



**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: Beant Logging & Investments Ltd.
dba Mackenzie Place
101 Stewart Drive
MacKenzie, BC V0J 2C0

Case: EH12-160

For the Licensee: Roger Haines
Traxler Haines, Barristers & Solicitors

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: February 28, 2013

Place of Hearing: Prince George

Date of Decision: April 15, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Beant Logging & Investments Ltd, holds Liquor Primary License No. 132783 for the operation of a liquor primary licensed establishment known as Mackenzie Place located in Mackenzie, BC. Liquor sales are permitted from 11:00 a.m. to 1:00 a.m. Monday to Thursday; Noon to 2:00 a.m. Friday and Saturday; and 11 a.m. to Midnight on Sunday. The maximum capacity is 98 persons in area 1 and 25 persons on the patio. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia." Charanjiv Parmar is the principal of Beant Logging & Investments Ltd. and appeared as the licensee's representative during the course of the hearing (the "Licensee").

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (NOEA), (exhibit 1, tab 1).

The branch alleges that on June 15, 2012 the licensee contravened section 43(1) of the *Liquor Control and Licensing Act* (the "Act") by selling or giving liquor to an intoxicated person. The proposed enforcement action outlined in the NOEA is a 5 day suspension. This proposed suspension falls within the penalty range set out in item 9, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") for a first contravention of this type.

Item 9 provides a range of penalties for a first contravention of a licence suspension for four to seven days and/or a monetary penalty of \$5000 - \$7,000.

If the general manager does not make a finding that the licensee contravened section 43(1) of the *Act*, the branch alleges in the alternative that on June 15, 2012 the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain.

The proposed enforcement action for this alternative contravention is a \$5,000 monetary penalty, which falls within the penalty range set out in item 11, Schedule 4 of the *Regulation* for a first contravention of this type.

Item 11 provides a range of penalties for a first contravention of a licence suspension for four to seven days and/or a monetary penalty of \$5000 - \$7,000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS

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

Drunkenness

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(2) A licensee or the licensee's employee must not permit

(a) a person to become intoxicated, or

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Should a stay of proceedings be entered?
2. Did the contravention occur?
3. If so, has the licensee established a defence to the contravention?
4. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

1. Branch's book of documents, tabs 1 - 10.

EVIDENCE – THE BRANCH

Liquor Inspector A testified that on June 15, 2012 she was working with Liquor Inspector B conducting covert inspections of licensed establishments in the Mackenzie area. Covert inspections are conducted by liquor inspectors posing as patrons while observing the operation of the establishment being inspected. Typically the licensee is not advised of any problems observed at the time of the inspection but is contacted at a later date.

The inspectors entered Mackenzie Place at approximately 11:47 p.m., there was no doorman present. Liquor Inspector B purchased a beer for each of them from the liquor service bar. They took seats at a table in a raised portion of the room across from the bar. There were approximately 17 patrons in the establishment. Her attention was drawn to the boisterous behaviour of three patrons, two males and a female seated at a nearby table, approximately 8-10 feet away. One of the males ("Male #1"), a large man approximately 60 years old was interacting with the female. The inspector observed that he had a flushed red face, his speech slurred, his eyes bloodshot. The female was leaning back and forth on him. The second male at the table ("Male #2") appeared to be dozing on and off and at times making noises of growling like a bear. At approximately midnight a waitress served three cream coloured drinks to the table.

Male #1 was observed to get up from the table. He headed towards the kitchen before making his way to the bathroom area. Liquor Inspector B followed the male into the bathroom.

Liquor Inspector A testified that the female patron was observed engaging with a third male who was standing by the table ("Male #3"). They were yelling at each other. She choked him and he slapped her. Following this altercation the female returned to the table. Liquor Inspector A observed that the female patron's speech was slurred and her eyes bloodshot.

Liquor Inspector A observed the licensee walking thru the establishment interacting with patrons. He approached the table and spoke with Male #1. During this time the waitress delivered a drink containing a brown liquid with cream on the top to Male #1.

Shortly thereafter the female patron was observed to get up and leave the establishment. The two males remained at the table and at one point spilt their drinks on the table.

At approximately 12:37 a.m. Male #1 staggered over to the bar, perhaps for the purpose of paying the bill. At the same time a male patron ("Male #4") was observed entering the establishment. He was loud and boisterous, his speech was slurred. He was yelling, staggering and bumping into things, his eyes were bloodshot, his face flushed. He proceeded to the bar, was served a bottle of Corona beer and went onto the patio. This patron had been observed at another establishment earlier that night.

Liquor Inspector A testified that the inspectors left the establishment at approximately 12:55 a.m. The inspector used her I-phone to record her observations and comments of Inspector B during the course of the night. She completed her notes (exhibit 1, tab 2) immediately after leaving the establishment and forwarded copies to Inspector B and the liquor inspector responsible for the Mackenzie area. She testified that she has been a liquor inspector for approximately six years and during that time has made approximately 2100 inspections of licensed establishments. She distinctly recalls this inspection due to the altercation between the female patron and Male #3 and the interaction between Male #1 and the female patron.

Liquor Inspector B testified that he has been employed as a liquor inspector for approximately nine years with more than 30 years previous experience as a police officer and investigator. On June 15th, 2012 he was working with Liquor Inspector A conducting inspections of licensed establishments in the Mackenzie area.

They entered Mackenzie Place at approximately 11:47 p.m. There were approximately 17 patrons in the establishment. He purchased two beer and joined Liquor Inspector A at a table approximately six feet from a table of three patrons engaged in animated conversation. One of the patrons was an older, heavy set male (Male #1). He was constantly rocking side to side and front to rear. The younger male (Male #2) was animated and boisterous. The female was boisterous, her speech slurred. The person he believed to be the licensee walked thru the establishment from time to time or was seated near the bar.

Liquor Inspector B testified that at about midnight a waitress served the table of three patrons with three milky brown drinks. The three patrons had become more animated and loud. At approximately 12:20 a.m. Male #1 got up from the table and Liquor Inspector B followed him as he began walking toward the kitchen corridor. The inspector turned into the bathroom followed by the male patron. Liquor Inspector B testified that Male #1 was staggering and took up a position beside the inspector at the urinal. His face was flushed, he was sweating profusely, his eyes were glassy and bloodshot. His fine motor skills were retarded. The inspector spoke briefly with him. His speech was slurred. He leaned his head against the wall. He had difficulty with his zipper. He was weaving with the result that he urinated on his shoes and the floor.

The inspector returned to his table. He observed Male #1 return from the bathroom, staggering. Male #2 was slouched in a chair with his eyes closed. Male #1 then went to the bar and spoke to the bartender. He then staggered back and dropped into a chair at the table. The waitress brought him a milk coloured drink.

Liquor Inspector B testified that, at approximately 12:28 a.m. the female patron got up from the table and staggered into a male patron (Male #3). She grabbed the male by the throat and he slapped her. They engaged into a heated argument then fell into each other's arms. The female was then assisted into her coat by another woman and staggered out of the establishment.

At approximately 12:37 a.m. Male #1 began making growling noises like a bull moose. Male #2 stood up from the table and either bumped or hit it knocking the drinks to the floor. Liquor Inspector B said that none of the staff took any notice. At that time a male patron (Male #4) entered the establishment. He was loud and boisterous. He purchased a Corona beer from the bar and went out onto the patio. Liquor Inspector B testified that he had seen this person earlier at another establishment. He followed Male #4 onto the patio. He appeared to be intoxicated, his face was flushed, his speech slurred, his motor skills retarded.

The inspectors left the establishment shortly after 1 a.m. Liquor Inspector B completed his notes (exhibit 1, tab 3) at approximately 2:30 a.m. after returning to his residence. In the preparation of his notes he used the times recorded by Liquor Inspector A in her notes recorded on her I-phone (exhibit 1, tab 2). He testified that the observations recorded in the notes are his own and were made independent from those of Liquor Inspector A.

Liquor Inspector B in his testimony referred to copies of documents from the Branch file:

- Exhibit 1, 4; the Contravention Notice issued to the licensee.
- Exhibit 1, tab 5; the liquor primary licence in effect at the time of the alleged contravention.
- Exhibit 1, tab 7; a copy of the "Guide" in effect at the time of the alleged contravention. He referred to excerpts from the Guide dealing with: "Your role as a licensee", "Over-service and intoxicated patrons" and "Physical and mental signs of intoxication".
- Exhibit 1, tab 8; Inspection Interview Sheet signed by the licensee on July 13, 2006.

A NOEA was prepared with a recommendation for a five day licence suspension as the licensee had failed to sufficiently monitor the level of intoxication of the patrons.

EVIDENCE – the licensee

Witness C (Male #1) testified that he is 65 years old and weighs between 235 and 240 lbs. He has been a resident of Mackenzie BC since March 2012 and eats many of his meals at Mackenzie Place. In June of 2012 he had been diagnosed as having an enlarged prostate and was undergoing hormone therapy. This resulted in him having hot and cold flushes which may make him appear to be sweaty and red faced. He was subject to mood swings. He suffers from gout which causes his feet to swell. It can be irritated by playing golf thus causing more swelling and his leg going to sleep. He suffers from back pain and normally walks with a forward lean. If the nerve in his back pinches it may cause him to stumble.

Witness C recalled June 15, 2012 because it was the day before his birthday. His business partner (Male #2) had driven down from Fort Nelson that day. They played golf in the afternoon then went to his residence to discuss their business located in Fort Nelson. They called a cab and went to Mackenzie Place at approximately 9:30-9:45 p.m. to order dinner before the kitchen closed at 10 p.m. It was a Friday night and the music was loud, he had to yell to make himself heard. The atmosphere was hot as it does not have proper air conditioning.

Witness C testified that he had a couple of drinks before dinner and a few after. He did not keep track of the number. The licensee bought him several drinks to celebrate his birthday. Drinks were being sent to him, he did not consume them all. He was drinking mixed drinks containing spirits, liqueur and milk.

Witness C testified that he does not recall walking towards the kitchen, but it has happened before by taking a wrong turn when going towards the bathroom. He does not recall having a conversation at the urinal. He has a problem urinating and does not have proper flow or direction control. He will normally sit on a toilet to urinate but will not do so late at night in a pub. In using the urinal he will lean his arm or head against the wall as it is more comfortable and less painful on his back.

He does not believe that he was slurring his words unless he was playing with his false teeth. He does not recall drinks being knocked off the table. The table was a single pedestal type with a loose top. He does not recall him or Male #2 imitating a bear and a moose. They may have been just teasing each other. He does not recall swaying back and forth while seated at the table unless he was just keeping time to the music being played.

Witness C testified that his business partner had dinner and drinks at the table and was shooting pool after dinner. He is a rambunctious person who likes to joke around. He was not intoxicated that night. They were both tired. His partner had been up since 4:30-5 a.m. and made a nine hour drive from Fort Nelson to Mackenzie. He had been up since 6 a.m. They had played golf.

Witness C said he is acquainted with the female who was at their table. She is a camp cook usually spending three weeks to a month in a camp before returning to town. She is loud and animated. She was not slurring her words. She is a native person with a native type of speech and different pronunciation. He does not believe that she was drunk but he does not remember every detail of that night.

He paid the bill to a female bartender and he and his partner left the establishment sometime between 12:30 and 1 a.m. They walked down the stairs out of the establishment without difficulty. They returned to his residence for further discussion about their business. His partner operates the business in Fort Nelson and is unable to attend this hearing as a witness.

He testified that he was not intoxicated that night. He had had a few drinks but was not beyond his ability to function. He was not out of control or throwing up.

The Licensee testified that his company has held the liquor licence for Mackenzie Place for 20 years. He is always present on site supervising the operation. He has a good relationship with the local police officers; they make regular visits to the establishment on busy nights. He has never had a complaint about intoxicated patrons. Patrons are cut-off from liquor service if necessary and either put into a taxi or given a ride home.

The Licensee said that he first became aware of the alleged contravention when he received the Contravention Notice (exhibit 1, tab 4) approximately one month after the June 15th date and later received the NOEA (exhibit 1, tab 1). He checked to see who was working that night. It was a female bartender and a female waitress. The bartender had worked at the establishment for approximately one year; she had her Serving It Right certificate (SIR). The waitress worked there for three weeks. He told her to get a SIR. He is not certain whether she did so or not. Neither currently work at the establishment and their whereabouts are unknown.

He recalls the night of June 15, 2012. The Licensee testified that he was on site all day, speaking with customers and making sure that there were no violations. He particularly keeps an eye on those patrons who sit in the far corners of the establishment to ensure that they are of age and are not intoxicated. He also regularly checks the patio area and the washrooms. The lights were dim and the music loud as favoured by the customers. He recalls Witness C being present. He arrived with his business partner shortly before 10 p.m. and ordered dinner. There was nothing unusual about him except that he was celebrating his birthday. He was in a good mood, having a good time and other patrons were visiting with him at his table. The Licensee said he spoke with Witness C a couple of times but didn't buy him any drinks. His partner was busy playing pool most of the night. He knows that Witness C has prostate cancer, has had back surgery, has a problem with his leg and has trouble walking. They left at approximately 12:30 a.m.

He did not see any drinks knocked over at their table or hear them making bear or moose noises.

The Licensee testified that he knows the female patron seated at their table. She had just returned from working as a camp cook at a mine site for a month and was more active and loud than usual. She was playing pool most of the night. She tends to swear a lot. He spoke with her that night. She was not slurring her words. He didn't see her arguing with anyone that night. He spoke to all of the patrons during the course of the night. None were intoxicated. No one was throwing up or falling over.

The Licensee knows the patron described as Male #4. He did not see him come into the establishment but saw him later on the patio. He didn't appear to be intoxicated but was loud and was arguing with another patron. The Licensee said he took a bottle of Smirnoff Ice from Male #4 and told him that he had to leave. He has subsequently been barred from the establishment for life for conducting illegal activities in the establishment.

The Licensee testified that he has received training in intoxication. He watches for persons with blurry eyes, problems speaking or walking or falling asleep. Anyone showing signs of intoxication are asked to leave. He trains his staff to watch for minors, to make eye contact with patrons and observe how they are behaving.

SUBMISSIONS – the Branch

The branch advocate's submission is summarized as follows:

Two liquor inspectors seated in the establishment observed a table of three patrons exhibiting signs of intoxication. The female patron was loud and boisterous, slurring her words, staggering and was involved in an altercation. Male patron #1 was described as having slurred speech, sweating, glassy eyed, delayed gross motor skills and staggering. Despite interacting with the licensee and staff he was continued to be

served liquor. Male patron #2 was described as sitting slouched in his chair with his eyes closed and making strange animal sounds. Despite their intoxicated condition none of the three patrons were requested to leave the premises. A fourth patron, male #4 was observed exhibiting signs of intoxication, loud slurred speech upon entering the establishment yet was served a bottle of beer. His condition should have been assessed prior to being served liquor.

The licensee or staff failed to monitor the patrons. Liquor service to these patrons could have been cut-off and the patrons requested to leave the premises. The licensee sold or gave liquor to an intoxicated person or in the alternative allowed an intoxicated person to remain on the premises. The recommended penalties are necessary to demonstrate to the licensee and the community the importance of compliance with the law.

SUBMISSIONS – the Licensee

Stay of Proceedings

Counsel submitted that the branch practice of providing the Hearing Delegate with a copy of the NOEA containing a summary of the evidence to be given by the branch witnesses gives rise to a reasonable apprehension of bias on the part of the Hearing Delegate. Likewise the branch practice of having liquor inspectors sharing their notes prevents the Hearing Delegate from receiving a fair and unbiased view of the evidence. The result of these practices requires a stay of proceedings be entered on behalf of the licensee to ensure that justice be seen to be done.

Intoxication

The evidence of the licensee is that he observed and spoke with male patron #1 and did not believe him to be intoxicated. That evidence was not challenged and is as credible as that of the liquor inspectors. There is little evidence of symptoms of intoxication for male patron #2. He was playing pool well. He may have been tired as a result of having a tiring day causing him to sit slumped at the table. Knocking the liquor glasses off the table was the result of him accidentally bumping a small wobbly table top. The female

patron was known to the licensee. She is typically loud and boisterous and had just returned from a month in a mining camp. The licensee did not believe her to be intoxicated. His evidence was not challenged and is as credible as that of the liquor inspectors. There is no doubt on the evidence that male patron #4 was intoxicated. The law requires that the licensee have reasonable time to make observation of the condition of the patron and to make a decision of appropriate action to be taken. Here the patron entered the premises while the bartender was occupied with male #1 paying his bill and had a limited opportunity to deal with him. He was observed on the patio by the licensee and immediately requested to leave the premises.

Intoxication is not defined in the legislation. Black's Law Dictionary (4th edition) equates it with drunkenness. Drunkenness is described as the condition in which the capacity for rational action is substantially lessened. Merriam-Webster dictionary describes it as being affected by alcohol and provides synonyms such as besotted, blasted, or blitzed.

Here there is no evidence of any of the subject patrons falling over or of being sick or requiring assistance to get home. They all negotiated the 20 stairs necessary to exit the premises. The licensee was in attendance. He has a 20 year record of operating without a problem. There is no numerical limit on the number of drinks permitted to be sold to each patron. In the period of observation by the inspectors there was one round of three drinks served to the table of the three patrons and one beer sold to male patron #4.

In conclusion it has not been proven on a balance of probabilities that the subject patrons were intoxicated.

Penalty

Should intoxication be found it is open for the Hearing Delegate to find that no penalty is necessary. Here is a licensee with a 20 year record of constantly being on site monitoring the operation of the establishment. Thus it is appropriate that no penalty be imposed.

Should a penalty be found necessary, the minimum suspension penalty would be appropriate.

REASONS AND DECISION

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

Stay of proceedings

Counsel for the licensee has submitted that in the interests of justice a stay of proceedings be entered. The branch practice of providing a Hearing Delegate with a copy of the NOEA containing the summary of evidence to be entered at the hearing gives rise to a reasonable apprehension of bias on the part of the Hearing Delegate. The branch practice of having liquor inspectors sharing their notes prevents the Hearing Delegate from receiving a fair and unbiased view of the evidence.

I have considered counsel's submission. Actual bias has not been alleged. The enforcement hearing proceedings are administrative in nature with the Hearing Delegate appointed as the representative of the General Manager of the branch, acting in the stead of the General Manager and not that of an independent decision maker. As such the Hearing Delegate comes to the hearing cognizant of branch actions, practices and policies. Typically, as in this case, the NOEA with the summary of evidence is part of the administrative hearing process and is provided to the Hearing Delegate upon appointment to the hearing. It is normally placed into evidence as a document exhibit

(as it was here, exhibit 1, tab 1) by the branch advocate during the course of the hearing. It is incumbent upon the Hearing Delegate at the completion of the hearing to make a determination based on the weighing of the best evidence presented. Typically, as in this case, the best evidence is the *viva voce* testimony of the inspectors as witnesses. It is not based on a summary of the anticipated evidence presented in a document. In these circumstances I am satisfied and so find that the branch practice does not give rise to a reasonable apprehension of bias as to require a stay of proceedings. To enter a stay in the circumstances here would not serve the interests of justice but would serve to negate the General Manager's responsibility to supervise the conduct and operation of licensed establishments pursuant to section 6(c) of the Act.

The branch practice of having liquor inspectors sharing their notes occurs, in my experience, in cases where the inspectors are conducting covert inspections. The nature of the inspection precludes inspectors from handwriting their notes in a notebook during the course of the inspection. The practice has arisen during the course of such inspections of one inspector using an I-phone or like device to record notes on behalf of both inspectors. These notes are then provided to the other inspector and may be used in the making of notes by that inspector. That is what has occurred in this case. The notes of Liquor Inspector A are found at exhibit 1, tab 2. They are the printed-out notes she made on the I-phone and were completed by 1:05 a.m. shortly following the inspectors' departure from the establishment. The notes of Liquor Inspector B are found at exhibit 1, tab 3. He testified that they were made following his return home in the early morning hours following the inspection. The notes of the two inspectors differ in style and content and reflect for the most part the observations of the individual inspectors. The inspectors testified that they reviewed their notes prior to giving their evidence. I am satisfied that their evidence *viva voce* was unbiased and credible. To enter a stay in the circumstances here would not serve the interests of justice but would serve to negate the General Manager's responsibility to supervise the conduct and operation of licensed establishments pursuant to section 6(c) of the Act.

Intoxication

The branch has presented evidence that during the evening hours of June 15, 2012, two liquor inspectors conducted a covert inspection of the licensed area of Mackenzie Place located in Mackenzie BC. The attention of the inspectors was drawn to the boisterous behaviour of three patrons seated at a table inside the establishment. During a period of approximately 45 minutes the inspectors observed signs of intoxication in the three patrons. The patron described as Male #1 exhibited signs of intoxication such as staggering when he walked, flushed face, sweating profusely, eyes glassy and bloodshot. His fine motor skills were retarded. He weaved back and forth when standing and when seated in a chair. The patron described as Male #2 was observed to sitting slouched at the table eyes closed and at one point bumped the table knocking over the drinks of liquor. The female patron was observed as being boisterous, having slurred speech, staggering and being involved in a loud and physical altercation with another male patron. Liquor was served to the table of the three patrons during the time of the inspectors' observation. A third male patron was later observed entering the establishment. He was described as yelling, staggering and bumping into things. He proceeded to the bar, purchased a bottle of beer and went onto the patio. In conversation with the inspectors it was observed that his eyes were bloodshot, his face flushed, his speech slurred, and his motor skills retarded.

The patron described as Male #1 testified that on the night in question he was at the establishment with his business partner having dinner and celebrating his birthday. He suffers from various illnesses which combined with medications give rise to particular symptoms which may make it appear that he is intoxicated. Treatment for prostate cancer results in him having hot and cold flushes making him appear to be sweaty and red faced. He suffers from gout which causes his feet to swell. It can be irritated by playing golf thus causing more swelling and his leg going to sleep. He suffers from back pain and normally walks with a forward lean. If the nerve in his back pinches it may cause him to stumble. He testified that both he and his business partner were tired as a

result of a long day and playing golf. Neither was intoxicated. He had a few drinks but was not beyond his ability to function. He was not out of control or throwing up.

The Licensee testified that all of the subject patrons are known to him. He observed the three patrons seated at the table during the time in question and none of them were intoxicated. When he observed male patron #4 on the patio he took his drink from him and required him to leave.

In considering and weighing the evidence presented I prefer the evidence of the liquor inspectors. They are both experienced inspectors and have received training in identifying intoxicated persons. They made notes of their observations at the time or shortly thereafter. I have no reason to doubt the integrity or veracity of the inspectors' evidence. They presented their evidence *viva voce* with every opportunity for challenge by counsel acting for the Licensee.

The physical and mental signs of intoxication as described in the Guide provide a description of the symptoms, which without evidence to the contrary, provide evidence from which a state of intoxication in an individual may be concluded. These signs of intoxication have been provided to licensees by the branch. Here the female patron and male patrons #1 and #4 exhibited several symptoms of intoxication. Some of those symptoms observed in male patron #1 may have been exacerbated by his medical conditions and tiredness but I am satisfied they are nonetheless symptomatic of the patron's state of intoxication.

On the whole of the evidence, I find on a balance of probabilities that the female patron and male patrons #1 and #4 observed by the inspectors during the evening/early morning hours of June 15/16, 2012, were intoxicated. I find that despite the readily observable symptoms of intoxication the patrons were served liquor by staff within the establishment.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention 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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently 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 these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale 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 made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors), and
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend 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.

At the time in question in this case I find that the directing mind of the licensee was the Licensee. He was on site and was responsible for the operation of the establishment and the supervision of the staff. He had interacted with the three patrons occupying the table near the liquor inspectors and had every opportunity to observe their physical condition. He testified that he did not believe them to be intoxicated; none were throwing up or falling over. Consequently he did not direct his staff to cease liquor service to them nor request them to leave the premises.

The condition of Male #4 upon entering the establishment was described by the inspectors as being intoxicated. He obtained a bottle of beer from the bartender who either failed to recognize his condition or was preoccupied with another patron. He was later requested to leave the premises by the Licensee, not as a result of his intoxicated condition but to prevent an altercation.

The Licensee testified that he had received training concerning intoxication however did not explain the nature or breadth of the training. The training he provided for his staff must be considered rudimentary at best. He did not provide into evidence any policy or procedure manuals or directives to guide and inform staff on their duties.

From the evidence presented I am satisfied that neither the Licensee nor his employees adequately understand what constitutes intoxication. It does not require that a patron be incapacitated to the point of falling down, throwing up or being incoherent.

For the aforementioned reasons 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 June 15, 2012, the Licensee contravened section 43(1) of the *Liquor Control & Licensing Act (the Act)* by selling or giving liquor to an intoxicated person.

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 have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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

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

Intoxication is considered by the branch to be a serious public safety issue. Intoxicated persons can be a danger to themselves or others. It is often a factor in crimes such as domestic violence, assaults, driving offences and public nuisance and vandalism. Intoxicated patrons may be unable to exercise sufficient judgment to stop consuming liquor. Providing liquor to an intoxicated person may increase the risk of harm to themselves or others.

All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions and the seriousness of the contravention I find that a penalty is necessary to ensure future voluntary compliance.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this Licensee within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

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 five day suspension for a first contravention of this type.

On the one hand we have an experienced licensee with 20 years experience with no previous contraventions. On the other hand we have circumstances in which three patrons were obviously intoxicated and were served liquor. Further we have an experienced licensee who does not adequately understand the nature and symptoms of intoxication. In the circumstances, I find that a five day liquor licence suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 132783 for a period of five (5) days, to commence as of the close of business on Thursday, May 23, 2013 and to continue each succeeding business day until the suspension is completed.

Signs satisfactory to the general manager showing that a 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, and must remain in place during the period of suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: April 15, 2013

cc: Liquor Control and Licensing Branch, Surrey Office
Attention: Michael Clark, Regional Manager

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