



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: Mastma Enterprises Limited
dba Sapphire
238 Leon Avenue
Kelowna, BC V1Y 6H9

Case: EH12-231 & 274

For the Licensee: Timothy T. Brown
Porter Ramsay LLP

For the Branch: Cristal Scheer

General Manager's Delegate: Edward Owsianski

Date of Hearing: October 2 & 3, 2013

Date of Decision: November 20, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Mastma Enterprises Limited, operates Sapphire located in Kelowna B.C. Robert Audy and Ettore (Eddie) Racano are principals of the corporate licensee and appeared as the licensee's representatives. The licensee holds Liquor Primary Licence Number 015483 for the operation of a licensed establishment, with liquor sales from 7:00 p.m. to 2:00 a.m. seven days per week. 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

Contravention 1 (EH12-231)

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action ("NOEA") dated December 28, 2012. The branch alleges that on September 28, 2012 the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain.

The proposed enforcement action outlined in the NOEA is a 10 day suspension, which falls within the penalty range set out in item 11, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") for a second contravention of this type.

Item 11 provides a range of penalties for a second contravention of a licence suspension for 10 to 14 days.

Contravention 2 (EH12-274)

The branch's allegations and proposed penalty are set out in the NOEA dated April 10, 2013. The branch alleges that on November 29, 2012 the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain.

The proposed enforcement action outlined in the NOEA is a 20 day suspension, which falls within the penalty range set out in item 11, Schedule 4 of the *Regulation* for a subsequent contravention of this type.

Item 11 provides a range of penalties for a subsequent contravention of a licence suspension for 18 to 20 days.

The licensee disputes the alleged contraventions.

For the purposes of this hearing, and in accordance with section 3 of the *Regulation*, the General Manager has delegated to me, the undersigned adjudicator, the powers, duties and functions provided to the General Manager by section 20 of the *Act* and sections 65-69 of the *Regulation*.

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 contraventions occur?
2. If so, has the licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

EXHIBITS

- Exhibit No. 1:** Branch's book of documents, tabs 1-13
- Exhibit No. 2:** Digitized video recording re Contravention 1 (EH12-231)
- Exhibit No. 3:** Digitized video recording re Contravention 2 (EH12-274)
- Exhibit No. 4:** Written argument of the branch
- Exhibit No. 5:** Written argument of the licensee

EVIDENCE – BRANCH

The branch called five liquor inspectors as witnesses.

Contravention 1 (EH12-231)

Inspectors A and B

Liquor Inspectors A and B testified that on September 28, 2012 they were conducting covert inspections of licensed establishments in the Kelowna area. Both have several years experience as liquor inspectors conducting hundreds of inspections (inspector A) and approximately 2500 by inspector B. Inspector A was a police officer for 29 years prior and had made thousands of walk through patrols of licensed establishments. Both have received training in identifying intoxicated persons.

At approximately 10:42 p.m. (after standing in line, passing through the security check, and paying a cover charge) the inspectors entered Sapphire posing as patrons. Initially they remained in the downstairs area, moving upstairs at approximately 12:35 a.m. and taking a seat on a couch located near the top of the stairs.

Inspector B made notes of their observations on her iPhone (Exhibit 1, tab 2). Some of the notes were made while inside the establishment, some after departing. The notes do not differentiate between the observations of each inspector. Inspector A did not make any notes.

Their attention was drawn to a young couple dancing in the aisle between seating areas. The upstairs does not have a dance floor. The male was overly exuberant, flailing his arms while dancing. He appeared to be intoxicated. Staff were observed walking through the area. None intervened.

Inspector A testified that the male appeared to be intoxicated, unsteady on his feet, and constantly holding onto his girlfriend who appeared to be trying to hold him up. His eyes appeared glassy and bloodshot. His facial features appeared slackened. He was unsteady, shuffling to retain his balance. At one point he fell backwards onto a couch and was helped up by his girlfriend. He bumped into a female patron. He engaged in a boisterous hug with a male patron. The inspector considered this to be an overly emotional display and a further sign of intoxication. During the time of their observations a fight ensued between two male patrons resulting in the inspectors leaving the establishment. Inspector A observed the couple going down the stairs. The female was leading the male downstairs. The male patron was obviously intoxicated.

On cross-examination, Inspector A testified that he was unable to recall whether he attended other establishments that night but did recall his observations of the young male patron. He observed him for approximately 20 to 25 minutes and formed the opinion that he was intoxicated, intoxicated but not drunk. The inspector testified that in his experience virtually every establishment has intoxicated patrons inside. The issue is the level of intoxication and whether they should be removed. Questioned on the magnitude of his statements he responded that perhaps he may have overstated. He refined his evidence saying that it was not unusual to find persons in some form of intoxication in licensed establishments with intoxication levels varying from minor to gross. His assessments were based on observations in many establishments over the years. He agreed that he has not been in all establishments within the province.

Inspector B testified that she was making notes for herself and inspector A on her iPhone but was making her own observations as well. She was not certain whether it was her or inspector A who first noticed the young couple. The young male was being supported by the young female. His gross motor skills were delayed, he shuffled his feet to steady himself. She observed him twice stumble backwards onto a bench. As she watched the young male patron she observed that his pants were continually falling

down and being pulled up by him until they eventually fell below his bum exposing his boxer shorts. The couple were dancing very provocatively with his groin area on her backside, his hands all over her body. Following the fight occurring on the second floor she and inspector A left the establishment. As they were going down the stairs she observed the young couple. The girlfriend was guiding him, his eyes were red, glassy and unfocused. At this point the inspector was more concerned with leaving than with the young couple.

On cross-examination, Inspector B testified that although her notes do not mention the couple dancing she does recall it. As the incident occurred a year previous, her mind is not exactly clear on the exact movements. She testified that her testimony was based on both her notes and her recollections. She made some of the notes inside the establishment prior to the fight occurring. The remainder were made later. She testified that that night she had conducted two inspections prior to Sapphire.

Contravention 2 (EH12-274)

Inspectors C and D

Liquor Inspectors C and D testified that on November 29, 2012 they were conducting covert inspections of licensed establishments in the Kelowna area. They entered Sapphire, posing as patrons at approximately 10:00 p.m., leaving at about 12:30 a.m.

Inspector C testified that he began employment as a liquor inspector in October 2012. He is a qualified nurse with extensive experience in dealing with persons having addiction and mental health challenges. Shortly after entering Sapphire he observed a male patron, approximately 5 foot tall, wearing a Blue Jays hat who appeared to have a level of intoxication. He focused on this patron for the remainder of night and considered him to be intoxicated on either alcohol or drugs. He had difficulty walking, bumping into patrons and staff. His reactions appeared slow in that he would bump into a person then slowly turn to look at the person and smile. His eyes were squinty. The inspector tried to engage the patron in conversation. The patron smiled and mumbled incoherently. The inspector testified that he believed that the patron should have been cut off from liquor service and escorted from the establishment. Had he not

been working in a covert capacity he would have brought the patron to the attention of the security staff. He made notes of his observations.

On cross-examination, Inspector C testified that he saw the subject patron bump into persons on four or five occasions. Two of which were with staff members, a server carrying drinks who gave the patron an annoyed look, and a security staff member trying to get to the washroom. The establishment was busy but not overcrowded. He did observe other patrons bumping into people but they did not appear intoxicated. The patron did not appear to be suffering from any physical handicap. He appeared to be under the influence of drugs. He had a beer in his hand the whole night and was drinking from it from time to time.

Inspector D testified that she has been employed as a liquor inspector for approximately six years. She has received training in observing signs of intoxication. Entering the establishment she observed a musician playing on stage with persons dancing. She observed a male patron wearing a Blue Jays hat standing at the edge of the dance floor who appeared to be intoxicated. He was short, approximately 5'2". He was holding a glass containing a coloured liquid. As he moved through the area he was observed bumping into other persons without acknowledging that he was doing so. She observed the patron for approximately 45 minutes following which he was escorted from the establishment by two male and one female staff shortly before 11:00 p.m.

The inspector testified that while she was in line waiting outside, prior to entering the establishment, she observed three young blonde women in their early twenties arrive in a white limousine and enter the establishment without having to wait in line. She later observed them inside sitting in a booth consuming drinks previously purchased from the bar. She observed them leave the booth and proceed to the washroom. They were holding hands, one following the other. She followed them into the washroom. They appeared to be intoxicated. One of the females was swaying on her feet, taking a long time to put on lipstick. She screamed, "I'm f...ing drunk". Another was trying to apply blush makeup. The third was leaning on the sink. She had a dead stare, her eyes half shut. The inspector left the washroom at this point. She made notes of her observations after leaving the establishment.

On cross-examination, Inspector D testified that when she observed the subject male his eyes were half closed. He appeared to be stumbling as he bumped into other patrons. She did not observe him bumping into any staff members. She testified that her attention was drawn to the three young females as she considered it unusual that they would be walking hand in hand to the washroom. They appeared to be happy, their faces glowing. They were not stumbling as they walked. Later, she observed them leaving the establishment. They were not holding hands nor stumbling.

Inspector E

Inspector E testified that he is the inspector responsible for the Kelowna area. He was notified and briefed on the observations of inspectors A to D. He issued the contravention notices at Exhibit 1, tab 5 and prepared the Notices of Enforcement Action at Exhibit 1, tab 1.

The recommended penalty for contravention 1 is a 10 day suspension. The licensee had a previous contravention for the same contravention occurring within the past year. A 10 day suspension is the minimum for a second contravention of the same type occurring within a one year period. The recommended penalty for contravention 2 is a 20 day suspension. It is the third contravention of the same type within the past year.

Inspector E believed that suspensions are necessary to impress the licensee on the seriousness of permitting intoxicated patrons to remain in the licensed establishment. He testified that the branch considers permitting intoxicated patrons to remain in a licensed establishment to be a serious public safety concern. Intoxication can change a person's behaviour and lead to assaults. Intoxicated persons cannot make rational decisions, their inhibitions are lowered. A licensee must prevent their further consumption of alcohol.

Inspector E referred to further documents contained within Exhibit 1:

- Tab 6, the liquor licence in effect at the time of the contraventions
- Tab 7, the floor plan for the establishment
- Tab 8, the Guide for Liquor Licensees, which contains the terms and conditions of the licence, and deals with topics such as the Role of a Licensee, Controlling Establishments, Overservice and Intoxication, Physical and Mental Signs of Intoxication
- Tab 9, inspection and interview document for the establishment signed by the licensee representative
- Tab 10, documents related to previous compliance meetings held with the licensee representative
- Tab 11, documents related to previous license suspensions
- Tab 12, previous enforcement hearing decision

EVIDENCE – LICENSEE

The licensee called two of the principals of the corporate licensee as witnesses.

Licensee Representative 1

Licensee Representative 1 Ettorino (Eddie) Racano testified that he is a principal of the corporate licensee and has been one of the managers at Sapphire's since 2006. It is open three nights a week: Thursday, Friday and Saturday. He is responsible for its nightly operation and is present almost every night. His duties include hiring and supervising staff. He monitors the bartenders to ensure that there is no over-service and that they are not drinking on the job.

The establishment does not have a handbook for staff. Bartenders must have Serving It Right (SIR) certificates and are told to look for signs of intoxication in patrons such as fumbling with their money. Any patrons appearing to be intoxicated are cut off from liquor service and given water to drink. The bartender notifies one of the security staff to escort them out, leaving them with a friend if possible. There are 20 to 25 total staff, including 12 to 15 security staff working on a nightly basis covering the entrance, the

exits, one at each bar and one or two in the upstairs area. They are constantly moving through the establishment checking patrons in each of the areas.

The establishment has a video security system with multiple camera locations. Video recordings from the system are retained for a 30 day period during which the images may be downloaded for retention. The system begins recording over the images after 30 days and they are no longer available. The witness produced into evidence excerpts of video recordings retrieved from the video security system for the nights of September 28, 2012 (Exhibit 2) and November 29, 2012 (Exhibit 3).

The video recordings for the night of September 28 are extensive as they were downloaded at the request of inspector E as a result of the altercation witnessed by inspectors A and B. There is little video coverage for the night of November 29 as there had not been a request for a download and it didn't occur to them (the principals) to download the video recordings for that night. In hindsight it would have been a good idea, however without knowing what area or time to concentrate on it would have meant downloading video recorded from all 32 cameras.

Cross-examination

Licensee Representative 1 testified on cross-examination that it is common to reject/eject several persons a night for intoxication. An incident log book is maintained by Robert Audy on the advice of inspector E following the September 28 altercation.

Newly hired bartenders are told to look for signs of over-service and intoxication. They start out working with experienced bartenders. All have SIR certificates. Following the previous contraventions and the incidents of September 28 and November 29, staff were reminded to watch for intoxicated patrons and watch the amount being served to patrons. Staff meetings are held every three months. No written agenda or minutes are kept. Staff are told that if a suspension occurs everyone misses work.

Asked why intoxicated patrons were not removed earlier, Licensee Representative 1 responded that it is difficult to keep one person under observation for a long period of time similar to what the liquor inspectors were doing. Asked whether it might be because of not enough training for staff he responded maybe.

He is not aware of why the subject patron of September 28th was ejected as recorded on the video. It may have been because the security staff believed that he was intoxicated or because of the blood on his shirt.

He is familiar with the male patron described by inspectors C and D on November 29. He is a regular when they have hip-hop shows. He was in an accident and walks with a shuffle as if one leg is shorter than the other. He has a lazy face. He has a medical certificate allowing him to possess marijuana.

Licensee Representative 2

Licensee Representative 2 Robert Audy testified that he is a principal of the corporate licensee and has been a manager there for the past 14 years. He is present almost every night. His duties include being in charge of the security staff. He walks the floor and views the video monitors during the course of the night to monitor what is occurring within the establishment. If he observes a problem he notifies the security staff to deal with it. Staff are reminded nightly to be observant for intoxicated patrons and escort them out. They will typically eject an average of 10 persons a night.

Those security staff that deal with patrons are required to have provincial Basic Security Training (BST). The training is a week in length and includes dealing with intoxicated persons and distinguishing between symptoms of intoxication and physical handicaps. There is always at least one security staff member upstairs as well as the manager, Racano. It is not uncommon for patrons to dance in a very animated fashion—that is the norm today—it is not an indication of intoxication. It can be difficult to determine if a person is intoxicated while they are dancing. It is easier to do so once the person is standing.

Cross-examination

Licensee Representative 2 testified on cross-examination that he did not know why the male patron was escorted out on September 28. It could have been because of intoxication or because he had blood on his shirt. The security person dealing with the patron is not longer working at the establishment and is not available as a witness. Security staff tend to be transient in their employment.

There are several copies of the Guide kept in the office and are provided to employees who need to read through them. They now keep a log of violent incidents occurring in the establishment which is available for police or legal proceedings. They also record incidents of intoxicated patrons. He did not bring the log to the hearing.

Video Recordings

The video recordings were viewed during the course of the hearing with comments by the licensee's witnesses:

September 28, 2012 (Exhibit 2)

The time of the recording is illustrated in the top right corner. It is based on a 24 hour clock, i.e. 23:01 is 11:01 p.m.; 00:01 is 12:01 a.m. Messrs. Racano and Audy described the images depicted at several different time intervals:

- 23:43 – the subject couple as described by inspectors A and B arrive
- 23:46 – couple entering
- 23:47 – security check area where identification is scanned for authenticity and photographed
- 23:48 – security pat-down
- 00:36 – liquor inspectors A and B take a seat on the second floor near the stairwell
- 00:36.53 – subject couple walk past liquor inspectors and begin dancing
- 00:37.59 – subject couple and others dancing. Staff member walking through. Witness Racano wearing striped shirt in the background
- 00:40.42 – liquor inspectors watching subject couple off screen, other patrons dancing

- 00:42.37 – subject couple re-enter scene, dancing, male’s pants slipping down, inspector typing into iPhone
- 00:45.29 – male subject attempts to kiss female, she pushes him away, he stumbles backward and breaks his fall on the couch. Continued dancing. Pants falling down and being pulled up. Witness Racano walks by
- 00:52.06 – male subject hugging other male patron. Male subject pulls up pants. Subjects dancing
- 00:55.06 – altercation between two male patrons. Male subject steers victim away
- 01:07.04 – bottom of stairs
- 01:07.11 – subject couple moving from bottom of stairs towards washroom. Male enters washroom, female waiting outside
- 01:09.32 – security staff member proceeds to washroom
- 01:10.59 – security staff member escorts male subject out
- 01:11.02 – subject couple departing
- 01:11.24 – subject couple leaving with staff member

November 29, 2012 (Exhibit 3)

The time of the recording is illustrated in the top right corner. It is based on a 24 hour clock, i.e. 23:01 is 11:01 p.m.; 00:01 is 12:01 a.m. The time illustrated is one hour ahead of the actual time as a result of the time setting not being adjusted for a return from Daylight Saving to Standard time, i.e. record time 23:01 is actual time 22:01. [For the sake of clarity I have adjusted the times from that illustrated to that of the actual time.] Messrs. Racano and Audy described the images depicted at several different time intervals:

- 22:07.02 – the downstairs bar
- 22:07.16 – liquor inspector D at bar area, speaks to a patron picking up liquor
- 22:08.33 – male patron (perhaps the subject of inspectors’ C and D’s observations) walks up to the bar to the right of inspector D and then walks towards the washroom area
- 22:10.30 – same male patron returns to bar area to right of inspector D and purchases a beer
- 22:09.03 – portable bar area with booth seating area to the right

- 22:10.04 – 22:13.4 - tall blond female patron (perhaps that described by inspector D as the blond female patron attempting to put on lipstick in the washroom) viewed entering, leaving and re-entering booth seating area to the right of the portable bar area
- 22:15.04 – inspector D to washroom, not preceded by any female patrons
- 22:19.50 – staff member escorts patron from the premises
- 23:47.29 – staff member escorts male patron from the premises (perhaps the subject of inspectors C and D's observations)
- 00:18.18 - inspector D to washroom, not preceded by any female patrons
- 00:18.40 - staff member escorts two patrons from the premises

In order to clear up some discrepancies in the testimony of inspector D and the scenes depicted in the video for November 29, inspector D was recalled as a witness and asked the following:

1. Whether the male patron observed standing near the dance floor was the same person as recorded in the scene at 22:08.33, she said "yes", hesitated, and then said, "No, the person observed near the dance floor was wearing a darker jacket."
2. Whether the subject male patron observed standing near the dance floor was the same person as recorded being escorted out at 23:47.29, she responded, "Yes."
3. Whether the tall blond female patron observed attempting to put on lipstick in the washroom was the same person viewed entering, leaving and re-entering booth seating area to the right of the portable bar area in the scenes at 22:10.04 – 22:13.4, she responded, "No."
4. The number of times she went to the washroom, she responded, "Three".

SUBMISSIONS – BRANCH

The branch advocate's written submission (Exhibit 4) is summarized as follows:

The branch advocate reviewed the testimony of the liquor inspectors:

Contravention 1 - September 28, 2012 (EH12-231)

Inspector A observed a young couple dancing exuberantly. The young male appeared to be intoxicated. He appeared to be held up by his female companion. His eyes were glassy and bloodshot, his facial features flaccid and slackened. He moved in a grossly uncoordinated way. His gait was awkward, he shuffled to maintain his balance. He fell onto a couch six feet in front of the inspectors and had to be helped up by his companion. He bumped into another female patron. He hugged another male in an overly affectionate manner then struggled to maintain his balance.

Inspector B observed the male patron hanging onto his female companion for support. He was holding her in a provocative manner while dancing. His pants were continually falling down. When he was standing he would step out to steady himself. He twice fell onto a couch. She closely observed the male patron while leaving, his eyes were red unfocused and glassy.

Both inspectors testified that staff from the establishment walked through the area where the couple were observed but failed to take any action.

Contravention 2 - November 29, 2012 (EH12-274)

Inspector C testified that he noticed an intoxicated male immediately upon entering the establishment. His eyes were squinty, his speech incoherent. He had trouble walking, swaying and bumping into others. His reaction times were delayed. He appeared to be on drugs not suffering from any medical condition. While the intoxicated male was eventually removed by staff, it should have been done earlier. [I pause to note that this varies from my notes and recollection.]

Inspector D testified that the intoxicated male was stumbling in and out of patrons. He bumped into people but failed to apologize. He was escorted out by staff. He was not the male viewed in the video standing to her right at the bar.

Inspector D also observed three female patrons holding hands and together making their way to the washroom. She followed them and observed one of the females having trouble putting on lipstick and screaming "I'm so f...ng drunk". She was not the female viewed in the video.

The branch advocate submitted that the elements of the contravention, permitting an intoxicated person to remain, have been proven on a balance of probabilities for both alleged contraventions:

- the branch witnesses provided evidence that the subject patrons were intoxicated
- the patrons were within the red-lined area of the establishment
- the licensee knew of ought to have known that the subject patrons were intoxicated

The branch advocate submitted that the licensee's defence of due diligence must fail because of key deficiencies in its operating system:

- the licensee lacked written policies and procedures to guide staff
- the licensee failed to provide training on intoxication for its staff
- the licensee failed to promptly remove the intoxicated patrons
- the licensee failed to effectively supervise its staff by not having written tests for staff and having inadequate training
- the licensee failed to provide as evidence a copy of its incident log

The branch advocate submitted that the proposed penalties of a 10 day and a 20 day suspension of the liquor licence are warranted to reinforce to the licensee the need for compliance.

SUBMISSIONS – LICENSEE

Counsel's written submission (Exhibit 5) is summarized as follows:

Counsel submitted that the alleged contravention is stated at section 43(2)(b) of the Act:

- (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.

This section was considered by the BC Supreme Court in *Zodiac Pub v. General Manager LCLB*, 2004 BCSC 96 (CanLII). The court adopted the Oxford Dictionary definition for “permit” as “To admit or allow the occurrence of...”. In that case the adjudicator found that the subject patrons were “clearly and obviously intoxicated”. The court noted that absent the evidence and the adjudicator’s finding that the patrons’ levels of intoxication were “clear and obvious”, the element of “permit to remain” might have been harder to establish, even on a balance of probabilities.

Intoxication is not defined in either the Act or Regulation. In these proceedings it is determined by reference to the common indicia of intoxication such as those found in the Liquor Primary Terms and Conditions. During an inspection a liquor inspector makes a determination whether or not a person is intoxicated having regard to his or her subjective observation and interpretation of the actions of the subject patron.

Contravention 1 - September 28, 2012 (EH12-231)

Counsel submitted that viewing the video footage contained within Exhibit 2 the subject male and his female companion are observed entering Sapphire 11:43 p.m. They proceed through the security screening process of presenting their identification and being subject to a pat-down by security personnel. The subject male appears normal with no indications of being intoxicated. They are seen dancing in the upstairs area. Contrary to the testimony of inspector A there are several patrons dancing in the upstairs area.

While the subject male is observed holding onto his female companion it does not appear that he is doing so to support himself but rather it is their style of dancing. When the subject male is seen falling onto the couch it is as a result of being playfully pushed by his companion. The evidence of inspector B was focused on the manner in which the couple were dancing and that the subject male’s pants were falling down. Neither are signs of intoxication. She said that she saw the subject male fall onto the couch twice. She had opportunity to closely observe the male patron and stated that his eyes were red, glassy and unfocussed. She said that his gross motor skills were retarded and he shuffled his feet when standing.

Counsel submitted that viewed objectively the video footage does not show the male patron displaying any obvious signs of intoxication. His appearance and demeanour is similar to other persons dancing in the area. He is shown assisting the victim of the assault and does not appear to be intoxicated. The male patron is shown being lead from the premises shortly after this. He is not displaying any signs of intoxication. It is likely that he is being made to leave because of the blood on his shirt, not because of intoxication.

Licensee's counsel submits that the branch has failed to prove that the subject male was intoxicated, certainly not clearly and obviously intoxicated as to raise the attention of security staff. Counsel further submits that as the *Act* has been interpreted by the courts to be public safety legislation, the determination of intoxication must consider whether the alleged intoxicant is a substantial risk to himself or others. There is no evidence that the subject patron here was a risk to himself or anyone else.

Contravention 2 - November 29, 2012 (EH12-274)

Counsel reviewed the evidence of the liquor inspectors. Inspector C testified that he observed the intoxicated male patron upon arriving at the establishment at 10:00 p.m. His eyes were squinty, his speech mumbled, he was bumping into persons and was having difficulty standing. He believed the male to be under the influence of drugs. Inspector D testified that he was stumbling in and out of patrons, bumping into persons without apologizing. His eyes were half closed and he was not talking to anyone.

Counsel submits that these observations are insufficient for a finding of intoxication. The establishment was busy and patrons were bumping into others, including inspector C. The video footage in Exhibit 3 at approximately 23:08 shows a male patron approaching the bar and standing beside inspector D. The patron walks with a limp and a side to side gait. He negotiates his way through the crowd without bumping into anyone. The licensee contends that this is the patron referred to in the testimony of inspectors C and D. Inspector D recalled to testify on the point at first says yes, then says no because this male appears to be wearing a light coloured jacket whereas the subject male was wearing a dark one. Counsel submits that the difference in the appearance of the jacket is due to lighting conditions. Some dark clothing, such as the

subject's jacket and the dark clothing worn by security staff will appear light, other dark clothing, such as inspector D's jacket will remain dark. Counsel submits that the male patron is the subject male observed by the inspectors. The video footage of him approaching and leaving the bar without stumbling and bumping into others conflicts with the testimony of inspectors C and D. Counsel submits that the whole of the evidence does not support a finding that the subject patron was clearly and obviously intoxicated nor does it support a finding that he was a danger to himself or others.

Counsel submits that the evidence of inspector D regarding the actions of the alleged intoxicated female was insufficient to prove that she was clearly and obviously intoxicated.

Counsel submits that should it be found that if any of the subject patrons are found to be intoxicated the licensee must be afforded the defence of due diligence. The licensee has a policy that any patron showing signs of intoxication are to be removed from the premises of which staff are regularly reminded. Security staff hold valid security licenses and have received training in identifying intoxicated persons. The licensee principals are present most nights and monitor the behaviour of patrons.

Counsel submitted that the licensee is at a disadvantage in preparing a defence where the details of the alleged contravention are not made available by the branch until months after the event. Timely notice is in keeping with natural justice in allowing a licensee to respond in a meaningful way. The branch has not offered any explanation why the details were not disclosed in a timely manner and the defence provided by the licensee should be considered in that light.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and counsel for the licensee.

The alleged contraventions are that, on two separate occasions, the licensee did permit an intoxicated person to remain in that part of the licensed area where liquor is sold or served.

The term "intoxication" is not defined in the Act or Regulations. For the purposes of this hearing I find that the physical and mental signs of intoxication as described in the Guide provide a description of the symptoms, which without evidence to the contrary, provide evidence from which a state of intoxication in an individual may be concluded. These signs of intoxication have been provided to licensees by the branch.

The test to be met is not whether the inspectors considered the subject patrons to be intoxicated. Whether the subject patrons were intoxicated is a determination to be made on a balance of probabilities by the adjudicator after having considered and weighed all of the relevant evidence.

The evidence in this case is somewhat unique in that we have, in addition to the observations of the liquor inspectors, the video recordings made within the establishment during the same period of time. The recordings do not cover the whole period of time during which the inspectors made their observations and vary in their clarity. They are nonetheless a useful part of the evidence to which consideration must be given.

Contravention 1 – September 28, 2012 (EH12-231)

The evidence of the inspectors is that the subject male patron came to their notice after they had taken their seats in the upstairs area of the establishment in close proximity to the top of the stairs. He was dancing overly exuberantly flailing his arms, was holding onto his female companion for support and appeared to be intoxicated. The inspectors observed him for approximately 20 to 25 minutes. His eyes were glassy and bloodshot, his facial features slackened. He fell backwards onto a couch and was assisted up by his female companion. When not dancing he appeared unsteady, shuffling his feet to retain balance. He bumped into a female patron on one occasion and engaged in a boisterous bear hug with a male patron who appeared to be holding him up. As the inspectors were leaving they observed the subject patron on the stairs, he appeared obviously intoxicated and was being guided by his female companion.

Video recordings

The video recordings of the subject patron and his female companion at Exhibit 2 are extensive. They do not however cover all of the time that the subject patron was being observed by the inspectors but do cover all of the incidents involving the subject patron. I have reviewed the recording and the following represents my observations and findings:

Camera 3 (23:43.20-23:46.40) – subject male and female companion waiting in line and eventually entering the establishment. No visible signs of intoxication.

Camera 8

- 00:36.52-00:39.10 – the subject male and his female companion enter the camera view and commence dancing in the area immediately in front of where the inspectors are seated. The dancing may be seen to be exuberant but there is little that would indicate that the subject male was intoxicated.
- 00:42.42 – the couple, dancing, re-enter the camera view. There is little evidence that would indicate that the subject male was intoxicated.
- 00:45.35 – the subject male appears to become a little overly amorous and is pushed away by his female companion. He loses his balance and falls backward. Although fleeting it appears that his balance has been compromised by more than just the push by his companion. While not being conclusive as a sign of intoxication it gives rise to the possibility.
- 00:48:08 – the subject male is again pushed away by his companion and struggles to maintain his balance. Once again, although fleeting, it appears that his balance has been compromised by more than just the push by his companion. While not being a conclusive sign of intoxication it gives rise to the possibility.
- 0050:20 – the subject couple re-enter the camera view, the subject male appears to stumble backwards into a female patron. It appears that his balance is compromised and he is beginning to display signs of intoxication.
- 0052:00-0053:00 – the subject male engages with a large male patron in a mutual bear hug. It appears that during this time the subject male is largely dependent upon the other male for support. He appears to be intoxicated.

- 0055:18 – an altercation has just occurred. The subject male steps in to intercede.
- 0056:14 – subject male is being attended to by his companion.
- 0056:54 – subject male is lead to sit on a couch by an unknown female. His balance appears compromised. While not being a conclusive sign of intoxication it gives rise to the possibility.
- 0059:00 – subject male is lead down the stairwell by his companion. His balance appears compromised. While not being a conclusive sign of intoxication it gives rise to the possibility.
- 01:01.50 – subject male and companion enter the camera view from the stairs, passing directly in front of the liquor inspectors. He is being pulled forward by his companion. He appears to be intoxicated.

Camera 14 (1:11.08) – male subject escorted by staff member from washroom.

Conclusion

I have considered all of the evidence. I find on a balance of probabilities that the male patron entered the establishment in a sober condition. However, as the night proceeded he began to display signs of possible intoxication, subtle and fleeting at first, but becoming apparent during the course of the night. By 00:50.20 he is displaying signs of intoxication and it would have been prudent for the licensee or staff to check his condition.

I have given careful consideration to the circumstances in which the evidence was obtained. Here two liquor inspectors making a covert inspection observed a male patron who they believed was intoxicated. They concentrated their observations on the male patron, perhaps not exclusively but certainly substantially. I, in observing the video recordings, did likewise. Further, I was able to re-play and re-view the recordings. The licensee and staff do not have such opportunities. That said however, it is the responsibility of the licensee and staff to be vigilant for patrons displaying signs of intoxication and to take appropriate action to ensure that an intoxicated patron is not permitted to remain the licensed establishment.

I find on a balance of probabilities that, given the evidence presented here, the actions of the subject male patron were such that by 00:53.00 the subject male was intoxicated and the licensee or staff should have interceded to escort the patron from the premises. That they did not gives rise to the contravention.

I find that on September 28, 2012 the licensee permitted an intoxicated person to remain in that part of the licensed area where liquor is sold or served.

Contravention 2, November 29, 2012 (EH12-274)

The evidence of the inspectors is that shortly after entering the establishment they observed a male patron standing near the dance floor. He appeared to have difficulty walking and was observed bumping into other persons on several occasions. His reactions were slow. He had squinty eyes. Inspector C attempted to engage the subject male patron in conversation but was unable to understand him as he mumbled incoherently. The inspectors' evidence differed on whether the subject patron was holding a beer or a glass containing a coloured liquid. Inspector C did not provide evidence that the subject patron was escorted from the premises. His evidence was that the subject patron was in the establishment for 2 ½ hours, he should have been cut-off and removed from the establishment. That he was not was a concern. Whereas inspector D testified that she observed the patron being escorted from the establishment by staff.

Inspector D testified that she also observed three female patrons holding hands making their way to the washroom. She followed the three into the washroom and observed one struggling to put on lipstick and exclaiming, "I'm so f....ng drunk". The branch advocate submitted that this was the only one of the three who might be considered to be intoxicated.

Video recordings

There is no video recording of the subject female patron.

The video recordings of the subject patron at Exhibit 3 are not extensive. I have reviewed the recordings and the following represents my observations and findings:

Camera 15

- 22:07.50 – inspector D is observed at the liquor service bar.
- 22:08.30 – male patron, short stature, wearing ball cap and jacket walks to the liquor service bar and stands to the right of the inspector.
- 22:08.58 – male patron walks away from the bar towards the washrooms.

Inspector D testified that this was not the subject patron of her observations as the subject patron was wearing a dark jacket and this patron is not. The licensee submits that the patron fits the same physical description of the subject patron and that the jacket appears light in colour due to the lighting conditions. Following careful review I can agree only that it is possibly the same person. The video recording is in black and white and of poor quality.

Camera 3 (23:47.28) – male patron being escorted from the premises. Inspector D identifies this patron as the subject of her observations and testimony. The video is in colour and is of good quality.

The female patron

The only evidence of intoxication is that she was struggling to put on lipstick and exclaimed, "I'm so f...ng drunk". I find that the incident is not in itself sufficient to provide evidence of intoxication.

The male patron

I have considered all of the evidence. I am unable to conclude on a balance of probabilities that prior to being escorted from the premises by staff the subject was intoxicated.

It is my experience that it is not unusual for patrons, within the crowded conditions of a busy licensed establishment operating as a nightclub, to bump into each other, particularly on and near the dance floor. The inspectors were in the establishment for approximately 1 ¾ hours, from 10 p.m. until 11:47 at which time the subject patron was escorted from the premises. During this time they observed the patron bump into other persons on four to five occasions, two of which were with staff members. The inspectors were not specific in the timing of their observations.

Something caused the staff to escort the patron from the premises, it may very well have been as a result of him bumping into the two staff members. The patron was observed to be stumbling as he walked. The evidence is that he walked with a limp which may have been misinterpreted by the inspectors who were unfamiliar with him. That he mumbled incoherently is not sufficient in itself to be conclusive of intoxication. It can't reasonably be expected that the staff will approach and speak with a patron unless there is some reason to do so. The patron was observed holding either a beer or glass of coloured liquid. This can be considered as some evidence that he was able to make himself understood to bar staff.

Conclusion

I find that the Branch has not met the onus of establishing on the balance of probabilities that either the male or female patron was intoxicated at the date and time of the alleged contravention and were permitted to remain in the licensed establishment.

The branch has not proven on a balance of probabilities that on November 29, 2012 the licensee contravened section 43(2)(b) of the Act.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The Law

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In these circumstances it must be considered whether the licensee had:

- a. implemented adequate training and other systems to prevent the contravention and
- b. taken reasonable steps to ensure the effective application of that training and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The evidence is that the licensee does not have a training system for its employees. It is fair to say that it relies on the required certification for its staff, Serving It Right: Responsible Beverage Service for those in non-security functions and Basic Security Training for security employees. The licensee does not have a system to test the required knowledge of each employee and the ability to carry out the requirements. It is fair to say that the licensee assumes that because an employee is properly certified each has the necessary knowledge and ability to carry out the requirements of the job. That in my view does not represent due diligence. A licensee ought to create a training program specific to the requirements and circumstances of the establishment. The licensee should develop a testing regime in order to ensure itself that each employee understands the job requirements and has the ability to carry them out. The licensee does not have written policies and procedures to provide a reference and review for employees from time to time.

On a positive note, it is evident on the evidence contained within the video recordings, that the licensee employs adequate staff to maintain control of the premises and it is apparent that at least one of the principals of the corporate licensee is on site. Staff members, including the licensee are seen to be actively patrolling and monitoring the establishment and taking action where they deem it necessary. In my view the problem leading to the contravention goes to the lack of adequate training and supervision of staff regarding identifying symptoms of intoxication in its patrons and taking appropriate action. It appears that the licensee has set its threshold for intoxication too high. While staff may be alert for symptoms of gross intoxication, that is not sufficient to meet the requirements of the Act.

For the aforementioned reasons I find on a balance of probabilities that the licensee's training and other systems to prevent the contravention of permitting an intoxicated person to remain in the licensed establishment were not adequate to meet the test of the reasonable licensee. Thus the defence of due diligence must fail.

In conclusion, I find on a balance of probabilities that on September 28, 2012, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that area of the establishment where liquor is sold or served.

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 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 compliance. Among the factors that I considered in determining the appropriate penalty in this case are: 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 a previous proven contravention of the same type for this licensee for this license within the year preceding this incident. I therefore find this to be a second contravention for the purposes of Schedule 4 and calculating a penalty.

The branch considers that permitting an intoxication to remain in a licensed establishment to be a serious public safety issue. Intoxicated patrons can become a danger to themselves or others and may be the cause of disturbances, nuisance and criminal behaviour. Allowing an intoxicated person to remain in a licensed establishment increases the opportunity for further liquor consumption and increases the risk of problem behaviour. Reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions and the seriousness of the contravention, I find that a penalty is necessary to ensure future compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulation provides a range of penalties for a second contravention of this type. I find that the minimum penalty of a ten day suspension of liquor licensing privileges is necessary, appropriate and reasonable.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence Number 015483 for a period of ten (10) days to commence at the close of business on Thursday, January 9, 2014 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor Licence be held by the branch or the RCMP Kelowna Detachment from the close of business on Thursday, January 9, 2014 until the Licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the licence 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

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: November 20, 2013

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Cristal Scheer, Branch Advocate