



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: Quail Place Estates Ltd.
dba Liquid Zoo Show Lounge
c/o David Habib
4493 Stewart Road East
Kelowna, B.C. V1W 4C1

Case: EH16-095

For the Licensee: David Habib

For the Branch: Hugh Trenchard

General Manager's Delegate: Daniel M. Graham

Date of Hearing: January 26, 2017

Date of Decision: February 7, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Quail Place Estates Ltd. (the "Licensee") operates a night club doing business as Liquid Zoo Show Lounge (the "Establishment") under Liquor Primary Licence #200533 (the "Licence"). The Establishment is located at 274 Lawrence Avenue, Kelowna, B.C.

The Licence specifies hours of liquor sales from 11:30 a.m. to 2:00 a.m. seven days a week. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication *A Guide for Liquor Licensees in British Columbia* (the "Guide").

Mr. David Habib, a principal of the corporate Licensee, represented the Licensee for the purposes of this hearing. Ms. Becky Komant, shareholder of the corporate Licensee, also attended part of the hearing. Throughout these reasons for decision, Mr. Habib and the corporate Licensee - individually or collectively - may be referred to as "the Licensee" as the context requires.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

On September 1, 2016, the Branch issued a Notice of Enforcement Action alleging that the Licensee contravened: 1) section 12 of the *Liquor Control and Licensing Act* [RSBC 1996] c. 267 (the "Act") by contravening a term and condition of the Licence, and 2) section 73(2)(a) of the Act by failing to promptly produce and submit a record, thing or sample. ("NOEA 1")

The Branch subsequently decided not to pursue the first alleged contravention, and issued a replacement Notice of Enforcement Action dated January 17, 2017 ("NOEA 2"). The Branch alleges that on Monday, July 25, 2016 the Licensee contravened section 73(2)(a) of the Act by failing to promptly produce and submit a record, thing or sample.

The proposed penalty is a \$10,000 monetary penalty, which falls within the penalty range set out in item 31, schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "Regulation"). The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

The Licensee disputes the finding of a contravention. He did not expressly advance an argument that the evidence establishes a defence of due diligence.

For the purposes of this hearing, and in accordance with section 5 of the *Liquor Control and Licensing Act* [SBC 2015] c. 19 (“ the Current Act”), the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Current Act and Part 6 of the current *Liquor Control and Licensing Regulation*.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, [RSBC 1996] c.267

73(1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager may

(a) require a licensee to produce records the licensee is required to keep under this Act...

(2) Without limiting any other provision of this section, a licensee must

(a) promptly produce and submit for inspection any record, thing or sample requested by the general manager...

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

Record-keeping requirements

34 (1) In addition to any other terms and conditions imposed under the Act, it is a term and condition of a licence, other than a licence issued under section 7 [*special occasion licences*] of the Act, that the following records, as applicable, must be kept for a period of at least 6 years:

...

(i) employee records including names, addresses, salaries, primary job responsibilities, shift schedules and dates of employment;

(j) records of incidents or events, if any, that occurred in or adjacent to the licensed establishment, and,

(i) in the case of a licensee who holds a catering licence, that occurred in or adjacent to the caterer's business location, or

(ii) in the case of a licensee who holds an authorization, that occurred in or adjacent to an event site that is the subject of the authorization;

...

Schedule 4

Enforcement Actions

Production of Records

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
31	A breach of section 73(2)(a) of the Act [<i>failure to produce a document or record or thing</i>]	10-15	20-30	30-60	\$7,500-\$10,000

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 19 inclusive.
- Exhibit 2: Printed copy of an e-mail from the Licensee to an RCMP officer (the "Constable") dated July 14, 2016.
- Exhibit 3: Printed copy of an e-mail response from the Constable to the Licensee dated July 15, 2016.
- Exhibit 4: Printed copy of a text exchange between the Licensee and an RCMP video technician (the "Technician") dated Friday, July 15.
- Exhibit 5: An undated copy of a text exchange between the Licensee and the Technician.
- Exhibit 6: An Employee List provided by the Licensee to the Branch (the "Employee List").

WITNESSES

A liquor inspector (the "Inspector") provided evidence on behalf of the Branch.

Mr. Habib provided evidence on behalf of the Licensee. The Licensee also called the Constable as a witness.

EVIDENCE - BRANCH

The Inspector

The Inspector stated that he has been a liquor inspector in the Kelowna area since 2008. He estimated that during his time as a liquor inspector and during his 30 year career as a police officer before joining the Branch he has conducted thousands of inspections of all types of liquor licenses and licensed premises.

The Licence was issued to the Licensee under a number of special terms and conditions detailed in Appendix A attached to a letter from the general manager to the Licensee dated December 9, 2011. (the "Appendix A T&C") (Exhibit 1, tab 5). Terms and conditions relevant to the current case include the following:

1. Video Surveillance

- a. Licensee must have video surveillance at all ID checking areas.
- b. Must have video surveillance of all areas inside the establishment including behind the bar, the office/s, storage areas, patios, entries and exits and coat check.
- c. Licensee must have video surveillance at all entrances and exits to the establishment, and must cover the exterior and interior areas of the exits and entrances.
- d. The video surveillance system must be capable of producing video records on demand by the police or the liquor inspector.
- e. Licensee must not permit any patrons to enter the establishment in the event that the video surveillance system is not working.
- f. The video surveillance system must have a security system to limit access to authorized personnel.
- g. The licensee will maintain a log of all personnel who access the video surveillance system.
- h. The video surveillance system must be capable of retaining one week's worth of data...

8. Police and Liquor Inspector Authority

- a. Upon demand, the police or liquor inspectors, have the right to examine the ID scanner, video recorder, and electronic weapons detection system at any time to confirm they are operational and working as intended.
- b. On demand, the licensee will provide copies of all video surveillance maintained by the system.

The Inspector testified that on July 14, 2016 he issued the Licensee a Notice to Provide Records ("Notice 1") (Exhibit 1, tab 7) requiring the Licensee to provide two types of record by 4:30 p.m. on July 25, 2016:

"1. All employee records including name, addresses, salaries, primary job responsibilities, shift schedules and dates of employment. Scope: Business day of Sunday, July 10, 2016.

2. All records of any incidents or events that occurred in or adjacent to the licensed establishment. **Please note the definition of a record in the footnote below.** This includes all CCTV records, digital or tape. Scope: Monday, July 11, 2016 from 0001 hours until 0200 hours. Business day of Sunday, July 10, 2016.” (emphasis included in original)

The Inspector stated that he advised the Licensee about Notice 1 and its contents by telephone on July 14, 2016 and by e-mail at 2:02 pm the same day (Exhibit 1, tab 10). The Inspector and the Licensee communicated at various times over the next few days. The Licensee e-mailed the Inspector on July 18, 2016 including the statement “Just so you are aware, I have so far done everything I could do to get you the video from the outside cameras. I hope to have it today.” (Exhibit 1, tab 10).

On July 27, 2016 – having not yet received the requested records - the Inspector sent the Licensee a second Notice to Provide Records (“Notice 2”) (Exhibit 1, tab 8). Notice 2 stated that the Licensee had not provided the records requested in Notice 1 and advised the Licensee that a Contravention Notice (Exhibit 1, tab 2) had been issued. Included in Notice 2 was the statement that “Issuing this CN does not release you from your obligation to provide all the required records by the previously set date.” The Inspector sent the Contravention Notice and Notice 2 to the Licensee at the address of the Establishment by registered mail on July 27, 2016, but because the Establishment was not open at the time of day Canada Post attempted delivery, the documents were returned to the Inspector by Canada Post on August 30, 2016. The Contravention Notice and Notice 2 were resent to the Licensee at an alternate address the same day.

On July 28, 2016 the Licensee phoned the Inspector to tell him that he was having difficulty getting the video, and was advised by the Inspector that the CN and Notice 2 had been issued. The Licensee followed up with an e-mail to the Inspector later that day reading “I will have all requested information early next week, Sorry for the delay.” (Exhibit 1, tab 11)

On August 9, 2016 the Licensee delivered to the Inspector’s office the Employee List (Exhibit 6) and two flash drives purportedly containing the video coverage requested in

Notice 1. When the Inspector attempted to open the video files on his office computer on August 11, 2016 the files would not open as there was no attached player software. The Inspector immediately advised the Licensee that he could not open the files and the Licensee picked up the flash drives later the same day. The Licensee stated that he would attach a player to the flash drives so the video could be viewed.

The Inspector testified that the Employee List is only part of the employee information requested in Notice 1 – the primary job responsibilities, shift schedules and dates of employment were not included and to date have not been provided by the Licensee. He also testified that to date the requested video has not been provided. The Inspector stated that at the time the Licensee picked up the flash drives, he advised the Licensee that the employee information provided was incomplete.

The Inspector referred to the Licensee's compliance history as detailed in Exhibit 1, tab13 and NOEA 2. He noted previous occasions when the Licensee had been late in delivering requested information. He stated that he opted to pursue enforcement action because investigations and enforcement are impeded without timely access to documents. The Inspector considered the Licensee's compliance history when recommending the \$10,000 monetary penalty because of the Licensee's previous "inconsistency" in supplying requested records.

The Inspector at times referred to his file notes (Exhibit 1, tab 12) in responding to questions about the timing of the foregoing events.

Cross Examination of the Inspector

In response to questions from the Licensee, the Inspector stated that:

- The purpose for requesting the records in Notice 1 was to further an investigation into an alleged contravention. The Inspector declined to state the specific nature of the alleged contravention on the basis that the investigation was still ongoing. He acknowledged that the nature of the alleged contravention was "concerning," and that the investigation is dependent on receiving the requested records.

- The Inspector received information on July 11 that led him to request the subject records. He did not advise the Licensee or request the records until July 14 because he had been on duty the previous weekend, and under the terms of the collective agreement he was required to take time off during the week.
- He could not say with 100% certainty that he specifically discussed shortcomings in the employee records with the Licensee on August 11, 2016. He did not advise the Licensee in writing specifically that the employee records that had been provided were insufficient to satisfy the request in Notice 1.
- The general relationship between the Licensee and the Branch is very amiable – the Licensee is generally very cooperative.
- The Inspector is aware that the Licensee has an arrangement with the RCMP with respect to accessing video from the Licensee's camera system, but he is not aware of the details of that arrangement.
- There was frequent dialogue between the Licensee and the Inspector during the period before July 25, 2016.
- The Inspector did not try to download a player from the internet for the video files on the flash drives. He has tried in previous cases with limited success. Users of BC government computers are very limited as to the types of files they can download. The Inspector did not feel it was his obligation to ask the RCMP to download a player for the files.
- The Inspector acknowledged that the Licensee was not the operator of the Establishment during 2005 and 2008 when a number of the matters in the compliance history record arose.

Re-direct Examination of the Inspector

In response to questions from the Branch advocate, the Inspector stated that:

- He may have had ongoing dialogue with the Licensee between July 28 and August 9, but he hadn't indicated anything in his notes and couldn't say with complete certainty.
- The Inspector has never spoken to the RCMP regarding any agreement that the Licensee may have regarding the downloading of video. He does not know the terms of any such agreement, and does not believe it changes the Licensee's

responsibility to the Branch. He does not know who can or can't access the video.

EVIDENCE – LICENSEE

The Constable

The Constable stated that he has been with the RCMP since 2007. His role is enforcement of the downtown's night life with respect to vice. In his role he interacts with hospitality industry owners and operators. The Licensee is president of the Downtown Night Club Association and the Constable liaises with that organization.

The Constable stated that whenever the RCMP has a need to request video from the Licensee's surveillance system the Constable contacts the RCMP's Technician to attend at the Establishment to download the video. To his knowledge the Licensee is not trained to pull video from the system, and the Establishment is the only establishment that leaves all downloading of video to the RCMP. The Constable confirmed that the Licensee had e-mail communication with him on July 14 and 15, 2016 regarding downloading video at the request of the Inspector. (Exhibits 2 and 3)

The Constable stated that he has worked with the Licensee for many years and that the Establishment is a good leader for other clubs. In the Constable's stated opinion, the Licensee operates at a high standard of public safety and is a leader in the industry. He refers other clubs to the Establishment with respect to standards he would like to see in the industry. The Licensee maintains higher levels of training and ID verification than asked, and is open in his communications.

Cross Examination of the Constable

In response to questions from the Branch, the Constable stated that:

- The arrangement with respect to the RCMP downloading video from the Licensee's system was in place prior to the Constable's dealings with the

Licensee. The process has worked well and the Constable has never had occasion to question it.

- The Constable had seen the Appendix A T&C in conjunction with his work with the Inspector. He was not aware of any term or condition specifying that only the RCMP could download video from the Licensee's system.
- To the best of the Constable's knowledge, the Technician is the only person at the RCMP who has the codes for accessing video from the Licensee's system.
- When the Constable receives video from the Licensee's system, he does not have to download any player software to view the video.
- The Constable frequently liaises with the Inspector. The Constable does not always inform the Inspector of RCMP requests for video from the Licensee.

The Licensee

The Licensee testified that he had operated the Establishment for some years prior to 2004. Motivated in part by concern for the safety of his family and staff in the face of increasing gang violence in the night club industry in Kelowna, the Licensee sold the night club in 2004. The sale consisted of the night club business and the premises rather than sale of the corporate Licensee. As part of its due diligence regarding transfer of the Licence, the Branch subsequently determined that one of the purchasers of the business had involvement in a well-known motorcycle gang. Accordingly, the Branch refused to transfer the License to the purchasers, and the Licensee resumed operation of the business in January 2012.

To reduce the potential risk of violence associated with the involvement of the motorcycle gang in the intervening years, the Licensee worked with the Branch to develop the Appendix A T&C. To avoid any opportunity for gang members to intimidate the Licensee or his staff to tamper with video evidence, the Licensee made an agreement with the RCMP that only the RCMP would have the codes to be able to access video from the Licensee's surveillance cameras.

After receiving Notice 1 via e-mail from the Inspector (Exhibit 1, tab 9), the Licensee e-mailed the Constable (Exhibits 2 and 3) and texted the Technician (Exhibit 4) to request that the video be downloaded. As it turned out, the Technician was out-of-province

that week and was not available to retrieve the video. She suggested the Licensee contact one of her colleagues at the RCMP with his request, but the colleague she specified did not know the codes for the Licensee's equipment.

By July 18 the Licensee concluded that the RCMP was not going to be able to download the video in time for him to meet the July 25 deadline specified in Notice 1. This was the only time in 3 years that the Technician had been unable to attend the Establishment to download video – there had never previously been any delay longer than 48 hours. Anxious to meet the deadline, the Licensee texted the Technician and had her provide him with the access code for the video equipment. About mid-night that night, the Licensee had a tech-savvy member of his staff use the codes to download the requested video onto two flash drives.

The Licensee maintained that he was in communication with the Inspector during this time and was under the impression that the Inspector had verbally extended the July 25th deadline in order to accommodate the difficulties the Licensee was having downloading the video. The first day that the Licensee and the Inspector could coordinate their schedules to facilitate the delivery of the flash drives was August 9. At the same time he delivered the flash drives, the Licensee also delivered the Employee List. When the Inspector called him on August 11 to advise that he could not open the video files on the flash drives, the Licensee attended at the Inspector's office to pick up the flash drives. He stated that the Inspector did not tell him then or at any time that the Employee List was not adequate to satisfy the request for employee records in Notice 1.

The Licensee texted the Technician to ask her whether the downloaded video could be played on any computer. (Exhibit 5) The Technician responded that the Licensee's video equipment does not always download the player software with the video; however anyone who has the video can download the player from the equipment supplier's website.

Cross Examination of the Licensee

In response to questions from the Branch, the Licensee responded that:

- The Technician provided the pass codes to the Licensee on or before July 17.
- He can't recall why it took so long to get the flash drives to the Inspector after July 18. He does know that he was busy at the time with medical treatment for a seriously ill family member. Because of concern about his responsibilities under privacy protection legislation, the Licensee was not comfortable in simply dropping the flash drives off at the Inspector's office – he wanted to deliver the flash drives to the Inspector personally.
- The flash drives are still in the Licensee's possession. To the date of this hearing the Licensee has not had the player software installed on the flash drives. The Licensee has never viewed the files on the flash drives and does not know whether the downloading was done correctly.
- The Licensee has never missed a deadline without advising the Branch ahead of time. There is no question in the Licensee's mind that the Inspector verbally extended the deadline for provision of the requested records.
- The Licensee had asked his bookkeeper to respond to the request for employee records. He did not personally turn his mind to the details of the request and while he quickly scanned the Employee Record that he subsequently submitted to the Inspector, he did not double check whether anything was missing. The Licensee does not use shift schedules, and the other information requested was unclear. If the Branch had advised him that the employee information provided by the bookkeeper was incomplete, he could have accessed the required records from the Licensee's computer systems within "two minutes." The system creates a record every time an employee clocks on or off the job.
- The Licensee can tell from the wage rates on the Employee List what position each of the employees holds, and from that can describe their job responsibilities.
- He had no concerns about providing his tech-savvy staff member with the pass codes for the video surveillance system as the staff member has no gang associations. Besides, he felt he had no other option.

In response to questions from me, the Licensee stated that:

- He has not produced the flash drives to date because he thought that having missed the deadline, there was nothing more he could do. No one has told him he could make the issue “go away” by providing the flash drives. He did not realize the Inspector would have difficulty downloading the player software on his government computer.

SUBMISSIONS – BRANCH

The Branch advocate submitted that the elements of the contravention had been established. He argued that demand for records in Notice 1 was clear and the July 25 deadline provided a reasonable amount of time for the Licensee to be able to comply. To date no complete records have been provided as required by Notice 1.

Regarding the defence of due diligence, the Branch stated that there was more that the Licensee should have done; for example, double checking the bookkeeper’s response to the request for employee records, and viewing the videos on the flash drives. The Branch also argued that, in any event, the Licensee was the directing mind of the corporate Licensee and therefore due diligence is not available as a defence.

The Branch advocate deferred to NOEA 2 with respect to the recommended \$10,000 monetary penalty.

SUBMISSIONS – LICENSEE

The Licensee stated that he truly believes in the legislation and the terms and conditions of the Licence – in 2011 the Licensee was the only one in the community to sign on to the Appendix A T&C. He said that unless he knows the precise nature of the alleged contravention that triggered the request for the surveillance video, he feels it may be just a fishing expedition. Nonetheless, he said he does not dispute the Inspector’s authority to issue Notice 1. However, he argued that the Branch shares some responsibility for his inability to provide the requested records by July 25. He argued that the Inspector’s evidence indicated that the alleged contravention that was the basis

for the requirement to produce records in Notice 1 was “concerning”, and that it was unreasonable for the Inspector to wait for at least 3 days from the time the alleged contravention came to his attention, to issuing Notice 1. He argued that the Act also deems notification after 3 days, so effectively the time he had to respond was even shorter. The Licensee stated that under the Appendix 1 T&C his video system is only required to preserve video for one week (though it is capable of preserving it for much longer), so he was left with very little time to download the video.

The Licensee also argued that the Inspector knew about the arrangement whereby the Licensee relied on the RCMP to download video from the surveillance equipment. It was reasonable to rely on this process as in three years there had never been a delay of more than 48 hours for the Technician to download video from his system and it enhanced staff safety and integrity of the video evidence. The Licensee argued that he went “above and beyond” in making best efforts – starting from the day he received Notice 1 - to get someone from the RCMP to download the video, and finally in desperation he compromised his safety protocol agreement with the RCMP by acquiring the pass code from the Technician and instructing one of his staff to download the video files.

With respect to the employee records, the Licensee argued that he was never advised that the Employee List which he provided on August 9 was insufficient to satisfy the requirements of Notice 1 so he never had a chance to correct any deficiency.

The Licensee also argued that he had stayed in contact with the Inspector throughout the relevant time period, that he had kept the Inspector fully informed as to the difficulties he was having in obtaining the video files, and that the Inspector had verbally extended the deadline beyond July 25.

Regarding compliance history, the Licensee stated that the January, 2012 incident of failure to promptly provide video footage was because his video surveillance equipment at the time required several hours and up to 100 CDs to download the requested video. Immediately after that incident the Licensee upgraded the equipment so it now can download to a flash drive almost instantaneously. An incident on February 24, 2012 related to failure to provide a name change application by the time

required. The Licensee noted that the Establishment had been operating under the Liquid Zoo name since 2004.

Regarding the proposed penalty, the Licensee argued that it is unfair to expect him to pay such a huge amount for a problem that he, the Inspector, and the RCMP all played a part in. He argued that night clubs in Kelowna generally lose money or break even 3 days a week, and that a 3 day Licence suspension would be a more reasonable penalty.

REASONS AND DECISION

Contravention

Based on the evidence and submissions herein, I find that on July 25, 2016 the Licensee contravened section 73(2)(a) of the Act.

I find that the video surveillance and the employee records requested in Notice 1 fall within the categories of records prescribed in section 34 of the Regulation.

With respect to the video surveillance, I find that it is a record of incidents or events that occurred in or adjacent to the Establishment. The issuance of Notice 1 on July 14 did not cause an unreasonable delay such that the July 25 deadline could not reasonably be achieved by the Licensee. The fact that Notice 1 did not identify the specific nature of a possible contravention does not affect the reasonableness of the timeline or the validity of the request. The Licensee's evidence was that despite his arrangement with the RCMP, he was able to obtain the passcode and have one of his employees download the requested video onto 2 flash drives on July 18. While acknowledging that during the period July 14 to July 18 the Licensee had been unsuccessfully pursuing various options with the RCMP to get the video downloaded, I find there is no evidence to suggest that because of the 3 day lapse between July 11 and July 14 the Licensee was unable to have the video downloaded and delivered to the Branch by the July 25 deadline.

There is no evidence to support the Licensee's contention that the Inspector had verbally extended the July 25 deadline. By July 27 the Inspector had issued the Contravention Notice and Notice 2 as he was entitled to do under the legislative

scheme. Even if the Inspector had extended the timeline as maintained by the Licensee, I find that the video record provided by the Licensee on August 9 was not complete or even substantially complete without the ancillary software required to allow it to be viewed. It is difficult to reconcile the Licensee's good reputation and leadership, as attested to by the Inspector and Constable, with the evidence that to the date of this hearing the Licensee had still never resubmitted the flash drives to the Branch with the video files and requisite player software. Based on the evidence and for the foregoing reasons, I find the Licensee did not promptly provide the video record as required by section 73(2)(a).

With respect to the employee records requested in Notice 1, they fall squarely within the types of records prescribed by section 34 of the Regulation. The Licensee argued that he thought the Employee List satisfied the requirements of Notice 1, and that he was never specifically advised by the Inspector that the Employee List was deficient. The evidence on this point is mixed. The Inspector's file notes (Exhibit 1, tab 12) and his oral testimony on direct examination indicate that the Licensee had been advised on August 11 that the primary job descriptions were not provided, but in his testimony under cross-examination the Inspector said that he could not be 100% sure. In my view – for the reasons that follow - even if the Inspector had not expressly brought this shortcoming to the Licensee's attention on August 11, it does not excuse the Licensee from his obligations under section 73(2)(a) of the Act.

Accepting the Licensee's evidence that he does not use shift schedules *per se*, and that he can determine the employee's job title and duties from the wage data on the Employee List, I find that the Employee List falls far short of providing the Branch with the records required by Notice 1 with respect to primary job responsibilities, shift schedules and dates of employment. I find that Notice 1 is clear on its face as to what was required, and that it is the Licensee's responsibility to ensure that he provides all the records required by the Branch. The evidence shows that the Licensee relied entirely on his staff to interpret the request in Notice 1 and to provide the requisite information; he took only a cursory glance at the Employee List before submitting it. The Licensee confirmed that providing the job responsibilities, shift information, and employment dates from his records system would take only a matter of minutes, but he has not provided this information to date. Based on the foregoing evidence and reasons, I find

the Licensee did not promptly provide the employee records as required by section 73(2)(a).

It follows from the foregoing findings regarding the video records and employee records that I conclude (as mentioned above) that on July 25, 2016 the Licensee contravened section 73(2)(a) of the Act.

Due Diligence

The Licensee is entitled to a defence if it can be shown that he 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, he 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:

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 Act.

The defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale 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 made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); 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. These principles apply to the contravention in the current case.

Analysis

The Licensee did not expressly advance an argument on due diligence. I have found a contravention of section 73(2)(a) of the Act. Given this and the findings of facts around this non-compliance, I find that the Licensee does not meet the test of due diligence.

Mr. Habib has been the primary person communicating with the Branch and accordingly is the one responsible for the non-compliance. Under the first stage of the test for due diligence as set out above, I find that he is the directing mind. Accordingly, the defence of due diligence is “essentially eviscerated” and is not available to the Licensee as described in paragraph 41 of *Beverly Corners*.

Even if Mr. Habib were not a directing mind, the evidence does not establish a defence of due diligence. With respect to the video records, the evidence shows that he made no attempt to review the video material to make sure it covered the right time frame or whether it could be viewed. He stated that he is not sure whether the downloading was done correctly. Regarding the employee records, the Licensee relied entirely on his bookkeeper to interpret the request in Notice 1 and to provide correct and complete

information. The Licensee took only a cursory glance at the information that he submitted. In the result, for the reasons detailed above, the response to the request for employee records was deficient. There is no evidence of any type of training or systems being in place to ensure that records requests from the Branch are responded to completely and on time. In my view this evidence does not reflect the degree of diligence necessary to establish a defence of due diligence.

PENALTY

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the Licence, I may do 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

In this case the facts are that the Licensee has failed to provide two sets of records by the deadline required by the Branch. Such records as were provided are incomplete. In these circumstances, I find that a penalty is warranted.

The factors that I considered in this case in determining the appropriate penalty include: consideration of 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.

There is no record of a proven contravention of the same type for the Licensee at the Establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

The Licensee does have a significant compliance history since re-opening the business in January 2012. Until the current case, the only enforcement action taken against the Licensee through to the hearing stage was in 2012 and the proven contravention was for a matter unrelated to section 73(2)(a).

There are a number of instances on record where the Licensee has been late in providing records requested by the Branch. The incident in January 2012 went to an enforcement hearing and the original request for records was determined to have not provided the Licensee with reasonable time to comply, so no contravention was proven. I have given no weight to this instance. The incident in February 24 involved failure to submit a name change application on time. A contravention notice was issued, but the Licensee eventually provided the record and no further enforcement action was taken. As a mitigating circumstance the Licensee argued that the Establishment had already been operating under its new name for many years. I don't view this as a mitigating factor. In August 2012 a request for documents was issued to the Licensee related to an alleged contravention. On this instance the Licensee delivered the requested documents within the required time. In April 2013 an alleged contravention was observed and a records request was issued to the Licensee. He delivered the records two days after the deadline.

The foregoing review of the Licensee's compliance record includes two previous instances of requested records being provided after the specified deadline, which does represent a concerning pattern of misapprehending the seriousness of a request for information by the Branch. In the current case, the Licensee started out by making immediate efforts to respond to Notice 1. The evidence indicates that he has all the requested records in hand or could easily produce them. I view it as an extremely aggravating factor that to date the Licensee has not provided the requested records to the Branch and that since August 11, 2016 he does not appear to have made any enquiries with the Branch as to how he may satisfy his outstanding obligations.

The failure to produce records is a serious contravention that undermines the regulatory compliance and enforcement regime. Without access to records associated with the operation of an establishment, The Branch may be unable to identify serious contraventions posing an unacceptable risk to public safety.

In consideration of:

- The public safety concerns related to the failure to promptly produce records as requested;
- The insufficiency of evidence of due diligence;
- The Licensee's compliance record as noted above; and
- The Licensee's failure to make any effective efforts since August 11, 2016 to provide the requested records

I am satisfied that a monetary penalty of \$10,000 is appropriate and necessary in order to bring the Licensee into compliance with the statutory requirement to provide records in a timely manner, and to achieve the Branch's objectives with respect to general and specific deterrence.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$10,000 to the General Manager of the Branch on or before March 9, 2017.

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: February 7, 2017

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Stephen Hitchcock, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate