



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

Case: EH19-042

For the Licensee: Terry Friesen, (“Licensee’s Representative”)  
Greg Harney, Barrister & Solicitor  
Shields Harney, Barristers & Solicitors  
 (“Licensee’s Counsel”)

For the Branch: Hugh Trenchard

General Manager’s Delegate: R. John Rogers

Dates of Hearing: September 24 & 25, 2019  
December 10, 2019

Date of Final Written Submissions: January 23, 2020

Date of Decision: March 9, 2020

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**Liquor and Cannabis  
Regulation Branch**

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## INTRODUCTION

Strathcona Hotel of Victoria Ltd. (the "Licensee") holds Liquor Primary Licence No. 136243 (the "Licence") pursuant to which it operates an establishment called the "Games Room" (the "Games Room") adjacent to another establishment called the "Sticky Wicket", both establishments are located within the Strathcona Hotel (the "Establishment") located at 919 Douglas Street, Victoria, B.C., V8W 2C2.

According to the terms of the Licence, the Licensee may sell liquor from 10:00 a.m. to 2:00 a.m., Monday through Sunday.

The Liquor Primary Licence is, as are all liquor primary liquor licences issued in the Province, subject to the terms and conditions contained in the publication "Liquor Primary, Terms and Conditions " (the "Liquor Primary Terms and Conditions Handbook").

Appearing at the hearing on behalf of the Licensee was the Licensee's Representative and the Licensee's Counsel.

As noted above, the hearing ran for three days, following which the Branch and the Licensee made written submissions.

## ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated May 21, 2019 (the "NOEA"), (Exhibit 1 tab 1).

The Branch alleges that on April 4, 2019, the Licensee contravened Section 61(2)(b)(ii) of the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act") by allowing an intoxicated person to enter or remain in the service area of the Games Room. Item 9, Schedule 2 of the *Liquor Control and Licensing Regulation* BC Reg 241/2016 (the "Regulation") sets out the range of penalties for a first contravention of this type as being a 4 to 7-day licence suspension and/or a \$5,000 to \$7,000 monetary penalty. The Branch

proposes either a 4-day licence suspension starting on a Thursday and continuing for successive business days until completed or a monetary penalty of \$5,000.

The Licensee disputes the contravention. However, the Licensee submits that if I find the contravention to have been proven, the Licensee is pursuing a due diligence defence to the contravention.

The Licensee in its submissions has requested that, if a penalty is imposed for the contravention alleged in the NOEA, that the penalty be a monetary penalty rather than a suspension of the Licence.

For the purposes of this hearing and in accordance with Section 5 of the *Act*, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by Section 51 of the *Act*.

## RELEVANT STATUTORY PROVISIONS

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

#### **Conduct at event site or in establishment, service area or liquor store**

61 (2) A licensee or permittee or an employee of either must not

(a) sell or serve liquor to an intoxicated person or a person showing signs of intoxication, or

(b) allow

(ii) an intoxicated person to enter or remain in a service area,

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

#### **Schedule 2**

#### **Monetary Penalties and Licence Suspensions**

#### **Intoxicated Patrons**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
9	A breach of section 61(2)(b)(ii) of the <i>Act</i> [ <i>allowing intoxicated person to enter or remain in service area</i> ]	4-7	10-14	18-20	\$5,000 - \$7,000

Since the occurrence of the alleged contravention on April 4, 2019, the *Regulation* has been amended and as of June 5, 2019 a new penalty schedule has come into effect. However, for the purpose of the matter at hand, as the alleged contravention occurred prior to June 5, 2019, the relevant basis for calculating a penalty is the provisions of Schedule 2 as above set out.

## 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 for the contravention?

## EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 14.
- Exhibit 2: An enlarged floorplan of the service area of the Games Room.
- Exhibit 3: The Licensee's book of documents, tabs 1 to 6.
- Exhibit 4: The Licensee's Due Diligence Book.
- Exhibit 5: A blue t-shirt similar to the blue t-shirts worn by the participants of the event called the "Bunny Hop" who were patrons of the Establishment during the evening of April 4, 2019.
- Exhibit 6: A CD containing a copy of the CCTV video footage referenced by the Branch.

## WITNESSES

The Branch called Liquor and Cannabis Inspectors A and B ("Inspector A" and "Inspector B", respectively and collectively the "Inspectors"). Inspector B was the author of the NOEA.

The Licensee called the Licensee's Representative, the Licensee's security manager (the "Security Manager"), the Licensee's security employee who was on duty in the Games Room on April 4, 2019 (the "Security Employee"), and the Licensee's bartender who was working in the Games Room on April 4, 2019 (the "Bartender").

## EVIDENCE

### **Preliminary Ruling on the Branch's Evidence**

The Contravention Notice #B000104 (the "Contravention Notice"), (Exhibit 1 tab 2), contains a description of the contravention alleged by the Branch to have occurred in the Games Room during the evening of April 4, 2019. It is this contravention which constitutes the basis for the issuance of the NOEA and is the subject of this hearing. The Contravention Notice alleges that on April 4, 2019 at 10:38 p.m. the Licensee contravened section 61(2)(b)(ii) of the *Act* by allowing an intoxicated person to enter or remain in a service area. The "Details" section of the Contravention Notice includes the words "observed 3 x male patrons intoxicated in games room".

The NOEA is dated May 21, 2019. In the section of the NOEA entitled "B. **Narrative**", reference is made to the fact that on April 16, 2019 a copy of CCTV camera footage pertaining to events occurring in the Games Room on the evening of April 4, 2019 was provided to the Branch by the Licensee. The NOEA then goes on to make observations based upon this CCTV footage pertaining to events which occurred in the Games Room prior to Inspector A and Inspector B arriving at the Games Room at 10:35 p.m. on April 4, 2019.

At the hearing, I would not permit the Branch to submit into evidence that portion of the NOEA referencing occurrences in the Games Room prior to the arrival of Inspector A and Inspector B at 10:35 p.m. on April 4, 2019. Nor would I permit into evidence that portion of the CCTV footage recorded prior to the arrival of the inspectors to the Games Room on that evening.

In giving the reasons for my determination, I noted that in the matter at hand the Contravention Notice was issued on April 8, 2019 based upon the personal observations of Inspector A and Inspector B and not upon the contents of the CCTV camera footage received by the Branch after the Contravention Notice was issued. From the Licensee's perspective, based upon the contents of the Contravention Notice, it appeared that the case that the Licensee was required to meet to rebut the contravention in the Contravention Notice was focused upon the actions of the three males in the Games Room commencing with the arrival of Inspector A and Inspector B.

Section 51(1) of the *Act* provides the General Manager with the authority to take action against a licensee for a contravention of the *Act*. Section 51(7) of the *Act* requires that if the General Manager proposes to exercise this authority against a particular licensee, that the General Manager must provide this licensee with written notice specifying the reason why the General Manager proposes to take this action and advising the licensee of the action that the General Manager proposes to take. It is the Branch's procedure that this written notice is not the contravention notice issued to a licensee by a liquor inspector. Rather, this written notice as required by section 51(7) of the *Act* is the notice of enforcement action subsequently issued by the Branch to the licensee.

However, I determined that, in this particular instance and based on the facts before me, the only portions of the NOEA and the CCTV camera footage which the Branch was able to introduce into evidence for the purpose of proving the contravention alleged in the NOEA were those portions of the NOEA and the CCTV camera footage dealing with occurrences in the Games Room while Inspector A and Inspector B were present in the Games Room and observing the activities of the patrons present in the Games Room at that time.

## **The NOEA**

### The Occurrences in the Games Room

A summary of the relevant provisions of the NOEA that deal with the occurrences in the Games Room with reference to the alleged contravention are that:

- On April 4, 2019 at 10:35 pm, Inspector A and Inspector B in the course of conducting a public safety inspection entered the Establishment and made their way to the Games Room. Upon their arrival, they noted a number of patrons present as part of what is described in the NOEA as a "University of Victoria 'Pub Crawl' event" (the "Bunny Hop"). These patrons were readily identified by their matching light blue t-shirts with a logo on the front consisting of a caricature of a rabbit and the words "the Bunny Hop" (the "T-Shirt"), (Exhibit 5);
- One of the Licensee's bartenders was wearing the T-Shirt;
- The student patrons which caught the attention of the Inspectors were three males, M-1, M-2, and M-3, each of whom was wearing the T-Shirt and was obviously part of the group of patrons participating in the Bunny Hop;

- M-1 was observed by the Inspectors staggering as he walked by them to the main bar;
- In the pool table area of the Games Room, the Inspectors then observed a young female patron wearing a T-Shirt lying back on a pool table with her midriff exposed. She then permitted another patron in the T-Shirt to place a 1 oz. shot glass containing what appeared to be an alcoholic beverage on her exposed stomach. The Inspectors then observed M-3 lean down with his hands behind his back and pick up the shot glass between his teeth. He then proceeded to consume the contents of the shot glass;
- M-2 and M-3 then proceeded to walk by the Inspectors on their way to the main bar. As M-2 and M-3 passed the Inspectors, they noted that these patrons exhibited signs of intoxication, appearing unsteady on their feet, staggering from right to left as they walked, having glazed and bloodshot eyes, and demonstrating delayed motor skills in that their arms were moving in a manner to ensure that they kept their balance as they walked;
- M-2 and M-3 then joined M-1 at the bar and each consumed together with several other student patrons a shot of what appeared to be an alcoholic beverage;
- M-2 was then observed by the Inspectors sitting at the bar in a hunched over position with his head bobbing up and down over the bar. He then stood up and began to converse with M-1 and M-3, with all three males talking loudly with their speech sounding slurred, undecipherable and incoherent to the inspectors who were in earshot of them;
- Shortly thereafter, M-2 proceeded towards the male washroom, walking unsteadily and staggering from right to left as he walked. M-1 and M-3 followed him into the washroom;
- Approximately five minutes later, the Inspectors entered the male washroom and observed M-2 on his hands and knees in a toilet stall vomiting violently. M-1 and M-3 were present and encouraged M-2 to “get it all out buddy”. The Inspectors noted all three males to be emanating a strong odour of alcohol, they were talking with slurred speech, and they were unsteady on their feet;
- Outside the washroom, the three males passed Inspector A and he noted that all had bloodshot eyes, were slurring their speech, were staggering as they walked, and that M-2 had vomit on his shirt; and
- The three males returned to the bar area, briefly talked with their friends and departed the Establishment before the Inspectors could identify them to the Licensee’s security staff.

### The Elements of the Alleged Contravention

The NOEA sets out elements of the alleged contravention which included the following:

- M-1, M-2, M-3, were observed in the Games Room for a period of twenty minutes demonstrating strong symptoms of intoxication and carrying out the following behaviour:
  - consuming shots of liquor,
  - staggering,
  - demonstrating delayed motor skills (holding each other up and head bobbing),
  - lacking inhibitions (hugging),
  - slurred speech, and
  - bloodshot eyes;
- At no time did the Licensee's staff intervene despite the fact that the group of students as part of the Bunny Hop were largely the only patrons in the Games Room;
- As one of the Licensee's employees was wearing the T-Shirt, the Licensee must have had prior knowledge of the gathering of the Bunny Hop, and, as such, the Licensee could be taken to be endorsing the event;
- The female patron who lifted her T-Shirt and permitted a shot glass to be placed on her midriff was never approached or assessed as to her level of intoxication or general well-being; and
- Two members of the Licensee's security staff were observed laughing at the patrons who demonstrated definite signs of intoxication.

### **Evidence of Inspector A**

Inspector A testified that he had been a liquor inspector with the Branch for a period of a year. Prior to his employment with the Branch, he had been a policeman in Ireland for ten years during which time he had received a degree in policing.

He stated that his area of responsibility within the Branch is downtown Victoria, Cook Street Village, and parts of James Bay. During his time as an inspector for the Branch, he has conducted over a thousand inspections. During his time as a police officer in Dublin, part of his duties was to patrol the bars in his area of responsibility which included a number of establishments which catered to students.



He testified that both in Ireland and in Canada he has had training in being able to identify intoxication in a patron and how to distinguish a state of intoxication from other behaviors a patron might exhibit.

Inspector A identified the following documents in Exhibit 1:

- A copy of the Licence (tab 3), including the fact that by its terms and conditions the provisions of the Liquor Primary Terms and Conditions Handbook applied to the Licence, a copy of which handbook he identified as (Exhibit 1 tab 12);
- A copy of the floor plan of the Games Room (Exhibit 1 tab 4);
- A copy of his notes (Exhibit 1 tab 8) concerning the allegations in the Contravention Notice, which notes were made by him a couple of days after the event; and
- A copy of the webpage describing the Bunny Hop (Exhibit 1 tab 10), of which Inspector A testified he became aware prior to the night of April 4, 2019 through social media. In his testimony, Inspector A noted that this document contained the words “The combination of tasks, shots, and creative outfits tied together with an amazing crowd and the famous bunny hop shirt make this night a truly unique experience you need to join in to believe.”.

Inspector A, in his testimony, confirmed the description of the activities that he and Inspector B carried out on the evening of April 4, 2019 as set out in the NOEA, and with reference to the CCTV video camera footage recorded during the events in question, and introduced into evidence at the Hearing, added that:

- There was a clear line of sight between the bar, the pool table and the students in the vicinity of the pool table and that the bar staff were not particularly busy;
- While the female was lying back on the pool table with her bare midriff, there was a group of students gathered around, cheering very loudly and filming the event;
- when M-1, M-2 and M-3 returned to the bar after leaving the pool table area, each took a shot glass of liquor served by the Bartender, cheered, clinked glasses together, and drank the liquor in one swallow grimacing afterwards;
- After drinking the liquor, the three males demonstrated definite signs of intoxication, which signs could be readily observed by the Bartender and other bar staff;

- The two Inspectors exited the men's washroom at 10:49 p.m. and the three males exited the washroom at 10:55 p.m.;
- Upon the exit, M-1 appeared to slip and almost fall down, having to steady himself against the wall as he exited; and
- Approximately a minute after exiting the washroom, the three males left the Establishment.

On cross-examination, Inspector A confirmed that:

- He did not interview any of the three males or approach them and suggest that they had had too much to drink because before he and Inspector B had finished their observations and had had an opportunity to speak to the three males, the three males had left the Establishment;
- There was no violence, the three males were hugging one another and having a good time, and he did not believe that there was a public safety issue with respect to the three males for themselves or with respect to any of the other patrons in the Games Room;
- That the NOEA was incorrect in that what actually occurred was that:
  - M-3 poured a portion of the contents of a shot glass on the bare midriff of a woman laying on the pool table, and
  - M-3 then proceeded to lick some of these contents from the woman's stomach and drink the balance of the contents from the shot glass;
- He had never previously seen such a "midriff shot" in a licensed establishment during the many inspections that he had previously performed;
- M-2 and M-3 had sufficient coordination to write on the back of a T-Shirt as demonstrated in the CCTV camera footage;
- He was unaware that there were patrons escorted out of other licenses of the Establishment during the evening of April 4, 2019;
- During the time that he and Inspector B observed the three males, one of them had two drinks of liquor and the other two had one;
- The contravention is not for over service of liquor;
- He and Inspector B were in the men's washroom for between 30 and 60 seconds.

## **Evidence of Inspector B**

Inspector B testified that his area of responsibility was Saanich and the Gulf Islands. As part of his responsibility, he conducts public safety inspections when he enters a licensed establishment and looks for patrons who might be causing a risk to themselves or others, such as intoxicated patrons. He has conducted approximately 750 inspections during his time as a liquor inspector. During this time and during his time as a police officer, he has had experience in dealing with intoxicated persons.

Inspector B identified the following documents in Exhibit 1:

- A copy of the NOEA (Exhibit 1 tab 1) of which he confirmed he was the author and that, except as noted below, the facts and matters set out constituted an accurate summary of what occurred on the evening of April 4, 2019;
- A copy of the Contravention Notice (Exhibit 1 tab 2) issued to the Licensee on April 8, 2019, which he confirmed he was also the author; and
- A copy of the compliance history of the Licensee (Exhibit 1 tab 5), noting that there were no contraventions by the Licensee of a nature similar to the contravention referenced in the Contravention Notice.

Inspector B testified that when he had subsequently reviewed the CCTV video camera footage from the Games Room from the night in question, he realized that the male involved with the woman with the bare midriff lying on the pool table was not M-2 as described in the NOEA but was M-3. He stated that what M-3 in fact did was to pour a bit of the contents of the shot glass on the woman's midriff, lick off this liquid from the woman's midriff, and then consume the balance of the contents of the shot glass.

Inspector B, with reference to the CCTV video camera footage recorded during the events in question, noted that:

- After the incident involving M-3 and the woman with the bare midriff lying on the pool table, he had observed that there was loud cheering and clapping from the people gathered around. Inspector B testified that this "midriff shot" was an unusual event to witness at a licensed establishment and that upon its occurrence he had expected that one of the Licensee's staff would have asked the woman to get off the pool table and to ensure that she and the other parties involved were not intoxicated;

- The reason for pursuing enforcement in this matter was because it was a public safety issue, generally these are more serious in nature and focus on a concern about people who cannot look after themselves or are of harm to others; and
- After leaving the men's washroom and having discussed the matter with Inspector A, they had determined that these three males should be reported to the Licensee's security staff, but that before the inspectors had had an opportunity to act, the three males had exited the Establishment.

On cross-examination, Inspector B confirmed that later on the evening of April 4, 2019, he had had a conversation with the Security Manager and that during that conversation he had not mentioned the three males and what he and Inspector A had observed in the Games Room earlier in the evening.

## **EVIDENCE – LICENSEE**

### **Evidence of the Licensee's Representative**

#### The Licensee's Representative's Responsibilities

The Licensee's Representative testified that he has worked for the Establishment for twelve and a half years. His current position is the Director of Operating Outlets with responsibility for the food and beverage service within the Establishment. Before coming to work for the Establishment, he stated that he had worked elsewhere in the hospitality industry on Vancouver Island.

He testified that the Establishment has approximately 300 employees for whom he is responsible. These employees include servers and bar tenders who are specifically assigned on a daily basis to the various licensed areas of the Establishment, save and except for the liquor store. These employees are considered one pool and include a security team of approximately 26-30 employees. These security team members are readily identifiable when on shift as they have a specific uniform.

The Licensee's Representative identified the bar tender in the Games Room wearing the T-Shirt on the evening of April 4, 2019 as the Bartender. The Licensee's Representative also identified the Security Employee who is a member of the Establishment's security team and has been employed in this capacity by the Establishment for over two years.

He testified that on the evening in question, there would have been one member of the Establishment's security staff assigned to the Games Room, while the Security Manager whose responsibility was to float throughout the various licensed areas within the Establishment, would from time to time have been present as well. When required, he stated, there was another member of the security team who would also assist in the Games Room. He noted that the CCTV camera footage confirmed the presence of this additional member of the security staff in the Games Room.

### Security Staff Training

All members of the security team, he testified, have to be licensed in order to be employed by the Licensee. They have all taken the basic security training course and have been certified. The Security Manager who is responsible for overseeing the activities of the Licensee's security employees has worked for the Establishment for four to five years. He, as well as the Security Supervisors, have their Advanced Security Training Certificates. These courses and the resulting certifications are offered by the Justice Institute of British Columbia.

He testified that the Licensee's security employees are trained in security issues which include the identification of intoxicated patrons. This training, he stated, is carried out both during the security courses and during the in-house training carried out by the Establishment. The Establishment has meetings of its security team every two to three months, to which meetings they bring in guest speakers to speak on topics of assistance to the members of the security team to effectively perform their responsibilities.

### Identifying Signs of Intoxication

The Licensee's Representative testified that intoxicated patrons are of no value to the Establishment. He noted that both the Establishment's bar tenders and servers get training in identifying and refusing to serve intoxicated patrons, both in the course of securing their Serving it Right certification and with ongoing in-house training.

He testified that this in-house training includes identifying signs of intoxication such as slurred speech, stumbling or staggering, and glazed or glossy eyes. The operating protocol for the Establishment, he stated, is that if a bar tender or server has identified a patron that they believed to be intoxicated that they notify a member of the

Establishment's security team and this security person would be responsible for ensuring that the intoxicated patron left the Establishment.

### Ex 2

The Licensee's Representative identified Ex 2 as a not to scale drawing of the Games Room. He noted that this drawing showed a direct entrance for patrons into the Games Room from outside the Establishment. He testified that the Establishment's security employees monitored this entrance in the evenings.

### Ex 3

The Licensee's Representative identified:

- Ex 3 tab 3 as a USB flash drive containing an electronic copy of the current Due Diligence binder for the Establishment;
- Ex 3 tab 4 as a USB flash drive containing video files from security cameras at the Establishment on the evening of April 4, 2019;
- Ex 3 tab 5 as a copy of a page of the security log for the Establishment for the date of April 4, 2019 completed by the Security Manager. He testified that this document records which of the members of the security team were on duty on that date, where in the Establishment they worked, what events occurred of which they were aware, and which of these events needed to be recorded. He noted that this document recorded the Security Employee as being assigned to the Games Room on that date. He also referenced the notations of "E: 19" and "D: 33" and testified that these notations recorded that on the date in question, 19 patrons were removed from the Establishment and 33 people had been denied entry;
- Ex 3 tab 6 as copies of pictures depicting the Games Room from the perspective of table 12 where the Inspectors testified that they were standing (page 1) and measuring the distance from table 12 to the portion of the bar where M-2 was sitting (page 3). He noted that:
  - the picture on page 2 showed two patrons sitting at the bar and suggested that on the night in question, patrons sitting where these 2 patrons pictured sat demonstrated that the Inspectors' vision from table 12 might have been impaired and making it difficult for them to view the events to which they had testified,

- patrons were able to come to the bar and stand and order drinks, so that there could be more patrons at the bar than there were seats,
- the lighting in the Games Room on the evening in question caused the pool tables to be well lighted, but around table 12, the lighting because of the low ceiling and the light coming from the wall sconces was not bright,
- the ambient sound in the Games Room on the night in question, because of the Bunny Hop, consisted of very loud music which the Bartender put on to cater to the patrons present in the Games Room. He suggested that it would have been very difficult for the Inspectors to have heard what the three males were discussing at the corner of the bar from where they were located at table 12.

#### Ex 4

The Licensee's Representative confirmed that Ex 4 represented a copy of the Due Diligence Binder of the Establishment which had been compiled by Diana Olsen, the Director of Human Resources for the Establishment. He stated that Ms. Olsen was very knowledgeable about the operations of the Establishment having worked in many capacities within the Establishment for well over a dozen years.

He testified that he has played a big part in the creation of the contents of the Due Diligence Binder, as well, as he believed that it is extremely important to the proper operation of the Establishment that the policies and procedures practised by the Establishment are in keeping with the most current best practices and procedures of the hospitality industry.

#### Ex 5

The Licensee's Representative identified Ex 5 as a blue t-shirt similar to the blue T-shirts worn by the participants of the "Bunny Hop", many of whom were patrons of the Establishment during the evening of April 4, 2019. He noted that the T-Shirt has a "Bunny" logo on its front and, on its back, two columns. The first column is entitled "The Task" and consists of a checklist of 11 tasks ranging from "Start a Chant" to "Lap Dance" and included "Body Shot". The second column is entitled "The Shots" and consists of a list of 12 types of liquor to consume ranging from "Liquid Cocaine" to

“Lemon Drop”. The back of the shirt also contained icons of eight glasses of beer inserted between the words “I drank... beers”.

He noted that each item on both lists included circles opposite each item. He noted that, from a review of the CCTV camera footage of the Games Room while the Inspectors were present, a number of the patrons wearing the T-Shirts were writing with a marker on the back of other patrons wearing the T-Shirts. He suggested that the patrons who were writing were recording the fact that the person wearing the T-Shirt had either accomplished the task or drunk the shot listed opposite the circle being coloured in.

#### The Licensee’s Practices and Procedures

The Licensee’s Representative testified that he had been advised by knowledgeable people in the hospitality industry that the policies and procedures of the Establishment were the best that this person had seen with respect to the service of liquor in the hospitality industry.

The Licensee has a meeting of its front of house staff every six to nine months to which all such staff are required to attend and for which attendance these staff members are paid.

For the Licensee’s security employees, identifying an intoxicated patron is a topic of discussion at each meeting of the security personnel. He confirmed that he had no doubt that a member of the Establishment’s security team is well trained in and has the ability to identify an intoxicated patron. The Licensee takes public safety very seriously and has a cab voucher program to ensure that an intoxication patron can be taken home safely.

The Licensee’s Representative testified that all the Establishment’s employees sign off on having reviewed and understood the Establishment’s rules on best practices and procedures and agree that, if they are found to have breached one of these rules, they will immediately be terminated. He confirmed that this has happened, even though the employee terminated was a long term, experienced, and excellent employee who was found to have served liquor to a minor without having asked for identification.



The Licensee's Representative testified that the Licensee communicates with its staff regularly concerning best practices and procedures and advises its staff on a regular basis on changes to the liquor laws. Signage is posted throughout the Establishment and in the staff premises to serve as a constant reminder.

To ensure that staff have such practices and procedures on top of their minds, the Licensee administers quizzes to its staff on a regular basis concerning best practices and procedures, including how to identify intoxicated patrons. The staff members have about 2 weeks to complete the quizzes and to submit their answers. Each member of the Licensee's staff is required to participate in these quizzes.

The Licensee confirmed that the Establishment has manuals distributed to its staff and, as well, a newsletter circulated on a quarterly basis.

He testified that he was involved in the training program dealing with a responsible service package for all staff members who have to sign off confirming that they understand and will operate in connection with this.

#### Cross-Examination of the Licensee's Representative

On cross-examination, the Licensee's Representative testified that:

- He was aware that the Bunny Hop was going to happen and when asked if the fact that the Bartender was wearing the T-Shirt indicated that the Establishment was endorsing the Bunny Hop, the Licensee's Representative testified that whenever there is an event of a group such as the Bunny Hop patrons coming to the Establishment, for example to support a particular football team, when possible, a member of the Establishment's staff would wear a jersey for the football team the fans was supporting. He stated that wearing such a piece of clothing was not an endorsement of the event, but rather a part of participating in the event. He confirmed that the Establishment did not offer special pricing incentives to the participants in the Bunny Hop. He also confirmed that student patrons at the Establishment represented a large percentage of its clientele;
- When asked if it would not have been wise that if the Establishment's staff knew about the Bunny Hop that they should have been particularly vigilant for intoxicated patrons, the Licensee's Representative agreed and testified that the

Establishment had had additional security staff working that night and that, at the start of the evening, he had had a meeting with all the security staff to encourage them to be extra vigilant. He stated that he believed that it was due to this event that there were 33 denials of entry to the Establishment on that evening as set out on the page of the security log (Ex #3 tab 5), while on a normal Thursday night there might be one third of such denials. He noted that, from the CCTV video footage, he was able to determine that the reason that members of the Licensee's security staff were observed by Inspector A and Inspector B to be laughing was not that they were laughing at the antics of patrons in the Games Room, but rather that they were observing another member of the Licensee's security staff who was in the process of escorting a patron from the Establishment;

- When directed to a portion of the CCTV video footage which shows M-2 with his head down while the staff member clears an empty glass from in front of him, and asked whether or not the staff member should have been concerned that M-2 was intoxicated, the Licensee's Representative suggested, firstly, that the server might not have observed the action of M-2 and, from looking at the video footage, M-2 might just have lowered his head to smell what was in his glass. In any event, he testified, if a staff member saw this happening, he would want the staff member to continue watching the individual to observe if there were further indications of intoxication. As the inspectors testified, he noted, there are a number of signs of intoxication, and that it would not necessarily be appropriate to ask a patron if he or she is intoxicated as so much depends on the circumstances;
- When asked about the activity known as a "body shot", he testified that, in his visits to the Games Room over the course of years, he has seen a young female leaning back on the pool table engaging in this activity and that it is not unusual. However, when he sees such an activity, he will recommend to his staff that they keep an eye on this young female. However, he testified, he did not believe that this action in itself confirmed intoxication as he noted that it was a task for the participants in the Bunny Hop to complete and that it was not necessarily a method of consuming alcohol. The "shot", he noted, could have been orange juice;

- The Licensee's Representative was directed to page 21 of the copy of the Serving it Right Manual (Ex 1 tab 11) and in the paragraph entitled "Impaired Judgment" to the sentence which reads:

While, of course, you always have a duty to protect guests from injuring themselves or others, your warning bell should ring whenever you see patrons indulging in reckless behaviour, like consuming a drink quickly while friends chant and cheer, or trying to perform a physical stunt they saw on the internet

and he acknowledged that the activity of the female lying back on the pool table and having a male pour liquor on her naked stomach and licking it off could be a sign of intoxication and a "warning bell", but that there would be other behaviours required to be observed to clearly establish a state of intoxication;

- When asked if the Establishment's staff are trained to look for patrons displaying signs of a medical condition, the Licensee's Representative testified that if a patron is showing signs of stress then staff are trained to call the paramedics and the Establishment's security personnel have done this many times and have in the past helped to save lives;
- The Licensee's Representative was directed to Ex #4 and was asked if he could confirm that the contents of the Due Diligence Binder and the practices and procedures provided for in there were in place prior to April 4, 2019, and he confirmed that to be the case;
- When directed to the two incidents in the Games Room, the midriff shot and the head nodding, and asked what he would have done, he testified that he would have observed and keep watching for multiple signs of intoxication as it is a combination of factors which leads to the conclusion that there is intoxication and that is what the Licensee's staff are trained upon;

### **Evidence of the Security Manager**

The Security Manager identified a copy of his statement in Exhibit #3 tab 2.

The Security Manager testified that he had been employed by the Licensee for over two years as the security manager. He stated that he had had over seven years of experience in dealing with security in the hospitality industry at pubs and bars as well as three years as a trainee with the reserve of the Saanich Police.

When asked to compare the compliance culture at the Licensee with the culture at his previous places of employment, he testified that the Licensee was much stricter in ensuring that all employees were aware of and compliant with all the rules and regulations concerning the service of alcohol.

He testified that there are regular meetings of the Licensee's security employees attended by the Licensee's Representative to which they bring experts in the security field to perform training. Part of this training is how to remove intoxicated patrons from the premises without harm to the patron or the security employee.

He testified that when he is on duty, he moves throughout the Establishment. On April 4, 2019, there was at least one member of the Licensee's security staff in each room of the Establishment at the start of the evening and, as it got later in the evening, they increased this number. The Security Employee was assigned specifically to be stationed in the Games Room.

The Security Manager testified that the Security Employee is one of the more senior members of the security team with a lot of experience in dealing with intoxicated patrons and knows very well what signs to look for in patrons to determine whether or not the patron is intoxicated.

He confirmed that one of the security employees during the evening was moved from another location in the Establishment to the Games Room to assist the Security Employee during a particularly busy period. He testified that in a situation such as the Bunny Hop, as he was not aware in advance as to what part of the Establishment might be busy, it is the procedure to have a security employee move from one location to another depending upon need.

He testified that, at the end of each shift, the security employees get together and discuss what has gone on during the evening and make the logbook entries from notes taken during the evening. Ex #3 tab 5 is a copy of the entry in the logbook for the Establishment for April 4, 2019.

He testified that when the patrons are university students, as was the case on the evening of April 4, 2019, they are exuberant, effervescent, fun and full of energy.

He was directed to the CCTV camera footage of the three males entering the Games Room on the evening of April 4, 2019 and noted two security employees requesting identification from the patrons entering. He expressed his opinion that from looking at this footage none of these three males demonstrated signs of intoxication during their entry.

He testified that whenever liquor inspectors attend the Establishment, he makes a point of having a conversation with them to ensure that everything is in order. He testified that, when he met Inspectors A and B on the evening of April 4, 2019 after the inspectors had seen M-2 vomit in the men's washroom of the Games Room, he had specifically asked the Inspectors how everything was going in the Establishment for that evening. The Inspectors told him, he testified, that everything was fine, everything was OK. They did not advise him that a patron had vomited in the men's washroom of the Games Room nor that there had been any problem of which he should be aware.

He confirmed that there were other patrons in the Games Room on the evening of April 4, 2019 who were part of the Bunny Hop patrons who were ejected that night.

He testified that, every Wednesday at four o'clock, he meets with the Licensee's Representative in the Establishment to discuss what problems might have occurred during the week, what events were coming up, and anything that needed to be addressed and that the entire security team meets every two to three months.

On cross-examination, the Security Manager was asked:

- what discussions he had had with his staff in anticipation of the Bunny Hop and he testified that events such as the Bunny Hop encouraged the consumption of alcohol and that his security staff should be particularly vigilant about patrons having been drinking prior to attending the Establishment and over consumption while in the Establishment; and

- If he was the author of the notations on the page of the log book (Ex 3 tab 5) and he confirmed that he was and confirmed that he floated throughout the Establishment on that night, with his intention to spend an equal amount of time in each of the locations in the Establishment, unless there was a specific incident.

### **Evidence of the Security Employee**

The Security Employee testified that he had been working with the Licensee for approximately 6 years. His role as part of the security team is to ensure the safety of patrons and staff in the Establishment. In carrying out this role, he checks ID's for those entering the Establishment and he removes any intoxicated patrons from the Establishment.

He confirmed that there is a meeting of the entire security team every two to three months to review past events, what might be coming up, and how to do his job better.

He confirmed that on April 4, 2019, he was working in the Games Room and had been told at the start of his shift that the Bunny Hop was happening. He confirmed that every patron entering the Games Room that night was asked for identification and was checked to ensure that they were not intoxicated. He testified that he would never admit any patron who appeared to be intoxicated and he certainly did not that evening.

### **Evidence of the Bartender**

The Bartender testified that he had been employed by the Establishment for twenty plus years and that before working for the Licensee he had worked in New Brunswick and had secured bartender experience there.

He has had his Serving it Right certificate for over twenty years. He has experience in identifying intoxicated persons and confirmed that there is no benefit to him or to the Establishment in permitting an intoxicated person to remain in his bar. He testified that on the night of April 4, 2019, he had had a number of intoxicated folks removed from the Games Room after he had called security to have them removed.

When asked of his reaction if he saw a patron with a bobbing head, he testified that such behavior might be a sign of intoxication. As a bartender, he noted, he has lots of opportunity to observe motor skills when a patron pays as well as when they drink what they have purchased. He testified that each of the three males in question paid by credit charge taking from 45 seconds to two minutes to complete the transaction. During each of these transactions, he noted no indicia of intoxication. He confirmed that it is his experience that if a patron is intoxicated that they will have difficulty using electronic payment methods.

He testified that, prior to the three males purchasing their drinks, there was a conversation among them as to which one of the listed shots on the back of the T-Shirt they each wanted. During this discussion, he testified, he did not observe any indicia of intoxication. He noted their speech was quite precise.

When asked if he had seen any of the three males bobbing his head, he testified that he had noted that M-1 kept swooping his hair back from his headband. But as to a head bobbing, he stated, he didn't see any of the males do this.

On cross-examination, the Bartender testified:

- That a group such as the patrons representing the Bunny Hop will stay about a half an hour at each location identified as part of the pub crawl, but when they arrived at the Games Room, it didn't necessarily mean that they had been drinking elsewhere;
- When asked if he saw a midriff shot would he have been concerned, he testified that such activity is not unusual among young people. He stated that it is not necessarily an indication of intoxication and that he was more concerned about people laying on the pool tables; and
- When asked about the reaction of M-2 to the shot he had drunk as seen on the CCTV camera footage, the Bartender responded that he believed that M-2 clearly didn't like the taste of the shot and that's why he asked for water. It is not unusual for someone to drink a drink, he testified, and for it not to agree with them to the extent that they end up being sick to get rid of it.

## SUBMISSIONS – BRANCH

In its submissions, the Branch noted that for the Licensee to be liable for the contravention alleged in the NOEA, the Branch must prove on a balance of probabilities that:

1. A patron within the Games Room exhibited a constellation of behaviours consistent with intoxication;
2. There was an opportunity for staff of the Licensee to notice the presence of this patron exhibiting these behaviors consistent with intoxication; and
3. Staff failed to take immediate action to remove the intoxicated person from the premises.

In support of its position, the Branch cited the following previous decisions rendered by Branch Hearing Delegates:

*The Brickyard* EH19-019 and the following paragraph at (p.22)

As to whether the female patron, being intoxicated, was allowed to remain on the premises, I find that once a staff person interacts with a person, whether for the service of food or any type of drink (alcoholic or non-alcoholic), or simply sees a person enter the premises, the staff person has an obligation to make an assessment whether the person is intoxicated and if the person is intoxicated, to immediately request the person to leave the premises.

and:

*Brew Street Café and Kitchen* EH17-028 (p. 22)

Because of the length of time both patrons were in the establishment, I find that the security personnel, if doing their job properly, should have observed the same signs noted by the officers.

The Branch submitted that the actions of the three males in the Games Room as observed by Inspector A and Inspector B and confirmed by CCTV video footage clearly indicated all requisite forms of intoxication, but that the consumption of liquor by M-3 from the woman's midriff, and the vomiting in the men's washroom by M-2, were sufficient to remove any doubt and demonstrated on a balance of probabilities that the



Branch had met the first element of proof required of it, namely that one or more of the three male patrons were intoxicated.

It is the Branch's position that, as the Licensee had advanced knowledge that participants of the Bunny Hop would be arriving at the Establishment on the evening of April 4, 2019 and that these participants had most likely been consuming alcohol prior to their arrival, they might, therefore, be intoxicated upon their arrival. Because of this, the Licensee's staff had an elevated obligation to assess whether a patron was intoxicated, both upon entry and during the patron's stay in the Establishment.

Based upon this elevated obligation, it is the Branch's position that the Bartender and a server should have been alert to possible signs of intoxication from the participants in the Bunny Hop, and in this context had an ample opportunity to observe M-2 when he was sitting at the bar with his head drooping. This demonstration of intoxication by M-2 imposed an obligation upon either of them to have immediately summoned the Licensee's security personnel and to have had M-2 removed from the Establishment. As this was not done, the Branch submits that it has established the second and third elements of the contravention, and the Licensee is, therefore, liable for the contravention as alleged in the NOEA.

With respect to the Licensee's position that its employees were duly diligent, the Branch submitted that the evidence before me falls short of establishing this due diligence. It is the Branch's position that the Licensee had prior notice of the Bunny Hop requiring it to have taken extra steps to ensure that its staff were duly diligent as there was a high probability that patrons had arrived at the Establishment already intoxicated or nearly so.

The Branch submitted that, as this elevated standard of vigilance required in the circumstances from the Licensee's staff on April 4, 2019 was not evident, the Licensee has not demonstrated that the defense of due diligence applies to the alleged contravention.

## SUBMISSIONS – LICENSEE

The Licensee submitted that:

- Inspector A and Inspector B observed the patrons in the Games Room involved in the Bunny Hop for only twenty minutes;
- At no time during the time in question did any member of the Licensee's staff observe symptoms of intoxication in M-1, M-2, and M-3, nor were they aware of M-2 having vomited in the men's washroom;
- The only evidence of consumption of alcohol by the three males was one drink while at the bar of the Games Room; and
- The evidence confirms that a number of patrons involved with the Bunny Hop were asked by the Licensee's staff to leave the Establishment on April 4, 2019.

It is the Licensee's position that the evidence before me does not demonstrate on a balance of probabilities that a member of the Licensee's staff observed one of the three males to be intoxicated and to thereby be required to have the Licensee's security staff remove this patron from the Establishment.

With respect to the Branch's position on the Licensee's due diligence, the Licensee notes that the standard is not perfection or absolute observation of every single incident, but simply a standard of compliance with best practices, which standard employed by the Licensee is demonstrated in the evidence before me.

## REASONS AND DECISION

### **The Legislation**

The basis for the contravention is section 61(2)(b)(ii) of the *Act* which provides that a licensee must not allow an intoxicated person to enter or to remain in a licensed service area.

To establish that a contravention has occurred under this section, the Branch must first demonstrate on a balance of probabilities that a patron found in a licensed premise was intoxicated. If it has demonstrated intoxication, it must then prove on a balance of probabilities, either that the licensee allowed this patron when intoxicated to enter the

licensed service area, or that the licensee allowed this patron when intoxicated to remain in the licensed service area.

In this latter option, the legislation does not appear to require that the Branch demonstrate that the patron found to be intoxicated achieved this state of intoxication in the licensed service area. In other words, it would appear that it does not matter how the patron became intoxicated, if the patron is intoxicated and is in the licensed service area, the licensee is required to cause the patron to leave the licensed service area or to face a contravention that the licensee “allowed” the intoxicated patron to remain.

In the matter at hand, the evidence before me from the Security Employee who permitted the three males to enter the Establishment on April 4, 2019 was that the three males did not appear to show that they were intoxicated at the time of their entry into the Establishment.

Therefore, I find that for the Branch to establish a contravention in this matter, the Branch must establish on a balance of probabilities that Inspector A and Inspector B were correct in their determination that one or more of the three males in question were intoxicated and that the Licensee allowed the intoxicated party or parties to remain in the Establishment following this determination.

It is acknowledged that determining whether or not a particular patron is “intoxicated” requires the observation of a number of behavioural signs. This means that a party making this determination is left to rely on that party’s observations of the patron in question over a period of time looking for such characteristics as changes in speech, appearance, mood, and physical coordination together with a loss of inhibition, disruptive behavior and signs of impaired judgement.

### **The Alleged Contravention**

In the matter at hand, the patrons of the Establishment were largely students from the University of Victoria who were involved in what was called a “pub crawl” and as part of an event entitled the “Bunny Hop”. During this event, the participants dressed in T-Shirts (Ex 5) and worked together to fulfill the items enumerated on the back of the T-Shirt each of them wore. These items included the participants being given the

opportunity to indicate by completing a notation on the back of the garment whether or not they had drunk any one of 12 “shots”, how many of eight beers they had consumed, and how many tasks they had completed. One of the tasks on the list was a “body shot”.

The event included stops at 5 licensed premises in the downtown Victoria area (Ex 1 tab 10) and it was obvious that the consumption of alcohol was a main feature of the evening’s event for the patrons involved. The Branch has submitted that, as the Licensee had prior knowledge that their licensed premises were to be venues for the Bunny Hop event, its staff should have been vigilant looking for signs of intoxication among the patrons attending the event. The evidence before me is that, as a result of this Bunny Hop event, the Licensee had scheduled additional security personnel to be in attendance on the evening of April 4, 2019 and that these personnel had been briefed on what to expect for the evening in preparation for the arrival of the participants in the Bunny Hop.

The task for the Inspectors was to determine, from observing the activities of the various patrons, whether or not one or more of them demonstrated sufficient signs for the Inspectors to consider one or more of these patrons as “intoxicated” for the purpose of section 61(2)(b)(ii) of the *Act* and, therefore, requiring an employee of the Licensee to take the necessary action to require a particular patron to leave the Establishment.

In its submissions, the Branch cited the paragraph from *Brew Street Café and Kitchen* EH17-028 (p. 22) noting that if the security personnel of the licensee in question had been doing their job properly that they would have observed the intoxicated patrons and would have had these patrons removed from the licensed service area. It is to be noted that in this decision, the Hearing Delegate made this observation after noting that the patrons who were alleged to have been intoxicated were in the establishment for over two hours and were in the presence of the licensee’s staff during that time period thereby giving the licensee’s staff ample opportunity to become aware of the intoxicated patrons.

As well, the Branch cited *The Brickyard* EH19-019 (p.22) and based upon this decision submitted that the action by the Licensee's staff to remove intoxicated patrons should have been immediate and because of the Licensee's staff failure to act immediately, the contravention set forth in the NOEA was established.

In the matter at hand, unlike the situation in *Brew Street Café and Kitchen* matter, the time frame for the inspectors to make their observations was twenty minutes and not two hours. The time frame in this matter is more akin to the fact situation in *The Brickyard* where the inspectors over a two to three-minute period of observation made the decision that the patron in question was intoxicated. Having made this determination, one of the inspectors spoke to the staff member who, the inspector observed, had previously interacted directly with the intoxicated patron, and the staff member then had the intoxicated patron removed from the premises.

However, the difference in the fact situation before me to that in *The Brickyard* is that, in the matter at hand, the evidence is that the Inspectors were observing the three males and it was not until M-2 had vomited in the men's washroom that they made the determination that at least one of the three males was intoxicated and should be removed from the Establishment. It was for this reason, they testified, that they had not earlier approached a member of the Licensee's staff to report an intoxicated patron in the Games Room. Indeed, it is their testimony that as they were coming to this decision to approach the Licensee's staff, the three males left the Establishment.

In order to find a contravention of section 61(2)(b)(ii), the Branch has to establish two (2) elements on a balance of probabilities. Firstly, that the patron in question was intoxicated and, secondly, that the intoxicated patron was allowed to remain in the licensed service area.

From the facts before me, I think the Inspectors had a very difficult task in making their observations concerning signs of intoxication given the activities of the three males being observed, the activities of the group in which they were engaged, and the antics engaged in both by the three males and the group in which they were involved. However, although the argument made by the Bartender that the reason for M-2 vomiting in the men's washroom was that his body was rejecting the alcohol he had just

consumed might have merit in isolation, given the other observations made by the Inspectors, I find that their conclusion of M-2 being intoxicated after observing him vomiting is correct and that M-2 was indeed intoxicated for the purpose of the contravention.

However, I have difficulty with the Branch's position with respect to the second aspect of the alleged contravention. How could it be said that M-2 was "allowed" to remain in the Games Room if after leaving the men's washroom, he and M-1 and M-3 exited the Establishment. Indeed, the evidence is that the three males departed as the Inspectors were making a determination on their state of intoxication. In other words, before the Inspectors had had an opportunity to determine that of the three males at least M-2 was intoxicated, and to advise the Licensee's staff that the three males should be asked to leave the Establishment, the three males had left the Establishment.

Therefore, I am unable to find that the Branch established that the Licensee's staff should have become aware of the three males being intoxicated and, thereby, a finding that the Licensee allowed M-2 or all the three males while intoxicated to remain in the Establishment in contravention of section 61(2)(b)(ii) of the *Act*.

### **Contravention**

Having found that the Branch has not proven on a balance of probabilities that the Licensee allowed an intoxicated patron to remain in the Games Room, I dismiss the alleged contravention against the Licensee included in the Contravention Notice.

### **Due Diligence**

Having found the Licensee not liable for the contravention included in the Contravention Notice, I needn't consider the Licensee's evidence with respect to a defence of due diligence.

**ORDER**

As I have found the Branch has not proven the contravention contained in the NOEA, I dismiss the allegation against the Licensee.

*Original signed by*

\_\_\_\_\_  
R. John Rogers  
General Manager's Delegate

Date: March 9, 2020

cc: Liquor and Cannabis Regulation Branch, Victoria Office  
Attn: Stephen Hitchcock, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office  
Attn: Hugh Trenchard, Branch Advocate