment on January 18, 2013 between approximately 9:30 to 10:45 p.m.

I accept the Inspectors' evidence that they had a clear line of sight from the bar area to the table the patron was sitting at. I accept that the lighting was normal for a pub, in the evening and with a band playing. I accept their evidence that within minutes they noticed the male patron who appeared to be nodding off. I find that the Licensee's staff should also have been able to make that observation. This is one clear sign of intoxication.

I accept the evidence that, with that lighting, the Inspectors when sitting at the table could and did see the intoxicated patron's eyes were bloodshot. I also find that the Licensee's staff should have been able to see that his eyes were bloodshot when attending at the table. I do not accept counsel's suggestion that it was too dark for that to be discerned. The patron's bloodshot eyes are another clear sign of intoxication.

I accept that after one beer a person may smell of liquor. I find that the odour of liquor was only one of the signs of intoxication relied on by the Inspectors.

I accept the Inspectors' evidence that they observed the older male patron to be having difficulty sitting up in his seat, he was nodding off, and he had difficulty standing and walking. These are all clear signs of intoxication and all should have been visible to the Licensee's staff.

I accept the Inspectors' evidence that they had a conversation with the older male patron over a period of time and that the patron's speech was slurred. This is another clear sign of intoxication, and easily discernible to the Licensee's staff had they made any inquiries of the patron.

I accept that the Inspectors saw the older male patron consume beer in the Establishment but that they were unable to say if the patron had become intoxicated in the premises.

For all of the above reasons, I find that the older male patron exhibited several clear signs of intoxication over a period of at least 30 minutes while within the red-lined area of the Establishment. Those signs are consistent with the signs of intoxication set out in the Guide. Based on these findings, I find the older male patron was intoxicated and was allowed to remain in the Establishment. I find that the Licensee contravened section 43(2)(b) of the Act by allowing this patron to remain in the Establishment.

With respect to counsel's submission that without notification on the night of the contravention the Licensee is unable to mount a defense, I find that the Licensee said he had video of the evening in question. He had the opportunity to produce video that he said would show there was no intoxicated person in the Establishment. It was the Licensee's own act, by failing to produce the video within the time set for production, that may have limited the Licensee's ability to mount a defense.

I also find that, while not bound by prior decisions of other delegates, there have been other cases where an inspector on a covert operation did not notify the licensee of a contravention until a later date and the contravention was found to have taken place.

Due Diligence

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

The Licensee's counsel expressly stated no due diligence defence was being made. When he suggested that to do so would be contrary to the defence that the contravention did not occur, I advised him that a due diligence defence could and frequently was made with a defence that the contravention did not occur. He confirmed that no due diligence defence was being made. No evidence of any kind was submitted that could support a finding of due diligence.

In any event, I have turned my mind to the defence and have considered the decision of the BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, which recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

I find that in these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee whose actions contravened the legislation was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who contravened the legislation was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the contravention occurred), then the questions to be considered and answered are whether the licensee had:
 - implemented adequate training and other systems to prevent the contravention, and
 - taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

I have no evidence about any of the staff on duty that evening, but reasonably expect not all staff on duty that evening was a directing mind of the Licensee. If the failure to take action was by a person or persons who was not a directing mind of the Licensee, then I need some evidence of training and other systems to prevent the contravention. It is the responsibility of the Licensee to provide that evidence. I find no evidence of any training or other systems for staff to prevent intoxicated persons from remaining in the premises. For these reasons, I find the defence of due diligence fails.

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 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

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

I find that a penalty of a four day suspension to be appropriate.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of liquor primary licence 021261 for a period of four days to commence at the close of business on Thursday, June 26, 2014 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the police from the close of business on Thursday, June 26, 2014 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Dianne Flood
Enforcement Hearing Adjudicator

Date: May 23, 2014

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

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