



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: Strathcona Hotel of Victoria Ltd.
dba Strathcona Hotel
919 Douglas Street
Victoria, BC V8W 2C2

Case: EH15-106

For the Licensee: Greg Harney, Legal Counsel
Shields Harney

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: May 18 and 19, 2016

Date of Decision: June 21, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Strathcona Hotel of Victoria Ltd. (“the Licensee”) owns the Strathcona Hotel at 919 Douglas Street, Victoria, B.C. (“the licensed premises”). The Licensee holds Liquor Primary Licence No. 136243 (the “licence”).

According to the terms of the licence, liquor may be sold from 11:00 a.m. to 2:00 a.m. Monday through Sunday. 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”).

The Licensee is alleged to have contravened those terms and conditions on December 5, 2015 (business day of Friday, December 4, 2015), by permitting an intoxicated person to remain in the premises.

Mr. Harney, legal counsel, appeared at the hearing and represented the Licensee. Mr. Grant Olson, a principal of the Licensee, attended the hearing and gave evidence.

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 December 15, 2015 (the “NOEA”) (Tab 1, Exhibit 1).

The Branch alleges that the Licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (“the Act”) by permitting an intoxicated person to remain in the licensed premises.

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 11, Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (“the Regulation)). The Branch proposes a \$5,000 penalty in this case.

The Licensee disputes that an intoxicated person was allowed to remain in the premises. The Licensee says there is no or insufficient evidence the person was in fact intoxicated and there is no evidence he was permitted to remain in the premises. In the alternative, the Licensee claims the defence of due diligence.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Drunkenness

- 43 (2) A licensee or the licensee's employee must not permit
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the 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: The Branch's Book of Documents, Tabs 1 to 22
- Exhibit 2: A CD copy of excerpts from the Licensee's video recording from the night of December 4, 2015
- Exhibit 3: The Licensee's Book of Documents, Tabs 1 to 24
- Exhibit 4: A list of the management and staff working in the Clubhouse area of the premises on the night of December 4, 2015

EVIDENCE – BRANCH

The Branch Advocate called one witnesses: a liquor inspector.

A second inspector was away on vacation. The Licensee took issue with that inspector being called to give evidence by telephone as that inspector did not have copies of the Exhibits available to him. The Branch declined to call that inspector.

The Liquor Inspector

The Liquor Inspector testified she has been a liquor inspector since 2006. As a liquor inspector, her responsibilities include ensuring compliance by licensees with the Act and Regulation and conducting inspections to do that. Her geographic area of responsibility is the Victoria region and includes Food Primary licenses, Liquor Primary licenses, breweries, distilleries, wineries, and special occasion licenses. She has conducted at least 3,000 inspections, with about 1,000 of those being of Liquor Primary licenses.

The Inspector testified that she has taken training on the signs of intoxication, including the RCMP five day Roadside Screening Program and an internal Branch program lead by a toxicologist. She stated that the usual cause of intoxication is by drinking.

The Inspector listed the following signs of intoxication: slurred speech, bloodshot eyes, impaired gross motor skills (difficulty walking, staggering), impaired fine motor skills, irrational thoughts when speaking, sleepiness, sleeping, and vomiting.

In her opinion, a person observed sleeping meant the person could be intoxicated and on a scale of intoxication, a person sleeping indicated they were highly intoxicated. In her experience, she had rarely seen people sleeping in a licensed premise.

The Inspector identified an excerpt from the Branch Compliance and Enforcement Manual, Section 4: Intoxicated Patrons (Tab 21, Exhibit 1). She said in making her observations on inspections she considered the Signs of Intoxication set out at page 7 of that excerpt. And when making observations she considered the Elements and Evidence of permitting an intoxicated person to remain, at page 13 of that excerpt. She specifically referenced the fourth bullet, which included "sleepy, sleeping".

The Inspector identified Tab 16, the SIR program manual. She said all serving staff are required to have their SIR certificate.

The Inspector said she issued the NOEA, (Tab 1, Exhibit 1) and the Contravention Notice (Tab 2, Exhibit 1).

The Inspector identified the licence (Tab 3, Exhibit 1) and noted that it was specifically subject to the Terms and Conditions (Tab 17, Exhibit 1). She testified that the Licensee was expected to be aware of the Terms and Conditions and to comply with them. The Inspector identified page 40 of the Terms and Conditions, regarding over-service and intoxication.

The Inspector also identified the Final Interview Sheet that the Licensee had signed off on, on May 14, 2013 (Tab 12, Exhibit 1) and the floor plan for the premises (Tab 4, Exhibit 1).

According to the Inspector, on the night in question, she and another inspector were out conducting routine inspections. They entered these premises at about 1:45 a.m., through the main entrance on Courtenay Street.

She described the premises as quite busy at the time. She said the inspectors went through the premises and then up to the second floor level in the area of the Clubhouse. It took two to three minutes to get to the mezzanine floor, which offered a good observation point for the establishment. Within a minute of arriving at the mezzanine floor, she noticed a gentlemen sitting on a bar stool, overlooking the dance floor.

The Inspector marked the floor plan (Tab 4, Exhibit 1) to show the location where she and the other inspector were, using an "A", and the location of the patron, using a "B".

The Inspector said the observed patron's head was bobbing and he was starting to go to sleep. She observed a lot of people around him. She testified that she saw security in the area on a number of occasions and a busser cleared the adjacent table, only two feet away. The Inspector testified that she saw another patron wake up the sleeping patron and the patron then going back to sleep.

The Inspector testified that she watched the patron for about 25 minutes. She said that at times his head bobbed, but the majority of the time he was sleeping. She said in her notes she recorded that staff were in the vicinity of the patron five times, walking by, but when she later watched the video (Exhibit 2) she saw the staff members were in the vicinity of the patron on 12 occasions. At some points, she said, the staff were directly in

front of the patron, sometimes they were facing him, other times they were facing a different direction.

The Inspector said the lighting was dim and the patron was about 20 to 25 feet away but she could clearly see the patron and the staff members. She thought the area where the patron was sitting was on a slight elevation in relation to the dance floor. In her opinion, the staff had an unobstructed view of the patron.

The Inspector testified that about 2:11 a.m., the bar was closing and the staff were getting everyone out. A security person came up to the patron, woke him up and escorted him out to the Douglas Street exit, marked with an "X" on the floor plan (Tab 4, Exhibit 1). She said the inspectors went down the stairs and followed the patron out. She said the patron did not resist the security staff. The Inspector said that she was about two feet behind the patron at the exit doorway. She described him as having one foot in, one foot out, in a sideways attempt to get out the door. She said he was facing her and she saw him clearly and he had bloodshot eyes.

The Inspector testified that about two minutes later she saw the patron outside on the sidewalk, staggering and then leaning up against a lamppost to steady himself. She said he was talking irrationally and incoherently and was argumentative. The Inspector said another person calmed the patron down. She watched the patron until about 2:25 a.m. and said from her observations his gross motor skills were impaired. She described him as staggering, leaning against the post, head bobbing, and argumentative. She said he was slurring his words. She recalled he was asking for a cigarette. He was loud, louder than the general noise outside and the people he was speaking to.

The Inspector went inside and advised a security person, later identified as the Security Manager, there was an issue with the patron – how he was removed and not properly cared for on the street. The Security Manager then went outside and came back and said the people who had befriended the patron said they would take care of him.

The Inspector testified she formed an opinion the patron was intoxicated when she saw him inside and his head was bobbing and he fell asleep, and when she later saw his bloodshot eyes on the way out and the way he staggered and was belligerent outside.

The Inspector identified the other inspector's notes (Tabs 7 and 8, Exhibit 1) and her own notes (Tab 9, Exhibit 1). She said Tab 10, Exhibit 1 was the running record used on the computer to prepare the NOEA. She said the note made on December 7 about the security staff being busy at the Distrik, another licensed establishment in the same building, was that the security from these premises went to help out in those premises.

The Inspector identified her "grid" of observations from the video clips the Licensee provided from the video cameras, recorded on the night in question (at the bottom of Tab 10, Exhibit 1). She said one video clip was from inside the premises from 1:00 to after 2:11, recorded from the location she marked with a "C" on the floor plan (Tab 4, Exhibit 1). Two video clips were from the outside of the premises, showing when the patron was on the street outside. The two outside video clips were taken from two different cameras – one near the X on the floor plan and one further along Douglas, in front of the Licensee's Retail Store.

The Inspector testified that the Branch has no evidence from either her observations or from the video clips that the patron was served any liquor that night.

The Inspector referred to her grid and reviewed the video clips and identified several times when the patron's head was bobbing and when he appeared to be sleeping. She identified one instance when he almost fell off the stool. She also identified several occurrences when different members of the security staff (identified by clearly marked jackets and shirts) were in the vicinity of the patron. She also identified the still image photographs (Tab 11, Exhibit 1) and said they corresponded, to an extent, with her "grid".

The Inspector also identified on the video clip the patron appearing to enter the premises and climb up on the bar stool. This happened before she arrived.

The Inspector reviewed the video clips taken outside and says they show the patron staggering, using the lamppost for support, and interacting with other people. She re-iterated that in that interaction he was initially incoherent, disorientated, belligerent, and louder than the others. His speech was slurred. In her opinion, he clearly did not

know the group of people he was interacting with, but they were able to calm him down.

The Inspector said that the patron's behaviour changed during the time he was outside. She said he changed from apparently intoxicated to a more normal behaviour and better control of his motor skills. The Inspector said the patron eventually left in a taxi at about 2:55 a.m.

The Inspector stated that her reason for pursuing enforcement action was her serious concern for public safety. She thought the monetary penalty recommended would ensure the Licensee gets the message and was selected because a strong message was needed.

The Inspector agreed the floor of the mezzanine from which she was viewing the premises was about seven feet above the dance floor. She said there were a few patrons in the mezzanine and the DJ booth. She did not know at the time that the camera, from which the video clip was later provided, was located there. She agreed the mezzanine gave an advantageous viewpoint of the lower level.

The Inspector agreed that the railing at which the patron was seated overlooked the dance floor and was raised a few feet from the dance floor. She agreed that if a person was walking along the dance floor, they would have to look up at the railing. She agreed the railing had a shelf for patrons to put their drinks, but could not recall if there was a cap on the shelf, but agreed that that would make sense.

The Inspector agreed the patron was on a bar stool and during the time she watched him he did not fall off the stool. She did not see the patron served liquor and did not know for a certainty that he was intoxicated by liquor. She confirmed she first saw the patron between 1:47 and 1:49 a.m.

The Inspector agreed she had a mandate to protect the public. She agreed she had watched the apparently intoxicated patron on a bar stool for about one half hour and did not approach the Licensee's staff about the patron until after he had left the premises. She said while she was watching the patron inside she was trying to

determine if he was intoxicated. She did not make any attempt to wake him up or to talk to him or to do any sobriety tests. The other inspector also did not take any of those steps.

When asked whether it was possible none of the security staff saw the patron, the Inspector disagreed. She agreed she could not positively say the staff saw the patron. She did say she did not see any security staff approach the patron prior to 2:11 a.m. She agreed no staff approached the patron, interacted with him and then allowed him to remain on the premises.

The Inspector said she herself did not permit the patron to remain on the premises by not going to security and telling them about the patron. She said that was not her role.

The Inspector agreed there may be circumstances other than intoxication that might cause a person to jerk their head back. She agreed the patron did not sway from side to side on the bar stool and that the patron sat up a number of times. She confirmed the patron did not fall off of the bar stool.

The Inspector agreed the dance floor was busy. She agreed that the lighting was "nightclub" lighting – dim with flashing lights. She agreed the video from the inside camera made the premises look brighter than it was. She agreed the patron had dark hair and a dark complexion and was wearing a grey sweater or hoodie.

She agreed the patron from time to time leaned on his arms and from time to time slumped over.

The Inspector confirmed the location where the patron was seated as being next to the dance floor, along a rail and not at the bar. She also confirmed there were pillars between the patron and the bar.

The Inspector re-iterated that when security escorted him to the door, she followed the patron out. She said that he exited the door in a sideways motion and she could see his eyes were blood shot. The Inspector agreed there could be other causes for bloodshot eyes, including tiredness.

The Inspector said that when the patron exited, he went over to a light pole and did not fall over.

The Inspector confirmed neither she nor the other inspector had any conversation with the patron. She did not see the patron served alcohol. She did not know if he had consumed alcohol at any of the Licensee's other premises. The Inspector only saw the security staff and the person she assumed was a busser. She did not see any servers.

She confirmed that when she spoke to the Security Manager about 10 to 15 minutes later, he assured her that the patron was being taken care of by others.

The Inspector confirmed that the video showed a number of staff wearing jackets that identified them as security. In her opinion, there was a sufficient number of security staff on the premises that night. When the bar closed, the security staff were active in moving the patrons to the exit.

The Inspector did not see the patron vomit. She did not know what the patron sounded like ordinarily but said he spoke in aloud voice when initially exiting the premises. She said he later calmed down when the other patrons took responsibility for him.

The Inspector confirmed her conversation with the Licensee and that the Licensee was well aware of his responsibility to not allow intoxicated patrons to remain on the premises.

She agreed that the indices of intoxication as set out at 14.1.2 of the Compliance and Enforcement Manual (Tab 21, Exhibit 1) were subjective. She confirmed she did not see the patron walking other than entering and exiting the premises. She did not see the patron passed out. She confirmed that when outside the premises, the patron was able to take his cell phone from his pocket and not drop it. She confirmed the video showed the patron going up and down the curb multiple times without falling.

EVIDENCE – LICENSEE

The Licensee's counsel called Grant Olson, a principle of the Licensee, as the Licensee's only witness. For ease of reference, Mr. Olson's evidence is referred to as having been given by the Licensee.

The Licensee reviewed the history of the establishment as a family business originally owned and operated by his grandfather, father and uncle, and now owned by him and his brothers. His involvement in the business dated from a teenager, through university and, after some years away, as the general manager since about 1990. In the years he was away from the business, he studied and worked as a hotel consultant.

The Licensee reviewed the licenses held for the building, with "just short of 1600" licensed seats. He also gave an overview of the management and staffing structure. He advised the Licensee took the liquor licensing laws very seriously.

The Licensee said on a busy night usually 11 security were on staff for the entire building. He said each of the premises would have a security staff member on each door and one security member would be roaming. The security staff were identified as security by clear logos on their shirts and jackets. He also said the security staff, managers and the front desk all carry walkie-talkies so they can be in contact with each other if the need arises. He said the Security Manager has been working for the Licensee for about eight years.

The Licensee described the lighting in the premises as "nightclub lighting" – with hazers and moving lights. He said the clips from the video camera would make it look brighter in the premises than it actually would have been. As an example, he said when the much brighter house lights came on at closing at 2:00, that brighter lighting does not show as significantly different on the video.

The Licensee said that with the dance floor busy, it would be possible for security to pass through the area and not see the patron who was seated along side but up from the dance floor and wearing dark clothes. Also, he thought the railing along that area, between the patron and the dance floor also would make it more difficult to see the patron from the dance floor.

The Licensee said the bar stool the patron was seated on was a swivel type of stool, about 30 inches high. He said the area in which the patron was seated is about 2 feet above the dance floor, so when seated the patron would have been about 5 feet above the dance floor. Two large pillars were located between this area and the bar behind it. He said the video showed the bar was busy, with a number of other patrons standing between the bar and this patron.

The Licensee said when he heard about the incident he was upset and “shattered”. He said the Licensee has a zero tolerance policy and in the past they have terminated staff for failing to comply. He testified that staff are reminded of the zero tolerance policy every shift.

He said he thought that with the Licensee’s policy of strict compliance for staff, he would be terminating a staff member for the incident. He viewed the video to identify which staff was responsible.

The Licensee said that on viewing the video, he could not see that any staff actually saw the patron and ignored him. Instead, what he saw was a “bad coincidence”, where the staff just did not look at and see the patron. Staff was looking around but their attention was on other patrons and on areas in premises. On the one occasion where the staff member did look directly at the patron, the patron was sitting up. He said he realized all he could do was “give staff hell” for not seeing the patron.

He said he also interviewed all the staff shown on the video and they all explained they just did not see the patron. He believed the staff when they said that. He described the security staff as an excellent team, diligent and very serious about their responsibilities.

The Licensee said that he has a highlighted sense of responsibility and enhanced due diligence for intoxicated patrons due to an unfortunate incident some years ago. In that case, a sleeping patron was woken up and asked to leave. The patron returned with a gun and shot a staff member. This was a terrible incident for the Licensee and its staff. So, he said, problems associated with sleeping patrons are high on the Licensee's radar.

In another case, he said the Branch proceeded to a hearing, but the hearing was not concluded and the allegation withdrawn, but it still made the Licensee pay attention to the issue.

The Licensee said they have a system in place to avoid intoxicated patrons on the premises and in his opinion that system is effective. He said they have a full-time, trained professional human resources person, responsible for training and on-going support. The former HR person was in place for about ten years, and the new person for about a year. He said the HR staff had experience in liquor service.

The Licensee reviewed their hiring requirements, which included a requirement for SIR certificates for all servers and a Justice Institute Basic Security Training license for all security staff. He described the Licensee's training and orientation as robust and said it included sign offs by staff and quizzes. He said the Licensee was diligent in its training and insisted on the training being completed.

He described their orientation program as taking several days and said all staff, including non-serving staff are required to sign off that they know the signs of intoxication and the rules for liquor handling.

The Licensee reviewed Exhibit 3 which included job descriptions, hiring and training materials, examples of employee contracts and sign-offs, and minutes from security staff meetings.

- Tab 1 is the Doorman job description. The job specifications expressly include to prevent "overly intoxicated" patrons from entering the premises. He said every security staff person is required to sign off on the responsibilities as indicated on the form.

- Tab 2 is a copy of the employee contract, expressly acknowledging the knowledge of the SIR program and understanding of the Terms and Conditions, with express responsibilities including to inform security and/or management if an overly intoxicated person is seen on the premises and that an intoxicated person is to be escorted from the premises. Employees expressly acknowledge that failure to meet responsibilities may result in termination of employment. He said every single employee is given and made to read the Liquor Primary and Food Primary Guides and are required to sign off on the contract as having done that. The Licensee also said the staff are quizzed on the Terms and Conditions.
- Tab 3 is a commitment by staff for a number of things, including not to permit intoxicated persons to enter. He said every staff must sign off.
- Tab 4 is a Security and Rules of Conduct Form for door/security staff that includes refusing entrance to intoxicated persons. He said every security staff must sign off.
- Tab 5 is a copy of the initial interview form for staff. It is used for screening purposes, to get a sense of the character and judgment of potential employees, and includes a test for knowledge/ability to identify signs of intoxication.
- Tab 6 is a quiz on the SIR.
- Tab 7 is a checklist for due diligence requirements. It is an internal document. Staff are required to read and sign off on the entire house policy manual. Among the duties and responsibilities it refers to are for staff:
 - to communicate with each other to avoid over-service.
 - to deny entry and remove patrons as required,
 - to ensure patrons get home safely.It also refers to having a designated driver program. The Licensee confirmed they have a program whereby taxi vouchers may be issued to patrons. The Licensee said they have a large account for this. Also if a patron looks to be driving when they should not be, the Licensee said they will call the police.
- Tab 8 is a quiz on the signs of intoxication all staff are required to take.
- Tab 9 is the server training and information manual, which includes a section on the SIR program, signs of intoxication and "how to cut a patron off". The designated drive and taxi voucher programs are explained under the heading of "Best Practises in Ensuring Our Patrons Arrive Home Safe".

- Tabs 10 to 15 and 17, 19, 20, 22 are agendas for security staff meetings. The Licensee said they hold these meetings every three months. Attendance is mandatory and staff are paid to attend. He said at every meeting they review with security staff the rules about preventing intoxication from occurring and not admitting intoxicated persons and minors. He referred to the various meeting agendas and the specific mention in the agendas of these issues, including watching for pre-drinking by young people. He said due diligence in preventing intoxicated patrons is a crucial issue not just for licensing but also for insurance reasons.
- Other tabs had copies of signed employee forms.

The Licensee confirmed that all of the documents presented in Exhibit 3 had been in place prior to the night in question. Some had been updated over the years.

The Licensee said that on reviewing the video of the night in question he could see the head of security spot the patron when the house lights went on and draw another security staff person over with him to speak to the patron. He said on the video of the patron leaving he did not see any signs of intoxication like staggering. He said their policy is if a patron is found passed out or "really intoxicated" they would not let a patron just walk out on to the street. The Licensee said the door staff out on the street will assess the person and if they have friends who are willing to take care of them. They might take a person to a cab, and if the person is really belligerent or violent, they will call the police. If no one will take care of a person, the door staff will bring them back in, give them water, assess and communicate with them whether they can get home with a cab or if the person "becomes their responsibility".

The Licensee agreed that at least three and possible four different security staff members walked by, in front or behind the patron, but said the video is clear the staff members just did not look in the direction of the patron. The Licensee reiterated that the video shows that the one time a staff member looked directly at the patron, the patron was sitting up and looked alert. The Licensee said the person removing dishes from a nearby table would have been a busser, and he does not think the busser would have noticed the patron. The Licensee said that from the video it is clear that at the first sign of staff seeing the patron, the staff took appropriate steps to get him up and out, and at that time, the patron did not exhibit signs of intoxication.

The Licensee could not explain why no server had approached the patron or why no server appeared in the area covered by the video camera. He said there was no excuse for the lack of service, even at that time of night. He said that last call is at 1:30 a.m., so it's ok to serve until 2:00 a.m., and the premises have to be cleared by 2:30 a.m. He said wait staff are instructed to approach new patrons and ask if the person wants a drink, even at last call.

The Licensee agreed it was almost incredible that with all the security staff, trained to be observant and to watch for signs of intoxication, that none of them saw the patron. The Licensee agreed that at least some of the various training and other orientation documents referred to "overly intoxicated" persons, but he said in his opinion, staff understood that to mean "intoxicated". He did not believe staff would be confused about their responsibility due to the qualifier of "overly". He thought "overly" just meant to look for more than one sign of intoxication. He also thought the word "overly" might have been imported from the concept of "over-service".

The Licensee agreed that sleeping was a sign of intoxication but said that at the time of night it might simply be a sign of tiredness, for example, if someone had worked earlier in the day. He said it was possible for a person to be sleepy but not intoxicated.

The Licensee said the staff are trained to assess intoxication and make thousands of assessments every year. He said that if staff saw a person sleeping, they would absolutely not serve them.

SUBMISSIONS – BRANCH

The Branch Advocate submits that the Licensee knew or ought to have known that an intoxicated person was allowed to remain in the premises.

The Branch Advocate says the Inspector's evidence and the video of the patron inside the premises are sufficient to show the patron was intoxicated. The video from outside the premises supports such a finding and is on its own sufficient to make that finding.

The Branch Advocate says the Licensee's staff either knew or ought to have known the patron was intoxicated while in the premises. The failure to see and check on the patron cannot excuse the staff from their responsibility, especially when they are trained to be on the look out for intoxicated persons.

He says the Licensee's evidence of what the staff did or did not see is hearsay. The Branch Advocate says the Licensee's belief in the staff's assertion they did not see the patron is not reasonable. He says the Licensee's known policy of termination means the staff had reason to misrepresent the truth. He also says the failure to call the security staff and have them testify should support a finding of an adverse inference.

The Branch Advocate says the Licensee failed to meet the standards required for a defence of due diligence. He says the evidence presented of staff training and follow up falls short of the standard to be met. He says the failure of up to four staff to make a determination of intoxication is on its face evidence of the lack of training. He says this is not a situation of a rogue employee not following instructions, but rather a case of where staff either did not understand their obligation or all of whom failed to carry out their responsibility.

The Branch Advocate also suggests that the use of the term "overly intoxicated" in the training materials may have confused staff about their responsibilities and formed a flawed foundation for the training that was given. Without an opportunity to hear evidence from the staff on this, the Branch Advocate suggests this is impossible to determine.

SUBMISSIONS – LICENSEE

The Licensee's counsel says the evidence does not support a finding the patron was intoxicated, or if intoxicated, that staff permitted the patron to remain in the premises. The Licensee's counsel also says the Licensee has met the test of due diligence.

The Licensee's counsel says that the patron did not exhibit signs of intoxication while in the premises. He says the patron did not sway on or fall off the bar stool, despite appearing to sleep and his head bobbing. He submits that while sleeping and head bobbing may be signs of intoxication, they can also be signs of tiredness, especially late

at night. The Licensee's counsel disputes whether the Inspector could have seen whether the patron had bloodshot eyes, and also says bloodshot eyes may also simply be a sign of tiredness. The Licensee's counsel says the video does not show the patron to be stumbling or having difficulty navigating when leaving.

The Licensee's counsel also says the patron's agitated behaviour outside the premises may have been of other causes, and suggests it may have been caused because he could not get a cab. The Licensee's counsel says in any event, that that behaviour was after the patron left the premises and was not seen by staff. Once the staff did see him sleeping inside, counsel says the staff took reasonable steps to remove the patron. He submits that no other steps were required, because staff did not assess him as intoxicated while in or when leaving the premises.

The Licensee's counsel says that in any event, the Licensee did not permit the patron to remain, because staff did not see the patron and make any assessment of him, intoxicated or not. While he says the failure to see the patron seems incredulous, the video is clear evidence that that is what in fact occurred. The Licensee's counsel says the only time a staff member looked directly at the patron, his head was up and he seemed alert and the patron was not drinking, so there was no reason for security to take any action. The Licensee's counsel says "permitted" requires actual knowledge of the intoxicated person and there was not actual knowledge here.

The Licensee's counsel reiterates there was no evidence the patron was served liquor while on the premises.

The Licensee's counsel also reiterates the Licensee's evidence that he was prepared to terminate the employee(s) responsible, but the video showed no employee was responsible for any contravention.

The Licensee's counsel says no adverse inference should be drawn by the Licensee not calling the security staff to testify. He says the Licensee is credible and there was no point in incurring the substantial time and cost of having a number of staff merely testify they saw nothing.

The Licensee's counsel says the standard for due diligence is not perfection. The word "overly" is used in some of the training materials, but he says no confusion arose. He submits the training and other documents are permeated with the signs of intoxication. He says the staff clearly know a sleeping patron is to be investigated, they just did not see this patron sleeping. The Licensee's counsel notes that the subject of removing sleeping patrons had been raised with security staff numerous times, and as recently as September, 2015. And with its unfortunate past history, he says sleeping patrons are clearly an issue with the Licensee.

The Licensee's counsel says clearly the Licensee is unhappy the incident occurred. He submits the Licensee does not want intoxicated persons in the premises under any circumstances, as they are nothing but a problem.

The Licensee's counsel notes that on the evening in question there was a full staff complement on duty and that they were clearly patrolling the premises. Counsel submits that it is not plausible that with all those patrols being carried out, that the security would, if they saw the patron, simply ignore him. He also says the bartenders could not see the patron because of the posts and the other patrons in the area.

In support of his submission, the Licensee's counsel referred to three cases on the sufficiency of the evidence:

- Palomino's Rock'n Horse Cabaret Ltd., December 1, 2005
- Bastion Inn Ltd., May 2, 2006
- City Centre Manor Holdings Ltd., October 24, 2011

and to one case on due diligence:

- 352382 British Columbia ("Boston Pizza"), July 8, 2015

REASONS AND DECISION

Contravention

The Licensee is alleged to have permitted an intoxicated person to remain on the premises. There are two elements to the contravention:

- that a person was intoxicated in the premises, and
- that the Licensee permitted the intoxicated person to remain in the premises.

Both elements need to be proven for a contravention to be found.

With respect to both elements, I have considered the oral testimony of the Inspector and the Licensee. I have viewed the video (Exhibit 2) and have considered the documents filed as Exhibit 1, especially the still images taken from the video (Tab 11, Exhibit 1).

I accept the evidence of the Inspector and the Licensee that the premises were dark with “nightclub lighting”. I accept the Inspector’s and the Licensee’s evidence that the location of the inside video camera and the resulting video provided a very good view of that part of the premises where the patron was located. I also accept the Licensee’s evidence that the video camera is very good and that the resulting video appears much brighter than it would have been in the premises that night, especially as that is corroborated by the lack of a substantial change in the brightness when the house lights went up after the bar stopped serving.

I accept the evidence of the Inspector, and as confirmed by the video, that:

- the dance floor was busy and people were moving about,
- the patron was seated on a bar stool just off the dance floor and on several occasions his head bobbed and he put his head down on his arms and appeared to be sleeping,
- on several occasions, security staff were in the close vicinity of the patron, passing both in front of and behind him,
- the patron was not served liquor during this time,
- no staff approached the patron and he was not asked to leave the premises until after the house lights went up after the bar stopped serving.

I also accept the Licensee’s evidence the bar stool on which the patron was seated swivels, and his submissions as confirmed by the video that

- the patron did not appear to be having difficulty staying seated on the bar stool,
- the patron did not appear to stagger when leaving the premises.

I also accept the Inspector's evidence, confirmed by the outside video camera, that outside the premises the patron appears to be disoriented and staggering. I also accept the Inspector's testimony that while outside the premises the patron was loud and it was hard to understand what he was saying.

As noted above, I accept the Inspector's evidence that she observed security and other staff in the vicinity of the patron. I also accept that it was reasonable for the Inspector, from her physical viewpoint, to conclude that the staff saw the patron sleeping and his head bobbing and did nothing about him. Based on that, and her observations of the patron both inside and outside the premises, I conclude it was reasonable for the Inspector to issue the Contravention Notice.

However, I also accept the Licensee's submission that the Inspector's view of the patron was from a different angle or viewpoint than that of the various staff who were, on several occasions, in the vicinity of the patron.

I find the Inspector would not have been able to tell with any real certainty whether the staff actually saw the patron. I looked carefully at the video, which I have found is brighter than the actual lighting had been in the premises at the time, to determine if the staff in fact saw the patron and disregarded him, despite signs of intoxication.

I find the quality of the video to be very good and that I am able, without hearing directly from staff who appear in it, to interpret the video. I also accept the Licensee's evidence as being highly credible. Based on my view of the video, I accept it was reasonable for the Licensee to accept and believe his staff's statements that they did not see the patron. For this reason, I am not prepared to draw any adverse inference respecting the Licensee's decision not to call staff members to give evidence. In another case, without such good video evidence, I might have drawn such an inference.

I find from the video and the still images taken from the video that, while almost incredible, in each case of when the staff are in the vicinity of the patron, either the staff's attention is focussed on other patrons or another area of the premises or on the one occasion when the staff is looking directly at the patron, the patron is sitting upright and not showing any signs of intoxication. In that regard, the video has almost

a quality of a drawing room farce or a bad B movie, where the actors are doing everything but what the audience wants them to do – notice what is going on elsewhere.

On this evidence, I find that the Licensee's staff in fact did not see the patron's head bobbing or see him putting his head on his arms. I find the staff were not near enough to the patron to see his bloodshot eyes. I find there were no other signs of intoxication inside the premises that the staff might have seen before the patron was asked to leave when the bar closed. Not having seen the patron when he exhibited what might have been signs of intoxication, I find the Licensee's staff did not permit a person who may have been intoxicated to remain in the premises.

I also considered whether, despite having not seen the patron, the staff ought to have seen him and taken action. That is, whether the staff simply turned a "blind eye" to the presence of a potentially intoxicated patron in the premises. I considered and agree with the Licensee's submission that in this case it makes no sense for the staff to have intentionally ignored the presence of the patron. I find from the video evidence that the security staff are obviously and continually patrolling the premises and that they are in fact looking to make sure that everything is in order. I conclude from their conduct that they are very involved in that task and I conclude from that that evidence they did not simply ignore or take no action in relation to a possibly intoxicated person. Such a finding just does not fit with what appears to be reasonably vigilant oversight of the premises. As above, I find the security staff's failure to notice and take action in regard to the patron to be one of bad timing, not any inaction or wilful disregard on the part of the staff. I find on the evidence that the Licensee's staff did not ignore or fail to take action in relation to a potentially intoxicated person.

Having found as above, I find the Licensee did not permit the patron, who may have been intoxicated, to remain in the premises. Given this finding, I do not need to make a finding on whether the patron was in fact intoxicated and the impact of the evidence from outside the premises on making any such finding.

I find the contravention has not been proven.

Due Diligence

Given my findings a contravention has not been proven, I do not need to address the defence of due diligence, but in case I am wrong in finding no contravention has been proven, I will address this issue.

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 leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. 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, 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).

In those circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee responsible for the contravention (in that case, selling liquor to a minor) 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 made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the licensed premises when the sale is made), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (e.g. the sale of liquor to minors); and,
 - b. 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.

Directing mind

I find the Licensee’s security staff are not the directing mind of the Licensee, and so I turn to the second issue - training and systems.

Training and systems

I find the Licensee’s oral evidence and the documents in Exhibit 3 to constitute satisfactory evidence of effective staff training with a goal to preventing intoxicated persons from remaining in the premises and of systems in place to ensure that does not happen. The system is robust in its content. Its implementation is thorough. The Licensee obviously takes the issue seriously and imparts that to its staff.

While the Licensee does use the term “overly intoxicated” in its materials, I find based on the Licensee’s evidence that the Licensee is in fact vigilant about preventing intoxicated patrons from entering or remaining in the premises and I find the Licensee’s staff would not have been confused about that by the reference in the materials to

“overly”. However, it may be advisable, to avoid any possibility, to remove the reference to “overly” from the materials.

Reasonable steps to monitor

I also find from the Licensee’s oral evidence and the documents in Exhibit 3 satisfactory evidence of reasonable steps being taken to monitor the staff training and the systems in place to ensure that intoxicated persons do not remain on the premises. Again the on-going reminders and meetings are robust and a clear on-going reminder to staff of the seriousness of the issue.

I find that if a contravention had been proven, the Licensee would have been entitled to a defence of due diligence.

CONCLUSION

Based on my assessment of the evidence, as set out above, I find the evidence falls short of establishing that on December 5, 2015 the Licensee permitted an intoxicated person to remain in the premises. Therefore, the allegation that the Licensee contravened section 43(2)(b) of the Act has not been proven.

Original signed by

Dianne Flood
General Manager’s Delegate

Date: June 21, 2016

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

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