



**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:	Denlee Holdings Ltd. dba Cariboo Hotel c/o Darlene Cyca 254 Front Street Quesnel, BC V2J 2K2
Case:	EH07-144
For the Licensee:	Barry Carter
For the Branch:	Tania Cogan
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	February 19, 2008
Place of Hearing:	Quesnel
Date of Decision:	March 27, 2008

## **INTRODUCTION**

The licensee operates an establishment that holds a liquor primary licence. The licence number is 011342. Hours of sale are 9:00 a.m. to 2:00 a.m. Monday through Saturday, and 10:00 a.m. to 2:00 a.m. Sunday.

On August 2nd, 2007, at approximately 11:30 p.m., a liquor inspector attended at the establishment to conduct a licensed premise check. She observed what she believed to be three intoxicated patrons. The three patrons were not in the company of each other.

As a result of the inspection, the establishment was served with a contravention notice.

The licensee appeared at the hearing by way of counsel. The branch attended by means of an advocate.

## **ALLEGED CONTRAVENTIONS**

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action dated October 1, 2007. The branch alleges that on August 2nd, 2007, the licensee permitted intoxicated persons to remain in the area of the establishment where liquor is sold, served, or otherwise supplied contrary to s.43(2)(b) of the *Act*.

## **RELEVANT STATUTORY PROVISIONS**

See Appendix A.

## ISSUES

1. Did the licensee contravene a provision of the *Act* by permitting an intoxicated person to remain in the area of the establishment where liquor is sold, served or otherwise supplied contrary to s. 43(2)(b)?
2. If so, is a penalty warranted and what is the appropriate penalty?

## EXHIBITS

Exhibit No. 1: The Branch's book of documents

Exhibit No. 2: The Licensee's book of documents

## EVIDENCE and DISCUSSION

The branch called the liquor inspector who conducted the License Premise check. The licensee called its primary shareholder and two servers who were on duty on the night in issue. Each of these witnesses provided *viva voce* evidence and was cross-examined by counsel for the licensee or the branch advocate.

The licensee provided thirteen written statements, all of which were admitted into evidence without contest by the branch advocate. The statements are contained in the licensee's book of documents (exhibit No. 2). Two of the statements are from employees (a bartender and a server) who were in attendance at the relevant time and place. The remainder of the statements are from individuals who were not present at the establishment on the day in issue. Those statements are not intended to provide evidence of the actual events of August 2, 2007, but rather of the character and community standing of the licensee and the licensed establishment.

To the extent that the statements in exhibit No. 2 were not tested by *viva voce* evaluation and cross-examination, I find that where they are contrary to live testimony, I prefer the evidence obtained by live testimony. Where the statements were not contradicted, however, in light of the branch advocate's acceptance of them into evidence, I find the statements represent acceptable if not determinative evidence of the content of those statements.

### Liquor Inspector

The inspector described her considerable experience in government, as a human resources professional, an employment assistance worker, and an investigative officer, prior to becoming a liquor inspector. She has been responsible for licensed premise checks for a large rural area including Quesnel and several logging and mill towns for two years. She has also had experience working in liquor primary and food primary licensed establishments and had considerable classroom and on-the-job training in identifying symptoms of intoxication. The inspector was not tendered as an expert witness.

The liquor inspector testified that she attended the establishment on the day in issue for a routine inspection. She noted three individuals in the red-lined area who she concluded were intoxicated:

- One male was seated in the smoking room. He was slouched in his chair. She observed him to try to light a cigarette four times. He had a difficult time co-ordinating the lighter and the cigarette to affect the lighting. She observed that his fine motor skills were retarded. He was drinking what appeared to be beer, from a mug. She drew a conclusion that this male was intoxicated.
- She observed another male who was seated near the pool table. He was also slumped in his chair and had bloodshot eyes. She watched him for ten minutes and drew the conclusion that he was intoxicated.

- She observed a third male who was up walking. She noted him to have some mobility problems. She noted that he was quite tall - over six feet - and his movements were “really jerky.” He was “unsure of his feet”, unsteady, and appeared to be feeling each step. She noted his eyes were bloodshot and he had a hard time keeping them open. His face was flushed.

The inspector indicated that she spoke to a waitress, “K”. She asked the waitress if she knew that intoxicated patrons were not allowed to remain in the liquor area, and the inspector pointed out the third person, whom she believed to be intoxicated. The inspector testified that “K” advised her that “K” had served that patron one beer and would be asking the patron to leave and calling a taxi for him.

The inspector further testified that she went up to the bar in the establishment and for some time attempted to get the bartender’s attention. She asked the bartender about service to the third allegedly intoxicated patron and the bartender said, “It is so busy I have kept my head down all night and don’t know who I have served.”

She also indicated that she has worked with many people with mental and physical disabilities, and although symptoms of intoxication can be confused with symptoms exhibited by persons with a disability, a person with a disability can be intoxicated. She formed the opinion that the third male was intoxicated notwithstanding that he may have had a disability related to mobility.

The inspector identified all of the relevant documents in exhibit No. 1, and in particular past contravention notices including one for permitting an intoxicated person to remain (tab 12), and a compliance meeting related to that contravention.

## The Licensee

The licensee's primary shareholder indicated that her family has been involved in the establishment since 1969, and she worked in the establishment part time as a server and bartender. She bought into the establishment in 1979 and has been in control of it since 2001.

She testified that she cleaned-up the establishment, converted the once lower-class bar into a respectable establishment that is a valuable part of the local community, and set new standards for service and responsibility. She still works shifts in the bar, and sets an example for her staff. She said, "If [the staff] see me pick up garbage off the floor, they will pick garbage off the floor when I am not there. There is one set of rules for staff and customers. It is the living room code: If you can't do it in my living room, you can't do it in my bar."

With respect to intoxicated patrons, she testified that she asks them to leave and they usually leave. The staff has instructions to ask such patrons to leave, and if the patrons don't leave, the staff is instructed to call the police. The staff is also instructed to call taxis for intoxicated patrons. She also said, "While waiting for a cab, we usually sit them on a bar stool until a taxi comes. We feel as a customer service, it is our obligation to get that person home."

The licensee testified that she first heard about the requirement to remove an intoxicated patron from the red-lined area in June of 2007.

She indicated that when she left the establishment on August 2, 2007, "There were no patrons who were loud or aggressive or belligerent or staggering - suffering from obvious signs of intoxication."

Finally, she testified that the establishment is not "a fly-by-night operation that serves beer till they drop."

### First Server

A server testified that she has worked in the hotel for eight to nine months. She said the establishment is well run and that they have a policy of refusing to serve intoxicated patrons. She said they don't let intoxicated people in and if they become intoxicated while in the establishment, they cut the patron off and refuse to serve them. The patron is then asked to leave and as "he can't get another drink, the patron leaves."

She also said, "The longest it has taken to get someone to leave might be five or ten minutes. They can wait for the cab and then they can go. There is a place where they can wait for a cab outside."

The server indicated that there were 25 or 30 patrons in the two sections that the inspector was watching that night. She said business picked up late in the night but "it was not like madness..."

She said that the inspector pointed out a patron who had too much to drink and told her that he had to be asked to leave. She agreed that she would ask the patron to leave and she indicated to the inspector that she had only served the patron one beer. The server said, "He was not doing what I thought a drunk guy would be doing. He wasn't loud or fighting and I didn't want to argue with the inspector so I told him to leave. He sat in the bar for another ten minutes."

The server also indicated that the inspector told her about another intoxicated patron by the pool table, but they could not find him.

She testified that generally, if she decides that a patron is intoxicated, she will sometimes call him a cab and tell him to wait outside. She said, "They sometimes finish their beer and then they will go outside. I tell them I am going

to call a cab. I don't take their beer away. They will ask if they can finish their beer and I say that I am going to call a cab."

She said she did not take any active steps to remove the third male from the establishment. She testified, "He didn't need to be called a cab. He wasn't being rude or nothing like that. He was very polite and just sat there. When I said I was going to call a cab, he said, like, okay. I didn't know that I had to take them out myself. I didn't think he was so drunk that he had to leave. He was just sitting there being loud. I thought he was fine to sit there and wait for a cab for some minutes. The licensee has never informed me that I had to remove them from the bar. I didn't know I had to. I thought just call them a cab."

### Second Server

This server testified that she was present at the relevant time and place. She did not notice anyone in the bar that was intoxicated. She said that she knows that if someone is intoxicated, she is supposed to ask him to leave. She said her bosses trained her and talked to her about what to do if a patron is intoxicated. She confirmed that *Serving it Right* trained her not to serve patrons to the point that they are falling over drunk, and that she has not had any updates or additional training since taking the course.

She said that the rule in the establishment is, "if they are intoxicated, sometimes they wait in the foyer. If they are a friend, you will get them a coffee and call them a cab. It is common sense, basically."

### **SUBMISSIONS**

The branch argued that the evidence supports findings that three individuals in the pub were intoxicated at the alleged time and date, and that all three individuals were in plain view of the licensee's staff. The staff took no steps to

remove them despite the obligation to do so. Only after the liquor inspector advised a staff member of one of the intoxicated patrons, did the employees do anything about it. Further, while waiting for a taxi, the employees allowed an intoxicated patron to remain seated at the bar.

The licensee indicated that taxis can take 15-20 minutes to arrive and an intoxicated patron might be left to wait on a bar stool until the taxi arrives.

Licensee's counsel argued that there is no objective test for intoxication. There are therefore many opinions as to whether a person is intoxicated or not. There are physical signs of intoxication and mental signs of intoxication provided in the Guide (exhibit No. 1- tab 17), and the inspector only testified as to physical signs, and not even half of the physical signs identified in the guide were observed. There was no indication of slurred speech or the odour of alcohol on the patrons' breath.

Further, counsel said, only one of the three allegedly intoxicated patrons was pointed out to the staff, and therefore the licensee was not able to respond to the allegations or prepare a defence in respect to the other two patrons.

Counsel argued that the rate at which individuals become intoxicated varies with the individual, the amount of alcohol or other relevant substances the individual has consumed and the time that has elapsed since the individual consumed the alcohol. Counsel submitted that this variation in fact situation could lead a patron to become intoxicated in a short time, for example immediately after a diligent evaluation by the licensee.

The licensee also argued that the third patron was asked to leave. The patron did leave. Therefore the issue is reasonableness. In other words, did the licensee have an obligation to remove the individual immediately, or within a

reasonable time of ascertaining that the patron is intoxicated? And if the latter, how much time is reasonable?

The licensee argued that the patrons were not permitted to remain.

Finally, the licensee argued that it exercised due diligence in the operation of the establishment such that any allegation of contravention of the *Act* can be answered with the licensee's reasonable actions.

## **FINDINGS and CONCLUSION**

Section 12(2) of the *Act* sets out that the General Manager may impose terms and conditions on a licensee.

Liquor Primary Licence No. 011342 sets out terms and conditions on its face including: "the terms and conditions contained in the publication: *A Guide for Liquor Licensees in British Columbia*."

Page 13 of the Guide states in part, "It is your responsibility to make sure patrons do not become intoxicated while in your establishment. You must not let a person who is apparently under the influence of alcohol or drugs enter or remain in your establishment. You must refuse the person service, have the person removed, and see that he or she departs safely."

The Guide also lists physical and mental signs of intoxication.

The instructions set out in the Guide can be seen as an elaboration of the expected conduct of a licensee in complying with the *Act*, where the *Act* is silent about how to comply with the obligations indicated therein. The list of physical and mental signs of intoxication is clearly intended to be helpful in making a determination of intoxication. Nowhere does the Guide indicate that the list is

exhaustive, or intended to be a checklist of necessary symptoms. The licensee's submission that the liquor inspector's conclusion of intoxication is a hollow one as it does not fully encompass all of the items listed in the Guide must fail.

The inspector identified three patrons as intoxicated. I will deal with each separately.

Patron #1 - The evidence supports that this patron was sitting in the smoking room of the establishment attempting to light a cigarette. The inspector concluded that he was unable to do so as a result of retarded motor skills due to intoxication. She observed him for ten minutes. He was slouching and swaying back and forth. He was drinking what appeared to be beer, from a mug.

The licensee provided no contradictory evidence respecting this particular patron's appearance or conduct, and I accept the evidence of the liquor inspector with respect to her observations. The patron had difficulty with the rudimentary task of lighting a cigarette. He was in a smoking area and it is therefore reasonable to conclude that he was a smoker familiar with the task. The inspector observed him for ten minutes, and noted some indicia of intoxication. I find that the patron was demonstrating signs of impairment. Given that it was 11:30 p.m., and the patron appeared to be drinking beer from a mug in a liquor primary establishment, I conclude that on a balance of probabilities that the cause of this patron's impairment was intoxication.

I find, however, that there is insufficient evidence to establish that the licensee permitted this patron to remain once he was intoxicated. The only evidence before me as to how long the patron was in the establishment is the ten minutes during which the inspector observed him. Ten minutes might in some cases be sufficient time to establish that the licensee or its employees knew or ought to have known that the patron was intoxicated, and therefore permitted him to remain. In this case, however, the evidence is not specific as to whether the

cigarette lighting incident occurred at the beginning or the end of the inspector's ten-minute observation period. The licensee argued that an individual could become intoxicated in a short period of time, as a result of previous (and unobserved) drinking. I accept that possibility. In this instance there is insufficient evidence that the patron was intoxicated for that whole ten-minute period to overcome the burden of proof. The only other evidence relating to this patron, is that he left on his own accord.

Patron #2 - The evidence supports that this patron was sitting in the pool room opposite the end of the service bar. The inspector testified that the patron had extremely bloodshot eyes and staggered off toward the washroom. She concluded that he was intoxicated.

There was no contradictory evidence with respect to whether or not this patron was intoxicated. Absent any evidence to the contrary, I find the inspector's testimony sufficient to meet the burden of proof. This patron was in a drinking establishment late at night, had bloodshot eyes, was seen to be drinking, and was seen to stagger toward the washroom. Absent any contrary evidence, the test is not a difficult one to meet. I find that Patron #2 was intoxicated.

When the inspector informed a staff member of this patron's presence, the patron was nowhere to be found. It is reasonable to conclude that the patron left the establishment very shortly after the inspector observed him. Without any evidence of how long the patron had been in the establishment prior to his first being observed, or if the licensee's employees observed him, I cannot find on the balance of probabilities that the licensee permitted this intoxicated patron to remain.

Patron #3 - This individual was seen walking up to the bar. The liquor inspector noted that he was unsteady on his feet. His movements were jerky and his eyes were bloodshot. His face was flushed. He had a hard time keeping his eyes open. The inspector concluded that he was intoxicated and advised one of the Licensee's employees that the patron should not be allowed to remain in the establishment. That employee agreed to ask the patron to leave, advised the patron, and called a taxi for him to get home. The employee testified that she did not conclude that the patron was intoxicated but did not want to argue with the inspector. I note that she did not testify that she felt the patron was not intoxicated.

I find that Patron #3 was intoxicated. The patron was available for scrutiny by one of the licensee's employees. That employee may have advised the patron that he had to leave because of the inspector's request, but the inspector did not require a taxi to be called. There was no evidence produced that indicated any reason to call a taxi, other than the licensee's own testimony that intoxicated patrons are often allowed to wait at the bar until a taxi can be called and does arrive.

The inspector asked a bartender if she had served this patron, and the bartender answered that "It is so busy I have kept my head down all night and don't know who I have served." This is confirmation that at least some of the employees were less than diligent about monitoring the condition of some of the patrons, some of the time. The provisions of the Guide (exhibit #1, tab 17, p.13) describes s. 43(2)(b) of the *Act* in terms of a person "who is *apparently* under the influence..." (emphasis mine). It is not a requirement that the licensee or its employee confirm that a person is under the influence, but only that the person appears that way. Again, the test appears to have a low threshold. Once that threshold has been reached, the licensee or its employee has an obligation to act.

The employee called a taxi for this intoxicated patron (patron #3). The patron was permitted to sit at the bar until the taxi came. The evidence indicates that the wait was approximately 15 minutes. Counsel for the licensee argued that permitting the intoxicated patron to wait at the bar was a reasonable action under the circumstances. He argued that letting an intoxicated patron out the door to wait for a taxi when it is 40 below zero would be irresponsible. He submitted that a fifteen minute wait at the bar is reasonable and something less than permitting the patron to remain.

I disagree. I find that the concept of reasonableness is only to be applied in the execution of the action required by the *Act*, not in the interpretation of when the action is required. Section 43(2)(b) says in part: “must not permit...an intoxicated person to remain in that part of the licensed establishment where liquor is sold, served, or otherwise supplied. There is no prohibition on allowing the patron to wait outside of the red-lined area, or elsewhere in the establishment. Further, there is no evidence that it was 40 degrees below zero in Quesnel on August 2<sup>nd</sup>.

I find that by inviting or allowing this patron to remain seated at the bar in the red-lined area while waiting for a taxi, the licensee or its staff permitted a person to remain as described in the *Act*. I find, therefore that the elements of the contravention have been proven.

Due diligence is a complete defence to a contravention under the *Act*. The licensee submitted that it was duly diligent in the operation of the establishment and that the establishment occupies a prominent and respected position in the community. Evidence was provided in support of the licensee’s position in the community. The evidence was in large part uncontroverted.

I can and do accept the proposition that the licensee is well regarded in its community. This however, does not speak to the defence of due diligence. In order for the defence to be effective, it must speak to the licensee's policy and implementation of that policy, and claim reasonable behaviour as a result. In the event that a licensee has employees or staff to monitor, it must establish that the employees were informed of the relevant policy, trained accordingly, monitored or supervised in accordance with the policy and perhaps even tested on it. The manifest degree in all cases is reasonableness. Further, the policy must include specific references to the issues involved in the allegation. General operating policies will not discharge the obligation to adhere to specific requirements of the *Act*. Only specific policies aimed at the issue involved in the allegation of contravention and the aforementioned follow-up of those policies can be seen to establish due diligence.

The licensee and her employees attested to the basic premise that intoxicated patrons are not allowed to remain on the premises. The evidence was inconsistent as to whether the licensee and all of her employees understand the obligation to remove intoxicated patrons from the area in which liquor is sold, served, or otherwise supplied. There was no formal policy relating to that requirement of the *Act* put into evidence. There was no confirmation of consistent employee training with respect to this issue, no written policy manual presented, and no evidence of testing or updating the employees with respect to how to deal with intoxicated patrons. One of the licensee's witnesses testified that intoxicated patrons are to wait outside. One of the licensee's witnesses testified that intoxicated patrons are allowed to wait at the bar. One of the licensee's witnesses testified that she did not know intoxicated patrons had to be removed.

One of the servers indicated that whether an intoxicated patron waits in the foyer or is given a coffee depends on "if they are a friend". She added, "It is common sense, basically." It is not available for the licensee or its employee to determine

what is common sense in the application of the *Act*. The requirement that the employee must not permit the intoxicated person to remain is not dependent on the intoxicated person's relationship to the licensee or its staff.

I have no doubt that the licensee intends to treat her clientele with respect, and that she makes a concerted effort to do so. Her licence obligates her, however, to follow a legislated mandate that may be different from her living room code. There are things that may be allowed in the licensee's living room that are not allowed in her establishment, and they include specifically, the possibility of allowing an intoxicated person to remain.

I find that the licensee has failed to establish on a balance of probabilities that it exercised due diligence in the operation of the establishment. In particular, I find that the licensee did not take reasonable steps to prevent the contravention of s. 43(2)(b) of the *Act*.

I find the licensee contravened s. 43(2)(b) by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

## **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 have the 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 *Regulations*. 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.

For the contravention of s. 43(2)(b) of the *Act*, the branch recommended a four (4) day suspension of the licence.

In considering the appropriate penalty for this contravention, I have reviewed the establishment's history of compliance. This includes allegations that did not go to enforcement hearing and on which the branch took no action. The licensee has to the date of contravention, been served with eight contravention notices and has attended three compliance meetings. One of the past allegations of contravention was for s. 43(2)(b) of the *Act* for allowing an intoxicated patron to remain. One of the compliance meetings was held to discuss that contravention.

I find that a penalty is warranted under the circumstances in order to obtain voluntary compliance with the *Act* and *Regulation* in the future.

A four (4) day suspension is within the range of penalties set out in the *Regulation* for a first offence of this nature. I find that a four-day suspension is reasonable under the circumstances.

**ORDER**

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 011342 for a period of four (4) days to commence at the close of business on Wednesday April 23, 2008, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulations*).

*Original signed by*

Sheldon M. Seigel  
Enforcement Hearing Adjudicator

Date: March 27, 2008

cc: Quesnel RCMP

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office  
Attention: Tania Cogan, Branch Advocate

## APPENDIX A

### LIQUOR CONTROL AND LICENSING ACT [RSBC 1996] CHAPTER 267

#### Licences

- 12** (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
  - (b) that are in addition to those referred to in paragraph (a).
- (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (a) limit the type of liquor to be offered for sale,
  - (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,
  - (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
  - (d) designate the areas within an establishment where minors are permitted,
  - (e) approve, prohibit or restrict games and entertainment in an establishment,
  - (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
  - (g) vary seating requirements in the dining area of an establishment,

- (h) vary requirements with respect to the location of an establishment,
  - (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
  - (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
  - (k) specify requirements for reporting and record keeping, and
  - (l) control signs used in or for an establishment.
- (4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.
- (5) A licence expires on the date specified on it as the expiry date.
- (6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.

### **Drunkenness**

**43 (2)** A licensee or the licensee's employee must not permit

- (a) a person to become intoxicated, or
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.