



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*

Licenses:	Nancy Lydia Manuck and Shayne Vincent –Ray Manuck dba Brothers Bowling and Billiards #13-33550 South Fraser Way Abbotsford, BC, V2S 5G7
Cases:	EH16-064 & EH16-079
For the Licensees:	Nancy Lydia Manuck and Shayne Vincent –Ray Manuck
For the Branch:	Hugh Trenchard
General Manager's Delegate:	R. John Rogers
Date of Hearing:	January 10, 2017
Date of Decision:	February 9, 2017

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

The Licensees hold Liquor Primary Licence number 306786 (the "Licence"), pursuant to which they operate Brothers Bowling and Billiards at #13-33550 South Fraser Way, Abbotsford, B.C., V2S 5G7 (the "Establishment").

According to the terms of the Licence, the Licensees may sell liquor from 11:00 a.m. to 1:30 a.m. Monday through Sunday.

The Licence is, as are all liquor licences issued in the Province of British Columbia, 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 penalties are set out in the Notices of Enforcement Action dated July 4, 2016 (the "First NOEA") (Exhibit 1 tab 1) and July 15, 2016 (the "Second NOEA") (Exhibit 1 tab 3), respectively.

In the First NOEA, the Branch alleges that on May 28, 2016, the Licensees contravened section 42(4) of *Liquor Control and Licensing Regulation* (the "Regulation") made pursuant to the *Liquor Control and Licensing Act* R.S.B.C. 1996, c.267 (the "Act"), by allowing liquor to be removed from the Establishment. Item 29, Schedule 4 of the Regulation sets out the range of penalties for a first contravention of this type: a 1 to 3 day licence suspension and/or a \$1,000 to \$3,000 monetary penalty. The Branch proposes a monetary penalty of \$2,000 and that the following be added to the Licence as a term and condition of the Licence:

Must have fully operational, recordable video surveillance of front entrance way, interior and exterior. Additionally the monitor must be visible at all times and located where staff can easily view it

In the Second NOEA, the Branch alleges that the Licensees contravened section 73(2) of the Act by failing without a reasonable explanation to respond by the required date of June 10, 2016 to the Notice to Provide Records addressed to the Licensees and dated May 31, 2016 (the "Notice to Provide Records") (Exhibit 1 tab 15). Item 31, Schedule 4 of the Regulation sets out the range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty. The Branch proposes a suspension of 10 days.

Between the date of this hearing and the issuance of this decision, the Act and the Regulation have been replaced by the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 and the regulations made thereunder. However, as the allegations contained in the First NOEA and the Second NOEA and as this hearing occurred prior the coming into force of this new legislation, this decision has been made pursuant to and in accordance with the provisions of the Act and the Regulation.

Pursuant to Section 6.1 of the Act, the General Manager delegated to me with respect to the matters referenced in the First NOEA and the Second NOEA the powers, duties and functions provided to the General Manager by section 20 of the Act and sections 65-69 of the Regulation.

## **RELEVANT STATUTORY PROVISIONS**

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

#### **Power to retain documents and inspect books and premises**

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

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

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

#### **Consumption of liquor in licensed establishments**

42 (4) Subject to subsection (4.1), all liquor sold or served in a licensed establishment, other than liquor sold by charitable auction, must be consumed in

the licensed establishment, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

- (a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;
  - (b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence;
  - (c) liquor that is brought for sale, or sold by charitable auction.
- (4.1) Liquor sold or served by a licensee in a licensed establishment may be taken to and consumed in an adjoining licensed establishment that is licensed to the same licensee.

#### Schedule 4 Enforcement Actions

##### Liquor Service

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
29	A breach of section 42(4) of this regulation by permitting liquor sold in the licensed establishment to be taken from the establishment	1-3	3-6	6-9	\$1 000 - \$3 000

##### Production of Records

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

## ISSUES

1. Did the contraventions occur?
2. If so, have the Licensees established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

## EXHIBITS

Exhibit 1: Branch book of documents, tabs 1 to 24.

## WITNESSES

The Branch called two witnesses:

1. Liquor Inspector A ("Inspector A"); and
2. Liquor Inspector B ("Inspector B").

The Licensees called no witnesses, but gave evidence directly.

## EVIDENCE – BRANCH

### The First NOEA

In the First NOEA, the Branch alleges that at approximately 9:15 pm on Saturday, May 28, 2016 while Inspector A and Inspector B (the "Inspectors") were conducting routine inspections in the Abbotsford area, they drove into the parking lot of the Establishment and observed two females exiting the Establishment through the main entrance. When the Inspectors approached these females they noted that in her hand one of them had an amber bottle with a silver and blue label on it, a label usually identified with a name brand beer. The Inspectors also noted that this female was wearing bowling shoes.

Inspector B asked the female holding the beer bottle if they served beer inside the Establishment and she replied "Yup, sure do, and you can bowl too".

The Inspectors entered the Establishment through the main entrance and proceeded to conduct a walk through, checking all the bowling lanes, the billiards area, and the

seating area, and ending up back at the main entrance where they observed both of these females still standing outside the Establishment. The female to whom Inspector B had spoken still had the beer bottle in her hand.

Inspector A then spoke to one of the Licensees and advised her that it appeared that liquor had been removed from the Establishment and that a Contravention Notice would be forthcoming. The party to whom Inspector A spoke advised Inspector A that the Licensees did not have security that evening, but that members of their staff had just walked about the exterior of the Establishment and had not found anyone outside with liquor. Therefore, the party whom the Inspectors had observed could not have been one of the patrons of the Establishment.

Prior to leaving the Establishment, the Inspectors pointed out to one of the Licensees that the two females whom they had previously observed outside had now entered the Establishment and were standing in the area of the first bowling lane with a group of other people

On June 2, 2016 CN#005436 (Exhibit 1 tab 2) (the "First Contravention Notice") was delivered by a liquor inspector other than one of the Inspectors to the Licensees together with the Notice to Provide Records. The Notice to Provide Records required production of the following records:

- Video footage from May 28, 2016 between the hours of 8:30 pm and 10:00 pm showing the main entrance of the establishment and the bowling lanes.
- Liquor receipts for the large party that rented the first bowling lane nearest the front entry for May 28, 2016 in relation to this enforcement issue.

### **The Second NOEA**

In the Second NOEA the Branch alleges that on May 31, 2016, Inspector A sent a copy of the Notice to Provide Records by email to the Establishment. The Notice to Provide Records specified that the records required were to be produced by the Licensees no later than 4:30 pm on June 10, 2016. The Notice to Provide Records also on its face set out the penalties imposed should the Licensees fail to respond within the time required.

On June 9, 2016, Inspector A received an email from one of the Licensees which stated that the video system was being worked on and that the Licensees could not figure out why it was not fully recording. In this email response, there was no reference to the required sales receipts.

Inspector A responded to this June 9, 2016 email, reminded the Licensees that the video footage was due the following day by 4:30 pm, and stated that if the Licensees could not produce the requested video footage by that time that they would need to provide a detailed response in writing as to why it was not available.

By way of an email to one of the Licensees dated June 15, 2016, Inspector A advised that as she had received no response to the Notice to Provide Records, a contravention notice would be issued. Consequently, on June 20, 2016, Inspector A issued Contravention Notice #B011882 (Exhibit 1 tab 4) (the "Second Contravention Notice") against the Licensees and mailed a copy of the same to the Licensees.

### **Inspector A**

In her testimony, Inspector A:

- Stated that as a liquor inspector working for the Branch her responsibility was for the geographic area which included Pitt Meadows, Maple Ridge and Abbotsford, and that, therefore, the Establishment was within her area of responsibility;
- Identified the First NOEA, the First Contravention Notice, the Second NOEA, the Second Contravention Notice, and the Notice to Provide Records and confirmed that she had authored all of these documents;
- Confirmed that the facts contained in the First NOEA and Second NOEA were correct and testified that:
  - when she observed the woman holding the bottle of beer at the entrance to the Establishment, she believed that the bottle did not have a cap on it. However, as the woman's hand was covering the label on the beer bottle, she could not see whether or not the beer bottle had any liquid in it;
  - when she saw that the two women who had been standing outside the main entrance door had re-entered the Establishment, she noted that the woman who had previously held the beer bottle was now not holding it;

- after the two women had re-entered the Establishment, they rejoined a group of about ten people, and the liquor receipts sought in the Notice to Provide Records was for liquor purchased by this group of people; and
- she could not recall whether or not there were beer bottles on the table around which this group of people had gathered;
- Testified that the terms and conditions of the Licence include the terms and conditions of the Guide, that the Licensees are required to be aware of the provisions of the Guide, and pointed to the Guide at page 20 which states:

#### Where customers may consume liquor

Customers may not bring their own bottles of liquor to consume in your establishment, and you may only sell and serve liquor in the licensed area of your establishment (commonly referred to as the “red-lined area” of your floor plans).

You may not permit customers to consume liquor outside of the red-lined area, or to take liquor from the red-lined area to other parts of your establishment, .....

- Identified the report of a compliance meeting held on March 22, 2016 (Ex 1 tab 9) at which the Licensees and another member of their family were present and testified:
  - that she had called this compliance meeting as a result of the issuance within the first two weeks of March of two contravention notices dealing with the removal of liquor from the licensed area in the Establishment;
  - that at this compliance meeting she had discussed the provisions of s. 42(4) of the Regulation and the penalties to which the Licensees would be subject if they were found to be in breach of this provision;
  - that at this meeting, the Licensees confirmed that they had a problem with people consuming liquor in their cars while parked in the Establishment’s parking lot; and
  - that the Licensees at the end of the meeting had committed to:
    - conduct staff meetings to discuss staff responsibilities with respect to the provisions of s. 42(4);
    - provide additional video monitoring of the front of the Establishment and to place a monitor elsewhere in the

- Establishment so that staff could better monitor the main entrance of the Establishment; and
- on busier nights increase the patrols of the Establishment's parking lot and bring in a security guard to monitor the front entrance of the Establishment;
- Confirmed that when she was at the Establishment on May 28, 2016 it was not busy so that she would not have expected a security guard to be at the front door of the Establishment; and
  - Identified copies of a string of emails between her and one of the Licensees starting with an email on May 30, 2016 and with the last email dated July 22, 2016 (Ex1 tabs 13, 14, 16,17, 18, 19 and 21), which emails Inspector A noted that:
    - the email of May 30, 2016, being the first working day after the incident on May 28, 2016, constituted advanced notice to the Licensees that as the Notice to Provide Records was being issued, the Licensees should preserve the video footage from the night of May 28, 2016;
    - the email of May 31, 2016 provided to the Licensees an electronic copy of the Notice to Provide Records;
    - although the email from one of the Licensees dated June 9, 2016 made reference to video footage it was to the effect that one of the Licensees was working on the CCTV system, and there was no reference to the receipts referenced in the Notice to Provide Records;
    - her email of June 9, 2016 responding to the aforementioned email of the same date from one of the Licensees, Inspector A stated in bold print "if you are unable to provide the video footage as required by my Notice to Provide Records, you will need to put the reasons in writing to my attention";
    - the email of June 15, 2016 which advised that Inspector A had stopped by the Establishment the day before at about 4 pm, but as the door was locked, she was not able to discuss the matter with the Licensees and so she had to issue the Second Contravention Notice; and
    - the email of June 16, 2016 from one of the Licensees was the first response from them with respect to the receipts referenced in the Notice to Provide Records.

## **Inspector B**

In his testimony, Inspector B stated that:

- His responsibility was for the geographic area which included Langley and the Southern part of White Rock, but that he had jurisdiction in the Abbotsford area, as well;
- On May 28, 2016, he was a passenger in a vehicle driven by Inspector A, and as they drove into the parking lot of the Establishment he had a clear and unobstructed view to observe two females leaving the Establishment by the front door. He noted that one of these females had a cigarette in her hand and the other had a beer bottle in her hand;
- When he and Inspector A had parked the vehicle and walked up to these two females who were standing two to three feet outside the front door of the Establishment on the sidewalk, he recognized the uncapped bottle held by one of the females to be a name brand bottle of beer;
- He said to the females "Oh you can buy beer in there?" and the female holding the beer bottle lifted it up and said "Yes, and you can bowl too";
- After speaking with the females, he and Inspector A entered the Establishment and did a walk completely around its interior circumference for a period of five to seven minutes, and, during this time, although he did not notice their reentry, by the time he had completed this walk around, he noticed that these females had returned inside the Establishment;
- There was nothing to indicate that the beer bottle had come from inside the Establishment; and
- The Establishment was not busy when he and Inspector A were there, but he could not say for sure that he saw other beer bottles on tables in the Establishment.

On cross examination, Inspector B testified that he did not examine the contents of the bottle of beer held by one of the females and confirmed that the bottle might have been empty.

## **EVIDENCE—LICENSEES**

In their testimony, the Licensees denied having served the female who was observed by the Inspectors to have had a bottle of beer in her hand. The group of women of which this female was a part was drinking wine and hard liquor and was not drinking beer. This was confirmed by the fact that there were no beer bottles at the table this group occupied.

When this female was made aware of the presence of the Inspectors by one of the Licensees she stated that when she went outside the Establishment to have a cigarette, she had gone to her car and had gotten the beer there. She said that she would write a letter to Inspector A to that effect and that Inspector A should be given this woman's cell phone number so that Inspector A could confirm with her what had happened.

The Licensees testified that people came to the Establishment to bowl or play billiards and as they didn't want to spend the money in the Establishment to purchase liquor, they went out to their car to drink. The Licensees stated that they didn't have the ability to prevent people from drinking in the parking lot. Normally, they testified, they would have had a security person on the main door of the Establishment, but on the night of May 28, 2016, because it was so quiet, the Licensees had instructed their security guard to go home as she was not feeling well.

Following the compliance meeting held with Inspector A on March 22, 2016, the Licensees did install new monitors and cameras. However, the camera situated at the front entrance of the Establishment had somehow been broken a day or two prior to May 28, 2016, so that there was no recorded video footage of that area for the night of the incident to provide to Inspector A as required by the Notice to Provide Records. The Licensees testified that they only became aware that this camera was missing when they went to look for the video footage as required by the Notice to Provide Records.

With respect to the requested receipts, the Licensees testified that they had asked the Establishment's point of sale vendor, Squirrel, to assist them in obtaining copies of the receipts. As Squirrel had not responded, the Licensees didn't have the required copies

of the receipts. It is their position that the email of June 9, 2016 to Inspector A explains this to Inspector A.

With respect to their failure to communicate with Inspector A, the Licensees testified that following the incident on May 28, 2016 it had been a very stressful time for them. Their business was poor, they were dealing with electrical issues at the Establishment, and they had not intended to neglect their obligation to communicate with Inspector A concerning the Notice to Provide Records.

On cross examination the Licensees confirmed that:

- they were working the night of May 28, 2016;
- they do serve the brand of beer which comes in the bottle held by the female observed by the Inspectors, but that they didn't serve this beer to this female;
- at the time of the incident, the Establishment was almost empty apart from a group of about 10 women at one bowling lane. One of the Licensees served these women only wine and hard liquor, but not beer. Many of these patrons had separate bills;
- They do not know how to access the Establishment's POS system and obtain copies of receipts and it is for that reason that they called Squirrel who never responded back to them;
- The Licensees believe that the woman got the bottle of beer from her car as she was not served beer by the Licensees;
- The Licensees acknowledged that they have a problem with people bringing liquor into the Establishment purchased elsewhere or drinking liquor in the parking lot rather than purchasing liquor from the Licensees;
- The obligation to have security is only on busy nights. This was not a busy night;
- Following May 28, 2016 there is now a new camera outside the building with a wide angle view with night vision and covered by a cage. This camera wasn't there on the night of the incident;
- One of the Licensees told Inspector A verbally that the cameras weren't working and about the problem with the Squirrel folks and that therefore she thought that she had complied with the Notice to Provide Records;
- The Licensees are the policy makers, they have a full book of policies, they have fully certified security staff, they hire trained servers, they have an incident book

in which all incidents are recorded, but they didn't bring these with them to the hearing;

- The Licensees have a toolbox meeting of their staff every week and discussed the incident of May 28, 2016 after it had happened; and
- The Licensees testified that they had lots of signage in the Establishment stating that no liquor was to come in or out of the Establishment and, since the incident on May 28, 2016, they have posted a new sign which states that if a patron takes liquor from the Establishment, the patron could be fined \$250.

## **SUBMISSIONS – BRANCH**

With respect to the contravention referenced in the First NOEA, the Branch submitted that the elements of the contravention had been made out and that the evidence demonstrated that the Licensees had permitted liquor to be removed from the Establishment. The fact that one of the females was wearing bowling shoes suggested that she was in the middle of a game and that it's more than likely that she would have purchased the liquor while she was inside the Establishment, that she had then exited for a short period, and that she had then returned inside the Establishment to resume her game.

It was a reasonable question, the Branch submitted, as to whether or not the beer bottle was full, but it would appear to have had some liquor in it and not have been completely empty.

The Branch submitted that there is evidence that the Establishment does sell that kind of beer, and this suggests that the Establishment is the more likely place from whence the beer came.

The recommended penalty is in the middle of the range and the Branch submitted that Inspector A pointed to the compliance meeting as one of the rationales for choosing a median penalty as there had been discussions at this compliance meeting about the issues of bringing liquor in and out of the Establishment. It appears from the evidence of the Inspectors that this problem had not been entirely addressed so the middle penalty was recommended.

The additional term and condition was reasonable, the Branch submitted, in order to promote compliance and to help ensure that the monitors are reviewed regularly so that staff can be certain that liquor is not brought out of the Establishment.

In terms of the second alleged contravention, the elements of this have been made out, the Branch submits, in that Inspector A communicated with the Licensees on three occasions referencing the demand for the records and noting the requirement for a written explanation as to why the records were not being produced. The evidence of Inspector A was that what response the Licensees did make was not communicated to her sufficiently clearly for her to be satisfied that the records were not available and could not have been provided.

In terms of the timing, there was a reasonable amount of time provided by Inspector A between the time she asked for the records and the deadline she gave for providing them.

With respect to the question of due diligence, the Branch submitted that one of the Licensees was the directing mind on site and was directly involved with the event on May 28, 2016. In any event, the Branch submitted, there is no evidence presented by the Licensees to satisfy a proper defence of due diligence.

## **SUBMISSIONS – LICENSEES**

The Licensees submitted that the evidence does not establish where the beer bottle held by the female in question came from. Nor does the evidence establish that there was indeed beer in the bottle. As well, the Licensees noted that the evidence was that there were no beer bottles on the table occupied by the group the two females joined in the Establishment. This fact confirmed the Licensees' evidence that they did not serve this female the beer that she had in her possession outside the Establishment.

With respect to the Notice to Provide Records, the Licensees submitted that they were under the impression that they had verbally advised Inspector A of what had happened and why the requested records had not been produced. They acknowledged that they should have responded to the emails in a better and more timely manner. However, at

the time that this was going on, the Licensees were concerned that they were going to lose their business.

## REASONS AND DECISION

### **Contravention**

#### The First NOEA

For a finding that the Licensees are liable for the contravention alleged in the First NOEA, the Branch must prove on a balance of probabilities that the Licensees breached the provisions of s. 42(4) of the Regulation which mandates that the Licensees “must not allow liquor” to leave the licensed area of the Establishment.

The Act defines “liquor” in s. 1 as follows:

“liquor” means, subject to the regulations, beer, cider, wine, or spirits, or another product intended for human consumption, that contains more than 1% alcohol by volume

It is to be noted that this definition does not include the containers in which liquor is contained, such as beer bottles or wine bottles.

It was acknowledged by the Inspectors in their testimony that as the female wearing the bowling shoes outside the Establishment who was holding the beer bottle in her hand was largely covering the beer bottle with her hand, that they were unable to state with certainty that the beer bottle she was holding contained any liquid. Further, the Branch in its submissions acknowledged that there was no evidence before me that the beer bottle which was held by this female did indeed contain liquor.

Nor was there evidence before me of a witness having seen the female in question drinking from the bottle of beer she held in her hand.

In their evidence, the Licensees acknowledged that they had had difficulty with patrons going out to their vehicles in the parking lot and consuming alcohol rather than purchasing the same from the Licensees within the Establishment.

Also in their evidence, the Licensees were adamant that they did not serve beer to this female, pointing both to the fact that this female was part of a group of women who were only drinking wine and hard liquor on the night of the incident and to the fact that the evidence was that there were no beer bottles on the table occupied by this group.

Finally, I have the hearsay evidence from the Licensees that the female in question stated that she had not purchased the beer from the Licensees, but that she had gone to her car to acquire the beer and that she would be willing to confirm this fact to Inspector A.

In fairness to Inspector A and the Branch, when Inspector A sought copies of the bar receipts for the group joined by the female holding the beer bottle, Inspector A was not provided them by the Licensees. Similarly, when Inspector A sought video footage providing visual evidence of the movements of the female with the beer bottle in and out of the Establishment, this, as well, was not forthcoming. The Branch was, therefore, left to proceed on the basis that the evidence provided a reasonable inference that the beer bottle indeed did hold liquor, and that this beer bottle containing liquor had been purchased by this female from the Licensees before being carried by her outside the Establishment where she was seen by the Inspectors.

In some situations, a reasonable inference can be drawn from the evidence to meet the Branch's obligation to prove a contravention on a balance of probabilities. However, I do not find that to be the case here. I find that there are too many missing factors to the evidence presented by the Branch for it to meet its onus and to prove that the alleged contravention occurred.

I therefore find that the Licensees are not liable for the contravention alleged in the First NOEA.

### The Second NOEA

To find the Licensees liable for the contravention alleged in the Second NOEA, the Branch must prove on a balance of probabilities that the Licensees were in breach of the

provisions of s. 73(2)(a) of the Act in that they failed to “promptly produce and submit for inspection” the receipts and the video footage as requested by the Notice to Provide Records.

Again, the wording of this section is to be noted in that it uses the word “promptly”.

A finding of liability under this section requires two factors. The first is that the Licensees were aware of the Notice to Provide Records. And the second is that being aware of the existence of the Notice to Provide Records that the Licensees failed to provide the required records in a “prompt” manner.

In the matter at hand, the evidence is that the Notice to Provide Records was delivered to the Establishment on June 2, 2016 by an inspector working for the Branch other than the Inspectors. This inspector was not present to give evidence at the hearing. Nor was there any proof before me in the form of a signed receipt to confirm that the Licensees did indeed receive the Notice to Provide Records.

However, there was ample evidence before me in other forms that the Licensees were aware of the issuance of the Notice to Provide Records. Firstly, there was an extensive email string which referenced the Notice to Provide Records and the records the Branch required to be produced. And this email string was two way in that it included responses from one of the Licensees acknowledging, albeit indirectly, the records referenced in the Notice to Provide Records. This correspondence between one of the Licensees and Inspector A clearly shows that the Licensees were aware of the issuance of the Notice to Provide Records.

Secondly, at the hearing the Licensees freely acknowledged that they did not provide the records sought for by the Notice to Provide Records. They provided excuses for not doing so, and excuses for a delayed and inadequate response to both the Notice to Provide Records and to Inspector A’s subsequent email string communication.

As was noted above, without the sought for records, Inspector A had difficulty ascertaining a greater understanding of what had happened during the incident on May 28, 2016.

I find that the Licensees were fully aware of the issuance of the Notice to Provide Records and, despite being given ample opportunity to do so, did not “promptly” produce the required records or offer in a timely manner a reasonable explanation as to why they were unable to do so. Based upon this conclusion, I find that the Licensees were in breach of the provisions of s. 73(2)(a) of the Act as alleged in the Second NOEA not only in failing to provide the records requested by the Notice to Provide Records, but also in failing to act with the celerity suggested by this provision with the inclusion of the word “promptly”.

### **Due Diligence**

Following a finding of liability, the Licensees are liable unless they can demonstrate that they were duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensees must not only establish procedures to identify and prevent from happening activities that might lead to this contravention of the Act, they must ensure that such procedures are consistently in operation and acted upon by its employees.

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 respondeat 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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application

of the defence of due diligence in the context of the sale of liquor to a minor contrary to the Act (see paragraphs 41 to 44).

The Court states that the defence of due diligence is to be considered in two stages:

1. Whether the employee who sold liquor to the minor was a directing mind of the Licensees – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who took such action or failed to take such action was not a directing mind of the Licensees (and there is no requirement that a “directing mind” must be on the premises when the contravention occurs), then the questions to be considered and answered are whether the Licensees had:
  - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
  - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend upon the evidence presented. The onus is on the Licensees to establish on a balance of probabilities that they had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

### Directing Mind

The evidence before me is quite clear that the Licensees are the directing minds of the Establishment. As well, the evidence before me clearly establishes that one of the Licensees was present at the Establishment during the incident on May 28, 2016 and was actively involved with Inspector A and I so find. Therefore, I find that the defence of due diligence is not available to the Licensees.

## **PENALTY**

Pursuant to section 20(2) of the Act, having found that the Licensees have contravened the Act, the Regulation and/or the terms and conditions of the Licence, I may do one or more of the following:

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

I am not bound to order the penalty proposed in the Second NOEA. 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 factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the Branch; the seriousness of the contraventions; the threat to the public safety; and the well-being of the community.

I find that a penalty is warranted for the breach by the Licensees of s. 73(2)(a) of the Act as alleged in the Second NOEA.

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

I accept the Branch's recommendation of a 10 day suspension of the Licence as an appropriate penalty.

Reference was made in the evidence before me to the compliance meeting held on March 22, 2016 (Ex 1 tab 9) at which the Licensees and another member of their family were present. This compliance meeting was called by Inspector A as a result of the issuance within the first two weeks of March of two contravention notices dealing with the removal of liquor from the licensed area in the Establishment. At this meeting the Licensees had, among other commitments, undertaken to provide additional video monitoring of the front of the Establishment and to place a monitor elsewhere in the Establishment so that staff could better monitor the main entrance of the Establishment. It was obvious on the evidence before me that, although matters appear to have been subsequently remedied, on May 28, 2016 this commitment by the Licensees had not been met. In light of this, I find it reasonable to include in the Licence as an additional term and condition, the term and condition sought by the Branch in the First NOEA.

## **ORDER**

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence number 306786 for a period of ten (10) days to commence at the close of business on March 16, 2017 and to continue each succeeding business day until the suspension is completed.

I also order that the following be added to the Licence as a term and condition of the Licence:

Must have fully operational, recordable video surveillance of front entrance way, interior and exterior. Additionally the monitor must be visible at all times and located where staff can easily view it

To ensure these orders are effective, I direct that the Licence be held by the Branch or the Abbotsford police department from the close of business on March 16, 2017 until the Licensees have demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence 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*

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R. John Rogers  
General Manager's Delegate

Date: February 9, 2017

cc: Liquor Control and Licensing Branch, Surrey Office  
Attn: Rupi Gill, Regional Manager

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