



**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: Fort Chelsea Holdings Ltd.
dba Coachman Inn (Victoria)
229 Gorge Road East
Victoria, BC V9A 1L1

Case: EH11-138

For the Licensee: Miles Stanley

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: May 3 & 4, 2012

Place of Hearing: Victoria, BC

Date of Decision: May 28, 2012

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

The licensee, Fort Chelsea Holdings Ltd, operates the Coachman Inn (Victoria) located in Victoria, BC. The hotel has a licensed lounge known as the Upper Deck Sports Lounge (the Lounge), Liquor Primary Licence 120212, with liquor sales from 11:00 a.m. to 1:00 a.m. Monday to Saturday and to Midnight on Sunday. The lounge has a licensed capacity of 110 patrons in the main area and eight patrons on the patio. It is operated by a third party operator, 0847964 BC Ltd. which has been approved by the branch. Miles Stanley is the principal of 0847964 BC Ltd. and appeared as the licensee's representative during the course of the hearing. 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 CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated February 6, 2012. The branch alleges that on September 17, 2011, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

The contravention is being treated as a second under the penalty schedule and the proposed penalty is a 14 day licence suspension (item 11 of Schedule 4, *Liquor Control and Licensing Regulation*).

For a second contravention of this type, Item 11 provides a range of licence suspension penalties from 10 to 15 days.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 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.

(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 contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

Exhibit No. 1: Branch's book of documents, tabs 1 – 12.

Exhibit No. 2: Two page pamphlet, "Serving it Right".

Exhibit No. 3: Licensee's book of exhibits.

EVIDENCE – The Branch

The branch presented two liquor inspectors as witnesses, **A** and **B**. The inspectors testified that on September 17, 2011, they were acting in a covert capacity while inspecting licensed establishments in the Victoria area. In other words, they did not identify themselves as being liquor inspectors during the course of their inspections. They entered the Upper Deck Lounge of the Coachman Inn at approximately 9:20 p.m. and proceeded to separately walk through the lounge.

Inspector A testified that he has been a liquor inspector since February 2011 during which time he has conducted approximately 1200 inspections of licensed establishments. He has been an auxiliary police officer for approximately 10 years. He has considerable experience in identifying and dealing with intoxicated persons and is familiar with the branch policy and procedures related to intoxication.

Upon entering the lounge he walked past the front of the liquor service bar where he observed two male patrons standing, leaning on the bar, between the bar stools. One was wearing a white shirt (patron 1), the other, a blue ball cap (patron 2). Patron 1 fell backwards into the inspector. Patron 2 caught the patron, stopping him from falling over, and apologizing to the inspector. Patron 1 also apologized.

The inspector testified that both patrons were excessively loud and boisterous in their conversation. Patron 1's eyes were observed to be bloodshot, reddened and glassy, his eyelids heavy and droopy. His speech was slurred when apologizing to the inspector. Both smelled heavily of liquor. Questioned on this point by the licensee representative he responded that it was more than just the smell of liquor on the breath it was emanating from their pores.

The inspector took a seat at a table to the side of the bar with inspector B and continued his observations of the two patrons. Patron 1 was consuming beer from a glass; patron 2 was drinking beer from a bottle. Both appeared to be using the bar to steady themselves. They engaged in brief conversations with the bartender. Patron 1, in consuming his beer, was observed to bring his mouth part way to the glass rather than lifting the glass the full way to his mouth. Later the two patrons walked from the bar to the rear exit with a third patron, returning in 10 to 15 minutes. Both patrons 1 and 2 were staggering as they walked. Patron 1 fumbled for a cigarette from a package. They shortly returned to the bar and resumed drinking their beer. Patron 1 was observed to try and sit on a bar stool, but he fell back and was caught by patron 2. At one point patron 1 was observed to walk from the bar to the patio area, and he stumbled and tripped a little as he approached the patio.

He observed patron 1 leave the lounge and he followed him down the stairs to the street level. Two people assisted Patron 1 in going down the stairs by putting his arms over their shoulders. Outside the patron and a female companion waited for a taxi. He showed the inspector that he had one joint left for later at home. At one point the patron stepped back and stumbled into a flower garden. The inspector observed that the patron had red, bloodshot eyes, heavy eyelids, and his speech was slurred. He believed that the patron to be intoxicated.

The inspector testified that he also observed patron 2 in the lounge for approximately 1½ hours during which time he had bloodshot, reddened eyes, heavy eyelids, was loud and boisterous with slurred speech. He staggered when he walked but not as badly as patron 1. He believed patron 2 to be intoxicated.

Neither patron was asked to leave by the establishment's staff. They continued to be served beer which they consumed.

The inspector issued a contravention notice (exhibit 1, tab 2) and made a written request to the licensee for documents and a copy of the security video. The security video was not available but had been viewed by another inspector and was determined to be of too poor a quality to be useful (exhibit 1, tab 8b1). He subsequently prepared a NOEA with a recommendation for a 14 day liquor licence suspension. This was the second contravention for permitting an intoxicated person to remain in a licensed establishment. This licensee had served a previous four day suspension for the same contravention occurring on June 26, 2011, and had attended a compliance meeting on July 6, 2011. The inspector considered that a 14 day licence suspension penalty was necessary in these circumstances to ensure future voluntary compliance. The inspector was concerned that permitting an intoxicated person to remain in a licensed establishment is a serious public safety issue and can lead to harm to the intoxicated person or others.

Inspector B testified that she has been a liquor inspector for approximately two years during which time she has conducted more that 500 inspections of licensed establishments. She has attended a training course on intoxication given by a toxicology consultant for the branch and has had experience with intoxication as a liquor inspector. She is familiar with the physical and mental signs of intoxication as outlined in the branch publication, "A Guide for Liquor Licensees" (exhibit 1, tab 6, p 26).

Upon entering the lounge she made a walkthrough of the licensed area and met up with inspector A who advised her that a patron had fallen into him as he walked by. He wished to stay and observe the situation. She and inspector A took seats at a table along side of the bar. She observed patrons 1 and 2 at the bar drinking from a glass and bottle of beer respectively. After a short while she approached the bar to obtain some water from the bartender and engaged in a conversation with the two patrons. Patron 2 introduced himself and patron 1 to her. He said that they had been golfing and drinking all day and that patron 1 had had his best game ever and that he, patron 2 had played one-handed. He also introduced her to a third patron who he identified as a person who had helped him build his deck.

The inspector testified that she spoke with patrons 1 and 2 for about five minutes. Their speech was slurred, they smelled heavily of liquor. Patron 2 struggled to articulate his words to the point of over-exaggeration. He had red, glassy eyes. Patron 1's speech was mumbled when he spoke to patron 2. He had red eyes and droopy eyelids which he could barely keep open. He was very unsteady and at one point reached over to patron 2 pulling on him with the result that both of them almost fell backward.

The inspector returned to her table. A short time later she observed patrons 1 and 2 and a third patron walk past the table to a rear exit. They were very unsteady on their feet. Patron 1 tried to focus on getting a cigarette out of a package. They later returned to the bar area. Questioned by the licensee representative whether she felt that patron 1 would have been able to negotiate the outside stairs on his own, she replied that she didn't believe that he would be able to. Approximately five minutes later patron 1 walked to the patio, appearing to trip as he entered.

She later observed patron 1 being assisted by two persons at the top of the stairs. He was unable to make it down on his own.

She testified that from her observations of the two patrons she believed both to be intoxicated. She made notes of her and inspector A's observations during the course of the night on her iphone, later sending them to her office computer as an email (exhibit 1 tab 8a1).

EVIDENCE – THE LICENSEE

Witness C is the person identified as patron 2. He testified that he was not intoxicated at the lounge the night of September 17, 2011. He had participated in a Par 3 golf tournament earlier in the day following which he had a couple of beer and then went home for dinner. He went to the lounge at about 6:30 pm, drank approximately six beer and left around 11:00 p.m. He disagreed that he was slurring his words or staggering. He suffers from hay fever when golfing which would account for the red eyes. He tends

to speak loudly particularly when in a crowded room. Shortly after 10:00 p.m. he, accompanied by patron 1 and another friend left the lounge via the rear exit, went down the three flights of stairs and across the street where they smoked a joint of marijuana and returned to the lounge. None of them had any problem with the stairs. Patron 1 was assisted in leaving later in the night as his knee was bothering him. He had hurt it while golfing. He did not see patron 1 bump into anyone that night. He recalls speaking to inspector B at the bar. The conversation lasted less than a couple of minutes.

Witness D is the person identified as patron 1. He testified that he had played in a golf tournament on September 17, 2011. Whereas he normally plays only 9 holes of golf he played 18 holes that day and was subsequently tired. Following the tournament he went home, ate and then went to the lounge with his girlfriend at approximately 7:00 p.m. He drank four pints of beer while there, with an additional glass of beer at the end of the night. He does not recall falling into anyone at the bar, if it appeared that he had it may have been his leg giving out. He was not staggering around. He has a bad leg and after playing 18 holes of golf it may have looked like he was staggering.

Shortly after 10:00 p.m. he and two other patrons left the lounge, went down three or four flights of stairs, then down the hill and across the street to the park where they smoked a marijuana joint. He was tired at the end of the night and felt the effects of the marijuana. He knew that he was over the limit for driving and took a taxi home. His girlfriend and a friend assisted him down the stairs because his leg was hurting.

Witness E testified that she was with patron 1 the night of September 17, 2011. They arrived at the lounge between 7:00 pm and 7:30 p.m. that night. He was not drinking heavily for him, having four or five beer during the evening. She was not aware of him being intoxicated. Patron 2 consumed a few beers and was happy and talkative. Both have loud voices but no louder than others at the bar. Around 10:00 p.m. both patron 1 and 2 left the lounge to go across the street into the park to smoke a joint. This increased the effect of the alcohol consumption, and patron 1 became unsteady on his feet so they decided to go home. It took 45 minutes before they obtained a ride. They

had a couple of glasses of beer while waiting. He was unsteady and sometimes his knee gives way so they assisted him downstairs. She agreed that he was swaying and wobbling around while waiting outside.

Witness F testified that she was working the night of September 17, 2011. It was a busy night with a party in a downstairs licensed area and an unusually busy night in the lounge. She worked as a server in the lounge and assisted in running food orders. She does not recall seeing the two patrons in the establishment that night. They are regular patrons and it would be out of character for them to be staggering, and she would have noticed it. If it were to occur she would immediately notify the bartender/bar manager.

She has six years experience working in licensed establishments and holds a "Serving It Right" (SIR) certificate and a similar certificate from Ontario and is familiar with the signs of intoxication. She will cut patrons off from liquor service if the occasion requires it. The licensee has a "Serving it Right" pamphlet (exhibit 2) posted at the back of the premises. Staff meetings are held monthly whenever all staff can get together. She is not familiar with the branch publication, "A Guide for Licensees".

Witness G testified that he had been golfing with patrons 1 & 2 on September 17, 2011. He went home afterwards and received a call from patron 2 about 8:30 p.m. asking if he was going to the lounge. He arrived at the lounge shortly after 9:00 p.m. Both patrons 1 and 2 were standing at the bar drinking beer and talking about the golf game. Neither were staggering or slurring their words. Shortly after 10:00 p.m. the three of them left the lounge and went to the park to smoke a joint and returned to the lounge. He was unaware whether patron 1 was staggering. Patron 1 was getting tired and showing the effects of smoking marijuana. At about 10:53 p.m. patron 1 was tired and wanted to go home. He and witness E assisted him downstairs. When the taxi arrived he had a brief conversation with the male inspector who was standing outside, asking him if the taxi was his. The female inspector remained upstairs. He then returned upstairs to the lounge. Patron 2 shortly finished his beer and they left.

Witness H testified that he has been a bartender for 12 years, holds a SIR certificate and a similar certificate from Alberta. He was working as bartender/bar manager at the lounge the night of September 17, 2011. At that time he had been working at the lounge full time for approximately three weeks. He had been hired to replace a bartender on maternity leave and to improve the operation of the lounge which was having problems with regular patrons.

September 17th was a busier than normal Saturday night with a band performing in the lounge and two other functions in licensed areas downstairs. In addition to bartending/bar managing in the lounge he was checking on the downstairs functions and assisting with food orders. There was one server working in the lounge. The lounge manager (witness I) was away on vacation. Following the incident he was contacted by inspector A and requested to write up a report. He watched a video surveillance tape for the night and wrote up an incident report (exhibit 1, tab 10e).

He knows patrons 1 and 2 as regulars. They were in the lounge that evening, standing at the bar discussing their golf game earlier in the day. They seemed to be in good shape. He did not observe them to be staggering or he would have cut them off from further liquor service. He served patron 1 four to five pints of beer during the night, plus two glasses of beer at the end of the night while he was waiting for a ride. He was not concerned that either patrons 1 and 2 would be driving home. Their safety was not an issue. Patron 1 had wanted pints of beer at the end of the night but was restricted to glasses as his condition had deteriorated since returning from the patio. In hindsight he should have taken the last glass from him and dumped it out. He did his best at the time. He is not aware of what activities patrons engage in when they go outside of the premises unless it affects the safety inside. His job is to be concerned about what occurs inside.

He testified that he held a staff meeting after the liquor licence was suspended for the first contravention. He explained to staff what had occurred and what needed to be done in the future. If a judgment call was made to cut-off liquor service to a patron it was to be made sooner. Pre-shift meetings are held with staff and communications between staff on different shifts are undertaken to make staff aware what patrons have been drinking. The expectations of regular patrons have changed. They will depart for another bar if they are getting to the point where they may be cut-off at the lounge.

He testified that there have not been any further incidents since September 17th. Staff are well aware of the requirements and realize that the branch is serious; allowing intoxicated patrons in the lounge is not acceptable. They have used this enforcement hearing as a position for change.

Witness I testified that he is the principal of the third party operator of the lounge and holds a SIR certificate. The lounge had an earlier contravention for an intoxicated patron. Following notification by the branch, he viewed the security video of the earlier incident and accepted the penalty. An intoxicated patron had been served by the bartender. The bartender was fired and he hired the current bartender (witness H) who has 12 years experience and in whom he has confidence.

When notified of the September 17th allegation he viewed the security video. It depicts patrons 1 and 2 at the bar and patron 1 on the patio smoking a cigarette. Neither are staggering. He was unaware how to save the video at the time. A liquor inspector viewed the video. He did not know how to save it either but said that if the branch had need of it he would return with a technician. He did not hear further from the branch and so allowed the video to erase. The quality of the videos from the security system is good and they have been used by the police in the past.

He testified that he does not agree with inspector A's testimony that patron 1 fell into him. The space between the bar and a post and tables is only about four feet. With patrons 1 and 2 standing at the bar that would allow only two feet for anyone to pass behind and it is likely that they would be bumped because of the small space.

He testified that they do provide information to staff necessary to do their jobs and they hold staff meetings. Bulletins and notices, as depicted in the photographs at exhibit 3, are posted for staff to read as is the SIR pamphlet (exhibit 2). The Guide for Licensees is not reviewed with staff as there is much information in there that is not necessary for them. It is available in the office for staff to read. He does not have a training manual for staff but relies on the SIR training program and hires only experienced staff. They maintain an incident log and record any problems or information necessary for other staff (excerpts in exhibit 3). The number of staff is small, five to six employees. He works there as the day bartender and is often there seven days a week. He was not present the night of September 17, 2011.

Staff does cut-off liquor service to patrons when it is necessary to do so. Most patrons are regulars and have been coming to the lounge for years. The drinking habits of some are no longer allowed. They are making changes with those that are necessary. It is not always well accepted.

SUBMISSIONS – the Branch

The branch advocate's submission is summarized as follows:

Section 43(2)(b) of the Act prohibits a licensee from permitting an intoxicated person from remaining in a licensed establishment where liquor is sold or served. The elements constituting the contravention have been proven. The liquor inspectors observed two intoxicated patrons in the licensed area of the establishment for approximately 1 ½ hours. The licensee knew or ought to have known the intoxicated

condition of the two patrons as they were clearly visible to staff and had interacted with the bartender who continued to serve them liquor (beer).

For the licensee to be duly diligent, the licensee must do all that is reasonable to prevent the occurrence of the contravention. The licensee must provide adequate training for staff and have a system in place to prevent the contravention. The licensee must take reasonable steps to ensure that the system is effective. Here the licensee failed to implement adequate training and an adequate system to ensure that its policies were acted upon. Having signs is not sufficient if they are not acted upon. No written tests were administered to staff.

The licensee failed to provide adequate supervision for its employees. The licensee failed to provide the employees with adequate training for the mental and physical signs of intoxication. The licensee's defense of due diligence must fail.

The recommended 14 day licence suspension penalty is necessary to reinforce the need for voluntary compliance.

SUBMISSIONS – the Licensee

The licensee's submission is summarized as follows:

The integrity and experience of the liquor inspectors is in question. Inspector A is prone to exaggeration. He testified that in one year as a liquor inspector he has conducted in excess of 1200 inspections. This would require four inspections a day, seven days a week. He testified that patrons 1 and 2 were louder than other patrons at the bar whereas other testimony was that they were no louder than others at the bar. He testified that patron 1 fell into the flower bed outside. This is an exaggeration. He testified that liquor was coming out of the pores of patrons 1 and 2. This is an exaggeration.

Inspector B testified that she observed patron 1 outside downstairs waiting for a taxi, whereas inspector A testified that he went downstairs while B remained inside upstairs. Inspector B testified that patron 1 could not have negotiated the flights of stairs to go outside earlier in the evening whereas the evidence of patrons 1 and 2 and witness G was that they all negotiated the stairs.

The inspectors did not make separate notes of their observations. Inspector B made notes of both inspector A's as well as her own observations. The summary of evidence provided was made jointly by the inspectors, they collaborated on the events. Neither was as observant as he or she should have been as neither testified about the strong English accent of patron 1.

The symptoms displayed by patrons 1 and 2 were not signs of intoxication. Patron 1 is overweight and has a bad knee. Patron 2 has hay fever. Persons standing at a bar will lean upon the bar.

The bartender, witness H, served patron 1 at 10:30 p.m., about the time that the marijuana was having an effect. He noticed the patron's condition at 10:38 p.m. The patron was outside at 10:52 pm, thus the patron was cut-off and removed from the premises within 14 minutes. Patron 2 was not in as poor condition and there were no concerns about letting him remain inside.

They are aware of their responsibility for a patron's safety and do not serve a patron to the point of gross intoxication. There is no scientific measure for intoxication. The symptoms may be misconstrued. It is a judgment call on the part of each person. If staff observes a person to be intoxicated, they will not be served. If the inspectors were concerned about the condition of the patrons they should have advised staff on duty at the time.

The licensee was duly diligent. Experienced staff were hired and provided with information about their responsibilities and what was expected of them. The bartender had 12 years experience without a contravention. There is good communication among staff.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and the representative for the licensee.

Intoxication

The branch has presented evidence that during the evening hours of September 17, 2011, two liquor inspectors conducted a covert inspection of the licensed lounge area of the Coachman Inn in Victoria. The attention of inspector A was drawn to patrons 1 and 2 standing at the bar when patron 1 fell into the inspector as he passed by the bar area. The inspector observed signs of intoxication in the two patrons. Subsequently he and inspector B took seats in the lounge where they observed the patrons for approximately 1 ½ hours. During this time they observed signs of intoxication in the two patrons, namely slurred speech, reddened and glassy eyes, a strong odour of liquor, loud boisterous behaviour.

Patron 1 was noted to be staggering when walking, appearing to stumble at one point, was unsteady on his feet at the bar and was assisted in maintaining his balance by patron 2. He had heavy, droopy eyelids. He fumbled while getting a cigarette from its package. He was assisted in going down the stairs on leaving the premises. Outside he was swaying, was unsteady on his feet, and stumbled into a flower garden.

Both inspectors have experience in identifying intoxication. Both concluded that patrons 1 and 2 were intoxicated. The bartender at the lounge observed the patrons condition yet continued to serve them liquor (beer), making no effort to cut-off liquor service and have the patrons leave the premises as required by the Act.

The licensee has presented evidence that the two patrons were not overserved and had consumed only a moderate amount of liquor over several hours at the lounge that night. The symptoms exhibited by the two patrons were not due to intoxication but rather medical conditions, tiredness and the use of marijuana. These conditions increased during the course of the evening resulting in patron 1 having to be assisted in leaving the premises. The bartender, observing the deteriorating condition of patron 1, had essentially cut-off further liquor service. The patron left the premises within a short period of time.

I prefer the evidence of the liquor inspectors. Inspector B made notes of their observations during the course their inspection. I have no reason to doubt the integrity or veracity of the inspectors' evidence. They presented their evidence *viva voce* with every opportunity for challenge by the licensee representative.

The physical and mental signs of intoxication as described in the Guide provide a description of the symptoms, which without evidence to the contrary, provide evidence from which a state of intoxication in an individual may be concluded. These signs of intoxication have been provided to licensees by the branch. Here the patrons exhibited symptoms of intoxication. Some of those symptoms may have been exacerbated by medical conditions and by the tiredness of the patrons but I am satisfied are nonetheless symptomatic of the patrons' state of intoxication.

On the whole of the evidence, I find on a balance of probabilities that the two patrons observed by the inspectors during the evening hours of September 17, 2011, were intoxicated.

Due Diligence

The licensee is entitled to a defence 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, sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

[25] 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:

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. *If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.*

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely *whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons.* That inquiry requires, of course, consideration of *who, on the*

premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.

(My emphasis in italics)

The licensee does not have a training program for its employees. It relies on hiring employees with previous experience who have completed SIR training. There is no training or procedures manual which an employee could refer to. There are some bulletins posted for staff perusal.

Section 43 of the Act requires that a licensee must not sell or give liquor to an intoxicated person, must not permit a person to become intoxicated or permit an intoxicated person to remain in a licensed establishment. To meet these requirements a licensee must monitor the condition of patrons on a continuing basis.

Here, we had an inspection by two liquor inspectors during the course of which their attention was drawn to the behaviour of two patrons. The behaviour raised concerns that the patrons may be intoxicated. Observations by the inspectors for a period of 1 ½ hours confirmed their concerns. At the time of the inspection, the licensee representative was not present and establishment was being operated by two employees, a server and a bartender who also acted as the bar manager when the licensee representative was not present. It was a busy night. Both, in addition to their duties in the lounge, were engaged in other duties as well. Neither of the employees took any action to deal with the patrons. The bartender/bar manager was also overseeing activities in two other licensed areas. He was, in the strict legal sense, the directing mind of the licensee.

On the whole of the evidence, I find that the employees either failed to monitor the patrons to a sufficient degree to meet the requirements of the legislation or failed to recognize the intoxicated condition of the patrons.

Through the previous contravention process and compliance meeting held with the liquor inspector, the licensee was well aware of the branch's concern regarding the intoxication of patrons found within the establishment. It is apparent from the evidence that some portion of the regular clientele of this establishment, left to their own decision processes, will consume to the point of intoxication. The licensee and its staff, knowing of this situation, must be particularly vigilant. Here, two intoxicated patrons were not identified as such by the staff on duty and were permitted to remain in the establishment.

Giving consideration to the evidence as a whole, I find that the licensee's system was not sufficient to reasonably ensure compliance with the law relating to the prohibition of permitting intoxicated patrons to remain in the licensed area of the lounge.

In conclusion, I find that the licensee is not entitled to the benefit of the defence of due diligence.

In conclusion, I find on a balance of probabilities that on September 17, 2011, the licensee contravened section 43(1)(b) of the *Liquor Control & 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.

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 or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. 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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include: whether there is a proven compliance history, a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

This is the second contravention of the same type for this licensee for this licence within the 12 months preceding this contravention. I therefore find this to be a second contravention for the purposes of Schedule 4 and calculating a penalty.

Permitting intoxicated persons to remain in a licensed establishment can have a deleterious effect within the licensed establishment and within the community at large. All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions, and the seriousness of the contravention, I find that a penalty is necessary to ensure future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulations provides a range of penalties for a first contravention of this type. The branch has proposed a 14 day suspension as the contravention occurred shortly following the first contravention and a subsequent compliance meeting. In the circumstances here I find that the recommended fourteen day license suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 120212 for a period of fourteen (14) days, to commence as of the close of business on Friday, June 29, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Victoria Police Department from the close of business on Friday, June 29, 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 a license suspension penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 28, 2012

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate