



**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:	0847924 B.C. Ltd. dba J.J.'s Pub 1342 Shoppers Row Campbell River, BC V9W 2E1
Case:	EH13-071 & EH13-135
For the Licensee:	Andy Kamali
For the Branch:	Peter Mior
General Manager's Delegate:	Nerys Poole
Dates of Hearing:	January 21 & 22, 2014
Date of Decision:	February 17, 2014

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

The licensee, 0847924 BC Ltd. holds Liquor Primary Licence Number 005763 (the "licence") for the operation of a liquor primary establishment known as J.J.'s Pub (the "Pub") located in Campbell River, B.C. The Pub is permitted to sell liquor from 10:00 a.m. to 2:00 a.m. Monday to Saturday and from 11:00 a.m. to midnight on Sundays.

Mr. Abbas (Andy) Kamali is the principal and sole owner of 0847924 BC Ltd and the operator of the Pub. He appeared as the representative of the corporate licensee at the hearing and I refer to him throughout this decision as the licensee. The total patron capacity on the licence is 240 persons.

This hearing involved two alleged contraventions, one for permitting an intoxicated person to remain in the Pub on March 9, 2013 and the second dealing with the entry of a minor on May 12, 2013.

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" (the "Guide")

## ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

### **Intoxicated Patron (section 43(2)(b))**

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated May 10, 2013 (the "first NOEA"). (Exhibit 1, tab 1)

The branch alleges that, on March 9, 2013 (business day of March 8, 2013), the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

For a first contravention of this type, Schedule 4, item 11 of the *Liquor Control and Licensing Regulation* (the "Regulation") provides a range of licence suspension penalties from four to seven days and/or a \$5,000 to \$7,000 monetary penalty for a first contravention of this type. The branch is recommending a suspension of four days.

**Minor (section 33(1)(c) or section 35)**

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated July 22, 2013 (the "second NOEA"). (Exhibit 1, tab 5)

The branch alleges that on May 12, 2013 (business day of May 11, 2013), the licensee contravened section 33(1)(c) of the Act by permitting a minor to consume liquor in the Pub.

For a first contravention of this type, Schedule 4, item 2 of the Regulation provides a range of licence suspension penalties from 10 to 15 days and/or a \$7,500 to \$10,000 monetary penalty for a first contravention of this type. The branch is recommending a suspension of 10 days, and the addition of specific terms and conditions to its licence.

In the alternative to a finding of a contravention of section 33(1)(c) of the Act, the branch alleges that the licensee contravened section 35 of the Act by permitting a minor to enter or to be on the premises.

For a first contravention of this type, Schedule 4, item 3 of the Regulation provides a range of licence suspension penalties from four to seven days and/or a \$5,000 to \$7,500 monetary penalty for a first contravention of this type. The branch is recommending a suspension of five days, and the addition of specific terms and conditions to its licence.

For a finding on either contravention, in addition to the recommended suspension penalty, the branch is recommending the following terms and conditions be added to the licence:

### **Security Staff**

- 1) The licensee must hire an adequate number of licensed security staff to conduct all required screening and other security functions.
- 2) The licensed security staff must be present on Friday and Saturday nights from 19:00 hours until close.
- 3) The security staff must be briefed on their duties and must be clearly identified as security staff.

The licensee disputes both contraventions. The licensee does not dispute the addition of the terms and conditions above, with one modification: changing the time in (2) from 19:00 hours to 21:00 hours. During the course of the hearing, the branch agreed to this change.

### **RELEVANT STATUTORY PROVISIONS**

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

### **Drunkenness**

- 43 (2) A licensee or the licensee's employee must not permit
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

### **Supplying liquor to minors**

- 33 (1) A person must not
- ...
- (c) in or at a place under his or her control, permit a minor to consume liquor.

## Minors on licensed premises

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances.

## ISSUES

- 1) Did the contravention of section 43(2)(b) occur?
- 2) If so, has the licensee established a defence to the contravention?
- 3) If the contravention of section 43(2)(b) is proven, what penalty, if any is appropriate?
- 4) Did the contravention of section 33(1)(c) occur?
- 5) If no, did the contravention of section 35 occur?
- 6) If I find there was a contravention of section 33(1)(c) or section 35, has the licensee established a defence to the contravention?
- 7) If the contravention of either section 33(1)(c) or section 35 is proven, what penalty, if any, is appropriate?

## EXHIBITS

- Exhibit 1:** Branch Book of Documents, tabs 1 to 15.
- Exhibit 2:** Affidavit dated January 20, 2014, signed by the Bartender who worked on March 8/9, 2013.
- Exhibit 3:** Affidavit dated January 16, 2014, signed by Patron 4, who was in the Pub on May 11/12, 2013.
- Exhibit 4:** Affidavit dated January 15, 2014, signed by Patron 3, who was in the Pub on May 11/12, 2013 and who testified at the hearing.

- Exhibit 5:** Affidavit dated January 16, 2014, signed by Patron 5 who was in the Pub on May 11/12, 2013
- Exhibit 6:** Affidavit dated January 20, 2014, signed by Patron 6 who was in the Pub on May 11/12, 2013.
- Exhibit 7:** Affidavit dated January 15, 2014, signed by Patron 7 who was in the Pub on May 11/12, 2013.
- Exhibit 8:** Affidavit dated January 15, 2014, signed by Patron 8 who was in the Pub on May 11/12, 2013.
- Exhibit 9:** Affidavit dated January 15, 2014, signed by Patron 9 who was in the Pub on March 8/9, 2013.

### **PRELIMINARY ISSUE – ADMISSIBILITY OF DOCUMENTS**

The licensee brought eight signed affidavits to the hearing, and one unsigned typed statement. The licensee had originally indicated he would be calling about seven witnesses. The licensee had not disclosed these affidavits or the unsigned statement to the branch advocate. All the affidavits were dated less than one week prior to the hearing dates. The affidavits were signed by the Bartender present on March 9, 2013, one patron present on that evening, and six patrons present in the Pub on May 12, 2013.

The branch advocate had an opportunity to review the affidavits and the unsigned statement at the end of the first day of hearing and made submissions on their admissibility on the second day of the hearing. The branch advocate pointed out that the licensee had received notice, both in the form of a letter and in a pre-hearing conference with the registrar, about the requirement to provide copies of any written documents at least 14 days before the hearing. I considered the purpose of the enforcement hearing rules and in particular, the statement that “the adjudicator may exercise discretion when imposing them in order to ensure administrative fairness.”

I agreed with the branch advocate that, if admitted, I should give these documents less weight than testimony from the witnesses as there was no opportunity to cross-examine the affiants on their statements, nor did the branch advocate have the opportunity to consider whether or not to call any of the affiants, because he was not aware of them until the first day of the hearing.

Nevertheless, in the interest of providing fairness to an unrepresented licensee and to ensure these hearings do not become too rigid and adherent to the rules of disclosure, I decided to admit the eight affidavits and consider what weight to give them when writing this decision. I marked them as Exhibits 2-9. I also allowed the branch advocate to recall the licensee on the second day of the hearing to ask him questions about the preparation of the affidavits.

I did not admit the typed statement from a taxi driver as it was not signed by the individual and thus, even if admitted in this hearing, I would not give it any weight.

## WITNESSES

The branch called three witnesses:

- the RCMP Officer who attended at the Pub on both evenings of the alleged contraventions and made reports to the Liquor Inspector on the alleged contraventions
- the Liquor Inspector who received the reports from the RCMP Officer and who wrote the NOEAs for the two alleged contraventions
- the minor who entered the Pub on May 11/12, 2013

The licensee called four witnesses:

- the licensee
- three patrons who were present in the Pub on the night of the May 11/12, 2013 incident (Patrons 1, 2 and 3)

As noted above, the licensee submitted eight affidavits that I marked as Exhibits 2-9. The licensee had put up a notice in the Pub in preparation for the hearing, asking if any of his patrons had been present on the evenings of the incidents and would be willing to make a statement or testify. The licensee stated, under questioning from the branch, that the only communication he had with patrons 1, 2 and 3 was with regard to the hearing date. He also agreed to pay the travel costs of these witnesses.

## FACTS

### **Intoxicated Patron (section 43(2)(b))**

On Friday/Saturday, March 8/9, 2013, two RCMP officers and two auxiliary officers were conducting a routine check of bars in Campbell River. At approximately 1:20 a.m. on March 9, 2013, they entered the Pub. The first RCMP Officer noticed a patron who was sitting by the stage, within the red-lined area of the Pub, and appeared to be asleep. Staff had a clear view of the patron. The first RCMP Officer approached the patron and attempted to wake him. He initially tried to verbally arouse him, then shook him and finally used trapezoidal pain compliance – which uses a pressure point on the shoulder to arouse people. At that time, the male woke up and was flailing his arms.

The first RCMP Officer noted signs of intoxication: odour of liquor on his breath, glazed eyes, slurred speech, unsteadiness on his feet, and his anger response on being woken up. He placed the male in custody and took him out to the patrol car, where he was taken to the RCMP detachment, lodged in the cells, and released in the morning. The patron was issued a violation ticket for being intoxicated in public (Exhibit 1, tab 3).

The first RCMP Officer sent a copy of his report, prepared at 2:10 a.m. on March 9, 2013, to the Liquor Inspector. (Exhibit 1, tab 2)

The licensee agreed that the patron was intoxicated. The licensee in his testimony and the Bartender and another patron in the Pub in their affidavits (Exhibits 2 and 9) all stated that staff had called a cab for him.

I find that the patron was seated in the red-lined area of the Pub and, based on the indicia of intoxication noted by the RCMP Officer; I find that he was intoxicated.

**Minor (section 33(1)(c) or section 35)**

On the evening of May 11, early morning hours of May 12, 2013, at 12:28 a.m., two RCMP Officers were conducting a bar check of the Pub. The RCMP Officers walked through the Pub immediately after the RCMP had been called to the Pub because of a fight. The security staff at the Pub had ejected at least two males from the Pub just prior to the RCMP officers' entry into the Pub.

The first RCMP Officer noticed a young male sitting in the Pub and approached him as he knew him to be a minor from a previous encounter. He asked him for identification. The first RCMP Officer then called the licensee over and showed him the identification, which indicated that the male was an 18 year old minor. There was beer on the table where the minor was sitting. The licensee and the first RCMP Officer escorted the minor out of the Pub.

Staff in the Pub advised the first RCMP Officer at the time of the incident that the minor "must have come in with the smokers or during the fight" (recorded in the RCMP Officer's report at Exhibit 1, tab 6). Other patrons in the Pub observed the minor enter the Pub in a surreptitious manner just as the door staff were engaged in ejecting the other patrons who were involved in the fight. The minor was in the Pub for no longer than 5 to 10 minutes before being removed.

I find that a minor entered the Pub while the doormen were otherwise engaged in dealing with ejecting patrons who had been fighting.

**SUBMISSIONS – BRANCH****Intoxicated Patron (section 43(2)(b))**

The branch submits that section 43(2)(b) of the Act is clear. A licensee must not permit an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The Pub has a foyer at the front door, located outside the red-lined area. The licensee was unaware, when asked, if he knew what constituted the red-lined area of his Pub. There is no provision in the Guide (Exhibit 1,

tab 12, page 33) that allows patrons to remain in the red-lined area while waiting for a cab. A licensee must have the intoxicated person removed from the red-lined area and see that he or she departs safely.

The first RCMP Officer stated that no other staff in the Pub approached him to say the patron was waiting for a cab. The patron was slumped over in clear view of the staff.

The branch submits that, where there is a conflict between the live testimony of the RCMP Officer and that of the staff in the affidavits, that I should accept the evidence of the RCMP Officer, as having been subject to cross-examination in the hearing.

### **Minor (section 33(1)(c) or section 35)**

The branch submits that an 18 year old minor was found inside the Pub in the early morning hours of May 12, 2013. The branch agrees that there is some contradictory evidence as to whether or not he consumed from a bottle of beer. The branch points out that the RCMP Officer's evidence was reliable and straightforward. The RCMP Officer made notes only three hours following the incident and noted that the minor was consuming beer.

The branch submits that the licensee's witnesses who gave their observations about the minor did not make any notes to record what occurred on the day in question. Therefore I should give them less weight when making my decision about whether or not the minor was actually consuming liquor in the Pub.

### **Due Diligence – both alleged contraventions**

The branch submits that the licensee was in the Pub during both incidents. The licensee is the directing mind and therefore responsible for the events on these two evenings.

The branch submits that the licensee was unaware of the laws that affect his liquor licence. He did not seem to be sufficiently aware of the requirement to remove intoxicated patrons from the red-lined area.

Due diligence is measured against the actions of a reasonable person in similar circumstances and requires that the person using the defence take all reasonable care. The branch says a reasonable person would have the patron wait for a cab in the unlicensed area.

With respect to the entry of the minor, the branch says that a staff person should be positioned at the front door in the event a doorman is pulled away to deal with unruly patrons, or, at the very least, that the room be patrolled after the fight to ensure no minor entered. It was the RCMP Officer who located the minor. No staff noted the minor's presence. As the minor was observed by several patrons, he should have been seen by the staff. The licensee testified that he followed the fight to the door and then returned to the bar. A reasonable licensee should have passed through the room at that point to make observations of the patrons and, if done, he would have detected the minor.

The branch submitted that the licensee was present and working on the evenings of both incidents. If the RCMP Officer and the patrons were able to make the observations of the minor, then clearly the licensee should have been able to make them and to take action. The licensee should have removed both the intoxicated patron and the minor before being told to do so by the police.

In the alternative, if I am to consider evidence of due diligence, the branch says that the licensee has submitted no evidence of policies and staff training to prevent such contraventions.

## **SUBMISSIONS – LICENSEE**

### **Intoxicated Patron (section 43(2)(b))**

The licensee agreed that the patron removed by the police in the early morning hours of March 9, 2013 was intoxicated, and that he was sitting in the licensed area of the Pub.

However, the licensee submits that he was following the guidelines in the Serving It Right manual with respect to ensuring an intoxicated patron gets home safely. The licensee stated in his evidence that he noticed the patron had some keys and he did not want him driving. If the patron had been removed to the foyer area of the Pub, the licensee says he may have left the Pub on his own, possibly driven his car and been a danger to himself and others. The licensee was not aware of the actual boundaries of the red-lined area in his establishment and believed that having the patron wait for a cab inside was the best option.

The licensee also submitted that the affidavit evidence from the Bartender and from a patron was that there was only one other patron in the Pub, not eight as stated by the RCMP Officer. Both the Bartender and the other patron stated in their affidavits that staff had called a cab for both patrons and that the cab was slow in coming that night. The licensee confirmed this in his testimony. The Bartender in her affidavit said she told the RCMP Officer that the licensee had called a cab.

The licensee stated that the RCMP Officer misinterpreted what he heard from staff at the time that the RCMP Officer was dealing with the intoxicated patron. The licensee says that the Bartender (supported in her affidavit) yelled for the licensee to come out, as he was in the back and that she was not yelling to the officers to get the patron out.

The licensee submitted that the Liquor Inspector conducted no investigation into the incident. The licensee did not save the CCTV video because he received the request too late from the Liquor Inspector. The CCTV videos are erased after seven days. The licensee says the Liquor Inspector could have asked the Bartender for more information about the incident.

The licensee attended a compliance meeting on April 2, 2013 about the March 9<sup>th</sup> incident and received the first NOEA after the meeting. At this meeting, the licensee made commitments to improve door security and later hired two more security staff for Friday and Saturday evenings.

**Minor (section 33(1)(c) or section 35)**

The licensee agreed that a minor entered the Pub in the early morning hours of May 12, 2013, but that he was only there for five minutes at the most and that he did not consume any liquor. He said the minor was sitting at a table with bottles of beer that had not been cleared from the table. The Pub staff never served the minor.

The licensee submitted that door staff were busy with ejecting the males who had been involved in the fight and the minor slipped into the Pub at that time. The licensee said as soon as he saw the minor he went to ask for his identification but the RCMP Officer was already there and informed the licensee that he could not talk with the minor. The licensee and the RCMP Officer ejected the minor.

The licensee submitted that, as the fracas at the door distracted staff and the minor's presence was of such short duration, the licensee should not be penalized. He further says that the original Contravention Notice dated May 17, 2013 (Exhibit 1, tab 9) and the Police Licensed Premises Check dated May 12, 2013 (Exhibit 1, tab 7) both cited section 35 as the contravention. The Contravention Notice was amended several weeks later to include section 33(1)(c) and section 35 in the alternative. The licensee submitted that, if the RCMP Officer was certain the minor was consuming beer, he should have issued the Licensed Premises Check for section 33(1)(c) and the Liquor Inspector should have cited this section in the Contravention Notice dated May 17, 2013.

**REASONS AND DECISION****Intoxicated Patron (section 43(2)(b))**

The licensee agreed the patron was intoxicated and that he was in the licensed area of the Pub. There was no evidence about how long the intoxicated patron had been in the Pub or how he became intoxicated.

I accept the licensee's evidence that the licensee or his staff had called a cab for the intoxicated patron. I also accept the licensee's evidence that the Bartender was not yelling to the police officer to "get him out of here" but rather were calling for the licensee to come out front as the police officers were dealing with the intoxicated patron.

There was conflicting evidence presented as to whether or not there were eight patrons (as reported by the RCMP Officer) in the Pub or only two patrons. I do not need to resolve this as this evidence is not relevant to the question as to whether or not the licensee contravened section 43(2)(b).

I find that the Pub has an area outside the licensed area (i.e. the foyer at the front) where the licensee could remove people while they are waiting for a cab (shown on the floor plan (Exhibit 1, tab 11)). I find that the licensee's failure to understand the red-lined area of the Pub contributed to the contravention here. I do not accept the licensee's excuse for not moving the intoxicated patron to the foyer, which was that he was afraid the licensee might just leave and get in his car. The licensee has door persons or other staff who should be able to monitor anyone sitting by the front door waiting for a cab.

I therefore find that the licensee contravened section 43(2)(b) of the Act on March 9, 2013, by permitting an intoxicated person to remain in the Pub. I will deal with the question of the defence of due diligence below with respect to both contraventions.

#### **Minor (section 33(1)(c) or section 35)**

The licensee has agreed that a minor entered the Pub on May 12, 2013. However, the licensee states that the minor did not consume any alcohol in the Pub. The licensee further says that, in the confusion over ejecting several males who had started a fight in the Pub, the minor managed to slip in unnoticed. The licensee said he was about to approach the minor and ask him for identification when he saw the RCMP Officer speaking with him. He believed that the minor might have been someone involved in the fight and that was why the RCMP Officer was talking to him.

I have reviewed the evidence with respect to whether or not the minor was consuming any beer at the table. The affidavit evidence of patrons who observed the male was quite consistent in stating that the minor did not consume anything. They all commented on the very brief time, maximum of five minutes, that the minor was in the Pub. I give the affidavit evidence less weight than the evidence of live witnesses who were subject to cross-examination.

Both the licensee and Patrons 1 and 2 agreed in their live testimony that the minor was in the Pub for five minutes or less. Patron 1 stated the minor was in the Pub for about three minutes. Patron 2 said the minor was there less than five minutes and that he did not drink as he was not there long enough. Patron 3 (in his affidavit and at the hearing) stated the minor had not been drinking. Patron 1 made no comment in her testimony about whether or not the minor was drinking.

The minor stated he was in the Pub for about 5 to 10 minutes and that he did not consume any alcohol. The minor admitted that his recollection of the incident was not that clear, but he was quite emphatic in his testimony under questioning from the branch that he did not drink anything. He signed a written statement on November 24, 2013 (Exhibit 1, tab 8), stating several times that he did not drink anything that evening in the Pub.

The minor was also very clear in his testimony and in his statement that no one other than the RCMP Officer asked him for identification. The licensee, in his evidence, stated that he did not see the minor consume anything but admitted he may have missed a minute or two when observing him.

I find it difficult to reconcile the licensee's evidence that the minor was not drinking with the statement of the RCMP Officer that he observed the minor consuming alcohol. I found the RCMP Officer and the licensees' witnesses credible and forthright in their testimony. I did not perceive any "coaching" of the licensee's witnesses as to what to say and the licensee stated he had not done so. The RCMP Officer noted in his report written immediately after the incident, that he observed the minor drink from a bottle of beer. It is possible that the presence of a bottle of beer on the table, from the previous occupants of that table, led the RCMP Officer to note in his initial report that the minor

was consuming. It is also possible that the minor was drinking from one of the bottles on the table.

The RCMP Officer chose to cite only section 35 in the Police Licensed Premises Check (Exhibit 1, tab 7). In addition, section 35 was the only section cited in the Contravention Notice dated May 17, 2013. (Exhibit 1, tab 9) When the RCMP Officer was asked in cross-examination why he only cited section 35 and not section 33(1)(c) of the Act, he answered that, at that point in time, he felt that the minor was only on the premises.

On June 7, 2013, the branch issued the second Contravention Notice, citing section 33(1)(c) and section 35 in the alternative. This Contravention Notice was not included in the branch's book of documents (Exhibit 1). The Liquor Inspector stated he amended the Contravention Notice dated May 17, 2013 and issued the second Contravention Notice after reading the RCMP Officer's report.

There was a period of almost a month in which the licensee believed the contravention was permitting a minor to be on the premises. The licensee never disputed the fact that a minor was in the Pub. However, he and his witnesses and the minor claimed that the minor did not consume liquor while in the Pub. The licensee did not save any CCTV video footage of the evening. I comment on this omission below under due diligence. However, I conclude that if the licensee had known at an earlier date that the branch was alleging a contravention of section 33(1)(c), he may have reviewed his CCTV footage to establish whether or not there was evidence of the minor consuming. The lack of immediate notice to the licensee of this contravention, which implies double the penalty, leads me to conclude that, in fairness, I should find only that the licensee contravened section 35 of the Act, by permitting a minor to be on the premises.

With respect to the licensee's submission that he should be excused any penalty because the minor was in the Pub for a very short time and because staff at the door had been distracted by the fight, I find that the excuse of a fight does not provide the licensee with a defence. There were no doormen at the door when the minor entered the Pub. Neither the licensee nor his staff prevented his entry. The licensee is responsible at all times to ensure he complies with the law and if there are distractions for some staff, he is responsible to ensure that the law is not broken.

The licensee or his staff could have surveyed the room immediately after he or his staff came back into the Pub, after the distraction of the fight. He could have assigned another staff member to monitor the door. The licensee's patrons who testified and who signed the affidavits all observed the minor "sneak in" or enter surreptitiously so the question remains: why did the Bartender or other serving staff not see the minor enter and deal with him appropriately before the RCMP Officers entered?

As the minor entered the Pub and remained in the Pub for a period of about five minutes, I find that the licensee permitted a minor to enter and to be on the premises and therefore contravened section 35 of the Act.

### **Due Diligence**

The licensee is entitled to a defence if it can be shown that he 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, he 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 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 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 the 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 he had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The licensee was present in the Pub on both evenings. The licensee is the directing mind. On March 9, 2013, the licensee permitted an intoxicated patron to remain within the licensed area. On May 12, 2013, neither the licensee nor his staff prevented the entry of a minor who sat down at a table in the Pub.

The contravention in the *Beverley Corners* decision cited above was the sale of alcohol to a minor. The same questions apply to the contraventions here. As the licensee was present and involved in the monitoring of activities in the Pub on both nights, he was the directing mind with respect to both contraventions. Under the *Beverley Corners* analysis, the due diligence defence is not available.

If I am wrong that the licensee was the directing mind on the premises, I find further that the licensee presented no evidence of its policies and staff training. The licensee stated in his testimony that he had an incident log book but he did not produce one for the hearing. The licensee presented no evidence about staff meetings, reminders to staff about policies, if any. The most damaging to the defence of due diligence was the licensee's own admission that he was not aware of the significance of the red-lined area.

The licensee did not save any of the CCTV video footage despite the May 16, 2013 request from the Liquor Inspector to do so. The licensee was aware that the branch had issued a Contravention Notice as a result of the police inspection on May 12, 2013. A prudent licensee should immediately preserve any video evidence and provide it to the branch. I find that the licensee was not duly diligent when he failed to save the evidence that was available through the CCTV video footage. It is not sufficient for a licensee to say at a hearing that the branch had not requested it in time.

The licensee presented no evidence to demonstrate that he has implemented adequate training and other systems to prevent either contravention. I find that the licensee has failed to establish a defence of due diligence.

Finally, I wish to comment on the licensee's submission that the branch failed to conduct a full investigation before deciding to issue the NOEAs. The licensee is required to comply with the requirements of the Act, the Regulations and the terms and conditions of the licence. The Guide (exhibit 1, tab 12) reminds licensees of their responsibilities and the consequences if they are not in compliance. It is not up to the branch to examine witnesses and conduct a full investigation prior to issuing a NOEA. If a licensee disputes a contravention, the onus is on the licensee to preserve any evidence and to bring it to a hearing.

## **PENALTY**

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

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

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

The factors that are considered in determining the appropriate penalty in any particular circumstance include consideration of 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

### **Intoxicated Patron (section 43(2)(b))**

Permitting intoxicated persons to remain in a licensed establishment can have a negative effect within the licensed establishment and within the community at large. A licensee is responsible for taking all reasonable measures to avoid such contraventions. I find that the licensee here had taken no action to remove an

intoxicated patron from the licensed area. I, therefore, find a penalty is warranted to encourage future compliance.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 11 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

The branch is recommending a four day suspension, the minimum under Schedule 4 for a first contravention. I find that a four day suspension is reasonable and appropriate in the circumstances of this contravention.

### **Minor (section 35)**

I find that a penalty is warranted on the facts of this case to ensure future compliance. In this case, the licensee failed to have proper procedures in place to prevent the minor from entering the Pub. A penalty will provide a strong message to the licensee, staff, other patrons, and the community that a contravention occurred and has been taken seriously by the branch.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 3 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

The branch is recommending a five day suspension and the addition of terms and conditions to its licence. Having found a penalty is warranted, I am bound to order the minimum set out in the Schedule. The branch has submitted that a five day suspension is justified given the licensee's compliance history. The compliance history is set out in the second NOEA.

There is no record of previous enforcement action taken against this licensee. There was a compliance meeting held on April 2, 2013, relating to the section 43(2)(b) contravention and I have imposed a penalty for that contravention. I find that the licensee's willingness to add the recommended terms and conditions to its licence demonstrate his intentions to initiate a stronger system of door control in the Pub to prevent future contraventions. I am satisfied that a four day suspension will be sufficient to bring the Licensee into voluntary compliance.

The addition of the terms and conditions on the licence will ensure improved door control. I would also advise the licensee to introduce a system of training his staff about the terms and conditions of his licence, which include ensuring his staff understand the terms and conditions in the Guide.

## **ORDER**

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence Number 005763 for a period of eight (8) days to commence at the close of business on **Thursday, March 20, 2014** and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Campbell River RCMP detachment from the close of business on **Thursday, March 20, 2014** 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.

I further order the following terms and conditions be added to licence number 005763:

**Security Staff**

- 1) The licensee must hire an adequate number of licensed security staff to conduct all required screening and other security functions.
- 2) The licensed security staff must be present on Friday and Saturday nights from 21:00 hours until close.
- 3) The security staff must be briefed on their duties and must be clearly identified as security staff.

*Original signed by*

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Nerys Poole  
General Manager's Delegate

Date: February 17, 2014

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

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