



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: Weigh West Marine Resort Incorporated
dba Dockside Marine Pub
643 Campbell Street
Tofino, BC V0R 2Z0

Case: EH12-232

For the Licensee: Ted Hanman

For the Branch: Cristal Scheer

General Manager's Delegate: Daniel M. Graham

Date of Hearing: October 10, 2013

Date of Decision: November 26, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Weigh West Marine Resort Incorporated (the "Licensee") operates Dockside Marine Pub (the "Establishment") under Liquor Primary Licence 107542 (the "Licence"). The Establishment is located at 643 Campbell Street in Tofino, B.C.

The Licence specifies hours of liquor service daily, 7 days a week, from 11:00 a.m. to 1:00 a.m. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the "Guide").

The Licensee's legal counsel represented the Licensee for the purposes of this hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated December 20, 2012 (the "NOEA"). The Branch alleges that on Friday, October 5, 2012 the Licensee contravened section 42(3) of the *Liquor Control and Licensing Regulation* (the "Regulation") when an employee of the Licensee consumed liquor while working at the Establishment.

The proposed enforcement action outlined in the NOEA is a two day suspension of the Licence. The range of penalties for a first contravention of this type is a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty (item 27, schedule 4 of the Regulation).

The Licensee, through its counsel, admitted that the *actus reus* for the alleged contravention occurred, but submitted that it was *de minimis* and also sought to establish the defence of due diligence. The Licensee also disputed the proposed suspension penalty, arguing that if a defence is not established, a monetary penalty would be more appropriate in the circumstances of this case.

For the purposes of this hearing, and in accordance with section 3 of the Regulation, the General Manager has delegated to me the powers, duties and functions provided to the general manager by section 20 of the *Liquor Control and Licensing Act* (the "Act") and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Consumption of liquor in licensed establishments

42 ...

(3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment or while working at the site of a residential event catered by the licensee.

Schedule 4 Enforcement Actions Liquor Service

| Item | Contravention | Period of Suspension (Days) | | | Monetary Penalty |
|------|---|-----------------------------|-------------------------|------------------------------|---------------------|
| | | First Contravention | Second Contravention | Subsequent Contraventions | |
| 31 | A breach of section 42(3) of this regulation as a result of an employee or the licensee consuming liquor while working on the licensed premises | 1-3 | 3-6 | 6-9 | \$1,000- \$3,000 |

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1:** The Branch's Book of Documents, tabs 1 to 10 inclusive.
- Exhibit 2:** A large photocopy of the floor plan for the Establishment, submitted by the Branch.
- Exhibit 3:** Five colour photos taken inside the Establishment, submitted by the Licensee.
- Exhibit 4:** The Licensee's binder of documents, tabs 1 to 6 inclusive.
- Exhibit 5:** A photocopy of the Serving It Right certificate of the Licensee's employee who allegedly was consuming alcohol while working at the Establishment, submitted by the Licensee.

EVIDENCE – BRANCH

The Branch called one witness: a liquor inspector (the "Inspector").

The Inspector

The Inspector testified that he entered the Establishment through its main entrance at about 23:45 on the dark, rainy Friday evening of October 5, 2012. He had selected the Establishment for inspection as it appeared to be the busiest establishment in town on that particular evening.

The Inspector said that he took a seat where he had a clear view of the interior of the Establishment, and was watching for contraventions such as overcrowding, serving minors, drug use, or other illegal activities. He noticed two patrons to his left at the end of the bar. One patron, in a lime green golf shirt, was drinking a glass of a liquid that the Inspector concluded was beer, based on its colour and effervescence, and based on the patron's manner of drinking it. Subsequent evidence showed that this patron was the food and beverage manager for the Establishment; accordingly, this patron is referred to hereinafter as the "Manager".

The Inspector stated that he observed the bartender tossing the Manager a set of keys. The Manager took the keys, passed through the adjacent dining room (which appeared to be closed), and returned a few moments later with an unopened box of beer. He then went behind the bar, set down the unopened box of beer, and returned the keys to the bartender. The Manager then came out from behind the bar and continued consuming beer.

The Inspector said that, over the next ten minutes or so, he saw the Manager going behind the bar for purposes of unloading and loading the dishwasher, taking money and working the till, and pouring beer and placing it on servers' trays. During these functions the Manager left his beer at the end of the bar, and would periodically return to the beer and have a sip, then go back to his duties. The Inspector stated that at one point a server asked about the beer at the end of the bar, and the Manager pointed to it to indicate it was his. The server nodded in agreement and placed dirty glassware on the bar, which the Manager then placed in the dishwasher. He then picked up his beer and went to stand beside the other patron at the end of the bar.

The Inspector testified that he then approached the Manager, identified himself as a liquor inspector, and asked to speak in private. The Manager stated that he was the manager of the Establishment. The Inspector said that while he was talking to the Manager, he could smell liquor on the Manager's breath. The Inspector exited the Establishment at 23:59, drove two blocks, and parked to make notes.

In response to questions from the Branch during direct examination, the Inspector said that the Manager had admitted he'd been consuming beer, and had said that he was off duty and was just "helping out". The Inspector stated that he'd issued a Contravention Notice (tab 3 Exhibit 1) on October 6, 2012, and identified a copy of the notes he'd made after leaving the Establishment on the night of the alleged contravention (tab 2 Exhibit 1).

Finally, while still under direct examination, the Inspector acknowledged that he was the author of the NOEA (tab 1 Exhibit 1). In response to a question as to why he had pursued the enforcement action and the proposed penalty set out in the NOEA, the Inspector said that it was out of concern for the safety of the other patrons, staff, and the community. He said that the consumption of alcohol can negatively affect a person's ability to exercise judgment appropriately. He said that as a manager at the Establishment, the Manager was in a leadership role and was expected to set a good example for the other employees. Accordingly, the Inspector proposed a two day suspension which he described as being a "medium penalty".

Cross-examination

Counsel for the Licensee pointed out that there was no reference to the Manager drawing or pouring beer in the Inspector's notes, or the Contravention Notice, or the NOEA. He asked the Inspector whether he would have pursued enforcement action if the Manager had only retrieved the box of beer, unloaded the dishwasher, and worked the till. The Inspector replied that he would still have pursued enforcement. When asked if drawing beer would have been the "worst" or most serious of the Manager's alleged work-related activities, the Inspector replied "I don't break it down that way."

The Licensee, through its counsel, introduced as Exhibit 3 a series of five photographs taken inside the Establishment by the Licensee subsequent to the alleged contravention. In response to questioning by counsel, the Inspector indicated that the Manager had been standing at the front of the bar, and closer to the till, than reconstructed in the Exhibit 3 photos.

EVIDENCE – LICENSEE

The Licensee called two witnesses: its Director of Operations (the "Director"); and a frequent patron of the Establishment who had been in the Establishment on the night of the alleged contravention ("Patron X").

The Director

The Director said that the Licensee operates four businesses in Tofino and area, with the Establishment being one of two licensed premises. The Director oversees operations at the four locations, and specifically oversees the general manager of the Establishment, who in turn oversees the Manager, who had been hired as the food and beverage manager of the Establishment in May 2012.

The Director stated that employees are trained through use of the Licensee's policy manual, or Employee Handbook. He said that monthly staff management meetings are also held, and anyone who handles alcohol is required to have Serving It Right certification. He said that once-per-month staff meetings were the main means of communication with staff, along with periodic memos. The Director testified that subsequent to the alleged contravention, management spoke to all staff reiterating the rules about not drinking on duty.

The Licensee introduced a binder, including tabs 1 to 6, as Exhibit 4 (tab 5 of Exhibit 4 had been intended to contain the five photos which had instead been entered earlier as Exhibit 3). The Director referred to the Licensee's Employee Handbook (tab 2 Exhibit 4) which was current at the time of the alleged contravention, pointing out that it states: "At no time before or during your shift is it permissible to consume alcoholic beverages or be under the influence of drugs. This will result in immediate dismissal." The Director acknowledged that staff members are allowed to drink after their shift is complete, as long as they are not in uniform.

The Director confirmed that the Manager had signed a document (tab 3 Exhibit 4) acknowledging that:

The use of drugs and/or alcohol during working hours is strictly prohibited. To be under the influence of either substance during working hours will be considered grounds for immediate dismissal. This shall serve as final notice of the policy and no warning will be issued prior to termination.

The Licensee introduced the Manager's Serving It Right Certificate as Exhibit 5. The Director confirmed that the Manager had not been dismissed as a result of the alleged contravention, but had been disciplined with a verbal warning. The Director was not aware as to whether there had been previous instances where the Manager had to be disciplined for any type of misconduct. He said that the Manager had in fact been given a raise earlier in October, 2012 for good performance (tab 4 Exhibit 4).

The Director testified that the Manager's shift had been finished at 9:00 p.m. on the night of the alleged contravention. He said that staff members are not expected to help out or to work after their shift is over –it would be against policy, and “once you're off, you're off.”

Cross-examination

In response to a question, the Director acknowledged that while one could load and unload the dishwasher without going entirely behind the bar, it would not be the normal way to use the dishwasher. He also acknowledged that only staff would pass through the closed dining area and access the cooler in the kitchen area from which the Manager retrieved the unopened box of beer.

The Director confirmed that he was not on site at the Establishment the night of October 5, 2012. In response to questioning, he agreed that it is the responsibility of the Licensee's management to ensure that staff members don't consume alcohol while on duty. The Director confirmed that the Manager had not been dismissed for the alleged contravention, and that the copy of the Employee Handbook (tab 2 Exhibit 4) had not been signed by the Manager in the spot provided for an employee signature.

In response to a question the Director replied that employees are tested on their knowledge of the liquor laws by management going over “certain items” with them. He acknowledged that the Licensee does not subject employees to a written quiz with required passing mark, stating that they expect that training is conveyed by the Serving It Right certification process. He said that:

- a copy of the Guide is available to staff, but that staff are not required to sign that they've read the Guide
- no minutes are kept of staff meetings

The Director acknowledged that the Licensee had confirmed in a letter dated October 18, 2012 that “[The Manager] did not procure a drink through his own efforts. [He], at one stage whilst on the public side of the bar and after 9:00 pm, acquired a drink from the bartender.” The Licensee went on in the October 18, 2012 letter to write that “These are the circumstances and it is our submission that no contravention occurred.” In response to questioning, the Director confirmed that it is not the Licensee’s policy to have patrons help out behind the bar, to pass through the kitchen, or to access the cooler.

Patron X

Patron X testified that he has frequented the Establishment for many years. He knows many people in town and has in the past had business dealings with various staff there. He recalled that he was in the Establishment on the night of the alleged contravention because a band that he likes was playing that night. It was the first time he was able to listen to the band without there being a throng of summer tourists.

Patron X said that he normally arrives at the Establishment before 9:00 p.m., drinks tea or non-alcoholic beer, and then leaves about 10:30 when the Establishment starts to get too busy. He said it was very busy on the night of October 5, 2012, being almost as loud as in the summer.

Patron X testified that on the night in question he observed the Manager standing in the public area in front of the bar. He did not see the Manager go behind the bar, or pouring drinks, or working the till, but acknowledged that it was possible those things did occur. He said that in his experience staff at the Establishment have always acted professionally.

Cross-examination

Patron X acknowledged that on the night of the alleged contravention, there were “whole periods of time” when he was not watching the Manager. He described the Establishment that night as being “frenetic” and a “self-serve nightmare”. He stated that he could not recall what the Manager was wearing that night, but that in his experience the Manager did not ever wear any kind of uniform.

SUBMISSIONS – BRANCH

The Branch submitted that there is sufficient evidence on the elements to prove the contravention. The advocate said that the Manager was drinking beer while “helping out”, and said that the actions of the Manager in:

- being thrown the keys
- retrieving beer from the cooler
- loading and unloading the dishwasher
- working the till, and
- pouring drinks

should be construed as work.

The Branch submitted that there is insufficient evidence to demonstrate that the Licensee exercised due diligence to avoid the contravention. The Branch emphasized the risk to public safety inherent in having Establishment employees’ judgment impaired by alcohol, and stated that the proposed two day suspension is in the middle range of penalties provided for a first contravention under Item 27 of Schedule 4 of the Regulation.

SUBMISSIONS – LICENSEE

The Licensee, through its counsel, submitted that it is relevant that the Manager was not on shift at the time of the alleged contravention. The Licensee conceded that, despite the Licensee’s assertion in its letter of October 18, 2012 that “no contravention occurred”, the Manager’s actions after his shift ended on October 5, 2012 did constitute “working” as contemplated by section 42(3) of the Regulation and that the Manager (an employee

of the Licensee) was drinking beer in the Establishment while working. The Licensee submitted, however, that the contravention was *de minimis*.

While being clear that he was not alleging that the Inspector's evidence on the point was fabricated or inappropriate, the Licensee argued that the Inspector's oral evidence about the Manager drawing or pouring beer should be disregarded since it was not corroborated in the Inspector's notes written on the evening in question, or in the NOEA. The Licensee submitted that this evidence should not be given any weight, having been raised at this late date.

The Licensee suggested that there is a range of "work" activities from minor to more egregious, and that the activities noted in the Inspector's notes and the NOEA (handling the keys, fetching the unopened box of beer, loading/unloading the dishwasher, and working the till) constituted a "marginal" or "minimal" contravention. The Licensee submitted that drawing, or pouring beer would be a "ramp up" to a more serious range of activity.

The Licensee submitted that it had taken the alleged contravention seriously and responded appropriately. Counsel described Patron X as being a thoughtful, careful, and credible witness and said that there is no evidence that the Establishment is anything but responsibly run. He said that if the Manager had been behind the bar for more than just a very small proportion of the time, Patron X would have noticed it.

With respect to penalty, the Licensee submitted that if it was not successful in establishing a defence of due diligence, the facts fall at the weakest end of the possible range of events, since the Manager was only periodically "helping out", while spending most of his time standing on the public side of the bar taking occasional sips of beer. Counsel submitted that there was no evidence that the Manager was intoxicated, and said that a suspension would be entirely out of line with previous decisions of the General Manager.

REASONS AND DECISION

Contravention

The Licensee has admitted that the Manager (an employee of the Licensee) was consuming beer while engaged in “working” in the Establishment as contemplated by the Regulation. Counsel described the alleged contravention as being *de minimis*.

Section 43(2) of the Regulation does not require that the Licensee’s employee becomes intoxicated, or that someone is injured as a result of the employee’s consumption of alcohol. The “evil” that the provision seeks to prevent is the creation of an unacceptable level of risk that a licensee or employee will impair his or her judgment on the job, which in turn would raise a public safety risk.

In the current case, the Manager was not only raising those risks by drinking while conducting a number of different work activities on a night when the atmosphere in the Establishment was described as “frenetic”, but these risks were magnified by the fact that he was in a leadership role in the Establishment. His actions set a poor example for other employees in the Establishment. In the circumstances, the actions of the Manager cannot be said to be *de minimis*.

The evidence, viewed as a whole, demonstrates that the Manager (an employee of the Licensee) was consuming alcohol while working in the Establishment outside of his regular shift schedule. The elements of the contravention have been proven on the balance of probabilities. Accordingly, I find that on October 5, 2012, the Licensee contravened section 42(3) of the Regulation.

Due Diligence

The Licensee is entitled to a defence 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 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 respondeat 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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In the circumstances of the current case, the defence of due diligence is to be considered in two stages:

1. Whether the employee who committed the prohibited act was a directing mind of the Licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who committed the prohibited act was not a directing mind of the Licensee (and there is no requirement that a “directing mind” must be on the premises at all times), then the questions to be considered and answered are 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 education 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 all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Analysis

There is no evidence before me to suggest that the Manager had the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute him being a directing mind, as described in *Beverly Corners*. Accordingly, I find that the Manager was not a directing mind of the Licensee.

I must now consider the second stage of the due diligence analysis. That is, had the Licensee:

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

The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and risks underlying the prohibition against employees drinking while working. Licensees and their staff are responsible for controlling the behaviour of patrons in their establishments to ensure public safety. Employees risk impairment of their ability to control the establishment if they are consuming alcohol while working.

In the current case, there is limited evidence of training or systems being in place to prevent contraventions of this nature from occurring. The Licensee has an Employee Handbook which advises employees that consumption of alcohol before or during their shift will result in “immediate dismissal.” They are advised that they may drink “after work” in guest areas only, and only if they are not in uniform. The Manager was required to sign a document acknowledging that use of alcohol during working hours was prohibited.

The Licensee indicated that additional training is provided at staff meetings and through periodic memos. No minutes or agendas for staff meetings were introduced into evidence, and no memos relating to consumption of alcohol by employees or guidance regarding working after an employee's regular shift were produced. The Licensee indicated that it considered the Serving It Right training substantially covered off the need for employee training.

The Licence expressly incorporates the terms and conditions of the Guide by reference. On page 10, the Guide specifies that a licensee is responsible for making sure its employees follow B.C.'s liquor laws and the terms and conditions of its license, even when the licensee is not on site.

On page 27 the Guide specifies that licensees and their employees may not consume liquor in the licensee's establishment during working hours, including breaks, meal periods and between shifts on the same day. Employees may consume liquor provided, among other things, they are not treated differently than a regular patron. There is no evidence before me to indicate that the Licensee's employees were trained on the terms and conditions of the Guide, other than the evidence that the Guide is available in the Establishment for employees who wish to read it.

There is virtually no evidence before me with respect to steps being taken to ensure the effective application of the Licensee's training and systems. The evidence shows that both the bartender and at least one server were aware that the Manager was drinking while he was performing work-related activities, but there is no evidence that either individual thought anything of it. Whatever systems the Licensee may have had in place were simply not adequate to prevent a contravention of section 42(3). The one demonstrable control that the Licensee did have in place, "immediate dismissal" for consuming alcohol during working hours, was not applied to the Manager, sending an inconsistent message to the Licensee's staff.

I find that the evidence does not establish that the Licensee had reasonable training or systems in place with respect to potential contraventions of section 42(3) of the Regulation, and that no reasonable steps were taken to ensure staff's compliance with that provision.

Accordingly, I find the evidence is insufficient to prove on the balance of probabilities that the Licensee exercised due diligence to ensure that contraventions of this nature do not occur.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the Licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the Licensee
- Suspend all or any part of the Licence
- Cancel all or any part of the Licence
- Order the Licensee to transfer the Licence

I am not bound to order the penalty proposed in the NOEA. However, if I find that either a licence suspension or a 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.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee at this Establishment within the preceding twelve months of this incident. Therefore, I find

this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 27 in Schedule 4 provides a range of penalties for a first contravention of this type: a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty.

Mitigating circumstances in the current case include the following:

- There is no evidence before me that the Licensee has a compliance history, or that previous warnings were issued to the Licensee
- The Manager does not appear to have been intoxicated or unruly
- The Manager was consuming his beer in the public area in front of the bar rather than behind the bar

Aggravating circumstances in the current case include the following:

- Consumption of alcohol by Licensees and employees during working hours does create an unacceptable risk to public safety
- The Licensee provided minimal training to its employees with respect to liquor legislation or the terms and conditions of the Licence
- The Manager was in a leadership position in the Establishment and set a poor example for other employees

Considering the evidence as a whole, I find that a monetary penalty is more applicable in the circumstances than a period of suspension. On balance, the monetary penalty should be in the mid-to high range of the scale. I conclude that a monetary penalty of \$2,500 is appropriate and necessary in order to bring the Licensee into compliance.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$2,500 to the general manager of the Branch on or before January 3, 2014.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the Establishment by a Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: November 26, 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