



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

IN THE MATTER OF

A hearing pursuant to Section 20 of

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

Licensee: Quail Place Estates Ltd.
dba Club Mediterranean Cabaret
aka Liquid Zoo
274 Lawrence Avenue
Kelowna, BC V1Y 6L3

Case: EH12-010 & 014

For the Licensee: J. Barry Carter
Mair Jensen Blair LLP

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: July 20, 2012

Date of Decision: August 15, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Quail Place Estates Ltd, operates Club Mediterranean Cabaret, also known as Liquid Zoo located in Kelowna, BC (the licensed establishment). The licensed establishment has Liquor Primary Licence 200533, with liquor sales from 11:30 a.m. to 2:00 a.m. seven days per week. It has a licensed capacity of 241 persons in the main areas and 60 persons on the patio. David Habib is the principal of the corporate licensee and appeared as the licensee's representative (the licensee) during the course of the hearing. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions (T & C) contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide"). The licence is also subject to the T & C found in Appendix A to the licence, dated December 9, 2011. Those T & C include, amongst others; that the licensee must have a video surveillance system in the establishment capable of retaining one week's worth of data; that the licensee must ensure that no patron or employee be allowed entry into the establishment with any apparel or jewellery with gang affiliated identification and that where any person removes a garment inside the establishment revealing any gang affiliated identification or support for any gang or gang activities that person will be removed immediately.

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The branch's allegations and proposed penalty are set out in two Notices of Enforcement Action (the "NOEAs").

Alleged Contravention #1 EH12-010 (dated March 16, 2012)

The branch alleges that on January 12, 2012, the licensee contravened section 12 of the *Liquor Control & Licensing Act* (the Act) and the following terms and conditions of its licence which state:

4. Gang Affiliations

- (a) Licensee must ensure that no patron or employee will be allowed entry into the establishment at any time with any apparel or jewellery of any kind with gang affiliated identification.
- (b) Where any person (employee or patron or entertainer) who removes a garment inside the establishment that reveals any gang affiliated identification or support for any gang or gang activities – including tattoos and all types of apparel – that person will be removed immediately.

The proposed penalty is a three day licence suspension (item 46 of Schedule 4 of the *Liquor Control & Licensing Regulation* (the Regulation)).

Item 46 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 - \$3000.

Alleged Contravention #2 EH12-014 (dated April 11, 2012)

The branch alleges that on January 20, 2012, the licensee contravened section 73(2)(a) of the Act by failing to promptly produce documents or records requested by the branch. The proposed penalty is \$7500 (item 31 of Schedule 4 of the *Regulation*).

Item 31 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 10 - 15 days and/or a monetary penalty of \$7500 - \$10000.

The licensee disputes the contraventions.

RELEVANT STATUTORY PROVISIONS

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

Licences

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

Power to retain documents and inspect books and premises

73 (1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager, a person designated by the general manager or a person within a class of persons that is designated by the general manager may

(a) require the licensee to produce any prescribed document relating to the operation of the business licensed under this Act,

(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 a person acting under the authority of this section,

ISSUES

1. Did the contraventions occur?
2. If so, what penalties, if any, are warranted?

EXHIBITS

- Exhibit No. 1:** Branch's book of documents, tabs 1 – 19.
- Exhibit No. 2:** Black ball hat with red lettering, "113" on front and "KINGPIN CREW" on back.
- Exhibit No. 3:** Email dated April 3, 2012 from David Habib to the Deputy General Manager of Compliance and Enforcement for the Branch.
- Exhibit No. 4:** Written submissions of the branch.
- Exhibit No. 5:** Written submissions of the licensee.

EVIDENCE – The Branch

Alleged Contravention #1 EH12-010

The branch presented two police officers and a liquor inspector as witnesses.

The officers, Constable A and Corporal B testified that on January 12, 2012 at approximately 10:30 p.m. they attended the licensed establishment for the purpose of conducting a walk-thru of the premises. The establishment was not busy with approximately 20 patrons inside. Lighting inside was dim, as is customary for such establishments; it was however possible to see throughout. Security staff was present at the front entrance as well as inside. The officers were aware that the establishment uses treoscope technology to photograph patrons and to scan their identification. They were aware that privacy legislation prohibits the retention of the photos and scanned

identification for longer than 24 hours. They were also aware that the establishment had just recently reopened after a lengthy closure and was subject to a number of conditions including being restricted from permitting motorcycle gang members to wear their colours or other gang identifying materials inside.

Constable A testified that once inside he observed a group of patrons seated at a table near the bar, several of whom he recognized as being members of a local motorcycle gang. One of the group, a known motorcycle gang member left the table and proceeded to the washroom, passing in front of a security employee. The officer observed that the individual was wearing a black ball cap with red lettering, "113" on the front, and "KINGPIN CREW MC" in smaller lettering on the back. He testified that at the time he was not aware of the significance of the letters "113" but that he recognized "KINGPIN CREW MC" as referring to a local motorcycle gang with ties to the Hells Angels. The officer spoke with the subject patron when the patron left the washroom and advised him that he was not permitted to wear the hat in the establishment. The patron removed the hat and gave it to the officer. The officer advised the security staff member standing nearby that the hat was not permitted to be worn in the establishment. The officer turned the hat over to Corporal B.

Corporal B testified that once inside he observed Constable A speaking with a staff member outside the washroom. He then observed the constable speaking with a patron who had just left the washroom and observed him taking a hat from the patron. The Corporal received the hat from the constable. It was black with red lettering, "113" on the front, and "KINGPIN CREW MC" in smaller lettering on the back. He testified that at the time he was not aware of the significance of the letters "113" but that he recognized "KINGPIN CREW MC" as referring to a local motorcycle gang. He gave the hat to the licensee who was working with security at the front door. The licensee told him that he didn't see the patron wearing the hat when he entered the premises otherwise he would have taken it from him. The officer testified that in his opinion the licensee runs a good establishment.

The officers testified that they did not observe any problems in the operation of the establishment other than the incident with the hat and left the establishment shortly thereafter. They returned approximately one hour later and served a copy of a Licensed Premises Check form (LPC) to the licensee.

Corporal B testified that he did not request a copy of any of the treoscope images from the establishment. Constable A did not provide any evidence on the point. Neither of the officers testified as to whether they requested a copy of a video from the establishment's in-house video system.

Alleged Contravention #1 EH12-010 and Alleged Contravention #2 EH12-014

A **Liquor Inspector, witness C**, testified that he is the inspector responsible for the Kelowna area in which the establishment is located. The establishment had been closed for several years and had reopened in January, 2012. The liquor licence had been re-issued at that time and contained several additional terms and conditions to those normally associated with similar type of establishments. In particular, the following two from Appendix A to the license (exhibit 1, tab 11):

The following terms and conditions apply to Liquor Primary licence # 200533:

1. Video Surveillance

- a) Licensee must have video surveillance at all ID checking areas.
- b) Must have video surveillance of all areas inside the establishment including behind the bar, the office(s), storage areas, patios, entries and exits and coat check.
- c) Licensee must have video surveillance at all entrances and exits to the establishment and must cover the exterior and interior area of the exits and entrances.
- d) The video surveillance system must be capable of producing video records on demand by the police or the liquor inspector.

- e) Licensee must not permit any patrons to enter the establishment in the event that the video surveillance system is not working.
- f) The video surveillance system must have a security system to limit access to authorized personnel.
- g) The licensee will maintain a log of all personnel who access the video surveillance system.
- h) The video surveillance systems must be capable of retaining one week's worth of data

4. Gang Affiliations

- a) Licensee must ensure that no patron or employee will be allowed entry into the establishment at any time with any apparel or jewellery of any kind with gang affiliated identification.
- b) Where any person (employee or patron or entertainer) who removes a garment inside the establishment that reveals any gang affiliated identification or support for any gang or gang activities – including tattoos and all types of apparel – that person will be removed immediately.

The inspector testified that prior to the licence being re-issued he met with the licensee on December 14, 2011 and spent considerable time going over each of the terms and conditions with him, (see liquor license and appended T & C at exhibit 1, tab 11), as well as the general T & C found in the Guide for Licensees (exhibit 1, tab 13). At the licensee's request he met with a video technician contracted by the licensee to service video surveillance equipment in the establishment. He went over the applicable conditions with the technician and was advised that the system was capable of meeting the terms and conditions and would have a one month retention period.

The inspector testified that following the reopening of the establishment he received a report from Corporal B (exhibit 1, tab 4) advising that police officers had made a licensed premises check of the establishment the night of January 12, 2012 and observed a motorcycle gang member wearing a hat bearing gang insignia inside the establishment contrary to the T & C of the liquor licence. The inspector also spoke with

the corporal who advised that at the time of the incident he had requested the licensee representative for a copy of the video surveillance tape but had not received it.

The inspector was also contacted by the licensee representative on the matter and spoke with him further on January 17, 2012. He advised the licensee on that date that he needed a copy of the security video for the night of January 12, from the time that the subject patron entered the establishment until the time of the conversation between the officer and the patron. This request was followed up in writing in a letter dated January 19th and hand delivered to the licensee on that date.

Alleged Contravention #1 EH12-010

The inspector testified that he completed a Contravention Notice (CN) on January 19, 2012 alleging a contravention of the T & C of the licence (EH12-010) (gang affiliated apparel) and provided it to the licensee at the time of their meeting on that date. He subsequently prepared a NOEA dated March 16, 2012 for the alleged contravention. He recommended a three day licence suspension, the maximum for a contravention of this type. He testified that the T & C regarding gang affiliations had been put into place as a result of the previous history of the establishment involving gang activity and business dealings with gang members. The T & C would assist the licensee in controlling the operation of the establishment and remove the opportunity for violence and intimidation of the licensee by having the branch making the requirement as part of the liquor licence. In recommending enforcement action and a three day suspension the inspector was concerned that the licensee had not taken the T & C requirement seriously enough given that the alleged contravention occurred four days after the establishment had reopened.

Alleged Contravention #2 EH12-014

The inspector testified that after requesting a copy of the video on January 17th and delivering a written request on January 19th he had not received the video and consequently spoke with the licensee about the security video on January 25th (see inspector's notes at exhibit 1, tab 8). The licensee advised that there were some issues in providing the video. Apparently the recorder for the system would require to be transcribed on 40 compact discs to cover the period of recording requested. He advised the licensee that he was issuing a CN and proceeding to enforcement action.

A CN was issued to the licensee on January 27th alleging the licensee failed to produce the video requested (exhibit 1, tab 10). The inspector subsequently prepared a NOEA dated April 11, 2012 for the alleged contravention. He recommended a \$7500 monetary penalty, the minimum monetary penalty for a first contravention of this type. He testified that the T & C required the licensee to maintain a video surveillance system capable of producing video records on demand. The video record for the incident of January 12 was requested and never received giving rise to the contravention. The contravention is considered serious as the branch requires the production of videos and documents to ensure that an establishment is being operated properly. Despite several requests being made for the video it has never been received. A penalty is necessary to encourage future compliance.

EVIDENCE – The Licensee

The licensee presented four witnesses, the licensee principal, a video technician and two bartenders.

The licensee principal (the licensee), **witness D**, testified that he is the principal of the corporate licensee. The corporate licensee is currently a tenant of the property housing the licensed establishment. Prior to mid 2004 he was principal of both the corporate licensee and the corporate owner of the property. He sold both businesses at that time and had ceased operating the licensee business while awaiting the transfer of the liquor license to the new corporate owner of the licensee business. The licensee business was being operated by the new owners during the interim period. The licence transfer was refused by the branch because one of the principals of the corporate owner of the property was a member of the Hells Angels. He was subsequently required to take back the ownership of the licensee business which was then without an active liquor licence and was closed for over two years until reopening January 9, 2012. It is now known as Liquid Zoo.

Prior to the licensee's business reopening he met with liquor inspector C and went over the terms and conditions of the liquor licence. He was aware of the conditions regarding "Gang Affiliation". He considered that it referred to the Hells Angels, given the past history with the licence transfer process. He was not provided with the names of any gangs and is not aware of what gangs are affiliated with the Hells Angels. He relies on the expertise of the branch and the police. He was aware of the terms and conditions regarding the security video system requirements. He is not familiar with the video system or its operation so he contracted with an experienced video technician to work with the liquor inspector to ensure that the requirements were met.

He testified that he works at the licensed establishment every night and was working the night of January 12, 2012. There were 17 – 18 employees working including security staff at the front entrance and within the licensed areas. He works at the front entrance operating the treoscope system and patting down patrons when necessary. Police officers attended at the establishment several times that night. The first visit was at approximately 9 p.m. when there were only about 15 to 20 patrons present. They attended later between 10:30 and 11 p.m. when the establishment was busy with more than 100 patrons on the main floor area. He observed the subject patron in discussion

with an officer and walked over to them. The officer said that the hat worn by the patron was not allowed and handed it to the licensee. The hat was retained and later returned to the patron. A duplicate hat was later obtained for the purpose of this hearing (exhibit 2). The licensee told the officer that the patron did not enter the establishment wearing the hat. This was confirmed by the patron who said that he had it in his pocket and later put it on inside. The licensee told the officer that he did not know what "113" meant.

He testified that it is very difficult to determine who are gang members. The T & C do not prohibit gang members from patronizing the establishment; they are prohibited from wearing gang related apparel inside. There are other motorcycle clubs with insignia who are veterans' clubs or Christian clubs who he now tells to remove such clothing. If he believes any clothing to be gang related it must be removed. The officers left after 10 – 15 minutes, returning with a larger group approximately one hour later and said that they were responding to information they had received that there were patrons wearing gang colours in the establishment. None were found. Corporal B gave him a copy of the LPC and said that he was told that he had to do it. None of the officers asked for a copy of the security video or the treoscope information.

The following morning he called the liquor inspector who was not aware of the incident and was unaware what "113" meant. The inspector later contacted him on January 17th and said that he now had everything and that "113" stood for the first two letters in Kingpin Crew, i.e. the 11th letter K and the 3rd letter C. He, the licensee told the inspector that he needed more information regarding gangs to do a better job. The inspector said that he, the inspector, may want a copy of the surveillance video. The inspector did not make a request for it. On January 19th at approximately 8:30 p.m. the inspector gave him a copy of the "Notice to Provide Records" which included the security video recordings. He contacted the security technician that night who came the following day. The technician then told him that the video recording would have been eliminated on January 18th as the system was only set up to retain for 7 days and that if it had been possible to obtain the recording as requested it would take up to 40 compact discs to do so.

He later contacted the inspector and advised him that there were problems getting the recording. If it was possible to get the recording it would take 40 compact discs to obtain the recording as requested. He provided the inspector with the technician's phone number. An hour later the inspector issued the licensee the CN alleging the contravention for not providing the video security tape as requested. He has since viewed other video recordings from the security system. Because of low lighting and the use of laser lighting in the establishment they are generally of poor quality and it is not possible to read printing on clothing. The photos taken thru the telescope system are in black and white and it is difficult to read printing on clothing. Consequently there would not have been anything gained from viewing the video had it been available.

In response to questions from the branch advocate he testified that prior to the inspector's written request it never crossed his mind to view the security video or have a copy made. He never considered that it was an issue which would lead to enforcement proceedings. At the time of the incident he knew the Kingpin Crew as a motorcycle club but did not recognize them as a criminal gang. Following the incident he contacted the Kelowna RCMP detachment to get information regarding known gangs. He sent an email (exhibit 3) to the branch requesting that the branch provide a list of the names and insignia of gangs which could be posted as a notice at the entrance of the establishment. He was told that he could obtain such information from the internet. He has since created a list.

Witness 4 testified that he is employed as a master technician with a company in the business of security, surveillance and access control. In December 2011 he was contracted by the licensee to oversee and maintain the video surveillance system at the licensed establishment. At the licensee's direction he met with liquor inspector C a few days prior to the reopening of the establishment and followed the inspector's directions in the placement of the video cameras located inside the establishment. He spent a total of 24 hours repairing, replacing or adjusting the components of the system. The system at that time consisted of 16 cameras and two video recorders, one with the capability of holding 30 days of recording, the other 40 days. Thus the system had the

capability of retaining 30 days of recording with the redundancy of an extra recorder. The system was set up with a seven day retention period on a 24 hour basis as required by the T & C. [Thus a recording made at 00:00 hours on a Monday would be lost at 00:00 the following Monday.] The quality of the images varied with the capability of the cameras. Some cameras were low light capable and would produce better quality images than others without that capability and may have captured the printing on clothing.

He testified that on January 19, 2012, he was working in the Kamloops area when he received a call from the licensee around 3 – 4 p.m. asking him to obtain an image from the system from January 12, 2012. He finished his work in Kamloops and proceeded to the licensed establishment in Kelowna in the late night/early morning hours. The requested image was no longer available as it was now outside the seven day retention period. He estimated that they missed the retention period by about three to four hours. He testified that the equipment in use in the system at that time could copy only to compact discs, consequently upwards to 100 would have been needed to cover the time period requested. Workarounds may have been possible had the images still been available. The system has since been upgraded with a new recorder with increased memory and the ability to download onto small portable digital storage devices.

Witness F testified that he has been employed as a bartender or manager within licensed establishments for approximately 30 years and has been employed as the head bartender at the licensed establishment since it reopened. He is aware of the T & C attached to the liquor licence. They have been posted inside the establishment. He is aware of the provisions regarding gang affiliation. He is aware of gangs within the Kelowna area, particularly the Hells Angels and knows the Kingpin Crew to be an up and coming gang. The T & C had been discussed at a staff meeting and he was aware that patrons were not allowed to wear gang related clothing. What gangs were included was not discussed. He assumed it referred to the Hells Angels.

He has not previously seen the hat, subject of exhibit 2. He was working the night of January 12, 2012 and recalls the police officers doing a walk thru but was not aware of the incident involving the hat until a few days later. With the type of lighting at the establishment it might be marginally possible to see the writing on the hat at a distance of ten feet.

Witness G testified that he has been employed as a bartender in licensed establishments for approximately 17 years and has been employed at the Liquid Zoo since it reopened January 9, 2012. He is familiar with the T & C of the licence which have been posted in the establishment and is aware that the gang affiliation conditions prohibit the wearing of colours, vests or t-shirts affiliated to gangs. The matter was discussed by the licensee at a meeting who took it to refer to anything with the Hells Angels name on it. He is aware of the Hells Angels and the Kingpin Crew as being gangs in the Kelowna area as well as other gangs having existed over the years. He was working at the main bar the night of January 12, 2012. It was a busy night and they were about three quarters full. He was not aware of the incident involving the hat until later. He testified that it is common for patrons to wear hats in the establishment. It would be difficult to read the printing on a hat from the bar because of the lighting conditions. He was unaware until recently that "113" referred to the Kingpin Crew.

SUBMISSIONS – The Branch

The branch's written submissions are found at exhibit 4 and are summarized as follows:

Alleged Contravention #1 EH12-010

Section 12(2) of the Act authorizes the general manager to impose T & C on a licence. In this case the T & C is that the licensee must ensure that no patron or employee will be allowed entry into the establishment at any time with any apparel or jewelry of any kind with gang affiliated identification and where any person removes a garment inside the establishment that reveals any gang affiliated identification or support for any gang

or gang activity – including tattoos and all types of apparel – that person will be removed immediately. The T & C were extensively reviewed with the licensee by the liquor inspector.

The licensee requires all patrons to remove their hats to be photographed prior to entering the establishment but does not inspect the hats in possession of patrons for gang affiliated identification. That could have been done in this case. The licensee can employ other staff to check and verify that gang apparel is not being worn in the establishment. Here a police officer observed a patron wearing a hat with the name of a gang printed on the back of the hat. The subject patron walked past a security employee wearing the hat. It was observed by the officer and was there to be seen by staff. Further the licensee did not have the patron removed immediately as required by the T & C.

It is the licensee's responsibility to inform himself as to what constitutes gang affiliated identification. He failed to do so. The evidence of the contravention is uncontroverted. The T & C were put in place to assist the licensee. He has not put procedures in place to identify and deal with the problems of patrons wearing gang affiliated identification. The proposed three day licence suspension is warranted and will reinforce the need for voluntary compliance.

Alleged Contravention #2 EH12-014

Section 73(2)(a) of the Act requires a licensee to promptly produce any record requested by a liquor inspector. The evidence is that the liquor inspector made a verbal request to the licensee to produce the video record from the security system for the period of 8 p.m. to midnight of January 12, 2012. The verbal request was followed up in writing. It is a T & C of the license that the licensee maintains a security video surveillance system with a seven day retention period. The video record requested by the inspector has never been received by the branch.

The proposed \$7500.00 monetary penalty is warranted and will reinforce the need for voluntary compliance.

SUBMISSIONS – The Licensee

The licensee's written submission is found at exhibit 5 and is summarized as follows:

Alleged Contravention #1 EH12-010

The evidence is that the patron did not enter the premises wearing the subject hat, thus there is not a contravention of 4(a) of the T & C. The patron did not remove any garment thus revealing gang insignia thus in the strictest sense there is not a contravention of 4(b).

The branch argues that the wearing of the subject hat is in itself a breach of the conditions. If so it is not a strict liability offence and thus it must be considered whether it is reasonable in the circumstances for the licensee not to detect the hat as being gang affiliated and whether the licensee took all necessary steps to prevent the wearing of gang affiliated apparel. The licensee made inquiries of the police, the branch and the Bar Watch Association to gain assistance in identifying potential gang associations. He did not receive any helpful information.

The subject hat was observed by only one of the police officers and then only after the officer had approached a table of known gang members and later observed one of them walk away from the table. The hat is a black ball cap with red lettering. It is similar in style to hats worn by many sports team fans. The dominant lettering on the hat were the numbers "113" on the front of the hat. The significance of those were unknown to the licensee, the police officers and the liquor inspector at that time. The lettering denoting the gang insignia was on the back of the hat. It was in smaller size letters and was difficult to read in the dim lighting inside the licensed establishment. Giving consideration to all of the factors it is unreasonable in the circumstances to expect the

licensee or his employees to appreciate that the hat worn by the patron was gang affiliated and that the patron should thus be removed from the premises. As such the licensee has not contravened a T & C of the licence.

Alleged Contravention #2 EH12-014

The liquor inspector had a discussion with the licensee concerning the security video from the establishment for the night of January 12, 2012. The licensee did not interpret the discussion as a formal request to produce the video record. No formal request was made by the inspector until he delivered the written request on January 19th. In making the request the inspector was aware that the licensee had contracted out the operation and maintenance of the video surveillance system to a third party. Upon receiving the request the licensee contacted the contracted technician who attended the establishment immediately that he was available. It was too late to copy the record as requested as the seven day period of retention had lapsed. It is the licensee's position that in the circumstances of this case the demand was made too late for the licensee to reasonably comply and thus there was no contravention of section 73 of the Act.

The Guide places a responsibility on the licensee to allow an inspector to view the video. Here the video was retained for a seven day period as required by the T & C. The inspector did not take opportunity to view the video during this time period. Section 73 provides authority for the branch to request records for the purpose of the administration or enforcement of the Act. In this case the branch was relying on the evidence of the police officers, the video would not add to that evidence. Consequently the licensee was not in contravention of section 73 of the Act.

The video could perhaps provide evidence to exonerate the licensee, thus the licensee would be punished for failing to provide evidence that would assist his case. To find that the licensee contravened a T & C of the licence and then a contravention for failing to produce evidence of that contravention would be to punish the licensee twice for the same act or to punish him for failing to provide further evidence to support the first contravention.

Penalty

The finding of a contravention does not automatically result in the imposition of a penalty. There is no previous enforcement history for this licensee and he has been described by one of the police officers as operating a good establishment. If a contravention is found for breaching a T & C of the licence the contravention should be considered as trivial or petty and should result in either no penalty or a minimum penalty of a one day suspension. Should a contravention be found for failing to produce the video as requested, it should not result in the imposition of a further penalty.

REASONS AND DECISION

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

Alleged Contravention #1 EH12-010

The evidence is that on January 12, 2012 a police officer observed a patron in the licensed establishment wearing a hat with the lettering "Kingpin Crew MC" on the back. The hat was not worn into the establishment but was carried in the patron's pocket unobserved by the licensee who processes each patron into the establishment.

Constable A knows the Kingpin Crew to be a motorcycle gang with ties to the Hells Angels. I accept that it is common knowledge that the Hells Angels have established notoriety within the province. The evidence of the licensee is that he was unaware of the nature of the Kingpin Crew and viewed them as a motorcycle club not unlike many other motorcycle clubs, some made up of veterans or religious groups. The evidence of two employees of the licensee is that the Kingpin Crew are known as a local motorcycle gang. When providing evidence about known motorcycle gangs both mentioned the Hells Angels and the Kingpin Crew.

Giving consideration to all of the evidence, I find on a balance of probabilities that the Kingpin Crew are a gang as described in paragraph 4 of the T & C of the licence. I further find that the subject hat bearing the lettering "KINGPIN CREW MC" is "gang affiliated identification" as described in paragraph 4.

The licensee has argued that given the evidence that the subject patron did not wear the offending hat into the establishment nor remove any garment revealing any gang affiliated identification, there is, strictly speaking, no breach of the T & C. I do not agree. In interpreting the meaning of paragraph 4 of the T & C I am satisfied that it is necessary to consider its purpose. Here the purpose is, in my view, to prevent the identified presence of gang members or supporters from patronizing the establishment and thus intimidating the staff or other patrons. The T & C was imposed by the branch to assist the licensee by making it a branch requirement and not one imposed by the licensee. To allow a narrow interpretation of the paragraph would defeat the purpose of the T & C. I find that in this case where the gang affiliated identification was carried into the establishment and later revealed or displayed may be reasonably interpreted as being caught within the provisions of paragraph 4 and is on its face a breach of the T & C.

Further, in consequence, the subject patron was required by the T & C to be immediately removed by the licensee or his employees. That he was not is on its face a breach of the T & C.

Due Diligence

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

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

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

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

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

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

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

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely *whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons.* That inquiry requires, of course, consideration of *who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.*

(My emphasis in italics)

Here, the evidence is that the liquor inspector spent considerable time with the licensee going over the general and specific T & C for the liquor licence including the provisions of paragraph 4 as noted above. The licensee did not inquire or satisfy himself what was required under paragraph 4 concerning the terms, gang, gang affiliations or gang affiliated identification. The licensee made an assumption that the terms related only to the Hells Angels. It was only after the incident of January 12th regarding the subject hat and patron that the licensee made inquiry. While the licensee posted the T & C in the establishment and brought them to attention of his staff there is no evidence that he provided instruction or direction on how the staff were to carry out the requirements of the T & C.

The licensee was on site at the time of the alleged contravention and was the directing mind of the corporate licensee.

The evidence is that subject patron was in plain sight within the licensed establishment and at one point walked past a security employee who either failed to see or recognize the gang affiliated identification or failed to act on the provisions of paragraph 4. The licensee, once the subject patron and the gang affiliated identification were brought to his attention failed to have the patron removed.

Giving consideration to the evidence as a whole, I find that the licensee's system was not sufficient to reasonably ensure compliance with the provisions of the T & C of the licence and I find that the licensee is not entitled to the benefit of the defence of due diligence.

In conclusion, I find on a balance of probabilities that on January 12, 2012, the licensee contravened section 12 of the *Liquor Control & Licensing Act* (the Act) and the following terms and conditions of its licence which state:

4. Gang Affiliations

- (a) Licensee must ensure that no patron or employee will be allowed entry into the establishment at any time with any apparel or jewellery of any kind with gang affiliated identification.
- (b) Where any person (employee or patron or entertainer) who removes a garment inside the establishment that reveals any gang affiliated identification or support for any gang or gang activities – including tattoos and all types of apparel – that person will be removed immediately.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

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

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

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

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

It is common knowledge to the licensee that the branch has a concern with known gang members being associated with this establishment in the past. That concern led to the refusal of the branch to transfer the liquor licence and the establishment ceasing to operate for over two years. When the licence was re-instated it was with several specific T & C, including those found at paragraph 4, which were accepted by licensee. Despite the branch's best efforts the licensee breached the T & C on the fourth day of business upon reopening after the two year closure.

I do not agree with the licensee that the breach may be considered as being trivial or petty. It goes to the heart of the branch's concern and efforts to assist the licensee in addressing those concerns. In the circumstances I find that a penalty is necessary to bring about future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulations provides a range of penalties for a first contravention of this type. The branch has proposed a three day suspension, the maximum for a first contravention of this type. In the circumstances here I find that the recommended three day licence suspension is necessary, appropriate and reasonable. It should serve to bring to the attention of the licensee, his employees and those persons patronizing the establishment, of the branch's resolve to fully enforce the T & C of the liquor licence issued to the establishment.

Alleged Contravention #2 EH12-014

The liquor licence for this establishment requires as a T & C of the licence that the licensee must have a video surveillance system within the establishment capable of producing video records on demand by the police or a liquor inspector and the system must be capable of retaining one week's worth of data. The evidence is that the licensee has met that specific T & C.

Section 73(1)(a) authorizes a liquor inspector to require a licensee to produce a record relating to the operation of the licensed business. Section 73(2)(a) requires a licensee to promptly produce the record requested.

The evidence of the liquor inspector is that the need for the licensee to produce a copy of the video recording of an event occurring the evening of January 12, 2012 first arose on that date in conversation between the licensee and a police officer. The licensee denies that such a request was made. The police officers did not address the issue in their evidence. The evidence of the liquor inspector is that he made a verbal request to the licensee for the recording during a conversation held on January 17th. The licensee denies that such a request was made and characterizes the conversation as the inspector telling him that he, the inspector, may need the video recording. Neither the inspector nor the licensee made notes of their conversation.

On January 19 the inspector provided the licensee with written notice requiring that the video recording for January 12 between the hours of 8 p.m. to midnight inclusive be produced by 4:30 p.m. of the following day. There is no conclusive evidence of what time the written notice was provided to the licensee. The inspector did not provide any evidence on the point. The licensee's evidence is that upon receiving the written notice he contacted the technician contracted to maintain the video surveillance system. The best evidence is that of the technician who testified that he received a call from the licensee sometime between 3 and 4 p.m. that date.

The evidence of the inspector is that the video recording has never been produced as requested. The evidence of the technician is that he was working on a job in Kamloops when he received the phone call from the licensee and went immediately to the establishment upon completion of that job, arriving late night/early morning. Despite his best efforts he was not able to produce the requested video record as the recording system had completed the seven day cycle by that time and the video recording requested was no longer available.

The branch submits that a contravention for failing to produce the required record has been established. The licensee submits that there can be no contravention, as, amongst other reasons, the request was not reasonable, the inspector knew that the T & C of the licence only required the licensee to retain video recording records for a period of seven days. He also knew that at the time of the written request that the seven day period was about to run out. Consequently the late hour request was not reasonable in the circumstances.

I am in agreement with the licensee. Failing to provide the records requested by an inspector is a serious contravention with potential consequences of a penalty for a first contravention ranging from a minimum 10 – 15 day suspension, and/or a \$7500 to \$10,000 monetary penalty. I find that the request to provide the record must be clear and unequivocal and must be reasonable in the circumstances. Here the inspector was aware of the incident giving rise to the request for several days. The evidence of the licensee is that he phoned the inspector the day following the incident, i.e. January 13th. There is no evidence to the contrary. While it is clear that the inspector discussed the video record with the licensee on January 17th, I find that the clear and unequivocal request was not made to the licensee until January 19th, sometime between 3 and 4 p.m. thus leaving a period of time of only four to five hours for the licensee to effectively comply. I find that that period of time is not reasonable in the circumstances of this case. Consequently, I find on a balance of probabilities that the alleged contravention has not been established.

In so finding I should explain that it is not part of my finding that the circumstances here of a licensee not adequately informing himself on the operation of the video surveillance system and contracting out that responsibility to a third party were a consideration. The licensee bears the ultimate responsibility for the operation of all facets of the licensed establishment and cannot avoid liability because a contracted third party was not available in this case to complete the recording prior to it being inaccessible.

ORDERContravention #1 EH12-010

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 200533 for a period of three (3) days, to commence as of the close of business on Wednesday, September 19, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Kelowna RCMP Detachment from the close of business on Wednesday, September 19, 2012, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager showing that a license suspension penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 15, 2012

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

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