



**DECISION OF THE
GENERAL MANAGER**

LIQUOR AND CANNABIS REGULATION BRANCH

IN THE MATTER OF

A hearing pursuant to Section 51 of

The Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Licensee: Oak & Carriage Hospitality Ltd.
dba Oak & Carriage
3287 Cowichan Lake Rd
Duncan, BC V9L 4C1

Case: EH18-041

For the Licensee: Duncan Morrison

For the Branch: Hugh Trenchard

General Manager's Delegate: Nerys Poole

Date of Hearing: October 16 and 26, 2018

Date of Decision: November 26, 2018

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

The Oak & Carriage Hospitality Ltd. dba Oak & Carriage (the “licensee”) owns the Oak & Carriage at 3287 Cowichan Lake Rd. in Duncan, BC. The licensee holds Liquor Primary Licence number 033696 (the “licence”). A third party operator, 0999594 B.C. Ltd., operates the establishment. Duncan Morrison represented the third party operator and the licensee at the hearing.

According to the terms of its licence, the licensee may sell liquor from 10:00 a.m. to midnight from Monday to Thursday and from 11:00 a.m. to 1:00 a.m. Friday and Saturday, and from 11:00 a.m. to midnight on Sunday.

The branch alleges that the licensee has contravened the *Liquor Control and Licensing Act* (the “Act”) on Saturday, April 14, 2018, (business day of Friday, April 13, 2018) by:

1. Contravening a term or condition of its licence by selling liquor outside the hours of liquor service as specified on the licence;
2. Failing to ensure an employee does not consume liquor while working, contrary to section 142(1) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 241/2016 (“the Regulation”).

The licensee disputes the allegations set out in the Notice of Enforcement Action dated June 6, 2018 (the “NOEA”). With respect to the first alleged contravention, the licensee’s defence is that the establishment did not sell liquor after the closing time of 1:00 a.m. With respect to the second alleged contravention, the licensee admits that Mr. Morrison was performing the duties of an employee and acting as a manager on the evening of April 13/14, 2018. However, the licensee submits that Mr. Morrison was drinking de-alcoholized wine, not liquor. The licensee does not raise 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 *Liquor Primary Terms and Conditions* (the “Terms and Conditions Handbook”).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch's (the "branch") allegations and proposed penalty are set out in the NOEA (exhibit 1, tab 1).

The branch alleges that on April 14, 2018 (business day of April 13, 2018), the licensee contravened a term and condition of its licence, by selling liquor outside the hours of liquor service as specified on the licence.

The range of penalties for a first contravention of this type is a one to three day suspension and/or a \$1000 to \$3000 monetary penalty (item 54, Schedule 2 of the Regulation). The branch proposes a monetary penalty of \$1,000. The NOEA sets out the reasons for not offering a choice of penalty in this alleged contravention: the identified contravention was conducted in sight of the establishment manager, who should not have permitted staff to continue liquor service after the licensed hours as per the legal requirement and his own policy.

The branch also alleges that, on the same date, the licensee contravened section 142(1) of the Regulation, by failing to ensure an employee does not consume liquor while working. The range of penalties for a first contravention of this type is a one to three day suspension and/or a \$1000 to \$3000 monetary penalty (item 25, Schedule 2 of the Regulation). The branch proposes a monetary penalty of \$2000 (two thousand dollars). The branch offers no choice of penalty and recommends a higher than the minimal penalty because, the branch alleges that "the identified contravention was conducted by the establishment manager/third party applicant, who has a greater responsibility to lead by example, ensure the safety of the establishment and have oversight of staff."

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, S.B.C. 2015, c.19

Terms and conditions on licence

15 (2) Without limiting subsection (1), the general manager may impose terms and conditions respecting all matters related to the manufacture, purchase, sale, service and consumption of liquor under a licence or

endorsement and the operation of establishments and service areas, including, without limitation, respecting one or more of the following:

- (a) the days and hours that a service area is allowed to be open for the sale, service or consumption of liquor;

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016

Consumption by employees

142 (1) A licensee must ensure that its employees do not consume liquor while the employees are working in the establishment or at an event site or residential event.

ISSUES

1. Did the contravention of contravening a term of condition of its licence occur, i.e. did the licensee sell liquor outside the hours of liquor service?
 - a) If so, has the licensee established a defence to the contravention?
 - b) If the contravention is proven, what penalty, if any, is appropriate?

2. Did the contravention of an employee consuming liquor while working occur?
 - a) If so, has the licensee established a defence to the contravention?
 - b) If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: branch book of documents
- Exhibit 2: 3 stapled pages with page 1 showing a photo of a bottle of Black Cellar wine
- Exhibit 3: 8 stapled pages of photos showing inside area of establishment and the menu
- Exhibit 4: photo of four bottles of wine showing front labels
- Exhibit 5: photo of four bottles of wine showing back labels
- Exhibit 6: email dated May 15, 2018 from the establishment to the branch re. CCTVs

Exhibit 7: hand drawn sketch with Xs showing location of people inside the establishment

Exhibit 8: copy of 2 pages from Internet re. Loxton wines and a one page BC Business article

WITNESSES

Two liquor inspectors testified for the branch. Duncan Morrison testified for the licensee and the third party operator.

Because the licensee's and third party operator's representative at the hearing was Mr. Morrison and he was also the licensee's only witness, I refer to "the licensee" when he was making submissions and cross-examining the liquor inspectors, and to "Mr. Morrison" when he was testifying as a witness.

MANAGEMENT OF ESTABLISHMENT

Mr. Morrison testified and the liquor inspectors agreed that, at the time of the alleged contraventions, Mr. Morrison's company was the third party operator applicant. Mr. Morrison started at the establishment in February 2017 with the option of becoming the third party operator. In May of 2018, after the date of the alleged contravention, his company became the official third party operator. Until that date, he was under contract to the previous third party operator to manage the establishment. The licence at tab 3 of exhibit 1, with expiry date of May 31, 2019, notes the third party operator as 0999594 B.C. Ltd.

EVIDENCE – BRANCH

Two liquor inspectors testified for the branch. Liquor inspector 1 was the author of the NOEA. He explained that he and liquor inspector 2 entered the establishment about midnight on the evening of April 13, 2018. The two liquor inspectors did not identify themselves for reasons of safety. Although liquor inspector 2 had met Mr. Morrison on a previous occasion, Mr. Morrison did not recognize him.

The branch advocate showed the CCTV footage during the hearing (exhibit 1, tab 13). The footage shown at the hearing demonstrated that Mr. Morrison was performing some work duties. There was nothing to show what occurred in and around the bar area of the establishment.

Issue 1 – sale after hours

The two liquor inspectors sat down adjacent to the service bar in the establishment to observe what was going on. They sat at a table about three to four metres from the bar. They pointed out where they were sitting on the floor plan at tab 4 of exhibit 1.

At about 1:09 a.m. on April 14, 2018, the two liquor inspectors observed a female bartender pour an amber coloured liquid, which they believed to be beer, from a pitcher located behind the establishment's service counter into the glass of a patron who was seated at the bar. Liquor inspector 1 estimated the pitcher to be about $\frac{3}{4}$ full when the bartender poured it.

Liquor inspector 1 testified that he saw the patron drink from the glass after the bartender poured from the pitcher. In cross-examination, liquor inspector 1 admitted he did not see the beer being poured into the pitcher. He only saw the beer being poured into the glass of the patron. Liquor inspector 1 thought it might have been a pitcher used by the bartender to catch the overflow at the taps and that she just gave it away to a patron at the end of the night. He could not say whether there was foam at the top or not. He was unable to say how much beer was left in the pitcher when the bartender poured. He only noted the one pour after 1:00 a.m. He testified that, after pouring from the pitcher, the bartender put it back behind the bar.

Liquor inspector 1 noted that liquor service ends at 1:00 a.m. but that patrons have a half hour to finish drinks after 1:00 a.m. He stated that no more drinks can be sold and served after the 1:00 a.m. closing.

When pressed on cross-examination to answer whether or not it is okay for a server to pour from a bottle of wine after the closing time, but within the half hour after closing time, liquor inspector 1 responded that, as long as the sale of the bottle of wine occurred before the closing, then it is okay for a server to pour from the bottle into a glass.

Typically they do not consider this a contravention.

The list of sales transactions shows several jugs or pitchers of beer but does not indicate the time of sale. (exhibit 1, tab 11)

Liquor inspector 1 was asked about the possibility of the beer being sold prior to the closing time of 1:00 a.m. He responded that the pitcher of beer has to be sold to more than one patron, and if there were more than one patron consuming the pitcher, it would not be a contravention if the pitcher was still on the table and being poured after the 1:00 a.m. closing.

Liquor inspector 1 testified that he only observed one patron being served from the pitcher after closing time but that he had no idea when the pitcher might have been sold or if it was being consumed by more than one patron during the evening. He agreed that if it was being consumed by more than one patron earlier in the evening, then it would not be a contravention for the bartender to have poured from the pitcher after closing time. Liquor inspector 1 agreed he had no idea how long the pitcher may have been sitting just behind the bar or if it was on the bar before and was being consumed by more than one patron.

Liquor inspector 2 testified about his observations of the pitcher being poured after closing time. He observed the bartender take a pitcher, not a full pitcher, and to pour it into a patron's glass on the east side of the bar. He testified it was between $\frac{1}{4}$ and $\frac{1}{2}$ full. He believed it was a "foam" pitcher.

In cross-examination, liquor inspector 2 noted that the pitcher was located on the south side of the main bar, behind the bar on the service side, not on the customer side. To the best of his recollection, she poured from the pitcher into a mug. He could not recall if the pitcher was left on the bar or if she returned it to the service side of the bar. He did not recall a lot of foaming. He described it as light in colour. He saw the pitcher

being poured only the one time. He had no idea as to what may have happened prior to his observations of seeing the bartender pour from the pitcher.

Liquor inspector 2 agreed that smoking was permitted on the patio of the establishment.

The contravention notice and the NOEA specify the alleged contravention as “sell liquor outside the hours of liquor service as specified on licence”

Issue 2 – consumption of liquor while working

Liquor inspector 1 described his first observations of Mr. Morrison at the bar, when the two liquor inspectors entered the establishment.

Liquor inspector 1 stated that Mr. Morrison “appeared to be consuming a glass of red wine.” Liquor inspector 2 saw Mr. Morrison “in conversation with patrons and consuming a glass of wine.”

The two liquor inspectors observed Mr. Morrison performing the following work duties over the course of the time they were in the bar:

- making adjustments to the music system;
- doing some dishes;
- making entries on the touch screen terminal on two separate occasions;
- providing direction to one of the staff members;
- using the glass washer, collecting dishes and putting them in the machine;
- after closing, turning off music and lights;
- intervening with a staff member to request identification of three youth and asking them to leave when they did not produce ID.

When the liquor inspectors first entered and identified Mr. Morrison sitting at the bar apparently consuming a glass of wine, liquor inspector 2 stated he was focussed on determining “if Mr. Morrison was working or not or if he was off duty.”

Liquor inspector 1 stated that their observations of Mr. Morrison performing various duties were consistent with him being an employee. He was moving between the front of the bar where the customers sit to behind the bar at various times. Liquor inspector 1 testified that he saw Mr. Morrison pour from a bottle that he thought was white wine. It was underneath the service counter. Liquor inspector 1 was unable to identify the product.

At approximately 12:26 a.m., liquor inspector 2 observed Mr. Morrison moving behind the bar where he reached down into a lower refrigerator. He testified that he observed Mr. Morrison pour from this bottle, identified as a white wine and started consuming. Liquor Inspector 2 did not state how he identified this as white wine. Mr. Morrison moved back out around bar and had a further conversation with patrons. Two males were seated on either side of him at the bar. At 12:40 a.m., he did a few more duties behind the bar and then moved back out to the customer side.

About the time Mr. Morrison moved to stand on the customer side of the bar, liquor inspector 2 testified that he observed the bartender take a bottle of Black Cellar from the shelf on the wall behind the bar and pour it into Mr. Morrison's glass on the bar. Liquor inspector 2 stated that he had a clear unobstructed view of the area and was able to identify the bottle that was poured into Mr. Morrison's glass. He stated that he saw the bartender pick up the bottle of Black Cellar and saw her put it back on the shelf. He watched her go to the bottle, put her hand on it, remove the top, and pour it and watched her put it back. He saw her pour from the bottle into the glass but he could not see the label as it was being poured.

Liquor inspector 1 testified that he saw the bartender pour from a bottle into Mr. Morrison's wine glass but that he did not have a clear line of sight to be able to see which bottle was poured into Mr. Morrison's glass.

Liquor inspector 2 told liquor inspector 1 to take photos of the three bottles on the shelf and to take one of Mr. Morrison consuming. Liquor inspector 1 took the photos. (exhibit 1, tab 9) The photos show Mr. Morrison in front of the bar, consuming from a wine glass. On his right is a male in a dark leather jacket. A third photo is of three bottles of wine on a shelf, with only one label clearly visible, showing "Black". All witnesses agreed this was Black Cellar.

The branch submitted photos of a screen shot from the Liquor Distribution Branch website showing a photo of a Black Cellar wine, shiraz cabernet, with a price of \$10.49 and an alcohol content of 13%. Exhibit 2 includes the screen shot and an email sent from liquor inspector 1 to the branch advocate on October 11, 2018, one week before the hearing commenced. In the email, liquor inspector 1 states that he contacted the manufacturer of Black Cellar wines on October 10, 2018, and confirmed that Black Cellar does not produce any non-alcoholic Black Cellar products.

Liquor inspector 2 did not refer to any symptoms of intoxication in direct examination. His notes made on the evening refer to Mr. Morrison “exhibiting signs of physical intoxication.” (exhibit 1, tab 8) He made no reference to what these signs were in his notes. In cross-examination, the licensee questioned liquor inspector 2 as to what signs he was referring to. Liquor inspector 2’s response was that Mr. Morrison was “jovial, communicating with patrons, your motor skills slowed down, I noticed bloodshot eyes.” Liquor inspector 1 did not refer to signs of intoxication in either his notes or his testimony. The NOEA does not refer to any signs of physical intoxication.

Liquor inspector 2 agreed that Mr. Morrison did not stumble. When asked in redirect if he could detect an odour of alcohol on Mr. Morrison’s breath, liquor inspector 2 responded that he was not in conversation with him so he was unable to detect any liquor smell.

When asked in cross-examination as to why the liquor inspectors did not identify themselves at the time, liquor inspector 1 stated that they quite frequently conduct inspections where they don’t identify themselves, particularly when staff members are consuming liquor.

EVIDENCE – LICENSEE

Since May of 2018, Mr. Morrison’s company has been the third party operator of the establishment. At the time of the alleged contraventions, Mr. Morrison was the operations manager and his company was the third party operator applicant. He stated that the female bartenders working on April 13/14, 2018 are no longer working in the establishment.

Mr. Morrison testified that he responded to the Notice to Produce issued April 16, 2018 (exhibit 1, tab 10) by sending the Serving It Right certificates, names of employees working on April 13, 2018, copies of sales records from that evening and the available CCTV footage. He followed this up with an email dated May 15, 2018 (exhibit 6) addressed to liquor inspector 1, explaining that many of their cameras had not been working for months and that various attempts to have this remedied had gone unanswered by the vendor. He stated in the email: "To this day, the entire system is not fully functioning." He concluded with: "We are as frustrated as anyone – we believe that full video coverage of that evening would exonerate us."

Mr. Morrison testified that he first heard that there was a problem that evening when he received the Notice to Produce. The Notice to Produce did not indicate the alleged contraventions. Mr. Morrison received the contravention notice on May 15, 2018.

Issue 1 – sale after hours

Mr. Morrison testified about the normal practice in the bar with respect to holding customers' drinks. He explained that the establishment has a heated smoking patio, something which is permitted in the Cowichan valley. At times, they offer full service on the patio, but not on the night of the alleged contravention. When people go outside to the patio for a smoke or go to the washroom, it is common for those sitting at the bar to ask the bartender to watch over their drinks and, at times, to move something like the pitcher to the service area.

He said they do not use a pitcher for the purpose of catching foam as they do not waste an ounce of beer. He maintained this was an old practice no longer followed in most bars. He said that the establishment is not in the habit of keeping random jugs of beer and offering it free to customers.

He could not recall where the pitcher was as observed by the liquor inspectors. He believed that it was where liquor inspector 2 suggested, on the lower deck on the service side of the bar and in front of customer so bartender would know whose it was. He maintained that having a pitcher on the service side of the bar is consistent with

their normal practice of holding drinks for customers while they are either outside or in the washroom.

Mr. Morrison stated that the pitcher of beer was purchased before 1:00 a.m.

Issue 2 – consumption of liquor while working

On the night of the alleged contraventions, Mr. Morrison agreed he was performing the duties as a manager of the establishment. He also agreed he was drinking wine. He testified that he was drinking a de-alcoholized wine known as Loxton, a wine he has been drinking for about ten years. He submitted photos of four bottles of wine, two showing the Loxton label and one showing Red/Rouge de-alcoholized wine and a fourth bottle on the left as Wayne Gretzky Okanagan which he stated was an alcohol wine. (exhibits 4 and 5). He submitted a print-out of information about Loxton and the process used to remove 12% alcohol from the wine to reduce it to a level below .5%. The establishment sells this wine for \$8 a glass. Mr. Morrison stated that this product is not the same as a non-alcoholic wine, which tastes more like a fruit juice. As described in the Loxton information sheet: “This procedure produces a de-alcoholized wine that displays clean, fresh “varietal” fruit flavours with complex flavour characters and bouquet that are not found in regular non-alcohol juices.”

Mr. Morrison described himself as a sommelier and a wine connoisseur. He prefers the Loxton wines to fruit juice. He stated that if he were to drink alcohol wine, it would not be Black Cellar which he considers to be an entry level wine. He described it as “cheap plonk.” Mr. Morrison says he never drinks alcohol wine while working, although he admitted he may have done so years ago when he was much younger. He said that, a little before midnight and the entry of the liquor inspectors, he switched to “socialization” mode, which is when he will sit or stand on the customer side of the bar and be friendly with the customers. He says that, if he is serving, he would not be drinking anything at all, but when he switches to socialization mode, he enjoys drinking this de-alcoholized wine. He said he often does this later in the evening and sees it as a shift in his roles. Although still functioning as manager, he is relaxing with the customers and no longer engaged in service to the customers. At that point, he will often start drinking the de-alcoholized wine to be more sociable with the customers.

On the night that the liquor inspectors observed him, he stated that he was drinking from the two Loxton bottles, one red and one white. He said one was in the fridge and the other was on the left hand side of the bartender's till. Mr. Morrison pointed to the photos of him standing at the bar. (Exhibit 1, tab 9) He pointed out the gentleman on his right with the black leather jacket and something dark beside him that could have been a backpack. He stated that further to the right was a post. Given the obstructions along the bar, he stated it was impossible for the liquor inspector, seated where he was, to follow the trajectory of the Black Cellar bottle on the shelf to his glass on the bar counter. He suggested the bartender may have taken the bottle of Black Cellar off the shelf but then poured it into the glass of someone else at the bar.

With respect to any signs of intoxication, Mr. Morrison stated that if he had been drinking almost the equivalent of a bottle of alcohol wine, he would have been stumbling and not functioning well at all. Throughout the time the liquor inspectors observed him, he was performing various functions, like removing glasses from the glass washer, a delicate operation as the glasses are slippery and easy to drop. He was also operating the till, which requires some dexterity that he would not have had if he had imbibed as described by the liquor inspectors.

Mr. Morrison testified that he drove home in the early morning hours of April 14, 2018, after a meeting he had with the janitors. He further stated that the police often sit at Berkley's Corner to conduct a road check, and that he drives by there on his way home. He added that the most he would ever drink when he intends to drive is one glass of wine, certainly not a whole bottle as suggested by the liquor inspectors. However, on April 13/14, he was working and not drinking alcoholic wine at all.

SUBMISSION – BRANCH

Issue 1 – sale after hours

The branch advocate agreed that the only evidence of service was the pouring from the pitcher into the customer's mug. There was no evidence to support a conclusion that the licensee sold a pitcher of beer after the closing hour.

Issue 2 – consumption of liquor while working

The branch advocate described the evidence that showed Mr. Morrison was performing the functions as a manager. There is no dispute on this. He reviewed the evidence of the liquor inspectors with respect to the consumption of liquor. Liquor inspector 2 stated that he saw a staff member remove the Black Cellar bottle from the shelf and then saw her pour from a bottle into Mr. Morrison's glass. Even if it was not the Black Cellar bottle she removed from the shelf, the evidence showed that all three bottles in photo (exhibit 1, tab 9) were alcoholic wine. The bottle was returned to that shelf.

The branch advocate submits that it was possible for liquor inspector 2 to observe where the bottle was located and to see it being poured into the glass, as he testified. The liquor inspectors were seated maybe 12 to 15 feet from Mr. Morrison. Liquor inspector 2 observed the bottle being poured and returned to the shelf and then instructed liquor inspector 1 to take a photo of the bottles on the shelf. Although liquor inspector 1 was not able to actually see the bottle being removed and then poured, liquor inspector 2 did and testified to this.

The branch advocate conceded that it was possible that Mr. Morrison had only one drink from the alcoholic wine and that the other glasses he poured were from de-alcoholized wine. Even if I find he drank only one glass of alcohol wine, that is sufficient to make a finding of a contravention here.

With respect to a due diligence defence, the licensee did not provide any evidence of this and stated that he was not making a defence of due diligence. The branch advocate noted that, as Mr. Morrison admitted he was the manager in charge of all operations and thus the directing mind of the establishment, the defence was not available to the licensee.

SUBMISSION - LICENSEE

Issue 1 – sale after hours

The licensee submits that the liquor inspectors both agreed that, if the sale occurs before the closing time of 1:00 a.m., the actual pouring from a bottle or pitcher is not a contravention. He stated that he and other licensees have been told that “serving” is creating the sale. Licensees have an additional half hour to allow customers to finish their drinks and to vacate the establishment after the official closing time on the licence.

The licensee pointed to Mr. Morrison’s statement that they do not use a “dump” pitcher when pouring beer any more. He stated this is not a practice they use in the establishment. He further emphasized that neither liquor inspector could say there was foam on the beer. If it was a “foam catcher,” and he says it could not have been as they do not do this, it would have had quite a bit of foam in it.

The evidence from Mr. Morrison was that the bartender will often hold glasses or pitchers or bottles on the service side of the bar when a customer goes to the smoking patio or to the washroom.

With respect to whether or not there was anyone else sharing the pitcher of beer, the licensee submits that there is nothing to prove that it was not purchased by two or more customers.

Issue 2 – consumption of liquor while working

The licensee disputed the testimony of liquor inspector 2 who stated that he saw the bartender take the Black Cellar from the shelf behind the bar, walk over to the bar with the bottle and pour from the bottle into the glass. The licensee asked why there is no photo of the bartender actually pouring from the bottle. He questioned why the liquor inspectors did not note the Black Cellar in their notes recorded on the evening of April 13/14. The licensee asserts that the liquor inspectors did not mention the Black Cellar wine until they noticed there was non-alcoholic wine on the establishment’s menu when the licensee disclosed the documents two weeks prior to the hearing. At that

time, the licensee asserts that the liquor inspectors did further research on Black Cellar to confirm they did not produce de-alcoholized or non-alcoholic wine. Liquor inspector 1 provided evidence of this research to the branch advocate only one week before the hearing, outside the required disclosure deadline. The licensee did not object to the admission of these documents, but emphasized the timing to demonstrate the “late in the day” attempts to support their assertion that Mr. Morrison was drinking alcohol wine.

The licensee referred to some of the specific details in the liquor inspectors’ notes about their observations of his performance of job duties. Neither liquor inspector mentioned Black Cellar in their digital notes at the time or in the NOEA.

The licensee adds that, because of the customers sitting at the bar, the post, plants and other obstacles, as testified by Mr. Morrison, it was impossible for liquor inspector 2 to be able to maintain a line of sight from the Black Cellar bottle on the shelf to where the bartender poured it. The licensee agrees it was possible that liquor inspector 2 saw the bartender take the Black Cellar bottle from the shelf and then possibly pour from that bottle into a customer’s glass.

With respect to whether or not Mr. Morrison was showing any signs of intoxication, the licensee points out that liquor inspector 2 did not refer to these in direct examination. Liquor inspector 2 only mentioned the symptoms when the licensee, in cross-examination, pressed him to explain the comment in his notes about him “exhibiting signs of physical intoxication.” The licensee disputes that liquor inspector 2 was close enough to Mr. Morrison to observe that he had bloodshot eyes.

When the licensee asked liquor inspector 2 to describe any symptoms of intoxication, liquor inspector 2 described Mr. Morrison as “jovial.” The licensee submitted that Mr. Morrison testified that he was in “socialization” mode and that “jovial” was not a sign of intoxication.

ANALYSIS AND REASONS

Issue 1 – sale after hours

I find the following facts:

- A bartender poured beer from a pitcher kept on the service side of the bar at 1:10 a.m.
- There was no or very little foam in the pitcher

The two liquor inspectors gave different evidence about the amount of beer in the pitcher. Liquor inspector 1 believed it was about $\frac{3}{4}$ full and that the bartender had returned it to her side of the bar after pouring into the patron's mug. Liquor inspector 2 believed the pitcher was about $\frac{1}{4}$ to $\frac{1}{2}$ full and could not recall where the bartender placed the pitcher after pouring into the patron's mug.

With respect to whether or not the establishment had sold the pitcher to more than one customer, there is no evidence to support a finding on this either way. Further, selling a pitcher of beer to only one customer is not the alleged contravention here.

With respect to after-hours service, but not sale, I accept the evidence of the liquor inspectors that pouring from an already purchased bottle or pitcher into a glass in the half hour after the official closing time is not a contravention. I further note that the contravention notice and the NOEA describe the contravention as "selling liquor outside the hours of liquor service as specified on the licence."

There was no evidence to support a finding that the establishment sold the pitcher after closing time. I therefore find that the contravention of selling liquor after the closing time has not been proven on a balance of probabilities.

Issue 2 – consumption of liquor while working

There are two elements to the contravention in section 142 of the Regulation:

- 1) A person must be an employee of the licensee
- 2) That person must be consuming liquor

Mr. Morrison agrees he was the operating manager of the licensee on the evening of April 13/14, 2018 and that he was performing work duties that evening and during the time the liquor inspectors were in the establishment.

I find that the first element of the contravention is proven, and I turn to the second element, whether or not the employee of the licensee was consuming liquor.

Liquor is defined in section 1 of the Act as:

"liquor" means, subject to the regulations, beer, wine, spirits or other product that is intended for human consumption and that contains more than 1% alcohol by volume;

Liquor inspector 2 testified that he saw the bartender lift the bottle of Black Cellar, a red wine containing 13% alcohol, from the shelf, move to the bar counter close to Mr. Morrison and pour from the bottle into Mr. Morrison's glass. Liquor inspector 2 asked liquor inspector 1 to photograph three bottles on the shelf, one of them being visible in the photo as a bottle of Black Cellar. Black Cellar does not produce any non-alcoholic wine. (exhibit 2)

Mr. Morrison provided a different view of what liquor inspector 2 was able to see, particularly in terms of what was poured into his glass. Mr. Morrison pointed out the person sitting beside him, the rather large backpack beside this patron obscuring a clear view to the area behind the bar, and other barriers along the bar that would have interfered with liquor inspector 2's ability to follow the bottle from the shelf to Mr. Morrison's glass without an interruption in his line of sight.

The licensee referred to the fact that liquor inspector 2 agreed that he was unable to see the label on the bottle when it was being poured. The licensee pointed to the photos of Mr. Morrison drinking from his glass (exhibit 1, tab 9) and questioned why there was no photo of the bartender pouring from the bottle into his glass.

I accept that liquor inspector 2 saw the bartender pick up a bottle of Black Cellar from the shelf and walk over to the counter to pour it into someone's glass. However, I am not persuaded that liquor inspector 2 had a clear line of sight to follow that bottle the whole way to Mr. Morrison's glass. I note the photo of Mr. Morrison consuming with a rather large gentleman beside him that would have blocked liquor inspector 2's view at some point while watching the bartender.

I find that Mr. Morrison's testimony about what he was drinking that night to be very persuasive. He testified about his normal practice of drinking Loxton de-alcoholized wines if he were in "socialization mode" with the customers. He emphasized many times that he was not drinking an alcoholic wine on April 13/14, 2018.

I find that, once the liquor inspectors saw Mr. Morrison standing at the customer side of the bar and drinking what appeared to be wine, their focus was on the duties Mr. Morrison was performing as an employee, not on whether or not the wine had the requisite alcohol to make it "liquor" within the meaning of the Act. The notes that both liquor inspectors made on the evening of April 13/14, 2018 reflect their focus: the liquor inspectors' observations, after the initial comments about Mr. Morrison consuming what appeared to be wine are all about the various duties he was performing. I find further that the absence of any reference to Black Cellar in the liquor inspectors' notes and the NOEA, combined with the rather late disclosure of the information about Black Cellar wines, as well as the emphatic testimony from Mr. Morrison about what he was drinking, lead me to conclude that it is more likely than not, that the bartender did not pour an alcoholic wine into Mr. Morrison's glass.

I find that the liquor inspectors observed Mr. Morrison drinking wine while performing some managerial duties in the establishment. I find further that Mr. Morrison was drinking Loxton de-alcoholized wines. The evidence does not support a finding that he was drinking "liquor," as defined in the Act, on the evening of April 13/14, 2018.

I find that the contravention of section 142 of the Regulation has not been proven on a balance of probabilities.

CONCLUSION

I have found that neither of the contraventions alleged in the NOEA has been proven. I therefore do not need to consider the issue of penalty.

Original signed by

Nerys Poole
General Manager's Delegate

Date: November 26, 2018

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

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