



**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:	Royal Nelson Holdings Ltd. dba Royal on Baker 330 Baker Street Nelson, BC
Case:	EH15-110
For the Licensee:	Peter Dale Arsenault
For the Branch:	Jay Blackwell
General Manager's Delegate:	Dianne Flood
Date of Hearing:	May 3, 2016
Date of Decision:	May 27, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Royal Nelson Holdings Ltd. (“the Licensee”) owns the Royal on Baker at 330 Baker Street, Nelson, B.C. (“the licensed premises”). The Licensee holds Liquor Primary Licence #306487 (the “licence”). Peter Dale Arsenault manages the licensed premises as a Third Party Operator (“the Third Party Operator”).

According to the terms of the licence, liquor may be sold from 9:00 a.m. to 2:00 a.m. Monday through Saturday and from 9:00 a.m. to midnight on Sundays.

Mr. Arsenault, the Third Party Operator, appeared at the hearing and represented the Licensee. Mr. Poul Henriksen, a principal of the Licensee, also attended the hearing and testified.

The licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication “A Guide for Liquor Licensees in British Columbia” (the “Guide”).

The Licensee is alleged to have contravened those terms and conditions on November 1, 2015 (business day of Saturday, October 31, 2015), by permitting intoxicated persons to remain in the premises.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch’s (the “Branch”) allegations and proposed penalty are set out in the Notice of Enforcement Action dated December 16, 2015 (the “NOEA”) (Tab 1, Exhibit 1).

The Branch alleges that the Licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (“the Act”) by permitting an intoxicated person to remain in the licensed premises. More specifically, the Branch alleges that four intoxicated persons were allowed to remain in the licensed premises: the Third Party Operator, the Bartender, a male “DJ” and a female patron.

The range of penalties for a first contravention of this type is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty (item 11, Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 ("the Regulation)). The Branch proposes a four-day suspension.

The Licensee disputes that any intoxicated person was allowed to remain on the premises. The Third Party Operator says he was tired and on prescription medication that night, the Bartender had not consumed any liquor, and the DJ was not intoxicated nor was a female patron.

A related alleged contravention of section 44 (1) (a) of the Regulation (failure to clear patrons by the time required) was resolved by way of a waiver. As such, this hearing dealt only with the allegation of allowing an intoxicated person to remain on the premises.

RELEVANT STATUTORY PROVISIONS

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

Drunkness

- 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.

ISSUES

1. Did the contravention 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?

EXHIBITS

Exhibit 1: The Branch's Book of Documents, Tabs 1 to 12

EVIDENCE – BRANCH

The Branch Advocate called three witnesses: two police officers and a liquor inspector.

Police Officer 1

Police Officer 1 testified that he has been a City of Nelson police officer for 11 years and that as a police officer he is authorized under the Act to conduct inspections of licensed premises. He said he has conducted many such inspections and when conducting “walk throughs” [inspections], he looks for compliance issues: intoxicated persons and over-service. He said he usually does not consider capacity issues unless the licensed premises appear to be overcrowded.

Police Officer 1’s evidence was that he was on duty with Police Officer 2 on the evening of October 31, 2015, which was Halloween. That evening was also the night Daylight Savings Time (“DST”) applied so that clocks were to be turned back one hour.

In giving his testimony, Police Officer 1 referred to his narrative text hardcopy report (Tab 8, Exhibit 1). He said that on the night in question he and Police Officer 2 were patrolling downtown Nelson by car. On a drive-by at about 2:14 a.m., they noted the licensed premises to still be quite full. The Officers saw the Third Party Operator outside of the premises with a doorman. Police Officer 1 called him over and advised him that DST did not apply to permit the licensed premises to stay open later. Police Officer 1 testified that he advised the Third Party Operator to clear the licensed premises or there could be serious consequences. He said the Third Party Operator then immediately re-entered the premises.

Police Officer 1 testified that he and Police Officer 2 returned to outside the licensed premises at about 2:30 a.m. and the licensed premises looked to be still occupied. He and Police Officer 2 entered the premises. Police Officer 1 said they observed about 30 people with drinks and said he did not observe any effort being made to get them moving out of the premises.

Police Officer 1 testified that he and Police officer 2 observed and interacted with four persons who, in his opinion, were intoxicated and allowed to remain in the premises: a female patron, the Bartender, the Third Party Operator and the DJ.

The female patron

Police Officer 1 said that shortly after he and Police Officer 2 entered the licensed premises a young female patron approached them, carrying a drink in her hand. He said the female had a conversation with him of about one minute. He said she exhibited signs of intoxication: she had liquor on her breath, her words were slurred, and her eyes were glassy. In his opinion, the female patron was intoxicated.

He said a male observed the female patron talking to the Police Officers and approached her and tried to take her drink away. The female resisted and the male then identified himself as a staff member. Police Officer 1 said she then relinquished her drink and staggered to the front door. No staff member accompanied her and he did not see her again.

The Bartender

Police Officer 1 testified that the Bartender then approached the Police Officers, had a brief conversation with them and then returned to behind the bar. Police Officer 1 said the Bartender smelled of liquor and exhibited signs of intoxication, but did not provide any other details on what those signs were. His narrative text hardcopy report (Tab 8, Exhibit 1) does not indicate any other details of the signs of intoxication and only indicates the bartender "appeared somewhat under the influence". In his oral opinion, Police Officer 1 said the Bartender was intoxicated, but not grossly so.

He testified that the Bartender was not escorted out of the licensed premises by any staff person and did not leave the licensed premises while the Police Officers were there.

The Third Party Operator

Police Officer 1 said the Third Party Operator approached the Police Officers and had a conversation with the Officers about the time change. Police Officer 1 said the Third Party Operator exhibited signs of intoxication by alcohol or drugs, specifically, a glazed look and seeming to be disoriented and nervous. He said the Third Party Operator did not smell of alcohol but did have low speech, which the Officer thought was intended to avoid breathing on the Officers. He testified that in his opinion, the Third Party Operator was intoxicated.

His narrative text hardcopy report (Tab 8, Exhibit 1) indicates that he suspected the Third Party Operator had been drinking but the interference of the DJ (described below) made gathering evidence of this “nearly impossible”.

He testified that the Third Party Operator was not escorted out of the licensed premises by any staff person and did not leave the licensed premises while the Police Officers were there.

The DJ

Police Officer 1 testified that while engaged in conversation with the Third Party Operator, a male, subsequently identified to him as the DJ, approached the Police Officers and interrupted the conversation they were having with the Third Party Operator. Police Officer 1 said the DJ exhibited signs of being highly intoxicated: slurred speech, unsteady on his feet, and zero comprehension of what was going on. He said the DJ obstructed the conversation the Police Officers were trying to have with the Third Party Operator. His narrative report indicates that the DJ’s breath smelled strongly of liquor.

In his opinion, he testified, the DJ was intoxicated to the extent that if he had seen the DJ in that state on the street, he would have arrested him and put him in the drunk tank. He said a staff member tried to get the DJ on his way but was unsuccessful and then left the DJ still trying to interfere with the Police Officers’ conversation with the Third Party Operator.

He testified that the DJ was not escorted out of the licensed premises by any staff person and did not leave the licensed premises while the Police Officers were there.

The Licensee’s representative did not ask any questions of Police Officer 1.

Police Officer 2

Police Officer 2 testified that he has been a City of Nelson police officer since March, 2015. Prior to that, he was an RCMP officer for nine years. As a police officer, he is authorized to conduct inspections under the Act. While an RCMP officer, he regularly

conducted inspections of licensed premises. He said that in one of his postings he conducted inspections of licensed premises about every two to four days. He said as a Nelson Police Officer, he conducted "walk throughs" about every two to three weeks. In conducting an inspection, he typically asks the door staff how things are going and looks for over-service and for staff involvement with customers.

Police Officer 2's evidence was that he was on duty, in uniform, with Police Officer 1 on the evening of October 31, 2015. He referred to his narrative text hardcopy report (Tab 8, Exhibit 1). He said the Officers were patrolling downtown Nelson by car. At about 2:15 a.m., they noted the licensed premises to still be quite full. He heard Police Officer 1's conversation with the Third Party Operator about the expectation for the Third Party Operator to shut down and clear the premises. He said they then went down the street to monitor people leaving other bars.

Police officer 2 testified that he and Police Officer 1 returned to the licensed premises at about 2:30 a.m. He said there were still a number of people outside on the patio, but not as many as earlier. Police Officer 2 testified they parked the vehicle and entered the premises. He said there were still about 30 to 40 people inside. Police Officer 2 said he observed patrons enjoying beverages that looked to have been freshly poured because they had fresh ice in their drinks.

The Third Party Operator

Police Officer 2 said he observed the Third Party Operator at the end of the bar, and said he looked to be having a good time. He testified that in his opinion the Third Party Operator had consumed alcohol. He said the Third Party Operator did not smell of alcohol, but had similar signs of impairment as the DJ (described below). He said that while in the conversation with the Police Officers, the two men, the Third Party Operator and the DJ, clasped arms together.

His narrative text hardcopy report (Tab 8, Exhibit 1) indicates that the Third Party Operator was visibly under the influence of alcohol or another intoxicating substance due to the way he was slurring his speech, his watery eyes, and his mannerism. His report also indicates that he did not detect the smell of liquor on the Third Party

Operator's breath, as "distinguishing same in said environment was not possible" and also notes that the Third Party Operator was trying to calm the DJ down.

The DJ

Police Officer 2 testified that while engaged in conversation with the Third Party Operator, a male staff member - the DJ - approached. Police Officer 2 said the DJ exhibited signs of intoxication: slurred speech, bloodshot watery eyes, and an inability to stand. The DJ smelled like alcohol on his breath. In his opinion, the DJ most definitely exhibited signs of intoxication.

Police Officer 2 did not give any oral testimony about the female patron or the Bartender, nor does his narrative report contain any statements about these individuals.

The Licensee's representative did not ask any questions of Police Officer 2.

The Liquor Inspector

The Liquor Inspector testified he has been a liquor inspector since 2003. As a liquor inspector, his responsibilities include liaising with licensees and providing information on licensing requirements and conditions to ensure compliance by licensees with the liquor legislation. He also conducts liquor inspections, looking for compliance. He said that in doing that he gives public safety issues extra diligence.

The Liquor Inspector testified that licensees are expected to be aware of and comply with the Terms and Conditions as referred to in the Act. He said the Terms and Conditions were written to assist licensees in understanding the legislation and to operate within their licence. He identified an excerpt of the Terms and Conditions at Tab 11, Exhibit 1.

The Liquor Inspector said a licensee is expected to be familiar with the Role of the Licensee and the prohibition on over-service, set out in the Terms and Conditions at pages 11 and 12 and page 40 respectively (Tab 11, Exhibit 1). He said over-service is one of the major items he spends time on with a licensee when they get their licence.

He said the licensed premises are within his geographic area of responsibility. He identified the license in effect for the licensed premises on November 1, 2015 (Tab 3, Exhibit 1). He said the premises had been previously licensed as a Food Primary and then changed to a Liquor Primary Licence on June 30, 2015.

He said that every time there is a change in a license, the licensee is required to sign off. He also said that when there is a new license he meets with the licensee to go over and discuss the items listed in the interview sheet (page 4, Tab 9, Exhibit 1) and to ensure the licensee knows its responsibilities under the Terms and Conditions.

The Liquor Inspector testified that he met with the Licensee and the Third Party Operator on June 24, 2015 when he completed a third party interview. The Liquor Inspector reviewed the Final Inspection Interview Sheets for that meeting, retrieved from the Branch's database (Tab 9, Exhibit 1). As part of that interview, the Liquor Inspector said he had the Licensee and the Third Party Operator sign off on the items discussed. Those items included the prohibition against allowing any person to become intoxicated and if such persons were found on the premises, the need to remove them from the premises. He said the prohibitions regarding staff drinking while working and allowing intoxicated persons on the licensed premises were the same for both types of licenses – Food Primary and Liquor Primary.

The Liquor Inspector testified that a few days after November 1, 2015, he met with the Police Officers, who told him about the events on November 1, 2015. On November 9, 2015, the Liquor Inspector called a meeting with the Third Party Operator and the Police Officers, at the police station. At that meeting he issued the Contravention Notice (page 2 of Tab 2, Exhibit 1).

The Liquor Inspector requested the Third Party Operator produce a list of employees working that evening (Tab 6, Exhibit 1) because the Police Officers had informed him that two of the intoxicated persons were staff members.

He also requested the Third Party Operator produce the Incident Log (Tab 7, Exhibit 1). The Liquor Inspector said licensees are required to keep a log of all incidents of intoxication in the premises. He looked to see what was recorded by the Third Party Operator for October 31/November 1, 2015 and found no acknowledgement of any incidents for that date.

The Liquor Inspector testified he had reviewed the Police Officers' notes (Tab 8, Exhibit 1) and determined a Notice of Enforcement Action was warranted and issued that document (Tab 1, Exhibit 1). His evidence was that he took the enforcement action because there was strong evidence from the Police Officers' notes of four persons with signs of intoxication being permitted to remain on the premises.

The Liquor Inspector referred to the Licensee's compliance history (Tab 10, Exhibit 1). He specifically referred to the meeting with the Third Party Operator on February 17, 2015 (when the license was a Food Primary Licence) at which they discussed ensuring staff did not consume liquor while working, no intoxicated person to be permitted to remain, and the obligation to write down all incidents of intoxication. The Inspector reiterated that these prohibitions were the same for both types of licenses – Food Primary and Liquor Primary.

The Liquor Inspector said he was of the opinion that enforcement action was necessary because staff were drinking on the job plus there was no record in the Incident Log, so there was more than just an intoxicated patron on the premises.

The Liquor Inspector said the concerns about employee consumption of liquor included a diminished ability to do their job responsibly. For this reason, staff are not allowed to have even one drink while working. An additional concern is that if a staff member was prepared to be non-compliant about that requirement (drinking liquor while working) that may indicate they might be more likely to be non-compliant about other requirements.

The Liquor Inspector recommended a four-day suspension because voluntary compliance was not working. He again noted that a previous compliance meeting had addressed not allowing intoxicated persons to remain in the premises and yet the circumstances here arose.

On questioning by the Licensee's representative (the Third Party Operator), the Liquor Inspector said that whether band members are considered staff depends on whether they are a house band and always play at the premises, in which case they were considered staff, or if they were just playing for one night, in which case they were not considered staff.

EVIDENCE – LICENSEE

The Licensee's representative called four witnesses: the Licensee, the Bartender, another bartender ("Bartender 2"), and the Doorperson on duty that night. He also gave evidence.

The Licensee

The Licensee testified that he had known the Third Party Operator for about two years and knew the Third Party Operator to be up-front, truthful and honorable. He said the Third Party Operator was incapable of lying, even when it was to his benefit to do so.

The Licensee acknowledged he was not present the night in question and he had no knowledge about what went on.

The Bartender

The Bartender testified that he had several years experience as a bartender. He said he never drinks liquor while working and that he was not drinking on the night in question. He said because he is engaged in conversations with customers he keeps a mini-bottle of Listerine to keep his breath fresh. He thinks that is what the police officers smelled and thought was liquor.

The Bartender also testified that they were “busy as hell” that night. A live band was playing. He could not recall how many people were on staff that night. He did recall two staff were behind the bar and there was a security detail and at least one waitress on the floor.

The Bartender said he knew the Police Officers and he had a short conversation with them about the requirements to close on the night of the DST change. The Bartender said the staff shut down and locked up when they were told to by the Police Officers.

The Bartender said he works on Friday and Saturday nights. He testified that he is responsible for making entries into the Incident Log. He said he has made only two reports since he was hired in August, 2015. Both incidents involved patrons who got violent. He said his understanding was that a record needed to be made when the police were called. He did not think the events of the night in question required a record in the Incident Log as they were non-issues. He said he did not know the protocol for recording incidents, just that when the boss says there has been an incident he records it.

Bartender 2

Bartender 2 testified that she had many years experience in the liquor industry in Alberta. She was hired by the Third Party Operator in June, 2014 and had worked for him since then, except for a four month period in 2015.

This was her first job serving liquor in B.C. She had served liquor in Alberta from about 1994 to 2002, then had been out of the liquor industry for about 10 or 11 years. She said she had her SIR certificate, but there is no similar certificate in Alberta.

She testified that she did not recall seeing the DJ that night, other than when he was on the stage. She said she could not say if he was intoxicated. She could not say for certain if anyone had been served liquor after 2 a.m. Her evidence was that the staff stopped serving when told to.

She had experience in dealing with intoxicated persons at the premises, probably about once a week. She said most often the person walked in intoxicated and was refused service.

On October 31/November 1, 2015 she recalled one person who was intoxicated. She could not recall the details and did not know who it was but thought they had been served and then asked to leave. She did not recall making any entry in the Incident Log about that.

She testified that she sometimes makes entries in the Incident Log, if she has had to take care of the matter. She also testified that if someone comes in intoxicated, are asked to leave and do so, then she would not make an entry in the book because there was no incident to report. This is the first job she has had where she has needed to record incidents in a log book. She recalled once having to call the police when two persons, not their patrons, were fighting outside the premises. She said they had a good relationship with the Nelson Police Department.

Bartender 2 said that on the night in question, people were either served by a server or came up to the bar. She said that when a person bought drinks at the bar, she did not always know who they were buying them for.

Bartender 2 said that security staff and the servers on the floor team up to assess patrons. Every now and then, she would leave the bar and walk around, but said that night was busy and it was hard to get out from behind the bar. She said it was easier to assess patrons if they came to the bar [to get their drinks]. She said that if a patron was assessed as being drunk, they were removed immediately so that others could not buy them drinks.

Bartender 2 said she had no idea if the door was busy that night. She said the staff that evening was comprised of six or seven "out front": two bartenders (herself and Bartender 1), a "bar back", the female door person and two servers - one of whom was let off shift earlier in the evening. She thought there were about 140 to 150 patrons in the premises that night. She described it as busy that night, as the band was good. She said it was hard to see out past the patrons at the bar.

The Doorperson

The Doorperson testified that she was on the door until about 1:35 a.m. She said she was the front of line security, taking the money and checking ID. She was ensuring that no one was coming in drunk. The Doorperson said when working the door on other evenings, she had refused entry a few times. An example she gave was when someone was tripping over something that was not there.

The Doorperson claimed to have a "photographic memory".

She said typically the Third Party Operator does not work on weekends, but she believed he was working that night. She said he was helping out, wherever he was needed - on the door, removing empties, getting change, and getting liquor, but that he was not serving liquor.

She could recall five of the staff that worked that night and one of the servers, but could not recall with any certainty the other server who worked that evening. The Doorperson said the "bar back" was also working security. At times, she said, he was out on the floor, collecting empties, checking bathrooms, and keeping an eye on the crowd. She said there was a live band, and the DJ played between the sets.

She testified that in her opinion, none of the staff was drinking. She said she saw staff drinking water and coffee but did not see any staff member drinking liquor.

She did not recall anyone being escorted out of the licensed premises that evening. She thought the cover charge that night was either \$10 or \$15, but she could not recall which.

The Doorperson testified that after she came off the door at about 1:35 a.m., she waited in the corner to be paid by the Third Party Operator. She said she was in the licensed premises until everyone left. She said she saw the Police Officers come in. She did not have any interaction with the Police Officers. She thought everything was normal.

She testified that she saw the Third Party Operator and the DJ talking to the Police Officers, but could not hear the conversation. From her viewpoint, she thought the DJ's body language as "not very inviting". She described his behavior as "off". She said the DJ was in the Police Officer's face, but said she did not think she needed to get up. She said she thought the conversation between the DJ and the Police Officers took about 10 to 15 minutes. She did not see the conversation end. She said after the conversation with the Police Officers, the DJ appeared to be very, very upset. She said he was mumbling and angry, storming back and forth. She said from past experience, she kept out of his way. She did not describe anyone asking the DJ to leave the premises.

The Doorperson said she know the DJ. She said she had had an interaction with him earlier in the evening, and they talked for about 30 to 45 minutes. She said the DJ had been drinking but did not recall seeing him drunk. She thought he had a can of "Monster" drink.

The Doorperson said she did not see the Police Officers talk to anyone else that evening because she was not watching them, rather she was looking around the premises.

The Third Party Operator

The Third Party Operator testified that he took hotel management in 1978 and after that he managed numerous nightclubs and bars. He said he got out of the industry about 15 or 20 years ago when he became involved in a ski and bike shop. He became re-involved in the industry, and the premises, about two years ago.

He said the rules [for licensed premises] have changed and are a lot tougher now. He said he has become familiar with the new rules by running the licensed premises and working with the Liquor Inspector. He said he has read the Terms and Conditions, but did not read the small print on the DST rules. He said he had just had a staff meeting to keep all staff on board. He said he had been pushing staff on compliance with the rules.

The Third Party Operator said nine staff were working that night. Tab 6 of Exhibit 1 lists those staff members. The Third Party Operator said that in addition to the Doorperson, the sound engineer and the cook also provided security. He said the cook, when not cooking, walks around and checks for over-service. He referred to the cook as the

muscle guy. The Third Party Operator said that the sound engineer has a good viewpoint from the sound booth. He said the "bar back" also acted as security.

Regarding the specific allegations, the Third Party Operator testified as follows.

The DJ

The Third Party Operator testified that the DJ was not a staff member. He said that the band had hired the DJ. The Third Party Operator said that the rules for the DJ and the band for the service of liquor is that if the DJ and band were staff they could not to be served liquor, but if they were just hired for the evening, then they could be served liquor. He said the band usually had a drink or two. The Third Party Operator said that the only staff member who recalled serving the DJ was one of the servers from the floor, who recalled serving him a drink or two.

The Third Party Operator said that just prior to the conversation with the Police Officers, he and the DJ had been having a conversation about the DJ storing his turntable in the Third Party Operator's office. He did not think the DJ was intoxicated.

The Third Party Operator did say he thought the DJ was mouthing off, trying to stick up for him, and got in the face of the Police Officers. He says that the DJ is like that when he is upset. He described the DJ as belligerent that evening. He said the DJ was in close proximity to the Police Officers and was loud. He said the DJ thought the Police Officers were treating the Third Party Operator unfairly but in fact the DJ was causing the problem. The Third Party Operator said the DJ's behavior made the Police Officers mad and that is the reason they charged the Third Party Operator. In his opinion, he thought the Police Officers felt threatened, but he admitted he never mentioned that at the meeting with the Liquor Inspector or to the Police Officers.

The Third Party Operator said that he did not notice that the DJ was drunk. He said he did not smell alcohol on the DJ. He did not think the DJ had been drinking, but said the DJ might have brought it [liquor] in the drink can that he was holding. He said usually the DJ drank a type of beer they sell, but he did not see him doing that that night. He did not see the DJ that much that night. He said he did not see the DJ staggering.

The Third Party Operator testified that he has known the DJ for about 10 years, principally through the DJ working at the Third Party Operator's other business. He thinks the DJ has a thing with authority. The Third Party Operator thinks the DJ was trying to make it up to him, because the DJ had been fired by him at his other business.

The Third Party Operator

The Third Party Operator testified that on the night in question he was on medication for sciatica. It [sciatica] was bothering him and he was limping. He said that by the end of the evening he was overtired. He testified that he was not mixing his medication with liquor.

The Third Party Operator also says he is not the greatest talker and speaks quietly. He also said sometimes he speaks when he shouldn't because he has ADHD.

The Bartender

He said the Bartender does not drink on duty and was not drinking that night.

The female patron

The Third Party Operator said he did not notice anyone intoxicated. He said by the end of the evening people act silly and are overtired.

About Police Officer 1's testimony about the intoxicated female patron, the Third Party Operator said he did not see that interaction. He said he later learned who he believed who the female patron was and that she is "super-friendly". He did not recall talking to her that evening. He said she may have been intoxicated when she was talking to the Police Officers, but a staff member got her out of the premises. He did not see a staff member take a drink away from the female patron.

SUBMISSIONS – BRANCH

The Branch Advocate submitted that the Third Party Operator knew or ought to have known that intoxicated persons were allowed to remain in the premises.

The Branch Advocate said that intoxication is a serious contravention, and had been discussed with the Third Party Operator. The Third Party Operator had met with Liquor Inspector and had signed a declaration on February 15, 2015 that he would ensure intoxicated persons were not allowed to remain on the premises.

The recommended penalty of a four-day suspension is appropriate with the Third Party Operator's compliance history. A four-day suspension is the minimum under the Regulation.

SUBMISSIONS – LICENSEE

The Licensee's representative, the Third Party Operator, said that he did not feel they had allowed intoxicated persons to remain on the premises. He said when they found out the female patron was intoxicated, a staff person took away her drink and removed her from the premises. He reiterated his testimony that he was not drinking that night and the bartender did not drink. He suggested that the DJ left the licensed premises when the Police Officers left.

The Third Party Operator said closing the licensed premises for four days will hurt the staff. He did not think the Licensee deserved to be shut down. He said he was working hard to make the business work.

REASONS AND DECISION

Contravention

The Licensee is alleged to have allowed four intoxicated persons to remain on the premises. In considering the allegations I have considered the evidence of all of the witnesses about each individual alleged to be intoxicated and have also considered the evidence collectively, as a whole. I have made the following assessment of that evidence and the following findings based on my assessment of the evidence.

The Third Party Operator

The Police Officers evidence of the Third Party Operator's intoxication was a glazed look and appearing to be disoriented and nervous, and his mannerisms (linking arms with the DJ).

The Police Officers did not smell liquor on his breath, although Police Officer 1 thought he was speaking low to avoid breathing on them. Police Officer 2 also referred to slurred speech.

However, the Police Officers' also gave evidence of an interaction with the Third Party Operator some 15 minutes earlier, with the Third Party Operator having a conversation with them while seated in their car. They made no mention of any smell of liquor on the Third Party Operator or slurred speech at that time. I find that if the Third Party Operator had consumed liquor at that time, he would have smelled of it and the Officers would have noted it then. Further, neither Police Officer suggested in their oral testimony or in their written reports that the Third Party Operator exhibited any signs of intoxication at the time of that earlier conversation.

I accept the Third Party Operator's testimony that he was on medication and he was tired at the end of a long night. And, given that I had to repeatedly request he speak up when giving his evidence at the hearing, I also accept that he naturally speaks softly. I find that with that propensity, combined with his tiredness at the time, he was not speaking softly on the night in question to avoid breathing on the Officer. I also find that it would have been very difficult to detect slurred speech.

Further, as noted above, neither Police Officer suggested that the Third Party Operator exhibited any signs of intoxication at the time of the earlier conversation. I find that it is inconsistent that only some 15 minutes later the Third Party Operator would be exhibiting signs of intoxication.

Based on the foregoing, I find there to be limited evidence of any signs of the Third Party Operator being intoxicated. I also find that those signs reported were equally consistent with the Third Party Operator being on medication.

Based on these factual findings, I find that the Third Party Operator was not intoxicated on the night in question and as such no contravention occurred with respect to allowing him to remain on the premises.

The Bartender

Only Police Officer 1 gave evidence about the Bartender being intoxicated. The oral testimony was of a brief conversation and a smell of liquor. In his narrative text hardcopy report (Tab 8, Exhibit 1), the Officer referred to the Bartender as exhibiting signs of intoxication, but no details were given in the notes or orally about what those signs were.

While I am not confident in accepting the Bartender's evidence that he had used Listerine, which was the reason he may have smelled of liquor, I do note that there is no strong evidence of any other signs of intoxication.

I also note Police Officer 2, when referring to the Third Party Operator in his narrative report, indicated the difficulty of detecting the smell of liquor on that person, given the environment.

So while I may accept the evidence may establish the Bartender *may* have consumed liquor, which is a contravention the Licensee has been specifically spoken to about and warned against, that is not the contravention alleged.

Based on the foregoing, I do not find there to be sufficient evidence that the Bartender was intoxicated and therefore, I find that the Bartender was not intoxicated on the night in question and as such no contravention occurred with respect to allowing him to remain on the premises.

The female patron

I accept Police Officer's evidence about the female patron being intoxicated. He noted several signs of intoxication and they were all clear, well-accepted signs of intoxication, without any other rational explanation. I do not accept the Licensee's evidence that the female patron was simply super friendly, and I note the Licensee's admission that the female patron may have been intoxicated. I also note that a male staff member

approached her and removed her drink. Presumably he had a reason for doing so and that reason was that she was intoxicated. Based on these findings on the evidence, I find there is sufficient evidence to find the female patron was intoxicated and I so find.

The contravention alleged against the Licensee is permitting an intoxicated person to remain on the premises. The issue is whether the female patron, being found to be an intoxicated person, was permitted to remain on the premises.

I accept Police Officer 1's evidence that on seeing the patron speaking to the Officers, the male staff member removed her drink and she staggered to the front door. The Licensee suggested this means she was not permitted to remain on the premises and no contravention occurred. The Licensee did not call the male staff person to give evidence. None of the other witnesses for the Licensee gave any evidence of the interaction of the Officers and the female patron. The Police Officers were not questioned whether the male staff person gave any oral or other direction to the female patron to leave. There is no evidence of any such efforts.

I am left then with the question whether it is sufficient for a licensee to passively observe an intoxicated patron leave the premises or whether the licensee must do something more to ensure that in fact the patron does leave safely.

I find that on determining an intoxicated patron is on the premises, the Licensee must take active steps to ensure that the person is safely removed from the premises. That did not happen here. On this basis, I conclude that an intoxicated patron was permitted to remain on the premises and a contravention has been proven.

If I am wrong on that, I find that while the contravention implies some level of knowledge by the Licensee of the state of intoxication, a Licence cannot simply turn a blind eye to the presence of an intoxicated person and deny having permitted the person to remain. I find on the evidence that the intoxicated female patron had just been served a fresh drink. I find that at the point she was served a fresh drink, the Licensee either knew, or ought to have known, she was intoxicated but was prepared to allowed her to remain on the premises, at least until she finished her drink. The Licensee cannot

serve an intoxicated person liquor and then claim the person was not permitted to remain on the premises.

Allowing a person to be served liquor implies the Licensee's staff has some level of knowledge about the person's state or level of consumption. If they don't know the person's level of consumption, then they should not be allowing the person to be served. So having served a person who was intoxicated, they have allowed or permitted an intoxicated person to remain.

The DJ

I prefer the evidence of the Police Officers on whether the DJ was intoxicated to that of the Third Party Operator. The Police Officers' evidence was clear and consistent, not only internally with their narrative reports but with each other. The Police Officers' evidence was of clearly exhibited, well-accepted signs of intoxication (see page 40, Tab 11, Exhibit 1): slurred speech, watery eyes, unsteady on his feet, and zero comprehension of what was going on.

The Third Party Operator, by his own admission, was on medication and was over-tired. I find that his ability to make an accurate assessment of the DJ's condition may have been affected by that. I also find that, as the Doorperson's assessment of the DJ's sobriety was from earlier in the evening, it is unreliable about his condition later in the evening. Bartender 2 was unable to give any assessment. Bartender 1 was not asked about this.

Further, the Police Officers' evidence is corroborated at least in part by other evidence of the Doorperson and by that of the Third Party Operator. The Doorperson described the DJ's behaviour at the time in question as being "off". The Third Party Operator admitted the DJ had been served alcohol by at least one server, and given my comments below about bar service (under the heading of Due Diligence), I find that he could have very easily been served additional drinks by others through bar service. In any event, the source of the liquor is not the issue. The issue is permitting an intoxicated person to remain; how the person became intoxicated is not the question.

I do not accept the Third Party Operator's suggestion that the Police Officers only brought forward the contraventions because they were angry with the DJ for his interaction with them. The Third Party Operator did not challenge the Police Officers on this when they were testifying, despite being given the clear opportunity to ask questions of the Police Officers. Nor did the Third Party Operator raise the issue with the Liquor Inspector, either before or at the hearing. The Third Party Operator should have raised the issue with these witnesses when given the opportunity, so that they might be given the opportunity to respond to the allegation. Without that chance to respond, and given the strong evidence of intoxication that I accept, I find the DJ was intoxicated in the premises. I now need to consider if the DJ, while intoxicated, was allowed to remain in the premises.

I accept the Police Officers' evidence that while an unsuccessful effort was made by a staff member to disengage the DJ from the conversation, no effort was made to remove the DJ from the premises while the Officers were there. This is, in and of itself, evidence that the DJ was permitted to remain in the premises while intoxicated. Additionally, the Doorperson's evidence is that after the DJ's interaction with the Police Officers, she observed the DJ storming about the premises. She made no mention of any effort by any person to remove the DJ from the premises. For these reasons, I find that the contravention of allowing an intoxicated person, the DJ, to remain on the premises has been proven.

Due Diligence

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

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

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of 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 those circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee responsible for the contravention (in that case, selling liquor to a minor) 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 licensed 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 (e.g. 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.

Directing mind

Firstly, with respect to permitting the intoxicated DJ to remain, I find that the Third Party Operator is a directing mind of the Licensee. I also find that the Third Party Operator knew or ought to have known the DJ was intoxicated and despite that, he allowed the DJ to remain on the premises. For this reason, the defence fails.

Secondly, with respect to permitting the female patron to remain, I find that the Third Party Operator, being actively engaged in monitoring the premises, ought to have known she was intoxicated and he allowed the female patron to remain on the premises. For this reason, the defence fails.

Training and systems

If I am wrong on the above, I find that the security staff and/or the Bartenders and/or the serving staff knew or ought to have known the DJ and the female patron were intoxicated and one or more of them allowed her to remain on the premises. These staff persons are not a directing mind of the Licensee, so I must look to the second aspect of the test: training and systems.

I find there is no evidence of any training of staff to prevent intoxicated persons from remaining in the premises or of any systems to ensure that does not happen. The limited efforts the staff do report taking with respect to removing intoxicated persons seem to have been self-initiated and self-directed. For this reason, the defence fails.

I will take this opportunity to comment on bar service and the defence of due diligence in cases of intoxicated patrons. I accept Police Officer 1's evidence that the female patron had a fresh drink in hand when he spoke to her. I note and accept Bartender 2's admission that patrons could buy drinks that were intended for another patron. Based on both bartenders' evidence I find that the premises were "super busy" and also find the bar staff had no way of knowing whom was getting what drinks. I find the opportunity for an intoxicated patron to be served liquor can be higher when bar service is allowed, instead of direct service by wait staff who typically have a better opportunity to know who is getting what drink and to assess the patron's level of intoxication. I find that for a licensee to rely on security staff to monitor patrons' level of intoxication in situations of widely accessible bar service, a robust level of training for

security staff to assess patrons needs to be in place and to be actively implemented and monitored. I have no evidence of that here.

Reasonable steps to monitor

Having found no evidence of any training, I need not address the second part of this test (reasonable steps to ensure the effective application of any such education and the operation of those systems).

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.

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

There is no record of a proven contravention of the same type for this Licensee at this establishment within the preceding twelve 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 4-7 day licence suspension and/or a \$5,000 to \$7,000 penalty.

The factors that I have considered in determining the appropriate penalty in this case include: the seriousness of the contravention; the threat to the public safety; and the well-being of the community, and the Licensee's compliance history and history of warnings by the Branch.

In the circumstances, I find the appropriate penalty to be a four-day suspension.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence #306487 for a period of four days to commence at the close of business on Friday, July 8, 2016 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor license be held by the Branch or the City of Nelson Police Department from the close of business on Friday, July 8, 2016 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.

Original signed by

Dianne Flood
General Manager's Delegate

Date: May 27, 2016

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Stephen Hitchcock, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Jay Blackwell, Branch Advocate