



**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: Bayside Inn & Pub Ltd.
dba Bayside Inn Hotel (Alert Bay)
81 Fir Street
Alert Bay, BC V0N 1A0

Case: EH15-022

For the Licensee: Baldev Manhas

For the Branch: Cristal Scheer

Enforcement Hearing Adjudicator: Dianne Flood

Date of Hearing: September 10, 2015

Date of Decision: October 22, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Bayside Inn & Pub Ltd. (the “licensee”) owns and operates the Bayside Inn Hotel (Alert Bay) at 81 Fir Street, Alert Bay, BC. The licensee holds Liquor Primary Licence number 129367 (the “licence”).

According to the terms of its licence, the licensee may sell liquor from 11 a.m. to 1 a.m., Monday through Saturday, and from 11a.m. to midnight on Sunday.

Mr. Baldev Manhas is the principal and owner of the corporate licensee and appeared as the licensee’s representative at the hearing.

The licensee is alleged to have contravened the Liquor Control and Licensing Act (the “Act”) on Saturday, January 17, 2015, (business day of Friday, January 16, 2015) by

- allowing a person to consume liquor in the licensed establishment beyond the time permitted by the licence, contrary to section 44(3) of Liquor Control And Licensing Regulation, B.C. Reg. 244/2002 (“the Regulation”), and
- the consumption of liquor by an employee while working in the licensed establishment, contrary to Section 42(3) of the Regulation.

The licensee admits that its employee sold liquor to patrons beyond the time permitted by the licence and also that the employee consumed liquor while working in the premises. However, the licensee disputes the finding of a contravention on the basis that its policies, practices, procedures and training establish a defence of due diligence.

The licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication “A Guide for Liquor Licensees in British Columbia” (the “Guide”).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch’s (the “Branch”) allegations and proposed penalty are set out in the Notice of Enforcement Action dated May 8, 2015 (the “NOEA”) (Exhibit 1, tab 1).

The Branch alleges that on January 17, 2015 (business day of January 16, 2015), the licensee contravened section 44(3) of the Regulation by allowing consumption of liquor beyond the time permitted by the licence. The range of penalties for a first contravention of this type is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty (item 26, Schedule 4 of the Regulation). The Branch proposes a monetary penalty of \$7,000.

The Branch also alleges that on the same date the licensee contravened section 42(3) of the Regulation, by allowing the consumption of liquor by an employee while working in the licensed premises. The range of penalties for a first contravention of this type is a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty (item 27, Schedule 4 of the Regulation). The Branch proposes a penalty of a three-day license suspension.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

44 (3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

42 (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment or while working at the site of a residential event catered by the licensee.

ISSUES

1. Did the contraventions occur?
2. If so, has the licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: Branch's Book of Documents, tabs 1 to 10

Exhibit 2: List of excerpts from the CCTV surveillance tapes for January 16, 2015

Exhibit 3: DVDS excerpts from the CCTV surveillance tapes for January 16, 2015

Exhibit 4: Two pages of time sheets for July/August, 2014

WITNESSES

The Branch called an RCMP officer and a regional liquor inspector as witnesses.

Mr. Manhas gave evidence on behalf of the licensee.

CONTRAVENTION

The Licensee accepts the facts set out in the NOEA (Exhibit 1, tab 1) and the evidence given by the Branch's witnesses about the events on January 16 and 17, 2015 and admits it contravened sections 44(3) and 42(3) of the Regulation, as detailed in the NOEA.

Based on that evidence and admission, I find that the licensee contravened sections 44(3) and 42(3) of the Regulation.

DUE DILIGENCE DEFENCE

The licensee is entitled to a defence if it can establish that it was duly diligent in taking reasonable steps to prevent the contravention from occurring.

With respect to the defence of due diligence, the Supreme Court of Canada, *in R. v. Sault Ste. Marie*, (1979) 2 SCR 1299 at page 1331, has said:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application of the defence of due diligence in the context of the Act (see paragraphs 41 to 44 of that decision). As such, the law respecting the defence of due diligence as set out by the Court in that case applies here.

The Court said the defence of due diligence is to be considered in two steps:

1. Directing mind: Whether the employee who committed the contraventions (allowed the after-hours sales and consumed the liquor) 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 was not a directing mind, to be successful in the defence, the two-part test will be:
 - a. whether the licensee had implemented adequate training and other systems to prevent the contraventions (the after-hours sales and consumption of liquor while working), and
 - b. whether the licensee had taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual and depend on the evidence presented. As such, I need to set out the facts of the contraventions, which the licensee has accepted as true, and the evidence presented of the licensee's efforts to prevent the contraventions.

EVIDENCE—BRANCH

The RCMP Officer's Evidence

The call out

The RCMP officer testified that on January 17, 2015 at about 6:09 a.m. the dispatcher called him about a report of a break and enter at an apartment above the licensed premises. He and a second officer attended and found a man in the apartment and a woman who asked for the man to be arrested. She reported the man (who was known to her) had broken into her apartment after she had locked him out due to his erratic

behaviour. The officer said the man smelled of alcohol. The man's identification was checked in the CPIC system and it was determined he was in breach of two conditions – non-contact with the woman and not to consume liquor.

The Arrest

The officers attempted to arrest the man, who resisted. There was a significant struggle to get the man into the police car. The man was resistant, agitated, and had problems walking, which the officer attributed to his apparently high level of intoxication. The man was taken to the station and placed in a cell.

The Victim's statement

The officer returned to the apartment and took a statement from the woman. She said she and the man had been drinking beer and tequila shots at the licensed premises. She said they were served their last drink about 3:30 a.m. and the premises closed at about 4:30 a.m. when they returned to her apartment. The man then got out of hand. The man went outside and she locked him out. He returned and banged on the door. She locked herself into the bathroom and called the RCMP. The man broke in through the front door and then smashed a hole in the bathroom door and threatened her.

Meeting with the Licensee

The officer later attended at the premises and met with the licensee. The licensee told the officer the bartender had signed off on closing at 1:30 a.m. The officer suggested the licensee look at the licensee's CCTV video surveillance of the premises. When the officer returned, the licensee admitted the bartender had kept the premises open late. The licensee was very apologetic and expressed frustration with the employee and the difficulty in getting good employees.

The officer said he told the licensee the incident – violence against a female - was serious and he issued a Police Licensed Premises Check (PLPC) to the licensee. The officer forwarded the PLPC and his police report to the liquor inspector.

Policing concerns

The officer testified that the community of Alert Bay does not have 24 hour policing. Sometimes there are only two officers on the island. When this call came in, one officer was at home, but on duty. The other officer was off duty, at home sleeping and had to be called in.

The officer testified that a policing concern with respect to the late closing of these premises and the failure of the licensee to “self-police” and close on time, is that with limited police resources, the officers don’t patrol after 2:00 a.m. This means the police’s ability to deal with potential impaired drivers after 2:00 a.m. is limited, which is a detriment to the community.

The bartender identified

The officer reviewed certain portions of the CCTV video clips and identified the person shown drinking behind the bar as the bartender who had been employed by the licensee (“the bartender”).

The Regional Liquor Inspector’s Evidence

The liquor inspector who issued the NOEA was not available for the hearing and another liquor inspector, the regional liquor inspector, gave evidence (“the regional liquor inspector”).

The regional liquor inspector testified that he had reviewed the NOEA and the CCTV video referred in it. He also had a discussion with the inspector who had issued the NOEA. The regional liquor inspector agreed with the other inspector’s conclusions and the recommendations set out in the NOEA.

The regional liquor inspector testified that according to the terms of the licence, service of liquor was to cease by 1:00 a.m. and the premises were to be cleared of patrons 30 minutes after that. The only persons permitted to be on the premises after that 30 minute time period were staff.

The CCTV video clips

Several CCTV video clips were reviewed at the hearing and the regional liquor inspector said the video clearly shows the bartender did not clear the premises at 1:30 a.m. as required by the license. The video clearly showed that customers were still in the premises, consuming liquor, until sometime after 5:00 a.m. The video also clearly showed the bartender consuming liquor behind the bar during that time. The regional liquor inspector said the video showed at least 14 instances of consumption of liquor by the bartender. It also showed a large bottle of liquor that the bartender personally drank from was, over the time period, virtually emptied.

The regional liquor inspector testified and the video clips played in the hearing clearly showed, over the time period, the bartender had difficulty standing and difficulty operating a cell phone, the cash register and the debit machine, all while still serving liquor to patrons. The regional liquor inspector said that clearly the bartender's ability to control the premises and/or to assess patrons with respect to their levels of intoxication was impaired. He said that patron and public safety was impaired as a result.

The Guide

The regional liquor inspector reviewed the Guide (Exhibit 1, tab 6), which he said is made available to all licensees. The regional liquor inspector testified that in 2011 the Licensee was given a copy of the Guide and past issues of noise and disturbance were discussed.

From the Guide, the regional liquor inspector highlighted:

At page 11: the role of the licensee to make sure employees follow the liquor laws and the terms and conditions of the license, even when the licensee was not on site.

At page 19: the licensee's obligation to clear the premises 30 minutes after service ending and the prohibition from selling or serving liquor or from using the establishment for any other purpose between closing time and 6:00 a.m.

At page 34: the licensee's responsibility to control the establishment and ensure patrons, staff and other members of the community are not harmed as a result of liquor misuses in the establishment and the need to take reasonable measures to make sure the business is not operating contrary to the public interests. The steps that can be taken by licensees to ensure responsible service, set out on that page, were also reviewed.

At page 40: the licensee's responsibility to prevent over-service and to not allow an intoxicated person to remain on the premises.

At page 41: the prohibition on consumption of liquor by the employees during working hours or after the hours of service permitted by the license.

The regional liquor inspector noted that the hours set for an establishment reflect standards set by the community, the local government and the Branch. One concern in setting closing hours is to avoid neighbours being disturbed by persons leaving at closing.

The regional liquor inspector identified as another concern that a licensee, who knows there is a limited police presence and therefore potentially limited enforcement, does not try to "get away with" operating outside the terms and conditions of the licence.

The Past History

The regional liquor inspector referred to two compliance meetings held with the licensee (Exhibit 1, tab 9):

- On March 2, 2014 as a result of a Police Licensed Premises Check issued for intoxication, refusal to allow entry to a peace officer and failure to clear the premises. The matters discussed at the compliance meeting included those matters and the need to cut-off the sale of liquor from the adjacent beer and wine store by 11:00 p.m. The licensee made a number of commitments to address these matters, including to hold regular staff meetings.
- On November 26, 2007 where matters discussed included section 42(3) (Consumption of liquor by an employee), section 44 (Time and hours of sale). The licensee made a commitment to staff training and to enforcing no drinking by staff when working.

The Recommended Penalties

The regional liquor inspector recommended a \$7,000 penalty for the service after hours and a three-day suspension for the consumption of the liquor by the employee. He noted that both are within the ranges set by the Schedule to the Regulation.

He said the recommended \$7,000 penalty reflects the length of time the premises were open after the legal closing time (1:30 a.m. to 5:00 a.m.) and the number of persons who remained on the premises (six). It also reflects the previous discussions about this at the compliance meetings. He said the amount of the fine also reflects the probability of a connection between the after-hours service and the policing call-out.

The regional liquor inspector said the recommended three-day suspension reflects that the period of time that the employee consumed liquor (from about 9:30 p.m. to about 5:00 a.m.) and his high level of intoxication – which was the highest level of employee intoxication that this inspector, in his experience, had seen.

Also of concern was that the bartender had apparently worked for the licensee, serving liquor, for some time prior to obtaining his SIR certification on January 4, 2015. The bartender's SIR certificate is included as part of Exhibit 1, tab 10. The regional liquor inspector said its date of issue can be determined by the sequence of numbers shown on it.

In response to questions by the licensee, the regional liquor inspector said that once issued, there is no mechanism in place for the Branch to revoke a person's SIR certification. He also said that while a violation ticket may be issued to an employee, whether to do so is in the inspector's discretion. He said violation tickets are used very rarely. He said no violation ticket was issued to the bartender.

EVIDENCE—LICENSEE

Mr. Manhas' Evidence

Mr. Manhas is the principal of the licensee. He testified that he has been a partner in the licence since 1995/96 and became directly involved in operations in about February, 2014. Previous to that, the son of another partner had managed the premises.

Mr. Manhas said that the licensee takes its responsibilities under its licence and its compliance with all government regulations seriously. He said it strives to create a safe environment for staff and customers. He was personally mortified that the contraventions had occurred.

Mr. Manhas had earlier submitted a series of documents to the Branch, which were entered into evidence as tab 10 of Exhibit 1. He referred to several of the documents in his oral evidence.

Mr. Manhas testified that he and his wife live on the premises. They operate a restaurant adjoining the pub and typically work from 8 a.m. until 10:00 p.m., seven days a week. He said he hired employees to work in the pub, because he cannot do both. While he is usually present, he was in Nanaimo on the night the incident occurred.

The events on the night in question

Mr. Manhas testified that the employee who was scheduled to work that evening called in another employee, the bartender, to work for her instead. The first employee went home and the only employee on the premises was the bartender. He referred to the time sheet for January 16, 2015 (Exhibit 1, tab 10) which showed the one employee signing out at 8:30 and the bartender signing in at 7:30 and out at 1:30. No other employees are shown to have been working on that date.

Mr. Manhas said that while the bartender was called in by the other employee without his knowledge that could have happened even if Mr. Manhas had not been away in Nanaimo. Mr. Manhas said there was no protocol that the bartender, a new employee, ought not to be left alone without supervision.

Mr. Manhas admitted the CCTV video clips clearly show the bartender was drinking liquor while working and also that he served liquor to patrons well after the required closing time.

The bartender

Mr. Manhas testified that the bartender had not worked “too long” in the bar, “probably since November or December”. Mr. Manhas had known the bartender prior to that, from construction work the bartender had done for him. He said the bartender was friends with the former bar manager and he had started working under the former bar manager who had trained him. Mr. Manhas had had to let the former bar manager go because he could not afford to pay him.

The bartender did not have his SIR when he started, but Mr. Manhas said that the previous bar manager, who had his SIR, supervised the bartender and the bar manager stayed to close up the premises. Mr. Manhas said that someone with their SIR always needed to be there. He knew the bartender had worked as a bartender without his SIR, and he, Mr. Manhas, had been after the bartender to get his SIR. The bartender had worked without supervision for about one month when this incident happened.

Mr. Manhas testified that until this incident he had no reason to believe that the bartender would act as he did. He had never had any prior issues with the bartender’s work, and no other employees had come to him with any concerns. The bartender always showed up for his shifts on time and had an excellent attendance record. Mr. Manhas stated that the bartender had appeared, by all accounts, a reliable and trustworthy employee “who completed all necessary training”. Mr. Manhas said he thought that due to the bartender’s age of about 60 years, the bartender would be reliable.

Mr. Manhas testified that the bartender was well-known in the community. No one in the community would have expected this behaviour from him. Mr. Manhas said there is no evidence the bartender acted with his permission.

A statement made by the bartender, included at tab 10, alleges different circumstances for that evening. Mr. Manhas testified he soon learned that the bartender's statement was "all a lie". When Mr. Manhas found out what had happened, he terminated the bartender.

The Licensee's Policies

According to Mr. Manhas, the one-page Bayside Inn Policies ("the Policies") (Exhibit 1, tab 10) were prepared by the previous bar manager. The Policies are addressed to Bayside Employees and are stated to be from Management. At the bottom, there is a space for the initials of, presumably, various employees.

Mr. Manhas testified that every employee gets a copy of the Policies on their first day of work. He said the goal of the Policies is to outline the licensee's goals and to ensure employees are aware of them and to ensure their compliance with them.

The Policies open with a statement that employees are required to follow the liquor laws of BC and that what followed was a brief overview of what is required on duty. It touches on the need for identification under the age of 25 years and the types of acceptable identification, the maximum drink serving size, not to allow anyone under the influence of alcohol or drugs to remain on the premises, to call police if someone does not leave when requested to do so, and to document any incidences. Closing hours are set out, with the direction that there be no exceptions to ending liquor sales at 1:00 a.m. Everyone was to be out by 1:30 and if patrons refused to disburse, employees are directed to call the police. Rides are to be provided if necessary and patrons are not allowed to bring in outside liquor.

A September 2014 addition, on the reverse side, adds that anyone who comes in after midnight is to be closely monitored to make sure they are not already intoxicated, no alcohol was to be served to new patrons after 12:30 a.m., only water or non-alcoholic beverages were to be served to these patrons, and to make sure patrons were not entering the bar after 1:00 a.m.

Two copies of the Policies were presented at Exhibit 1, tab 10. One copy had not been initialled by anyone. The other copy appears to have been initialled by the bartender and by the other employee who was working on the night in question, but not by the other three employees' whose initials are shown.

Mr. Manhas testified he presumed that by signing the policy the employees are indicating they have read and fully understand it.

The licensee did not have any policies about termination or other steps that might be taken to ensure employees complied with the licensee's policies.

The Guide

Mr. Manhas said that he had a copy of the Guide in his office but he didn't physically update it because it is over 300 pages and he did not see much difference in the amendments.

Staff Training

Mr. Manhas testified little in-house training is provided by the licensee. He said that, other than the bartender, the staff members have been with the licensee for many years, perhaps 10 to 15 years "off and on". The various members of staff come and go, but typically always return. The full-time regular bartender has worked for the licensee for about six or seven years. Mr. Manhas said that with the staff history of coming and going, the licensee did not do any reference checks to see what training staff had had elsewhere or for any non-compliance issues they might have had.

Mr. Manhas testified that the training of staff is primarily through their SIR certification. He got his own SIR certification in or around 2000. He also said he would also go over the Policies and then get input from older employees.

Mr. Manhas testified that he went over the Guide with new employees. He did not record anywhere that the bartender or any other employee had read the Guide.

Staff meetings

No formal staff meetings are held.

Mr. Manhas said that during “down times” during the day he and the staff would informally talk about issues related to service. These included how to ensure compliance and to avoid anything that would need the RCMP to become involved, such as no over service, identification requirements, maximum drink size and employees not consuming liquor when working. He said that for this reason there was no need to include not consuming liquor while on duty in the Policies, plus he said the SIR program covered that.

Mr. Manhas said the employees are not told they will be terminated if they violate the Policies, because it is common sense that if he were to allow them to stay on, he would be fully responsible for giving them an opportunity to mess up again.

CCTV

Mr. Manhas said the employees were well aware of the CCTV, which was in operation on the night of the contraventions.

Mr. Manhas said he had a university student help him to upload the CCTV video tapes, after being informed of the incident by the RCMP. He had difficulty watching the video, because of what it showed - his employee drinking on duty and also giving free drinks to patrons after the time permitted for closing.

Mr. Manhas said he now uses the CCTV video cameras to monitor who is in the restaurant and what staff are doing. He can use the cameras to check for closing on time. On occasion, he views the camera monitors from off-site.

He stated that the installation of the CCTV video surveillance cameras is evidence of the efforts he has taken to ensure employees are complying with the liquor laws.

Closing time

Mr. Manhas said that the premises are often closed earlier than the permitted time. He submitted two pages of time sheets for July and August, 2015 (Exhibit 4) which he said showed that on only six days in July were the premises open to 1:30 a.m. and on only two days in August were they open to 1:30 a.m.

References

In addition, Mr. Manhas provided two "character references". One, by the local physician, attests to Mr. Manhas' good reputation, hard work ethic, and generous contributions to the local community. The writer also says he has seen Mr. Manhas refuse service to intoxicated persons. The other reference is from an aboriginal justice worker. He describes the many ways Mr. Manhas and his wife actively support the community, especially the less fortunate. He also describes the difficult state of the community generally, and the hard work of Mr. and Mrs. Manhas in their business and in support of the community.

SUBMISSIONS – BRANCH

The Branch noted the licensee had admitted that one of its employees allowed the consumption of liquor beyond the time permitted by the licence and also consumed liquor while working. Additionally, the CCTV video clips are ample evidence of the contraventions. The only issue to be determined is the availability of the defence of due diligence. The Branch submitted that the licensee failed to meet the test for that defence. The Branch also submitted there were aggravating factors that supported the penalties recommended.

The Branch submitted that the licensee can avoid responsibility for a proven contravention only if a defence of due diligence is established. To establish a successful due diligence defence, the licensee must prove it has taken reasonable steps to ensure compliance with the law. Reasonable steps include making sure proper policies are in place, proper training is given, and recurring and effective reminders are made. The Branch says that the licensee failed to prove it had taken the reasonable steps required and so the defence is not available in this case.

The Branch reviewed the oral and documentary evidence presented by the Branch and by the licensee. The Branch said that while the bartender's actions might be characterized as those of a "rogue" employee, the responsibility to comply with the terms of the license, including the Guide, begins and ends with the licensee. Here, the licensee's training, policies and programs were deficient in that they failed to provide appropriate or adequate instructions to staff on these critical matters.

The Branch submitted that the licensee's failure to ensure the bartender had his SIR certification before he began serving liquor to patrons is also illustrative of the licensee's lack of due diligence.

The Branch submitted that a penalty ought to be imposed given the serious consequences of late closing and an intoxicated bartender. The Branch pointed to the length of time the premises were open after closing time, the severe intoxication of the bartender, and the lack of supervision. The Branch suggested there was a clear link between the contraventions and the need to call the RCMP, which took considerable police and court time to deal with, with related impacts on the community. The bartender was so intoxicated, he could not properly request identification from minors, assess the level of patrons' intoxication, or make sure patrons had a safe ride home. In these circumstances, a penalty of \$7,000 and a three-day suspension would be appropriate.

SUBMISSIONS – LICENSEE

Mr. Manhas said the defence of due diligence should apply as the licensee said it did all that could reasonably be expected of it. He says the bartender's actions were the bartender's alone and the licensee ought not be held responsible for what was, in effect, a rogue employee.

Mr. Manhas submitted that he operated under the assumption that trained employees would follow the law. He never encouraged the licensee's employees to break the law. He said no other measures were possible to prevent what happened. He says the premises are now closing much earlier than required.

Mr. Manhas noted that it was he who had provided the CCTV video surveillance tapes to the police, and it was the tapes that provided the clear evidence of the infractions. He stated that the installation of the CCTV video surveillance cameras is evidence of the efforts he has taken to ensure employees are complying with the liquor laws.

Mr. Manhas submitted the amount of the penalties is disproportionate to the contraventions. He said the penalties would place a significant financial burden on the licensee, and are not in the community's best interests. Mr. Manhas said that the community had been going through hardships and difficult times and he has provided support to the community whenever possible. He also says that many in the community expressed shock at the proposed penalties. Mr. Manhas says that even with the economic hardship of running a small pub, he has never condoned or encouraged employees to violate the law or policies for profits, nor has he put profits over the safety of his community.

He also says it is unfair the bartender was not also charged or his SIR certificate revoked. The bartender clearly broke the rules and also stole from the licensee by not charging for drinks, yet nothing happened for him. He said employees need to know there are consequences for them if they do not comply with the liquor laws.

REASONS AND DECISION

Based on all of the evidence, including the CCTV video clips and the Licensee's admissions, I find the licensee contravened sections 44(3) and 42(3) of the Regulation.

I specifically find as facts that on January 17, 2015 (business day of January 16, 2015):

- The licensee's bartender allowed the consumption of liquor by patrons on the premises until about 5:00 a.m., which is well beyond the 1:30 a.m. closing permitted by the licence.
- The bartender consumed a significant amount of liquor while working and he was clearly intoxicated to the extent he could not act in patrons' and the public's best interests.

- Two patrons served by the bartender after the time permitted by the licence were involved in a domestic violence dispute to which the RCMP were called at approximately 6:00 a.m.
- The bartender was the sole employee on the premises that evening.

Having found the contraventions are proven, I will now turn to the defence of due diligence. The law that sets out the tests for a defence of due diligence is set out above. Those two tests are: whether the person who committed the contravention was the directing mind of the licensee and, if not, whether the licensee had in place adequate training and other systems to prevent the contraventions from occurring.

Directing Mind

Based on the evidence presented, I find Mr. Manhas is the directing mind of the licensee. I also find that Mr. Manhas was not present when the contraventions occurred.

I find that bartender, who served the liquor after closing and who consumed the liquor while on duty, was not a directing mind of the licensee and that he acted contrary to the licensee's policies. As such, I find the contravention took place without the licensee's direction or approval and I move to the second part of the test.

Adequate training and other systems to prevent the contravention

The onus is on a licensee to establish on a balance of probabilities that it exercised all reasonable care to prevent the contraventions by establishing adequate training and other systems and by ensuring effective application of that training and other systems. The test is what is reasonable, not what is perfection.

The test in effect recognizes that if a "rogue employee" does something that constitutes a contravention, the licensee will not be held responsible if the licensee took all reasonable care to avoid that from happening, through training and other systems and adequate follow up on that training and systems. To determine if the licensee here did take all reasonable care, I need to examine and assess the evidence of the licensee's training and other systems and of the follow-up on those efforts.

Mr. Manhas' evidence is that there was little in terms of staff training. He relied on the staff's SIR certification and their sign-off on of the licensee's Policies as training. He referred to informal staff meetings as being used to ensure effective application of that training. He relied on the installation of the CCTV surveillance and its production to the RCMP as evidence of his responsibility as a licensee.

I have assessed the totality of the evidence to determine whether it demonstrates all reasonable care was taken to prevent the contraventions and I find the licensee's efforts to be lacking, so that the defence fails. I will further address each of the licensee's submissions.

Serving It Right

In this case, I find that relying on the SIR training of the bartender, without more, is insufficient to meet the test of due diligence.

The bartender had no previous experience in serving liquor. He had only obtained his SIR certification some 10 days or so before the contravention. He was inexperienced and left to manage the premises alone. His age did not equate to knowledge of the liquor laws or, as became apparent, responsible service.

I also find, based on the evidence and the licensee's admissions, the bartender was serving liquor to patrons prior to obtaining his SIR certification and the licensee knew that that was happening. Even though the bartender's service of liquor without his SIR certification allegedly happened for perhaps less than a month, I find this very troubling. It indicates to me that the licensee was prepared "to turn a blind eye" and knowingly failed to meet his obligations as a licensee. I find that by allowing this to happen the licensee may have given the wrong message to the bartender and potentially other employees about the need to comply with the liquor licensing obligations.

The Licensee's Policies:

I find that the licensee's Policies are deficient for the following reasons:

- The Policies do not address employee consumption of liquor while on duty.
- For the matters that are listed, there is no information given to employees about the rationale for the Policies, so that employees might better understand their obligations and responsibilities in relation to the listed matters.
- Employees are not asked or tested to ensure they understand the Policies and/or their need to comply, or the consequences of a failure to comply.
- It appears not all employees have signed off on the Policies.

With respect to the first point, that the Policies do not address employee consumption of liquor while on duty, I do not mean to say all requirements to comply with the Act and Regulation must be set out in an express policy. Some might say, as the licensee submitted, that the requirement not to drink on duty should be known, and is just common sense. However, I note that from the compliance history of this licensee, there is a past history of employees drinking while on duty. In my opinion, that past history establishes a clear need to expressly address this issue with staff. And while I do note that that past history is from 2007, the evidence is that most staff have been with the licensee for 10 years or more. As such, those staff and any new staff need to have been given clear and unambiguous direction on that matter. The Policies fail to do that.

And as noted above the failure to have all employees sign off on the policies, or to test the employees to ensure they understand what they are signing and the consequences of the failure to comply, fall short of what might reasonably be expected of a licensee.

In-house training

With respect to Mr. Manhas' evidence on training, I find there to be discrepancies. He said new employees are given the Guide to read, but he also said there have been no new employees, except the bartender. He said the bartender's training was conducted by the former bar manager, but there is no evidence of what that training consisted of or how or if the bartender was tested on his understanding of what the liquor laws required of him.

In conclusion, I accept Mr. Manhas' evidence that little in-house training was done and I find that what little training was done was insufficient.

On-going follow-up

The only evidence of any on-going follow up to ensure employees comply with the Policies was the informal conversations during "down times" about measures taken in order to avoid contraventions. Being informal, there was no record of the "meetings", so what staff was directed to do, or how to do it, is unknown. There is no evidence that any of the matters that are the subject of this hearing were ever raised with the bartender.

CCTV

There is no evidence that at the time of the contraventions the CCTV was used to monitor employees conduct and compliance with the licensee's obligations. The licensee's use of the CCTV to monitor employees was only undertaken after the incident and does not support the claim for a due diligence defence. Further, the licensee's production of the CCTV videotapes after the incident was simply compliance with the licensee's obligations.

As noted above and based on all of the foregoing, I find that the licensee's Policies and training and the very limited on-going follow-up fail to meet this second part of the test for a due diligence defence and the claim for the defence of due diligence fails.

Having concluded that the defence of due diligence fails, I find the licensee has contravened section 44(3) and 42(3) of the Regulation and I turn now to the issue of penalty.

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 NOEA. 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.

There is no record of a proven contravention of the same types for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find these contraventions to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 26, Schedule 4 of the Regulation provides the range of penalties for a first contravention for allowing liquor consumption after hours is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

Item 27, Schedule 4 of the Regulation provides the range of penalties for a first contravention for consumption of liquor by an employee while working is a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty.

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

I find that a penalty is warranted here. 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.

The licensee's past compliance history indicates issues with respect to late closing and employee drinking while working. The licensee made commitments for staff training, to enforce no drinking by staff while on duty and to staff meetings. I find, based on the evidence, the licensee failed to meet these commitments in any meaningful way.

The contraventions are serious. Both the police officer and the regional liquor inspector referred to the pressure that late closing puts on the limited police resources in the community and the impact on the community as a result. The police officer noted the serious issue of impaired drivers and the inability to police for that after a late bar closing, putting the public at risk.

The regional inspector noted that closing hours reflect community and local government expectations. He also noted a concern with licensees possibly taking advantage when resources to monitor closing are limited.

The consumption of liquor by an employee while working is also serious. If an employee consumes liquor while on duty, the employee's ability to assess patrons for intoxication and to ensure minors are not served liquor is impaired. An intoxicated employee may be unable to ensure patrons get home safely at the end of the night. These are serious responsibilities. This was the worst case of employee impairment the regional liquor inspector had seen. The evidence is clear the bartender had no ability to make any of the assessments required of him.

Additionally, the officer's evidence is that the man who was arrested by the RCMP was considered to be highly intoxicated. I find that it is likely the man was over-served by the bartender. I also find that the domestic violence call to police is likely closely connected to the late closing and over service.

The bartender was new and inexperienced in the service of liquor. He was left alone to manage and close the premises without any oversight. He had been allowed to serve liquor for a period time without having his SIR certification. This is the wrong message to give to a new, inexperienced employee about a licensee's need for and expectations of compliance with its legal obligations.

Having found that a penalty is warranted, I am required to impose at least the minimum for each contravention. For the reasons above, these contraventions are serious and merit more than the minimum penalty.

I find that with respect to the contravention of Section 44(3) of the Regulation (allow consumption after closing hours), I find a penalty of \$6,000 to be appropriate.

I find that with respect to the contravention of Section 42(3) of the Regulation (consume liquor while working), I find a penalty of a two day suspension to be appropriate.

ORDER

Section 44(3)

Pursuant to section 20(2) of the Act, I order that the licensee pay a monetary penalty in the sum of \$6,000 to the general manager of the Liquor Control and Licensing Branch on or before November 20, 2015.

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.

Section 42(3)

Pursuant to section 20(2) of the Act, I order a suspension of the Licence for a period of two (2) days to commence at the close of business on Thursday, November 19, 2015 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the local police from the close of business on Thursday, November 19, 2015 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 police officer, and must remain in place during the period of suspension.

Original signed by

Dianne Flood
General Manager's Delegate

Date: October 22, 2015

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Stephen Hitchcock, Regional Manager

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