



**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: Silver Dollar Cabaret Ltd.
dba Cactus Jack's Saloon
120 Fifth Avenue
Kamloops, BC V2C 5M8

Case: EH11-050

For the Licensee: Duncan White

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: George C.E. Fuller

Date of Hearing: December 6, 2011

Place of Hearing: Kamloops, BC

Date of Decision: March 28, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Cactus Jack's Saloon is a liquor primary establishment operating pursuant to Liquor primary licence 111831 and is located at 120, Fifth Avenue, Kamloops, B.C. The liquor licence is issued to Silver Dollar Cabaret Ltd. (the "Licensee"), and the third party operator is Cactus Jack's Cabaret Ltd. The licensed hours of sale are from 7:00 pm to 2:00 am, Monday through Saturday and from 7:00 pm to midnight on Sunday.

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

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated July 13, 2011.

The Branch alleges that on March 26, 2011, the Licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a fourteen (14) day licence suspension (item 11 of Schedule 4, Liquor Control and Licensing Regulation) (the "Regulation").

The Branch also alleges that on March 27, 2011, the Licensee contravened section 12 of the Act by selling liquor outside the hours permitted by the terms and conditions of the licence. The proposed penalty is a three (3) day licence suspension (Item 46 of Schedule 4 of the Regulation).

The Licensee disputes both contraventions. With regard to the alleged contravention of section 43(2)(b) of the Act, the Licensee says that the subject patron, referred to as Unidentified Male 1 (UM1), was not intoxicated at the date and time referred to in the NOEA. With regard to the alleged contravention of section 12 of the Act, the Licensee says that it has done a good job with regard to addressing the issue of intoxication and, accordingly, raises the defence of due diligence.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licences

- 12(1) The general manager, having regard for the public interest, may, on application, issue a license for the sale of liquor.
- 12(2) The general manager may, in respect of any license 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 license is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).

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.

ISSUES

1. Did the contraventions occur?
2. Was the Licensee duly diligent?
3. If the contraventions occurred and the Licensee was not duly diligent, are penalties warranted under the circumstances?
4. If penalties are 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 12.
- Exhibit 2 – the floor plan of the licenced premises
- Exhibit 3 - the Licensee's book of documents, Tabs 1 to 23.

EVIDENCE

I pause at this juncture to consider the assertion of the Licensee that the Branch is somehow restricted to relying on evidence of intoxication of UM1 only at the precise moment of 11:00 pm on March 26, 2011, and cannot rely on evidence of intoxication subsequent to that time. In my view, such a proposition is without merit. The better view is that the Branch is entitled to rely on any relevant evidence of intoxication throughout the window of its inspection and is not restricted to the finite snapshot of UM1's behaviour. It may be that such evidence is consistent with, and supportive of an allegation of intoxication, or it may not, but it should not be excluded. Furthermore, any evidence of intoxication of other patrons which was gathered by the Branch during an inspector's attendance at the Licensee's establishment is also admissible, as it may be relevant to the selection of an appropriate penalty, if any.

The fundamental test of admissibility is the relevance of the evidence and its reliability. Accordingly, I will now review the evidence put forward by the parties in these proceedings in order to determine whether, in fact, UM1 was intoxicated and permitted to remain on the Licensee's premises.

PERMIT AN INTOXICATED PERSON TO REMAIN

Evidence of the Branch

On the late evening of March 26, 2011, Inspector E and RCMP Constable M were conducting a covert inspection of the Licensee's establishment. They entered the premises at 10:31 p.m. and noted that the bar was not busy. They walked around the Licensee's bar for approximately half an hour and then stood at a stand up bar from which position they had a clear and unobstructed view of the activities taking place in the establishment. According to Constable M, at 11:03 p.m. a patron known as UM1 ran in front of them from the main bar to the bathroom and puked through his hands. In doing so, UM1 ran by three bouncers and three bartenders at the main bar on his way to the bathroom. At this time, the bar was empty and almost all staff would have had a clear view of him puking on the way to the bathroom. All three bouncers went to the bathroom to check on him.

At approximately 11:06 p.m. UM1 came out of the washroom and Constable M had a good look at him at that time. She testified that his hair was messed up, he looked disheveled, had a flushed face, and was struggling with his half open pant's zipper. Generally he looked quite intoxicated based on her observations and experience. She further stated that UM1 could still care for himself and, as an RCMP member, she would not have arrested him, nor would she have put him in the drunk tank.

A short while later at approximately 11:30 p.m., UM1 was observed dancing with his friends and trying to sing. His face was flushed to a point of brightness and he was swaying back and forth, using a railing to hold himself up. He then moved to a position next to Constable M and she observed him closing his eyes and then opening them, but only half way. UM1 was trying to text but was unsuccessful, as he appeared not to have any dexterity in his fingers. This caused serious concerns for Constable M.

UM1 left the main bar area at approximately 11:42 p.m. and returned to the main bar area at approximately 11:56 p.m. where he drank a shooter. At approximately 12:02 a.m. he was back on the dance floor where he was observed to be stumbling, appeared unfocused and had a glazed face. He walked by Constable M and stepped on her foot in plain view of a bouncer near the women's washroom. As a result of this encounter, Constable M considered him to be intoxicated, as he had an extremely flushed face and was stumbling, and appeared to be oblivious to his surroundings. At approximately 12:20 a.m., UM1 was again observed holding on to a railing, appeared disheveled, had a far away gaze and was drinking a short drink. He and his friends then moved to the middle of the dance floor where Constable M noted that he had an unfocused look and still looked quite intoxicated.

At approximately 1:17 a.m., UM1 still appeared to be intoxicated as indicated by his flushed face, his disheveled appearance, his messy hair and the fact that he was trying to sing only every third word of a song. Constable M continued to be concerned, and therefore, arranged for the RCMP to attend and check on him. The RCMP arrived and had a conversation with UM1, but did not remove him. At 2:00 a.m. the bar was still serving and UM1 and his friends were drinking shooters.

With regard to other patrons who were, allegedly, at different stages of intoxication on the evening in question, Constable M and Inspector E observed the following: at approximately 11:34 p.m. an unknown male (UM2) had his eyes rolling and couldn't control his body and was considered to be severely intoxicated. At approximately 11:35 p.m. another unknown male (UM3) put his arms around Constable M and

Inspector E and tried to talk to them. They could not understand him because his speech was so slurred. Based upon the extent of the slurred speech, it was considered that he was intoxicated. UM3 was also seen behind the bar hugging the bar staff. At approximately 12:33 a.m., an unidentified female (UF1) was walking with a group of people and a male was holding her up. Notwithstanding the fact that there was a clear path for her walk through, she was unable to walk a straight line. Her face was flushed, she was not steady on her feet and would have fallen over if it had not been for the assistance of the male, and he apologized for her. At approximately 12:38 a.m., another unidentified male (UM5) was dancing in an exaggerated fashion and hitting other people on the dance floor. He was shuffling his feet and was very unsteady. At approximately 12:27 a.m., one of the bouncers was seen to be on a walk through, which was the first time that Constable M and Inspector E has seen that occur on this evening. At approximately 12:56 a.m., another unidentified male (UM6) moved behind Constable M and kicked her twice in her leg. He had a far away gaze and when he tried to dance he stumbled backwards. He also had trouble getting off his stool and staggered when he did. His eyes were half closed and he was swaying. UM5 was beside Constable M and he appeared to be nuzzling into her neck. He spit as he spoke and he was oblivious to the fact that Constable M was moving away from him. UM5 would let go of the railing and try to regain his balance. He said to Constable M, "I scared them off". He did not appear to be aware of his surroundings. He was swinging his arms around and trying to dance with Constable M. Constable M tried to ignore him and he eventually went back to the dance floor, but on the way he hit the railing with considerable force. He was completely oblivious to his surroundings and was not acting in a normal fashion, by any means. After 2:00 a.m., UM6 was making his way out of the establishment and almost fell over. At approximately 2:12 a.m., UM5 was between the two bars and was holding on to a bouncer in order to steady himself. At 2:22 a.m., another unidentified female (UF2) had considerable trouble walking. One of the security doormen stopped her and escorted back to the bar and gave her a glass of water.

The evidence of Constable M and Inspector E was consistent in all material ways.

Evidence of the Licensee

The Licensee, on the other hand, says that the description of UM1's activities, at the time in question, as reported by Constable M and Inspector E, is wholly inaccurate when compared to the video version of those events and, consequently, the Branch's evidence does not support a finding that UM1 was intoxicated at 11:00 p.m. on March 26, 2011.

In particular, the Licensee says that the video evidence confirms that UM1 was not acting in a manner that drew attention to him; he was wearing a normal fitting shirt, not a black, skin tight T-shirt; he was walking to the washroom, not running; he was walking in a perfectly straight line, not swaying or staggering and was dressed in a fashion of most young males, which could be described as disheveled.

Furthermore, the video evidence shows the expected response of security doormen who are seen immediately following UM1 to the washroom. It also shows UM1's departure from the washroom with no visible lack of co-ordination, or purpose. The video also shows UM1 talking to his friends and acting in a less euphoric manner, likely due to the warning of security doormen.

In addition to the video evidence the Licensee referred to the statements of two security doormen who had noted UM1 on his way to the washroom. These statements are found at tabs 16 and 18 of the Licensee's Book of Documents. The two staff examined UM1, at close range, in the well-lit and relatively quiet washroom and determined that he was not, in their collective opinion, "overly intoxicated" to the point that he would require removal from the establishment. If his face was flushed it was probably due to the fact that he had just washed his face in the washroom. Asked by the security doormen if he was alright, UM1 replied that he had a shot that did not agree with him. The security doormen continued to watch UM1 for approximately ten minutes after this encounter, without further incident.

As further corroboration, the Licensee referred to the medical opinion of a physician dated November 13, 2011, which is found at tab 18 of the Licensee's Book of Documents. He is a fully qualified physician who has worked as an emergency physician for 10 years and as a general practitioner for 15 years. He has extensive experience treating patients in all stages of ethanol intoxication and has testified as an expert witness for the Crown with regard to ethanol toxicity.

The physician explains that his opinion was requested specifically in relation to UM1 at approximately 11:00 p.m. and that in providing his opinion he had referred to the video evidence and the NOEA. Accordingly, his observations were as follows:

..... at 22:54 of the tape I saw UM1 consume beer and shots rather quickly and then proceed away from the bar. UM1 appeared to be in complete control of his physical faculties. At 22:56 of the tape I saw UM1 walk across an open area of the bar, on the way to the bathroom, cupping his mouth. UM1 then proceeded over to the bathroom. His movements were direct, in complete control. His gait was steady. No visible incoordination or lack of purpose. He did not appear disoriented. He exited a short while later (22:58 of the tape), walking with an unhurried easy/steady gait, in a completely coordinated fashion. He appeared to check his fly." "...UM1, when he appeared to vomit in his hand, was in complete control of his motor system. It is unlikely the vomiting occurred on the basis of alcohol intoxication or he would more likely have been exhibiting other major motor indicia of intoxication.

....in the early video, at 22:54 to 22:58 being in complete motor control, UM1 would unlikely be beyond stage 2 "euphoria".

BREACH OF TERM AND CONDITION OF LICENCE

Evidence of the Branch

The descriptions of the scene at closing time by both Constable M and Inspector E were consistent. At 1:41 a.m. a last call was announced. A second last call was announced at 1:48 a.m. At 1:55 a.m. a third last call was announced and, finally, at 2:01 a.m. a final last call was announced. At 2:02 a.m., two beers were served at the main bar and at 2:05 a.m. two shots of Captain Morgan Rum were also poured and served. At 2:16 a.m. two females were at the bar requesting shooters to which the bartender responded "show me your boobs". The bartender then went to the back of the bar and poured two shooters of red liquid, and although their respective views were not clear, Constable M and Inspector E concluded that the "boobs for beer" contract was carried out.

Evidence of the Licensee

The Licensee called the Licensee's bar manager who has worked in nightclubs since 1989. He has been the bar manager of the establishment since 2006. Furthermore he was instrumental in the establishment of the Kamloops Bar Safe Program which commenced approximately five years ago. That organization is comprised of representatives of Licensees, the RCMP, the nightclub owners and the fire marshal. Its mandate is to address the concerns of the constituent group and the public regarding licensed premises operations.

His duties include monitoring 25 cameras, monitoring radios utilized within the premises and addressing service staff security. He makes sure that service is stopped at 2:00 a.m. and patrons are out of the premises by 2:30 am. He identified the house policies, found under tab 1, of Exhibit 3, pages one to ten thereof, with particular reference to directions to staff regarding intoxicated patrons found at page five and the closing procedures found at page nine. Staff are made aware of these policies by virtue of the fact that they are required to sign off agreeing that they have read and understood the policies and agree that they will carry out their duties in a manner

prescribed by the Licensee and that failure to do so could result in termination of employment. Exhibit 3 tab 2 is an example of such a sign off. The example given is the actual document executed by the offending bartender (the "OB") on duty at the time of this alleged contravention.

In addition, the Licensee carries out initial staff training with employees. They would then be monitored by the bar manager and also by a senior, existing staff member. The Licensee conducts staff meetings on a regular basis. A hiatus of between four to six weeks would be the maximum time between such meetings. These meetings would be utilized to review house policies in order to make sure that there would not be any misunderstandings. Prior to the March 26 incidents, the last meeting was February 22, 2011. The sign in sheet for that meeting, found at tab 3 of Exhibit 3, indicates that the OB attended that meeting. The agenda of the staff meeting held on February 22, 2011, also found at tab 3 of Exhibit 3, indicates that the topics included the following: house policies reviewed; Liquor Act rules; how to assess or remove intoxicated patrons; and lights on, no drinks.

The bar manager first heard of the covert operation and its results on March 28, 2011, and immediately reviewed the video regarding service of liquor after 2:00 am. He met with the OB and reviewed the House Policy of prohibiting liquor service after 2:00 a.m. and terminated the employee's employment forthwith. The OB's statement to the Licensee contains the following: Exhibit 3, tab 20.

1. During my employment with Cactus Jacks I was provided a copy of Cactus Jacks' house policies.
2. I read the house policies, understood them and signed an acknowledgement to that effect dated August 11, 2010.
3. The house policies were regularly reviewed and discussed at staff meetings, including the staff meeting of February 22, 2011, which I attended, and opportunities provided to get clarification of any questions I might have had.

4. I always clearly understood that Cactus Jacks' policy was that no liquor service should take place after 2 a.m.
5. Despite that understanding, on March 27th at approximately 2:14 a.m. I served four drinks to two patrons knowing full well it was against house policy.
6. At a subsequent meeting the Cactus Jacks' bar manager I acknowledged my violation of the policy despite my clear understanding of the house policies.
7. As a result, my employment with Cactus Jacks was terminated with cause due to the violation of house policies.

The Licensee's final witness was a security shift manager for the Licensee since 2006. He has also been a security shift manager, since 1998, with a casino. He was also a regional manager for a security and crowd management company from 2003 to 2007. He has taken gaming security officers training at the Justice Institute and has taken "use of force" training from that institution as well. He has taken courses in tactical communication training with the RCMP. He was instrumental in the instalment of the Treoscope technology, which was voluntarily done on the part of the Licensee. He has also developed a fire safety plan and has written and instituted a "violence in the workplace" policy for the Licensee.

The security manager has also established a two-way radio communication system within the club which allows employees to carry out their functions without moving and also allows the monitoring of the establishment's occupancy from more than one location. He was also instrumental in founding the Bar Flush program with the RCMP, whereby the Licensee agrees to have four security staff on the road directing traffic, in order to safely clear patrons at closing time. He has also established a nightly patrol for the purpose of viewing all sides of the club's operations. In addition, the Licensee operates a passenger van and bus in order to ensure that patrons get home safely.

He was also instrumental in introducing the Licensee's terms and conditions of employment which need to be signed off by staff and also introduced the comprehensive staff house policies document found under tab 1 of Exhibit 3.

As a result of the introduction of these and other measures the Licensee's establishment is the first bar in the province to be 100% compliant with the *Security Licensing Act*. The security manager also arranged a course conducted by the RCMP, which teaches staff how to escort non-compliant patrons out of the establishment. He has also introduced a series of security doormen meetings to be held at a minimum of once per month, or as required. He has also introduced an escorted patron's log, to be completed by staff with respect to any incidences at the establishment.

On the evening shift on March 26, 2011, all staff working had signed off on the house policies document. The lines of sight within the club were clear and all security doormen were tied in by communication. The communication system tied all positions into the bar manager, who was the security department's eyes and ears up in the security booth.

In support of its position that the Licensee operates in a duly diligent manner, the security manager identified an exchange of email correspondence, in November, 2010, between himself and a compliance and enforcement investigator with Security Programs and Police Technology Division of the Ministry of Public Safety and Solicitor General found at tab 12 of Exhibit 3 in these proceedings. In the initial email, the security manager was proactive, stating that he "would very much appreciate anything you could point out that might allow me to tighten up our systems procedures and operations. I have made a lot of changes over the past three years since taking over the security and bar operations at the club but am always open to making it more professional." In response, the compliance and enforcement investigator stated "I thought you guys had a very good handle on things, the movement of people in and out was excellent, and I saw nothing that need improvement on by any means."

SUBMISSIONS OF THE BRANCH

The Branch submits that, based on the observations of Constable M and Inspector E, not only UM1, but upwards of eight other patrons were exhibiting a number of indicia of intoxication on the night in question. Based on their observations and experience, they concluded that these patrons were intoxicated and a number of them were grossly intoxicated. The Branch further asserts that there is no evidence before me that contradicts the observations made by Constable M and Inspector E, and accordingly, their eye witness evidence should be preferred over that proffered by the Licensee.

The Branch also submits that I should be cautious in accepting the written statements of the two security doormen, as the Licensee could have called these two staff members to testify and provide viva voce evidence and be cross examined.

With regard to the written opinion of the physician, the Branch submits that I should prefer the evidence of Constable M and Inspector E, as the physician was not present in the establishment on March 26, 2011, and his observations of the video covered a short period of time. Accordingly the physician was unable to assess whether UM1 had glassy eyes and a flushed face, as was observed by Constable M and Inspector E.

With respect to the allegations that liquor was served to patrons past the liquor service hours, the Branch submits that this allegation has been made out based upon the evidence of Constable M and Inspector E as well as the inculpatory statement of the OB at tab 20 of Exhibit 3, acknowledging the service to patrons past the hours permitted by its licence.

For the alleged contravention of permitting an intoxicated person to remain, section 43(2)(b) of the *Act*, a suspension penalty of 14 days is proposed. This recommended suspension penalty falls within the penalty range set out in item 11, Schedule 4 of the *Regulation* for a second contravention of this type.

For contravening a term and condition of a licence, by selling liquor outside the hours permitted by the licence, section 12(3)(c) of the *Act*, a suspension of three days is proposed. This recommended suspension penalty falls within the penalty range set out in item 46, Schedule 4 of the *Regulation* for a first contravention of this type.

SUBMISSIONS OF THE LICENSEE

With respect to the first alleged contravention of permitting an intoxicated person to remain, the Licensee points out that the NOEA specifically states that the alleged contravention occurred at 11:00 p.m. on March 26, 2011. The only person referenced at 11:00 p.m. in the NOEA is the individual referred to as UM1.

The Licensee submits that it has proven that UM1 was not intoxicated at 11:00 p.m., through a combination of video evidence, which clearly shows that UM1 was not exhibiting any signs of intoxication at 11:00 p.m., as well as the statements of security doormen who, unlike, Constable M and Inspector E, interviewed UM1, at close range, in a well-lit and relatively quiet washroom and determined that UM1 was not intoxicated. Finally, there is the statement of the expert witness, the physician, whose medical opinion confirms UM1 was not intoxicated at 11:00 p.m.

With respect to the second alleged contravention of selling liquor outside the hours permitted by the licence, the Licensee submits that it has been duly diligent in carrying out its responsibilities under the terms and conditions of its licence, including with respect to ensuring that the selling of liquor does not occur outside the hours permitted by its licence.

In this regard, the Licensee has submitted the statement of the OB who confirms he was fully aware of the Licensee's written house policy that no service should occur after 2:00 a.m. and whose employment was therefore terminated. Furthermore, the Licensee relies on the testimony of the Licensee's bar manager and particularly the security manager, which indicates the extent to which the Licensee is diligent in carrying out its responsibilities under the terms and conditions of its licence.

ANALYSIS AND DECISION

Permitting an Intoxicated Person to Remain

I have now had an opportunity to review and consider all of the evidence, both oral and documentary, as well as the written submissions provided by the Licensee and the Branch. In particular, I have carefully reviewed the video concerning the behaviour of UM1 at 11:00 pm on March 26, 2011, as well as the opinion of the physician and the written statements of the two security doormen and reached the conclusion that, on a balance of probabilities, the patron designated as UM1 was not intoxicated at 11:00 p.m. on March 26, 2011. However, I am satisfied that, largely based upon the unchallenged evidence of Constable M and Inspector E, detailing the behaviour of UM1 after that time, I am satisfied that UM1 became intoxicated between approximately 11:00 pm and closing time, at approximately 2:00 a.m. March 27, 2011, and I so find.

Furthermore, I am of the view that the evidence is overwhelming in favour of a determination that the Licensee contravened the terms and conditions of its licence by selling liquor outside of the hours permitted by its license, and I so find. One need not look any further than the inculpatory, written statement of the OB, found at Exhibit 2, Tab 20, item five, wherein the OB states as follows:

"Despite that understanding [the prohibition against selling liquor after 2:00 am], on March 27th at approximately 2:14 I served four drinks to two patrons knowing full well it was against house policy"

DUE DILIGENCE

The Licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions 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** (1978) 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 s. 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. [para. 25]

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. [para. 27]

I will now turn to applying that two-pronged test to the facts of the instant case. The Licensee's most senior employee, the bar manager, was on duty at all material times relevant to this case, and, accordingly was the directing mind of the Licensee's establishment. He is the most senior employee of the Licensee and reports directly to the ownership group. No other employee that evening was capable of being designated as a directing mind of the Licensee.

With regard to the second leg of the test, the evidence of the bar manager and the security manager was instructive. To begin with, the Licensee has produced a comprehensive house policies publication which not only identifies certain problems but provides detailed instructions regarding how to solve the particular problem.

Furthermore, employees are required to acknowledge in writing that they have read and understood the contents of the document and further agree that failure to follow the same could result in termination of employment. It would appear that the Licensee does not simply pay lip service to this threat, as witnessed by the termination of the employment of the OB shortly after his contravention had come to light.

The Licensee also schedules regular staff meetings in order to clarify any issues that staff might have, the last of such meetings being on February 22, 2011. One of the topics discussed at that meeting was, how to assess or remove intoxicated patrons. The Licensee has also installed a state of the art communication system, which aids in the identification of problems and their resolution. In a similar vein, the Licensee was one of the first bars in the Province to voluntarily install the Treoscope system and is the first bar in British Columbia to be 100% compliant with the *Security Services Act*. The Licensee was also instrumental in working with the local RCMP in creating the Bar Safe Program as well as the Bar Flush Program, in an attempt to minimize any potential road hazards at closing time. I found the evidence of both the bar manager and the security manager to be forthright, genuine and credible in establishing the lengths to which the Licensee has gone in order to establish and maintain compliance with the Act and Regulations.

This is a very difficult case. On the one hand, is a Licensee who has gone to considerable lengths, both within its establishment and also within its community, to attempt to ensure compliance with the Act and the Regulations.

On the other hand, there is troubling evidence with respect to not only one patron who was intoxicated but upwards of eight others who were in varying states of intoxication. Furthermore, there was a blatant contravention of section 12 of the Act, where drinks were still been served well past the 2:00 am cut off time.

Taking into account all of the above, I have concluded that, on a balance of probabilities, although the Licensee has established procedures to identify and deal with problems, it has not ensured that those procedures are consistently acted upon.

Accordingly, I find that the Licensee in this case 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 Regulations and/or the terms and conditions of the licence, I may do one of 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

However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and 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 achieving voluntary compliance. 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 of public safety, and the well-being of the community. With respect to the contravention of section 43(2)(b) of the Act, there is one proven prior contravention of the same type for this Licensee within the year preceding this incident. I, therefore, find this to be a second contravention for the purposes of Schedule 4, in calculating a penalty.

There can be no doubt but that contraventions of both section 43(2)(b) and section 12 of the Act are at the high end of the seriousness scale, and must be responded to accordingly. The most disturbing aspect of the section 43(2)(b) contravention is the sheer number of participants who were indulging in the over consumption of alcohol, which could have led to a disastrous result. Similarly, the sale and consumption of alcohol outside of the hours permitted by a license can easily generate any number of social ills or criminal events.

On the other hand, this Licensee has made an honest attempt to deal with these matters, both within its establishment and within the community. In light of all of the above, therefore, I am of the view that a ten day license suspension for a contravention of section 43(2)(b) of the Act and a one day suspension for a contravention of section 12 of the Act, for a total suspension of eleven days, is reasonable and appropriate in the circumstances of this case and I so order.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence 111831 for a period of eleven (11) consecutive days, to commence at the close of business on Friday, April 27, 2012, and to continue each succeeding "Business Day" means a day on which the Licensee's establishment would normally be open for business (section 67 of the Regulation). To ensure that this Order is effective, I direct that the liquor license be held by the Branch, or the Kamloops RCMP detachment, from the close of business on Friday, April 27, 2012, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager showing that the license is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: April 19, 2012

Cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

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