



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
*The Liquor Control and Licensing Act RSBC c. 267***

Licensee:	Coxson Holdings Ltd. dba Toro's Liquor, Beer & Wine Store 1220 Kalamalka Lake Road Vernon, BC V1T 6V2
Case:	EH10-081
For the Licensee:	Carlo Dagostini
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator	George C.E. Fuller
Date of Hearing:	February 23, 2011
Place of Hearing:	Kelowna, BC
Date of Decisio:	March 31, 2011

INTRODUCTION

The Corporate Licensee, Coxson Holdings Ltd., ("the Licensee") owns and operates an establishment known as Toro's Liquor, Beer & Wine Store in Vernon, BC. The licensee's retail store operates under Licensee Retail Store Licence Number 195161. The authorized representative of the licensee is Carlo Dagostini.

The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*" (the "*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated August 30, 2010.

The branch alleges that on April 14, 2010, the licensee contravened Section 43(1) of the *Liquor Control and Licensing Act* ("the "*Act*") by giving liquor to an intoxicated person or a person apparently under the influence of liquor. The proposed penalty is a four day licence suspension. The penalty range for a first contravention of Section 43(1) is a four to seven day licence suspension and/or a \$5,000 - \$7,000 penalty (item 9 of Schedule 4, of the *Regulation*).

The licensee denies that the contravention occurred, but if it did, then the licensee says that it is entitled to assert the defence of due diligence. The licensee further submits that, if the defence of due diligence is not available to it, then the penalty of a four day licence suspension is unwarranted.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act [RSBC 1996] chapter 267*****Drunkenness**

43(1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

ISSUES

1. Did the contravention occur?
2. Was the licensee duly diligent?
3. If the licensee was not duly diligent, are penalties warranted under the circumstances?
4. If a penalty is warranted, what are the appropriate penalties?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1:** The Branch's Book of Documents, tabs 1 to 9
- Exhibit 2:** Excerpt from the licensee's transaction register report
- Exhibit 3:** Excerpt from the branch's records showing the licensee's purchases of liquor from April 1, 2010 until April 30, 2010
- Exhibit 4:** Toro's Liquor Store Employee Manual dated January 5, 2010
- Exhibit 5:** Excerpt from Toro's Liquor Store Employee Manual dated January 5, 2010 entitled "Intoxicated Customers"
- Exhibit 6:** Letter dated September 3, 2010 addressed to "To Whom It May Concern" executed by Employee J.H.

- Exhibit 7:** Letter dated September 1, 2010 addressed to "To Whom It May Concern" executed by Employee, J.T.
- Exhibit 8:** Letter dated October 1, 2010 from the Licensee to the Adjudicator, setting out the Licensee's position

EVIDENCE

The branch called two witnesses. The first was an RCMP constable (Constable 1), who was off duty and who attended at the licensee's beer and wine store at approximately 5:05 p.m. on April 14, 2010.

Upon entering the parking lot, Constable 1 noted a vehicle parked in the fire lane. The Constable entered the licensee's premises and travelled down the first aisle which was tight to the windows and then circled around and went to the register. At that time, Constable 1 observed a male patron approximately 60 years old mumbling to himself, and in her view was not oriented to what he was doing. When the patron passed by the constable, she detected a strong odour of liquor, he was staggering, and appeared not to understand a bargain that the salesperson was attempting to convey to him. Constable 1 stated that the patron was definitely showing signs of impairment, by staggering, smelling of liquor, slurring his speech and being in a generally confused state.

Constable 1 was questioned with respect to her background regarding intoxication, and she indicated she had previously been a member of a RCMP Detachment in Saskatchewan, where she had been involved in approximately 1000 impaired driving cases. She also indicated that she had a personal connection with someone who was an alcoholic.

Constable 1 exited the premises and then re-positioned her vehicle so that she had a clear view of the vehicle in the fire lane, which she presumed to be that of the patron.

Constable 1 then contacted the RCMP Watch Commander and explained to him that, although she was not sure the patron was going to drive, she wanted an on-duty officer dispatched in case he did. Constable 1 then observed the patron exit the licensee's premises and stagger to his vehicle. Upon reaching his vehicle, the patron fumbled with his keys attempting to open the door and had difficulty lifting his beer purchase up into the vehicle.

The patron then started his vehicle and drove onto Kalamalka Road and the constable followed in her vehicle at approximately 40 kilometres per hour. Constable 1 also noted that the patron passed over the yellow line by approximately a foot or so while travelling on Kalamalka Road. The patron then turned down Browne Road to the Golfside Estates Apartments where he made several attempts to park his car. In the process he hit a carport support, damaging it. As he was getting out of his vehicle, Constable 2 arrived and confronted the patron at his front door. Constable 2 then made his own observations of the patron's condition and on the basis of same, arrested the patron and took him to the police station. At the station, two breathalyser tests were administered approximately 20 minutes apart, within an hour and a half period, and each demonstrated that the patron's alcohol level was 190mg% representing more than double the legal limit.

On cross-examination, the licensee suggested to Constable 1 that because she was notionally on duty at all times, and as a trained officer, she should have either intervened, and prevented the contravention from occurring, by either mentioning the circumstances to the licensee's staff, or by stopping the patron from proceeding onto Kalamalka Road. In response, Constable 1 said she did exactly what she was trained to do which was to call the Watch Commander and request back-up. This was due to the fact that Constable 1 had no equipment on her at all and in her opinion she certainly could not stop him with her own vehicle, as she did not know how he would react. As far as she was concerned, the best situation was to keep him calm and maintain the situation until back-up had arrived.

The licensee also suggested to Constable 1 that, given her experience with impaired drivers, she might notice things about impaired drivers that others might not. Constable 1 responded by stating that, in her opinion, anyone would have noticed that the patron was intoxicated.

Constable 1 was also questioned regarding her testimony concerning the timing and movement of Constable 1 and the patron within the licensee's premises but, in my view, none of those potential discrepancies would operate so as to alter the material facts of this case.

The branch then called the liquor inspector who had investigated the alleged contravention. The liquor inspector reviewed the provisions of the licence and the Guide and, in particular, identified the physical and mental signs of intoxication. In the Inspector's view, these provisions, in layman's terms, identify the guidelines for licensee's to abide by.

The liquor inspector then described the process that he utilized in obtaining all of the information regarding the alleged contravention and then provided his rationale for the selection of a four day licence suspension. In the inspector's view, the suspension proposed was deemed by the branch to be appropriate as it would show the seriousness of the offence to both the community and other licensees. Furthermore, it was felt that a monetary penalty may not bring the licensee into compliance, as it may be viewed as simply a cost of doing business.

Upon cross-examination, the licensee inquired as to the nature and extent of the liquor inspector's discretion with regard to issuing contravention notices. The liquor inspector advised that he had discretion with respect to non-public safety issues, but in the case of serious matters he would gather the evidence and discuss the same with his supervisor. The liquor inspector agreed with the licensee that Toro's had never been advised that it was out of compliance at any time prior to this alleged contravention.

Evidence of the Licensee:

The licensee called one witness who was an employee of the licensee at the time of the alleged contravention. She identified herself as the night manager who also trained other employees and also clerked when needed. She operates the tills, stocks beer, and watches for patrons under the influence and under age purchasers. In her words, she "handles all the ropes". She believes that as an employee that she has been trained on all policies and advised that over the two year period that she had been an employee there were regular meetings once per month. There would also be casual conversations with respect to policies and she would discuss policies on a daily basis with her manager.

When asked to advise of the number of times, over that same two year period, that she refused to sell liquor to intoxicated patrons, she stated definitely on a weekly basis and refusal to minors on a daily basis. In fact, it is her practice to request identification from anyone appearing under 30 years of age.

The night manager was aware of the identity of the patron as he was a regular customer and was well known to her. To her knowledge, the patron has serious health issues, including a bad leg and hip and that he was often muddled and on occasion she found it necessary to finish his end of a conversation for him.

The night manager was on duty during the early evening of April 14, 2010 and remembers coming out from the storage area and noticing that there was only one employee on the tills and there was a line-up. Accordingly, the night manager began ringing people through including the patron and was approximately two and a half to three feet from him over the counter. With regard to physical signs of impairment, the night manager stated that his eyes were normal looking and not red and that he always has a stagger and sometimes leans on the counter because of his health condition. When asked to refer to Constable 1's version of events, the night manger indicated that she did not detect slurred speech and that she could fully understand him. The night

manager stated that if the patron wasn't a regular, he might have seemed odd, but not intoxicated.

The night manager was then referred to Exhibit No. 5 in these proceedings being a letter written "To Whom It May Concern", by the other employee on duty at the time, Employee 1, dated September 3, 2010, the text of which is as follows:

"This is to state that I, [Employee 1], have been an employee at Toro's Liquor Store since February 2010. I was working the 4 to 11 p.m. shift along with my co-worker [the night manager] on April 14, 2010. It was a busy evening and [] opened a till beside me and helped the next customer who was in line. At no time did I observe anyone behaving in a way that would lead me to believe they were intoxicated or under the influence of drugs.

When I was employed by Toro's Liquor Store the rules and regulations for serving the public and public safety was clearly explained to me. I understand it is my responsibility and the importance of obtaining the proper identification and observing customers who may be under the influence of drugs or alcohol and to refuse service. I also read and signed the manual for company policies as well as having my Serving It Right. The owners and my manager, have staff meetings and regular updates in the staff communications book. As employers they are very definite as to our responsibility to the public and our own safety as employees.

I believe that myself, management and all my co-workers do their diligence to the best of their ability at all times while on the job.

The night manager then identified a letter authored by herself dated September 1, 2010, the text of which is as follows:

“This is to state that I, [the night manager], have been employed at Toro’s Liquor Store for approximately two years. During my time of employment at Toro’s Liquor Store I have been responsible for training new staff, which includes outlining our due diligence as employees to refuse service to individuals who cannot provide the appropriate two pieces of government issued identification or appears to be intoxicated or under the influence of drugs. At Toro’s Liquor Store all our responsibilities to public safety are clearly outlined in our policy manual which all staff must read when employed, as well as Serving It Right certification. Since my employment at Toro’s we have had countless staff meetings and personal meetings with the owners and manager regarding our responsibilities to public safety and how to deal with intoxicated people.

On April 14, 2010, I was working the 4 to 11 p.m. shift at Toro’s and at no time do I believe I sold liquor to anyone whom would have been observed as being intoxicated or under the influence of drugs. During my time of employment at Toro’s I have turned away many customers who I had observed and believed to be intoxicated, as well as many people who could not provide the required two pieces of identification.

I take great pride and care in my job and responsibilities that the owner, Carlo Dagostini, and my manager [the Manager] have clearly entrusted me with.”

The night manager concluded her testimony by stating that she had turned away regulars on the basis that they were intoxicated on a weekly basis and stated further that, if the patron was intoxicated, she would not have served him.

Under cross-examination, the night manager stated that since turning 19 years of age, she had worked in restaurants for six years and upon attaining 20 years of age, she had worked in three liquor stores. She had trained the other cashier on duty on April 14, 2010, and she had recently trained another employee with regard to the issue of intoxicated patrons, and in the course of doing so, had reviewed all books and manuals including Toro's Manual. When requested to identify the physical signs of intoxication, she easily responded: swearing, staggering, glassy eyes, smell of alcohol, attitude, aggressive behaviour and fumbling with wallets. She agreed that although the turning down of service to intoxicated patrons occurred daily, such an event may not necessarily be placed in the incident log.

Submissions of the Branch:

The branch says that a contravention of Section 43(1) of the *Act*, which is specifically selling or giving liquor to an intoxicated person, is one of the more serious contraventions of the legislation. In order to succeed, there must, first, be evidence of an intoxicated person or a person apparently under the influence of liquor. The branch submits that the evidence of Constable 1 was candid and straightforward and, accordingly, it was clear that the patron was intoxicated and it should have been easily observed by anyone in the vicinity of this patron. There was the smell of liquor, staggering, there was confusion, blood-shot eyes and slurred speech. Also, the patron was later detained by the police and blew 190mg%, which is over double the legal limit.

Second, there was evidence that liquor was sold to this patron. In this regard, there was the evidence of Constable 1 who testified that she had dealt with hundreds of impaired drivers and noted how obvious this patron's signs of intoxication were to her.

The evidence disclosed that the night manager was the manager and was responsible for the proper operation of the establishment and was responsible for the actions of staff at all times. The branch submits that the night manager did not properly assess the patron's condition when she sold him liquor because, if she did, she should have clearly seen the signs of intoxication. It is submitted that the night manager became

complacent with the patron, as he was a regular and, therefore, she did not take any reasonable steps to prevent this contravention from occurring.

With respect to the defence of due diligence, the branch submits that a reasonable manager would have utilized different training materials for staff working in a licensed liquor store as opposed to those working in a liquor primary establishment. Transactions in a liquor retail store are much shorter than transactions in a liquor primary environment and, therefore, it would be more reasonable and responsible for a manager to teach staff in a liquor retail store to not only identify the signs of intoxication, but also teach staff in how to assess a person's level of intoxication.

In the branch's view, it would be quite reasonable for a cashier to engage in conversation with a patron to determine their levels of intoxication. In the instant case, the evidence is that the Night Manager spoke to the patron and still did not notice that he had liquor on his breath. Accordingly, the branch submits that the night manager was not properly trained in detecting a person's level of intoxication.

Item 9, Schedule 4 sets out the range of penalties for selling liquor to an intoxicated person and that range is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty. The branch has recommended a four (4) day licence suspension.

Submissions of the Licensee:

In determining this matter, I have taken into account the submissions of the licensee as set out in Mr. Dagostini's letter of October 1, 2010 (Exhibit No. 8 of these proceedings), his opening statement, and his submissions upon the conclusion of the evidence.

The licensee submits that it takes responsibility for its licence very seriously to ensure that individuals apparently under the influence of alcohol or drugs are not given or sold liquor. The licensee understands that the sale of liquor to an intoxicated person can lead to various public safety concerns and it also understands that this responsibility carries forward to each staff member and it is for this reason that the licensee ensures

that its employees are trained with effective techniques to prevent problems relating to the sale of alcohol to minors and intoxicated individuals.

The licensee makes reference to the employee manual which the licensee believes demonstrates the establishment's due diligence in training its staff and the policies that have been put in place for the protection of the public and the licensee's staff.

As a long-term business owner of the establishment, the licensee believes that it has always done its due diligence in the training of staff in accordance with the rules and regulations of the *Liquor Control and Licensing Act* of British Columbia. On a regular basis, each staff member is clearly made aware of their responsibility for implementing the policies in order to protect the public from potential harm.

In this particular instance, the licensee does not believe that its staff member, the night manager purposely or by ignorance, failed to acknowledge the signs of intoxication displayed by the patron during a face-to-face transaction. It was the night manager's opinion that the patron was not obviously intoxicated.

The licensee believes that it has done its due diligence. It points out that it has written policies regarding the checking for identification, the training of its staff on implementation of new policy, constant requests from the managers to the staff regarding intoxication. The licensee feels that the night manager did comply with those policies on this occasion.

ANALYSIS AND DECISION

Having reviewed and considered all of the evidence, both oral and documentary, I have, on a balance of probabilities, concluded that on April 14, 2010 at approximately 5:05 p.m., the licensee contravened Section 43(1) of the *Act*, by selling liquor to an intoxicated person.

In this case, there was a direct conflict in the crucial testimony of two key witnesses, those being Constable 1 and the night manager. Both of these witnesses were able to have a clear and proximate view of the allegedly intoxicated patron and both of whom gave diametrically opposed assessments of the patron's condition.

On the one hand, Constable 1, a seasoned police officer, who has handled over 1000 impaired driving cases, stated that the patron exhibited all of the classic signs of impairment and therefore concluded that the patron was intoxicated. On the other hand, the night manager testified that the patron exhibited none of the classic signs of intoxication, but explained that the patron, because of significant health issues, would always stagger, sometimes lean on the counter, and have a raspy voice. At the time in question, she could not fully understand him. The licensee led no corroborating evidence with respect to the patron having health issues mimicking the signs of intoxication.

I am convinced by the forthright manner in which they gave their respective testimony that both witnesses truly believed in the veracity of their accounts of the patron's condition.

As a result of the existence of other corroborating evidence, however, I am able to resolve this discrepancy in favour of the branch. That evidence is in the form of the results of the two breathalyser tests which were administered to the patron within approximately an hour and a half of the patron's departure from the licensee's premises. Those results determined that the patron's ability to operate a vehicle was impaired by alcohol with a reading of 190mg% - more than double the legal limit.

In my view, this evidence is clearly more consistent with Constable 1's version of events and her assessment of the patron's condition, than those of the night manager. Accordingly, it is on this basis that I find that the patron was intoxicated when he purchased liquor from the licensee at approximately 5:05 p.m. on April 14, 2010.

DUE DILIGENCE

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

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

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

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of **Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch** (2004) BCSC 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 36(2)(b), it must prove, on a balance of probabilities each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who are, in fact, responsible for that part of the licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities."

The court in **Plaza Cabaret** clarified that the directing mind need not be an officer or director of the licensee:

"It would be the individual or individuals, perhaps the general manager or shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee." (emphasis added)

At the time in question in this case, the night manager was one of only two employees who were working in the licensee's beer and wine store and, more importantly, it was she who actually served the patron. Given her own description of her duties, which included that of "Manager" and that she "handles all the ropes"; I am compelled to the conclusion that when the contravention occurred here she was the directing mind and will of the licensee. Consequently, the licensee, notwithstanding its otherwise well intentioned efforts to attain compliance by, amongst other things, publishing a comprehensive employee manual, a Section of which is dedicated to this very type of contravention, providing training and conducting staff meetings on a monthly basis, is not entitled to the benefit of the 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 have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time;
- cancel a liquor licence;
- impose terms and conditions to a licence or rescind or amend existing terms and conditions;
- impose a monetary penalty;
- order a licensee to transfer a licence.

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound by 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. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, the *Regulation*, and the terms and conditions of the licence. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well-being of the community.

There are no proven contraventions of the same type for this licensee within the year preceding this incident. Schedule 4, Item 9 of the *Regulation*, sets out penalties for first contraventions of these kinds (a licence suspension of four to seven days and/or a monetary penalty of \$5,000 to \$7,000 for breaches of Section 43(1) of the *Act*).

The branch has recommended a four day suspension of the licence for this particular contravention.

There can be no doubt but that contraventions of Section 43(1) of the *Act* are at the high end of the seriousness scale. An incident, such as that which occurred in the instant case, has the obvious potential to quickly produce grave consequences and, therefore, should be dealt with accordingly from a penalty perspective.

On the other hand, however, the licensee in this case has seven years without incident with respect to the operation of Toro's Liquor, Beer and Wine Store.

Furthermore, the licensee has developed and published to its employees an employee manual, a provision of which counsels' employees with respect to the very contravention which occurred here. The licensee also administers tests to the employees, has regular monthly meetings, and provides updates when operating policies are changed.

Taking into consideration all of the above, I am satisfied that no additional penalty beyond the four day minimum suspension recommended by the branch is necessary to bring the licensee in this case into compliance.

ORDER

Pursuant to Section 20 of the *Act*, I order a suspension of Licensee Retail Store Licence No. 195161 for the period of four (4) days, to commence at the close of business on Tuesday, April 19, 2011, 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. To ensure that this Order is effective, I direct that the liquor licence be held by the branch or the Vernon RCMP Detachment, from the close of business on Tuesday, April 19, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: May 20, 2011

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Peter Mior, Branch Advocate