



**DECISION OF THE  
GENERAL MANAGER  
LIQUOR AND CANNABIS REGULATION BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 51 of  
*The Liquor Control and Licensing Act, S.B.C. 2015, c. 19*

Licensee:	Oak & Carriage Hospitality Ltd. dba The Oak Pub + Kitchen 3287 Cowichan Lake Rd Duncan, BC V9L 4C1
Case:	EH18-056
For the Licensee:	Duncan Morrison
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Dianne Flood
Date of Hearing:	December 4 & 5, 2018
Date of Decision:	January 30, 2019

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**Liquor and Cannabis  
Regulation Branch**

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## INTRODUCTION

The Oak & Carriage Hospitality Ltd. (the “licensee”) owns The Oak Pub + Kitchen located at 3287 Cowichan Lake Rd. in Duncan, BC. The licensee holds Liquor Primary Licence #033696 (the “licence”).

The licence provides for a capacity of 97 in service area Person 01, 20 in Patio 01 and 24 in Patio 02. According to the terms of the licence, the licensee may sell liquor from 10:00 a.m. to midnight from Monday to Thursday and from 11:00 a.m. to 1:00 a.m. Friday and Saturday, and from 11:00 a.m. to midnight on Sunday.

The licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication Liquor Primary Terms and Conditions (the “Terms and Conditions”).

The licence has a Family Foodservice endorsement that permits minors accompanied by a parent or guardian in all service areas until 10 PM when meal service is available.

A third party operator, 0999594 B.C. Ltd., operates the establishment. Duncan Morrison represented the licensee and the third party operator (“the TPO”). His evidence is referred to in this decision as the evidence of the TPO.

## ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch’s allegations and proposed penalty are set out in the amended Notice of Enforcement Action dated November 5, 2018 (the “NOEA”) (Exhibit 1, tab 1).

The allegations are that the licensee contravened its licence, by:

1. allowing a minor to enter or be in the service area, contrary to section 79(1) of the Act,
2. obstructing the general manager, contrary to section 43(b) of the Act.

In the alternative, the allegations are that the licensee contravened its licence, by:

- 1A. employing a minor, contrary to the Terms and Conditions, the regulations and section 79(2) of the Act,
- 2A. failing to produce a record, liquor sample or other thing, contrary to section 43(a)(iii) of the Act.

At the hearing, the Branch advocate advised that the Branch would not be proceeding with the allegation employing a minor, contrary to the Terms and Conditions, the regulations and section 79(2) of the Act. The Branch proceeded with the three remaining allegations.

The range of penalties for a first contravention of section 79(1) is a four to seven day suspension and/or a \$5,000 to \$7,000 monetary penalty (item 4, Schedule 2 of the Regulation). The Branch proposes a suspension of four days or a monetary penalty of \$5,000.

The range of penalties for a first contravention of section 43(b) is a 15 to 90 day suspension and/or a \$1,000 to \$3,000 monetary penalty (item 53, Schedule 2 of the Regulation). The Branch proposes a suspension of 15 days.

The range of penalties for a first contravention of section 43(a)(iii) is a 10 to 15 day suspension and/or a \$7,500 to \$10,000 monetary penalty (item 29, Schedule 2 of the Regulation). The Branch proposes a suspension of 10 days or a monetary penalty of \$7,500.

The licensee disputes all three allegations. The licensee says the minor was an entertainer and under the Terms and Conditions was permitted to be in the establishment at the relevant time. The licensee says the Inspector is mistaken about what was said by the TPO and the Inspector was not misled or obstructed as alleged. The licensee denies it failed to produce a requested record. The TPO says he produced all the documents he had in his possession and he produced the video footage as soon as he obtained it.

The licensee does not raise a defence of due diligence.

## RELEVANT STATUTORY PROVISIONS

### *Liquor Control and Licensing Act, S.B.C. 2015, c.19*

#### *Terms and conditions on licence*

15 (2) Without limiting subsection (1), the general manager may impose terms and conditions respecting all matters related to the manufacture, purchase, sale, service and consumption of liquor under a licence or endorsement and the operation of establishments and service areas, including, without limitation, respecting one or more of the following: [the listed items do not apply here]

#### *Inspections*

42 (1) For the purposes of the administration or enforcement of this Act or the regulations, the general manager may

- (a) require a licensee or permittee to produce records that are required under this Act or by the terms and conditions of a licence or permit to be kept by the licensee or permittee,
- (d) require a licensee or permittee to provide information relating to the inspection, and
- (e) require an employee or patron of, or a person retained by, a licensee or permittee to produce identification.

#### *Licensee or permittee must cooperate*

43 For the purposes of section 42, a licensee or permittee

- (a) must cooperate with the general manager by
  - (iii) promptly producing and allowing inspection and removal of the records, liquor samples and things the general manager is entitled to inspect or remove under section 42, and
- (b) must not obstruct the general manager or withhold, destroy, conceal or refuse to provide information or produce a record, liquor sample or other thing that is required by the general manager or is otherwise related to the inspection.

#### *Minors in establishment, event site, service area or liquor store*

79 (1) A licensee or permittee, an employee of a licensee or permittee, or a person who sells liquor in a liquor store must not allow a minor to enter or be in or at an establishment, service area, event site or liquor store if it is prohibited

- (a) by the terms and conditions of the licence, authorization or permit, or
- (b) by the regulations.

## **Liquor Primary Terms and Conditions**

### *Employment of Minors*

- If you have received permission to permit minors in your service area, you may employ minors as long as they are not employed to sell or serve liquor at any time. The only exception to this rule is that minors employed at stadiums may serve liquor but cannot open bottles, pour or mix liquor, and must be under the supervision of adult staff who are Serving It Right certified. Given the lack of supervision, minors may not be employed as hawkers in stadium seating areas.
- For establishments that are part of a larger business, minors may be employed in those areas outside the establishment (for example, at a hotel reception desk).
- If there is a time restriction on when minors may be in your establishment as patrons, then your employed minors may not work in your establishment outside those hours. The only exception to this is that minors employed before January 23, 2017 may continue to work in your establishment without a time restriction.
- If you have a catering endorsement, minors may serve food or work as entertainers at events, but they cannot sell or serve liquor.
- You may employ minors as entertainers but you must ensure that they are supervised by adult staff at all times. Whenever they are not entertaining, they may remain on your premises if you have permission to permit minors in your establishment. Otherwise, minors must leave the service areas.

- Under no circumstances may a minor perform as an exotic dancer or in any other form of adult-oriented or sexually explicit entertainment. Minors may not be employed within your establishment during this form of entertainment.

## ISSUES

1. Did the licensee allow a minor to be in the establishment contrary to the Act, as alleged? If so, has the licensee established a defence to the contravention? If the contravention is proven, what penalty, if any, is appropriate?
2. Did the licensee contravene a term of condition of its licence by obstructing the General Manager contrary to the Act, as alleged? If so, has the licensee established a defence to the contravention? If the contravention is proven, what penalty, if any, is appropriate?
3. Did the licensee fail to provide a record, contrary to the Act, as alleged? If so, has the licensee established a defence to the contravention? If the contravention is proven, what penalty, if any, is appropriate?

## EXHIBITS

- Exhibit 1: Branch's book of documents, Tabs 1 to 21, and an MSB stick of the licensee's video recording
- Exhibit 2: Branch's four-page summary of the contents of the licensee's video recording
- Exhibit 3: A photocopy of the Minor's birth certificate, sealed and not to be opened except by court order
- Exhibit 4: Licensee's book of documents, Tabs 1 to 4
- Exhibit 5: Photograph of a server, taken July 27, 2018

## WITNESSES

Three liquor and cannabis inspectors testified for the Branch. Duncan Morrison, the TPO, and the Minor testified for the licensee.

## BRANCH EVIDENCE

### Inspector 1

Inspector 1's evidence was that he has been an inspector with the Branch for three years and is now the Regional Inspector for Vancouver Island. His responsibilities include operations, oversight of the other inspectors on Vancouver Island, and his own licensee caseload. He carries out both administrative inspections looking for proper documentation, floor plans, etc. and public safety inspections looking for minors, intoxicated persons, and overcrowding. He has conducted over 1,500 inspections, with about 800 of those being inspections of Liquor Primary licensees. Prior to being a liquor inspector he had over 30 years of service with the military policing, with a wide range of duties including inspections.

Inspector 1 testified that in response to a public safety complaint that the TPO was employing two female minors to serve alcohol, he attended at the premises on the evening of July 26, 2018 with one other inspector and on the evening of July 27, 2018 with two other inspectors. The plan was the other inspectors would first conduct a covert inspection to identify the possible underage servers and then Inspector 1 would enter and ask for their identification.

His evidence was that on July 26, 2018 only one possible underage server was identified so the decision was made to return the following night.

Inspector 1 testified that on July 27, 2018 the two other inspectors entered the premises in a covert capacity and identified four female servers who might be underage. They texted photographs of the four to Inspector 1. Inspector 1 then entered the premises, went to the bar area and asked for the TPO. He testified that he identified himself to the TPO, told him about the nature of the inspection, and asked the TPO to have the four servers produce their identification. He said that as the premises were busy, he had the TPO produce the servers one at a time.

Inspector 1 said that when he entered the premises the person who was subsequently identified as a minor ("the Minor") was in the seated area by the music area. While he was first engaged with the TPO, the Minor came behind the service bar and spoke to the

TPO. Inspector 1 could not hear the conversation but said the TPO gestured for the Minor to leave and said the TPO had an expression of concern that she was behind the bar. He said he did not see if the Minor gave the TPO something.

Inspector 1 testified that he was under the belief that the Minor was serving liquor. He had been told she was serving liquor by Inspector 2. He said he did not see her serve liquor but wondered why she would otherwise be behind the service bar. He was questioned why, if he believed her to be a minor, he did not make a closer observation of her activities behind the bar, and why he did not question the TPO at that time about why she was behind the bar. He said his focus was on obtaining identification from the servers and confirming their age.

Inspector 1 said that the first two servers presented their identification and were of age. The third server was on the patio and had to be called inside to produce her identification, and she was of age. Inspector 1 said he asked for the fourth server to be produced but she could not be located. He believed the fourth server to be the Minor. He did not recall another, older server being present as a fourth server on duty that night.

He said he thought that Inspector 2 had seen the Minor serve liquor and said the two other inspectors had already indicated to him that the Minor was a server.

Inspector 1 testified that when the Minor could not be located, the TPO admitted that the Minor was under 19 years of age, but said the Minor was an entertainer, not a server, and worked for the music bingo operator. He said that he then went over to and asked the music bingo operator for his identification and confirmed his identity as "MA". He said, in response to his questions, MA said he owned the music bingo company, he worked for himself, and the Minor was not his employee and she worked for the TPO. Inspector 1 said the only reason he asked MA if he employed the Minor was because the TPO said MA employed her.

Inspector 1 testified that he then told the TPO that the music bingo operator said the Minor worked for the TPO and asked the TPO for the entertainment contract with the Minor. He said the TPO told him the contract was verbal. He said he then asked the



TPO why, if she was an entertainer, the Minor was behind the service bar. He said he got no answer to that question.

He said he was left with the impression that the TPO employed the Minor, but he had initially been led to believe something else - that she was employed by MA, the music bingo operator.

Inspector 1 admitted that MA's full name may be MAH and that he may have misread the identification produced to him or may have mis-recorded it as MA. He said a lot was going on, he had two covert inspectors, it was noisy, and people were consuming liquor.

Inspector 1 said when he repeated his demand that the Minor be produced, the TPO told him that she had gone home. Inspector 1 said he asked the TPO who had authorized that, in the face of his legal demand for her to be presented. The TPO offered to request her to re-attend. Inspector 1 said that he told the TPO that he, the inspector, had no legal jurisdiction to require the Minor re-attend but he would be asking the TPO for contracts, shift schedules, and tax records to support the TPO's position.

Inspector 1 testified that he also told the TPO that he would be requesting the video taken of the premises that night and why it was important to produce it, to corroborate the TPO's statements. He told the TPO a Notice to Produce documents would be issued for the video and for the contract with the Minor.

Inspector 1 said at that point in time, he believed the Minor was a server and he told the TPO that the TPO needed to counter that. Inspector 1 testified that he left his business card with the TPO and said he would return on Monday, July 30, 2018 and check the Minor's identification.

Inspector 1 left the premises, returning briefly to address an issue about a patron who had purchased beer at the retail store. He left again and was joined by the two other inspectors who had maintained their covert status. He said the inspectors told him they had gone to look at some patio improvements and the Minor had been discovered

there, crouched on the patio. He said the inspectors reported the Minor said she was hiding. He testified that given the duress the Minor was already under due to hiding from the inspectors, he did not pursue questioning her and they left.

Inspector 1 said that on Monday, July 30, 2018 he did not return and could not recall why he did not, suggesting he was busy with other matters. Instead, he issued the Notice to Produce on July 30, 2018. In response to the TPO's question whether the TPO tried to call him on July 30, 2018, Inspector 1 said he would have told the TPO that he could not talk to him and that he was required by law to talk to the Licensee.

Inspector 1 testified he issued the Notice to Produce (Exhibit 1, tab 11) on July 30, 2018, with a production date of August 7, 2018. He said the Notice was sent to a representative of the Licensee, and not the TPO, as the legislation required Inspector 1 to deal only with the Licensee. Inspector 1 subsequently learned that the Licensee's representative was in hospital. At that point, Inspector 1 said he then contacted the Licensee's other representative.

Inspector 1 said that on August 8, 2018 someone dropped off a package of information at the Branch, the contents of which are listed in Exhibit 1, tab 20. In Inspector 1's opinion the information package was deficient as it did not include everything he requested, including the video footage.

Inspector 1 issued a second Notice to Produce (Exhibit 1, tab 10) to the Licensee, on August 9, 2018, with a production date of August 15, 2018. A response was provided, dated August 13, 2018 (Exhibit 1, tab 12), indicating the Minor was employed by the TPO, which Inspector 1 said he found puzzling, given on July 27, 2018, he understood the TPO had said she was employed by MAH. He was of the opinion that the TPO had withheld information from him when questioned on July 27, when the TPO said the Minor was employed by the bingo music operator.

Inspector 1 testified that the August 13, 2018 response also included a copy of the Minor's birth certificate, which confirmed she was a minor. He said that she was a minor and in the premises after 10:00 p.m., which he said is prohibited.

As of October 9, 2018 the video footage had still not been produced, so Inspector 1 proceeded with the contravention of failure to produce, under section 43(a)(iii).

Inspector 1 testified that he received an MSB stick with the video footage on it on November 28, 2018. He said that footage contained only one camera angle within the licensed premises and another within the kitchen. The video footage within the licensed premises did not show the bar or cash till and ended at 34 seconds before Inspector 1 entered the premises. He said with the video footage only provided on November 28, he still had questions why only one camera angle was produced and why it stops just before he enters.

Inspector 1 testified that he was not aware that the TPO had advised another Branch inspector who was dealing with the TPO about a different issue about problems with the video cameras and retrieving video footage. Inspector 1 thought the cameras were operational. Inspector 1 said the TPO did not inform him why the video footage was not produced.

Inspector 1 said that the video footage showed the Minor was passing out music bingo cards and does not show her serving liquor, with menus in her hands, or picking up glasses. He said it does show her at one point with two glasses in her hands. He also said it doesn't show when she left or who authorized her leaving.

Inspector 1 said his handwritten notes (Exhibit 1, tab 8) were made contemporaneously with the event and he made notes in the Branch computer recording system (Exhibit 1, tab 14) on July 30, 2018. In the computer notes, he states: "the TPO attempted to obstruct the inspection by having the minor quickly departed prior to producing ID s requested".

Inspector 1 said in his opinion the TPO's information return on August 13 (Exhibit 1, tab 12) that the Minor was his employee and not the employee of the music bingo operator was different from what the TPO said on July 27, so that contributed to Inspector 1's sense of obstruction.

Inspector 1 issued the amended Notice of Enforcement Action, dated November 5, 2018, correcting the initial contravention and clarifying penalty options. He said he also added the failure to produce as an alternative instead of a separate action. Inspector 1 referred to the compliance history (Exhibit 1, tab 6) to support the recommended penalties.

Inspector 1 referred to the Terms and Conditions (Exhibit 1, tab 16) at page nine – Employment of Minors. He initially said that a minor was not allowed to be in the premises after 10:00 p.m. He said this applied even if the minor is an entertainer, saying paragraph five was to be read in conjunction with paragraph three. He subsequently said that if the music bingo was on, the Minor was permitted to be in the premises after 10:00 p.m. if she was an entertainer, but she must leave when she is not entertaining. He said that the music bingo had ended by 10:52 p.m. and as such the Minor was not to be in the premises at that time.

Inspector 1 questioned how a person giving out bingo cards could be classified as an entertainer. He was of the opinion that handing out bingo cards was a service being provided, not entertainment.

## **Inspector 2**

Inspector 2 testified he has been employed by the Branch since March, 2018. Previously he had been employed as a peace officer for 17 years, with 10 years as a corrections supervisor and before that as a commercial vehicle safety officer. He testified that he had undertaken investigations and was familiar with note taking and inspections.

He said that as a liquor inspector he is responsible for public safety and compliance of liquor licenses with their Terms and Conditions. His area of responsibility is Vancouver Island and his caseload includes food primary licenses, liquor primary licenses, liquor retail stores, and others. He has conducted about 300 inspections, including liquor primary licenses.

Inspector 2 testified that on July 27, 2018 he attended at the premises with Inspector 1 and Inspector 3 to conduct an inspection as a result of a complaint about minors being employed to serve liquor. As discussed with Inspector 1, Inspector 2 was to enter the

premises with Inspector 3 to covertly observe and point out to Inspector 1 who they thought the minor servers were. Inspector 1 would then enter and follow up with the TPO.

He said he entered the premises, looked around, observed who appeared to be working, and took a seat about 15 feet from the bar, for the best observations. He said there were about 30 patrons, in the various areas of the premises.

He identified four female employees he thought were young looking and were possibly underage. The Minor was one of the four. He testified that he took pictures of the four employees on his phone and texted them to Inspector 1. All the photos were taken from his seat and were of the bar area. He said that basically if he saw the person at the back of the bar, he assumed they were working as servers. He only made sure he saw each of the female servers behind the bar once. That was the test he applied to determine if they were servers, not the duties he saw them perform.

Inspector 2 testified that the Minor came over to their table. He said that the Minor stopped at their table and said hello. He couldn't recall the details of the conversation with the Minor. She didn't leave bingo cards on their table, as the Inspectors declined them. He agreed she did not offer to take an order for food or for drinks, nor did she take glasses from the table or bring a menu. He said after she stopped at their table, she then went to drop bingo cards on other tables. Inspector 2 agreed that in the picture he took of the Minor (Exhibit 1, Tab 15) she was holding papers, which could have been bingo cards.

Inspector 2 first said he saw the Minor behind the bar only once and that otherwise she was on the floor exclusively, handing out bingo cards and chatting to customers. He said she was handing out bingo cards nearly the entire time they were on the premises, so he assumed it was both during and between music sets. Inspector 2 was referred to his notes where he said all four female servers were behind the bar and were serving customers. He said that if that differed from his oral testimony, that his notes were more accurate than his recollection expressed in his oral testimony. He then stated that throughout the inspection he saw all four young looking employees serve customers but his focus was to identify possible minors who were behind the bar.

Inspector 2 testified that he and Inspector 3 were in the premises for about one and a half hours. He said the music bingo was going on almost all of the time. Most of the bingo players were playing in the raised area behind him and he was not looking in that direction. He was seated to look in the direction of the bar. He then said he saw the Minor in the bar area for a few minutes, three or four times. He said most of the time the Minor was in the bingo area. He also said he saw her serve a customer at the bar but couldn't recall anything about the customer. He agreed she could have served liquor or could have served pop. He couldn't say if the Minor was handing out bingo cards to patrons at the bar. He said his focus was not on who she served - that was not important. What was important to him was if she was a minor on staff.

Inspector 2 said he and Inspector 3 were served by a female server who was older. He did not take a picture of this server as he was focused on servers who could be minors. He said their server wore an apron and used a tray. Inspector 2 confirmed that the Minor did not have an apron on. He later said he couldn't recall if any of the other staff wore aprons, saying they might have, but he couldn't recall.

He said that when Inspector 1 entered the premises to make his inquiries, he and Inspector 3 left the premises and went outside. They saw some new construction at a patio on the premises, so they went and looked at it over the fence. While doing that, he said, a head popped up. Inspector 2 testified that he saw only the one person, who he identified as the dark-haired server in photo #3 (Exhibit 1, tab 15). Inspector 2 said Inspector 3 saw a second girl, the Minor, but Inspector 2 did not see her. He said both he and Inspector 3 were startled and when he asked what she was doing, the dark-haired server replied "hiding from my boss". He did not ask any follow-up questions. He did not consider the person to be in distress. He said they were all amused, by startling each other. He said he reported the conversation on the patio to Inspector 1, first by text and then in the car, describing it to him as a strange encounter and saying that the Inspectors were caught off guard.

When testifying about the Terms and Conditions for employing minors, Inspector 2 said if there is a time restriction when minors can enter the premises, employed minors cannot work in the premises outside those restricted hours. Here, he said, the restricted hours are 10:00 p.m. and that applied to all minors, including entertainers. When

asked, he said he had received no training on this policy or any specific direction about it. He was simply reading it and interpreting it, relying on his experience reading legislation and policy.

### **Inspector 3**

Inspector 3 testified that he has been an inspector with the Branch for five months. On July 27, 2018, he was under supervision for training. Prior to becoming a liquor and cannabis inspector he was a peace officer with Calgary transit for seven years, where he had dealt with violations of provincial and federal statutes, fatalities and other investigations. He said he was familiar with note taking and making observations.

He said as an inspector he is responsible to conduct inspections including inspections for public safety, which inspections may be routine or covert. He also liaised with the police, local governments and individuals.

Inspector 3 said he entered the premises with Inspector 2 at approximately 9:40 p.m. He was aware of the complaint about underage servers and their focus was on monitoring the servers. He testified that Inspector 2 was taking pictures and sending them to Inspector 1. He viewed his role as cover for Inspector 2 to take the pictures. He said they saw various servers and after they had adequate evidence, Inspector 1 entered.

Inspector 3 could not recall how many customers were on the premises. In his opinion, it was not too quiet and not too busy.

Inspector 3 said the Minor approached them twice at their table to encourage them to play bingo. He did not believe that she offered them a drink. Inspector 3 could not recollect who had served them. He could not recall if any of the servers were wearing aprons.

He testified that he did not have a good vantage point to see any activities behind the bar or to see if the Minor was handing out bingo cards to patrons because he was facing the wall and acting as cover for Inspector 2 to take photographs. He did not recall hearing the bingo announcer nor could he recall seeing anyone else handing out bingo cards.

Inspector 3 said he and Inspector 2 left the premises when Inspector 1 entered. They went around to the patio area to look at some construction changes being made to it. When looking over the patio fence, he was surprised by two females crouching or squatting behind it. He said one of the females said they were peeing, and he pulled back. He identified the females as the dark-haired female in photo #3 (exhibit 1, tab 15) and as the blonde female in photo #1 (exhibit 1, tab 15) who was later identified as the Minor. He said his conversation was primarily with the dark-haired female, who laughed and joked about hiding. The Inspectors then left in the area. He could not recall if the dark-haired female had said "I'm hiding from my boss" but it was possible she did. He couldn't recall whether it was he or Inspector 2 that spoke to Inspector 1 about this encounter in the car afterwards.

In Inspector 3's opinion, the time restrictions in paragraph three of the Terms and Conditions respecting employing minors (Exhibit 1, tab 16, page 9) apply to paragraph five, entertainers.

## LICENCEE EVIDENCE

### **Third Party Operator**

The TPO testified that he has been in the liquor business for at least 40 years. He said in that time he held about 15 different licenses including for food primaries, liquor primaries and nightclubs and had had numerous dealings with the Branch, police and entertainers.

The TPO said when he took over these premises it was an old bar that suffered from significant problems such as drug dealers and bad practices like serving past the permitted time and allowing persons to remain in the premises after closing. His plan was to make changes, clean up the premises and attract a new clientele. He testified



that this made some former patrons unhappy and they generated much negative gossip. He said it was one of these disgruntled former patrons who made the complaints about underage servers to the Branch.

The TPO testified that earlier in 2018 the Branch had brought other proceedings against the TPO that went to a hearing in October, 2018. In her decision in that hearing, the General Manager's delegate found those allegations were not proven (Exhibit 4, tab 1) ("the October hearing").

#### *The Minor*

The TPO said the Minor was only engaged as an entertainer, not as a server, and as an entertainer she was permitted to be on the premises at the time of the inspection. The TPO testified that he believed that the time restriction for minors on the premises did not apply to minors as entertainers as long as the minor were supervised.

The TPO testified that MAH was hired in Spring, 2018 to do the music bingo, but MAH wanted to move to another position as a chef, which lead to the TPO hiring the Minor. He testified that he had a verbal contract with the Minor.

The TPO testified that he is very strict about minors on the premises and he gave specific instructions to the Minor about the need for her to be supervised at all times. He said the supervision was to be provided by MAH and the bartender, who he identified as the dark-haired female in photo #3 (Exhibit 1, tab 15).

The TPO said he gave the Minor instructions that she could not touch liquor but she could pour herself pop. She was told that if a table asked for anything she was to direct them to a server. He said he knew the October hearing was coming up, so he was being very careful about ensuring compliance.

The TPO testified that the bartender was the Minor's primary supervisor. He said he told the bartender that she was in charge of the Minor and that he was very specific and articulate about that. He directed the bartender to ensure the Minor was doing her job. The Minor was to be at the station where the music equipment was, handing out bingo cards, or if on a break to be in front of the bartender. He said he directed the bartender

to make sure that the Minor was not to be near alcohol and was not to perform any server duties. The Minor could order food and pop but was not allowed to use the squirrel system to do that.

The TPO testified that he told MAH the same things - that the Minor was either to be with him on the equipment or passing out cards and she had no server duties.

To ensure that supervision, the TPO said he would call in to the bartender and make sure that things were okay and she was watching the Minor.

The TPO said the servers and bartenders are supposed to wear an apron to carry a pen and paper, coasters and a debit machine. He said if the servers don't have an apron, he will loan them one. He said on July 27, 2018 at least one of the servers on duty was wearing an apron. The Minor was not required to and she did not wear an apron.

#### *Events on July 27, 2018*

The TPO testified that he had just returned from Victoria when Inspector 1 made his entry. He described it as a slow night, with about 35 people present when the license permits 120. He said the three or four tables of people seated in the bingo room were enough to justify the music bingo, but it would have been MAH's decision when to conclude the music bingo.

The TPO said that Inspector 1 began showing him pictures of the servers and requested they produce their identification. He said he told Inspector 1 the photographs were not necessary, he would get the servers for him. The TPO said he rounded up the two servers still on shift at the time - the bartender and another server. He said Inspector 1 asked for a third server, who had gone off shift earlier but was on the smoking patio, to be presented with her identification. All three servers gave their identification, which showed that they were 19 or older.

The TPO testified that Inspector 1 then asked him to produce the Minor. He said Inspector 1 only asked for the Minor after he had obtained identification from the other three. He said that when Inspector 1 was looking to identify servers he did not think he meant the Minor because she was not a server.

The TPO said he told Inspector 1 that the Minor was not a server and she was 18 years old. The TPO said Inspector 1 directed him to go and find the Minor. The TPO said he told Inspector 1 that the Minor was no longer present and he thought she had gone home. The TPO testified that it did not occur to the TPO to have the Minor stay because the Minor was not a server. He said the bingo had ended and she was not allowed to stay after that.

The TPO testified that he said the Minor was an entertainer and worked with the music bingo operator, MAH. The TPO said that he told Inspector 1 that MAH was training the Minor. At that point, he said, he and Inspector 1 went over to MAH. He said Inspector 1 asked MAH if the Minor worked for him and MAH replied no.

The TPO said he never represented that the Minor worked for MAH. The TPO said MAH worked for him and the Minor also worked for him. The TPO was of the opinion that Inspector 1 had made up his mind that the Minor was a server.

The TPO testified that he told Inspector 1 about the verbal contract he had with the Minor, saying that verbal contracts with entertainers is how it is done in the Cowichan Valley.

The TPO said when Inspector 1 asked for the Minor again, he sent the bartender to the Minor's home to get her, but she was not there. The TPO said he told Inspector 1 the Minor was 18 and offered for him to speak with her on the following Monday. He testified that Inspector 1 said he would come back on Monday. The TPO said he agreed, as he wanted to deal with the matter so that it would go away. Inspector 1 then left.

The TPO testified that he then became aware the bartender was gone. She came back in and told him about being out on the patio with the Minor, who was afraid of her boyfriend. The bartender was not supposed to be smoking on the patio and so had been hiding that from him.

The TPO described the encounter with the Minor behind the bar when in conversation with Inspector 1. He said the Minor handed him a box of candies and it was the gesture of taking the candies from her that the Inspector misinterpreted as him urging the Minor to leave the area.

The TPO said the Minor was available for an interview by Inspector 1 on the Monday but that never happened. The TPO said he was cut out of the communications with the Inspector who said he could only talk to the licensee. As a consequence, the TPO said, he got a letter from the licensee to start the eviction process. He said Inspector 1 did not ask him any questions and only talked to the licensee, declining to meet or talk with the TPO. The TPO said that the inspector involved with the October hearing dealt with him directly so he could not understand why Inspector 1 would not do the same.

*Production of documents*

The TPO testified he was under the impression he had provided what was required and he referred to the information list he provided (Exhibit 1, tab 12). He said he didn't have the video footage until later and he could not produce what he didn't have.

The TPO said the video cameras were non-functional. Only two of the six worked. He realized the others were not working about a year ago. When he called the vendor to fix them, the vendor wasn't able to do that. He said he has no intention to fix the video cameras as he can't afford it. He said there is no requirement for a licensee to have cameras and if there are cameras there is no requirement to have them in working order.

The TPO said he had to hire an independent technician to obtain the video footage from the camera. It was the same technician he hired to get the video footage for the October hearing. The video technician was given instructions on August 10 or 11 to retrieve the video, and he came in in the second week of August to do that. He said he told the technician he had a deadline and directed the technician to deliver the video to the Branch, the same as for the October hearing. He testified that the prior arrangement was the technician would be paid \$500 and the technician agreed to that arrangement in this instance as well.

The TPO testified that the technician retrieved the footage as directed but then would not release it to him without the payment of \$5,000. He said the technician was extorting him because the technician knew he needed it. He said he refused to pay that amount. He testified that because the video technician had retrieved the footage, it was no longer available for anyone else to retrieve it.

The TPO said he only got possession of the video footage on November 27, 2018 when he agreed to pay the technician \$1,000. The TPO got the video and sent it to the Branch. He knew it was late but he was anxious to have it admitted. The TPO testified that he had not seen the video footage before it was dropped off. He said he did not know what time the video footage cut-off at. He has not talked to the technician about the video footage and why it ends at that time.

The TPO testified that he did not tell Inspector 1 of these difficulties, as he was hopeful that the technician would reduce the price and he was asking him weekly to do that.

The TPO said because he had told the inspector involved with the October hearing that the video camera did not work, and he was about a month late in delivering the video footage for the October hearing, he made the assumption that Inspector 1 would be aware of the issues regarding the video, so he did not need to elaborate on it with him.

The TPO referred to a May 15, 2018 email to the inspector involved in the October hearing that advised about the problems with the video system (Exhibit 4, tab 3). He said he believed Inspector 1, as the Regional Inspector, would have knowledge of that email. He based that assumption on his past experience with the Branch and other government agencies where he believed supervisors would have knowledge of that sort of information.

The TPO testified that he complied with the Notice to Produce Documents with respect to the October hearing, except for producing the video footage, which he provided about a month late. He said there were no consequences for that failure in that matter, as there has been in this matter.

The TPO testified that this was his first experience as a third party operator and that when he was a licensee he had never had a third party operator. He was surprised to learn that Inspector 1 would not talk with him directly. He testified that the other inspector dealt with him directly regarding matters in the October hearing, so he didn't think the refusal to communicate with him had anything to do with being a third party operator. The TPO maintained he was cooperative and did not delay or offer any resistance.

### **The Minor**

The Minor testified that on July 27, 2018 she was working for the TPO as an entertainer under a verbal contract that started in the first week of July. She said that under the terms of that contract she agreed to do bingo and karaoke shows for \$125 per show and to create social media input about 10 hours a week for \$12.50 per hour. She said she was to be working with MAH, with the intent she would learn how to do the shows and then replace him, as MAH wanted to move to a different job with the TPO.

The Minor described the bingo games as shows or performances. She said she had studied drama at school and was always given the lead roles. Her friend, the bartender, recommended her for the position.

She testified that she also created bingo cards and a music playlist for the bingo games. She did this work and the social media work at home on her own Mac computer and also used MAH's laptop.

The Minor testified that her work as an entertainer included setting up the video and sound system and hosting music bingo, including announcing, handing out cards and selecting the winners. She said passing out the cards is part of the job but not the whole job. She said MAH was training her and giving her pointers on how to use the microphone and how to be a better entertainer so she could take over. On her first night, she said, she'd simply watched MAH and handed out cards. On her second night, she said, she started announcing. She testified that on July 27 she did announcing and handed out cards, going everywhere throughout the premises and circling around each area to do that.

She said the video and sound system for the music bingo is located behind the bar. She testified that it plays music in each area of the premises, and is a bit complicated, saying it needs to be adjusted once or twice an evening, to turn the bingo music off and switch over to general music. To do that, she had to enter behind the bar.

The Minor testified that during the time of the contract, she did not serve food or beverages or use the squirrel system. When she was paid, no deductions were made, nor did she get a pay slip. She testified that the TPO did not direct her and MAH how to run the music bingo.

The Minor testified that she always had to have a supervisor when working inside the premises. She understood that she needed to be watched by someone at all times, not that they had to be right beside her but they needed to be in the same room and supervising. She said that generally when she was training MAH would be her supervisor.

Her evidence was that on July 27, 2018 she arrived around 7 p.m. with the performance starting around 8 p.m., which she said was typical. She said it was a slow night and they finished around 11 p.m., which she said was normal for a slow night.

The Minor testified that she took breaks throughout the night and on July 27, 2018 she was having a fight with her boyfriend. On her break between games she talked with her friend, the bartender, at the bar about the fight.

She testified that on July 27, 2018 she did not perform any server duties and did not access liquor. She said the TPO was very strict about what she could touch behind the bar. Her evidence was that around the middle of the evening she got MAH and herself glasses of pop from behind the bar because the servers were busy. She said the pop is dispensed from a "gun" and was free for her and MAH. She said she accessed the pop gun only to provide pop for herself and MAH. She said she never provided pop to anyone else.

The Minor did not recall the two liquor inspectors seated at the table. She thought she would have handed them bingo cards. She said she would not have offered them menus or drinks.

She testified that the TPO was not at the premises that night until about 11 p.m. when he arrived from Victoria. Her evidence was that when he arrived she walked behind the bar to tell him she was leaving and handed him a box of candies that she had purchased for the servers. She described it as a box about 10" x 6" with an open plastic see-through covering. She said that she had no other conversations with the TPO until later that night around midnight when her step-dad came to pick her up and the TPO said they needed to talk the next day.

The Minor testified that when she was leaving she went to the bathroom to answer a phone call. She said it was her boyfriend who was angry because he did not like that she was working a bar and how she was dressed, which she described as like a Vegas entertainer. She said she went outside crying, with the intent to hide from him, not knowing what else to do. Later, her friend, the bartender, came out but did not mention what was going on inside. The Minor said she told the bartender that the Minor's boyfriend was angry and she didn't know where it was safe to go.

The Minor described the interaction with the two liquor inspectors outside on the patio. She said as she was hiding from her boyfriend she was surprised by the inspectors and screamed. She testified that only the bartender talked to the inspectors. She said the bartender jokingly told the inspectors she was hiding from her boss. She thinks the bartender said that because she was smoking and she wasn't supposed to be smoking out there.

The Minor said that the next day the TPO told her that the liquor inspector thought she was serving liquor. He asked her to call in on Monday to speak with the inspector but that never happened.



She said that July 27 was the last show that she did. She started work for the TPO in the kitchen in August, and after she turned 19 in October began working for him as a bartender. She said the TPO is very strict about minors. She says he told her that she must ID anyone who looks to be under 25 years and he is very strict about that.

The Minor testified that when she was working as an entertainer she and MAH each took their breaks when they wanted to, not as directed by the TPO. He said the cost of her meals was deducted from her pay, but no other deductions were made. She was paid every couple of weeks but generally she, like MAH, was paid the day after the staff were paid, which she understood that to be the general practice for entertainers in the industry. She said that since starting work in the kitchen and as a bartender she has been getting pay slips and deductions are made.

## **SUBMISSIONS**

### **The Branch**

The Branch advocate submitted that under section 79(1) of the Act, minors are not allowed to be in an establishment if prohibited by the Terms and Conditions. Under the Terms and Conditions, minors can be allowed in an establishment if the licence permits them to be there. Also under the Terms and Conditions, if minors are permitted in an establishment as patrons until a specified time, minors can only be employed in the establishment up until that time. This, he said, applies to all minors, including those employed as entertainers, even independent contractors. This means if any minor is in the establishment when minors are no longer permitted as patrons, a contravention has occurred.

The Branch advocate submitted that in this case, the license's Family Foodservice endorsement permits minors only until 10:00 p.m. This meant no minors, even entertainers, are allowed in the establishment after 10:00 p.m. The evidence is that at the time of the inspection, well after 10:00 p.m., the Minor was present in the establishment and even if she was an entertainer, a contravention occurred.

With respect to the allegation of obstructing an inspection, the Branch advocate submitted that the TPO must have been worried whether the Minor was permitted to be on the premises. According to Inspector 1's evidence, the TPO said the Minor was working with or for MAH, which was not true. He suggested that the TPO, in pointing Inspector 1 in the direction of MAH mislead the Inspector and caused him to make an inquiry that he did not need to make.

With respect to the allegation of failing to produce documents, the Branch advocate said the video footage was delivered late and was incomplete without a good explanation. He suggested this indicates the video footage may have been something the TPO was concerned about. The video footage was requested and despite the alleged extortion by the video technician, Inspector 1 still has questions why the video was not complete. If the TPO had produced the video footage as requested in the Notice to Produce, that would have allowed the Inspectors to consider it, prior to proceeding.

The Branch advocate noted that the defense of due diligence was not available as the TPO was the directing mind of the Licensee.

### **The Licensee**

The TPO submitted that former patrons, disgruntled with the changes he was making to bring the premises into compliance with the Act and Regulations, invented the complaint about minors as servers. He said the evidence shows no minors were servers. He said the Minor was an entertainer and permitted to be on the premises when Inspector 1 attended.

The TPO submitted that the understanding in the industry is that minors who are entertainers may be present at any time, provided the minor is entertaining and is under supervision. He said that even Inspector 1 did not take the position that the Minor could not be in the premises after 10 p.m., provided she was an entertainer. The only dispute was whether the Minor was an entertainer. The evidence, he said, was clear the Minor was an entertainer.

He submitted that the only reason Inspector 1 made the inquiry of MAH, was to prove that the Minor was not an entertainer. That inquiry would only have been necessary if determining whether the Minor was an entertainer was an issue, as it was clear a minor was in the establishment after 10:00 p.m., which was not otherwise permitted.

With respect to the Terms and Conditions, the TPO said the separate paragraph, which expressly addresses entertainers, indicates they are to be treated differently. He suggested that if that is not the case, there would be no reason or need for a separate paragraph. He noted that this paragraph does not limit the presence of the minor to any time limit under the licence endorsement.

The TPO submitted that if the Terms and Conditions meant to restrict minor entertainers' hours the same as minor employees' hours are restricted in paragraph 3, it would have been easy to clearly say that. He said, given the consequences for having a minor on the premises, the Terms and Conditions should be clearer and more specific if the intent is that the time restrictions apply to minors.

The TPO further submitted even that the Branch's own employees were inconsistent and uncertain about the proper interpretation of the Terms and Conditions respecting the employment of minors. He said this shows the provisions require clarification and the Branch needs to communicate to licensees how that clarified provision is to be applied.

Regarding the allegation of obstruction, the TPO submitted he did not mislead Inspector 1 about the nature of the Minor's employment. He suggests Inspector 1 misheard one word in their conversation. The TPO maintained he said the Minor was working *with* the bingo music operator and did not say she was working *for* the bingo music operator.

He said he had no reason to mislead Inspector 1 about who the Minor worked for, as he had believed that he was correct in his interpretation that he could employ the Minor after 10 p.m. without any problem. He noted that he immediately admitted to Inspector 1 that the Minor was 18 years old and believed Inspector 1 merely wanted to confirm if she was an entertainer because if so, there would be no issue about her being there.

The TPO submitted he did not direct the Minor to leave the premises. He said that there is no dispute that his evidence, Inspector 1's evidence, and the Minor's evidence was that the bingo had ended, so it supports the Minor leaving the premises. The TPO said that because the Minor leaves when bingo is over, her leaving when she did was not unusual and he did not direct her to leave.

With respect to the incident on the outdoor patio, the TPO said the bartender was hiding because she was smoking where she shouldn't be. Inspector 1 misinterpreted what the other inspectors said to him about this encounter.

The TPO said he would have liked and had wanted Inspector 1 to interview the Minor but Inspector 1 did not do that. If the meeting had been held, the TPO says he would have been able to establish he had done nothing wrong. He said Inspector 1 could have dealt directly with him had he obtained the licensee's permission. The TPO's relationship with the licensee has been negatively impacted as a result of these allegations.

The TPO said he made every reasonable effort to give Inspector 1 the documents that were requested.

He said he had no employment records for the Minor, because she was an independent contractor, under a verbal contract. In determining whether the Minor was an employee or an independent contractor, he said one should look at the criteria applied by the Canada Revenue Agency ("CRA"). He submitted the Minor met the CRA criteria for an independent agent contractor: she set her own hours, she provided her own equipment, he made no deductions, she was paid by event not by the hour. He says this was the same for MAH and most other entertainers who are considered to be independent contractors.

The TPO submitted he was unable to provide the video footage on time because:

- only the one technician was able to retrieve the footage
- once retrieved by that technician the video footage was no longer available to be retrieved by anyone else
- the technician would not release the video footage to the TPO unless he paid an extortionate sum.

The TPO said he produced the video footage as soon as he was able to. He further says the video footage provides evidence that supports the TPO's position so he had no reason to suppress it. The TPO noted that the video showed that the Minor did not sell liquor, which was favourable to his position.

The TPO also submitted that Inspector 1, as Regional Inspector, knew or ought to have known he was having problems with the video system by virtue of similar problems in the matter leading to the October hearing. He points to Inspector 1 dealing only with the Licensee and not with the TPO as a reason why he did not notify Inspector 1 of the problems he was having in retrieving the video footage.

The TPO further submitted that the similar failure to produce video footage in the matter leading to the October hearing did not result in any allegation of a contravention.

The TPO submitted that overall the Inspectors' evidence was incomplete and inconsistent. He claimed the inspectors' recollections were not consistent with each other's evidence. The TPO submitted that Inspector 1's recall of the events and his notes were inaccurate. He pointed to the error in Inspector 1's recollection and in his notes about the name of the music bingo operator, and says Inspector 1 was more interested in proving the Minor was a server and not an entertainer. He claimed Inspector 1 had difficulty recollecting which servers produced identification to him and that his notes were deficient in recording what had occurred in that regard. He also questioned why the two inspectors did not ask any follow-up questions with the Minor and the bartender on the patio. He says their job is to investigate but they failed to actually do that.

The TPO suggested that if Inspector 1 had not restricted his dealings to with the licensee only, the hearing would not have been necessary.

### **The Branch's Reply**

With respect to the Inspectors' credibility the Branch advocate submitted inspectors should not be held to a standard of perfection. He said the Inspectors had an objective and they fulfilled that objective.

The Branch advocate also noted that the video footage shows the Minor in the area of the bingo equipment just immediately before Inspector 1 entered the premises. He says this is inconsistent with her evidence that the bingo was over. He suggests the video footage shows the bingo continuing, with patrons clearly having bingo daubers and bingo cards in front of them. He submits the Minor did not leave because the bingo was over, but that she was told to leave because there was an inspection.

### **ANALYSIS AND REASONS**

As noted above, the Branch did not proceed with the allegation of employing a minor contrary to section 79(2) of the Act. I will deal with each of the three remaining allegations separately.

#### **Allowing a minor to be in the establishment, contrary to section 79(1) of the Act**

Section 79(1) of the Act provides that minors are not allowed in an establishment if prohibited by the terms and conditions of the licence or the regulations. This means that minors may be allowed in an establishment, if permitted by the terms and conditions of the licence, which includes any specific endorsements on the licence and the Terms and Conditions that apply to all licenses.

Here, the Family Foodservice term of the License permits minors accompanied by a parent or guardian in all service areas until 10:00 p.m. when meal service is available. In addition, the Terms and Conditions permit minors in premises if employed, but only in certain circumstances. Those circumstances are set out above, but for ease of reading I will set them out again:

1. Minors may be employed in the establishment if the license permits minors to be in the service area, but the minors are not permitted to sell liquor. (An exception is made for stadiums where minors may serve liquor under the supervision of an adult.)
2. Minors may be employed in areas outside the establishment if that area is part of a larger business (for example, at a hotel reception desk).
3. Minors may only work in the establishment during those hours that the licence permits minors as patrons. (An exception is made for minors employed before January 23, 2017.)
4. Minors may serve food or work as entertainers at events under a catering endorsement, but they cannot sell or serve liquor.
5. Minors may be employed as entertainers but must be supervised by adult staff at all times. When they are not entertaining, the minors may remain on the premises if minors are permitted in the establishment, otherwise, the minors must leave the service areas.
6. Under no circumstances may a minor perform as an exotic dancer or in any other form of adult-oriented or sexually explicit entertainment and minors may not be employed within the establishment during this form of entertainment.

I find that only paragraphs 1, 3 and 5 may be applicable here. Those paragraphs provide that a minor may be employed in the establishment if the licence permits minors to be in the service area; the minor is not permitted to sell liquor; the minor may only work in the establishment during those hours that the licence permits minors as patrons; if employed as an entertainer the minor must be supervised by adult staff at all times and if a minor employed as an entertainer is not entertaining, the minors may remain on the premises only if minors are permitted in the establishment, otherwise when not entertaining, the minor must leave the service area.

I therefore need to consider and interpret how the Family Foodservice 10:00 p.m. limit on minors as patrons and paragraphs 1, 3 and 5 might apply, to determine if and when the Minor was permitted to be in the establishment.

On a reading of the above provisions, I find that the TPO was permitted to allow the Minor in the service area up until 10:00 p.m. (provided meal service was available) and she did not serve liquor. As any allegation that the Minor served liquor was abandoned by the Branch, the only allegation that remains simply relates to the Minor being present in the service area after 10:00 p.m.

The question then is whether, as the TPO suggested, there is an exception to the 10:00 p.m. time limit that permits a minor who is employed as an entertainer to be present in the premises after 10:00 p.m. The second question, as the Branch suggested, is whether the Minor was in fact employed as an entertainer. Also, because evidence was lead on the issue, I will address whether anything turns on the status of the Minor as an employee or an independent contractor.

When interpreting the Terms and Conditions, I must assume each word and phrase has meaning and to ascribe to those words and phrases a meaning that is as consistent and coherent as possible with the other words and phrases in the Act and the Terms and Conditions.

I find that if the Terms and Conditions intended that minors employed as entertainers were to be restricted to the same time limits as other employees, it would have been easy and clear to say that. Indeed, had that been the intent, there would be no need for the second sentence in paragraph 5, which provide that if the minor is not engaged in entertaining, they must leave the premises during those times minors are not permitted as patrons. I find a reasonable, consistent and coherent interpretation of this sentence is that a minor is permitted to be in the premises while actively engaged in entertaining, even during those hours minors are not permitted as patrons (subject of course to the overarching requirement of adult supervision at all times and the other requirements of the Terms and Conditions). If the minor is not actively entertaining, that is, if the minor is on a break during a time when minors are not permitted as patrons, the minor must leave the service area.

I also find that this interpretation also accords with Inspector 1's concluding evidence on how he interpreted the Terms and Conditions.



On this basis, I find that if the Minor was employed as an entertainer, was actively engaged in entertaining after 10:00 p.m. on July 27, 2018, and was supervised at by adult staff at all times, she was permitted to be in the premises at the time of the inspection. I turn then to the evidence on those points.

I accept the TPO's and the Minor's evidence that the Minor was hired as an entertainer and was being trained with the intent she would take over as the music bingo operator.

I accept the Minor's evidence was that on July 27, 2018 she actively distributed bingo cards, made announcements on the sound system, awarded prizes and adjusted the sound system as necessary. Her evidence is corroborated by the evidence of Inspectors 2 and 3 that they saw the Minor actively distributing bingo cards during the whole or close to the whole of the time they were present. I do note that while neither Inspector 2 or 3 could recall if they heard the Minor making bingo announcements or saw her handing out prizes, they both said they were focussed on the issue of the age of the servers and did not recall who made those announcements.

I find that, it being accepted that music bingo is entertainment, the activity of distributing the bingo cards is a key element of that entertainment and not simply a service.

I further find that while Inspector 2 may have seen the Minor behind the bar, that does not mean she was engaged in activities other than those required by her duties in providing music for the bingo. I accept the evidence of the TPO and the Minor that the controls for the sound system used by the music are located behind the bar. I accept the Minor's evidence that as part of her duties as an entertainer she needed to adjust those controls several times during the evening.

I further find that while Inspector 2 may have seen the Minor pour liquid into glasses that does not mean she was engaged in serving liquor. I also note that the Inspector 2's evidence on this point was inconsistent. Indeed the Branch did not proceed with any allegation that the Minor was serving liquor. I accept the Minor's evidence that she poured only glasses of pop for herself and the music bingo operator. This activity is not inconsistent with her activities as an entertainer.

I further find that the evidence of the brief encounter between the Minor and the TPO behind the bar, in front of Inspector 1, does not support a finding that the Minor was not an entertainer.

I find that the Minor's evidence that she left shortly after that encounter because the music bingo had concluded also supports a finding that she was an entertainer and not on the premises when no longer actively entertaining.

On this basis, I find that on July 27, 2018 the Minor was employed by the TPO as an entertainer.

I also accept the TPO's evidence that the Minor was supervised by the bartender and MAH, both adults, at all times, which was not challenged.

Further, no one gave any evidence to suggest that the Minor was not actively working the whole of the time after 10:00 p.m., that is, that she was on a break at any time after 10:00 p.m.

On the basis of all of this evidence, I find that on July 27, 2018 the Licensee employed the Minor in the service area as an entertainer and that after 10:00 p.m. the only activities she engaged in were those of an entertainer. On this basis, I further find that when the Minor was in the service area after 10:00 p.m. she was there in her capacity an active entertainer.

Given my finding that under the Terms and Conditions, the licensee was permitted to allow a minor in the service area after 10:00 p.m. if and when actively employed as an entertainer, and my findings with respect to the Minor being employed as an entertainer, I find that the licensee did not contravene the Terms and Conditions, the regulations and section 79(1) of the Act.

I further find there is nothing in the Act or the Terms and Conditions that require a minor who is an entertainer to be engaged as an independent contractor. The Act and the Terms and Conditions simply refer to "employing" minors, which on a narrow reading might exclude entertainers hired as independent contractors. However, I don't

read the Act and the Terms and Conditions that narrowly. I do find that a licensee is responsible for all minors who might be employed on the premises, whether engaged directly by them or anyone else as an employee or as an independent contractor. So nothing turns on whether the Minor was employed by the TPO as an employee or by someone else as an employee, or by the TPO as an independent contractor.

**Obstructing the general manager, contrary to section 43(b) of the Act.**

The Branch relies on two actions by the TPO that the Branch says constitutes obstruction:

- misleading Inspector 1 about the nature of the Minor's employment and who employed her.
- directing or otherwise permitting the Minor to leave the establishment contrary to Inspector 1's direction.

With respect to the allegation of misleading, Inspector 1's evidence is that the TPO said the Minor was *employed by* the music bingo operator (my emphasis). The TPO's evidence is that he said the Minor was *working with* the music bingo operator (again, my emphasis). To weigh and assess these witnesses' contrary evidence to determine what in fact was said, I have given consideration to the circumstances of this communication and also to how this aspect of each of these witnesses' testimony fits with the balance of their own and the other witnesses' testimony.

I find that at the point in time of the exchange, Inspector 1 believed the Minor was a server and also believed he saw a look of concern on the TPO when the Minor entered behind the bar. I find that at that time, Inspector 1 was, perhaps understandably, more focused on establishing whether the Minor was a server and not an entertainer, rather than on who employed her.

I note that Inspector 1 admitted he misheard or miss-recorded the name of the music bingo operator when making his inquiries. I further note the discrepancy between the inspectors' evidence about the encounter on the patio with the Minor and the bartender. Inspector 1's oral evidence and notes do not mention the bartender being on the patio or taking part of the conversation whereas Inspectors 2 and 3 testimony clearly does so. Further, Inspector 1's notes and oral evidence attribute the bartender's comments to the

Minor, contrary to the evidence of Inspectors 2 and 3. Additionally, their description of the nature of that encounter as amusing is substantially different from that of duress reported by Inspector 1.

I also note that the amended NOEA at page 4 sets out a different sequence of events and also states that Inspector 1 and 2 saw the Minor serving liquor, when that was not their oral evidence in the hearing. The Inspectors' oral evidence and the amended NOEA are also different about the exchange on the patio, and about the sequence of events around the first notice to produce.

I highlight and comment on these matters not to suggest that the inspectors did not do an adequate inspection or to hold them to a standard of perfection. Rather, I highlight them to show that how easy it may be during the course of inspection to miss-hear or even possibly misinterpret what has been said by another, and to illustrate how it is important to weigh and assess all of the evidence to determine what was said and by whom.

I further find that at the time of the exchange, the TPO had already advised Inspector 1 that the Minor was only 18 years old. I also find that the TPO believed he could legally employ her as an entertainer after 10:00 p.m. and so find he had no reason to mislead the Inspector about who employed the Minor.

Given all of this, I find on a balance of probabilities that in his communication with Inspector 1, the TPO was simply trying to establish that the Minor was an entertainer, not that she was employed by another person. I find the TPO did not actively mislead Inspector 1 on this point and this allegation has not been proven.

I turn now to the whether the TPO directed the Minor to leave, contrary to Inspector 1's direction to produce the servers to confirm they were of legal age.

The evidence to support this allegation is Inspector 1's belief that he saw the TPO looked concerned and gesturing the Minor to leave from behind the bar, coupled with the Minor actually leaving and the encounter on the patio.

I find that it is not unreasonable for a licensee to look concerned when an inspector is questioning him about compliance with the licence. A look of concern, without substantially more evidence, is not a sufficient basis to find a contravention.

The TPO says any gestures he made toward the Minor would have been in relation to the box of candy the Minor handed to him. The Minor's evidence was she did in fact hand him a box of candy. I find this evidence is a reasonable explanation for any gestures Inspector 1 may have observed and those gestures, without substantially more evidence, are not a sufficient basis to find a contravention.

I find that the TPO reasonably believed that Inspector 1's demand that the servers be produced did not include the Minor, who worked as an entertainer, and so he did not direct her to stay and produce identification.

I accept the evidence of the TPO and the Minor that the Minor typically left on her own accord when the music bingo was over, and that is what she did that night. While the video footage is inconclusive about whether the music bingo was in fact finished, Inspector 1 testified the music bingo was over at that time and I accept his testimony over the inconclusive video footage.

I further find that even if the music bingo had not ended, based on the Minor's evidence, the Minor's duties in relation to the bingo had ended at that time. Given that the Minor is only permitted in the premises while actively working, it is not unreasonable to conclude that she left the premises for that reason and not because she was directed to do so by the TPO.

I find, based on the evidence of Inspectors 2 and 3 and the Minor about the encounter on the patio, it was the bartender and not the Minor who said she was hiding from the TPO. As such, this encounter is not evidence that the TPO had directed the Minor to leave the premises.

Based on all of the foregoing, I find that the TPO did not obstruct Inspector 1 in his investigation by directing the Minor to leave the premises, contrary to the demand made by Inspector 1.

I find that the alleged contravention of obstructing the General Manager, contrary to section 43(b) of the Act, has not been proven.

**Failing to produce a record, liquor sample or other thing, contrary to section 43(a)(iii) of the Act.**

Two Notices to Produce Records were issued to the licensee. The Branch relies on the initial failure to produce and the late production of the video footage, as demanded in the second Notice, as the basis for this contravention.

There was no serious contention that the information (other than the video footage) was not provided, even though the Inspector was puzzled by that information. The evidence is that the Minor was not an employee; she was an independent contractor. As such, there were no employment records to be produced. The TPO did produce the information requested, albeit some of it was a day late.

With respect to the video footage, the TPO submits there is no requirement for a licensee to have video cameras or, if there are cameras, for those cameras to be operational. However, that is not the issue.

I find that if there is a camera, and it is operational, a licensee may be required to produce video footage. Here, there is no question there was a camera, and at least one camera was in fact operational. As such, I find the Branch was within its authority to make a request for the video footage to be produced.

I find that the ability of inspectors to request records and other documents is fundamental to their ability to conduct investigations. It is an important investigative tool. Indeed, after the video footage was produced, the Branch decided not to proceed with the first allegation.

I accept as fact that

- only the one technician was able to retrieve the footage
- that once retrieved by that technician the video footage was no longer available to be retrieved by anyone else

- that the technician would not release the video footage to the TPO unless he paid what the TPO viewed as an extortionate sum.

I also accept as fact that the TPO produced the video footage as soon as the TPO was able to get it. I find that the video footage provides evidence that supports the TPO's position and he had no reason to suppress it.

However, I further find that these facts do not detract from the fact that the TPO failed to produce the record within the time requested or within a reasonable time after that. I also find that the TPO did not communicate with Inspector 1 about the reasons why the video was not produced nor did he ask for an extension of time to produce it. I further find it was not reasonable for the TPO to assume Inspector 1 had any knowledge of any difficulties in producing the video. Based on these facts, I find that the licensee failed to produce the video footage within the time set in the Notice to Produce, which constitutes a contravention of section 43(a)(iii) of the Act.

The licensee did not plead due diligence and in any event as the TPO was directly responsible for the failure to provide the record, the defence of due diligence is not available to the licensee.

Having made the findings of a contravention and that the defence of due diligence is not available, I turn now to the matter of penalty.

## **PENALTY**

Pursuant to section 51(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

This is a first contravention of section 43(a)(iii). The range of penalties for a first contravention is a 10 to 15 day suspension and/or a \$7,500 to \$10,000 monetary penalty (item 29, Schedule 2 of the Regulation). The Branch proposes a suspension of 10 days or a monetary penalty of \$7,500.

I am not bound to order the penalty proposed. 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 2 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 and in the appropriate circumstances, I may assess no penalty.

Licenses are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action, and penalties imposed as a result of that action, are intended to both redress the licensee's non-compliance and to encourage future compliance by the particular licensee and by other licensees by way of deterrence.

The factors that I have considered in determining the appropriate penalty in this case include the seriousness of the contravention, the compliance history, the circumstances surrounding the contravention, the threat to the public safety, and the well-being of the community.

As stated above, the ability of inspectors to request records and other documents is fundamental to their ability to conduct investigations effectively. A Notice to Produce is an important investigative tool and needs to be complied with in a timely way, to determine and possibly eliminate or reduce the need to go to a NOEA and possibly a hearing.

A failure to comply is always serious, but here the records and the video footage were not destroyed or never produced. The requested documents were provided only one day late, and only the video footage was more significantly late. And, despite the Branch not proceeding with the allegation under section 79(2) once the video footage was produced, given the position taken with respect to the allegation under Section 79(1), a hearing to address that matter would likely have been required in any event. So this element does not weigh heavily against the licensee.



The compliance history shows this to be a first contravention of this nature. Further, the April 14, 2018 allegations were found in the October hearing not to be proven. So this element does not weigh heavily against the licensee.

Regarding the circumstances surrounding the contravention, I am seriously troubled by the TPO not communicating directly with Inspector 1 why the video footage was not being provided. I find it is unreasonable for the TPO to assume that Inspector 1, as Regional Inspector, would be familiar with all of the details of every case within his area of responsibility. Vancouver Island is a large area and there may be numerous active cases for which the Regional Inspector would have overall responsibility. It is unreasonable for the TPO to assume Inspector 1 would know the day-to-day activities on each of those matters. While Inspector 1 may have had some knowledge of the matters leading to the October hearing, another inspector had operational responsibility for that matter.

However, that concern is tempered at least in part by Inspector 1 dealing only with the licensee. Inspector 1 had indicated on July 27, 2018 that he would follow up with the TPO but he did not do so, and he had no further direct communications with the TPO. While I accept Inspector 1's evidence that he was required by the Act to deal directly with the licensee, I also accept the TPO's evidence that in the matters leading to the October hearing, another inspector continued to deal directly with him as the TPO. Further, the TPO's evidence that a similar failure to produce video footage on time in the October hearing did not result in any allegation of a contravention.

I have also considered the TPO's evidence that the failure to produce was not willful on his part, but was due to what he described as the technician's demand for an unreasonable amount of money that the TPO could not afford. I have also considered that the video footage supported the TPO's version of the events and he had no reason to withhold it, other than an inability to actually produce it. These elements do not weigh heavily against the licensee.

While the failure to produce documents is serious, it is independent of any other finding of a contravention. On this basis, I find any threat to the public safety and the impact on the well-being of the community to be low.

For all of these reasons, and on the facts in this case, I find that no penalty ought to be imposed.

## CONCLUSION

I have found that the licensee contravened section 43(a)(iii) of the Act and is not entitled to a defence of due diligence.

I have also found a penalty is not warranted here, based on the very specific facts and circumstances in this matter.

Despite having found no penalty is warranted, I do want to highlight for the licensee that this decision is a finding of a contravention and will be considered a “first contravention” for the purposes of section 4 of Schedule 2 of the Regulations. If the licensee commits a contravention of the same type within the next 12 months, that contravention will be a “second contravention” and be treated as such under the penalty schedule.

*Original signed by*

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Dianne Flood  
General Manager’s Delegate

Date: January 30, 2019

cc: Liquor and Cannabis Regulation Branch, Victoria Office  
Attn: Stephen Hitchcock, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office  
Attn: Hugh Trenchard, Branch Advocate