



**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:	The Civic Hotel Ltd. dba Civic Hotel 705 Vernon Street Nelson, BC V1L 4G3
Case:	EH07-169
For the Licensee:	Terry Napora
For the Branch:	Tania Cogan
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 21, 2008
Place of Hearing:	Nelson, BC
Date of Decision:	June 3, 2008

INTRODUCTION

The licensee operates an establishment in Nelson with Liquor Primary Licence No. 119233. The hours of operation indicated on the licence are 10:00 a.m. to 2:00 a.m. seven days per week.

On October 12, 2007, at approximately 1:45 a.m. (the business day of October 11, 2007), a police constable attended at the establishment and performed 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 intoxicated persons 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 December 15, 2007. The branch alleges that:

On October 12, 2007, the licensee contravened s. 43(2)(b) of the *Act* by permitting an intoxicated person to remain in the licensed establishment

RELEVANT STATUTORY PROVISIONS

Drunkenness

s. 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.

Liquor Control and Licensing Act, [RSBC 1996] chapter 267

ISSUES

1. Did the licensee permit an intoxicated patron to remain in contravention of s. 43(2)(b) of the *Act*?
2. If so, is a penalty warranted, and what is the appropriate penalty?

EXHIBITS

- Exhibit No. 1: Branch's book of documents
- Exhibit No. 2: Letter dated February 19, 2007
- Exhibit No. 3: Letter dated February 15, 2008
- Exhibit No. 4: Licensee's training manual

FACTS

The uncontroverted evidence is that when the police constable entered the establishment he was approached by Patron #1. The patron was holding a bottle of beer. The constable and Patron #1 had a short discussion and then the patron walked away, slammed his beer bottle on a table - spilling the beer - and exited the establishment. Patron #1 returned shortly thereafter. The constable then

noticed Patron #2 and Patron #3, both of whom had been in the company of the constable outside another licensed establishment earlier in the evening. Patrons #2 and #3 approached the bar and there the doorman advised either Patron #2, or both of them that he/they were cut off and would not be served. Patron #2 then approached the constable as though the constable had instructed the doorman to cut him off. A server later provided Patron #3 with two bottles of beer, one of which he gave to Patron #2. Patrons #2 and #3 were then seen to be sitting in the establishment drinking from the bottles of beer.

EVIDENCE

The branch provides evidence that three patrons were intoxicated and permitted to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied contrary to the *Act*.

The licensee provides evidence that the establishment is well-run and exercised due diligence in the operation of the establishment on the date of the allegation.

Patron #1

The police constable testified that he watched Patron #1 finish playing pool and walk out of the smoking area of the establishment. The Patron approached the officer and started to talk about a broken or stolen watch. The constable said the patron was incoherent, staggered a little, and then bumped into a couple of tables and slammed his beer down on a table, spilling the beer and sending the bottle spinning. The constable's observation lasted only two or three minutes.

The licensee's manager testified that he was playing pool with Patron #1 when the constable came into the establishment. He said that Patron #1 seemed agitated and "not his normal self." He left the game and bumped into a table. The manager said that the patron was on his way outside to have a fight with the

individuals who had earlier stolen his watch. The manager suggested that the patron might have been under the influence of drugs, but was not intoxicated.

I find that there is insufficient evidence to establish that Patron #1 was intoxicated. The testimony from the constable and the licensee's manager regarding the patron's focus on a conflict (over the watch) is consistent. Pending conflict can have an impact on the manner in which an individual carries himself. The constable did not notice the smell of alcohol or observe indicia of intoxication beyond slurred speech and an unsteady walk - and those observations were by all accounts, brief. The possibility of unknown drug use and the manager's acknowledgement that the patron was "not himself" during the pool game introduces an explanation as equally feasible as intoxication. Therefore I find that the balance of probabilities favours neither explanation for Patron #1's observed behaviour.

Patron #2

After observing Patron #1, the constable noticed Patron #2 and Patron #3. The constable immediately recognized them as individuals with whom he had interacted earlier in the evening. He testified that approximately twenty minutes before arriving at the establishment, he and his partner found Patron #2 and Patron #3 outside another licensed premise in town, and concluded that the two patrons were at that time intoxicated. The constable was about to arrest the two patrons for drinking and being intoxicated in public, but another individual indicated that she was a designated driver and would take the two patrons home.

The constable said that once he recognized Patron #2 and #3 he watched them approach the bar. The doorman (who was behind the bar) looked over at the constable and then indicated to the two patrons that they were cut off. The constable said he could not hear the doorman, but he observed the doorman's hand gesture, and its meaning was unmistakable. The constable said that Patron #2 then approached him and accused him of instructing the bar to deny

service to the two patrons. The constable indicated that his memory was clear that after he denied that he had so instructed the licensee, Patron #2 turned around and went deeper into the establishment. After leaving the bar for a few minutes, the constable returned and observed a server providing two Stella Artois beers to Patron #3. Patron #3 gave one of the beers to Patron #2, and they both sat down at a table and began to drink.

The constable testified that both patrons were intoxicated outside the other bar earlier in the evening. He observed staggering, slurred speech, a strong odour of alcohol, and extremely erratic behaviour including "yelling and screaming for no apparent reason" during the earlier exchange. This behaviour applied to both Patron #2 and Patron #3. When Patron #2 approached the constable in the establishment after being cut off by the doorman, the constable again noted a strong smell of alcohol on the patron's breath. The constable formed the opinion that this patron was intoxicated twenty minutes earlier, and was still intoxicated while in the establishment.

The constable noted that no employee of the licensee took any steps to remove Patron #2 from the establishment, and indeed that patron was seen drinking beer in the establishment later that morning.

The bartender testified that she witnessed the doorman indicating that one or both of Patron #2 and Patron #3 were cut off. At first, she testified that she was not sure if that applied to one or both of the patrons. Later she referred to Patron #2 as the intoxicated patron, and Patron #3 as the intoxicated patron's friend. She said that she provided Patron #3 with two beers at last call, but she did not see that patron #2 was with Patron #3, and did not know Patron #2 was still in the bar. She also testified that she did not make any efforts, nor was she certain if any other employee made any attempt to remove Patron #2 from the establishment after he had been cut off. She said in that respect only that she

believed the doorman could effectively remove the patron, if that was what he felt necessary.

The manager conceded that Patron #2 was intoxicated and should have been removed from the establishment. He confirmed that Patron #2 was not removed.

The doorman testified that he knew "right away on seeing him" that Patron #2 was intoxicated. He said that when Patron #2 and Patron #3 approached the bar, he cut them both off immediately. He said when one patron of a pair of patrons is intoxicated, it is best to ask them both to leave. He said that he watched the two patrons walk toward the exit and saw Patron #2 put his hand on the door. The doorman said he then diverted his attention to other duties. He did not see Patron #2 leave the establishment.

I find that Patron #2 was intoxicated, and the licensee or its staff took inadequate steps to remove him from that part of the establishment where liquor is sold, served or otherwise supplied. Although the doorman cut the patron off, he did not remove the patron from the premises.

Patron #3

The police constable indicated that he saw "a slight but noticeable stagger" in Patron #3's walk, but was not close enough to smell alcohol on the patron's breath. He acknowledged that he saw little other indicia of intoxication in this patron while in the establishment. Nonetheless, he formed the opinion that Patron #3 was intoxicated due in large part to his knowledge of the effects of alcohol and the time it takes a body to metabolize it, and his observations of this patron twenty minutes earlier outside the other bar. The constable confirmed that he had ample opportunity to observe Patron #3 during their earlier contact, at which time the patron dropped the contents of his wallet while fumbling for identification, smelled strongly of alcohol, slurred his speech, and acted inappropriately.

The bartender testified that she served Patron #3 two beers at last call. She said the patron did not seem drunk and it is not unusual for a patron to order two beers at last call. She also said she did not notice Patron #3 “wobbling.” I noted that the witness never recounted her testimony that she was not sure if Patron #3 was cut off along with Patron #2 or not, or if only Patron #3 was cut off.

The doorman indicated that he believed Patron #3 was not intoxicated, however, he asked Patron #3 to leave along with Patron #2.

I find on the balance of probabilities that Patron #3 was intoxicated in the establishment. The evidence of the constable was credible and consistent throughout his testimony. He appeared to have a thorough recollection of the relevant events and could answer seemingly unrelated questions on cross-examination such that the whole evening was fully described. The bartender, on the other hand, testified that she did not note any symptoms of intoxication, but she did not say how long she observed the patron or how clear her recollection was. The doorman provided no data or detailed observations but for his conclusion that this patron was not intoxicated. I prefer the detail of the constable’s testimony and the accuracy afforded by his contemporaneous *General Occurrence Report* generated from the incident (Tab 19, Exhibit 1).

I find that the police constable’s observations made outside the establishment and at another location can be used for the purpose of establishing a likelihood of intoxication in the establishment. There is nothing in the legislative scheme that requires that a determination of intoxication be based only on data learned inside the establishment. The usual manner of weighing and evaluating evidence obtained from whatever source or location is adequate for determining whether the components of a contravention are present, without restricting the origin of the observations to a particular time and place. In this case, I find that the indicia of intoxication that the constable observed some twenty minutes earlier, combined with the slight stagger observed in the establishment and no contrary

observations is sufficient to allow a finding that on a balance of probabilities, Patron #3 was intoxicated in the licensed establishment.

The evidence is clear that at no time during the date in question were adequate steps taken to remove Patron #3 from that part of the establishment where liquor is sold, served or otherwise supplied.

Due diligence

The licensee presented two letters from members of the community attesting to the proposition that the licensee transformed the establishment from one with a tarnished reputation to a better-run establishment with a more palatable clientele.

The manager testified that he was at the establishment at all relevant times and that all of the established protocols were in place. He looked at a copy of the training manual that was presented to him and confirmed: "Yes, this is the manual. I recognize it. I think it is the manual. I have not seen this in some time. I am not sure it is totally complete, but yes, this is it." He also testified that when the current licensee purchased the establishment it was home to a clientele of bikers and criminals and that he and his wife, the shareholders of the licensee, endured considerable effort and sacrifice in changing the clientele and improving the reputation of the establishment.

The bartender testified that the staff attends meetings every two months and staff members are tested on their knowledge of the law and the licensee's procedures at those meetings. She also said that protocol requires that she is supposed to cut people off and walk them out of the bar after they have paid a bill if they are intoxicated, and that patrons are not allowed to wait in the building for a taxi.

SUBMISSIONS

The branch submits that each of the identified patrons was intoxicated and the licensee took no steps to remove any of them, contrary to the *Act*.

The licensee submits that it understood that the allegation of contravention referred only to Patron #2. Counsel argued that the language of the contravention notice is such that it articulates only one allegation - and accordingly only one patron who was intoxicated. The licensee argued that if there were going to be allegations relating to three patrons, there should be three contravention notices served.

The licensee submits that Patron #2 was intoxicated and in that part of the establishment where liquor is sold, and that the licensee knew, or ought to have known that the patron was intoxicated in that part of the establishment.

The licensee submits that it was duly diligent, and therefore should not be held accountable for the contravention. In that respect it cites the following evidence:

- The doorman is a highly capable bouncer and he advised Patron #2 to leave.
- The bartender, having seen Patron #2 go to the constable, believed the police would take care of the patron from that point and later served Patron #3, whom she did not believe was intoxicated.
- The bouncer watched Patron #2 put his hand on the exit door before tending to his other duties.

The manager testified that the establishment has come a long way under his stewardship and should be credited with social responsibility.

The licensee cites *Ed Bulley Ventures Ltd. v. British Columbia (General Manager, Liquor Licensing Branch)* 2001 B.C.L.I. No. 5 as establishing the definition of *permit* as used in the operative section;

...a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.

Further, the licensee cites *A.M.P.M. Holdings Ltd (c.o.b. Oasis Hotel) v. B.C.* 2003, B.C.L.I. No. 1 with establishing the required level of diligence to avoid culpability for a contravention: "...*all reasonable measures...*" to avoid the contravention.

The licensee argues that it took all reasonable measures in that it had a form of policy manual, educated and trained its employees satisfactorily, had regular staff meetings, ejected Patron #2 almost immediately upon his entering the establishment, and its employee watched as that patron went as far as the door and into the presence of police.

In the alternative, the licensee submits that in the event that a contravention is found, no penalty is required or appropriate to obtain voluntary compliance in the future.

ANALYSIS AND DECISION

I have found that Patron #2 and Patron #3 were intoxicated at the time that the constable witnessed them in the establishment, as indicated in the Notice of Enforcement Action (NOEA).

I have found that the licensee or its employees did not take adequate steps to remove those patrons.

One or both of the intoxicated patrons were cut off and asked to leave the establishment. Neither of them did leave the establishment in a timely manner. One of the licensee's employees watched Patron #2 walk toward the police constable and the door, but by his own admission did not observe the patron leaving. The testimony is inconsistent as to whether Patron #2 was believed to be in the control of the constable, or was leaving on his own and had his hand on the exit door. I find it unnecessary to determine which version of the evidence is correct, as in my view either is insufficient to establish that the licensee took the required steps to remove the intoxicated Patron #2. A high degree of diligence, such as to satisfy the definition of *permit* as argued by the licensee, requires active steps to remove an intoxicated patron unless those steps are not required. In order for those steps to be not required, the patron must be observed to leave on his own, or being escorted by another and be observed to be out of the area specified in s. 43(2)(b) of the *Act*. In the alternative, if the intoxicated patron is in the custody of a police authority, those active steps may not be required. I find there is insufficient evidence to establish that any of the patrons referred to in this allegation were in police custody.

Further, there is no evidence that Patron #3 was cut off and not permitted to stay, but for one witness indicating that she was not sure whether or not that patron was cut off.

The evidence of staff meetings and the exhibiting of the training manual (Exhibit #4) in my view, fall short of establishing that the licensee did everything reasonable to prevent the contravention. I note in particular that the training manual makes no reference whatsoever to the obligation to remove intoxicated patrons.

I find that the defence of due diligence fails.

The licensee's submissions were focussed on the activities surrounding primarily Patron #2. This is consistent with counsel's submission that the enforcement process refers to a single contravention and accordingly must refer to a single intoxicated patron.

The contravention notice (Exhibit #1, Tab 3) issued on November 19, 2007, cites s. 43(2)(b) which is drafted in the singular. I find that this reference alone does not restrict the allegation to a single patron.

The summary of evidence provided in the NOEA dated December 15, 2007, describes three intoxicated males, and is clear notice of the case that the licensee had to meet.

I find that the enforcement process did encompass a single allegation of permitting multiple intoxicated patrons to remain in that part of the establishment where liquor is sold, served, or otherwise supplied.

The contravention has been proven.

PENALTY

Pursuant to section 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 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 by the minimums set out in Schedule 4 of the *Regulations*. However, I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The licensee says no penalty is warranted.

The branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, *Regulation*, and Rules. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

The licensee has a record of prior contraventions, including a contravention of the same nature as is this one, and a compliance meeting with the branch to address the issue of allowing intoxicated patrons to remain. However, as the relevant prior contraventions were more than one year ago, pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, section 1(1)(b), this is technically a first contravention. Schedule 4, Item 11, sets out the range of penalties for a first contravention of this type as four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

The branch recommends a four (4) day suspension.

A four (4) day suspension represents the minimum licence suspension for a contravention of this type.

The licensee not only permitted two intoxicated patrons to remain in the establishment on October 12, 2007, but also served them beer and allowed them to sit and consume the beer in the licensed premise while the patrons were intoxicated.

I find that a penalty is warranted in order to obtain voluntary compliance with the *Act* and *Regulation* in the future. Notwithstanding a previous compliance meeting at which the treatment of intoxicated patrons was the central issue, the licensee failed to properly deal with two intoxicated patrons.

I find that a suspension of four days is appropriate.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 119233 for a period of four (4) days to commence at the close of business on Thursday June 26, 2008, 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)

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 3, 2008

cc: Nelson RCMP

Liquor Control and Licensing Branch, Victoria Regional office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Tania Cogan, Branch Advocate