



**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: City Center Manor Holdings Ltd.
dba Traveller's Inn City Center
1961 Douglas Street
Victoria, BC V8T 4K7

Case: EH10-117

For the Licensee: Patrick Guy, Patrick Guy Law Corporation
Brian Markle

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: August 18 & 25, 2011

Place of Hearing: Victoria, BC

Date of Decision: October 24, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, City Center Manor Holdings Ltd, owns the Travellers Inn City Center located in Victoria, BC. At the time of the alleged contravention the hotel was being operated by a receiver, D. Manning and Associates. The hotel has a licensed lounge known as Soprano's Karaoke and Sports Bar (Soprano's), Liquor Primary Licence 119888, with liquor sales from noon to 2:00 a.m. seven days a week with a licensed capacity of 275 persons in the main area and 40 persons on the patio. Soprano's is operated by a third party operator, Serving For Success Consulting Ltd. which has been approved by the branch. Brian Markle is the principal of Serving for Success and appeared as the licensee's representative during the course of the hearing. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated November 22, 2010. The branch alleges that on September 18, 2010, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a seven day licence suspension (item 11 of Schedule 4, *Liquor Control and Licensing Regulation*).

Item 11 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 to \$7000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267***

43 (2) A licensee or the licensee's employee must not permit

(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 contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

- Exhibit 1:** Branch's Book of Documents, tabs 1 - 11.
- Exhibit 2:** Licensee's Book of Documents, tabs 1 – 9.
- Exhibit 3:** Document titled Soprano's Daily Incident Report, dated September 18, 2010.
- Exhibit 4:** Licensee's written submissions.

EVIDENCE - THE BRANCH

The branch presented three liquor inspectors as witnesses, each with several years experience as a liquor inspector and with training in identifying intoxicated persons. The inspectors testified that during the evening of September 18, 2010, they worked together conducting covert inspections of licensed establishments in the Victoria area. They arrived at Soprano's at approximately 10:00 p.m. taking seats inside and ordering beverages in order to appear as patrons. The establishment was not crowded with approximately 50 patrons inside. Shortly after their arrival they observed a young female patron who appeared to be severely intoxicated. She was swaying and staggering to the point of having to be held up by friends. She fell to the floor on two

occasions. Her clothing was dishevelled, her dress riding up exposing her tights. She appeared to be confused and disoriented. Staff present failed to take any action other than at one point telling her to put her shoes back on. She was consuming what appeared to be an alcoholic beverage. The inspectors left the establishment at approximately 10:30 p.m.

Outside they spoke with a male security staff member. [I pause to note this staff member did not appear as a witness and in the hearing learned that he left the employ of the establishment in November or December, 2010.] They identified themselves as liquor inspectors and advised him that a female patron was intoxicated and needed to be removed from the premises. He said that he had just come on shift and that the patron was celebrating her birthday.

The inspectors waited in their vehicle to observe whether the patron left the establishment. When after a twenty minute interval she was not observed leaving, two of the inspectors returned inside where they observed the patron still at her table. They were told by staff that she was still saying her goodbyes. The inspectors returned to their vehicle where they were approached by two staff members who said that the owner had said that the patron was not intoxicated and was permitted to remain on the premises.

Prior to departing from the area at approximately 11:00 p.m. the inspectors attempted without success to contact the Victoria Police watch commander to advise of their observations of an intoxicated patron being permitted to remain in the establishment. At approximately 11:30 p.m. whilst at another Victoria establishment they were approached by the head of the Soprano's security staff with whom they had talked earlier. He told them that the Licensee's security staff had eventually had the patron removed because she kept falling down.

In response to questions from the licensee's counsel the inspectors testified that they were familiar with the branch compliance and enforcement manuals which outline additional investigation that may be undertaken where it is suspected that an intoxicated patron has been permitted to remain in a licensed establishment (exhibit 2, tabs 8 & 9). The steps include making observations of the person's behaviour and physical appearance for signs of intoxication, interviewing the licensee, staff and perhaps the person involved and other patrons if safe to do so, and obtaining video surveillance records if possible. The inspectors testified that further investigation was unnecessary in this instance as all three inspectors were certain that the patron was intoxicated and video records often are not adequate for evidentiary purposes. The patron was not approached as doing so can lead to confrontation and present safety issues.

The inspector responsible for the Victoria area in which Soprano's is located referred to copies of documents from the Branch file for the establishment:

- Exhibit 1, tab 1: NOEA letter of November 22, 2010.
- Exhibit 1, tab 2: Contravention Notice (CN) issued to the licensee.
- Exhibit 1, tab 3: the liquor primary licence issued to the licensee and in effect at the time of the alleged contravention.
- Exhibit 1, tab 4: floor plan outlining the licensed area of the establishment.
- Exhibit 1, tab 5: Inspection and Interview information documents outlining the issuance of the license.
- Exhibit 1, tab 6: A copy of the Liquor Primary Guide in effect at the time of the alleged contravention. The Guide outlines the statutory and regulatory requirements for the operation of the establishment and sets out the terms and conditions of the liquor licence.

The recommended penalty for the alleged contravention was a seven day liquor licence suspension, the maximum suspension for a first contravention of permitting an intoxicated person to remain in a licensed establishment. The inspector testified that the contravention is considered serious and the level on intoxication significant and no action was taken by staff to have the patron removed from the premises.

EVIDENCE – THE LICENSEE

The licensee presented six witnesses: the licensee–representative, the manager, two security staff on duty at the time of the alleged contravention, the subject patron and a friend who was present at the time.

The licensee representative testified that he has operated the establishment for approximately 10 years with approximately 10 years previous experience at another establishment. He holds a “Serving It Right: Responsible Beverage Service” (SIR) certificate and is a member of the Victoria Bar and Cabaret Association. Soprano’s liquor service staff has SIR certificates, and security staff have provincial security certificates. The establishment has a policy and procedures manual which includes directions to staff on issues such as checking identification, liquor service and dealing with intoxicated patrons (exhibit 2, tabs 6 & 7).

Intoxicated persons are not permitted entry (exhibit 2, tab 1). Incidents reports are completed on incidents involving intoxicated patrons. New employees receive on the job training. Staff meetings are held on a regular basis. Because the establishment is located close to the arena they have developed procedures to ensure that persons ejected from the arena for intoxication are not then permitted to come to Soprano’s. The establishment has a security video system in place with 12 cameras. It records on a seven day loop thus any video record must be accessed within seven days otherwise it no longer exists.

He was out of town the night of September 18, 2010, and thus not at the establishment at the time of the inspectors' visit; however he received a phone call from the manager on duty advising that the inspectors were requiring that a patron who was celebrating her birthday be removed from the establishment. This surprised him as it had never occurred previously. He advised the manager to use her best judgement in handling the situation. He did not direct her or any staff to let the patron remain in the establishment. He was advised on his return that the patron was interviewed by the manager and subsequently requested to leave. He did not hear anything further and thought that was the end of the matter until sometime in mid to late November when he was advised by the receiver operating the hotel that a waiver had been signed accepting a licence suspension. He disagreed with the allegation by the branch and took steps to have the matter proceed to a hearing. In December 2010 he and the other staff members prepared statements of their recollection of the incident (exhibit 2, tabs 2 – 5).

The Manager of Soprano's testified that she has approximately 25 years experience working in licensed establishments and has worked in a management capacity at Soprano's for the past nine years. She holds a SIR certificate and is familiar with recognizing the signs of intoxication. She is aware that intoxicated persons are not permitted to remain in a licensed establishment. She rewrote the policy and procedures manual for Soprano's a few years ago and keeps it up to date. Although the manual does not explicitly deal with the signs of intoxication she has explained them to staff during staff meetings. All serving staff have SIR certificates and all security staff have provincial security certificates. Staff check the identification and level of sobriety of persons entering the establishment. Intoxicated persons are not allowed to enter or remain in the establishment.

She testified that she was working the night of September 18, 2010, and recalls that at approximately 10:00 p.m. she was in her office when she heard a shoe hit the door. She saw the doorman dealing with a young woman who had kicked off her shoes. This was the same patron who the liquor inspectors later told the doorman was intoxicated.

When the doorman passed this information on to her she called the owner as she had not encountered this situation previously. He told her to use her best judgement.

She then asked the patron to come into the office and spoke with her for 10-15 minutes. She did not assess her condition as being intoxicated. The patron did not lack alertness, her eyes were not bloodshot, her speech was not slurred, she did not smell strongly of liquor, and her clothing was not dishevelled. She was wearing high platform shoes without backs and thus took exaggerated care in walking. The patron was not emotional or irritable but polite, understanding and apologetic for causing the situation.

She explained to the patron that the liquor inspectors had seen her fall on the dance floor and assumed that she was intoxicated and thus was not permitted to remain on the premises. She told the patron that in the circumstances she must ask her to leave. The patron did not argue but just wanted to say goodbye to her friends still at the table. She walked unassisted from the office to the table, hugged her friends and left with a friend using the exit onto the street and not the main entrance/exit onto the parking lot.

She was aware that the liquor inspectors were in their vehicle on the parking lot. However, she did not feel it was her or the staff's responsibility to tell them that the patron had left via the other exit. In December 2010 she made notes of her recollection of the incident (exhibit 2, tab 3).

Soprano's head of security testified that he has worked as security staff in licensed establishments for approximately 19 years and has been the head of security at Soprano's for approximately nine years. He does not hold a provincial security certificate but relies on his age and experience to know what is required. All other security staff at Soprano's do hold such certificates.

He commenced work at Soprano's at 10:00 p.m. the night of September 18, 2010. There were approximately 40–50 patrons present with one group celebrating a birthday. He observed one female patron remove her shoes on the dance floor and instructed one of the security staff to tell her to put her shoes back on because for safety reasons all patrons must wear shoes of some type. He did not observe her falling to the floor. The liquor inspector told him that the female patron was intoxicated and must leave. He advised the manager, and she asked the patron into her office and spoke with her and two of her friends. He observed their conversation. The manager explained the situation with the liquor inspector and explained that in the circumstances she would have to ask her to leave.

He testified that in his judgement the patron was not intoxicated, she did not exhibit any of the signs of intoxication, was not emotional, irrational, aggressive or angry. He told the inspector that he had talked with the patron and did not believe her to be intoxicated. She was celebrating her birthday. The inspector said that she must leave and was unhappy that she was not made to leave when he pointed her out earlier.

He testified that he did not speak with the owner (licensee representative) and he did not tell the inspector that the owner said that the patron could remain in the establishment. He saw the inspector at another establishment later that night and told him that the female patron had left Soprano's. He completed an incident report at the end of the night (exhibit 3) and notes on December 17, 2010 (exhibit 2, tab 4).

Soprano's security doorman testified that he holds provincial security certificates and has many years of experience working in different areas of security. He was working at the entrance of Soprano's the night of September 18th commencing at 9:00 p.m. when patrons began arriving.

He was not directly involved with the inspectors or the female patron. He was told by the head of security that the liquor inspector said that the female patron was intoxicated and had to leave. He observed the patron and two other persons from her party speak with the manager in her office. When they came out he was told by the head of security that the patron did not have to leave. He and the head of security went outside and told the inspectors that she did not have to leave. Inside he saw that the patron was saying goodbye to her friends. She left via the exit onto the street. He spoke briefly with the patron's mother who said that she was surprised that the patron had to leave. He completed notes on December 6, 2010 (exhibit 2, tab 2).

The subject patron and a male friend both testified that on September 18, 2010, the female patron was celebrating her birthday with a party for friends and family at Soprano's. The male friend acted as the designated driver and did not consume any alcohol that day. They were together during the afternoon as the female patron and her friends prepared costumes for the party. She consumed two beers during the period of time, 2:00-7:00 p.m. prior to going to the party. They arrived at Soprano's at approximately 7:00 p.m. She consumed two alcoholic beverages between 7:00- 8:00 p.m. following which she switched to water.

She wore a pair of platform shoes to go with her 80's period costume. The shoes have four- inch high heels on top of a one-inch platform making walking difficult but she really wanted to wear them. She stumbled a few times when dancing wildly, was caught by her friends but fell over once near the end of the evening. She tried taking her shoes off but was told that shoes were required to be worn on the premises. She tried flip-flops but they would not fit over her tights.

The female patron was asked into the manager's office and told that the liquor inspector required that she leave. The manager told her that she didn't think that she was drunk, just having a good time, but that she had to ask her to leave. She spent about 12-15 minutes saying goodbye to her friends at the table and then left with her designated driver through the front door, the same door through which they had entered.

SUBMISSIONS

In considering this alleged contravention of permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied the first issue to be decided is whether the subject patron was intoxicated. For reasons which will become apparent below, I will outline only the salient points in the submissions.

Branch Submissions

The branch's submission is summarized as follows:

The evidence of the three liquor inspectors that the patron swayed, staggered and twice fell to the floor is consistent with the description of intoxication in the Guide. It is not necessary that all the signs of intoxication be demonstrated to find that a person is intoxicated. The subject patron demonstrated the ability to walk without falling while wearing the shoes in a sober condition at the hearing. The wording of the Act at section 43(2)(b) is intoxication and not gross intoxication. The evidence of the three liquor inspectors with considerable experience is to be preferred to that of the witnesses presented by the licensee.

Licensee Submissions

The licensee's submission is summarized as follows:

The terms intoxicated and intoxication are not defined in the legislation. In addition, there are many degrees of intoxication. Thus, the section is void and unenforceable. In cases such as this the most severe example of intoxication, i.e. gross intoxication, must be proven. The inspectors' determination that the patron was intoxicated was based only on their observation that she was dancing erratically, was being supported by friends and apparently fell. They did not gather further evidence as required in the

branch compliance and enforcement manuals. Contrary evidence was provided by the licensee's staff who are equally qualified to determine whether a person is intoxicated. The evidence is that the subject patron only consumed a moderate amount of alcohol up to 8:00 p.m. after which time she switched to water.

REASONS AND DECISION

In considering this alleged contravention of permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied, the first issue to be decided is whether the subject patron was intoxicated. The terms intoxication and intoxicated are not defined with the Act or Regulations. The branch in its Guide provides licensees with a list of physical and mental signs of intoxication (see Appendix). I find for the purposes of this decision that determining whether someone is intoxicated is subjective and is based on an evaluation of the evidence in light of the criteria as listed in the Guide for physical and mental signs of intoxication.

The evidence of the branch is that of three liquor inspectors who are experienced and trained in making determinations of intoxication by observing the behavioural, emotional and physical state of the person. The inspectors observed that the subject patron was swaying and staggering to the point of having to be held up by friends and that she fell to the floor on two occasions. Her clothing was dishevelled and she appeared to be confused and disoriented. They concluded that the patron was intoxicated. They were confident in their determination and were satisfied that no further investigation was necessary. They made their views known to security staff at the establishment and requested that the subject patron be removed from the establishment.

The evidence on behalf of the licensee was provided by staff, the subject patron and a friend all of who were present at the time of the alleged contravention. When the inspectors made their views known the manager interviewed the subject patron. The manager and the other staff testified that they did not observe physical, behavioural or emotional signs of intoxication. They, however, complied with the inspectors' request and asked the subject patron to leave the establishment. The patron and her friend testified about the moderate amount of alcohol she had consumed during the course of the day. They also provided an explanation for why she appeared unsteady on her feet, had stumbled and fallen and had needed assistance from her friends when walking. The shoes worn by the patron were produced during the course of the hearing and she provided a demonstration of her ability to walk while wearing them. The shoes were of a platform type with a notably high open heel. The care necessary to walk in them appeared genuine.

In considering the evidence put forth by the branch, I find that failing a reasonable explanation there is some evidence upon which it may be possible to conclude that the subject patron was intoxicated. In considering the evidence as a whole however, there is evidence that there was not sufficient alcohol consumed by the patron to cause her to be intoxicated, and that the behaviour exhibited was the result of a young woman celebrating a birthday in high spirits, insistent upon wearing footwear not conducive to her activities. That she had consumed some alcohol during the time prior to the inspectors' observations, while not sufficient to cause intoxication, may nonetheless have contributed to her behaviour. I note that the inspectors did not confirm that the subject patron was in fact still consuming alcoholic beverages during the time of their observations, nor did they make observations as to whether she exhibited other signs of intoxication. The inspectors did not follow up with further investigation nor determine whether a video was available and whether it may have assisted in making a determination of the patron's condition.

In conclusion, on the whole of the evidence, I cannot find on the balance of probabilities, that the subject patron was intoxicated. Therefore, the allegation that the licensee contravened section 43(2)(b) of the Act has not been proven.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: October 24, 2011

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate

APPENDIX

Over-service and intoxicated patrons

It is your responsibility to make sure patrons do not become intoxicated while in your establishment.

You must not let a person who is apparently under the influence of alcohol or drugs enter or remain in your establishment. You must refuse the person service, have the person removed and see that he or she departs safely.

You also must write down all incidents of intoxicated patrons and the action you took in an incident log, and have the information available for the liquor inspector or police officers.

Physical signs of intoxication:

- red or bloodshot eyes
- dishevelled appearance
- odour of liquor
- unsteadiness on feet
- staggering
- exaggerated care in walking
- slurred speech
- fumbling with small objects such as money

Mental signs of intoxication:

- lack of alertness
- exaggerated emotions
- aggression
- irrationality