



**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: IIC Enterprises Ltd.
dba Cheetah's
220 Lawrence Avenue
Kelowna, BC V1Y 6L3

Case: EH12-104 and EH13-026

For the Licensee: Sanjeet Parmar

For the Branch: Peter Mior

General Manager's Delegate: Daniel M. Graham

Date of Hearing: August 29, 2013

Date of Decision: October 9, 2013

**Liquor Control and
Licensing Branch**

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

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

IIC Enterprises Ltd., (the "Licensee") operates Cheetah's (the "Establishment") under Liquor Primary Licence Number 130456 (the "Licence"). The Establishment is located at 220 Lawrence Avenue in Kelowna, B.C.

The Licence specifies hours of liquor service daily, 7 days a week, from 7:00 p.m. to 2:00 a.m. The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide").

The Licensee's owner, Mr. Sanjeet Parmar, represented the Licensee for purposes of this hearing. Hereinafter, the term "Licensee" may be used to refer either to the corporate Licensee or to Mr. Parmar as the context requires.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in two Notices of Enforcement Action dated October 10, 2012 ("NOEA #1") and March 27, 2013 ("NOEA #2") respectively.

NOEA #1

In NOEA #1 the Branch alleges that on May 3, 2012 the Licensee contravened section 12 of the *Liquor Control and Licensing Act* (the "Act") by contravening a term or condition of the Licence. Specifically, the Licensee allegedly allowed patrons to enter into the Establishment while the ID scanner system was inoperable and that the Licensee had no suitable backup equipment in place.

The Branch also alleges in NOEA #1 that the Licensee contravened section 50 of the Act by allowing an exotic dancer to have physical contact with a patron.

The proposed enforcement actions outlined in NOEA #1 are a two (2) day suspension for the contravention of section 12 (item 46, schedule 4 of the *Liquor Control and Licensing Regulation*) (the "Regulation") and a four (4) day suspension for the contravention of section 50 (item 34, schedule 4 of the Regulation).

The range of penalties for first contraventions of this type is a one to three day licence suspension and/or a \$1,000 to \$4,000 monetary penalty for the breach of section 12, and a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty for the breach of section 50.

NOEA #2

In NOEA #2 the Branch alleges that the Licensee contravened section 73(2)(a) of the Act by failing to promptly produce records requested by the Branch.

The proposed enforcement action outlined in NOEA #2 is a \$7,500 monetary penalty (item 31, schedule 4 of the Regulation) for the breach of section 73. The range of penalties for first contraventions of this type is a ten to fifteen day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

The Licensee took no position on the alleged contraventions, but sought to establish the defence of due diligence for each alleged contravention.

For the purposes of this hearing, and in accordance with section 3 of the Regulation, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by section 20 of the Act and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

See attached Appendix I

RELEVANT TERMS AND CONDITIONS OF THE LICENCE

Appendix A

3. The Licensee must use electronic scanning equipment for ID verification and scan **all patron(s)** identification prior to entry. *[emphasis included]*
6. The Licensee must use the ID scanner system, video and electronic weapons detection process on all patrons each time they enter the establishment. No patron is to be admitted without being duly processed. **NO EXCEPTIONS.** *[emphasis included]*
7. In the event the video surveillance equipment, ID scanner or electronic weapons detection process system is not working or available, the Licensee agrees to refuse to admit patrons to the establishment until all such equipment is repaired or suitable back-up equipment is in place and fully operational.

ISSUES

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

EXHIBITS

- Exhibit No. 1:** The Branch's Book of Documents, tabs 1 to 21 inclusive.
- Exhibit No. 2:** A DVD containing a copy of video and screen shots from a security camera at the Establishment, submitted by the Branch.
- Exhibit No. 3:** A three page document submitted by the Licensee, showing a record of contacts between the Licensee and the supplier of the ID scanning equipment used at the Establishment.

The Licensee disclosed Exhibit 3 for the first time at the hearing. The Branch objected to it being admitted, as the Licensee had been advised by letter dated March 18, 2013 that the final date for disclosure of documents and witness names was August 9, 2013. The Licensee stated that he had misunderstood the instructions and thought that he just had to provide the documents at the hearing. He had called the Branch Registrar the day before the hearing to enquire as to the hearing's location, and in the course of that telephone conversation had been advised to submit the document before the hearing. The Licensee e-mailed the document to the Branch that day but it was too late for the Branch advocate to receive or review the document prior to the hearing. In the absence of any evidence of prejudice to the Branch by its admission, I admitted the subject document as Exhibit 3.

The Licensee also sought to submit as an exhibit an unsigned, undated copy of a standard form set of "rules" that the Licensee stated he requires each exotic dancer to sign. I declined to admit this document into evidence because:

- it was an uncompleted generic form document with limited probative value
- the Licensee did not have with him a copy of the document signed by the dancer involved in the alleged inappropriate touching incident, and
- it was submitted past the final disclosure date which had been communicated to the Licensee well in advance of the hearing

I declined to admit this document into evidence but advised the Licensee he could provide oral evidence related to the document.

EVIDENCE – THE BRANCH

The Branch called two witnesses: a RCMP constable and a liquor inspector.

The Constable

The Constable testified that while on duty on May 3, 2012, he received a call about 10 minutes before midnight advising that 8 to 10 males were fighting at the Establishment. On attending at the Establishment, the Constable and his partner found that the suspects had all left and that first responders were tending to an assault victim who had been repeatedly hit over the head with a bottle.

The Constable stated that he was advised by his partner that the Licensee's ID scanner ("Treoscope") was not working. His partner had been handed a "scrap of paper" by an employee of the Licensee on which had been written the names and BC drivers licence information of three suspects.

The Constable referred to a synopsis sheet and occurrence reports located at tabs 2, 3 and 4 of Exhibit 1. These documents and the Constable's oral testimony establish that the Constable entered the Establishment and noted it was not overly busy, but there were a "handful" of patrons present. The Constable spoke with the then manager of the Establishment and other employees of the Licensee who advised that the Treoscope had been out of commission for some time. When he asked how long the Treoscope had been out of commission, the Constable received answers ranging from 2 to 3 weeks to just over a week.

The manager had said that the Treoscope required a special chip that was difficult to find as the supplier (Treoscope Technologies, Inc. or "TTI") was based in Vancouver, but that the chip was now in the mail and they were waiting for it to arrive. The manager stated that it was more expensive to send the entire Treoscope to TTI than it was to send the chip. The Constable was advised that the Licensee's staff at the Establishment had been recording drivers licence information on pieces of paper as their backup equipment.

The Constable testified that the assault victim had suffered a concussion and severe lacerations that required several stitches. The RCMP was subsequently able to identify the suspects from the Establishment's security video and a Report to Crown Counsel was submitted. While viewing the security video the Constable noticed that an exotic dancer had made inappropriate contact with the assault victim just prior to the assault. The Constable forwarded a copy of the security video to the Branch.

In his Occurrence Report 4 (tab 3 Exhibit 1) the Constable wrote that, when he attended at the Establishment to serve a Police Licensed Premises Check the evening after the assault, he noted that two patrons entered the Establishment who were only hand searched and that no metal wand/weapons detector was being used as required by the terms and conditions of the Licence.

The Liquor Inspector

The Liquor Inspector testified that he was the author of NOEA #1 (located at tab 1 Exhibit 1) and of NOEA #2 (tab 7 Exhibit 1). The Liquor Inspector said that he had been notified by the Constable that the Licensee was having "difficulty" with terms and conditions of the Licence regarding the requirement to use an ID checker and electronic weapons detection system at all times. The Liquor Inspector subsequently received from the Constable a copy of video from the Licensee's security camera showing an exotic dancer on stage interacting inappropriately with the victim of the assault. A copy of the video was submitted to me as Exhibit 2.

The Liquor Inspector then followed up with his own enquiries. He called an individual connected to the licensee who advised that the Treoscope had not been working for at least a week prior to May 3, 2012 but that Licensee staff had been recording the name and date of birth of all people entering the Establishment. She explained that there had been "issues" getting repairs done to the Treoscope. The Liquor Inspector called TTI and was told by its representative that she had contact with the Licensee, and that TTI generally provided 24 hour turn-around for repairs.

Based on the results of his enquiries, the Liquor Inspector issued Contravention Notice B012460 to the Licensee on May 10, 2012 alleging the contraventions related to the Treoscope and the exotic dancer.

The Liquor Inspector testified that the video of the alleged inappropriate contact between the exotic dancer and the patron shows the dancer kneeling on the stage while removing the patron's shirt and kissing him on his bare chest. Time stamps from screen shots of the video show the incident lasting for at least 11 seconds. The stage is located in full view of the bar area. Very shortly after this incident the patron who was subject to the interaction with the exotic dancer was assaulted.

On being shown a floor plan of the Establishment (tab 14 Exhibit 1) the Liquor Inspector pointed out the stage, the adjacent bar, and the location where the incident with the exotic dancer occurred. He stated that the Licensee generally has staff at the nearby entrance, behind the bar, adjacent to the DJ booth, and circulating through the Establishment.

The Liquor Inspector testified that the Establishment had a history of gang violence for a number of years. He said that the Licensee voluntarily agreed to have the terms and conditions related to the use of an ID scanner and weapons detector added to the Licence to assist the Licensee to gain control of his Establishment. The Liquor Inspector stated that the purpose of these terms and conditions is to protect the safety of patrons and staff of the Establishment.

The Liquor Inspector said that as part of his investigation related to the use of the Treoscope, he issued a Notice to Provide Records to the Licensee dated January 14, 2013 (tab 9 Exhibit 1) by registered mail. The Notice required the Licensee to provide to the Liquor Inspector "any and all records related to the alleged malfunction of Treoscope as per Contravention Notice B012460" by January 30, 2013". On its face, the Notice shows the dates as January 14, 2012 and January 30, 2012 respectively, but the

Liquor Inspector testified, and I so find, that the year is in error and that the Notice was in fact issued in January 2013.

A tracking history document from Canada Post shows that the Notice was mailed in Kelowna on January 15, 2013 and was successfully delivered to the Licensee's mailing address in Port Moody on January 16, 2013. The tracking history document shows the delivery was signed for. Receiving no response to the Notice, the Liquor Inspector sent the Licensee a second Notice to Provide Records dated February 7, 2013 (tab 10 Exhibit 1) along with Contravention Notice B009812 (tab 12 Exhibit 1) alleging the contravention of failing to promptly produce a document, record or thing.

The Liquor Inspector testified as to the contents of a file note authored by him (tab 8 Exhibit 1). The file note states, among other things, that the second Notice to Provide Records was returned to the Branch on March 18, 2013 because it had not been picked up. The file note also indicates that the Liquor Inspector spoke with Mr. Parmar on March 20, 2013 and made arrangements for Mr. Parmar to pick up the second Notice to Provide Records and Contravention Notice B009812. The second Notice to Provide Records and Contravention Notice B009812 were delivered to the Licensee at the Branch's Kelowna office on March 25, 2013. Finally, the file note states that after speaking to the Licensee on March 27, 2013 and being asked to do so, the Liquor Inspector sent NOEA #2 to the Licensee's home mailing address by registered mail on March 27, 2013. As of April 17, 2013 NOEA #2 had still not been picked up by the Licensee.

The Liquor Inspector stated that to date he still has not received a response from the Licensee with respect to either Notice to Provide Records.

EVIDENCE – THE LICENSEE

Mr. Parmar testified on behalf of the corporate Licensee. He stated that at the time he agreed to have the terms and conditions related to the Treoscope added to the Licence, he had been told by the Branch that all other bars in the city would be required to adopt the same terms and conditions. He said that hasn't happened, and it creates an uneven playing field among the competing businesses.

The Licensee stated that when the ID scanner went down his own computer tech couldn't fix it. Staff contacted TTI who thought the problem may have been related to the camera. The Licensee was adamant that the weapons detector wand was operational and was being used. He said that every individual is also patted down as they enter the Establishment. The Licensee stated that he and his staff are responsible and proactive, that they contact the police whenever they have any kind of incident, and that the manager of the Establishment had voluntarily informed the police that the ID scanner was not working.

Exhibit 3 shows the following sequence of events:

- April 27, 2012 – the Licensee's staff first contacted TTI about an imaging problem with the Treoscope
- May 1, 2012 – the next contact listed was when TTI “walked [an individual connected to the Licensee] through” some diagnostics and concluded that the capture card may be damaged
- May 4, 2012 – a replacement capture card was received by the Licensee but it did not resolve the problem
- May 7, 2012 – an individual connected to the licensee sent parts of the Treoscope to TTI for servicing
- May 8, 2012 – the parts were received by TTI

- May 9, 2012 – TTI spoke in separate phone calls to an individual connected to the licensee and the Liquor Inspector. Both were advised that a working Treoscope would likely be sent to the Establishment later that day so that it could be in use by the Licensee on May 10. The TTI representative noted that the Liquor Inspector had said he would inform the police the Licensee would have one more evening “grace” period.
- May 10, 2012 – it wasn’t until May 10 that TTI actually completed the repairs and sent the repaired unit off to the Establishment

Regarding the incident with the exotic dancer, the Licensee said that he hires exotic dancers through an agency. Each dancer does a series of shows and then moves on to another establishment. The Licensee stated that he has a standard form document that he has each dancer sign prior to engagement. One of the terms of the document is that there will be absolutely no touching between the dancer and patrons at any time. Breach of this term results in dismissal without pay.

The Licensee testified that, following the incident on May 3, 2012 the dancer involved was dismissed the next day - cutting her engagement at the Establishment short by 2 days - and she has not worked at the Establishment since. The Licensee said that it is well-known throughout the industry that no contact is allowed between dancers and patrons. He said that the Establishment has approximately 100 girls a year from the agency, and that it is too big a burden on licensees to be responsible when a dancer does something that they all know they should not do.

The Licensee also stated that he has 18 security cameras in the Establishment and that he provided the video from all of them to the authorities on request. He held nothing back, and was advised by the Branch that as long as he’d been exercising due diligence he’d “be fine”.

Cross-examination

On cross-examination, the Licensee stated that he did not receive the Notices to Provide Records from the Liquor Inspector and couldn't recall seeing them before. He acknowledged that he had not attended the pre-hearing conference, stating that he had misunderstood the date. In response to a question as to when he had received Exhibit 3 from TTI, the Licensee answered that it had been a month to a month and a half ago.

When asked why he hadn't submitted the document to the Liquor Inspector in compliance with the Notices to Provide Records, the Licensee apologized and said that there had been a miscommunication and that he'd thought all that was required was for him to bring the document to the hearing. When asked if the Licensee recognized the name on the Canada Post Tracking slip related to the first Notice to Provide Records, the Licensee responded that this was an individual connected to him who works for the "business". Still under cross-examination, the Licensee said that he lives in Vancouver and was not on site on May 3, 2012. He stated that he attends at the Establishment 2 or 3 times a week and that his manager, who was on site the night of May 3, 2012, was responsible for such things as inventory, staffing and watching the floor and patrons. The Licensee said that there are usually two bartenders working and three to five door staff who check for ID, pat down and wand the patrons before entering, and who circulate through the Establishment watching for problems. There are usually one or two servers who "roam around" and are also supposed to keep an eye out for problems.

When asked what kinds of training or instructions are provided to staff, the Licensee said that they are instructed to look for intoxicated patrons, bottles on the stage, anything that could be dangerous or inappropriate. The Licensee stated that security staff are debriefed nightly to go over the events of the evening. In response to a question, the Licensee said the May 3, 2012 incident was discussed with staff, but that he didn't know whether an incident report had been written.

In response to a question from me, the Licensee said that he'd been advised by staff about the breakdown of the Treoscope "pretty much at the time it happened." He said the Treoscope had never broken down for more than a few 5 or 10 minute "glitches" prior to May 3, 2012 and that he'd never had to phone TTI before about anything of this nature. The Licensee now uses a different ID scanner.

In response to another question, the Licensee said that he was not aware of any previous incidents of inappropriate touching. When asked if he could comment on why no staff intervened during the incident on May 3, 2012, the Licensee responded that he had asked the manager about that and she'd said that it did not look to her as though the dancer had touched the patron. He said that that was "her observation of the incident."

SUBMISSIONS – THE BRANCH

The Branch submitted that the General Manager has the authority under section 12 of the Act to impose the terms and conditions of the Licence related to having an operable ID scanner. The Branch said that recording data on a piece of paper is not suitable backup equipment as required by term and condition 7 of the Licence, since such a process is not as capable of detecting false identification. The Branch said that the purpose for requiring the scanning equipment is to be able to exclude criminals from the Establishment, and that if it had been in place the assault on the patron on May 3, 2012 could have been prevented.

With respect to the alleged inappropriate contact between the exotic dancer and patron, the Branch submitted that the video shows the dancer clearly did contact the patron. There appeared to be no controls in place, as the Licensee's staff did not intervene. The Branch referred to page 31 of the Guide (tab 15 Exhibit 1) which provides that "Exotic dancers...may not...touch...members of the audience..."

Regarding the failure to promptly provide records, the Branch said that the records were requested by the Branch twice, the request was reasonable, and no response was provided by the Licensee until the day of the hearing. The Branch said that if the Licensee had taken the Branch's request seriously, it is possible that these proceedings may not have been necessary. The Branch pointed out that the penalties provided for a breach of section 73 are significant compared to many other penalties under the Regulation, which emphasizes the seriousness of the contravention.

SUBMISSIONS – THE LICENSEE

The Licensee submitted that while he acknowledges the Treoscope was not working on the night of May 3, 2012, the Licensee did all he could to resolve the issue. TTI did not know how to repair the machine and had no spare. TTI suggested troubleshooting which took time. The Licensee argued that his staff exercised due diligence by following up with TTI, manually recording the ID information of patrons, and having video of each patron. He indicated it was unreasonable to expect the Establishment to simply close down during the time it took to get the Treoscope repaired. The Licensee argued that the process his staff was using was adequate, as demonstrated by the fact that his staff provided the identification of the suspects to the police. Finally, he said that weapons detection wands and pat downs were operational at the relevant times.

Regarding the incident with the exotic dancer, the Licensee said that his rules are clear – there is to be no touching of patrons by dancers. He submitted that this is an industry standard, and that his staff could not have anticipated or prevented the dancer from doing what she did. He said that his staff called the police as soon as the alleged assault of the patron occurred, and they fired the dancer the next day.

With respect to the failure to promptly produce records, the Licensee apologized again for what he said was a misunderstanding. He also stated that he did not receive the Notices to Provide Records that were sent to him by registered mail, while acknowledging that he did receive other items that were sent by registered mail, including the Branch's book of documents (Exhibit 1). He said that if Canada Post does not leave a tag on their door, the Licensee does not know about the registered mail.

In closing, the Licensee said that if one looks at the pressure that licensees are under and the liabilities they face, coupled with the cooperative and proactive approach the Licensee has taken with the police and the Branch, the evidence demonstrates that the Licensee exercised due diligence as best he could "given what we had to work with."

REASONS AND DECISION

Contraventions

The Licensee has not challenged the evidence that the contraventions occurred.

Section 12 – Contravene term and condition by admitting patrons without having suitable back-up ID scanning equipment in place

Terms 3 and 6 of Appendix A to the Licence are clear that electronic ID scanning equipment must be used for all patrons prior to entry without exception. Term 7 provides that if the ID scanner is not working or is unavailable, the Licensee will refuse to admit patrons to the Establishment until "suitable back-up equipment" is in place and fully operational.

The Licensee has said that it would be unreasonable to expect the Establishment to close down simply because the Treoscope was malfunctioning, and that the backup system devised by the Licensee (100% ID checks, recording client data with pencil and paper, supplemented with security camera footage) was "adequate" in the circumstances to constitute the "suitable back-up equipment" contemplated by term 7.

In my view, the use of the words "suitable equipment" and "fully operational" in term 7 only make sense when read in the context of electronic scanning equipment. When read together, terms 3, 6 and 7 establish that "suitable back-up equipment" must be an electronic ID scanner, rather than the system of visual checks and pencil and paper recording used by the Licensee. The electronic detection of false ID simply isn't available without the scanning equipment. Similarly, term 7 is clear that unless the suitable backup equipment is in place and operational, the Licensee must refuse to admit patrons to the Establishment.

There is no dispute that: the Licensee's Treoscope ID scanner was not working on the night of May 3, 2012, no replacement electronic ID scanner was in place and operational, and patrons were being admitted to the Establishment.

Accordingly, having considered all of the evidence and the submissions filed in these proceedings, I find that on May 3, 2012, the Licensee contravened section 12 of the Act and terms and conditions of the Licence by admitting patrons without the required electronic ID scans being done.

Section 50 – Permit prohibited acts by stripper/exotic dancer

Section 50(2) of the Act provides the General Manager with broad discretion to impose restrictions and limitations on entertainment performed at licensed premises. The Licence includes by reference the terms and conditions set out in the Guide, including the term and condition that exotic dancers may not touch members of the audience. The video evidence is clear that the exotic dancer did touch the patron by removing his shirt and kissing his chest during her performance.

The evidence indicates that the stage is in full view of the service area at the bar and that the Licensee has a number of staff whose responsibilities include circulating through the Establishment keeping an eye out for potential problems. The oral evidence of the Licensee indicates that his manager saw the incident on the night in question but misinterpreted it as not involving any touching. No staff intervened to prevent or stop the contact between the dancer and the audience member.

Having considered all of the evidence and the submissions filed in these proceedings, I find that on May 3, 2012, the Licensee contravened section 50 of the Act by permitting the exotic dancer to touch the audience member.

Section 73(2)(a) – Fail to promptly produce and submit a record, thing or sample

The evidence shows that the Branch sent a Notice to Provide Records to the Licensee by registered mail on January 14, 2013, requiring the Licensee to submit any and all records related to the malfunction of the Treoscope by January 30, 2013. Despite a follow up Notice sent on February 7, and subsequent telephone conversations between the Liquor Inspector and the Licensee, the Licensee did not produce the document comprising Exhibit 3 until the day of the hearing - almost seven months after the required date of January 30, 2013 - and provided no other records.

In my view the records requested by the Branch are in relation to “incidents or events” (namely the malfunctioning of the Treoscope machine) as contemplated by section 34(j) of the Regulation. I find that the Liquor Inspector was acting under the authority of section 73 of the Act, the Branch’s request was reasonable in the circumstances, and the Licensee failed to produce the records “promptly” as required by the legislation.

Having considered all of the evidence and the submissions filed in these proceedings, I find that the Licensee contravened section 73(2)(a) of the Act by failing to promptly provide the requested records.

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 a 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 appropriately. The onus is on the Licensee to prove this defence on the balance of probabilities.

The law:

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

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

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

1. Whether the employee who committed the prohibited act 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 committed the prohibited act was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises at all times), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention; 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.

Findings of fact and applying the law to the facts:

Sections 12 – Contravene Term and Condition by admitting patrons without having suitable backup ID scanning equipment in place

The evidence is that Mr. Parmar was not in the Establishment on May 3, 2012 when the contraventions of section 12 and section 50 occurred. The manager had significant duties with respect to the day to day operations of the Establishment in the Licensee's absence. However, there is no evidence before me to suggest that the manager had the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute her being a directing mind, as described in *Beverly*

Corners. Accordingly, I find that the manager who was on site when these contraventions occurred was not a directing mind of the Licensee.

Since there was no directing mind on site at the time of the contraventions (and the law does not require that there must be a directing mind on site) I must consider the second stage of the due diligence analysis. That is, had the Licensee:

- a. implemented adequate training and other systems to prevent the contraventions; and,
- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

The analysis of what is adequate or reasonable must take place in the context of the public policy considerations underlying the requirement to electronically scan patrons' ID. The requirement for electronic ID scanning was incorporated into the Licence in 2011 as a result of a history of violent incidents at the Establishment. These incidents put the safety of staff and patrons of the Establishment at significant risk.

The Licensee provided no evidence of any training of staff regarding ID scanning or what to do in the event of malfunction of the electronic equipment. The Licensee said that he and his staff had diligently followed up with TTI to get the Treoscope operational as soon as possible. In the interim the Licensee said the staff had employed a method of visual ID inspections and manual recording of patron information that was sufficient to allow staff to provide the RCMP with drivers licence information on three suspects after the subsequent assault of a patron.

I note that according to the testimony of the Constable, the manager of the Establishment mentioned the cost of shipping the Treoscope to Vancouver was a consideration in the decision not to send the entire unit for repair immediately. That decision caused the Treoscope to be out of operation for additional time while the suspect chip was being replaced and tested. No information on shipping costs or the

cost of having a backup ID scanner was provided to me on which the reasonableness of the Licensee's course of action could be determined.

I find that the evidence does not establish that the Licensee had reasonable training or systems in place with respect to the contravention of section 12 and the terms and conditions of the Licence regarding the ID scanner.

Regarding the reasonableness of the steps taken to ensure the consistent and effective implementation of the Licensee's policies, the evidence indicates that the Licensee did not have an adequate approach to ID scanning in place at the time of the contravention, since there was no electronic backup system in place.

Therefore, the evidence is insufficient to prove that the Licensee exercised due diligence to ensure that contraventions of section 12 do not occur.

Section 50 – Permit prohibited acts by stripper/exotic dancer

For the reasons given above, I find that the manager who was on site when this contravention occurred was not a directing mind of the Licensee. I will now consider the second stage of due diligence, that is, had the Licensee:

- a. implemented adequate training and other systems to prevent the contraventions; and,
- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

The analysis of what is adequate or reasonable must take place in the context of the public policy considerations underlying the requirement prohibiting exotic dancers and strippers touching audience members. The "no touching" prohibition is a long-standing requirement which reflects accepted community standards.

The Licensee did not provide any evidence of staff training regarding what is or is not acceptable entertainment under the terms of the Licence, or what steps to take in the event that inappropriate entertainment should occur. The Licensee said that it is well-known in the industry that no touching is allowed, and that he has each performer sign a set of "rules" prior to their engagement which clearly states that no touching is to occur. The Licensee did not produce a copy of the "rules" document that had been signed by the dancer involved in the subject incident, and was not sure whether an incident report had been created. I find the evidence does not establish that the Licensee had suitable training or systems in place with respect to the contravention of section 50.

The evidence indicates an inappropriate degree of laxness at the Establishment, as the dancer in question apparently felt sufficiently comfortable to breach a well-known industry standard with respect to contact between dancers and audience members. Her sense of comfort was well-founded since no staff member intervened in the touching incident which the evidence shows was not fleeting in duration and which occurred in full view of the Licensee's staff.

I find that there was inadequacy of the Licensee's employee training and systems and ineffective communications with the dancer and staff with respect to Licensee policy. I find the evidence is insufficient to prove that the Licensee exercised due diligence to ensure that contraventions of section 50 do not occur.

Section 73(2)(a) – Fail to promptly produce and submit a record, thing or sample

Mr. Parmar is the owner of the corporate Licensee, and the evidence shows that he made the decision to accept the terms and conditions that were added to the Licence in 2011. Based on this evidence, I find that Mr. Parmar is a directing mind of the corporate Licensee.

The file note at tab 8 Exhibit 1 indicates that on March 20, 2013 the Liquor Inspector arranged with Mr. Parmar to pick up the second Notice to Provide Records and Contravention Notice B009812. Those documents were delivered to the Licensee at the Branch's Kelowna office on March 25, 2013.

The evidence shows a pattern of poor communications between the Licensee and the Branch. Those failures appear to occur internally to the corporate Licensee. The evidence indicates to me, and I so find, that the first Notice to Provide Records was signed for by an individual related to the licensee, yet Mr. Parmar testified that he did not receive it. The second Notice to Provide Records was not picked up from Canada Post by the Licensee. Mr. Parmar acknowledged that he had failed to attend the pre-hearing conference because he had misunderstood the scheduled date, and that he had misunderstood the requirement for disclosure to be complete by August 9, 2013.

Mr. Parmar did indicate that TTI had been "difficult to deal with" and that it had taken him a significant length of time to receive the document entered as Exhibit 3 from TTI, a document that should have been produced within the timeline detailed in the Notices to Provide Records. He also acknowledged that he had had the document for several weeks but because of a misunderstanding thought that he was not required to provide it until the enforcement hearing.

Since Mr. Parmar is the directing mind of the Licensee, and since he had notice of the requirement to deliver the requested records and failed to do so within the specified time, he is responsible for the contravention. Accordingly, the defence of due diligence with respect to the contravention of section 73(2)(a) is "essentially eviscerated" (see paragraph 41 of *Beverly Corners*). For these reasons, I find the defence of due diligence is not available to the Licensee with respect to the contravention of section 73(2)(a).

PENALTY

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

- Take no enforcement action
- Impose terms and conditions on the Licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the 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 penalties proposed by the Branch. 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 compliance with the Act, the Regulation, and with the terms and condition of the Licence. The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history, a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to the public safety, and the well-being of the community.

There is no record of a proven contravention of the same types for this Licensee at this establishment within the preceding 12 months of this incident. Therefore, I find each of these contraventions to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

The Licensee does, however, have a significant compliance history as follows:

- contravention of section 43(2)(b) of the Act [permit intoxicated person to remain] in February 2011; served a 5 day suspension
- contravention of section 12 of the Act [contravene a term and condition] in March 2011; served a 3 day suspension
- compliance meetings on June 21, 2010 and August 17, 2011 [permit drunkenness or violent, quarrelsome, riotous or disorderly conduct, section 36(2)(a) of the Act]
- compliance meeting on April 13, 2012 [permit unlawful activities or conduct, section 36(2)(b) of the Act]

Section 12

Item 46 in Schedule 4 provides a range of penalties for a first contravention of section 12 terms and conditions as a 1-3 day Licence suspension and/or a monetary penalty of \$1,000 to \$3,000.

The Branch has recommended a penalty of a 2 day Licence suspension in this case. The Licensee advanced no argument specific to penalty.

The testimony of the Liquor Inspector, and the Licensee's compliance history, indicate that violence has been a problem at the Establishment in the past. That was a significant factor in the decision to amend the Licence in 2011 to include the requirement for an electronic ID scanner. At hearing the Licensee argued that it was unreasonable to expect the Establishment to shut down simply because the ID scanner was malfunctioning. However, that is what the Licence requires, and is what the Licensee agreed to do when he accepted the amendment of the Licence in 2011.

I note that part of the context when issuing NOEA #1 for this contravention (as stated in NOEA #1) was that TTI had advised the Liquor Inspector that it had a 24 hour turn around for inoperable equipment. It is clear, however, from the sequence of events subsequently detailed in Exhibit 3 that the 24 hour timeline did not apply in this case. Several days were lost pursuing a misdiagnosis of the technical problem with the Treoscope. Even after TTI received the malfunctioning equipment on May 8, it wasn't until May 10 that the repairs were completed and the unit sent back to the Licensee.

While the Branch suggested there was a link between the lack of an electronic ID scanner and the subsequent assault, there is no evidence before me to suggest either the alleged assailant or his victim had a "record" or false ID that would have resulted in their being excluded from the Establishment if the Treoscope had been operational on May 3, 2012. As it turns out, the system of manual recording that the Licensee adopted did provide the police with information that identified the alleged assailant.

Considering all the circumstances, I find that a 1 day suspension penalty—rather than the recommended 2 days—should be sufficient to bring the Licensee into compliance with the terms and conditions of the Licence regarding ID scanning.

Section 50

Item 34 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4-7 day Licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

The Branch has recommended a penalty of a 4 day Licence suspension, which is the minimum period of suspension available under the Regulation. The Licensee made no submissions specific to penalty.

The Licensee is responsible for managing and controlling the behaviour of its entertainers and patrons, and for ensuring the safety of its staff, patrons and the community. In this case, the Licensee apparently had no effective controls in place either to prevent or respond to the inappropriate actions of the dancer. The interaction between the dancer and the patron was followed by an assault which caused serious injury to the patron.

Considering all the evidence, and given the Licensee's extensive compliance history and the potential risks to public safety raised by inappropriate entertainment, I am satisfied that a 4 day Licence suspension is appropriate.

Section 73(2)(a)

Item 31 in Schedule 4 provides a range of penalties for a first contravention of section 73(2)(a): a 10-15 day Licence suspension and/or a monetary penalty of \$7,500 to \$10,000.

The Branch has recommended a \$7,500 monetary penalty, which is the minimum monetary penalty available under the Regulation. The Licensee made no submissions with respect to penalty.

As noted earlier, the evidence in this case demonstrates a pattern of miscommunication between the Licensee and the Branch. The Licensee sought to shift the blame for some of the previous miscommunications onto Canada Post by implying that it had failed to leave notification of the delivery of registered mail. At the hearing, the Licensee offered an apology for the misunderstanding regarding the required date of delivery of the document entered as Exhibit 3. This document was a record that fell squarely within the terms of the two Notices to Provide Records. He also explained that he had had difficulties getting the record from TTI. However, he gave no indication that he had attempted to compile an equivalent record from his own files in an attempt to comply

with the Notices to Provide Records, or that he has since taken any steps to improve communications with the Branch.

A regulatory enforcement regime can only work effectively if the regulator has timely access to records as contemplated by the enabling legislation. As noted by the Branch at the hearing, this particular proceeding may not have been necessary if the Licensee had provided the document entered as Exhibit 3 as soon as he received it.

Considering all of the evidence in this case, I am satisfied that a monetary penalty of \$7,500 is appropriate and necessary in order to bring the Licensee into compliance with the statutory requirement to provide requested records in a timely manner.

ORDER

Pursuant to section 20(2) of the Act, I order:

- (a) that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Branch on or before November 13, 2013;
- (b) a suspension of Liquor Primary Licence number 130456 for a period of five (5) days to commence at the close of business on Wednesday, November 13, 2013 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the Kelowna RCMP detachment from the close of business on Wednesday, November 13, 2013 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the Establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the Establishment by a Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: October 9, 2013

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

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

Appendix I – Relevant Statutory Provisions

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

12 ...

(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)...

50 ...

(2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued...

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, ...

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

34 (1) For the purposes of section 73 (1) of the Act, the following documents are prescribed in relation to a licensee:

(a) liquor purchase records;

(b) liquor sales records;

(c) liquor disposal records;

(d) food sales records;

- (e) sales records respecting other merchandise or services provided by the licensee that are incidental to the business of the licensed establishment, if any, and, in the case of a licensee who is a caterer, that are incidental to the catering business, including, without limitation, the operation of the caterer's business location;
- (f) agreements and contracts between the licensee and a liquor manufacturer or its agent or representative;
- (g) invoices and purchase receipts for all equipment and other inventory that is used in the operation of the licensed establishment, if any, and, in the case of a licensee who is a caterer, that is used in the operation of the caterer's catering business, including, without limitation, in the operation of the caterer's business location;
- (h) lease and management contracts that are related to the licensed establishment, if any, and, in the case of a licensee who is a caterer, that are related to the caterer's business location;
- (i) employee records including names, addresses, salaries, primary job responsibilities, shift schedules and dates of employment;
- (j) records of any incidents or events that occurred in or adjacent to the licensed establishment, if any, and, in the case of a licensee who is a caterer, that occurred in or adjacent to an event catered by the caterer or that occurred in or adjacent to the caterer's business location;
- (k) records of court orders and judgments against a licensee respecting the sale, service or manufacture of liquor;
- (l) records of the quantity and price of liquor servings.

Schedule 4
Enforcement Actions

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
31	A breach of section 73(2)(a) of the Act [<i>Failure to produce a document or record or thing</i>]	10-15	20-30	30-60	\$7,500- \$10,000
34	Permitting in the licensed establishment entertainment by one or more exotic dancers or strippers that is prohibited or restricted under section 50 of the Act	4-7	10-14	18-20	\$5,000- \$7,000
46	Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specifically referred to in Items 1 to 45	1-3	3-6	6-9	\$1,000- \$3,000