



**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:	IIC Enterprises Ltd., dba Cheetah's 220 Lawrence Avenue Kelowna, BC V3H 1Z4
Case:	EH 13-117
For the Licensee:	Sanjeet Parmar
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Nerys Poole
Date of Hearing:	January 13 and 14, 2014
Date of Decision:	February 28, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, IIC Enterprises Ltd., dba Cheetah's, holds Liquor Primary Licence number 130456 (the "licence") for the operation of a liquor primary establishment known as Cheetah's located in Kelowna, B.C. The establishment is permitted to sell liquor from 7:00 p.m. to 2:00 a.m. seven days per week. The licence is issued to IIC Enterprises Ltd. Mr. Sanjeet Parmar is the principal of IIC Enterprises and appeared as the representative of the licensee at the hearing. I refer to both the corporate licensee and Mr. Parmar as the licensee throughout this decision.

The person capacity on the licence is 218 persons. The licence has a number of terms and conditions attached to it as Appendix A. These terms and conditions were attached to the licence on August 17, 2011 (Exhibit 1, tab 3).

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 allegations and proposed penalty are set out in the Notice of Enforcement Action dated August 28, 2013 (the "NOEA") (Exhibit 1, tab 1).

The branch alleges that, on May 18, 2013, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

For a first contravention of this type, Schedule 4, item 11 of the *Liquor Control and Licensing Regulation* (the "Regulation") provides a range of licence suspension penalties from four to seven days and/or a monetary penalty of \$5,000 to \$7,000 for a first contravention of this type. The branch is recommending a suspension of seven days.

The licensee disputes the contravention.

The NOEA includes a second alleged contravention for permitting drunkenness or violent, quarrelsome, riotous or disorderly conduct (section 36(2)(a) of the *Act*) relating to an incident on the same evening as the first alleged contravention. In a letter dated January 6, 2014, the branch informed the licensee that they were no longer pursuing enforcement action on the alleged contravention of section 36(2)(a).

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. Was the allegedly intoxicated individual (the "Male Patron") showing signs of intoxication when he entered the establishment?
2. What were the Male Patron's signs of intoxication at the time he was asked to leave by the RCMP Officers, and were they sufficient for a finding of intoxication?
3. If I find the Male Patron was intoxicated, has the Licensee established a defence to the contravention?
4. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: Branch's book of Documents, tabs 1 to 22

Exhibit 2: Thumb drive of licensee's CCTV video on May 18, 2013

Exhibit 3: Book of video stills from Exhibit 2

Exhibit 4: Licensee's Incident Reports

Exhibit 5: Licensee's Training Manual and Policies (submitted after the hearing, as ordered by the delegate)

Exhibit 6: Questions from branch advocate and answers from licensee on Exhibit 5 materials dated January 27, 2014 (as ordered by the hearing delegate)

DOCUMENT DISCLOSURE

During the hearing, the licensee and his witnesses kept referring to a training manual with instructions to staff and company procedures on dealing with intoxicated patrons, etc. I asked the licensee why he had not brought this manual to the hearing. He said he was not aware that he should have brought it. At this hearing, the licensee expressed some naiveté about the process and a lack of awareness about the importance of providing documents in a timely manner, if he wanted them to be considered on the issue of due diligence. I gave him the benefit of the doubt on this and therefore asked that he provide the documents for my consideration.

In the interest of fairness and the relevance of such a manual to the issue of due diligence, I made an order at the end of the hearing that the licensee provide the manual to the branch registrar. The branch advocate would then have an opportunity to ask questions of the licensee, in writing, and provide any further submissions on the issue of due diligence. The licensee was given the opportunity to respond to the branch's submissions. The deadline for the final receipt of the documents and submissions was February 5, 2014.

I have reviewed the documents and submissions made after the hearing. I marked the training manual and policies of the licensee as Exhibit 5. I marked the questions of the branch advocate and the answers from the licensee as Exhibit 6. Because of my findings below on the contravention, I have not had to address the question of due diligence.

However, I wish to remind the licensee of the purpose of disclosure of any documents that may be relevant to the issue before the hearing delegate. In a letter summarizing a telephone pre-hearing conference on October 9, 2013, the branch registrar noted the requirement to disclose documents within the timeframe set out in the Notice of Hearing. The Notice of Hearing letter dated November 22, 2013 noted the final date for disclosure of documents as December 13, 2013. In order for any evidence to properly be considered, it is important to provide these documents so the branch advocate has an opportunity to consider them and to be able to ask questions about them at the hearing.

I remind the licensee that he has now received sufficient warning as to the disclosure requirements in the enforcement hearing process and has been granted some leeway on those requirements by myself. If the licensee finds himself at a future hearing with another hearing delegate, he may not receive the same relaxation of the disclosure rules if he fails to provide or to disclose relevant documents in a timely manner.

WITNESSES

The branch called four witnesses:

- The liquor inspector who issued the NOEA as a result of his conversation with the police and the reports from the police
- The three Royal Canadian Mounted Police Officers (the "RCMP Officers") who attended at the establishment and requested the Male Patron leave the establishment

The licensee called five witnesses:

- The licensee's representative and sole owner of the establishment
- The manager
- The bouncer
- The head of security
- The bartender

The manager, the bouncer and the bartender were working in the establishment on the evening of May 18, 2013.

CCTV VIDEO FOOTAGE

I admitted the CCTV video footage from the establishment and marked it as Exhibit 2. During the hearing, the witnesses had an opportunity to view and comment on the video footage of the Male Patron when he entered the establishment, some views of him while he was in the establishment, and the period of time when he was in the VIP room and leaving the VIP room with the RCMP Officers. The manager, the bouncer and the bartender had not viewed the video footage prior to the hearing.

The branch also submitted a group of still photos, all taken from the video footage, showing date and time of each photo (marked as Exhibit 3).

I viewed the video footage and made my own observations from watching it. I found the video footage to be very helpful in reaching a decision in this matter.

FACTS

Procedure at the door of the establishment

As a result of some previous problems at this establishment, the branch appended some special terms and conditions to the licence (Exhibit 1, tab 3). These include specific requirements relating to the monitoring of patrons entering the establishment:

- Installation of video surveillance equipment where identification checking is taking place and all areas of the front entrance, as well as within the establishment
- The use of electronic scanning equipment for verification of identification ("ID") and the scanning of all patrons' IDs prior to entry
- The installation and use of a standard and operational electronic weapons detection system at the front entrance, which must be the sole entrance to the establishment
- The requirement that all patrons wishing to enter the establishment be processed with the ID scanner system, video and electronic weapons detection system
- The requirement that no patrons be permitted entry if any of the systems are not working or unavailable
- Mandatory searches of all bags, purses, backpacks, fanny packs or other carrying bags at the front entrance before admittance to the establishment
- The requirement for an adequate number of properly licenced security staff to conduct all screening and security required.

In order to comply with the additional terms and conditions on its licence, the licensee implemented a series of steps at the entranceway to the establishment, which include:

- An initial checking of two pieces of ID at the door of the establishment
- A second checking and scanning of ID and photo taken by a staff member in the small foyer of the entranceway of the establishment
- Use of a software program (Servall) to check scanned ID to determine whether a person should be refused entry
- The use of a wand for weapons detection and a patdown by security staff to check for any contraband or weapons

The Servall program (also described in the hearing as treoscope, the name for an earlier software version) is the software that Kelowna bars use to identify patrons who may have been refused entry at other bars, caused problems at other bars, or may have been banned for various reasons from entering Kelowna bars. Patrons must agree to have their photos taken and their ID scanned in the Servall program prior to being permitted entry to the establishment.

Male Patron's entry to the establishment

On May 18, 2013, at 9:11 p.m., the Male Patron entered the establishment with a group of friends. The group of friends were from out of town and apparently in Kelowna for a friend's bachelor party. According to the bouncer who remembered the group and had spoken with them when they entered the establishment, the group of friends had spent the day at a Kelowna beach. The bouncer testified that the Male Patron was not slurring his words nor was he staggering at all.

Prior to being permitted entry to the establishment, the group went through the procedures as set out above. Just outside the open door, the bouncer and the manager requested ID of each person wanting to enter the establishment, for the purpose of verifying age. Once past the initial ID check, the group entered the small foyer area and were asked to present ID again to a staff member behind a counter who took a photo and scanned the ID for the Servall program.

The video footage of the small foyer area shows the Male Patron standing and waiting for the ID check, photo and patdown. The security staff member passed the wand over him and patted him down. The Male Patron chatted with other males while they were waiting. After passing through these three steps at the entryway, the Male Patron and his friends were permitted to enter the establishment.

Observations of Male Patron in the establishment

The Male Patron was in the establishment for approximately one and a half hours. The bartender and the bouncer made some observations of the Male Patron and his group of friends during this period. The bartender testified that she remembered the group of males, including the Male Patron, who were sitting near the end of the bar for some of the evening, and she noted that they appeared to be having a good time together. She stated she did not observe any signs of intoxication from the group. The bouncer said he could see inside the establishment from the front door and noted the group at different times appearing to be enjoying themselves, playing pool and not being rowdy.

My observations of the Male Patron from the video footage show him, at different times, moving around the establishment without staggering, interacting with friends and generally appearing to be enjoying himself.

Prior to the Male Patron's entry to the VIP room, the video footage shows him at the pool table with other patrons, just outside the VIP room, at one point dancing with (presumably) one of his friends. He was not staggering or stumbling. At 10:19 p.m., there was no one sitting at the table in the VIP room. At 10:31 p.m., the Male Patron entered the VIP room for a few moments and can be seen standing and talking to another patron who was sitting at the table. At 10:39:16 p.m., the other patron had left and the Male Patron entered the VIP room again. Just before he entered the VIP room, he walked down the ramp and then later up the ramp and into the VIP room. He appeared to walk steadily and he carried a full drink without spilling any. He sat by himself with his drink of an unknown liquid.

At 10:41:29, another patron entered the VIP room and spoke to him briefly. The Male Patron can be seen in the video footage leaning back against the bench, then sitting up and putting his head on his arms at one point for a few seconds and then leaning back again. At 10:41:47 p.m., he took out his wallet from a rear pocket, examined the contents and put it back in his rear pocket. His movements in doing this were steady and not clumsy. He appeared to be nursing his drink and not imbibing.

Police entry to the establishment

At approximately 10:40 p.m., three RCMP Officers were conducting regular bar checks in the Kelowna area and entered the establishment. They immediately did a quick pass through of the establishment, with two RCMP Officers passing down one side and the other RCMP Officer walking down the other side of the establishment and passing directly by the VIP room. On his first pass by the VIP room, the first RCMP Officer did not notice the Male Patron. Less than 30 seconds later, he met up with the second RCMP Officer and they walked back. The third RCMP Officer was still checking on the other side of the establishment.

The two RCMP Officers observed the Male Patron apparently sleeping at a table in the VIP room. At 10:42:46 p.m., they stood at the open entranceway to the VIP room and knocked on the glass window and woke the Male Patron. Because the Male Patron had been asleep in the establishment with loud noise in the background, they formed the opinion that he was intoxicated. They told the Male Patron he could not stay in the establishment because he was intoxicated. The Male Patron stood up to leave with his drink and the first RCMP Officer told him to leave the drink behind. The Male Patron handed over the full glass to the second RCMP Officer without any argument. The second RCMP Officer took the drink and returned it to the table. The Male Patron left the VIP room, without staggering or stumbling, and started walking down the ramp leading from the VIP room towards the exit, with the two RCMP Officers behind him.

On leaving the establishment

The video footage showed the RCMP Officers walking down the ramp behind the Male Patron. The RCMP Officers testified about the resulting confrontation that led to the arrest of the Male Patron. I have considered the evidence of the confrontation from both the licensee's witnesses and the RCMP Officers. I find that this evidence relates to the second contravention and that, as the branch determined not to proceed with that contravention, I do not need to consider it in this decision.

SUBMISSIONS – BRANCH

The branch advocate submits that there was evidence presented to conclude that the Male Patron was intoxicated. Prior to the RCMP Officers' arrival at the VIP booth, the Male Patron was sitting alone, had put his head down more than once, he was lying back against the bench, and the RCMP Officers had to knock on the glass to rouse him. The RCMP Officers had extensive experience with identifying intoxicated persons.

Staff were unaware that the Male Patron was sitting in the VIP room and were not monitoring him. Staff should have investigated when he removed himself to the VIP room. Therefore, the branch submits that it has established the contravention on a balance of probabilities.

The branch presented submissions on the issue of due diligence, as a result of my order requesting the licensee's manual.

SUBMISSIONS – LICENSEE

The licensee submits that the Male Patron was not intoxicated when he entered the establishment at 9:11 p.m., nor was he intoxicated at the time of his removal at 10:43 p.m. If I find that the Male Patron was intoxicated at the time of his removal, the licensee submits that neither the licensee nor its staff permitted the Male Patron to remain in the establishment while intoxicated.

The licensee says that the evidence shows that any alleged signs of intoxication at the time of entry—leaning against the wall, putting his hand over his face, bobbing his head, droopy eyes—were not necessarily indications of intoxication, but rather the actions of someone who is tired and/or hot. The licensee says that the foyer area is very small and becomes quite hot. Further, the licensee submits that its staff were very clear in its evidence that the Male Patron did not exhibit any of the classic signs of intoxication—staggering, stumbling, fumbling with his ID, slurred speech, alcohol on his breath, etc.

The staff of the licensee had the opportunity to observe and talk closely with the Male Patron while the police officers and I only observed him from the CCTV video footage, which showed the Male Patron from one angle. The Male Patron can be seen on the video as he is asked to raise his head for the photo taken at the second ID check. He can be seen providing his ID and returning it to his wallet without any fumbling. The licensee adds that the appearance of “droopy eyes”, without further classic signs of intoxication, is not conclusive as to intoxication.

With respect to later signs of possible intoxication, after 10:15 p.m. on the video, the Male Patron is seen dancing with one of his friends at one point, talking to another friend, standing by the pool table, walking up and down the ramp without stumbling, and later going to sit by himself in the VIP room. The licensee says that a patron's decision to sit by himself could be for any number of reasons and does not imply that the Male Patron was intoxicated. Just prior to the police officers' entry, the Male Patron can be seen entering the VIP room with a full glass of some liquid, pulling out his wallet and apparently checking for money, putting his head down at one point, slouching on his seat.

The licensee says that the Male Patron may have been sleeping when the police officers first approached him, but he then stood when they asked him to, he did not stagger, he picked up his full drink and then handed it over to the police officer when requested and walked out of the VIP room, apparently without stumbling or staggering.

Finally, the licensee says that, if I find the Male Patron was intoxicated, the licensee has established a defence of due diligence from the evidence of its employee training and policies.

REASONS AND DECISION

Contravention

Issue 1 - Was the Male Patron showing signs of intoxication when he entered the establishment?

Only the licensee's witnesses were present when the Male Patron entered the establishment. At the hearing the police officers drew conclusions, after viewing the video footage, about the behaviour and actions of the Male Patron in the foyer area. I watched the video footage and drew conclusions from it as well as from the testimony of the licensee's witnesses, and the observations of the RCMP Officers.

At one point, the Male Patron leaned back against the wall and at another point, he can be seen wiping his face or forehead. He had no difficulty removing his ID from his wallet and standing at the counter to have his photo taken, and then returning his wallet to his pocket. He was not staggering at all while in the foyer. The bouncer stated that he remembered the individual and had not seen the video footage until he watched it during the hearing. The bouncer remembered that the Male Patron answered his questions clearly and was not slurring his words. The bouncer observed no signs of intoxication.

The RCMP Officers, from their observations of the video footage, noted some signs of what they believed to be intoxication: the Male Patron's head bobbing, leaning against the wall, wiping his face, droopy eyes.

I find that the signs noted by the RCMP Officers from the video footage in the foyer area are not conclusive as to intoxication.

The actions of the Male Patron, as noted by the RCMP Officers, may have occurred as a result of standing in a small hot space, feeling cramped by others in close proximity and thus leaning against the wall, as well as being tired from a day at the beach in the sunshine. Because of the angle of the camera pointing down from above, I do not consider the description of "droopy eyes" to necessarily indicate intoxication. The licensee's witnesses observed the Male Patron face to face at the time and testified that he was not showing signs of intoxication. All the patrons seen on the video footage in the foyer appear to be bobbing their heads, presumably caused by the jerkiness of the video footage.

I accept the evidence of the two licensee's witnesses as to the behaviour of the group and find that their evidence is supported by the video footage. I find that the evidence supports my conclusion that the Male Patron was not intoxicated at the time of entering the establishment.

Issue 2 - What were the Male Patron's signs of intoxication at the time he was asked to leave by the RCMP Officers, and were they sufficient for a finding of intoxication?

The Male Patron entered the VIP room at 10:39 p.m. Prior to entering the room, the Male Patron was not exhibiting signs of intoxication. As noted above under Facts, the bartender observed the Male Patron who can be seen in the video footage playing pool, dancing with his friends, carrying a full drink without spilling, and moving about the bar, appearing to have good motor control and to be steady on his feet.

The two RCMP Officers approached him in the VIP room at 10:42 p.m. The RCMP Officers drew conclusions about the Male Patron within the space of a maximum of two minutes. The RCMP Officers testified that they had to knock on the glass of the VIP room to wake up the Male Patron. The first RCMP Officer who entered along the south wall did not see him when he first passed by and then saw him sitting slouched in the VIP room, apparently asleep.

The second RCMP Officer had considerable experience in assessing an individual's intoxication. He testified as to what he generally looks for to assess an individual's level of intoxication: unsteadiness on their feet, poor motor control, slurred speech, red eyes, droopy eyes, odour of liquor on their breath.

The three RCMP Officers concluded the Male Patron was intoxicated because he was asleep, slouched in his chair, and they had to rouse him. When they roused him, they noted that he was rather stunned, with a droopy look. None of the RCMP Officers detected liquor on his breath, either when they first approached him or anytime after that. None of the RCMP Officers commented that the Male Patron slurred his speech when he responded to their request for him to leave. In the video footage, he appeared to be complying with the demands of the RCMP Officers, to leave his drink behind and to proceed to the exit. When he stood up with his drink in his hand, he was not stumbling and did not spill any of his full drink. He handed the drink to the RCMP Officer when asked.

I find that the RCMP Officer's conclusions about the state of the individual were based primarily on the fact they had to wake him up. I find that the signs noted by the RCMP Officers (glassy or red eyes, droopy eyes) may also be signs of someone who has just been roused from sleep. There was no evidence of over-service by the bar staff. There was no evidence to show that the Male Patron was drinking an alcoholic drink. None of the RCMP Officers smelled the drink. The bartender testified that she did not observe excessive drinking by the group during their time in the establishment.

The RCMP Officers gave evidence about the confrontation that occurred as they were exiting down the ramp and drew further conclusions about the Male Patron's state of intoxication as a result of this confrontation. For the purpose of making a decision on this matter, I do not need to draw any conclusions about what caused the incident resulting in the police handcuffing the Male Patron and arresting him. The police officers submitted that the resulting actions and what they considered to be irrational behaviour of the Male Patron supported their view that he was intoxicated.

My responsibility here is to determine whether or not the licensee permitted an intoxicated person to remain; therefore, my focus is on the behaviour of the individual leading up to the time at which the police officers decided to remove the Male Patron. I have limited my analysis to the period of the Male Patron's entry into the club, the period he was in the establishment and his behaviour and actions during his brief time in the VIP room before the police officers approached him.

There was considerable evidence from both the licensee's staff and the police officers, some of it conflicting, about the nature of the confrontation and exactly what occurred as the Male Patron was walking down the ramp. I find that the additional evidence about the confrontation does not change my conclusion about whether there was a contravention of section 43(2)(b) of the *Act*.

Conclusion on contravention

I have concluded that there were insufficient indicia of intoxication shown by the Male Patron. The signs noted to support intoxication—Male Patron falling asleep in a noisy bar, droopy eyes, and glassy eyes—are equally consistent with signs of tiredness after a day at the beach. Without further and stronger indications of intoxication such as slurred speech, odour of liquor, stumbling or staggering, I am unable to conclude that the Male Patron was intoxicated at the time the RCMP Officers woke him up. He responded positively to their initial requests to leave and stood up, steady on his feet, as he passed the drink to the RCMP Officer and walked without any sign of stumbling down the ramp.

I therefore find that, on a balance of probabilities, the contravention of section 43(2)(b), permitting an intoxicated person to remain, has not been proven.

Due Diligence

Given my findings on the contravention, I do not need to consider the defence of due diligence.

CONCLUSION

I have found the contravention has not been proven on a balance of probabilities.

Original signed by

Nerys Poole
General Manager's Delegate

Date: February 28, 2014

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

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Hugh Trenchard, Branch Advocate