



**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:	The Cambie Malone's Corporation dba Cambie Hotel (Nanaimo) 63 Victoria Crescent Nanaimo, BC V9R 5B9
Case:	EH13-077 & EH13-100
For the Licensee:	Kevin McLean
For the Branch:	Peter Mior
General Manager's Delegate:	Nerys Poole
Date of Hearing:	March 19, 2014
Date of Decision:	May 8, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Cambie Malone's Corporation dba the Cambie Hotel (Nanaimo) (the "licensee") operates a licensed establishment under the name of the Cambie Hotel, at 63 Victoria Crescent in Nanaimo, BC (the "Pub") under Liquor Primary Licence number 022747 (the "licence"). Under the licence, liquor sales are permitted from 11:00 a.m. to 1:30 a.m. seven days a week.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the "Guide").

This hearing dealt with two alleged contraventions against the licensee: one under section 43(2)(b) and one under section 73(2)(a) of the *Liquor Control and Licensing Act* (the "Act"). Kevin McLean appeared at the hearing as the licensee's legal counsel.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

EH13-077 – Alleged Contravention of section 43(2)(b) Permitting Intoxicated Person to Remain...

The branch alleges that, on March 30, 2013 (business day of March 29, 2013), the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated June 3, 2013 (the "first NOEA") (Exhibit 1, tab 1).

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 monetary penalty of \$5,000 to \$7,000. The branch is recommending a suspension of four days.

The licensee disputes the contravention.

**EH13-100 – Alleged Contravention of Section 73(2)(a)
Failing to Promptly Produce and Submit and Record....**

The branch alleges that, on April 12, 2013, the licensee contravened section 73(2)(a) of the *Act* by failing to promptly produce and submit a record, thing or sample requested by a liquor inspector acting within her authority under the *Act*.

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated June 3, 2013 (the "second NOEA") (Exhibit 1, tab 6).

For a first contravention of this type, Schedule 4, item 31 of the *Regulation* provides a range of licence suspension penalties from 10 to 15 days and/or a monetary penalty of \$7,500 to \$10,000. The branch is recommending a monetary penalty of \$7,500.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS

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

Drunkenness

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

Power to retain documents and inspect books and premises

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

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

(2) Without limiting any other provision of this section, a licensee must

(a) promptly produce and submit for inspection any record, thing or sample requested by a person acting under the authority of this section,

ISSUES

1. Did the contravention of section 43(2)(b) occur?
2. If so, has the licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?
4. Did the contravention of section 73(2)(a) occur?
5. If so, has the licensee established a defence to the contravention?
6. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: Branch book of documents, tabs 1 to 16.

Exhibit 2: Licensee's correspondence and response to request for documents (5 pages).

WITNESSES

The branch called three witnesses: two RCMP constables who attended the Pub on the evening of March 29/30, 2013, and a branch liquor inspector who gave general information about branch procedures and the handling of branch records.

For reasons unknown to me, the liquor inspector who issued the Contravention Notices and the NOEAs to the licensee (Liquor Inspector 1) did not testify.

The licensee called two witnesses: the owner of the Pub and the Pub Manager who was working on the evening of March 29/30, 2013.

FACTS

Permitting Intoxicated Person to Remain (section 43(2)(b))

The following facts about the evening of March 29/30, 2013 are undisputed.

On Saturday, March 30, 2013 at 12:25 a.m. (business day of Friday March 29, 2013), two RCMP constables entered the Pub to conduct a routine bar check. While in the Pub, the two constables observed a male patron sitting at the service bar near the cash register (the "male patron").

The RCMP constables drew conclusions about the level of intoxication of the male patron from their observations over the space of about 10 minutes. They observed him with another male who had his arm around him. Both males were drinking from bottles. The constables noted that the male patron was slumped over the bar counter top, his eyes were almost closed, and he was swaying on his bar stool.

After observing the male patron for a few minutes, Constable 1 spoke to the male patron and noted that he had poorly coordinated motor skills, smelled strongly of liquor, and was barely able to hold a conversation with him because of slurred speech. The constables continued to check the rest of the Pub for several minutes while maintaining their observations of the male patron at the bar.

The constables saw another male help the male patron get up from the bar stool and observed the male patron having extremely poor balance and described his legs "like jello." The two patrons headed towards the patio smoking area at the northwest end of the bar.

Constable 1 then advised the male patron that he was too intoxicated to remain in the Pub and would have to leave. Constable 2 asked a staff person at the bar for the Pub Manager, who was downstairs. He spoke with the Pub Manager and advised her that the male patron was too intoxicated to remain in the Pub. The male patron left with a female who assured the constables that she would take care of him.

The Pub Manager informed Constable 2 that she had stopped liquor service to the male patron some 5 to 10 minutes before the RCMP constables arrived. She had handed him his tab and said she would not serve him anymore. She had stopped service to him because his eyes were red and he appeared stoned, she thought possibly on marijuana. She said his tab for the evening was for one corona beer, two rum, and two shots of Jagermeister (a liqueur).

After cutting off the male patron, she went downstairs in the Pub to do some paperwork. The doorman notified her of the presence of the RCMP constables and she then came back upstairs.

Before leaving the Pub, Constable 2 issued a Police Licensed Premises Check (Exhibit 1, tab 4) to the Pub Manager, citing section 43(2), permitting an intoxicated person to remain, and section 12 of the *Act*, contravening a term and condition of the licence.

Liquor Inspector 1 received an email from Constable 2 the following day (Exhibit 1, tab 2). According to the first NOEA drafted by Liquor Inspector 1 (Exhibit 1, tab 1), she reviewed the circumstances of the incident from the constables' report and issued a Contravention Notice citing the contravention of section 43(2)(b) (Exhibit 1, tab 5).

Failing to Promptly Produce and Submit Records (section 73(2)(a))

The following facts are undisputed.

As a result of the issuance of the Contravention Notice dated April 2, 2013, for the alleged contravention of section 43(2)(b), Liquor Inspector 1 sent correspondence to the licensee on April 3, 2013, seeking information to assist in her inquiry (Exhibit 1, tab 7).

The information she requested included:

- A list of all personnel working at this establishment on 30 March 2013, along with a copy of each employee's 'Serving It Right' certificate (where appropriate)
- Any staff training manual or document that provides guidance to your staff in respect of intoxicated patrons in your establishment
- A record of the actual operating hours of the bar, and
- The incident book for this establishment

Liquor Inspector 1 advised the licensee, in bold at the top of the letter: "This requirement to provide records is a time sensitive document." She further advised, in the body of the letter, that failure to provide these documents is a contravention under section 73(2)(a) and section 73(2)(b) of the *Act*. She noted that the deadline for submission of the documents was April 12, 2013.

Liquor Inspector 1 sent the correspondence by Canada Post registered mail. She addressed this correspondence to 63 Victoria Street, Nanaimo, the address on the branch's file for the licensee and the mailing address noted on the licence. Proof of delivery was confirmed on April 4, 2013, with an employee of the licensee signing for the delivery. At the hearing, the licensee identified the employee as a bartender at the Pub. He no longer works there.

According to the second NOEA, by April 12, 2013, Liquor Inspector 1 had received none of the requested documents. She had received no communication from the licensee, nor any request for seeking an extension to the deadline of April 12, 2013.

On April 18, 2013, Liquor Inspector 1 issued a Contravention Notice to the licensee citing a contravention of section 73(2)(a) of the *Act* (Exhibit 1, tab 11). She sent this by Canada Post registered mail to the Nanaimo address of the Pub, with the same employee signing for the delivery (Exhibit 1, tab 10).

In a May 3, 2013 letter to Liquor Inspector 1, the licensee responded to the receipt of the Contravention Notice, noting that he received it on April 18, 2013 and stating "it is imperative that all letters and correspondence be sent to #400-525 Seymour Street, Vancouver, BC V6B 3H7 as that is where my office is located", and stating that he would contact the manager of the Pub and provide the requested documentation shortly. In a letter dated May 22, 2013, the licensee enclosed some of the requested documents and sent them by regular mail to Liquor Inspector 1 (Exhibit 2).

The licensee does not dispute the above facts, but disputes the finding of a contravention, stating that the liquor inspector should have communicated with him directly or sent the correspondence to his office in Vancouver, as she was aware of his phone numbers and his address there. I summarize the licensee's defence to this contravention under Licensee's Submission.

At the date of the hearing, the branch's records show the mailing address on the licence as 63 Victoria Street, Nanaimo, BC.

SUBMISSIONS

Licensee's counsel requested the opportunity to provide written submissions after the hearing. The branch advocate agreed with this. I, therefore, made an order setting out the timeline for the submissions with the final reply submission (if any) to be received by the branch registrar on April 2, 2014. I have received and reviewed the submissions.

Permitting Intoxicated Person to Remain (section 43(2)(b))

Branch Submission

The branch submits that the male patron was intoxicated while in the premises and that the staff did nothing to remove him until the constables entered and spoke to the Pub Manager.

The two constables observed the male patron at the bar, in full view of the staff there, and noted what they considered to be significant signs of intoxication: slurred speech, almost closed eyes, smell of alcohol on his breath, slumping over the bar, poorly coordinated motor skills, and inability to stand upright without swaying. The constables noted that staff were taking no action to remove the obviously intoxicated male patron.

The branch submits that the Pub Manager should have removed the male patron from the red-lined area, not just cut him off as she said she had done. She could have removed him to the unlicensed foyer area of the Pub, while waiting for a taxi or other ride to take him home.

The branch says that the recommended penalty is warranted as this contravention is a serious health and public safety issue. Intoxicated patrons can be a danger to themselves and to others.

Licensee Submission

The licensee initially criticizes the branch for failure to call as a witness the male patron alleged to be intoxicated or Liquor Inspector 1. The licensee says that I should draw an adverse inference because of the branch's failure to call these witnesses to the hearing.

With respect to the observations of the signs of intoxication, the licensee submits that the police officers should have conducted a breathalyzer, urine or blood test of the allegedly intoxicated male patron to prove intoxication.

The licensee points to the suggestion from the Pub Manager that she thought the male patron may have been high on marijuana. The licensee says there is no evidence that he was intoxicated from alcohol. The licensee points to a list of factors that might cause the signs noted by the officers including: sleep, medical conditions, poor lighting, shoe wear, prescription medication, stressors in life, barometric pressure, etc. The licensee further submits that, if the signs noted by the officers were a result of taking marijuana (as suspected by the Pub Manager), the branch has no authority to regulate individuals intoxicated by drugs.

The licensee says that the only evidence provided by the branch as to the male patron's level of intoxication was in the nature of hearsay, conjecture, and speculation.

The licensee states that the only evidence of the male patron's consumption of alcohol was that he had a bar tab indicating five drinks over three hours and some further evidence that two of these drinks may have been for other patrons.

The licensee submits that, as the delegate of the General Manager hearing this matter, I have no authority to regulate narcotic intake and that this is a pure question of law.

In response to the branch's submission that the Guide (page 33) refers to intoxication by alcohol or drugs, the licensee submits that this is not part of the legislation and that the branch only has authority to regulate with respect to alcohol under the legislation. Thus, if a person is intoxicated by drugs, the branch has no authority to deal with this.

Failing to Promptly Produce and Submit Records (section 73(2)(a))

Branch Submission

The branch notes that the initial letter or order to produce documents was sent to the licensee's mailing address, as noted on the licence, on April 3, 2013. The branch says that any delay between receipt of the letter at the address on record and the licensee's alternative address is the responsibility of the licensee.

The licensee eventually produced the documents in the April 3 request, on May 22, 2013, some 40 days later. The Notice to Produce letter, sent on April 3, was received on April 4, 2013 (Exhibit 1, tab 8). The Contravention Notice for failure to produce documents, issued on April 18, 2013, was received on April 19, 2013 (Exhibit 1, tab 19).

The branch says that the legislation requires a prompt response. The branch notes that the address of record for this licensee, as registered with the branch, remains 63 Victoria Crescent, Nanaimo. The branch notes that, while this is not a public safety issue, it is a high priority with the branch, as failure to comply erodes the authority of the General Manager of the branch and undermines the ability of the General Manager to fulfill his statutory duty.

The branch says that the recommended penalty is warranted here as there is no evidence of due diligence to ensure the branch has been informed of any change of address.

Licensee Submission

The licensee submits that the branch's failure to call Liquor Inspector 1 as a witness requires me to dismiss this alleged contravention. Further the licensee says that he provided a business card to Liquor Inspector 1 with his address in Vancouver and that the branch submitted no evidence to contradict this fact. The licensee blames the branch for not sending the request to produce documents to the address on its business card.

REASONS AND DECISION

Issues Raised in Submissions

The licensee raises two issues in its submission that I will address first. The two issues are: drawing an adverse inference against the branch for failure to call witnesses; and, failure of police officers to conduct a breathalyser, urine or blood test of the male patron to prove intoxication by alcohol.

Adverse Inference

I am not going to draw an adverse inference from the failure of the branch to call Liquor Inspector 1 or the male patron.

My task is to listen to the evidence presented and to determine whether the branch has proven a contravention on the balance of probabilities. Under the enforcement regime, a licensee is entitled to request a hearing when the branch alleges a contravention has occurred. The branch and the licensee are free to decide which witnesses they wish to call to a hearing in order to prove or disprove the alleged contravention.

There is no onus on the branch to call a witness. The licensee has the option of requesting a summons be issued to any witness whose evidence is relevant and necessary to support his defence.

Alcohol Testing

With respect to the question of a breathalyser, urine or blood test, the branch has no authority under the *Act* to require such tests, nor do police officers have this authority under the *Act*. The licensee submits that, without a breathalyser, urine or blood test, I cannot make a finding that the male patron was intoxicated by alcohol. I do not agree.

As a delegate of the General Manager, I am responsible for assessing the evidence before me about an individual's level of intoxication—which may consist of signs of intoxication observed by others and/or the number of drinks served to a patron. I make a finding about an individual's state of intoxication from a review of this evidence. Under the *Act*, I have the authority to make this finding to support or not support a contravention under section 43(2)(b).

Contraventions

Permitting Intoxicated Person to Remain (section 43(2)(b))

The evidence of the constables with respect to the signs of intoxication of the male patron was uncontroverted. The Pub Manager agreed she cut off the male patron from further liquor service as she thought he was intoxicated, although she was not sure whether it was drugs or alcohol.

I find that the male patron was intoxicated. The male patron was seated in the Pub and had been served alcohol by the bartender. His bar tab showed a total of one beer, two rums, and two Jagermeister shots. The symptoms noted by the RCMP constables were indicative of gross intoxication. I do not need to make a determination as to whether the male patron was intoxicated from alcohol served to him in the Pub, or whether he was intoxicated from drugs.

Section 43(1) uses the phrase “an intoxicated person or a person apparently under the influence of liquor.” I find that it is a reasonable assumption that a person in a licensed establishment who exhibits gross signs of intoxication is likely to be intoxicated from alcohol. If I am wrong on this assumption, I find that the phrase used in section 43(1) can be implied in section 43(2). The first part of section 43 deals with the prohibition on selling or giving liquor to an intoxicated person. The second part of section 43 makes it a contravention for a licensee to permit an intoxicated person to remain in the licensed establishment. I conclude that, in reading the whole of section 43, the phrase “or a person apparently under the influence of alcohol” can be read as prohibiting an apparently intoxicated person to remain in the licensed establishment.

The licensee submits that the Guide, at page 33 (Exhibit 1, tab 14), in its reference to “a person apparently under the influence of alcohol or drugs”, goes beyond the authority of the branch and beyond the legislation. I agree that the branch does not have regulatory authority over an individual’s consumption of drugs. However, the branch does have the authority to regulate the presence of intoxicated individuals in a licensed establishment. The reference in the guide to “drugs” is an acknowledgement that someone exhibiting signs of intoxication and “apparently under the influence of liquor” is not permitted to remain in an establishment.

The signs of intoxication exhibited by the male patron—staggering, slurred speech, poor balance, poor motor skills—are indications that a person is intoxicated, either from alcohol or drugs or both, and thus could be a danger to himself or others. Regardless as to the origin of the intoxication—whether from drinking alcohol prior to entering the Pub, or from ingesting drugs—the legislation is clear that the Pub has a responsibility to remove a person who is apparently under the influence of alcohol.

In the present case, the constables noted alcohol on the male patron's breath. Under cross-examination, the constable agreed that someone may have a strong smell of liquor after downing only one beer. I find that the constables' evidence about the smell of alcohol on the patron's breath was only one sign of intoxication. The smell of alcohol combined with the other indicia of intoxication noted by the constables, supports their conclusion that the male patron was intoxicated.

The Guide provides additional advice on what a licensee should do when there is an intoxicated person in a licensed establishment: "You must refuse the person service, have the person removed and see that he or she departs safely."

I find that the Pub Manager did the first of these—refused the male patron service—but did not follow up by having the male patron removed and seeing he departed safely. She only did this after the constables brought the presence of the male patron to her attention.

I, therefore, find that the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Failing to Promptly Produce and Submit Records (section 73(2)(a))

I summarize the timeline of events relating to this contravention as follows:

- April 3, 2013 – Liquor Inspector 1 makes a demand for specific documents under section 73 of the *Act* and sets a deadline for receipt of the documents by April 12, 2013. (Exhibit 1, tab 7)

- April 4, 2013 – a Canada Post tracking document for registered mail shows receipt of this April 3, 2013 letter by an employee of the licensee.(Exhibit 1, tab 8)
- April 18, 2013 – Liquor Inspector 1 sends a second registered letter and issues a Contravention Notice, citing section 73(2)(a) of the *Act* and referring to the previous April 3, 2013 letter and the demand for the documents with reference to the fact that the letter had been received on April 4, 2013. (Exhibit 1, tab 9)
- April 19, 2013 - a Canada Post tracking document for registered mail shows a signed receipt of this April 18, 2013 letter by the same employee of the licensee. (Exhibit 1, tab 10)
- May 3, 2013 – the licensee responds to the Contravention Notice, noting he received it on April 18, 2013, and insisting that correspondence be sent to his office in Vancouver. He adds in the letter that he will contact the manager of the Pub and “get you the documentation requested shortly.” (Exhibit 2)
- May 22, 2013 – the licensee sends a letter by regular mail to Liquor Inspector 1 and encloses the documents requested. (Exhibit 2)

The licensee stated in his testimony that he had provided his cell number and office address in Vancouver to Liquor Inspector 1 sometime during April or May of 2013. He admitted he has never filled out a change of address and submitted one to the branch. He felt that providing Liquor Inspector 1 with his business card and with the details as to how to contact him was sufficient.

The licensee was somewhat vague as to the date of providing his business card to Liquor Inspector 1. It is not necessary for me to make a finding on this, as I do not agree that the provision of his business card with a Vancouver address was sufficient notice to the branch of a change of mailing address for the licence of the Pub.

An employee of the licensee signed for both pieces of registered mail. The licensee says he did not receive it and suggests that it was the fault of Liquor Inspector 1 as she did not send it to his office in Vancouver. The licensee is responsible for hiring and training his employees. When a licensee is not on the premises of his establishment, he is responsible for ensuring his employees respond immediately to registered mail, especially registered mail from the branch.

Branch liquor inspectors rely on the official information recorded on the licence and within the branch database. In this case, the licence shows the mailing address as 63 Victoria Crescent in Nanaimo. The alleged failure of the licensee to receive these letters in a timely manner is not the fault of Liquor Inspector 1 or the branch. It is the fault of the licensee for not ensuring his employees provide him with any registered mail from the branch, and for not ensuring he has provided the branch with an official change of mailing address for the licence.

Therefore, I find the licensee contravened section 73(2)(a) of the *Act* by not promptly producing and submitting for inspection any record, thing or sample requested by a person acting under the authority of this section.

I find further that, once the licensee became aware of the request for documents, he did not act promptly in providing them. The licensee did not send any written notice of a change in its mailing address until May 3, 2013, a month after the initial letter from the branch requesting the documents and two weeks after the licensee stated he had received the Contravention Notice on April 18, 2013. The failure of the licensee to respond promptly to the receipt of the Contravention Notice and notify the branch of the change in its mailing address compounded the licensee's failure to respond promptly to the initial request for documents.

The branch did not receive the documentation requested until some time after May 22, 2013, sent via regular mail. A staff member of the licensee sent an email on May 21, 2013 to the Pub Manager requesting the documents (Exhibit 2). The licensee admitted that he was personally aware of the request for documents by April 18, 2013, yet his staff waited until May 21, 2013 to follow up with the Pub Manager on the request.

I note that the documentation received by the branch was only three pages: one page of a handwritten report from the Pub manager of the incident on March 29/30, 2013; one page with an email providing Serving It Right numbers (with one staff person's SIR number not included); and, one page of a copy of a branch information sheet on "Information for Liquor Licensees" (Exhibit 2). The document request was a simple one. I find no justification for not dealing with it promptly.

Due Diligence

I address here the question of whether or not the licensee has established a defence of due diligence to either the contraventions of section 43(2)(b) or section 73(2)(a).

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

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

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of 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 it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Permitting Intoxicated Person to Remain (section 43(2)(b))

With respect to the first step of the analysis, there was very little evidence from the licensee about who was responsible for drafting policies in the Pub or who was responsible for training its employees. If I were to conclude that the Pub Manager was the directing mind, that would end the analysis of due diligence, as she was present on the evening of the contravention. To be cautious, I will make the assumption that the Pub Manager was not a directing mind and thus proceed to the second two-part step in the *Beverly Corners* analysis.

The licensee presented no evidence of training and other systems to prevent the contravention of section 43(2)(b). In the April 3, 2013 request for documents (Exhibit 1, tab 7), Liquor Inspector 1 included a request for “any staff training manual or document that provides guidance to your staff in respect of intoxicated persons in your establishment.” The only document provided that might relate to this request was a one page information sheet about the branch’s enforcement process, issued by the branch in April 2009. Apart from a general statement about the licensee’s responsibilities for

ensuring compliance with the *Act*, there is nothing specific in the way of guidance to employees on the question of intoxicated individuals in a licensed establishment.

I find that the licensee has presented insufficient evidence to establish a defence of due diligence to the contravention of section 43(2)(b).

Failing to Promptly Produce and Submit Records (section 73(2)(a))

On the question of a due diligence defence to the contravention of section 73(2)(a), I find that the licensee is the directing mind who was responsible for this contravention. The licensee failed to provide written notice of the change in his mailing address to the branch and, presumably as a result, failed to provide the documents requested by the deadline of April 12, 2013.

In addition, the licensee failed to inform his staff about the importance of forwarding any time sensitive documents, especially any correspondence from the branch. Further, once the licensee as the directing mind became aware of the Contravention Notice on April 18, 2013, as stated in his May 3, 2013 letter to Liquor Inspector 1, he did not send the documents to the branch until May 22, 2013.

If I am wrong on the question of the directing mind here, I find that the licensee's failure to ensure its staff at the Pub immediately forwarded any correspondence from the branch to him indicates a complete lack of training or policies on this issue. A reasonable person operating a licensed establishment, who does not work on site, should have a system in place to deal with time sensitive correspondence from the branch. Thus, the licensee fails on the second part of the test outlined in the *Beverly Corners* case above.

I find that the licensee has not established a defence of due diligence 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 Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

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

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

The factors that I have considered in determining the appropriate penalty in this case 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.

Permitting Intoxicated Person to Remain (section 43(2)(b))

I find a penalty is warranted for the contravention of section 43(2)(b). The branch considers intoxication to be a serious public safety issue. Intoxicated persons can be a danger to themselves or others.

In this case, the Pub manager had stopped liquor service to the intoxicated patron but failed to follow up with the requirement that the person be removed from the Pub. I find a penalty is warranted to send a message to this licensee to ensure his staff are properly trained in the requirements of the *Act* and to encourage compliance in the future.

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 penalty. The branch recommends a suspension of four days, the minimum under Schedule 4.

Having found a penalty is warranted, I am bound to order the minimum. I accept the recommendation of the branch, a suspension of four days.

Failing to Promptly Produce and Submit Records (section 73(2)(a))

Section 73(2)(a) is not a public safety contravention. Nevertheless, it is one of those sections of the *Act* that is essential to ensure the effective monitoring of licensees. Non-compliance with requests for records or documents can seriously undermine the compliance and enforcement program of the branch.

In this case, the licensee attempted to lay the blame for its non-compliance on Liquor Inspector 1 by submitting that she should have sent the letters to his Vancouver address, despite the mailing address on the face of the licence.

I find that a penalty is warranted on the facts of this case to ensure compliance in the future, to remind the licensee of his obligations and responsibilities to the branch, and to emphasize the seriousness of its failure to respond to these branch requests in a timely manner.

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.

For a first contravention of this type, Schedule 4, item 31 of the *Regulation* provides a range of licence suspension penalties from 10 to 15 days and/or a monetary penalty of \$7,500 to \$10,000. The branch recommends a monetary penalty of \$7,500.

Having found that a penalty is warranted, I am bound to follow the minimum. I accept the branch's recommendation and order a monetary penalty of \$7,500 for the contravention of section 73(2)(a).

ORDER

Permitting Intoxicated Person to Remain (section 43(2)(b))

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence #022747 for a period of four days to commence at the close of business on **Thursday, June 12, 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 Nanaimo RCMP detachment from the close of business on **Thursday, June 12, 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.

Failing to Promptly Produce and Submit Records (section 73(2)(a))

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before **June 12, 2014**.

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

Nerys Poole

Date: May 8, 2014

General Manager's Delegate

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

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