

Northern Territory Licensing Commission

Reasons for Decision

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| Premises: | Gove Yacht Club |
| Licensee: | Gove Yacht Club |
| Licence Number: | 81401564 |
| Proceeding: | Complaint Pursuant to Section 48(2) Breaches of Section 102-Liquor not to be sold to an Intoxicated Person Section 121-Failure to Remove or Exclude Intoxicated Person from the Licensed Premises; Section 110-Failure of Licensee to Comply with a Condition of Liquor Licence |
| Heard Before: | Mr Richard O'Sullivan (Chairman) Ms Brenda Monaghan (Legal Member) Mr Walter Grimshaw |
| Date of Hearing: | 19 March 2009 |
| Appearances: | Mr Glynn Andrew Baynham, Nominee Inspector Allan Borg for the Director of Licensing |

Background

- 1) A hearing was held at Nhulunbuy Courthouse on 19 March 2009 concerning a complaint laid by the Director of Licensing against Gove Yacht Club Inc (the Club). The complaint related to incidents that occurred at the Club on 4 November 2008 and allege breaches of Section 102 (serving an intoxicated person), Section 121 (allowing an intoxicated person to remain on premises) and Section 110 (breach of licence condition 11 which limits those who can be supplied liquor to signed-in members and their visitors). The first two complaints are denied and the third is admitted.
- 2) At the hearing, Inspector Allan Borg appeared on behalf of the Director and Mr Glynn Baynham, Nominee, appeared on behalf of the Club. The complaint alleges that on 4 November 2008, a patron named Rodney McFadden (McFadden) spent a few hours at the Yacht Club and was served liquor despite the fact that he was neither a member nor a signed in visitor. Even though he became visibly intoxicated, he was served more liquor and at no time was he removed from the premises. When he finally left the premises voluntarily, he was so intoxicated that he was staggering and slurring his words. He soon fell asleep in the bushes in the Club car park and when he was awakened about half an hour later by police, he blew .226.
- 3) The Club denies that they served liquor to McFadden when he was intoxicated. Their evidence is that they noticed his skewed gait and only allowed him to be served more alcohol after checking out his level of sobriety by engaging him in conversation. They argue that McFadden's condition must have deteriorated sharply when he left the premises and entered the car park. The Club admits their failure to ensure that McFadden was properly signed in as a guest before they allowed him to drink.

- 4) The evidence before the Commission at hearing consisted of the following:
- i) Oral evidence and statutory declarations from Inspector Jeffrey Paull, Brevet Sergeant Patrick Carson who were both present at the Club for the latter part of the night in question;
 - ii) Oral evidence from ACPO Manuel Niki who was present at the Club on two occasions on the night in question;
 - iii) CCTV footage from the Club of the night in question;
 - iv) Statutory Declaration from Inspector Steven Holehouse and copy documents regarding the Section 110 breach of failing to properly sign in McFadden as a guest before supplying him liquor;
 - v) Oral evidence and statutory declarations from Glynn Baynham (Nominee) and Julius Janco (barman) who were both working at the Club on the night in question; and
 - vi) A written response to the complaints from the Club (undated).
- 5) Before considering the evidence in more detail, comment needs to be made on the CCTV footage. The camera surveillance system at the Club is not a requirement of the Club's liquor licence but is an initiative of their own. It is a simple system with only four cameras and it operates at only one frame per second. It is accepted that the timer displayed on the footage is twenty one minutes fast and, for the purposes of this decision, the times have been adjusted to real time.
- 6) The Club willingly provided the Director with CCTV footage from the night in question and it has been a useful tool in establishing times and some occasions of service of liquor. It is of no assistance, however in clarifying the sobriety and demeanour of McFadden as one frame per second is simply too slow to see such detail. The footage provided commences just before 4pm. It is not complete, however and a period from 5.30pm to 7.21pm (real time) is missing. It then continues until after McFadden leaves the premises.
- 7) Following careful consideration of all the evidence and in particular that evidence provided by witnesses in person, the Commission reaches the following conclusions on the facts;
- a) **2.50pm:** McFadden is seen in Nhulunbuy Township by Inspector Paull at approximately 2.50pm on 4 November. McFadden is with an Aboriginal woman and he is seen staggering and unsteady on his feet. Inspector Paull reaches the conclusion that he is intoxicated. This evidence accords with McFadden's comment to police that he was "sinking piss" before going to the Yacht Club. (Oral evidence of Inspector Paull and Statutory Declaration of PO Carson)
 - b) **3.57pm:** The arrival time for McFadden at the Club is unknown but CCTV footage shows him at the bar at around 3.57pm. He is seen talking to another patron called Valerie and is given a can of beer by her. Nominee Baynham notes he has "*a little bit of a stumble about him.*" McFadden seats himself at an outside table and begins talking to another patron. (CCTV and evidence of Baynham)
 - c) **4.15pm:** McFadden is supplied with a can of beer from the patron he is sitting with (CCTV).
 - d) **4.55pm:** McFadden goes to the bar and asks barman Janco for a drink. Baynham notes that "*he stumbled a bit on his way to the bar.*" Janco also notices his gait and is unsure whether or not he is intoxicated. Janco seeks advice from Baynham who talks to McFadden. McFadden provides a medical reason why his gait is unusual. He does not appear to Baynham to be intoxicated and is allowed to purchase a further 3 VBs from Janco. McFadden returns to his chair at the outside table and shares with Valerie and other man. (CCTV, evidence of Janco and Baynham)

- e) **5.19pm:** The other male patron purchases two (2) more drinks, returns to table and gives one to McFadden. (CCTV)
 - f) **5.30pm:** CCTV missing for period 5.30pm to 7.21pm.
 - g) **Approx.5.30pm:** Valerie is ejected because she is intoxicated. (Evidence of Baynham and Paull).
 - h) **Soon after 5.30pm:** Valerie re-enters and speaks to McFadden who becomes angry and alleges that she has stolen some money and his phone. McFadden uses Baynham's phone to call police. (Evidence of Baynham) Valerie is once again removed from the premises.
 - i) **Between 5.30 & 6pm:** ACPO Nikki arrives at the Club and talks to McFadden who has a VB in front of him- *"he was under the influence but he could still speak...he had a good understanding."* (Evidence of ACPO Nikki)
 - j) **Approx 6.45pm:** McFadden purchased another drink from Janco. Janco noticed that his speech was slightly affected as he was prolonging his ssss's. (evidence of Janco.)
 - k) **7.27pm:** McFadden is at the bar. He gets a beer but does not consume it. He is concerned that money has been stolen from him. He makes a long phone call. (Evidence of Janco and CCTV)
 - l) **7.43pm:** McFadden leaves the Bar (CCTV)
 - m) **7.45pm:** Licensing Inspector Paull arrives at Club carpark and notes McFadden swaying back and forth in carpark. Speaks to him and realises he is very intoxicated. McFadden wanders off, stumbles into garden and goes to sleep.
 - n) **8.25pm:** Police arrive at Club, wake McFadden and breath test him. His BAC reading is .226. Police escort McFadden to watch house where he remains in protective custody overnight.
- 8) Two (2) decisions must be made by the Commission - whether there is sufficient evidence to find on the balance of probabilities that there were breaches of Section 102 (serving an intoxicated person) and/or of Section 121 (allowing an intoxicated person to remain on premises) of the *Liquor Act*.
- 9) Section 102 of the *Liquor Act* states:
- a) *A licensee or a person employed by a licensee shall not sell or*
 - b) *supply liquor to a person unless the person to whom it is sold or*
 - c) *supplied is not intoxicated at the time (the onus of proof of which*
 - d) *lies with the defendant).*
- i) The Commission stated in a previous decision (Scotty's Place, Feb 2000): *"Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (the patron) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred."*
- 10) In the matter before the Commission, it is not contested that the Club sold alcohol to McFadden on the night in question. There are also reasonable grounds to suspect that McFadden was intoxicated later in the evening. The fact that he stumbled out of the Club heavily intoxicated at 7.45pm and fell asleep in the car park garden supports such a finding. So too the BAC reading of .226 taken at 8.25pm. Thus the onus shifts to the licensee to

prove on the balance of probabilities that McFadden was not intoxicated at the time of service.

- 11) Mr Baynham and Mr Janco both gave evidence that at no time did they serve McFadden when he was visibly intoxicated. Instead, Baynham submits that McFadden's behaviour must have dramatically deteriorated when he went outside. Whilst the Commission accepts that McFadden may have still been capable of holding a conversation between 5.30pm and 6pm when ACPO Nikki was speaking to him, by 6.45pm when he was buying another drink, he was slurring his words (prolonging his ssss's).
- 12) The combination of affected gait and affected speech should have alerted the barman to the fact that McFadden was now visibly intoxicated. Instead, he was served another drink. He then spent another hour at the Club before stumbling into the car park and falling asleep in the garden. The onus is on the Licensee to prove on the balance of probabilities that McFadden was not intoxicated when he was served. The Licensee has failed to discharge this onus when he was served alcohol at around 6.45pm. He had already queried this patron's sobriety much earlier in the evening and had served both McFadden and his drinking companions after that. When McFadden's speech was affected, any responsible barstaff would have refused service. This did not happen. It is regrettable that the CCTV footage is missing for the two hours between 5.30 and 7.21pm for us to see the number of times McFadden was served after 6.45pm. Noting however his visible level of intoxication at 7.45pm when he left the Club, the Commission finds on the balance of probabilities that service on McFadden continued during that time. In summary, the licensee has failed to discharge the onus and the complaint of a breach of s102 is upheld.
- 13) The second matter for the Commission's consideration is whether the Licensee breached Section 121 in failing to remove Webb from the premises. The section states:

121 Power to exclude or remove persons

- (1) *A licensee or employee of the licensee shall, or an inspector may, exclude or remove a person, not being a bona fide resident of the licensee's licensed premises, from the licensed premises if the person is intoxicated, violent, quarrelsome, disorderly or incapable of controlling his behaviour.*
- (1A) *A licensee, an employee of the licensee or an inspector may exclude or remove from the licensee's licensed premises:*
 - (a) *a bona fide resident of the premises, if that resident is intoxicated, violent, quarrelsome, disorderly or incapable of controlling his behaviour;*
 - (b) *subject to any other law in force in the Territory, any person (including a bona fide resident), if the presence or continued presence of the person on or at the premises would or might:*
 - (i) *render the licensee liable to a penalty under this Act or any other law in force in the Territory; or*
 - (ii) *in his opinion, disrupt the business of the licensee or unreasonably interfere with the wellbeing of other persons lawfully on the premises; or*
 - (c) *for or during a period not exceeding 12 months from the time a person was found guilty of an offence relating to the possession or supply of a drug on licensed premises, that person.*
- (2) *A person to whom subsection (1) or (1A) is applicable shall immediately leave licensed premises on being requested to do so by the licensee, an employee of the licensee, an inspector or a member of the Police Force.*
- (3) *A member of the Police Force shall, on the demand of the licensee, an employee of the licensee or an inspector remove or assist in removing from licensed premises a person*

who has been requested by the licensee, an employee of the licensee or an inspector in accordance with subsection (2), to leave the premises.

(4) A licensee, employee of a licensee, inspector or a member of the Police Force exercising a power under this section may use such force as is reasonably necessary for the purpose.

- 14) The Commission has found that McFadden was visibly intoxicated at 6.45pm when he was served more liquor (see above breach of Section 102). It has also found on the balance of probabilities that McFadden consumed more alcohol in the subsequent final hour he was on premises before he left the premises at 7.45pm and stumbled into the car-park. The Nominee's submission that McFadden must have suddenly shown visible signs of intoxication when he hit the night air are not accepted by the Commission. Instead, the only reasonable conclusion to reach on the evidence is that for the last hour that McFadden was on premises, he was showing visible signs of intoxication and that he was not removed. The *Liquor Act* is clear. If a person is visibly intoxicated, then the licensee or his staff must remove that person from the premises. This did not happen at the Gove Yacht Club on 4 November 2008. For the above reasons, the Commission finds that there has been a breach by the Licensee and Nominee of their Section 121 duties.
- 15) Submissions on penalty regarding all three (3) breaches (Sections 121, 102 and 110 regarding the signing-in failure) will be accepted either in writing or through Counsel within fourteen (14) days of publication of this decision

Richard O'Sullivan
Chairman

9 April 2009