



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267

Licensee: Roche Entertainment Inc.
dba Maxx Fish
4228 Village Stroll
Whistler, BC

APPEARANCES

For the Licensee: Peter Roberts, Manager, Maxx Fish
Alistair Knox, Manager of Operations,
Roche Entertainment Inc.

For the Branch: Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

File No. EH03-087

Date of Hearing: October 17, 2003

Place of Hearing: Vancouver, B.C.

Date of Decision: October 28, 2003

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8

Telephone: 250 387-1254
Facsimile: 250 387-9184

Location:
Second Floor, 1019 Wharf Street
Victoria BC

<http://www.ag.gov.bc.ca/lclb/>

Introduction

The licensee operates a cabaret known as Maxx Fish (“the cabaret”) in the Whistler Village. It is in area with other nightclubs, restaurants, stores, commercial outlets and hotels. The licensee holds a Liquor Primary Licence, No. 4781, which permits hours of operation from 7:00 P.M. to 2:00 A.M. Monday to Saturday and to 1:00 A.M. on Sunday. The licence permits a maximum capacity of 210 patrons.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action dated June 9, 2003, the branch alleged that on February 23, 2003 (business day February 22, 2003) the licensee permitted an intoxicated person to remain on the premises, contrary to section 43(2)(b) of the *Act*. The branch recommended an enforcement penalty of four (4) day licence suspension.

Schedule 4 of the *Liquor Control and Licensing Regulations, BC Reg. 608/76, Enforcement Actions*, provides a range of licence suspensions and monetary penalties for each contravention. The range for a first contravention for this alleged contravention, item 10, is a licence suspension of 4 to 7 days, or a monetary penalty of \$5,000 to \$7,000.

Compliance History

There is no record of proven similar contraventions, offences or enforcement actions (“compliance history”) for this licensee or this establishment within the year preceding this incident. Therefore, these contraventions, if proved, would each be considered a first contravention for the purposes of the Penalty Schedule.

The branch has had concerns over the past two years of possible contraventions related to liquor being removed from the premises, liquor not purchased in the premises being consumed, the licensee staff not producing a Serving It Right training certificate, the licensee staff permitting a person to become intoxicated, and the licensee staff permitted an intoxicated person to remain in the premises. The branch issued Contravention Notices in September 2001, April 2002, September 2002, January 2003 and March 2003. The branch did not pursue enforcement action for those alleged contraventions.

Issues

1. Does the evidence support the allegation that there was an intoxicated patron in the premises?
2. Does the evidence support the allegation that the licensee permitted an intoxicated patron to remain in the premises?
3. If the allegation is made out, is the recommended penalty appropriate?

Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Letter dated August 29, 2003
Exhibit No. 3	Cashout & Revenue check #325
Exhibit No. 4	Handwritten statement

Applicable Statutory Provisions

Drunkenness

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

Evidence

The branch called two police officers to give evidence. The licensee had anticipated that a patron (patron #1, below) would attend the hearing but that witness did not show. The manager of Maxx Fish testified.

The branch's evidence

The police officers testified that they attended the cabaret in plain clothes at approximately 1:30 A.M. on February 23, 2003. They walked around the cabaret, which they said seemed to be at capacity. After their walk around, they were standing near the entrance when a patron bumped into one of the officers (the 'first' officer). The officer alerted her partner (the 'second' officer) to this patron. The officers testified that as they watched the patron, they were between 8 feet and 15 feet distant from him.

The first officer testified that she watched the patron walk to the main bar and described him as 'wobbling' both in his walk and when standing at the bar. At the bar, she observed the patron slouched over the bar, with his hands on the bar. She testified that his eyes closed and opened, were bloodshot, and his face was flushed. She observed a server talk with the patron and return to him with a small drink of brown liquid, with a straw.

The first officer testified that she watched the patron walk from the bar to another patron standing by the entrance. She described his walk as 'wobbling' and noted that he bumped into other patrons. When he met his 'friend' they put their arms around each other shoulders in what the first officer described as an attempt to keep each other balanced. She described the 'friend' as having bloodshot eyes and flushed face and he was holding, and drinking from, a bottle of 'Listerine'.

The second officer testified that he watched the patron who his partner alerted him to at the bar. He testified that the patron's head went up and down and he

appeared to be losing consciousness off and on. He observed the patron being served a drink, leave the bar, and walk in a 'wobbling' manner, staggering, over to another patron. He described the two patrons as 'leaning into each other'.

For ease of reference I will refer to patron #1, the one who had been at the bar, and patron #2, the one who had the Listerine bottle. The officers approached both patrons, identified themselves as police officers, showed their badges, and asked for identification. The patrons questioned the identity of the officers and were not prepared to show their identification. The officers moved the patrons to a landing in the stairwell where it was quieter and repeated their demand. The officers testified that patron #2 refused to show his identification. The first officer described him as having slurred speech, flushed face, and a strong smell of liquor. Because he refused to show his identification, the first officer telephoned for assistance. When the back up uniformed officers arrived, patron #2 still refused to show his identification.

The second officer mainly dealt with patron #1. He testified that when the patron realized they were police officers he became agitated but then cooperated with them. He described him as having slurred speech and glassy eyes, smelling of liquor, and being unbalanced. The second officer smelled the drink he had been served at the bar and gave his opinion that it contained liquor.

When the back up officers arrived, both patrons were arrested for being intoxicated in a public place and taken to the police station. Later that morning, the first officer spoke with patron #2 in cells, and he told her the Listerine bottle contained Crown Royal rye whiskey.

While the officers were dealing with the patrons on the landing, they were approached by one of the door control staff who then alerted the manager to the situation. The manager took the two officers to an office and produced the

documents they requested. Both officers testified that all staff were cooperative, as they usually are.

The officers testified that both patrons were obviously intoxicated and that it would have been easy for staff to detect that they were intoxicated. Although the cabaret was near capacity, the area by the entrance and the bar were not very congested so that observation of the patrons was not difficult. They testified that when they first noticed patron #1, there was a door control staff standing approximately 8 feet from them and, in their opinions, could have seen the patron's signs of intoxication. The officers testified that the patron's demeanour at the bar – head slouching, eyes opening and closing, appearing to go in and out of consciousness – was clearly visible.

The first officer testified that she did not bring these individuals to the attention of the cabaret staff to deal with because they were beyond the point of simply being removed. She also testified that there is a bar liaison program in Whistler between the police and the licensees and that this licensee is part of the program.

The licensee's evidence

As noted, patron #1 did not attend the hearing as arranged. Exhibit No. 4 is a hand written statement by him. His statement indicates that he arrived at 12:30 or 12:45 A.M. and ordered a whiskey and 7-Up, followed 15 minutes later by another. He then went over to his friend and they were approached by the police. Exhibit No. 2 is a letter from his employer indicating that he got off work that night/morning at 1:00 A.M.

The manager, who took over as manager in January 2003, has worked in the liquor industry for eight years. He testified that he has spoken with patron #1 since this occasion and noted that he speaks with a slight speech impediment

and has a French accent. Therefore, the manager suggested that the police might have mistaken his normal voice as being slurred.

The manager did not have contact with the patrons, except to ask one of them a question. He had no observations about their levels of, or lack of, intoxication although he said they 'might' have been intoxicated.

The manager testified that both the server who the police allege served patron #1 an alcoholic beverage, and the door control staff the police observed near the entrance, are experienced employees who would have noticed if these patrons were as intoxicated as the officers suggest. The server told him that she did not think patron #1 was intoxicated. Her employment was terminated for unrelated reasons. The licensee did not ask her to attend the hearing.

Exhibit No. 3 is a printout showing the only single beverage that server sold at approximately that time. The manager testified that the description indicates it was an 'energy' drink, not an alcoholic beverage.

The manager testified that they have staff meetings every week to discuss concerns. He said that young people have been bringing liquor into the cabaret and to prevent that, they instituted a requirement to check coats. That entailed making room for a coat check and providing the service free. He also noted that there is a log book for staff to record police visits; however he forgot to bring it to the hearing. He testified that police are in regularly and, overall, there are few problems.

The manager advised that Maxx Fish is now closed and whether and when it will reopen has not been determined.

Submissions

The licensee submitted that I should find that the licensee did not permit intoxicated patrons to remain. He noted that some people become intoxicated quite quickly and that the staff may not have time to notice that these individuals had approached that level. He did not take issue with the officers removing the individuals and noted that the licensee would have removed them if the officers had given them that opportunity.

The licensee submitted that there have been hundreds of police and liquor branch inspections in this cabaret, with very few problems noted. The licensee is a member of the bar liaison program and works with the enforcement personnel.

The licensee noted that the individuals were charged and paid fines. Penalties have been paid and there should be no penalties levied against the licensee. He noted that the proposed licence suspension would amount to a loss of approximately \$20,000, although he produced no documents to substantiate that.

I questioned the licensee about a monetary penalty instead of a licence suspension and he had no submission on that.

Reasons and Decision

I find that the branch has proven the alleged contraventions. I find that both patrons #1 and #2 were intoxicated and I find that they were noticeably intoxicated so that they should have been removed by the licensee's staff.

On the basis of Exhibit No. 4, Patron #1's statement, I find that the drink the server provided him was alcohol. Although he claims to have had only 2 drinks, I accept the police officers' testimony that he was obviously drunk. Patron #1 was sufficiently intoxicated that he was slouching over the bar and his eyes were

closing, as though he was losing consciousness. Nonetheless, the server provided him with another drink.

Patron #2 was openly displaying his Listerine bottle, such that the officers saw it, and his level of intoxication was noticeable. I find that the licensee's staff should have been aware of his condition and should have removed him.

The officers' testimony was clear and unshaken. The signs of intoxication they describe are consistent with the branch's claim that the licensee should not have permitted the patrons to remain in the premises.

Penalty

Pursuant to ss. 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the regulations and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

I have taken into consideration that these are the first proven contraventions for this establishment and that the staff were cooperative with the police officers. I have given weight to the previous Contravention Notices only to the extent that they demonstrate the branch has told the licensee in the past of concerns about intoxicated patrons.

The range for first contraventions is 4 to 7 days, or \$5,000 to \$7,000 fine. The main goal of enforcement action is to achieve voluntary compliance. The licensee submitted that it was not necessary in this case to impose a penalty. I do not agree. The fact that the intoxicated individuals may have paid a fine is not relevant to this contravention. Quite apart from the patrons' legal responsibilities, the licensee has a legal responsibility. The branch has had previous concerns with this licensee about this contravention, and has raised the concerns. It is apparent that the licensee has not taken sufficient steps to ensure that it does not occur. I find the imposing a penalty is appropriate. The penalty must be sufficient to stress the importance of future voluntary compliance.

Although the branch has recommended a licence suspension, I have given consideration to imposing a monetary penalty because the establishment is closed and it is not clear when it will reopen. The branch recommended the minimum of the suspension range. The licensee suggested that the monetary impact of that would be well beyond even the maximum of the monetary penalty range. I find that an appropriate monetary penalty is mid-range, \$6,000.

Order

Pursuant to section 20(2) of the *Act*, concerning licence #4781, for the contravention of permitting an intoxicated patron to remain in the establishment contrary to section 43(2)(b), on February 23, 2003, I order Roche Entertainment Inc. to pay a monetary penalty of \$6,000, to be paid no later than November 30, 2003.

Original signed by

DATE: October 28, 2003

M.G. Taylor
Enforcement Hearing Adjudicator

cc: R.C.M.Police Whistler Detachment

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Wendy Jones, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Shahid Noorani, Branch Advocate
