



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

A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licensee:	Lescan Enterprises Ltd. dba Beaufort Hotel 3009 – 3rd Avenue Port Alberni, BC V9Y 2A4
Case:	EH05-083
For the Licensee:	Michael Wasserman
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	March 28, 2006
Place of Hearing:	Port Alberni, B.C.
Date of Decision:	April 20, 2006

INTRODUCTION

By agreement with the Liquor Control and Licensing Branch (the branch) pre-dating the hearing, 070891 B.C. Ltd., represented the licensee's interest in the hearing. In accordance with Exhibit No. 1, and the expressed consent of the branch as indicated by the branch advocate, I accepted that the individual appearing for the licensee (indicated above) had authority to bind the licensee for the purposes of this enforcement hearing.

The licensee operates a licensed bar within the Beaufort Hotel. There are several licenses in the Hotel. The licence in issue is Liquor Primary No. 106203.

On evening of Tuesday, April 26, 2005, the establishment was inspected by members of the R.C.M. Police Port Alberni Detachment. The inspection revealed allegedly intoxicated patrons in the establishment.

The branch issued a Notice of Enforcement Action (NOEA) to the licensee as a result.

ALLEGED CONTRAVENTION

The branch alleged that on April 26, 2005, at 9:00 p.m. the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting intoxicated persons to remain in the premises.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act*****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.

ISSUES

1. Did the licensee contravene Section 43(2)(b) of the *Act*?
2. Did the licensee act with due diligence such that its actions are a complete defence to the allegations?
3. Is a penalty warranted and if so, what is the appropriate penalty to be imposed?

EXHIBITS

Exhibit No. 1: Correspondence regarding representation at the enforcement hearing, submitted by the branch.

Exhibit No. 2: The branch's Book of Documents.

Exhibit No. 3: Three page e-mail correspondence submitted by the licensee.

Exhibit No. 4: One page e-mail correspondence submitted by the licensee.

EVIDENCE

The branch called an R.C.M. Police corporal. He testified as follows:

- He has been an R.C.M. Police member in Port Alberni for 21 years.
 - His routine duties include conducting Licensed Premise Checks (LPC).
 - He believes liquor has been identified as a contributor to local crime.
 - He has been dealing with intoxicated and impaired individuals professionally for 21 years.
 - He has training in identifying intoxicated individuals, as a breathalyser technician, and as a police expert in intoxication. He has been so qualified for 14 years.
 - He has dealt with hundreds of cases dealing with impaired individuals and intoxicated individuals.
 - He is able to identify and discern physical symptoms and signs in order to make conclusions as to sobriety and the degree of intoxication.
 - He was working with a partner on April 26, 2005, and at all relevant times was with that partner.
 - The licensee did not make any calls to the police on April 26, 2005.
 - He and his partner entered the licensed establishment by way of the main entrance on Angus street. There were no staff members at the door.
 - Upon entering the establishment, they were not approached by any staff members.
 - He observed only one staff member in the establishment. She was behind the bar.
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- The establishment was not busy. Most of the patrons were in the smoking room.
 - He and his partner entered the smoking room. He scanned the patrons from the middle of the room.
 - The smoking room was partitioned off from the main area of the bar by a glass wall with a large open door. The whole of the smoking room was clearly visible from the bar, through the door and through the glass wall.
 - He observed one patron seated at a table with an empty glass in front of her. She was later identified as VC. He watched her for some time as her eyes were droopy and she showed some signs of intoxication.
 - Then he observed a second female enter the smoking area and join the first female at the table. The second female was staggering. Her eyes were "blazing and droopy". She passed within one or two feet of him on her way to the table. She was later identified as MM.
 - The two females were seated approximately six to eight feet from where he was observing.
 - Approximately one minute after MM sat down, the bartender walked into the smoking room and asked that the two females leave the bar.
 - VC was belligerent and resisted.
 - He heard the bartender tell VC that she had enough to drink and it was time to go.
 - Both VC and MM were obviously intoxicated.
 - As the females began to leave, VC walked to him and said, "Kiss my hand." He refused.
 - Then she said, "Kiss my ass, then." He refused that request as well.
 - He noted that VC had a strong odour of alcohol, bloodshot eyes, and exhibited slurred speech. She was swaying while she talked.
 - VC and MM both walked out the main door. He observed them leave and noted they were both staggering.
 - His partner, who had been standing across the smoking room, joined him.
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- Their attention was then drawn to a disturbance outside. They went out the main door and found VC and MM fighting and arguing.
 - He decided that VC and MM should be arrested to protect themselves, prohibit further problems and protect public safety.
 - He arrested MM and his partner arrested VC.
 - Both females were intoxicated and combative. Both were handcuffed and placed in the police cruiser for transport.
 - He returned to the bar to speak to the bartender. The bartender said that her shift started at 5:00 p.m. and she was the only staff member on duty until the doorman came on shift after the police attended.
 - She told him that MM and VC arrived at 7:30 p.m. and each was served one Mike's Hard Lemonade (Mike's).
 - He asked if they were sober when they arrived and she advised, "They seemed reasonable to me".
 - The bartender told him that she told the women they could have only one bottle of Mike's each, and she served accordingly.
 - She also advised that she had been trying to eject them prior to the police attendance.
 - He and his partner left the establishment and proceeded to return to the detachment to book VC and MM into custody.
 - While booking VC and MM, he continued to evaluate their condition and was certain that they were both quite intoxicated.
 - MM continued to stagger and sway. She had a heavy odour of alcohol and bloodshot eyes. She said that she attended the pub at 7:00 p.m. with VC and that she had three glasses of beer at the pub. She said she also had two cans of beer before going to the pub.
 - She confirmed that the female bartender had served her.
 - VC was even more intoxicated than MM. She was falling over.
 - VC said she went to the bar with MM. She had three beers at her residence before attending the pub and then two Mike's at the bar.
 - Both females were booked in and held in custody until sober.
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- He re-attended at the bar to follow up with the bartender.
- The bartender advised that she served only two Mike's; one to each MM and VC, and she produced an inventory sheet showing only two Mike's had been served that night. She denied serving them any beer.

The branch called an R.C.M. Police constable. He testified as follows:

- He was the corporal's partner on April 26, 2005, and attended with the corporal at the Beaufort at approximately 9:00 p.m.
 - He has been with the R.C.M. Police Port Alberni Detachment for three years.
 - There were no doormen on duty when they arrived.
 - They were not approached by any staff upon their arrival at the bar.
 - Most of the patrons were in the smoking area.
 - The smoking area was well lit and easily surveyed from the bar.
 - He went into the smoking area and stood across the room from his partner.
 - He approached a young looking female and asked her to produce identification.
 - The female produced satisfactory identification, and satisfied him that she was of age.
 - After checking the patron for ID, he watched two females approach his partner. One of them asked him to kiss her hand, and then to kiss her ass. He heard his partner refuse politely. The female who asked was slurring her speech. Both females had trouble walking to the door.
 - Shortly after they exited, he heard yelling from outside.
 - Both he and his partner exited the bar to see what was going on.
 - The two females were screaming at each other and shoving each other.
 - The officers arrested both females.
 - He arrested VC. She resisted and he was forced to put her in handcuffs.
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- VC was clearly intoxicated. She had watery bloodshot eyes, was slurring her speech, and had a hard time walking.
- They assisted the females into the cruiser and then his partner returned to talk to the bartender. He stayed with the police cruiser.
- They transported MM and VC to the detachment and completed prisoner reports.
- They returned to the bar to speak to the bartender. She said she served them one Mike's each.
- He saw no other staff on duty.
- He and his partner did not intend to arrest MM and VC at the time they were expelled from the bar because they were causing no disturbance. Once outside, their behaviour changed and it became necessary in the interest of public safety to arrest them.
- In the absence of some problem behaviour, it is unnecessary to arrest people who are intoxicated. The police cannot arrest everyone in Port Alberni who is drunk.

The R.C.M. Police members identified their notes in Exhibit No. 2.

The branch called a compliance and enforcement officer (C & E officer). He identified all of the relevant components of Exhibit No. 2 and testified as follows:

- He has been a C & E officer in the area for some time and is responsible for the Port Alberni area. He is familiar with the Beaufort Hotel.
 - He was not involved in the LPC of the premises on April 26, 2005. He became aware of the LPC on April 27, 2005.
 - He attended the establishment on April 27, 2005, and obtained information from the bartender and one patron who was in attendance on April 26, 2005.
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- The bartender advised him that there was no doorman on duty on April 26, 2005. She said that on that occasion VC and MM were upset because of a death in the family. They were seated in the smoking area.
- The bartender told him that she had cut off both VC and MM and would not serve them any more after serving them one Mike's each.
- She said they did not seem drunk enough to throw out. She asked them to leave, because they were more upset than anything else.
- She said that she cut them off at 8:30 p.m.
- He recommended enforcement action and submitted that to the regional manager as usual.
- He decided to proceed because intoxicated patrons were observed in the establishment and had been there for a period of time. They were only removed when the police attended.
- There have been previous compliance issues with this establishment with regard to the same issue. That history was relevant to his decision to proceed to enforcement action.
- He also spoke to a patron who was at the establishment when he went to speak to the bartender. She identified herself as having been in the bar when the events of April 26, 2005, took place.
- The patron said she knows VC and MM. She said they were emotional, but she was not sure if they were intoxicated.

The licensee called the bartender. She testified as follows:

- She was working at the bar on April 26, 2005.
 - She was working alone, as the bouncer was occupied with another matter elsewhere in the Hotel for most of the night.
 - She had been working at the establishment for one and a half years.
 - It was a slow night.
 - There is no tolerance for intoxication at the bar. If anyone arrives intoxicated, they are removed immediately.
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- The patrons of the bar are predominantly native. Few white people come there.
 - Most of the patrons and staff know each other. They are like family.
 - In the past, she has removed people for intoxication. If she needs help to do it, she will call for help.
 - The only police issue that she remembers since she started working at the bar was when one patron "called the police on himself." On further questioning, she stated that the patron actually called the police on her for not serving him.
 - A band elder had died and was buried a couple of weeks earlier. That is what MM and VC were upset about.
 - She and MM and VC knew the elder well. He was probably not directly related to MM and VC, but in this community everyone is somewhat related.
 - Two Mike's were given to VC and MM. One in front of each of them. They were paid for by someone else. VC always gets hers with a straw and a glass. MM drinks out of the bottle. She gave VC a straw and a glass.
 - Everyone in the bar was in tears. She hugged VC and MM. It was very emotional. VC did not smell of alcohol.
 - When people in the bar need a hug, she gives them a hug.
 - Between 8:00 p.m. and 8:30 p.m., she asked VC and MM to leave because VC was getting upset, aggravated, and crying "non-stop".
 - The police arrived twenty-five minutes after she had asked VC and MM to leave.
 - VC did not leave because she was looking for her keys. Her keys were around her neck. The bartender told her that her keys were around her neck. VC continued to look for them.
 - She did not push the issue because she "did not want to start up with" [VC].
 - She does not distinguish between friends and patrons in the bar.
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- She is friends with VC and MM.
- She did not want to embarrass VC and MM in front of their friends in the bar, so she did not tell them they were cut off until after she gave them the two drinks.
- They were not bothering the other customers, so she did not make them leave any faster than they were leaving.

The licensee called a patron as a witness. She testified as follows:

- She was sitting in the bar on April 26, 2005, between 7:00 p.m. and the time VC and MM left.
- She confirmed the identity of the bartender and VC and MM.
- She is friends with all of them.
- VC and MM were present when she arrived.
- VC and MM were in the smoking area at 7:00 p.m. with a bottle and a glass on the table.
- She was seated at the bar and could easily see through the glass wall to the smoking area.
- VC and MM were emotional and upset. A friend of theirs had passed away and the funeral had been a few days before.
- She did not think they were intoxicated.
- She did not speak to either VC or MM and only heard them speak when one of them spoke to the police.
- She is a regular at the bar, but she does not drink. Her daughter works in the bar. She would be disappointed if the bar was closed down.

SUBMISSIONS

The branch submitted that the bartender allowed two patrons to remain when they were intoxicated. The actions of the bartender confirm her knowledge of the intoxicated state of the patrons. She did not expel them in a timely fashion and

the evidence discloses that the patrons would likely not have been expelled, but for the arrival of the police.

The licensee submitted that the evidence showed that MM and VC were not intoxicated but had been crying, and were emotional due to a death in the family. Their symptoms were not those of intoxicated persons, but rather of distraught persons. The evidence of the bartender is that when she hugged them, they did not smell of alcohol.

In the alternative, if VC and MM were intoxicated, they were removed by the bartender as required by the *Act* and *Regulation*. This was done in a reasonable and timely manner in light of the circumstances. The police did not remove the patrons, but rather coincidentally attended during the process of their removal by the bartender.

The licensee also submitted that as there was no move by the police to arrest VC and MM until the fight outside of the bar, they were satisfied while in the bar that the two females were not intoxicated. If they were intoxicated, the licensee argued, the police would have arrested them on the spot.

ANALYSIS AND DECISION

Section 43(2)(b) does not require the expulsion of an intoxicated patron, but rather requires that the licensee or the licensee's employee must not permit an intoxicated person to remain.

In order to find a contravention, I must determine on the facts that a person was *intoxicated*, that the person did *remain* in the licensed area, and that the licensee or its employee did *permit* her to remain.

Was VC or MM intoxicated?

The evidence of the bartender was that the condition of VC and MM upon entering the bar at 7:30 p.m. was "reasonable". Not sober. Not intoxicated. She served them one Mike's each and then an hour later, she cut them off and asked them to leave. She did not believe they were intoxicated, but rather emotional. By her own evidence, the bartender acknowledged they were not bothering anyone. The bartender considered herself a friend of both VC and MM and had cried with them and hugged them in the bar that evening.

Two R.C.M.Police witnesses independently testified that each VC and MM displayed considerable symptoms of intoxication including bloodshot and droopy eyes, slurred speech, unsteadiness, odour of alcohol, and trouble walking. They arrested both females for public drunkenness and transported them to the police detachment where the females were incarcerated for a period of time.

The licensee called a patron witness who did not believe VC or MM were intoxicated. I found the evidence of this witness to be tainted by personal interest, and not objective. I therefore discounted it, to the extent that it was inconsistent with that of the R.C.M.Police members.

I find that both VC and MM were intoxicated. I prefer the evidence of the R.C.M.Police members who both exhibited detached objectivity and experience in identifying intoxicated persons. I find the evidence of the bartender to lack credibility. It is not necessary for me to find whether VC or MM were intoxicated when they arrived, or if they were over-served in the establishment. I find that the bartender knew that the females were intoxicated by 8:30 p.m.

The licensee argued that as the police did not arrest VC and MM until the females began an altercation outside the bar, the members had not concluded that the females were intoxicated while in the bar. I find the evidence conclusive,

that the R.C.M.Police member in fact did conclude that the patrons were intoxicated while still in the establishment. The licensee submitted that if the police had believed VC and MM to be intoxicated, they would have arrested them immediately. I disagree, and accept the evidence of one of the R.C.M.Police members who stated: "The police cannot arrest everyone in Port Alberni who is drunk".

Did VC or MM remain in the licensed area?

The evidence is incontrovertible that both VC and MM were in the licensed area for at least one-half hour after the bartender knew that they were intoxicated.

Did the licensee or the licensee's employee permit either VC or MM to remain in the licensed area?

The licensee argued that the two females were indeed expelled from the premises by the bartender. It argued that it could not therefore, be found that VC or MM were permitted to remain. I disagree. The bartender may have observed that the two females were intoxicated upon their arrival at 7:00 p.m. I have already found that she did know by 8:30 p.m. The bartender asked the females to leave and thus began the process of ejecting them. They did not leave, however, and approximately one-half hour elapsed between the attempt at ejection and the arrival of the police. I do not accept that the police attendance marked anything more significant than a coincidence of timing with respect to the ejection of the females. I find that VC and MM were ejected by the bartender as a result of the police attendance. Prior to the arrival of the police, the bartender did nothing to follow up on the ejection of the females. She indicated that they would not leave, but she did not mention the issue to the police upon their arrival. I find that the bartender permitted VC and MM to remain in the establishment due to her relationship with them.

I do not accept that an eventual expulsion fulfills the mandate of Section 43(2)(b). The elapsed time between the moment the patrons were determined by the licensee's employee to be intoxicated and the moment of expulsion must be reasonable in the circumstances. In the event that an employee has difficulty removing a patron, there must be a continuity of effort to satisfy this requirement of the *Act*.

I find that the bartender allowed both VC and MM to remain for an unreasonable period of time after requesting that they leave. I find that the inaction of the bartender with respect to the patrons between the first attempted expulsion and the attendance of the police is tantamount to abandoning the expulsion process. I conclude therefore that between 8:30 p.m. and 9:00 p.m. the bartender knowingly allowed two intoxicated patrons to remain in the licensed area.

Is the licensee exonerated by reason of the exercise of due diligence?

The implicit suggestion by the licensee was that the bartender did all that she could have by asking VC and MM to leave, and by eventually succeeding in expelling them. I find that the evidence discloses wholly insufficient attention to the requirements of Section 43(2)(b) of the *Act*. This defence fails.

I find that the contravention has been proven.

PENALTY

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

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

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 *Regulation*.

The branch recommended a four (4) day suspension.

The range of penalty for a first contravention of Section 43(2)(b) of the *Act* in accordance with Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of five thousand (\$5,000) to seven thousand (\$7,000) dollars.

I find that a suspension of four (4) days is warranted and appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 106203 for a period of four (4) days, to commence as of the close of business on Tuesday, May 30, 2006, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).

To ensure this order is effective, I direct that Liquor Primary Licence No. 106203 be held by the branch or the R.C.M.Police Port Alberni Detachment from the close of business on Tuesday, May 30, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 20, 2006

cc: R.C.M.Police Port Alberni Detachment

Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Vancouver Island/Okanagan/Kootenay

Liquor Control and Licensing Branch Surrey Regional Office
Attn: Shahid Noorani, Branch Advocate
