



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

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act RSBC c. 267

Licensee:	Miller's Landing Pub Ltd. dba Cat & Fiddle Pub & Bistro 1979 Brown Street Port Coquitlam, BC V3C 2N4
Case:	EH06-160
For the Licensee:	Kirsten Tonge
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	October 29, 2007
Place of Hearing:	Surrey, BC
Date of Decision:	November 21, 2007

INTRODUCTION

The licensee operates an establishment with a liquor primary licence. The hours of operation indicated on liquor primary licence No. 032708 are 11:00 a.m. to 1:00 a.m. Monday through Saturday, and 11:00 a.m. to Midnight Sunday. The establishment also contains a food primary licence.

On the business day of September 29, 2007, a team of liquor inspectors and police constables attended at the establishment late in the evening as part of an anti-violence bar check initiative to do a licensed premise check. As a result of the inspection, the establishment was served with a contravention notice. That notice included an allegation that the licensee permitted an intoxicated person to remain in the premise contrary to the *Liquor Control and Licensing Act (Act)*.

ALLEGED CONTRAVENTIONS

The Liquor Control and Licensing Branch (Branch) made allegations and recommended enforcement action as set out in the Notice of Enforcement Action dated November 9, 2006. The branch alleges that:

1. On September 29, 2006, the licensee contravened s. 33 of the *Act* by supplying liquor to minors.
2. On September 29, 2006, the licensee contravened s. 43(2)(b) of the *Act* by permitting an intoxicated person to remain in the licensed establishment; and,
3. On September 29, 2006, the licensee contravened s. 35 of the *Act* by allowing a minor in the licensed establishment.

The s. 35 allegation was listed as a lesser but included contravention.

RELEVANT STATUTORY PROVISIONS

See Appendix "A"

PRELIMINARY MATTERS

Prior to the enforcement hearing, the allegation of supplying liquor to minors was withdrawn.

At the commencement of the enforcement hearing, I asked the parties if the allegation of minors in premises (s. 35) described in the NOEA as "lesser but included" was related to the remaining allegation or the withdrawn allegation. The branch advised that it was related to the withdrawn allegation and should be disregarded.

ISSUE

1. Did the licensee permit an intoxicated patron to remain, in contravention of s. 43(2)(b) of the *Act*?
2. If the licensee did contravene the *Act*, what penalty, if any, is appropriate?

EXHIBITS

Exhibit No. 1: The branch's book of documents

Exhibit No. 2: Police licensed premise check

Exhibit No. 3: Licensee's book of documents

Exhibit No. 4: Licensee's "Daily Report"

EVIDENCE

The branch called an RCMP police constable and a liquor inspector. Each had been present during the inspection.

The licensee called the owner/operator and the bar manager. Each had been present during the inspection.

The constable testified that he arrived at the establishment at approximately 11:20 p.m. on September 29, 2006. He noticed a male patron seated at the first table inside the patio. The patron sat with his chin toward his chest and appeared to be passing out. His head was down and his eyes were intermittently opening. The constable observed a "fresh" bottle of beer on the table in front of the patron. The constable gave the patron a shake to rouse him and asked the patron to step outside. The constable observed the patron from the rear as they walked outside the front doors and stopped on the wheelchair ramp. There, the constable asked the patron for identification. The patron had only an interim driver's licence. The constable had a discussion with the patron regarding the patron's identification and satisfied himself as to the patron's identity. He made notes and observed that the patron had a tattoo on his shoulder and five stars on his upper chest. The constable described the patron as using the railing to support himself, having difficulty with balance and speech, and slurring his words. The constable also said that he asked the patron what he had to drink, and the patron "told me to the best of his recollection, two pints of beer and the bottle that was in front of him." The constable could not say if he recognised the tattoo, or if the patron told him who it was. He answered that he didn't remember if the patron told him or not.

The constable also testified that he did not make observations regarding the people seated at the table with the patron, nor did he observe the patron drinking. He said also that the patron "could have been tired."

The constable described his past experience identifying levels of intoxication. He said that he worked as a general patrol officer for two years and had participated in 40-50 impaired driving investigations. He is a qualified breathalyzer technician and has standard field sobriety training. Based on that training, the constable believes that the patron was "at the higher end - moderate to high level of intoxication."

He confirmed that all of his questions of the patron and most of his observations were conducted outside of the red lined area of the licence.

He also said, "I did not ask any background questions. I made an assumption- that he was passing out based on my experience dealing with people in various states of intoxication."

The constable confirmed that he did not ask the patron how long he had been inside the establishment, and he did not do any form of sobriety testing.

The liquor inspector testified that she was part of the same task force and attended at the establishment, at the same time as the constable.

She entered the establishment from the back entrance and immediately her attention was directed to some patrons who appeared to be minors. After dealing with that situation for a period of time, she was asked to go outside the front door where a constable was dealing with an intoxicated male patron on the wheelchair ramp.

When she arrived at the ramp "she saw an intoxicated man standing there against the railing." She said he smelled of alcohol, was swinging, could not focus his eyes and was having a difficult time answering her questions. She elaborated by explaining that he provided several differing responses to her question relating to the quantity of liquor he drank that evening.

The inspector noted that the licensee's owner and manager was present with the constable and the patron. She told him that she thought the patron was intoxicated, but reported no reply from the owner. She said that the owner satisfied her that he would ensure the patron got home.

With respect to her training and experience identifying levels of intoxication, the inspector said, "We had intense training on the topic of intoxication with an expert - part of it was we had volunteers and observed their behaviour - a lot of training with observing intoxication."

She concluded that based on her experience, she believed that the patron was highly intoxicated.

The inspector added that the patron was "an obviously intoxicated person with a bottle of beer in front of him. He continued to drink."

The licensee called the owner/operator of the establishment. He identified the documents in the licensee's book of documents including the house manual/training manual and incident report. Although he was not in attendance on the night in question, he knew about the incident and the allegations. He described the licensee's policies and procedures with respect to intoxicated patrons, and his role in training employees and supervising area managers.

The licensee also called the bar manager who was on duty on September 29, 2006. She also described the licensee's training regime and policies with respect to intoxicated patrons. She indicated that she is not shy about asking intoxicated patrons to leave, or denying admission to persons she believes to be intoxicated. She was told of the allegation on the night it occurred. She remembered the patron and that he had "a pint or two of beer" and was sitting with a handful of people at a table near the entrance to the patio area. She did not recall the patron displaying any signs of intoxication. She said that she remembered what he had to drink

because it was only shortly after serving him that she was advised of the allegation. She also noted of the patron, "He was rough around the edges. He seemed just industrial. He did not have any teeth..."

SUBMISSIONS

The branch submitted that the evidence demonstrates that the patron was intoxicated while inside the establishment and that the licensee, or its staff, did not take steps to identify and remove the patron from the establishment.

The branch also submitted that the licensee cannot rely on a defence of due diligence as they did not take sufficient steps to prevent this contravention from occurring.

The licensee submitted that the RCMP constable only questioned the patron outside the establishment, did not consider whether the patron was fatigued or had a speech impediment, and did not notice that the patron was missing his front teeth.

The licensee submitted that the liquor inspector is not an expert in intoxication, did not notice the patron's missing teeth, and also conducted all of her questioning of the patron outside the establishment.

The licensee submitted "Any observations outside the [red lined] area were not relevant to section 43(2)(b)."

INTERIM APPLICATION

Following the testimony of the liquor inspector, the branch requested that the inspector be allowed to remain to observe the remainder of the proceeding.

Counsel for licensee made an application that the inspector be excluded. The basis for the request was that:

1. A witness may be intimidated by the inspector's presence. This may impair a witness's ability to be forthright and truthful, particularly if he feels it might prejudice the relationship.
2. The inspector's presence may prejudice the continued relationship with the licensee.
3. In the past, this inspector has been excluded at the request of counsel. In meetings, the inspector has taken notes that were used against the licensee in future meetings, to the detriment of the licensee.

I decided as follows:

Enforcement hearings are open to the public. Excluding the inspector would be denying a member of the branch an opportunity presented to any member of the public. She is a member of the public and of an interested party, and I would be reluctant to order her exclusion.

If, however, the presence of any person would be likely to interfere with the hearing process or the production of evidence, it would be appropriate to require that that person be excluded.

The test is whether this individual would likely interfere with the hearing process or the production of evidence.

The obligation of a witness is to answer questions put to him or her and to be truthful. I find that the presence of the inspector is not likely to interfere with that obligation. While I accept that the representative of the licensee may be uncomfortable with the presence of the inspector while he is testifying, I find that he will likely take his affirmation seriously and will overcome any discomfort and faithfully discharge his obligation to be forthright and truthful.

I find that the presence of the inspector is not likely to prejudice the ongoing relationship between the inspector and the licensee. The relationship is a professional one, and each of the two individuals has only professional interests at stake. The testimony of the licensee's representative may, on the contrary, improve the professional relationship with the branch's representative after he overcomes any discomfort.

Counsel for the licensee suggested that this inspector has in the past been excluded from a contravention hearing. Every adjudicator must have control over the hearing environment and do his or her utmost to ensure the integrity of the hearing process and the protection of its participants. I have not heard any evidence that would lead me to believe that the presence of this inspector would interfere with those objectives. I do not know the circumstances under which the inspector was excluded in the past. I find no reason why she should be excluded today.

Finally, counsel for the licensee suggested that the inspector has taken notes at past meetings, which notes were used against the interests of the licensee. I find this position to be irrelevant to the issue at hand. The inspector is charged with monitoring the conduct of the licensee. The subject matter of this hearing is not only germane to that charge, but a result of it. I find that the inspector is free to passively observe the remainder of the hearing, and she is free to take notes as she feels appropriate to her professional duties. I cannot anticipate how those notes might unduly prejudice the licensee's interests.

I order that the inspector may remain for the duration of the hearing if it is her will.

ANALYSIS AND DECISION

Evidence gathered outside the red lined area

Counsel for the licensee asked the branch witnesses where they made the observations that they made. The answer in most cases pointed to the ramp outside the front door. That area is outside of the red lined area indicated on the licence. The licensee submitted that any evidence gathered outside the red lined area is not relevant.

I disagree with that position. Section 43(2)(b) states that a licensee must not permit an intoxicated person to remain in the red lined area of an establishment. There is no prohibition against gathering evidence or formulating an opinion about the contravention outside of the area. The components of the contravention require a person to be intoxicated, and the licensee to permit the intoxicated person to remain in the red lined area. In this case, the RCMP constable requested that the patron step outside the establishment for questioning and evaluation. The constable followed the patron out of the red lined area. There is no doubt that the patron was inside the red lined area when the constable found him. This procedure is reasonable. If the officer then deduced that the patron was intoxicated, that evidence could be put forth for consideration in an enforcement hearing. It is the obligation of the enforcement adjudicator to determine whether the evidence supports a finding of each of the components of the contravention. In this instance, I have heard no evidence or submissions that would dissuade me from concluding that if the patron was intoxicated immediately after walking out of the premise, then he was intoxicated while he was inside the red lined area. The only consideration that could feasibly impact on the connection between the patron's state of intoxication inside and outside the red lined area is the amount of time required to transit the intervening distance.

Was the patron intoxicated?

The police constable's evidence was to some degree conflicting. On one hand he said the patron was having difficulty speaking and slurring his speech. On the other hand, he indicated that the patron responded quite succinctly about how much he had to drink. Further, the constable's testimony invited the possibility that the patron explained the identity of the tattoo.

I am also concerned that the evidence discloses that the patron had no front teeth, yet the constable, who was apparently watching the patron answer questions and slur his words made no mention of this.

The constable had the opportunity to support his observations by observing or speaking to the people with whom the patron was seated at the table. He did not do so. He also testified that the patron could have been tired, but did not testify as to whether tiredness could explain the patron's behaviour and apparent symptoms.

Finally, the constable did not corroborate the inspector's testimony (allegedly gathered at the same time and place) that the patron gave several inconsistent answers to the inspector regarding the amount and nature of alcohol the patron consumed prior to attending the establishment.

The liquor inspector was asked to go to the front where a constable was tending to an intoxicated male patron. She went there expecting to find an intoxicated patron. Her testimony confirms that she saw what she expected to see, first without any possibility of doing an evaluation of the patron's state on her own. Her first observation was of an intoxicated man. Following that initial observation, she observed a smell of alcohol, instability, the patron's inability to focus his eyes, and inconsistent answers to her questions.

I find the inspector's testimony problematic as well. I have no doubt that the inspector was sincere and acting with full awareness of her professional obligations. My familiarity with the inspector, however, and my understanding of the events of that night, cannot replace the actual evidence on which I am obligated to rule.

By statutory authority, an enforcement adjudicator sits as the General Manager of the branch. As General Manager, I may have actual knowledge of many factors that may prove relevant to a hearing. I may not, however, use that knowledge in my deliberation if it is not in evidence before me. Once the General Manager embarks on a process leading up to a hearing, the rules of administrative law- and particularly the requirement for natural justice apply. In part those rules require that the licensee be allowed to know the case against it. That requirement necessitates that the adjudicator not consider any relevant fact that is not presented in evidence in the hearing.

Based on the evidence presented at the hearing, I cannot find that the liquor inspector has the expertise to determine with any certainty that a patron is intoxicated. Her testimony with respect to her training and experience was limited to a single sentence which informed only that she had "intense training" with an expert and an opportunity to observe intoxication. While it may be that I could infer that the inspector has a certain degree of experience in evaluating intoxicated patrons by virtue of seven years employment as a liquor inspector, I am uncomfortable doing so.

My discomfort is compounded by the manner in which the inspector was first introduced to the patron. It is well known that suggestion can play a significant role in the interpretation of a situation. The inspector was asked to attend to an intoxicated patron. Her first contact with him was described as contact with an intoxicated man. I find that her statement was the result of suggestion as much as observation. When she did have an opportunity to observe the patron in some detail, she confirmed her initial impression. Finally, the inspector testified that the

patron was obviously intoxicated and seated with a beer in front of him. This confirms that her testimony was influenced by suggestion, as that evidence is inconsistent with her evidence that she first saw the patron outside the front door on the ramp. I must consider her testimony in light of what I find was her initial presumption of intoxication, and her limited statement regarding her experience and training in the identification of intoxicated persons.

Did the licensee allow the patron to remain?

The second element of the contravention requires that the licensee must have allowed the patron to remain in the red lined area once it was noticed or should have been noticed that he was intoxicated.

The branch provided no direct evidence on point. Only indirectly, or by inference, did the branch's evidence touch on this issue.

The RCMP constable indicated that when he first saw the patron, the patron had a fresh beer in front of him on the table. The patron was seated, had his eyes closed and appeared to be passing out.

The liquor inspector first saw the patron outside the establishment.

There was no evidence presented by the branch to indicate how long the patron was in the establishment, or from where the "fresh" beer came. There was no evidence presented that would indicate that the licensee's staff saw the patron at a time when he was exhibiting any symptoms of intoxication, or that the patron was in the establishment long enough that the licensee's staff ought to have seen him and made observations of symptoms of intoxication. There was no evidence presented that would indicate when the patron first became or appeared to become intoxicated. The only testimony with respect to the duration of the patron's stay in the establishment came from the licensee's bar manager. She said that she saw the patron come in and sit down, she served him one or two pints of beer, and she next

learned of him being outside with the RCMP constable. She said that while the patron was seated at the table, his friends bought him some shooters, but she was not asked how many, or even to estimate how many shooters or over what period of time.

Some of the submissions suggest that counsel treated the contents of the exhibits as having been proven. In this case, there is much in the documentary exhibits that has not been attested to. Documents included in or labelled as exhibits are accepted as authentic to the extent that they have been so labelled. An incident report, once entered as an exhibit, is accepted to be the document it professes to be without requiring further proof. The fact that the incident report has been accepted as an exhibit does not, however, prove the truth of the contents of that document. Critical evidence described in documentary exhibits must be addressed in evidence at the hearing.

Conclusion

I find that the evidence before me is insufficient to establish on the balance of probabilities that the patron was intoxicated when he was removed from the establishment.

I find further that the evidence before me is insufficient to establish on the balance of probabilities that the patron was exhibiting symptoms of intoxication for a sufficient period of time that the licensee, or its staff, ought to have taken action to investigate or remove the patron from the red lined area.

The contravention has not been proven.

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 21, 2007

cc: RCMP Port Coquitlam

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate

APPENDIX "A"***Liquor Control and Licensing Act, RSBC 1996 Chapter 267*****Supplying liquor to minors**

- 33** (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,
 - (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
 - (c) in or at a place under his or her control, permit a minor to consume liquor.
- (2) Subsection (1) does not apply if liquor is
- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
 - (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
 - (c) given or otherwise supplied to a minor in accordance with the regulations.
- (3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly
- (a) has it in the actual possession or custody of another person, or
 - (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.
- (4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.

- (5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant
- (a) required that the person produce identification, and
 - (b) examined and acted on the authenticity of the identification.
- (6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

Minors on licensed premises

- 35** A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except
- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
 - (b) with lawful excuse, or
 - (c) in prescribed circumstances.

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.