



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF**

A hearing pursuant to Section 51 of
The Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Licensee:	Clifton Enterprises Inc. dba Days Inn (Inn of the West) 4620 Lakelse Avenue Terrace, BC
Case:	EH18-006
For the Licensee:	Karim Basaria
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Nerys Poole
Date of Hearing:	May 16, 2018
Date of Decision:	June 12, 2018

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Clifton Enterprises Inc. dba Days Inn (Inn of the West) (the "licensee") owns and operates a licensed retail store, with Licensee Retail Store licence number 192204 (the "licence") at 4620 Lakelse Avenue in Terrace (the "LRS").

The licence is issued to Clifton Enterprises Inc. In the summer or early fall of 2017, the licensee changed the name from Inn of the West to Days Inn. At the time of the contravention, the LRS was doing business as Days Inn although the 2017 license still showed the name as Inn of the West. The 2018 licence shows the change of name to Days Inn.

According to the terms of its licence, the licensee may sell liquor from 9:00 a.m. to 11:00 p.m. Monday to Sunday. The licence is subject to the terms and conditions contained in the publication "Licensee Retail Store Terms and Conditions" (the "Guide"). (exhibit 1, tab 16)

The branch alleges that the licensee contravened the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act") on December 4, 2017, by selling or serving liquor to an intoxicated person or person who appears to be intoxicated or, as an alternative contravention, the branch alleges that the licensee contravened the Act by allowing an intoxicated person to enter or remain in a service area.

The licensee submits that the person in question was not visibly intoxicated. In addition, the licensee will present a defence of due diligence.

Karim Basaria appeared at the hearing as the licensee's representative. For the purposes of this hearing, and in accordance with section 5 of the Act, the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Act and Part 6 of the *Liquor Control and Licensing Regulation*.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated February 13, 2018 (the "NOEA"). (exhibit 1, tab 1)

The branch alleges that, on December 4, 2017, the licensee contravened section 61(2)(a) of the Act or, in the alternative, that the licensee contravened section 61(2)(b)(ii) of the Act. The range of penalties for a first contravention of either section is a four to seven day licence suspension and/or a \$5000 to \$7000 monetary penalty (items 7 and 9 of Schedule 2 of the *Liquor Control and Licensing Regulation*). The branch recommends either a four day suspension or a monetary penalty of \$5000 for either contravention.

The licensee indicated a preference for a monetary penalty if I find there has been a contravention and the due diligence defence fails.

The clerk received a violation ticket from the RCMP for the incident, indicating violations of section 62(2)(b)(ii) and section 75 of the Act. Each ticket carries a fine of \$230 against the clerk. I heard no evidence about when the RCMP issued these tickets. I have no jurisdiction over these violation tickets and explained that to the licensee and the clerk at the hearing.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Conduct at event site or in establishment, service area or liquor store

61(2) A licensee or permittee or an employee of either must not

(a) sell or serve liquor to an intoxicated person or a person showing signs of intoxication, or

(b) allow

(ii) an intoxicated person to enter or remain in a service area

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 18
- Exhibit 2: Licensee's documents, pages 1 to 22
- Exhibit 3: Hand drawn map showing Lakelse Avenue, Lazelle Avenue and laneway
- Exhibit 4: Audio CD of interview with LRS clerk

WITNESSES

The Branch called three witnesses:

- RCMP member who attended at the LRS on December 4, 2017 ("Officer 1")
- RCMP member who attended at the LRS on December 4, 2017 ("Officer 2")
- The liquor inspector who authored the NOEA (the "liquor inspector")

The licensee called two witnesses:

- the LRS supervisor
- the licensee's representative, Mr. Basaria

FACTS OF THE ALLEGED CONTRAVENTION

The following facts are undisputed.

On December 4, 2017, between 4:00 and 4:30 p.m. the two RCMP officers were on duty in their vehicle outside the LRS.

Officer 2 observed a male (the “customer”) crossing the intersection of Emerson Street and Lakelse Avenue and entering the LRS. Both officers walked to the outside of the LRS and observed the customer through the windows. The customer picked up a 15 pack of Wildcat beer, placed the beer on the front counter and had a brief conversation with the clerk as he paid for the beer. The customer exited the LRS whereupon Officer 2 asked him what he had purchased. The customer replied “beer.” The customer told Officer 2 that he had paid for the beer with a debit card and showed him the card. Both officers made observations of the customer and noted these observations in their reports.

Officer 1 then entered the LRS and spoke to the clerk, told her she had served an intoxicated person, returned the case of beer, and asked for the customer’s money to be refunded. The clerk refunded the money. The customer was allowed to continue home on his own accord.

Officer 2 wrote his report immediately after the incident (exhibit 1, tab 8). Officer 1 produced a report the following day and wrote a supplementary report on December 27, 2017, as requested by the liquor inspector. (exhibit 1, tabs 9 and 10)

The liquor inspector first heard about the incident from Officer 1 at a hockey game on the same date as the incident. Officer 1 informed the liquor inspector that he would be sending his report to the branch.

On December 8, 2017, the liquor inspector attended the LRS and spoke to the LRS supervisor. He informed him that he had received verbally information from the RCMP of a possible contravention of the Act and that he was awaiting a report from the RCMP. Once he received the report he would return and advise him how the branch would be proceeding. The RCMP sent an email with the officers’ reports to the branch on December 11, 2017.

On December 11, 2017, the liquor inspector attended at the LRS, spoke with the LRS supervisor, and informed him of the RCMP reports. The liquor inspector issued a contravention notice against the licensee (exhibit 1, tab 2) and a Notice to Produce documents. On the same day, the liquor inspector interviewed the clerk and recorded the interview. (exhibit 4)

On December 12, 2017, the LRS supervisor and Mr. Basaria attended at the branch office and provided the shift schedule for the LRS, sales receipts for the transaction and a letter stating no video recording of the transaction was available.

The liquor inspector asked Officer 1 to provide more information about the symptoms of intoxication that he observed on December 4, 2017 at the LRS. On December 27, 2017, Officer 1 provided a supplementary report. The liquor inspector completed his investigation on January 1, 2018 and prepared the NOEA dated February 13, 2018.

EVIDENCE OF OBSERVATIONS OF THE CUSTOMER

As the key finding I must make in this hearing is whether or not the customer was intoxicated so that the LRS clerk should not have served him, or allowed him to enter, I have grouped both the branch's and licensee's evidence under this heading. I deal with the evidence relating to other matters under separate headings.

Officer 1

In Officer 1's report, written the day after the incident at the LRS, he noted the following observations of the customer:

As [Officer 1] was on patrol with [Officer 2], he observed a male known to them to be walking in a staggering manner consistent with prior dealings with him being under the influence of liquor. He then walked slowly and overly deliberately across the street paying very little attention to vehicular traffic (light at the time).
(exhibit 1, tab 9)

From outside, through the window of the LRS, Officer 1 observed the customer walk through the LRS, pick up the beer and walk back to the front counter. When the officers confronted him outside the LRS, the customer was very cooperative with the officers who advised him he should not have been sold the liquor, given his level of intoxication. When asked how he paid for his beer, he immediately produced his bank card still clutched in his hand, with beer in the other.

Officer 1 entered the LRS and spoke with the clerk, advising her that the customer she served was "extremely intoxicated" and she should not have sold him liquor. The clerk told him that she just thought that the customer had something wrong with his leg. She refunded the purchase money as requested.

Officer 1 spoke with the clerk after the customer departed and reiterated again to her that she absolutely could not sell liquor to intoxicated patrons. The clerk was very apologetic and repeatedly stated that staff do not sell liquor to people who have been drinking and that she thought the customer had something wrong with his leg.

Officer 1 did not serve the clerk with a violation ticket that evening. He made attempts to serve the ticket at the LRS, but she was not working. The clerk attended the RCMP detachment office unsolicited but the officers were not working when she came to the RCMP office.

On December 27, 2017, Officer 1 produced a second "Occurrence Report" to respond to the liquor inspector's questions about the customer's physical symptomology displayed while inside the LRS. Officer 1 stated in this report:

[Officer 1] had observed [the customer] walking very deliberately and staggering slightly from side to side as he did so, his actions in retrieving the beer from the cooler were also very slow and deliberate. Upon exiting the store, it was noted that he had glossy eyes, slurred speech, and a strong odour of liquor on his breath. This encounter was outside on the sidewalk, and for an odour of liquor to have been detected in this environment, it would have been impossible for it not to be detected by staff working inside the licensed

premises. Police are also aware that [the customer] is a regular customer at this establishment, and staff would have been very familiar with him.
(exhibit 1, tab 10)

In his testimony, Officer 1 explained what symptoms he looks for when determining if someone is intoxicated. He looks at their gait, odour of liquor on breath, slurring of speech, glossy eyes, ability to follow a conversation, delay in responding in a conversation, lack of coordination. It also helps to determine if a person is intoxicated if he has prior knowledge of him. He said it is usually a constellation of several symptoms to lead him to believe someone is intoxicated.

Officer 1 was familiar with the customer from previous encounters with him and knew his normal gait. When the customer is sober, he said he "walks fine, no issues, not staggering, quicker than on this date." He stated that, in his observations of him walking towards the LRS, his gait was a "marked departure from the norm." He said the customer was not falling down on himself, that he was simply unbalanced and had an awkward gait. He testified that he observed this while he was inside the LRS as well, although he did not say this in his first report.

When Officer 1 was asked in cross-examination whether the odour of liquor could have been from spilled liquor on the customer's clothes from the customer's work in the bottle depot, Officer 1 responded that the odour of metabolized/consumed alcohol is distinctly different from alcohol from a bottle.

In his testimony, he repeated the observations he made in his second report. Upon exiting the LRS, the customer had a strong odour of liquor on his breath, heavily slurred speech, glossy eyes, and he walked with a marked departure from his normal gait.

Officer 1 estimated that the customer was in the LRS only a few minutes. When asked in cross-examination if he had any concerns about the safety of the customer being allowed to walk home, he reiterated several times that he was in the company of a sober friend. In his opinion:

“His safety was not at risk, given light traffic and in the presence of another sober male.”

“He was in the presence of another male who appeared to be sober.”

“Had he not been in the presence of another male, we might have acted differently.”

“Someone being extremely intoxicated may not be taken into custody when they are with someone else.”

In his first report at tab 9, he said “he was in the company of his sober brother who had been waiting outside for him, and lived a short distance away”

Officer 1 testified that it was dark out although in his report at tab 9, when he first observed the customer jaywalking across Emerson, he said it was “light at the time.”

He testified that the customer frequents the area around the LRS a lot and that this area is a common gathering place for a number of homeless people in Terrace.

In cross-examination, he was asked to elaborate on his understanding of “extremely intoxicated” - the words used in his testimony and in his report to describe the customer. He stated he has seen the customer when he has been “grossly intoxicated” i.e. unable to care for himself, unable to stand. They do not arrest all intoxicated people. He said that the customer was not at a level of intoxication that required arrest. He said that if it had been someone else, who was known to become aggressive and assault people when intoxicated, they might arrest him to ensure public safety. He emphasized that it is not the role of the RCMP to stop people who appear intoxicated from entering a LRS.

He repeated the observations in his first report that there were no other persons in the LRS at the time. There were no reasons why his intoxication would not be apparent, at least once the customer had approached the cash register to pay for his liquor. He stated that the customer was "not falling down on himself, simply unbalanced and awkward gait, not the norm for him."

Officer 2

Officer 2 wrote out a statement at 4:37 p.m. on December 4, 2017, immediately after the incident. (exhibit 1, tab 8)

In his statement, he said:

He observed [the customer] crossing the street at Emerson St. and Lakelse Ave. [The customer] was weaving back and forth and appeared unbalanced. Upon crossing the street [the customer] entered Days Inn Liquor Store. He observed from outside the window as [the customer] walked unsteadily to the back of the store and then returned to the front of the store in the same fashion carrying a 15 pack of Wildcat Beer. He then placed the case of beer on the front counter and [Officer 2] observed as he procured a card from his pocket. [The customer] was the only patron in the store at that time. [The customer] swiped his card two to three times then [Officer 2] observed as the clerk bagged the case of beer in a white grocery bag and then return it to him on the counter who then walked out of the store.

Upon exiting [Officer 2] asked [the customer] what he had purchased to which he stated beer. [Officer 2] asked [the customer] if he had been IDed and what he had purchased the beer with. [The customer] advised that he was not ID'd and that he paid with a debit card, which he produced from his pocket and showed Officer 2. While speaking Officer 2 could detect an overwhelming odour of liquor on his breath, his speech was heavily slurred and his eyes also appeared to be glassy.

...

[The customer] was allowed to continue home as he only lived 2 blocks from that location.

In his testimony, Officer 2 repeated these same observations of the customer outside the LRS.

Officer 2, when asked why he asked the customer if he had been IDed, said he was just checking to see if the LRS was IDing customers. He agreed that the customer was in his early fifties.

In his testimony, Officer 2 described the symptoms he looks for to determine if someone is intoxicated. He looks for someone who is unsteady on his feet, has glassy or watery eyes, a strong odour of liquor on his breath, stumbling, slow motor functions. He explained the difference between someone who might have physical impairments and someone who is intoxicated – he said the main indicators between those two is the odour of alcohol on their breath and/or slurred speech.

Officer 2 had worked in the area for three years and was familiar with the customer. He has observed him when he has been sober and when he has been in an intoxicated state. He had dealt with him numerous times as a police officer. He observed him crossing Emerson Street, walking unsteadily, swaying back and forth, and shuffling his feet. He suspected he was intoxicated. His gait was unbalanced, sort of a shuffle, moving side to side. He stated that his walking at that time was not typical of the customer. He was walking in a different manner from when he is sober.

He noted the customer walking unsteadily towards the back of the LRS. He watched him when he returned as he got out a bank card of some sort and attempted to swipe the card several times on the PIN pad on the counter. Other than noting that he swiped the card several times, Officer 2 did not recall any delay or fumbling.

He described the conversation between the customer and the clerk as minimal, not a long conversation. He estimated that the customer was inside the LRS for less than five minutes.

In cross-examination, Officer 2 was asked if anyone was accompanying the customer when he crossed Emerson Street and entered the LRS. Officer 2 stated the customer was alone. Officer 2 stated that the customer was allowed to return to his residence on his own, as he made an assessment that, although very much intoxicated, he was still able to care for himself and walk on his own.

When asked about whether there was still daylight, he responded that it was not dark at the time.

Officer 2 stated he has observed the customer at different times in the past, in various levels of intoxication. He said it is possible that he might be more intoxicated at other times, but in this case, he concluded that he was able to care for himself and get himself home. He could not say whether he went home for sure.

Under cross-examination, Officer 2 was asked to explain what "extremely intoxicated" meant to him. He described "extremely intoxicated" as a person who is unconscious, not able to walk, exhibiting symptoms such as odour of liquor, would request an ambulance to come and assess them. Officer 2 stated that the customer was not at that level, but he was intoxicated.

In cross-examination, Officer 2 repeated that the customer was alone and again, in answer to a re-examination question, he said he saw no one with the customer.

Officer 2 was aware that the customer worked in a bottle depot. He agreed that theoretically there could have been liquor spilled on him from this work. But he said, in this case, the odour of beverage was coming from his breath. He knows the customer as a longtime alcoholic. He had no doubts as to where the odour was coming from.

Officer 2 stated that the area around the LRS is known for a high level of liquor related offences. It is essentially a "hot spot." There is a group who regularly consume liquor in that area. They tend to be across the street in the park area. He has seen the customer at the LRS and in the park regularly.

The Liquor Inspector

As the liquor inspector was not there on the date of the alleged contravention, his observations of the customer were limited to his knowledge of him from previous dealings.

The liquor inspector agreed he was familiar with the customer, as he has known him about 18 years. When asked about the customer's gait, he stated that the customer always walks with a shuffle, whether sober or intoxicated. It is not more pronounced when he is intoxicated.

Interview with LRS Clerk

The clerk did not testify although she was at the hearing. The branch introduced a CD recording of an interview the liquor inspector had with her on December 11, 2017. (exhibit 4)

The clerk explained in the interview that, when the customer entered the LRS, he told her he had a sore leg. She stated he was wearing big shoes at the time. She thought someone may have been with him, or perhaps just another customer in the LRS at the same time.

When asked about her knowledge of intoxication symptoms, she explained that an intoxicated person will not walk properly, will have a smell, will talk a lot, he will do something that is not normal, he cannot stand or walk even. When asked how the customer appeared to her, she said he was talking and he told her he had a sore leg. He gave her his customer number when making the purchase. This required him to state a sequence of 7 numbers to allow him to receive points from the purchase. He had no difficulty providing her with the number. She described the customer as someone who laughs and talks a lot.

The clerk responded to a question about how she deals with intoxicated customers. She stated that sometimes they enter the LRS with someone who is sober. If so, she tells them both to leave. Often they have to tell groups of people to leave because one person is intoxicated. She stated that a number of homeless and/or intoxicated persons hang out outside the LRS on the doorstep. When they hang out in groups, the staff gets scared and will call the police who sometimes come, sometimes not.

When asked how often she had seen the customer in the LRS, she replied "very few" times.

LRS Supervisor

He was not present in the LRS when the customer entered. He believed he may have gone to deal with garbage or something else out back as he was on duty that day.

He has some familiarity with the customer. He has seen him coming to the LRS a few times a week. He said that, when he is talking, it is easy to see when he is drunk. He tries to talk too much. He never saw him slurring his speech. He said most times he comes to the LRS, he is sober as he works at the bottle depot.

The LRS supervisor stated that the customer returned to the LRS about 5:00 p.m. on the day of the alleged contravention. He told the customer that he would not serve him as they were getting into trouble for having served him earlier in the day.

The LRS supervisor stated that, when a customer is drunk, he is generally unable to provide his customer points number. The LRS supervisor gave a possible explanation for the customer having swiped his debit card several times. He pointed to the receipt at exhibit 1, tab 15, which shows the purchase of the beer at 4:17 p.m. The receipt shows the total due was \$25.48 and that the customer paid \$20 in cash and the remainder of \$5.48 with his debit card. He speculated that he used the debit machine a few times and was unable to access sufficient funds so he paid with cash and debit. He stated that if the customer paid the whole amount with his debit card, the receipt would show that.

LICENSEE'S EVIDENCE OF LRS

Mr. Basaria testified about the ownership of the LRS and its history. He stated that they have owned their business since 2007. They have never received any contraventions. He said they own a couple of hotels in town and are always willing to cooperate in any way they can to ensure they are complying with the liquor laws. Their company owns several licensed retail stores in B.C. and other provinces. They have never had any liquor law issues or contraventions with any of them.

Their staff are well trained and know not to serve intoxicated persons. He stated that he and/or his partner speak with the LRS supervisor almost every day by phone. He said the LRS supervisor reports directly to them, not to any of the hotel management.

When asked where the house policies come from, he said they were not from Days Inn. They have a franchise from Days Inn to operate the hotel. The franchise does not include the LRS as the LRS is separate from the hotel. He stated his partner created the house policies after speaking with other LRS owners and liquor licence holders. He repeated the evidence of the LRS supervisor, that management requires their employees to sign off every year to demonstrate they have reviewed the house policies.

LICENSEE'S EVIDENCE OF DUE DILIGENCE

The licensee provided evidence of its training, policies, practices and procedures aimed at preventing contraventions such as this one.

Training

All new hires must have their Serving It Right certificate before starting to work in the LRS. The licensees submitted copies of the staff's Serving It Right certificates, including the clerk's certificate. (exhibit 2, pages 11 to 13)

The LRS supervisor explained that the head office in Vancouver hires new staff. He is responsible for training them once hired.

The LRS supervisor explained the training process with new hires. He reviews the manual and gives them a copy to read. (excerpt included in exhibit 2) He reviews the signing document with them. The new hires must sign off saying they have read and understood the house policies.

On a new hire's first day in the LRS, the LRS supervisor reviews the manual point by point – emphasizing the liquor regulations on how to ID, how to know if someone is a minor, how to check fake IDs, how to verify IDs, how to identify intoxicated persons, how to ask for help from other employees as needed. With respect to requesting ID, he trains staff to request ID even if they know someone personally.

On identifying intoxicated persons and dealing with them, he explained that he trains staff to refuse service even if one person accompanying an intoxicated person appears to be sober. He encourages staff to check in with each other to help with refusing service. If a staff person who is serving feels that a customer is intoxicated, she is told to refuse service, regardless of what someone else may say. It is the clerk's decision to refuse service and management supports her.

He trains staff to identify intoxicated persons by initially greeting them when a customer enters, assessing the gestures, looking at the eyes, observing the walking, smelling for odour of liquor. He explains to them that they must ensure any intoxicated person leaves as soon as possible. He discusses the symptoms of intoxication with new hires. If they suspect a customer may be intoxicated, they must refuse service. Sometimes a customer may come to the counter with a case of beer and they then see he/she is intoxicated, so they refuse service.

He trains the new hires by identifying intoxicated persons when he is working with them and discussing the symptoms that he observes. He emphasizes that they are not allowed to sell them anything. Training lasts a few days until they are confident. He is there all the time.

He said they have many repeat customers and they can recognize them when they are drunk.

The LRS supervisor explained that new hires are assigned initially to work with someone and to learn the job that way. He stated they usually work with or shadow a senior employee for at least two shifts and if the new hire feels confident, she can then start serving on her own, but always with another employee nearby to help out. He is always there with a new hire and he observes her to be sure she knows what she is doing and that she is following all the policies. If she needs longer before starting on her own, he will work with her. The LRS supervisor stated that staff are rarely on their own. He may be in the back of the LRS dealing with supplies.

House Policies on Intoxication

The licensee submitted excerpt pages from its manual with its house policies on refusing entry to intoxicated patrons and refusing service to intoxicated patrons. (exhibit 2, pages 9 and 10)

House Police #2 (A) and House Policy #2 (B): Refusing Entry to intoxicated patrons sets out who will enforce this and lists Manager, Server, Host and Supervisor and then describes the methods of enforcement:

- Greet guests when they enter the premises
- Assess whether they have been drinking prior to arriving, and if so, their level of intoxication
- Identify a back-up co-worker to support you if a guest must be refused entry
- Refuse entry to guests showing signs of intoxication. Be polite but authoritative.
- Advise that it is against the law to provide service
- Avoid any confrontation, either verbal or physical
- If necessary, call a manager for support

The next section describes the procedure as:

1. Server and supervisor will observe behaviour of the guest upon entering the premises for signs of intoxication. Server and supervisor may question patron, look out for patrons who appear to be staggering or slurring their words and watch for patrons who are acting in rude or otherwise obnoxious manner.

2. Server and supervisor will greet guests when they enter the premises and assess whether they have been drinking prior to arriving and if so, their level of intoxication.
3. Upon observing any signs of intoxication, server or supervisor will advise guest that they are unable to allow entry. When refusing entry, staff will:
 - Be sure to have back-up co-worker ready to help
 - Do so in a polite but authoritative manner
 - Speak to the person privately and discreetly
 - Tell person, "I'm sorry, but it is against the law for me to let you in."
4. Staff will alert management if the person does not leave or if the situation looks like it has the potential to get out of control.

House Police #3 (A) and House Policy #3 (B): Refusing service to intoxicated patrons sets out who will enforce this and lists Server, Bartender, Supervisor and Manager and then describes the methods of enforcement:

- Assess patrons throughout their stay for signs of intoxication
- Identify a back-up co-worker to support you if a guest must be denied service and asked to leave
- Refuse service to the guests showing the signs of intoxication. Be polite but authoritative
- Advise that it is against the law to provide service, and they must leave
- Advise that it is for their own safety and well-being that you are taking this action.
- Avoid any confrontation, either verbal or physical
- If necessary, call manager for support

The next section describes the procedure as:

1. Server and bartenders will assess patrons throughout their stay for signs of intoxication.
2. In the case that a patron must be denied service and asked to leave, server or bartender will identify and brief a back-up co-worker.
3. Server or bartender will advise guest that they will be unable to provide further service, ask the guest to leave. Upon taking this action, staff will
 - Be sure back-up co-worker is ready to help
 - Be polite and authoritative
 - Speak to the person privately and discreetly
 - Tell the person: "I'm sorry, but it is against the law for me to continue to serve you."
 - Tell the person you are taking this action for their safety and well-being
 - Enlist the support of their friends in asking them to leave
 - Remove all bottles and glasses of liquor from the customer at the table or counter
4. Staff will alert management if the person does not leave or if the situation looks like it has the potential to get out of control.

Staff Signatures on House Policy

The licensee submitted sign-off pages from all the staff in the LRS, including one signed by the clerk. The sign-off page states:

I [employee's name] hereby agree that I have read and understood the house policy received on [date]. I will follow all the BC liquor laws mentioned in the house policy.

There is a line for the employee's signature and one for the witness. The LRS supervisor signed as the witness for the LRS employees. (exhibit 2, pages 14 to 18)

The sign-off pages submitted in the hearing were dated December 27, 2017 or December 28, 2017. The LRS Supervisor testified that these were the most recent ones that staff had signed. He testified that they review the house policies and any changes on an annual basis and have the staff sign off on this. He brought the most recent signature pages to the hearing. He testified that they have been using these sign-off pages and requiring staff to sign them since he started at the LRS. He stated that he signed off on a page like this at the time of his hiring at the LRS.

Reminders and Meetings

The LRS Supervisor has a regular staff meeting every Monday. He has been holding these meetings since he became supervisor in 2016. He stated that, compared to the former LRS supervisor, he is very strict. At these meetings, they discuss two major concerns they have in their LRS: intoxicated patrons and minors. He stated they have a lot of homeless who hang around outside the LRS and they have to be cautious to assess for intoxication. They often discuss the problem with the people who hang around outside the LRS. He discusses this issue with the head office management and ways to deal with it.

In addition, as the supervisor, he reviews policies almost every day with his staff. He is involved in training staff every day on different issues. The LRS has four staff. He watches the cameras in the LRS and, if he sees any trouble, he goes to the counter and helps out his staff. If a customer is difficult or threatening, he calls the police.

Logbook

He records any incidents in a logbook. When they bar a customer, he notes the reason in the computer system. He also makes notes of any incidents and discusses them with staff. He did not have a hard copy of notes to bring to the hearing. He does not circulate the notes to staff. He informs staff when a customer is barred from service. He often leaves a handwritten note on the counter to remind staff of this, or of other matters that they may need to know.

Signage

The LRS Supervisor testified that there are lots of signs in the LRS. A sign at the front counter says the LRS has the right to refuse service to anyone who is intoxicated. He said this sign has been there as long as he has worked in the LRS. The licensee did not provide any photos of this signage.

Complaint from Businessman and Actions Taken

The LRS has had concerns for some time about the people who hang around outside the LRS, often sitting in the entranceway to get away from the cold or rain. The LRS Supervisor explained that if he observes these people drinking outside the LRS, he bans them from entering the LRS. If he sees them drinking, he calls the police. He said he has made hundreds of calls to the police. The LRS Supervisor said they were calling the police regularly about homeless and/or intoxicated persons hanging around outside the LRS. He stated that the police did not always respond to their calls. He stated that he certainly did not serve these intoxicated people. If he did, he asked rhetorically why would he call the police.

Mr. Basaria testified about what happened on October 31, 2017 when the liquor inspector came to speak to them about a complaint made against them by another businessman in Terrace. The businessman claimed the LRS was serving intoxicated persons. Mr. Basaria thought that this complainant may have believed they were serving these people just because they were hanging around outside the LRS. He and the LRS supervisor discussed what could be done as they had been concerned for a while about the number of homeless who were hanging around the entrance to the LRS, especially in the winter months. He thinks the RCMP was getting tired of answering their calls about their concerns. They decided to install the metal gates as seen in the photos at exhibit 2, pages 5 and 6. They installed the camera system at the same time. This work was completed in November, prior to the alleged contravention on December 4. The liquor inspector thought this was a positive change.

Once the gates were installed, there was less of an issue with people hanging around outside their entrance. Management was very concerned about this as their presence was turning away good customers. The LRS Supervisor said: "The drunks were hurting business, good customers were not coming in."

The LRS supervisor stated that because fewer people were hanging about once the gates were installed, they did not have to call the police as often.

SUBMISSIONS – BRANCH

The evidence establishes that the customer had a strong overwhelming odour of liquor on his breath. Even though there was some discrepancy in the evidence about his walking gait, the customer was within a few feet of the cashier, who ought to have detected the odour of liquor that the police officers detected on his breath. Even if she had failed to assess his degree of intoxication up to that point, she should have known he was intoxicated once he was conversing and breathing on her.

With respect to the defence of due diligence, the branch advocate referred to some weaknesses in the evidence. The licensee relied heavily on the Serving It Right manual and there did not appear to be a formalized training system. The evidence did not clearly demonstrate that staff understood the signs of intoxication.

When the licensee took measures to prevent the homeless and potentially intoxicated people from frequenting the area around the store, this should have presented an opportunity to re-train and monitor staff to remind them of the importance of checking for intoxication.

The sign-off pages from the employees were all dated after the incident. The licensee did not provide the earlier documents although the witnesses stated they have been following this practice for several years.

In reply to the licensee's submission about conflicting evidence, the branch advocate says this evidence is not particularly relevant to the central issue, as to whether or not the customer was intoxicated. One officer said there was somebody with the customer while the other officer said he was alone. The relevant evidence is whether or not the customer was exhibiting all the symptoms that the officers said showed intoxication.

As to the evidence about the degree of intoxication, the officers provided evidence of their observations of the customer and concluded, based on their years of experience, that the customer was obviously extremely intoxicated, or at least intoxicated. The officers do not perform breathalyser evidence on pedestrians so this kind of evidence is not available for contraventions of this sort.

SUBMISSIONS – LICENSEE

The licensee submits that its record of no contraventions in the past ten years is evidence of how seriously they take their responsibilities as a licensee.

With respect to the allegation of serving an intoxicated customer, the licensee submits that this has not been proven. The LRS clerk referred to her belief that the customer had something wrong with his leg or foot. She stated this to Officer 1 when he entered the LRS immediately after she served the customer. She repeated it in her interview with the liquor inspector. The licensee submitted that it is possible any smell of alcohol on the customer as observed by the police officers, came from the customer's work at the bottle depot. The licensee referred to the inconsistency in the evidence of the police officers as to whether or not the customer was in the company of a sober person. The licensee points to the statement of the police officers, that the customer was very cooperative with them. The licensee submits that there were no breath tests to demonstrate the customer's level of intoxication and states further, that he was allowed to go home even though "extremely intoxicated" according to Officer 1's observation.

With respect to its defence of due diligence, the licensee says it has presented evidence of its policies, practices and procedures to demonstrate it is duly diligent. The licensee pointed to the evidence of staff training, the regular Monday meetings with staff, the ongoing reminders given by the LRS supervisor, the requirement that all staff have their Serving It Right certificates prior to beginning work

REASONS AND DECISION

Contravention

I am unable to conclude that the customer was exhibiting such signs of intoxication that the clerk should have refused him service on December 4, 2017. My reasons for this conclusion follow.

Officer 1 talked of the “constellation of symptoms” as being important for identifying an intoxicated person. I find that, on the evidence before me, there was not “a constellation of symptoms.” I am troubled by the fact that Officer 1 did not mention in his first report the other symptoms mentioned by Officer 2, i.e. the odour of liquor, heavily slurred speech and glassy eyes. When asked by the liquor inspector three weeks after the incident to produce another report elaborating on the physical symptoms that he observed, Officer 1 did so and referred to the symptoms mentioned by Officer 2.

I find that the failure to include these observations in his first report has particular significance here. Because of the inconsistency in evidence about the customer’s normal walking gait, these symptoms of intoxication are all that remain. As Officer 1 did not report these symptoms initially, I can only assume that they were not the key indicators of intoxication for him. I find that his observation of the customer, prior to entering the LRS, crossing the street “in a staggering or shuffling manner,” was the key indicator that led him to conclude the customer was “extremely intoxicated.”

With respect to the customer’s walking gait, I heard conflicting evidence from the branch witnesses about the customer’s normal gait when sober. The liquor inspector testified that he has known the customer for 18 years and that this shuffling was his normal gait. Both officers testified that the customer had a perfectly normal gait when sober.

Because of this differing testimony from the branch witnesses, I am unable to conclude that the shuffling or staggering as reported by the officers was a symptom of intoxication. The clerk stated to Officer 1 that, when he asked her about why she served an obviously intoxicated customer, she thought there was something wrong with his leg. She repeated this in her interview with the liquor inspector.

Another conflict in the branch's evidence is the question as to whether or not the customer was alone or in the company of a sober individual. I agree with the branch advocate that the question as to whether or not the customer was alone may not be directly relevant to a finding of intoxication. However, I find that the discrepancy in the officers' two statements raises questions about other indicia of intoxication. Officer 1 concluded that the customer was "extremely intoxicated" and so much so, that he may not have allowed him to go home if he had been on his own. Officer 1 stated several times in his testimony that the customer was with another sober male and emphasized that: "Had he not been in the presence of another male, we might have acted differently." Officer 2 stated he was alone and not in the company of anyone.

Officer 2 also did not agree that the customer was "extremely intoxicated", basically preferring a lesser description of "intoxicated" as, in his opinion, extremely intoxicated meant falling down drunk and unable to care for oneself. He did not describe the customer as a falling down drunk on December 4, 2017.

Without the shuffling gait as a symptom of intoxication, and with evidence of the customer's work in the bottle depot and possible smelling of alcohol from this work, I conclude that, in the few minutes that the clerk interacted with the customer, she did not perceive symptoms of intoxication. Based on the evidence I heard about the training provided to staff, the clerk had been trained to identify intoxicated patrons. The clerk in her interview stated she did not serve intoxicated patrons. The clerk also noted that the customer provided her with his points number, without any difficulty, something the LRS supervisor stated is often difficult for an intoxicated customer to do.

The LRS supervisor emphasized the procedures, discussed further below, to ensure staff do not serve intoxicated patrons. The house policy sets out the procedure for refusing entry and instructs staff to “look out for patrons who appear to be staggering or slurring their words and watch for patrons who are acting in rude or otherwise obnoxious manner.” I find that the clerk noticed the shuffling or staggering as she asked the customer about his leg. I am unable to conclude that the clerk noticed any further signs of intoxication that should have led her to refuse service to the customer.

Officer 2 referred to two or three attempts by the customer to swipe his debit or credit card, inferring that this indicated a lack of concentration or coordination possibly due to intoxication. The LRS supervisor pointed out that the receipt for the beer showed partial payment in cash and part with a debit or credit card, which could indicate the customer made an initial attempt to pay the whole amount on his card and was refused. I find this to be a plausible explanation for the observation that the customer swiped his card several times and can make no conclusion that this was an indicator of intoxication.

The officers were both familiar with the customer and said he was a known alcoholic. They referred to the number of liquor related offences in the general area of the LRS and to the fact that the neighbouring park across the street from the LRS is a known “hot spot” and a hangout for the homeless in Terrace. I acknowledge that the officers were being diligent in their efforts to address this issue in downtown Terrace. However, I am also of the opinion that the LRS staff were making best efforts not to serve any of these intoxicated individuals. The management of the LRS was very concerned about this, as the presence of intoxicated individuals outside the LRS was driving away what they called “good customers.” The metal gates installed prior to the contravention were an attempt to dissuade these people from sitting around at the entranceway of the LRS.

I accept the officers’ observations of the customer, that he had slurred speech, glassy or glossy eyes and an odour of liquor. I rely on Officer 1’s testimony about a “constellation of symptoms” which help him to determine if someone is intoxicated. I find that it is possible the customer had an odour of liquor on his breath but was not intoxicated. Further, in order to find that the licensee contravened the Act here, I

would have to conclude that these symptoms of intoxication were obvious to the clerk during the few minutes that she was serving him or that they were so evident to any reasonable person that she should not have served him. I am unable to draw this conclusion from the evidence before me. With respect to the alternative contravention of allowing an intoxicated person to enter or remain, I reach the same conclusion, that the server did not notice any signs of intoxication upon the customer's entry nor that any reasonable person should have noticed any signs of intoxication at the time of the customer's entry.

I conclude that the contravention has not been established on a balance of probabilities. Because of this conclusion, I do not need to consider the defence of due diligence. Nevertheless, I will review the licensee's evidence and make findings on this. My findings below on a due diligence defence, particularly on the training and review of the policies, support my conclusion on the contravention as I find that the clerk was well trained and rehearsed in how to identify intoxicated patrons.

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:

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 *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In the context of the contravention before me, the defence of due diligence is to be considered in two stages:

1. Whether the employee who served or allowed entry to an intoxicated person was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who served or allowed entry to an intoxicated person was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (serving or allowing entry to an intoxicated person); 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 on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Directing Mind

I find that the LRS clerk has nothing to do with compiling the company policies nor with the hiring or direct training of employees. I find that the LRS clerk is not a directing mind of the licensee.

Adequate training

The licensee requires its employees to have their Serving It Right certificates, prior to starting work in the LRS. The LRS clerk has her Serving It Right.

The LRS supervisor trains new employees. He testified about the process. He sits down with a new employee, reviews the manual with her and has her sign a sheet stating she has read and understood the manual. The new hire then works under the supervision of the LRS supervisor or another senior employee for at least two shifts and then is allowed to work on her own if the LRS supervisor thinks she is ready. The LRS supervisor is able to monitor the work of new employees through direct observation or on the camera.

I find that the training regime is adequate given the size of the LRS and the small number of employees. The LRS supervisor or a second employee is always on hand to assist if needed. I find that the regular monitoring of employees and the discussions that take place at the weekly meetings provide opportunities for ongoing training and reinforcement about the liquor laws.

Policies of the LRS re. Intoxication

The manual excerpt gives very thorough instructions on how to assess customers who may be intoxicated, how to refuse them entry and how to refuse service, including encouraging employees to ask for support from a co-worker in these situations. The specific instructions outlined in the policy on refusing service has language more applicable in a pub or restaurant situation. However, the message is clear – assess, do not serve, remove and ask for help as needed.

Effective Application of LRS Policy re. Intoxication

The next step in the due diligence analysis is the question as to whether the licensee has taken reasonable steps to ensure its staff consistently apply the LRS policies. I find that the licensee has been making every effort to avoid serving intoxicated persons. The evidence showed that the LRS is located in an area frequented by homeless and/or intoxicated persons. It is immediately across the street from a park where the homeless in Terrace often hang out.

The licensee took immediate steps to address the allegation in October of 2017 that they were serving intoxicated patrons. The licensee explained that they were not serving, that the intoxicated persons would hang out around the entranceway of the LRS and that this may be why this businessman believed they were serving them. To

address this complaint, the licensee installed metal gates to deter people from sitting in their entranceway.

The LRS supervisor and Mr. Basaria were both adamant that their employees are well trained. The LRS supervisor regularly reminds the employees to assess customers and not to serve intoxicated persons. I find that the licensee has taken a number of steps to emphasize to its employees the importance of not serving intoxicated customers, including:

- Signage in the LRS about refusal of service if intoxicated
- Encouragement to employees to request support from a co-worker or senior staff if in doubt
- Regular reminders about avoiding service to intoxicated customers
- Weekly staff meetings where this policy and other issues are discussed
- Recording of incidents in a logbook by the LRS supervisor and discussion of these with staff

I find that Mr. Basaria and the LRS supervisor are very sincere in their desire to comply with the legislation and to act responsibly with respect to refusing service to intoxicated customers. I also find that the ten years of experience in the industry without any contraventions speak to the licensee's commitment to uphold the liquor laws.

Although post-contravention events are not directly applicable to a defence of due diligence, I was impressed by the speedy response of both the licensee and the clerk to the allegations of a contravention. The licensee did not receive the contravention notice until a week after the alleged contravention. The licensee appeared with the required documents a day after receiving the notice to produce and the contravention notice. The clerk made a number of attempts to contact the RCMP in the days following the incident, and failed to get an immediate response to her messages. As noted in her interview with the liquor inspector, she was very concerned about the allegation and wanted to address the issue as soon as possible.

I am satisfied that the evidence demonstrates that the licensee has adequate training, policies and systems in place with respect to avoiding service or refusing entry to intoxicated customers. I find that if the contravention had been proven, the licensee would have been entitled to a defence of due diligence.

CONCLUSION

I find that the contravention of either section 61(2)(a) or section 61(2)(b)(ii) of the Act has not been proven on a balance of probabilities. I find further that the licensee has met the onus of establishing a defence of due diligence. My conclusions on this provide further support for my conclusion about the contravention as well as providing a complete defence to the contravention.

Original signed by

Nerys Poole
General Manager's Delegate

Date: June 12, 2018

cc: Liquor Control and Licensing Branch, Kelowna Office
Attn: Kurt Lozinski, Regional Manager

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