



**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 Cambie Malone's Corporation
dba Esquimalt Inn
856 Esquimalt Road
Esquimalt, BC V9A 3M4

Case: EH11-082

For the Licensee: Kevin McLean
Brandon Smith

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: December 13, 2011 & January 31, 2012

Place of Hearing: Victoria, BC

Date of Decision: March 16, 2012

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Cambie Malone's Corporation operates the Esquimalt Inn located in Victoria, B.C. The hours of liquor service are 9:00 am to 11:00 pm Monday and Tuesday, 11:30 am to 1:30 am Wednesday through Saturday, and 11:00 am to midnight on Sunday. 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 CONTRAVENTION AND PROPOSED PENALTY

By way of a Notice of Enforcement Action (NOEA) dated July 12, 2011, the Branch alleged that the Licensee contravened s. 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act) on May 27, 2011, at approximately 11:45 pm by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served, or otherwise supplied.

In particular, the Branch alleges that two independent patrons, a male and a female, were intoxicated at the time and place indicated in the NOEA.

Schedule 4 of the *Liquor Control and Licensing Regulation B.C. Reg. 244/2002* (Regulation) establishes prescribed penalties for contravention of the Act or Regulation. For a first contravention of this section, the range of penalty is four (4) to seven (7) days licence suspension and/or \$5,000-\$7,000 monetary penalty. The Branch proposes a four (4)-day suspension.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Drunkenness

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 Licensee contravene the Act as alleged?
2. If the contravention occurred, is a penalty required for that contravention under the circumstances of this case, and if so, what penalty is appropriate?

EXHIBITS

Exhibit No.1: Branch Book of Documents

EVIDENCE

Inspector 1

The inspector testified that she and inspector 2 arrived at the establishment at approximately 11:30 pm on May 27, 2011, in order to conduct a routine inspection in a covert capacity. She observed a group of males and a single female outside the establishment. She and inspector 2 observed the group for five to seven minutes, and ascertained that the males were members of the band performing in the establishment. The inspector observed the female arise from a seated position and talk with some of the males. The inspector said the female's eyes were glazed and her speech was slurred and she had an unsteady gate when she entered the establishment with one of the band members. The inspector entered and noted that there were only approximately 10 patrons and three staff in the licensed premises. She said that she

and Inspector 2 took up seats in a position from which they could see the whole of the establishment, and from there she observed the female patron go down a hallway toward the woman's washroom. The inspector testified that after a period of time, Inspector 2 went down the hall to find the female patron, whom she discovered was in the men's washroom. The inspector said that when the female exited the washroom, she went to the pool playing area, sat on a stool where she closed her eyes and looked as though she was falling asleep. Then the female began to play pool. The inspector said the female was "totally out of it," missed the cue ball several times, and was laughing so hard that she almost fell down a couple of times. The inspector also said that she observed a server approach the female and take an order for a glass of water. She said the server checked the female for identification. The inspector noticed that the female had some difficulty getting her identification from her coat. The inspector said once in the establishment, the female looked "like she had a neon light over her head that read: Look at me, I'm completely gutted." On cross examination, Inspector 1 said that she concluded the female was intoxicated before she entered the establishment and that she did not see the female patron in the men's washroom. The inspector also said the female was just as likely impaired by drugs as she was intoxicated.

Inspector 1 also testified that she observed three males enter the establishment. She said that one of them sat down and began to heckle the band and that the band played a song about being drunk in response to the actions of that patron. One of the other two patrons went to the bar and brought back six bottles of beer, two for each of their party. She said the first seated patron had glassy eyes and slurred speech and was demonstrating grand, uninhibited actions, including waving his arms wildly toward the band and blowing her kisses. She determined that he was "absolutely intoxicated." She said that the doorman welcomed all three of the males with a hug. She also said that she determined that the male who returned to the table with the beer was also probably intoxicated.

Inspector 2

Inspector 2 confirmed that she attended the establishment in a covert capacity with inspector 1 on May 27, 2011. She said that the inspectors observed the female outside with the band members, and the female was slurring her speech and was not particularly steady on her feet. The inspector said she did not conclude that the female was intoxicated at that time, but intended to observe her further inside the establishment. The inspector said that inside the establishment she observed the female sitting on a high stool and swaying with her eyes closed. She said she also watched the female playing pool and at one point the female missed the cue ball and almost fell over. The inspector watched the server check the female patron for identification and she remarked that the female was slow and fumbling when she was required to pull out her ID.

Inspector 2 testified that she also observed three males enter the establishment and one of them sat down immediately while another retrieved six bottles of beer. She said she was absolutely certain that the male carrying the beer was intoxicated as he staggered and began to heckle the band when he joined the seated male who was already heckling the band. She said the beer-carrying male was aggressive, blew her kisses, and was loud and showed exaggerated bodily movements. She testified that she did not think either of the other two males were intoxicated.

Patron

A patron testified that he attended the establishment at the time and place indicated on the NOEA with two of his friends from his apartment building. He said he does not know them well and they have since moved away. He said one of their number sat down and he went to the bar and purchased six bottles of beer, two for each of them. He said he does not blow kisses at women, and he does not believe the three of them were intoxicated before or after drinking the three beers. He said they did make some comments to the band but that their behaviour was not out of the ordinary; they were just having a good time.

Server

The server testified that she was working on the night of May 27 and that she remembers the young girl. She said the establishment was very slow and she thought the female looked young so she approached her and asked for identification. She testified that she assessed the female patron for intoxication, as she does all new patrons. The girl looked as though she had previously had something to drink, but she was not loud or obnoxious or stumbling or anything that would indicate she should be cut off or removed from the premises. The server said the woman ordered a glass of water without issue and that although she did have some trouble removing her identification from her coat it was not as a result of being intoxicated but that the woman's wallet "just hung up in a pocket." As to the males, the server said she does not remember them.

Bar Manager

The Bar Manager testified that he observed the female patron enter with the band member. He said that he knew right away that she had no money because she was young and used the band member to get in without paying the cover charge. He said that he did not mind because the bar was not very busy. He noted that his server checked the female's identification and took an order from her for water. The water order confirmed his assessment that she had no money. The Bar Manager testified that he watched the female play pool and that she played poorly. He said that although she missed some cue balls, that was likely the result of inexperience and laughter rather than an indicia of intoxication. He testified that the girl was laughing pretty hard and that could have been interpreted by some as being unsteady. He was watching her pretty closely because of not having much to do on that slow night, and he said that he did not believe that she was intoxicated. The Bar Manager testified that he knows the male patron who purchased the beer for the three males referred to, and he has cut that patron off from liquor service before and knows when he has had enough to drink. On this occasion, the Bar Manager testified, not only was the patron not intoxicated, but when asked to call a taxi to take the three to another bar, the Manager was

disappointed at losing the customers. He would have preferred that they stay longer. He was quite certain that none of the three were intoxicated or he would not have ordered the taxi to take them to the second (named) bar.

SUBMISSIONS

BRANCH

The Branch submits that the elements of the contravention have been proven and the contravention has therefore been made out.

LICENSEE

The Licensee submits that the onus on the branch to establish on a balance of probabilities that the patrons were intoxicated has not been met.

REASONS AND DECISION

The female patron

The evidence of Inspector 1 is that she determined that the female was intoxicated before she entered the establishment. At that time, the indicia on which the inspector so concluded were glazed eyes, unsteady gait, and slurred speech. Inspector 2, however was not as certain, and testified that she reserved her judgement pending further observation inside the establishment. The inspectors did not approach or speak with the female. It is the bailiwick of the adjudicator to determine based on the evidence including the observations of the witnesses, whether the patrons were intoxicated. The conclusions as to intoxication reached by the witnesses are typically not relevant. In this case, Inspector 1 testified that she concluded the female patron was intoxicated before she and the patron entered the establishment.

Both inspectors testified that inside, they observed the female patron closing her eyes and swaying on her seat and losing her balance after missing the cue ball. Inspector 2 also said the patron fumbled for her identification when pressed. I don't find these observations to be sufficient evidence of intoxication in the face of credible evidence to the contrary from the server and Bar Manager.

The server was credible, indicated that she assessed the female for intoxication in the normal course of her job, and observed that the female patron was not showing any signs of intoxication. She was confident that the patron's stumbling for identification was not related to intoxication, and she testified that the female responded to the request for ID and ordered a glass of water without issue or telling signs of intoxication.

The Bar Manager remembered the female patron well, watched his server request identification, and observed the female patron playing pool. He was confident that she was not intoxicated and explained that her unsteadiness could be explained by reasonable alternatives to intoxication. I am therefore left with some uncertainty as to whether the female patron demonstrated signs of intoxication outside of the establishment based on the difference in testimony by the two inspectors relating to that period of time, and as to whether the female patron demonstrated signs of intoxication inside the establishment based on the evidence of the server and Bar Manager who saw no such signs.

In total, the evidence with respect to the female patron does not establish to my satisfaction that the burden of proof has been met. Although there is some likelihood that the female was intoxicated, I have insufficient evidence to determine that she was more likely intoxicated than not.

The male patron

There was some confusion in the testimony of the two inspectors as to which of the three males was the subject of the allegation of intoxication. Inspector 1 said the first male to sit down was intoxicated and she described the symptoms that she observed as including exaggerated physical movements and loud uninhibited speech. She said the second male, the patron carrying the beer was also intoxicated but she did not elaborate on his symptoms because she believed she was testifying about the first (seated) male's condition. Inspector 2 said the beer-carrying male was intoxicated, and she described him as being loud and demonstrating exaggerated movements but she said she was not concerned about the other two patrons and did not think they were intoxicated. Although the inspectors' conclusions as to whether or not the male patron was intoxicated is not relevant to my finding, in this case, the inspector's testimony highlights the fact that they were each observing a different male patron. Although I do not require corroboration of both inspectors to conclude that a single patron was intoxicated based on demonstrated symptoms, Inspector 2 testified specifically that she did not believe the other male patrons present were intoxicated. This includes the patron identified as showing signs of intoxication by Inspector 1. That suggests that the seated patron was not demonstrating a range of observable signs of intoxication.

One of the patrons who may or may not have been identified by an inspector as intoxicated testified that he was the patron who carried the beer, and indicated that although he and his friends were addressing the band, and somewhat loud, they were simply having a good time and were not intoxicated. The Bar Manager testified that he knows one of the male patrons as a regular, the one who ordered and delivered the six bottles of beer, and he knows when to and has historically cut off service to that patron when required. He testified that the three male patrons were not intoxicated at the establishment on May 27, and he was accordingly prepared to send them off to another bar by taxi. The conflicting evidence, in particular, the confusion in the evidence presented by the two inspectors as to the subject of the allegation leads me to conclude

that the Branch has not met the onus of establishing on the balance of probabilities that a male patron was intoxicated at the date and time of the alleged contravention.

The branch has not proven on a balance of probabilities that on May 27, 2011, the licensee contravened s. 43(2)(b) of the Act by permitting an intoxicated person to remain in the licensed establishment.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 16, 2012

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