



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: Snowshoe Sam's Restaurant & Lounge Ltd.
dba Snowshoe Sams
Big White Mountain
Big White, BC V1X 4K5

Case: EH13-073

For the Licensee: Ian Weaver

For the Branch: Peter Mior

General Manager's Delegate: Daniel M. Graham

Date of Hearing: October 23, 2013

Date of Decision: November 27, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Snowshoe Sam's Restaurant and Lounge Ltd. (the "Licensee") operates Snowshoe Sams (the "Establishment") under Liquor Primary Licence 129241 (the "Licence"). The Establishment is located at 5375 Big White Road, Big White Mountain, Big White, B.C.

The Licence specifies hours of liquor service daily, seven days a week, from 11:00 a.m. to 1:00 a.m. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (the "Guide").

The Licensee's principal, Ian Weaver, represented the Licensee for the purposes of this hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated July 4, 2013 (the "NOEA"). The Branch alleges that on Saturday, March 16, 2013 the Licensee contravened section 33(1)(c) of the *Liquor Control and Licensing Act* (the "Act") by permitting a minor to consume alcohol in the Establishment. Alternatively, the Branch alleges that on Saturday, March 16, 2013 the Licensee contravened section 35 of the Act by permitting a minor to enter or be on the Establishment premises.

The proposed enforcement action outlined in the NOEA is a \$7,500 monetary penalty for the alleged contravention of section 33(1)(c). The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation")).

On the alternative allegation, the proposed enforcement action is a \$5,000 monetary penalty for the alleged contravention of section 35. 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 \$7,500 monetary penalty (item 3, Schedule 4 of the Regulation.)

The Licensee disputes the alleged contraventions, and also seeks to establish the defence of due diligence.

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

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, [RSBC 1996] Chapter 267

Supplying liquor to minors

33 (1) A person must not ...

(c) in or at a place under his or her control, permit a minor to consume liquor.

Minors on licensed premises

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

(a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,

(b) with lawful excuse, or

(c) in prescribed circumstances.

*Liquor Control and Licensing Regulation, B.C. Reg. 244/2002***Schedule 4**

Enforcement Actions

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
2	A breach of section 33 of the Act [<i>Selling liquor to minors</i>]	10-15	20-30	30-60	\$7,500-\$10,000
3	A breach of section 35 of the Act [<i>Minors on licensed premises</i>]	4-7	10-14	18-20	\$5,000-\$7,500

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 15 inclusive.
- Exhibit 2:** Photocopy of a driver's licence, submitted by the Branch.
- Exhibit 3:** Transcript of an oral interview, submitted by the Branch.
- Exhibit 4:** Handwritten statement, submitted by the Branch.
- Exhibit 5:** Printout of a text message, submitted by the Licensee.
- Exhibit 6:** Printout of an e-mail, submitted by the Licensee.

EVIDENCE – BRANCH

The Branch called three witnesses: an RCMP constable (the "Constable"), an investigator (the "Investigator"), and a liquor inspector (the "Inspector").

The Constable

The Constable testified that he entered the Establishment to conduct an inspection at about 11:30 p.m. on March 16, 2013. He said that there were staff at the door and a number of servers inside, and described the Establishment as "not overly busy." After circulating through the Establishment, the Constable spotted an individual at a table near the main entrance who he said "stood out as being younger". The Constable said that this individual (the "Minor") was seated with an older male, and had a pint of what appeared to be beer in front of him.

The Constable asked the Minor for identification. The only photo identification presented by the Minor was an out-of-date middle school student card that had been issued for the 2007-2008 school year. The birthdate on the card indicated that the Minor was 19 years old. The Minor said that he had no health care card, and his driver's licence had recently been taken away so he had no government issued ID.

The Constable testified that he left the Establishment to consult the police databases from his patrol car. He said that his enquiries established, through the Minor's driver's licence and other information, that the Minor was actually 18 years old. The Constable said that he went back into the Establishment, found the Minor at the ATM just inside the front door of the Establishment, and took him out to the patrol car where he issued the Minor a violation ticket for being a minor in a liquor establishment (tab 4 Exhibit 1).

The Constable said that after dealing with the Minor, he went into the Establishment and issued a Police Licensed Premises Check (tab 5 Exhibit 1) to a manager (subsequently identified herein as Manager 1). He described Manager 1's response as "good" and said that Manager 1 was "disappointed".

In response to questions during direct examination, the Constable said that the older male who was seated with the Minor had his own glass, and that the Minor's glass was ½ to 2/3 full of a "lighter-coloured" liquid. He said that he couldn't recall seeing the Minor drink from the glass. The Constable was referred to his Occurrence Report, in which he had written that he had observed the Minor "drinking a glass of light beer."

The Constable responded that in consideration of what he had written "I would say that he was drinking."

Cross-examination

In response to a question from the Licensee as to why the Constable had not escorted the Minor out of the Establishment when he first went out to the patrol car, the Constable responded that he had not yet established that the Minor was underage. In response to another question from the Licensee, the Constable confirmed that the colour of the liquid in the Minor's glass had been "light-coloured", not "brown". The Constable also confirmed that he'd written in the Occurrence Report that "[The Minor] stated that he just got his licence taken away for too many tickets and doesn't have any other ID, and the staff let him in because of that."

The Investigator

The Investigator testified by telephone that he and another investigator had interviewed the Minor in another region of the province on October 11, 2013. The Investigator said that the interview had been recorded. During the interview the Investigator took a digital photo of the Minor's driver's licence (Exhibit 2). The date of birth on the driver's licence confirms that the Minor was 18 at the time of the alleged contravention. The Investigator testified that the transcript (Exhibit 3) and the written statement of the Minor (Exhibit 4) resulted from the October 11, 2013 interview of the Minor.

According to the transcript and the written statement, the Minor and a friend had attended the Establishment at 6:30 or 7:00 to watch the UFC fights. The Minor stated that:

- He and his friend had arrived at Big White in the daytime
- He had walked into the Establishment through the front door and there were no door staff
- His friend bought the first round of drinks (beer), and the Minor bought a round (two pints of beer) from the bartender
- He (the Minor) had consumed three drinks of beer in the Establishment
- At no time did any staff of the Establishment ask the Minor for ID

Cross-examination

In response to questions from the Licensee, the Investigator confirmed that the Minor had told him that:

- There were no door staff at the front door of the Establishment when he walked in
- He had entered the Establishment at 6:30 or 7:00 pm
- No staff members asked him for ID

In response to a question from me as to why the Minor was not in attendance to testify, I was advised that the Minor had been summonsed, but that his parents did not want him to participate in the hearing since the Minor works on a factory line and couldn't take even one hour off work to testify.

The Inspector

The Inspector testified that he issued the Licensee a contravention notice (tab 7 Exhibit 1) and subsequently prepared the NOEA (tab 1 Exhibit 1). He said that the Branch's primary focus is to help Licensees gain voluntary compliance. He said that he had been to the Establishment many times and had never been approached by the Licensee regarding how to comply with the term and condition of the Licence that "Minors accompanied by a parent or guardian may be in the premises up to 8:00 PM."

The Inspector stated that he had pursued enforcement action on this file out of concern for public safety.

Cross-examination

In response to a question from the Licensee, the Inspector said he did not deny that he'd commended the Licensee in the past for doing well in terms of general practices at the Establishment.

The Licensee referred to a recent conversation he'd had with the Inspector when the Licensee had queried the Inspector as to whether he needed to ask every patron for ID. The Licensee asked whether the Inspector remembered telling him that the law doesn't require each patron to carry ID, and that the onus is on the Branch to prove that a patron was underage. The Inspector replied that he did remember the conversation, but that it is the Licensee's obligation not to allow minors into the Establishment.

EVIDENCE – LICENSEE

The Licensee called three witnesses: Manager 1, Manager 2, and Mr. Weaver.

Manager 1

Manager 1 testified that he was in his third season as an employee at the Establishment. He said that he does not willingly allow minors into the Establishment, and that he would be reprimanded – “probably fired” – by the Licensee if he did so. Manager 1 stated that the Licensee would not condone minors being in the Establishment.

When the Constable showed him the Minor's student card (tab 3 Exhibit 1) on the night of the alleged contravention, the Manager said that he was extremely disappointed, and then angry, that one of the staff would have accepted it as ID and let the Minor into the Establishment. He stated that it was the Licensee's policy to require appropriate ID from patrons even if they were personally known by staff to be of legal age.

Manager 1 said that at the end of the evening of the alleged contravention, he showed the Minor's ID to each member of the staff and asked if they had let the Minor in. He said that each employee universally thought the ID was a joke, and that no one had admitted the Minor into the Establishment.

When asked if there was another way into the Establishment other than the main entrance, Manager 1 said that there was one other way. He said that there is a balcony on the second floor at the rear part of the building, about 10 feet off the ground. He said that it would be a difficult climb, and that a person would likely need help to be able to climb up onto the balcony. Manager 1 stated that staff do check the balcony for people trying to get in that way.

Cross-examination

In response to a question about his experience in managing a bar, Manager 1 said that it was his third year working at the Establishment, and that in the off-season he works as a manager at a marina. He has a managerial background in another country, and obtained his Serving It Right certification three years ago.

In response to a question as to whether he was familiar with B.C.'s liquor laws, Manager 1 said that there is a copy of the Guide in the bar, and that he'd last looked at the Guide last season. When queried as to why he asks every patron for ID, Manager 1 said that all patrons are required by law to have ID. The Licensee interjected to explain that was how he had explained the law to Manager 1. When asked if he had ever looked at the Guide, the Act or the Regulation, Manager 1 said that he'd looked at them during his first year on the job, but hadn't read them front to back.

When asked if he knew that minors are allowed to be in the Establishment before 8:00 p.m., Manager 1 responded that he was not aware of that. In response to a question as to whether the Licensee gives any training to staff, Manager 1 said that he didn't know.

Manager 1 explained that it was his role to ensure the bar was running correctly and that other employees were doing their jobs. He deals with scheduling, maintenance, and other things. He confirmed that he was working at the Establishment on the night of March 16, 2013. He said that there would have been two staff working the door, three or four bar staff, and probably five servers. He stated that it's not feasible to station anyone at the back door that leads to the balcony because it's too cold, but that

staff do check the back door periodically. Manager 1 said that the door staff start work at 8:00 p.m.

Manager 2

Manager 2 testified that he is the bar manager, and that the only time he has ever known minors to be allowed into the bar area of the Establishment is in the early season before the restaurant opens. He said that during the season, no one under 19 is ever allowed into the bar area after 8:00 p.m.

Manager 2 explained that Exhibit 5 is a copy of an exchange of text messages between himself and a patron who he knows to be over the age of 19. He said that the messages show that the policy of the Establishment is not to let anyone in without ID. He expressed the opinion that no employee would have accepted the Minor's student card (tab 3, Exhibit 1) as valid ID.

When asked whether there are any ways to enter the Establishment other than the main entrance, Manager 2 said there were three other ways:

1. Someone could come in from the restaurant by going through the kitchen and using a flight of stairs. Manager 2 said that he was in the cash office on the night of the alleged contravention and would have heard anyone on the stairs.
2. There is a back door used by staff which is locked between 8:00 p.m. and 9:00 p.m. at night. Manager 2 would have heard if anyone had come in that way.
3. There is a door off the rear balcony, about 12 feet from the ground. Snow build up can make it accessible. The Licensee has Big White groom the snow down to ground level to minimize the chance of someone being able to climb onto the balcony.

Manager 2 expressed the opinion that the Minor probably gained access via the rear balcony. He said that the door staff walk through the Establishment when they start their shift at 8:00 p.m. to check IDs in the bar. The bartenders, servers and managers also ask for ID.

Cross-examination

Manager 2 stated that he'd only worked a couple of shifts in a bar in B.C. before he started at the Establishment. He obtained Serving It Right certification when he started with the Licensee. He stated that he used to think the law required all patrons to carry ID, but he now understands that isn't the case.

Manager 2 said that on the night of the alleged contravention he'd started work at 10:30 a.m. and worked until 2:30 a.m. The door staff arrived about 7:30 p.m. to start on the door at 8:00 p.m. In response to a question as to why no door staff are stationed at the back entrance off the balcony, Manager 2 said it is colder there, and it is difficult for anyone to gain access there because of the height.

Manager 2 acknowledged that the Minor could have entered through the front door prior to 8:00 p.m., but said that someone would have asked him for ID inside. He believes the Minor gained access "illegally". He said that the Licensee does actively try to educate staff about ID, referring to a time when a number of false IDs were circulating from another jurisdiction and staff were shown the false IDs.

Manager 2 said that one of the servers actually did see the Minor, but she had a tray full of drinks which she went to set down. By the time she turned around to ask the Minor for ID the Constable was already talking to the Minor.

Mr. Weaver

Mr. Weaver introduced Exhibit 6, which he said is an October 20, 2013 e-mail from the server who noticed the Minor in the bar area on March 16, 2013. He explained that he would have had the server attend to testify but she is currently overseas. In the e-mail, the server wrote that the Minor was not present at the table at 10:20 p.m., and that the two older males at the table bought a jug of beer with an extra glass which she now surmises was for the Minor who hadn't yet joined them. She wrote that she'd seen the Minor at the table about 11:00 p.m. but "thought nothing of it cause we are extremely good about asking for ID having security at the door from 8pm onward. I then at about 11:30pm saw the police at the table asking the guy for his ID."

Mr. Weaver said that he was working seven days a week so he was at the Establishment at the time of the contravention, but believes he was probably in his office on the restaurant level.

Mr. Weaver testified that on the weekend after the alleged contravention, he backtracked through security footage from the foyer near the main entrance, and saw the Minor in the vicinity of the ATM when the Constable came to take him outside. He saw the Minor coming out of the bar area, and conceded that the Minor had been in the Establishment. He stated that he'd then watched the video all the way back to 1:30 p.m. and did not see the Minor enter through the main entry, and concluded that he must have come in via the balcony. Mr. Weaver said that the Minor clearly looked underage and would not have been allowed in by staff without them asking for ID.

Finally, Mr. Weaver said that the Establishment serves non-alcoholic beer, and that there is no evidence that the Minor was drinking alcoholic beer.

Cross-examination

When asked if he had saved the security camera footage, Mr. Weaver said that it was too late to do so by the time he thought of saving it. His system only stores the video for two weeks and then erases it.

SUBMISSIONS – BRANCH

The Branch submitted that there is sufficient evidence on the elements to prove the contravention of section 33(1)(c). He said that the Minor was observed drinking liquor, and that the Minor admitted drinking beer. If the Minor had been drinking non-alcoholic beer, he would have raised that defence at the time he was issued the violation ticket. The Branch stated that staff should have known that minors could be on the premises up until 8:00 p.m., and taken steps to remove them after 8:00 p.m. He said there was no evidence that any staff member had asked the Minor for ID, even though the Minor had been readily observable to the Constable.

The Branch submitted that there is insufficient evidence to demonstrate that the Licensee exercised due diligence to avoid the contravention. The Branch said that the staff training and systems were inadequate, and that there is no evidence that areas such as washrooms were checked for minors when the door staff started their shifts.

Finally, the Branch stated that the Licensee needs better controls not just at the front door, but also at the back door off the balcony.

SUBMISSIONS – LICENSEE

The Licensee stated that he does have a training manual but didn't think to bring it to the hearing. He said that all servers are instructed to look for ID. He would have had a member of the door staff attend the hearing to testify, but they are mostly seasonal employees who live out of the country. The only local door staff member was not on shift on the night of the alleged contravention.

The Licensee argued that he does all that is reasonably possible to prevent access from the balcony. He hires a Bobcat to keep the snow level down in the back, and has staff periodically check the back door as it's too cold to station someone there permanently. He said that he is at a loss as to how to secure the balcony door, but that he will in future post someone there permanently if he has to.

The Licensee also pointed out what he said were inconsistencies in the Minor's evidence to demonstrate that the evidence was unreliable:

1. The Minor said that he and his friend had arrived in daylight and entered the Establishment at 6:30 or 7:00 p.m. The Licensee said that it was not daylight at 6:30 or 7:00 p.m.
2. The Minor told the Constable that door staff had let him in based on his student ID once he'd told them his driver's licence had been suspended. Subsequently, the Minor told the Investigator that there were no door staff when he walked in and that no staff members had asked for his ID.

Finally, the Licensee said that everything he has is invested in the Establishment. He said that he would never take the risk of allowing minors in the Establishment, and that he is adamant that his staff check for ID, even from people they know. He said that he cannot deny the Minor was in the Establishment, and that if staff had found him he would not have been there.

REASONS AND DECISION

Contravention

The Branch is alleging a contravention of section 33(1)(c) of the Act, and an alternative contravention of section 35 of the Act.

Section 33(1)(c) – permitting a minor to consume alcohol

The elements to the alleged contravention of section 33(1)(c) of the Act are that:

- a person permits
- a minor
- to consume liquor
- in or at a place under the person's control

The evidence is uncontroverted, and I so find, that the Minor was underage and that he was present in the Establishment (a place under the Licensee's control) on the night of March 16, 2013. This is a strict liability contravention, so the word "permit" does not imply that intent is an element of the contravention. The element is proved if the Minor's consumption of alcohol occurred in the Establishment. The onus is then on the Licensee to prove that he exercised due diligence to prevent the contravention.

Accordingly, the question of whether the Minor entered the Establishment:

- through the main entrance before 8:00 p.m. when the door staff started work, or
- through the main entrance by the door staff accepting his inadequate ID, or
- by climbing up to the balcony

is irrelevant to the contravention determination. It may (or may not) be relevant to the issue of due diligence, and will be discussed in more detail below during the due diligence analysis.

Consume liquor

The key element at issue with the alleged contravention of section 33(1)(c) is the consumption of liquor. The Constable's oral evidence was that he could not recall seeing the Minor drinking alcohol. When prompted to refresh his memory by referring to his Occurrence Report, he still didn't say that his memory was refreshed; instead, he hesitatingly responded that since he'd written that he'd observed the Minor drinking beer, that must be what he'd seen, and he'd now say that the Minor was drinking.

The Investigator's evidence (the Minor's interview statement) indicates that the Minor drank three glasses of beer in the Establishment. This portion of the Investigator's evidence is hearsay, since the Minor did not attend the hearing and was not available for cross-examination. As an administrative decision-maker, I am able to take this hearsay evidence under consideration. However, it would have strengthened the Branch's case if the Minor had attended to testify.

The Licensee argued that he sells both alcoholic and non-alcoholic beer, and there is no evidence that the beer consumed by the Minor was alcoholic. In my view, if it had been non-alcoholic beer the Minor would more likely than not have said so both at the time he was talking to the Constable and during the interview with the Investigator.

Regarding the apparent inconsistencies in the Minor's evidence, I don't see any inconsistency in the evidence that the Minor arrived at Big White in the daytime, but didn't enter the Establishment until 6:30 or 7:00 p.m. when it was dark. The Minor's statement to the Constable on March 16, 2013 was inconsistent with his interview statement on the issue of whether his ID had been checked by staff, but I find that inconsistency does not materially impair the rest of his interview statement.

However, in circumstances where:

- there are two alleged contraventions both arising from essentially the same set of facts
- proof of one alleged contravention (section 33(1)(c)) depends substantially on hearsay evidence and the other (section 35) does not
- the Constable's oral evidence on consumption was very hesitant even after consulting his contemporaneously made notes

- the Minor's interview evidence was non-contemporaneous and could not be tested by cross-examination, and
- the violation ticket issued to the Minor was for being a minor in a licensed establishment, rather than for consuming alcohol in a licensed establishment

I am not satisfied that the Branch has proved a contravention of section 33(1)(c) on the balance of probabilities.

Section 35 – permitting a minor to be on premises where liquor is sold

Regarding the alternative contravention of section 35, for the reasons detailed above, I have found that the Minor was underage and was present in the Establishment, a place where liquor is sold. I find as a fact that the Minor was in the Establishment from approximately 7:00 p.m. until he was removed by the Constable shortly after 11:30 p.m.

The Licensee admits (based on his review of the security camera footage) that the Minor was in the Establishment. The server's e-mail, submitted by the Licensee as Exhibit 6, demonstrates that she saw the Minor in the Establishment at approximately 11:00 p.m. and that he was there until removed by the Constable. Under the terms of the Licence, the Minor should not have been in the Establishment after 8:00 p.m. There is no evidence that any of the exceptions provided in section 35 apply.

As discussed in the analysis of section 33(1)(c) above, section 35 is a strict liability contravention and intent is not a required element of permitting a minor to be on the premises.

Accordingly, I find that on March 16, 2013 the Licensee contravened section 35 of the Act by permitting a Minor to be in the Establishment.

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 the circumstances of the current case, the defence of due diligence is to be considered in two stages:

1. Whether the employee who committed the prohibited act was a directing mind of the Licensee – if so, the defence of due diligence is not available and the inquiry stops there.

2. If the employee who committed the prohibited act was not a directing mind of the Licensee (and there is no requirement that a “directing mind” must be on the premises at all times), then the questions to be considered and answered are whether the Licensee had:
 - a. implemented adequate training and other systems to prevent the contravention; and,
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Analysis

I find that Mr. Weaver, as a principal of the corporate Licensee, has the authority to “design and supervise the implementation of corporate policy” and is accordingly a directing mind of the Licensee as described in *Beverly Corners*. On Mr. Weaver’s evidence he was in his office in the restaurant area of the premises on the night of the contravention. There is, however, no evidence to suggest that Mr. Weaver (or any other directing mind of the corporation) was in the red-lined area of the Establishment or that he personally played a role in the commission of the contravention.

Accordingly, I must now consider the second stage of the due diligence analysis. That is, had the Licensee:

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

The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and risks underlying the prohibition against minors being on premises where liquor is sold. Allowing minors into such an environment places them at increased risk of consuming alcohol. The consumption of alcohol by minors is a significant public safety issue because of:

- the effects of alcohol on growing bodies and developing minds
- the effects on individuals and society of irresponsible drinking behaviour learned at an early age
- a minor's lack of capacity to metabolize alcohol in the same manner as an adult, and
- liquor is a significant factor in many crimes committed by youth

In the current case, there is limited evidence of training or systems being in place to prevent contraventions of this nature from occurring. The Licensee said that he does have an employee training manual, but it was not submitted as evidence and there is no indication of the extent or efficacy of the training.

Manager 2 stated that there was an occasion when staff training occurred by showing them samples of false ID. There is no evidence of a training program where staff are told how to identify minors or tested on how to estimate a person's age.

The Licence expressly incorporates the terms and conditions of the Guide by reference.

1. On page 11, the Guide informs Licensees that "If you do not carry out your legal responsibilities, you could face serious penalties, including the suspension or loss of your licence."
2. On page 29: "You must not allow minors in your establishment, unless you have applied for and received special authorization from the general manager."
3. On page 30: "You must demonstrate that you are preventing minors from obtaining liquor. You must do an initial assessment of every patron before allowing them to enter your establishment (if you have door control), or before selling or serving them liquor."

While there is evidence that a copy of the Guide is kept in the Establishment, there is no evidence that staff were required to read it, or that their knowledge of liquor legislation, the terms and conditions of the Licence, or the Guide were ever tested by the Licensee.

There is virtually no evidence before me with respect to steps being taken to ensure the effective application of the Licensee's training and systems. The evidence shows that the Licensee is aware that a minor may enter the Establishment either through the main entrance before door staff come on shift at 8:00 p.m., or by climbing up onto the balcony. In my view it is more likely that the Minor used one of these two means of access, rather than his student identification card having been accepted by door staff.

It is not material to the determination of due diligence which of these two methods of entry the Minor used. It is clear that he spent a significant amount of time in the Establishment after 8:00 p.m. and he was not asked for ID by any of the Licensee's employees.

The Constable's evidence was that he was able to readily identify the Minor as appearing young. The Licensee acknowledged that the Minor clearly looked underage and should have been asked for ID. In Exhibit 6, submitted by the Licensee, the server stated that she saw the Minor but "thought nothing of it" because she was relying on her belief that the door staff do a good job of checking ID.

I find that the evidence does not establish that the Licensee had reasonable training or systems in place with respect to potential contraventions of section 35 of the Act. Accordingly, I find the evidence is insufficient to prove on the balance of probabilities that the Licensee exercised due diligence to ensure that contraventions of this nature do not occur.

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 NOEA. 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: 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.

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 3 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 \$7,500 monetary penalty.

I note that the Licensee had a compliance meeting with the Inspector on March 6, 2012 in relation to the alleged breach of a term and condition of the Licence regarding maximum drink size. As a result of that meeting, the Licensee committed to holding regular staff meetings and weekly management meetings. I also note that at the hearing, the Inspector acknowledged that the Licensee has generally been doing a good job in terms of general practices.

Considering the evidence as a whole, I conclude that a monetary penalty of \$5,000 is appropriate and necessary in order to bring the Licensee into compliance.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$5,000 to the general manager of the Branch on or before January 3, 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

Daniel M. Graham
General Manager's Delegate

Date: November 27, 2013

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate