



**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: 504806 B.C. Ltd.,
dba Grand Trunk Inn
2351 Church Street
Vanderhoof, BC V0J 3A0

Case: EH11-083

For the Licensee: Michael Brise

For the Branch: Bode Fagbamiye

General Manager's Delegate: Sheldon M. Seigel

Date of Hearing: September 28, 2011

Place of Hearing: Prince George

Date of Decision: October 21, 2011

**Ministry of Public
Safety & Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Grand Trunk Inn holds several liquor licenses including Liquor Primary Licence No. 0019556 and operates in Prince George B.C. The liquor primary licence stipulates that the hours of liquor sales are from 11:00 a.m. to 1:00 a.m. Monday through Thursday, 12:00 p.m. to 2:00 a.m. Friday and Saturday, and 11:00 a.m. to midnight Sunday. The licensed capacity is 88 persons, 55 persons, and 60 persons in three areas. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*" (Guide).

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTY

By Notice of Enforcement Action (NOEA), dated June 23, 2011, the Liquor Control and Licensing Branch (Branch) alleges that on May 27, 2011 at 10:25 p.m. the Licensee contravened section 43(1) of the *Liquor Control and Licensing Act* (Act) by selling or giving liquor to an intoxicated person. The proposed penalty is a six-day suspension of the liquor licence in accordance with item 9 of Schedule 4, of the *Liquor Control and Licensing Regulation* (Regulation).

In the alternative, the Branch alleges that on May 27, 2011 at 10:25 p.m. the Licensee contravened section 43(2)(b) of the 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 for this alleged contravention is a six-day suspension of the liquor license in accordance with item 11 of Schedule 4, of the Regulation.

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

ISSUES

1. Did the contravention of s. 43(1) of the Act occur?
2. If so, is a penalty warranted under the circumstances?
3. If not, did the contravention of s. 43(2)(b) of the Act occur?
4. If so, is a penalty warranted under the circumstances?
5. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

Exhibit No.1: Licensee's surveillance video of the establishment (excerpts from May 7, 2011).

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

Exhibit No. 3: A copy of a Wikipedia encyclopaedia web entry relating to the Saik'uz First Nation, provided by the Licensee

EVIDENCE

Three liquor inspectors testified for the Branch. The inspectors each testified that they have considerable expertise, developed by way of training and experience, identifying indicia of intoxication. They each stated that they entered the establishment in the company of the other inspectors at approximately 10:30 p.m. on May 27, 2011 in a covert capacity, which is to say that they did not disclose to anyone in the establishment that they were liquor inspectors.

They each observed that the establishment was very quiet. Their estimates of the number of patrons present ranged from 20 to 24 individuals. They each stated that the lighting was adequate to clearly see the whole of the establishment, that there was a single female employee observed tending to the patrons (described as a bartender or server), and that the beneficial owner of the establishment (the Licensee) was present at all times.

Each of the inspectors described three individual patrons of interest. They said the employee had a clear line of sight to each of the three identified patrons' at all relevant times. The inspectors testified that they were in the establishment for a total of 30-33 minutes and that each made notes that appear in Exhibit No. 2. The inspectors each described the three identified patrons as intoxicated. Patron #1, a male, was initially observed seated at a table near to where the inspectors were seated. He was with Patron #2, a female patron with a somewhat unusual hat that each of them described.

During their stay in the establishment, the inspectors observed the bartender/server clean a broken drink glass and some liquid from the patrons' table and appear to take an order for two additional glasses of beer. The inspectors also observed the bartender/server return to the table and place two beers in front of the two patrons

Each of the inspectors testified that one of the inspectors engaged in conversation with Patron #1, who introduced himself to the inspector and moved his chair up near the inspectors' table. Each of the inspectors also identified Patron #3 as a male who was playing pool nearby and who occasionally visited the table occupied by Patrons #1 and #2, and on one occasion pretended to serenade Patron #2 by singing and "playing his pool cue like a guitar."

Inspector #1 also testified as follows:

Patron #1 was unsteady on his feet, staggered when walking, and tripped when moving to introduce himself to the inspector. The patron knocked another inspector's beer onto Inspector #1's lap. The patron had red bloodshot watery glassy eyes, a flushed face, his fine and gross motor skills were clearly retarded and his speech was slurred. The patron was not more than four feet away from the inspector during most of the 33 minutes that Inspector #1 was in the establishment.

Patron #2 attempted to arise from her chair on numerous occasions. Each time she placed her hands on the chair arms and attempted to push herself out of the chair but fell back in. Her fine and gross motor skills were delayed. When she did speak it was unintelligible and rambling and Inspector #1 could not understand what she was saying. Her face was flushed and her eyes were bloodshot and watery. Patron #2 was five or six feet away from the inspector for the 33 minutes the inspector was in the establishment. The patron took out a change purse and tried to pay for two beers that the bartender/server brought but she kept coming up with less than the full amount. It took several attempts to get the last 50 cents (\$10.50 was the full bill), and the bartender/server had to return a second time to get it.

Patron #3 was a male playing pool. He had difficulty walking around the table and as he tracked the cue ball, he frequently supported himself with the table. He had a flushed face and bloodshot watery eyes, red bulbous nose, and a "paunchy" facial appearance. The inspector observed him consuming from a bottle of beer.

Inspector #1 said that at no time did he observe the bartender/server curtail service to Patron #1 or Patron #2, and at no time did either the bartender/server or the Licensee make any efforts to remove any of the intoxicated patrons. The inspector added that in his opinion, even a layperson would have been able to deduce from the conduct of the three persons that they were very drunk or grossly intoxicated. The female bartender chose to continue serving and allow the patrons to remain in the establishment.

Inspector #2 also testified as follows:

When Patron #1 got up he was unsteady. He got up to introduce himself and he knocked over a drink as he fell into a table. He moved his chair and was practically sitting at the inspectors' table. When Patron #1 stumbled, his eyes were only inches from the inspector, and glassy. The patron had an obvious odour of liquor on his breath. The patron's speech was somewhat slurred. In the inspector's opinion Patron #1 was visibly very intoxicated. Inspector #2 was close to this patron, five to seven feet away, and then closer when the patron approached to introduce himself. The server could see the patron, and when she came to the table she was very close to him.

Patron #2 was seated and slumped forward, nodding her head, and mumbling to herself. She seemed incoherent. Inspector #2 did not speak with her. At one point Patron #2 was served a glass of draft and presented with a bill. She began digging in her purse and had some difficulty and it took two to three minutes to produce sufficient coin. When she was seated she tried to get up several times and fell back into her chair and gave up. The inspector testified that Patron #2 demonstrated identifiable signs of intoxication, including nodding her head forward, trying with difficulty to pay for her beer, trying to get out of her seat, and mumbling. The inspector thought she was clearly intoxicated. He confirmed that Patron #2 was very visible to everyone in the establishment, including the bartender, for the whole time the inspectors were present.

Patron #3 was playing pool and appeared to be drunk. However, inspector #2 did not observe any of the normal signs of intoxication. He came to the conclusion that the patron was a seasoned and experienced drinker and a confirmed alcoholic. The inspector did not speak with the patron. He saw the patron have a conversation with patron #2. Patron #3 seemed to stagger and sway slightly. The inspector said that Patron #3 "ran the table" and that he demonstrated an ability to function consistent with a seasoned experienced drinker and perhaps a seasoned alcoholic. The inspector also said that he doesn't know if Patron #3 had any odour of liquor on his breath and didn't know how long the patron had been in the establishment.

Inspector #3 also testified as follows:

She observed Patron #1 being very unsteady on his feet and stumbling and falling back into his chair. He was in plain sight of anyone who cared to notice and should have been very visible to the bartender and to the Licensee. There was a clear line of sight between the bartender and Patron #1. There was a broken beer bottle on the table where Patron #1 and Patron #2 sat and it was there for some time before the server came to clean it up and take another order of drinks. Patron #1 introduced himself to the inspectors and had a fairly long conversation with them. He said he was at a fishing derby and had been drinking and had caught a 2 lb. fish and didn't win the derby. He was clearly intoxicated. His fine and gross motor skills were impaired. His eyes were bloodshot and glassy and his balance was poor. He had slurred speech. He was demonstrating clear signs of intoxication. The inspector said that she was very close to him; at times, one to two feet away. She said the staff did not intervene and in fact the server brought Patrons #1 another beer after it was clear that he was intoxicated.

Patron #2 was intoxicated. She wasn't able to speak in a coherent way. She couldn't get out of her chair. She closed her eyes and she was laughing and talking to herself. She was clearly showing a variety of signs of intoxication. Inspector #3 said she was very close to Patron #2 for most of the half-hour that they were in the establishment. She and the patron were at adjacent tables approximately two to three feet apart.

The inspector testified that she could clearly see the bartender, who would also have had a clear and unobstructed line of vision to the intoxicated patron. The staff took no steps to prevent any of the intoxicated patrons from drinking, nor did staff act on the observable signs of intoxication. In fact, the server provided more beer to Patron #2 after cleaning up a spilled and broken glass of beer on the table at which she sat. The inspector said that Patron #2 had difficulty handling cash but did eventually pay for the beers.

The Licensee testified as follows:

Patron #1 is visible in the surveillance video (Exhibit #1) at the end of segment two and the beginning of segment three. He indicated that Patron #1 is wearing a black ball cap and a black jacket and is seen approaching the bar, ordering a beer, talking with the bartender, receiving his beer, paying for it, and leaving the area with the full beer without any difficulties or any spillage of his beer. He said that the actions in the video occur just when the inspectors were in the establishment or immediately afterward and that the video represents how the patron looked and acted during the relevant time.

He testified that he interviewed the bartender after the contravention and she did not recall any intoxicated patrons on the night in question. He added that his interview with the bartender did not occur until more than 30 days after the allegation was made because the Branch did not disclose to him the identity of the patrons until that time. Prior to that, the Licensee understood that the allegation related to a single different individual who for whom the Licensee arranged a ride home when that individual became intoxicated.

The Licensee said Patron #1 always sounds like he is slurring his words, day and night. The Licensee says the patron is a somewhat regular customer and the Licensee knows him from the community. He adds that even early in the day he has trouble understanding what Patron #1 says, and he has not discussed this allegation with Patron #1.

Of Patron #2, the Licensee said the female is known [s. 22 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to personal privacy)]. As well, she has trouble getting up and moving around. She has difficulty hearing and understanding. The Licensee said he thinks she might have [s. 22 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to personal privacy)], but he is not sure. He said he sees her around the community on occasion. She is not a regular but she comes in to the bar “sometimes.” He said the staff is well aware of what she is like. He added that he does not remember her being in the bar on May 27, 2011, but she is the only female he knows that comes into the bar with a hat of the description set out by the inspectors: it’s not [s. 22 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to personal privacy)] He testified that everything he’s heard from the liquor inspectors seems to indicate that she is Patron #2. He said she speaks to herself and laughs for no reason. She even pretends to talk into a cell phone and she doesn’t have one. He said she acts intoxicated even when she is not.

The Licensee agreed that he was present at the relevant times, but indicated that he did not notice any intoxicated patrons or have any intoxicated patrons brought to his attention that night but for the single individual for whom he arranged a ride home. He does not specifically remember the patrons described by the inspectors being present in the establishment on May 27, 2011.

SUBMISSIONS

The Branch submits that all three patrons were in the red-lined area, and intoxicated. They all displayed obvious signs of intoxication that should have been patently obvious to the Licensee and the bartender/server. The Branch argues that Patron #1 and Patron #2 were each provided with additional alcohol when the server brought them a beer each and put the beers on the table in front of each of them and therefore the Licensee contravened s. 43(1).

The Branch also submits that in the event that the elements of s. 43(1) are not established, it is clear that each of the three patrons were allowed to remain in the red-lined area and therefore the Licensee contravened s. 43(2). In either case, the Branch submits that the conduct of the Licensee warrants the recommended penalty.

The Branch agrees that the video surveillance images show Patron #1 at the end of segment two and the beginning of segment three, but as it lasts only 15 or 20 seconds, it is of little probative value

The Licensee submits that Patron #1 is visible at the end of segment two and the beginning of segment three of Exhibit #1 and does not appear to be grossly intoxicated. He says that is the only cogent evidence of this patron's state of affairs at the relevant time. He says that Patron #1 has some personal traits that could lead one to believe he is intoxicated when he is actually not. Also it is not clear that the server provided liquor to him, as Patron #2 ordered and paid for any beer that was supplied to their table.

The Licensee submits that Patron #2 has a functional disability that can be interpreted as intoxication. There is no evidence that she was in fact intoxicated and the staff knows her better than the inspectors, and is able to tell when she is intoxicated.

The Licensee submitted that Patron #3 was playing pool and was described as having good eye-hand coordination and ran the table and therefore cannot be grossly intoxicated. He argues that while one inspector described this patron as clearly intoxicated, another inspector says that the patron might be a functional alcoholic and he cannot be sure that the patron was even drunk, let alone if he was demonstrating any indication of intoxication. Two trained inspectors disagree as to whether Patron #3 was showing any signs of intoxication, and therefore it would be unreasonable to

conclude that the Licensee's staff should be able to tell for sure. As for "Playing his pool cue like a guitar," the Licensee says: "Well, people like to have fun."

The Licensee also argues that from 40 feet away, he didn't see anyone that seemed intoxicated. He submits that if the inspectors sit down and interview someone for a half hour, they might learn something that a server can't tell from the bar 20 feet away, or from a quick exchange over an order or delivery of beer. He says that business does not allow or require his staff to interview every patron for 30 minutes.

The Licensee also submitted that the names of the patrons alleged to be intoxicated were not revealed to him until 30 days after the allegations, ensuring that he could not properly investigate the allegations. He talked to the bartender at the first opportunity (30 days post allegation) and she didn't remember anything. When he first heard of the allegation, he thought the Branch was talking about a different patron, which the staff was trying to prevent from driving home. The Licensee says this is supported by the documents exchanged prior to the hearing. He says that he thought he had investigated until he found out much later that the allegation was about completely different people. And by then it was too late to find out any information.

REASONS AND DECISION

I find the inspectors have considerable experience and professional training and skill at identifying the indicia of intoxication. Although the inspectors may be more skilled at identifying these indicia, the Licensee and his employees should be held to a reasonable level of expertise. It is their duty to ascertain whether patrons are intoxicated and some training and experience in that respect are fundamental requirements of the job and are part of the Serving it Right training which must be completed by all licensees, managers, bartenders, and servers. The test is whether with a knowledgeable eye, the Licensee or its staff should have been able to ascertain that a patron is intoxicated from a reasonable observation point over a reasonable

period of time. What is reasonable in the circumstances will depend on the fact situation in each case. The Licensee and its staff are not expected or required to interview each patron for a protracted period of time in order to ascertain if the patron is intoxicated, but neither can the Licensee or its staff avoid obligation by failing to evaluate a patron in the time and under the circumstances provided.

The only direct evidence of the state of intoxication or otherwise of the three patrons is that of the three inspectors and the video images as they relate to Patron #1. I note that the bartender/server was not called to testify, nor were any of the three patrons notwithstanding that they all appear to be known to the Licensee. The Licensee indicated that the bartender had no recollection of the relevant patrons in the establishment on May 27, 2011, when he investigated approximately 30 days after the alleged contravention. He also indicated that he did not discuss this matter with Patron #1. He was silent as to whether he discussed the matter with Patron #2 or Patron #3. No witness has provided direct evidence that any of these patrons was not intoxicated.

Each of the inspectors testified that they believe Patron #1 and Patron #2 were intoxicated. There is no evidence as to any medical condition that affects the behaviour of those patrons but for the statements of the Licensee. I find that those statements fall far short of establishing to my satisfaction that that these patrons have medical conditions that mimic intoxication so effectively as to fool the three experienced inspectors who had considerable time and exposure in which to evaluate the patrons. I note also that in the event that either or both of Patron #1 or Patron #2 do have such functional disabilities, the existence of those disabilities does not preclude the possibility that the patrons could become intoxicated as any other individuals may become intoxicated.

I carefully reviewed the video surveillance. I am satisfied that I correctly identified Patron #1 from the physical descriptions of him provided by the inspectors and the description of his actions and at what point in the video files he appears provided by the Licensee. The video portrays Patron #1 approaching the bar, conversing with the

bartender, obtaining a beer and handing over cash, and leaving the bar with a beer, as described by the Licensee. The patron does not appear to spill any beer. The duration that the patron's image is visible is approximately 20 seconds. I agree with the

Licensee that Patron #1 does not appear intoxicated in the video. The video, however, is of limited duration, has no audio accompanying it, and is of relatively poor resolution. The only signs of intoxication that could be expected to be visible on such a video would be physical unsteadiness, stumbling or tripping, or failing to be able to support himself or his beer effectively. The video image does not speak to indicia of intoxication related to speech, reasoning abilities, malodorous breath, or physical activities beyond the short time frame. The video evidence, though of some probative value in support of an argument that the patron was not intoxicated, is insufficient to reduce the power of the inspectors' evidence. I find that the corroborating evidence of the three inspectors satisfies me that on the balance of probabilities, Patron #1 was intoxicated.

I find the evidence that the bartender/server provided liquor to Patron #1 persuasive. I accept that when the bartender/server brought two beers to the table at which Patron #1 and Patron #2 were sitting, and put one beer in front of each patron, she provided one beer to each of the patrons. The fact that one of the patrons paid for both drinks is not conclusive evidence that both drinks were for her consumption. There is persuasive evidence that Patron #2 was served during the inspectors' presence.

The inspectors' evidence with respect to Patron #3 is somewhat equivocal. Although Inspector #1 was confident that the patron was intoxicated and showing signs of intoxication, Inspector #2 believed that while the patron was intoxicated, he was not showing traditional signs of intoxication. Inspector #3 provided no evidence with respect to Patron #3. Further, there is no evidence that Patron #3 was served liquor after he was intoxicated, if he was intoxicated. Accordingly, I have insufficient evidence to establish either that he was intoxicated or that the Licensee or its staff provided him with liquor.

I find that the Licensee or its staff sold or provided liquor to Patron #1 and Patron #2, both of whom were at the time intoxicated. The burden of proof is not met with respect to Patron #3. As I have found the facts of the contravention of s. 43(1) of the Act, the alternative allegation of a contravention of s. 43(2)(b) of the Act, is not relevant.

The alleged contravention occurred on May 27, 2011. The contravention notice was served on the Licensee on June 6, 2011, some nine days later. I find that nine days between observation of an alleged contravention by a team of covertly operating inspectors and delivery of a contravention notice is not excessive and does not prejudice the Licensee's ability to mount a defence to the allegations. The parties agreed that the names of the patrons were not released until some 30 days after the alleged contravention. The Licensee argues that this is an unreasonable delay, which prejudiced its ability to effectively investigate the facts in order to defend against the allegations.

I find that names of the allegedly intoxicated patrons are not relevant to the ability of the Licensee to adequately investigate the relevant circumstances. I find that the names of the allegedly intoxicated patrons are not required to be obtained by the inspectors or divulged to the Licensee in the event that the inspectors obtained those names by whatever means. In this case, it was notice enough that the inspectors observed three allegedly intoxicated patrons at a particular place and time and location within the establishment and by whom those patrons were served (in the case of Patron #1 and Patron #2) and at which table Patron #3 was playing pool. I note that by all accounts there were less than 20 patrons in the establishment at the relevant time. It is critical that the Licensee is notified in a timely matter of the allegation so that it may investigate, but a description of the facts without identifying the patrons by name is not defective. Further, there is no indication from the evidence that the Licensee could not obtain

information from the named parties in this case after 30 days. Accordingly, I find there is no breach of administrative fairness occasioned by the Branch not delivering names

of the allegedly intoxicated patrons to the Licensee sooner than 30 days after the alleged contravention occurred.

DUE DILIGENCE

The Licensee is entitled to a defense to the finding of a contravention, if it can be shown that the Licensee was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The Licensee must not only establish procedures to identify and deal with potential contraventions, it must also ensure that those procedures are consistently acted upon and updated to address weaknesses in the systems.

The Licensee says there are systems in place that satisfy the requirements of due diligence, but he provides very little evidence of the specifics of those systems or their implementation. I cannot, on the evidence before me, conclude that the Licensee has been duly diligent.

I find the Licensee contravened s. 43(1) of the Act when it sold or gave liquor to intoxicated Patron #1 and Patron #2 on May 27, 2011.

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 may do any one or more of the following:

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

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. 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.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. The range of penalties for a first contravention of section 43(1) of the Act pursuant to the Regulation, Schedule 4, item 9 is four to seven days suspension and/or a \$5,000- \$7,000 monetary penalty. The recommended suspension of six days falls in the range for a suspension for a first contravention. I find this penalty to both appropriate and warranted in light of the fact that there were two intoxicated patrons who were provided with liquor.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 0019556 for a period of six (6) days to commence at the close of business on Thursday, November 24, 2011, 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. 0019556 be held by the branch or the Vanderhoof Police Department from the close of business Thursday, November 24, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

Signs satisfactory to the General Manager showing that the license is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: October 21, 2011

cc: Liquor Control and Licensing Branch, Surrey Office
Attn: Michael Clark, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Bode Fagbamiye, Branch Advocate