



**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: Shing Fai Trading Co., Ltd.  
dba Villagers Inn Pub & Restaurant  
1867 Highway Drive  
Fruitvale, BC V0G 1L0

Case: EH15-066

For the Licensee: Qiao Ling Sui

For the Branch: Hugh Trenchard

General Manager's Delegate: A. P. Devine

Date of Hearing: March 1-3, 2016

Date of Decision: April 28, 2016

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Liquor Control and  
Licensing Branch

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## INTRODUCTION

The Licensee operates a liquor primary facility known as the Villagers Inn Pub & Restaurant located at 1867 Highway Drive in the community of Fruitvale near Trail, BC. Liquor Primary Licence #001465 permits the Licensee to sell liquor between the hours of 9 a.m. and 4 a.m. Monday through Sunday. The Licence is, as are all liquor licences 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 was represented during the hearing of this matter by its owner, Qiao Ling (Mary) Sui (the "Owner").

## ALLEGED CONTRAVENTIONS

The alleged contraventions that are the subject of this hearing are contained in a Notice of Enforcement Action ("NOEA") dated June 22, 2015. It is alleged that in the early morning of Sunday, May 31, 2015 the RCMP from the Trail Detachment conducted a routine inspection of the licensed premises. Upon arrival, they observed there were people loitering in the parking lot outside of the licenced facility. They also found beer and vodka cans and bottles near the entrance to the facility. Since no one claimed ownership of the liquor, the police officers emptied the contents of the liquor containers and then entered into the facility. Police Officer B was concerned that there was no one at the door, and on locating the owner, the officers were advised that the manager was away on a break.

Police Officer B reported that he observed a male patron who displayed overt signs of intoxication which he described as a droopy look on his face, an unsteady appearance on his feet, loud and drinking quickly. He was near the service bar and was seen to drink from a bar style glass while he was served another drink in a bar style glass.

Police Officer A observed a young looking male who was playing pool with a female. Both were asked for identification. The male stated he did not have identification. He was told he was not permitted to be inside the liquor establishments in those circumstances. The young male was escorted outside by the Police Officer A, and there he produced a driver's licence confirming that he was 17 years old. He said he had been

inside the facility for 20 minutes before he was approached by the police. He also said that he had not been asked for identification by staff in the pub.

Police Officer A returned inside the pub to continue checking for identification. There he approached three male persons and asked for their identification. Two of the males produced identification but the third was unable to do so. Police Officer A described the patron as extremely intoxicated, holding a drink in each hand. His speech was slurred, he had poor balance, watery and glassy eyes, and a strong odor of liquor on his breath. The patron (described as "Patron A") became aggressive and was arrested for being intoxicated in the public place and taken outside. A violation ticket was issued for being intoxicated in a public place in contravention of section 41 of the Act.

Police Officer B issued a Licensed Premises Check ("LPC") to the Manager of the facility. On reading the allegation of "permitting a person to become intoxicated" contrary to the Act, the Manager said "this is a bar". The Officer understood from this that it was acceptable to become intoxicated inside the licensed facility. Based on the evidence of Police Officer B, the Licensee allowed an intoxicated person to remain on the premises for 20 – 40 minutes.

In a subsequent meeting, the owner of the licensed facility advised the Liquor Inspector that the minor was in the pub and had used false identification. She said that the Manager had checked his identification. She advised the Inspector that she was unable to provide video evidence that was uninterrupted for the period of time in question.

The NOEA concluded that the Licensee had not succeeded in addressing the issue of refusing entry to minors. The issue had been discussed in several previous compliance meetings and inspections. Included in these was a discussion which took place when a Contravention Notice was issued for permitting a minor to remain on the premises. Enforcement action was considered necessary to ensure compliance. For the contravention of section 35 of the Act, a \$5000 monetary penalty was proposed. This is the minimum monetary penalty prescribed in schedule four, item 3 of the *Liquor Control and Licensing Regulation* ("Regulation").

With respect to allowing an intoxicated person to remain on the premises, the patron who was observed by the police officers to be in an intoxicated state was permitted to remain for at least 20 minutes. There had been compliance meetings to discuss the issue of intoxication on February 21, 2012 and June 9, 2006. There were also seven discussions with staff about the issue during separate inspections of the licensed facility. A four-day licence suspension was proposed for a breach of section 43(2)(b) of the Act. This fell within the penalty range set out in the schedule four, item 11 of the Regulation for a first contravention.

**RELEVANT LEGISLATION:**

***Liquor Control and Licensing Act [RSBC 1996] CHAPTER 267***

Section 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.

Section 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.

**Liquor Control and Licensing Regulation, BC Regulation 244/2002**

**Schedule 4**

**Minors**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
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

**Intoxicated Patrons**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
9	A breach of section 43 (1) of the Act by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor	4-7	10-14	18-20	\$5 000 - \$7 000
10	A breach of section 43 (2) (a) of the Act by permitting a person to become intoxicated	4-7	10-14	18-20	\$5 000 - \$7 000
11	A breach of section 43 (2) (b) of the Act by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold or served	4-7	10-14	18-20	\$5 000 - \$7 000

**EXHIBITS**

- Exhibit 1: Branch Book of Documents.
- Exhibit 2: Unredacted copies of tickets issued by the Police Officers.
- Exhibit 3: Recording of a statement by one of the Police Officers.
- Exhibit 4: Written statement by the Minor was on the premises.
- Exhibit 5: Copy of Financial Statements for Licenced Facility.

## EVIDENCE

### **Proposed Penalties:**

Liquor Inspector A gave evidence on behalf of the Branch. He testified that he spoke to the two Police Officers involved in the events of May 31, 2015 at the premises of the Licensee. Afterwards, he spoke to the Owner of the licensed facility and requested that she preserve video evidence for the night in question. He was told that she could not do so.

The Inspector reviewed the compliance history of the Licensee. He noted there have been many Contravention Notices, complaints, and compliance meetings with the Licensee. Some of these meetings had been instigated as result of complaints from the local community. The issue of minors and checking identification had been discussed at seven compliance meetings over the years, as well as during the course of inspections. A Compliance Notice was issued to staff for allowing a minor to remain on the premises on March 28, 2015.

In the past, enforcement action had not been taken. After receiving the evidence from the police officers in this case, however, enforcement action was pursued because of the strong evidence provided by the police, and because voluntary compliance had been ineffective. A monetary penalty was recommended for the minor being allowed to remain on the premises because a suspension alone would not be a deterrent. The Inspector observed that the facility is often not busy, and so a suspension alone would not necessarily provide a deterrent.

In cross-examination, the Inspector acknowledged that the Licensee had been cooperative. Generally, the licensed facility was quiet except when special events were held. In respect of this, there had previously been a four-day license suspension in 2010 for overcrowding.

## HEARSAY EVIDENCE

The Branch provided an audio statement from Police Officer B, one of the two RCMP Officers who was involved in the May 31, 2015 inspection. Apparently, Officer B was unable to attend the scheduled hearing because he was tied up on another matter. As

well, the Branch tendered a written statement from the Minor who had been present on the night in question. The Minor was issued a subpoena to attend the hearing but advised the Branch that he would not attend.

These documents are hearsay in nature, and were received but given little weight since the Licensee was unable to cross-examine the individuals who allegedly provided the statements.

The Branch also tendered a 2009 journal article on intoxication titled "Intoxication is Not Always Visible: An Unrecognized Prevention Challenge." The document was tendered because it refers to physical signs of intoxication. There was no accompanying evidence of the authoritative nature of this document as opinion evidence on the subject of intoxication. The description of symptoms of intoxication is interesting but not necessarily relevant to the determination of the issue in this case.

#### **ALLEGATION OF MINOR ON THE PREMISES**

Following is a summary of the evidence provided on the allegation of a minor on the premises issue. A Licensed Retail Store (LRS) and a hotel are attached and form part of the business operated by the Licensee. The Liquor Primary part of the business is generally very quiet. While the licence for the facility allows it to remain open until 4 a.m. each day, it is normally closed much earlier due to lack of trade. The only exception is on infrequent special occasions, notably Halloween and Boxing Day. Saturday, May 30, 2015 was a special occasion.

The Owner was approached by a local resident, a father whose son was turning 19. He made arrangements for a birthday gathering for his son and his friends on that evening. The discussion took place about a month before the actual event.

The Owner made arrangements to have a DJ available for the party. She also arranged for extra staff for an expected 20 – 30 guests. She told her staff on the evening of the event that they must be extra vigilant because an individual who was turning 19 would likely have many friends who were still minors.

The DJ arrived to set up at 11 in the evening. The bar at this time was still very quiet with no more than five patrons present. The Owner was in her office adjacent to the bar waiting for the other guests to arrive. She went to the door at about midnight, and while there, six young women ran by her into the bathroom which is close to the entrance door. She waited for them to come out and ID'd them. Two had proper ID, two were minors, and two had no ID. She told the four without ID that they must leave. All six of them left together but remained in the parking lot outside of the bar.

The Owner testified that all of the guests for the birthday party arrived together shortly after midnight. As a result, she was "slammed" checking for ID as they arrived. Her Manager was unavailable to help as he was on a break and patrolling the hotel which forms part of the property where the Liquor Primary facility is located.

Meanwhile, two RCMP police officers drove to the bar on a routine inspection. Police Officer A testified that the liquor primary facility of the Licensee and the other liquor primary facility in Fruitvale are part of their normal inspection routine on weekends. Usually they found the facility of the Licensee to be very quiet. On this evening, however, it was relatively busy.

The Officers drove into the parking lot to find about 10 young people standing outside the licensed facility. There were several cans containing beer and some liquor bottles next to the door of the bar. None of the people in the parking lot acknowledged ownership of the liquor, so the contents were poured out. Police Officer A testified that the liquor did not necessarily originate from inside of the bar. The Manager of the licensee's facility testified that they do not sell beer in cans inside the bar, so these must have been brought from an outside source.

The Police Officers entered the premises and stood inside the door for a moment to assess the activities that were then ongoing. The appearance of the clientele for the most part was quite young. Because of this, and because a minor had been found inside the facility on a prior occasion, the Officers decided to check ID. The Officers then walked towards the bar area which is located about 40 feet inside the door. The bar is located along the side wall to the right of the entrance. Beyond the bar the back wall opens into another room with two pool tables. Police Officer A walked into the pool room, and



observed a young man and woman apparently finishing a game of pool. The young man appeared to be younger than the crowd, someone that should have been asked for ID.

The Police Officer asked both persons to produce identification. The female person produced identification confirming that she was 19 years of age. The young male person said he did not have any identification. Police Officer A took him outside into his squad car. Once there, the young man produced a driver's license that confirmed he was 17 years of age. He was issued a ticket for being a minor inside a licensed establishment.

After this, both the Owner and the Manager of the licenced facility asked the Officer to search the minor to see if he was carrying false ID. The Officer had no authority to conduct such a search, and so declined to do so.

### **ALLEGATION OF INTOXICATED PATRON ON PREMISES**

Following is a summary of the evidence on the issue of allowing an intoxicated patron to remain on the premises of the Licensee. Police Officer B in his recorded statement said he made a comment when the Officers first entered the licensed facility about one of the patrons appearing to be intoxicated. Police Officer A did not recall this in his direct testimony until he heard the recording of Officer B. While he recalled the statement being made, he did not notice anyone that appeared to be intoxicated at that time.

It took the Police Officers about 25 minutes altogether to process the minor who was found inside the licensed premises. He was issued a citation for being a minor inside the premises at 12:55 a.m. The Police Officers then decided to perform an ID check to see if there were other minor persons inside. The Police Officers re-entered the bar to check other patrons for ID. Police Officer A walked past the end of the bar in order to take up a position in one corner of the facility. From there, he could observe the bar area and begin to ask patrons for ID. Once he took that position, Police Officer A observed three male patrons standing near the end of the bar. They appeared to be about 19 to 20 years of age. The Officer asked them to produce ID. Two of them did so. The third

individual ("Patron A") when asked for ID had a drink glass in each hand. Police Officer A did not confirm that the contents of the glasses contained liquor.

Patron A put the two drink glasses down and looked into his pockets for ID but could not produce any. The Officer noticed that Patron A's pants were riding very low as he searched in his pockets for ID. The Manager of the facility observed this was not unusual as it is a style of dress that Patron A often affected. Since Patron A could not produce ID, he was told he was required to leave the bar. Patron A then reached for one of the drinks that he had earlier put down, and started to consume it quickly. The Officer told him to put the drink glass down. Instead, Patron A turned away and quickly consumed the drink. In order to maintain control, the Officer restrained Patron A in handcuffs and took him outside. As the pair left, the friends of Patron A questioned loudly as to why he was being arrested.

Police Officer A observed signs of intoxication in Patron A including his being unsteady on his feet, his face was droopy or sagging, he talked loudly, his body leaned in an exaggerated manner, and he swaying as he talked. He staggered as he was taken outside from the bar area, although the Police Officer acknowledged this might have been due to his hands being handcuffed behind him. The Officer had not dealt with Patron A before but has since on other issues. On these other occasions, he has presented in a significantly different manner, being quiet and reserved.

Patron A was removed from the licensed facility in handcuffs and placed inside the police vehicle parked outside. A ticket was issued to him for being intoxicated in a public place at 1:19 a.m. Police Officer A left his vehicle to speak to the other Officer. When he did so, Patron A began to scream and yell, and he attempted to kick out the window of the police car. Officer A testified that he has seen this type of behaviour from other intoxicated persons. The Patron was told to quiet down or he would be pepper sprayed. Patron A continued to forcibly kick at the windows of the police car, and so the Officer used pepper spray. At this point, Officer A elected to drive him to the police station. On the way, Patron A hit his head forcefully on the partition between the front and back of the police car. In doing so, he sustained a cut to his head, and so had to be taken to hospital.

Police Officer B issued a Police Licensed Premises Check (LPC) for allowing a minor to enter or be on the premises contrary to section 35 of the Act. The LPC also alleged a contravention for allowing a person to become intoxicated on the premises contrary to section 43(2)(a) of the Act.

In his narrative report, Police Officer B commented that he gave the LPC to the Manager of the licenced facility. Upon reading the allegation of allowing a patron to become intoxicated, the Manager said "this is a bar". This comment is set out in the NOEA as evidence that the licensee did not concern itself with patrons becoming intoxicated. The Manager testified that he made the comment during a discussion with Police Officer B, who said that he did not drink. The Manager thought that the Police Officer made the comment in a hostile manner, so he responded "This is a bar", meaning that people come to the establishment for the purpose of having a drink.

The Owner testified that she had dealt with Patron A previously as a customer of the bar. He often had little money, and so would often drink water or pop, both of which are provided for free. On one occasion, however, he was drunk and effusive, hugging the Owner and draping himself around her. On this occasion, she had the Manager expel him from the bar. He tried to sneak back in several times that evening, and so he was told he was barred from returning to the facility for one month. During the planning of the birthday party, however, the father who was making the arrangements asked if Patron A could attend as he was a friend of his son. The Owner was told that Patron A would be on his best behaviour. When Patron A arrived at the door during the evening, the Owner spoke to him. He asked her if he could borrow her telephone. The Owner observed that he was able to dial nine and make a telephone call without difficulty. She did not feel that he was intoxicated at this time. The Manager also noted that when Patron A arrived that evening, he was polite and did not seem to be intoxicated.

There was one bartender serving drinks from the bar located inside the facility. She testified that there were many patrons buying drinks in front of the bar, and so her view to the room where the pool tables are located was obstructed. There was, however, a server working in the pool room area taking drink orders and checking for ID. The Bartender recalled that Patron A was standing in a corner beside the bar with two

friends. She knew him from past service at the Licensee's facility as well as at the other bar in Fruitvale. On the night in question, Patron A had one drink of liquor with his friends consisting of a round of "birthday shots" that were paid for by the host of the party. After this, Patron A was served only non-alcoholic drinks because he had no money.

The Bartender observed that the lack of funds was a common problem for this individual. In her observation, he was boisterous but so were his friends. When he was arrested, he became angry, as did his friends. He was not inside the facility for very long before the arrest took place. He came into the facility with the other members of the birthday party some time after midnight.

The Bartender works on a part time basis at both of the bars in the Fruitvale community. She has 38 years of experience in the bartender trade working in Alberta and BC. When she observes that a customer is intoxicated, her normal practice is to ask the customer to leave the facility or to wait in the lobby of the hotel which is part of the licensed facility. Her decisions about the sobriety of patrons is not questioned by the management of the Licensee.

#### **LICENSEE DUE DILIGENCE EVIDENCE**

JB is now employed as a part-time bartender for the Licensee. Previously, he had worked full-time for nine years beginning in 2003. He is also employed as a clerk in the licensed retail store (LRS) which is also operated by the Licensee. JB had been scheduled to work on the evening of May 30, 2015 but became ill and was replaced by another bartender.

JB described the policy of the Licensee for checking ID. Two pieces of identification are requested, and he must make sure that they belong to the person that tenders them. Otherwise, service is refused. His decisions to refuse service are not questioned by management.

JB testified that the licenced facility is usually quiet. There are a few special occasions during the year when it is busy, including Halloween and Boxing Day. Extra staff are hired for these events. When the facility is quiet, it acts more like a pub. A customer could enter the facility and walk 40 feet to the bar before being asked for identification. There would be no one stationed at the door to ask for ID on normal business days.

Over service is avoided by asking an apparently intoxicated customer to leave or to wait for a ride in the lobby of the adjacent hotel. Sometimes patrons come to drink from the other bar in town after it closes, and there is a risk then of inheriting a customer that is already intoxicated. Occasionally, patrons bring their own liquor into the bar. If it is discovered, the liquor is confiscated.

When it is busy, ID checks are normally done at the door to the facility. Often, JB will ask for ID again. When groups are large, the Owner will often ask for identification again to confirm the age of the patrons.

On cross-examination, JB advised that he worked as a bartender through college before coming to work for the Licensee. When he first was hired by the licensee, he was shadowed for two weeks while he learned about pricing, procedures, and about the patrons that frequented the facility. He learned about the policies of the Licensee about avoiding over service, checking for identification, not taking cheques from patrons, and operating the POS systems. There were Incident log books used at the beginning of his employment. He has not used them in the past few years. His policy is to ask for identification if a patron appears to be under the age of 30. The policy of the Licensee is to ask for ID if the patron appears to be under 25.

## **SUBMISSIONS – THE BRANCH**

The Branch submits that the allegations contained in the NOEA have been proved on the balance of probabilities. The presence of a minor inside the establishment in question suggests that there is a weakness in controlling the admission of patrons through the door. The defence of due diligence is not available to the Licensee because it was the owner who was managing the bar at the time the events took place. Further, there have been no written policies or procedures provided by the Licensee to illustrate how it staff is trained and supervised with respect to their duties under the Act.

While there were plans in place for the birthday party consisting of hiring extra staff and discussing with them the need to check ID, there was no plan to deal with the eventual arrival of the birthday guests en masse. There were gaps in time when there was no door control, and is permitted people to enter the premises without being checked for ID.

As far as the intoxicated person was concerned, the Licensee had past history with this person which led to his expulsion for intoxication. More care should have been taken to supervise and control his behaviour inside the facility. While Police Officer A did not notice the individual who was identified as Patron A when he first entered into the bar, that individual must have exhibited some of these behaviours that he showed when he was arrested. Patron A had a propensity and history of intoxication which had been seen before. His intoxication was not necessarily caused by alcohol served by the licensee but there nevertheless should have had increased vigilance. Action should have been taken sooner than the arrest by Police Officer A.

#### **SUBMISSIONS - THE LICENSEE:**

As far as the allegation of allowing a minor to remain on the premises, the Licensee submits there is no evidence as to how long the minor was inside bar. The Licensee suggests that he was there for much less time than stated by Police Officer A. The Officer's time assessments were not accurate because he stated that the time the officers arrived at the facility was after 11 o'clock. It is clear that they arrived after midnight. As well, the minor did not testify directly about his attendance at the bar. Perhaps he gave false ID when he entered. The appearance of the minor was such that he would have been asked for ID if he had been seen on entrance. Perhaps he did not play pool as alleged in the testimony of Police Officer A.

As far as the allegation of an intoxicated customer on the premises, there was no reason to suspect that Patron A was intoxicated. His reaction was one of anger upon being arrested. He did not, however, exhibit signs of intoxication when he entered the premises. Neither did the very experienced bartender see any signs of intoxication.

Regarding the policy of JB to ask for ID of anyone that appears to be under 30 years of age, the policy is his alone. He has not been coached by the Licensee in respect of that policy. In any event, it has not resulted in any confusion. The Licensee went above and beyond what was required to deal with the number of patrons that attended the birthday party. The Licensee was prepared to deal with the event and there were sufficient staff on hand. As such, the licensee acted with due diligence.

## ANALYSIS AND DECISION

### **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 addressed.

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:

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 Act. In considering these circumstances, the defence of due diligence is to be considered in two stages. First, ask 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. Second, 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; 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.

While the remarks of the Court were directed to the issue of the sale of liquor to a minor, the analysis applies equally to the defence of due diligence in respect of the matters that are before me. As far as implementing adequate training and systems to prevent the alleged contraventions of permitting a minor and an intoxicated person to remain on the premises, there was no evidence of such systems tendered by the Licensee. The evidence of initial training of newly hired staff establishes that they were primarily shown how to operate the business systems of the Licensee. While there are ongoing meetings with staff, there was no evidence of a schedule or routine for such meetings, and no written records as to the subject matters discussed.



It is apparent that the Licensee took steps to prepare for the event of a birthday party by hiring extra staff and discussing with them the need to be vigilant about asking for ID. This is not, however, evidence of staff training and other systems to prevent the occurrence of contraventions of the Act. Moreover, the persons that were most involved in the events leading up to the alleged contraventions were the owner of the licenced facility and the manager of the facility.

In view of the lack of evidence of staff training, and the involvement of management in the events relating to the alleged contraventions, I find that the defence of due diligence is not established. I find therefore that the defence of due diligence fails.

### **Allegation of Minor on the Premises:**

Section 35 of the Act created a contravention when a licensee allows a minor person to enter or to remain on its premises except in prescribed circumstances. The direct evidence about whether a minor person was permitted to be on the premises of the licensee on the evening in question was largely provided by Police Officer A. The Branch provided a written statement from the minor person who was allegedly involved in the incident reported on May 31, 2015. A subpoena was issued for the attendance of the individual who provided the statement, but he declined to attend. In the circumstances, I can put little weight on the statement where it is controverted by other evidence.

For example, the minor in a written statement averred that he had entered the premises and no one was attending at the door to ask for ID. He also stated that he was playing pool for 20 minutes before he was approached by a police officer. There is no independent evidence as to how the individual came to be on the premises, and so I discount that aspect of his statement. Police Officer A first noticed the minor person playing pool with a female individual. Both appeared to be finishing a game of pool, which supports the inference that they had been present long enough to play a game of pool at least.

There is no doubt that the individual who Police Officer A took outside was a minor. His driver's license verified that he was 17 years of age at the time. It also appears that he was inside the licensed premises long enough to play a game of pool without being challenged to produce ID. There was a server in the area where the pool tables are situated. The evidence of the bartender was that the job of this person was primarily to check for ID. The server did not testify about the circumstances of the minor person being inside the license premises. I must infer that her evidence if she had been called would not be helpful to the Licensee.

In the NOEA, the Licensee alleged that the minor person had produced false identification in order to be allowed into the licenced premises. In its submissions, the Licensee argued that the minor person "might have" used false identification. There is, however, no objective evidence to verify that the minor person was asked for and produced false identification. I therefore cannot accept this as an explanation for the minor being permitted on the premises of the Licensee.

The offence created by section 35 is satisfied if the minor is authorized to enter or to be on licensed premises other than in the circumstances described in the Act. There is no evidence that the Licensee authorized or permitted the minor to be on its premises. It is quite possible that the minor snuck into the licensed facility in a manner which would escape the due attention of the Licensee. Nevertheless, the minor was authorized or permitted to remain on the premises for long enough, and in circumstances where he should have reasonably been checked for ID. The evidence satisfies me that there was a failure of the Licensee to check the minor individual for ID within a reasonable time, and to expel him from the premises. In view of this, the Licensee was in contravention of section 35 of the Act as alleged by the Branch.

#### **Allegation of Intoxicated Person on the Premises:**

Section 43(2) of the Act provides that a licensee or a licensee's employee must not permit a person to become intoxicated or for an intoxicated person to remain where liquor is sold, served or supplied.

The allegation by the Branch with respect to this provision is that the Licensee was in breach of section 43(2)(b) by permitting an intoxicated person to remain on the premises where liquor is sold. This is different from the allegation contained in the LPC issued by Police Officer B, which was issued for allowing Patron A to become intoxicated.

As noted earlier, Police Officer B did not testify in the hearing before me. He recalled in his recorded statement that when he entered onto the premises, he noticed someone at the bar about 40 feet away, a male who appeared to be intoxicated. The Officer observed that the individual had a drooping face, was loud, and was drinking quickly. He chugged a glass and slammed it on bar, and the bartender poured another drink. He also recalled that he told Police Officer A this individual would be a problem. The allegation is contained in the NOEA, and is the basis for the conclusion that the Licensee allowed an intoxicated person to remain on the premises for 20-40 minutes.

Significantly, however, Police Officer A made no similar observation when he first entered into the licensed facility. He did recall that Police Officer B made the statement but only after hearing the recording. There is nothing in this that clearly identifies the individual that Police Officer A later arrested and removed from the premises.

In fact, Patron A only came to the attention of the Police Officer when he later returned to the licensed facility after dealing with the minor who was found on the premises. He returned for the purpose of checking other patrons for identification. It was upon asking three young persons together to provide identification that he made observations about the apparent intoxication of Patron A.

As Police Officer A noted, signs of intoxication are subjective. There are no standardized tests administered to demonstrate intoxication. Patron A was observed to be garrulous and showing symptoms of intoxication such as being unsteady on his feet, droopy face, talking loudly, etc. He staggered as he was taken outside from the bar area, although the Police Officer acknowledged that this might have been due to his hands being handcuffed behind him. Once outside, Patron A acted in a manner consistent with intoxication as he reacted angrily to being restrained in the police cruiser.

The Licensee had experience with Patron A being intoxicated on the premises previously, and so was under a duty to be more observant about his behaviour. The Owner, however, did check on Patron A when he arrived with the other guests for the birthday party. He was not seen to be impaired at that time. Nor was he served alcohol other than one drink, contrary to the assertion set out in the LPC.

It is apparent that Patron A became impaired while he was in the premises of the Licensee on the night in question. It is not, however, apparent when or how he became impaired. The only evidence about what was in the glasses he was drinking from was from the bartender. She testified that he was served soft drinks.

Patron A may have been pre-drinking before arriving at the premises of the Licensee. The presence of liquor in the parking lot may have been a source of outside liquor. There is no evidence that he was served alcohol when he was on the premises of the Licensee except for one drink that was paid for by the host of the birthday party. When he arrived at the premises, however, he was not seen to be impaired.

Pre-drinking is an acknowledged problem for the Licensee. The Owner and the Manager both testified that patrons may come from the other bar in Fruitvale when it closes. The Licensee remains responsible to ensure that patrons who become intoxicated are not allowed to remain on the premises whatever the source of their intoxication.

The allegation in the NOEA is the Licensee allowed a patron to remain on the premises in an intoxicated state for 20-40 minutes. Without the testimony of Police Officer B, that allegation is not established on the evidence. Police Officer A did not make the same observation, and was not drawn to deal with Patron A because he exhibited signs of impairment. He was not seen to be impaired on the evidence of the bartender, and there is no evidence that the glasses he was drinking from when he was arrested contained alcohol.

I find that the allegation the Licensee was in breach of section 43(2)(b) of the Act is not made out on a balance of probabilities.

**PENALTY**

Pursuant to section 20(2) of the Act, having found that the licensee has contravened section 35 of 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.

I find that a monetary penalty is warranted in this case for allowing a minor to remain on the premises. The Liquor Inspector testified that there have been several compliance meetings with the Licensee concerning the issue of minors. Included in this was a Compliance Notice issued to staff for allowing a minor to remain on the premises which was issued shortly before the events which occurred on May 31, 2015. I agree with the Liquor Inspector that a monetary penalty is necessary to encourage the Licensee to maintain compliance in future with the requirements of the Act concerning minors entering or remaining on its premises.

**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 Liquor Control and Licensing Branch on or before May 31, 2016.

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 Liquor Control and Licensing Branch inspector or a police officer.

The allegation that the Licensee was in breach of section 43(2)(b) of the Act is dismissed for the reasons previously stated.

*Original signed by*

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A. P. Devine

Date: April 28, 2016

Delegate to the General Manager

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

Liquor Control and Licensing Branch, Victoria Office  
Attention: Hugh Trenchard, Branch Advocate