



**AMENDED 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: 0731380 B.C Ltd., dba Kitimat Hotel  
Under Licence Name: Kitimat Night Club,  
560 Enterprise Avenue, Kitimat, BC, V8C 2E2

Cases: EH14-158, EH14-162, and EH14-166

For the Licensee: Mark Zilin Wang

Counsel: Jeffrey E. Wittmann, Barrister and Solicitor,  
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Barristers and Solicitors

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For the Branch: Cristal Scheer

General Manager's Delegate: R. John Rogers

Dates of Hearing: May 26, 27 & 28, 2015

Date of Decision: August 5, 2015

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

The licensee, 0731380 BC Ltd, (the "Licensee") operates the Kitimat Hotel in Kitimat, British Columbia. From a location within the Kitimat Hotel, the Licensee operates the Kitimat Night Club (the "Night Club"). The Licensee has the Liquor Primary Licence No. 005538 (the "Licence") which allows liquor sales in the Night Club from Noon to 2:00 a.m. on Monday, Tuesday and Wednesday, Noon to 4:00 a.m. on Thursday, Friday and Saturday and 11:00 a.m. to 2:00 a.m. on Sunday. The total patron capacity for the Licence is 321.

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

The Night Club consists of a stage, a dance floor for customers, a DJ's booth, and what are described as "VIP Rooms" where private performances by exotic dancers occur. The four VIP Rooms are located in an area of the Night Club which is closed off by a glass doorway from the main customer area of the Night Club. Entry into this doorway leads to an entrance foyer from which each of the VIP Rooms is accessed. Each VIP Room consists of an eight foot by six foot cubicle containing a CCTV video camera, a standing lamp, a cabinet, a CD player, and at least one chair. Privacy to each of the VIP Rooms is secured by a curtain covering the access from the central foyer.

The Licensee's representative, Mr. Wang, is the manager of the Licensee and has been a co-owner of the Licensee since 2003 (the "Owner").

In EH14-158 the Licensee is alleged to have contravened Section 50 of the *Liquor Control and Licensing Act* on October 24, 2014 by permitting an exotic dancer to perform prohibited acts in one of the VIP Rooms.

In EH14-162 the Licensee is alleged to have permitted on October 28, 2014 an intoxicated person to remain in the Night Club contrary to Section 43(2)(b) of the *Liquor Control and Licensing Act*.

And in EH14-166 on November 16, 2014, the Licensee is alleged to have permitted a minor to enter and be in the Night Club contrary to Section 35 of the *Liquor Control and Licensing Act*.

With the consent of the representative of the Licensee, Mark Wang, his counsel, and the advocate for the Liquor Control and Licensing Branch (the "Branch"), all three of the alleged contraventions were heard sequentially at one hearing on the dates set out above

For the purposes of this hearing, and in accordance with section 6.1 of the Act, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by section 20 of the Act and sections 65-69 of the Regulation.

#### **ALLEGED CONTRAVENTION AND PROPOSED PENALTY FOR THE FIRST NOEA**

The Branch's allegations and proposed penalties for EH14-158 are set out in the Notice of Enforcement Action dated January 5, 2015 (the "First NOEA"). In the First NOEA, the Branch alleges that on October 24, 2014 the Licensee contravened section 50 of the *Liquor Control and Licensing Act* (the "Act") by permitting an exotic dancer employed by the Licensee to touch a patron during her performance in one of the private VIP Rooms.

The proposed enforcement action outlined in the First NOEA is a 4 day suspension of the Licence. Item 34, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out a range of penalties for a first contravention of this type as being a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

#### **RELEVANT STATUTORY PROVISIONS FOR THE FIRST NOEA**

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

The relevant portion of section 50 of the Act provides in section 50(2):

(2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of

entertainment performed or carried on in the establishment for which the licence is issued.

**The Licence contains the following provision:**

- The terms and conditions to which this licence is subject include the terms and conditions contained in the publication “A Guide for Liquor Licensees in British Columbia” as that publication is amended from time to time.

The Guide on page 40 identifies an “exotic dancer” as an entertainer who removes clothing during a performance and/or who performs in a sexually suggestive manner and states that such an exotic dancer may not:

- Touch, share food and beverages or pass objects to members of the audience or touch, share food and beverages with other performers

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

Schedule 4  
Enforcement Actions

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
34	Permitting in the licensed establishment entertainment by one or more exotic dancers or strippers that is prohibited or restricted under section 50 of the Act	4-7	10-14	18-20	\$5,000 -\$7,000

**ISSUES FOR THE FIRST NOEA**

The issues for the First NOEA are:

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

**EXHIBITS FOR THE FIRST NOEA**

**Exhibit 1:** Branch Book of Documents, tabs 1 to 9;

**Exhibit 2:** A set of documents entitled "Late Disclosure Documents" as they consist of documents disclosed by the Branch to the Licensee's counsel after the date upon which Branch disclosure should have been completed. The Licensee's counsel did not object to the introduction of these documents into evidence. These documents consist of:

1. A copy of the notes of the witness referred to below as "Constable A" dated October 5, 2014;
2. A copy of a Contravention Notice No. B012148 dated October 11, 2014;
3. A copy of a Police Licensed Premises Check dated October 5, 2014 issued by Constable A;
4. A copy of an email dated December 8, 2014 from the Owner to the party referred to below as "Retired Inspector B";
5. A copy of a letter dated October 20, 2014 from Retired Inspector B to the Licensee;
6. A copy of a No Enforcement Action Recommendation made by Retired Inspector B and dated September 12, 2014 with respect to Contravention Notice No. B012146; and
7. A copy of a document entitled "Kitimat Hotel Employee List".

**Exhibit 3:** A copy of a document entitled "Kitimat Hotel Floor Plan";

**Exhibit 4:** A copy of a document entitled "Kitimat Hotel Police Profile";

**Exhibit 5:** A copy of a document entitled "Kitimat Hotel Employee Working Rule";

**Exhibit 6:** A copy of a document entitled "DANCER AGREEMENT SHEET";

**Exhibit 7:** A copy of an email dated May 18, 2015 from The Owner to the party referred to below as "Inspector A"; and

**Exhibit 8:** A copy of the statement dated February 2, 2015 of the party below referred to as "Exotic Dancer A";

## **PRELIMINARY RULINGS ON EXHIBITS FOR THE FIRST NOEA**

### **Ruling on Admissibility of Exhibit 4**

The Licensee objected to the inclusion of Exhibit 4 in that it referred to previous incidents other than the incident which occurred on October 24, 2014 and which lead to the issuance of the First NOEA. The Licensee submitted that the document was inadmissible as:

- being prejudicial to the Licensee;
- the Licensee was not able to defend itself against the allegations contained in Exhibit 4; and
- Exhibit 4 contains reference to incidents quite different to the matter at hand and therefore not relevant and with no probative value other than possibly to penalty.

I determined that Exhibit 4 was admissible because its contents reflected the motivation for the witness referred to below as "Sgt. A" to perform the licensed premise check on October 24, 2014 and to look behind the curtain of VIP Room number 3 on that night. However, only those portions of Exhibit 4 which referenced the 5 incidents involving exotic dancers were to be included in evidence, the balance of the document was to be redacted.

### **WITNESSES FOR THE FIRST NOEA**

The Branch called RCMP Sgt. A ("Sgt. A") and Liquor Inspector A ("Inspector A"). With the consent of the Licensee, Inspector A testified by video link.

The Licensee called the Owner and the exotic dancer ("Exotic Dancer A") who allegedly committed the act which is the subject of the contravention contained in the First NOEA. With the consent of the Branch, Exotic Dancer A appeared by a telephone link.

### **EVIDENCE - BRANCH - RELEVANT TO THE FIRST NOEA**

#### Evidence of Sgt. A

Sgt. A testified that he has been an RCMP officer since 2001 and was posted to Kitimat, British Columbia in 2014. On cross examination he confirmed that prior to issuing

Police Licensed Premises Check ("LPC") #B158570 (Exhibit 1 tab 2) (the "First LPC"), he had not before in his career issued an LPC for prohibited exotic dancing.

Sgt. A. identified the floor plan of the Night Club set out in Exhibit #3 and confirmed that although it did not reflect the floor plan of the Night Club relevant to the Licence (Exhibit 1 tab 4) it did reflect the layout of the Night Club on the morning of October 24, 2014.

With respect to the events that happened on the morning of October 24, 2014, Sgt. A testified:

- he conducted a walkthrough of the Night Club where he observed 20 to 30 patrons in the bar area,
- he observed no member of the staff monitoring the door to the foyer of the VIP Rooms, nor did he observe a staff member watching the monitor located in the foyer of the VIP Rooms,
- he moved aside the closed curtain of VIP Room number 3 and observed a patron of the Night Club (the "Patron") seated in a chair with Exotic Dancer A kneeling on his lap facing the Patron,
- although the light in this VIP Room was off and although Exotic Dancer A had her back to him, he noted that there was sufficient illumination from the foyer so that he could see that Exotic Dancer A was topless with a bikini bottom,
- he identified himself and asked the Patron to leave the VIP Room,
- outside the VIP Room, he found the Patron apologetic and cooperative, and the Patron stated that as it was his birthday his friends had purchased a private performance with Exotic Dancer A,
- the Patron confirmed that he had been in the VIP Room for a few minutes and that during that time that Exotic Dancer A had been "pressing up against him",
- in a subsequent conversation with Exotic Dancer A, she confirmed to Sgt A. that she was an employee of the Licensee and that she was aware that touching a patron during her performance was prohibited, and
- he subsequently spoke with the manager of the Night Club and served her with the First LPC.

Sgt. A testified that the reason for the prohibition against an exotic dancer touching a patron was the concern for the safety of the exotic dancers, especially for such dancers working in a closed room such as one of the VIP Rooms. He stated that there had been previous incidents involving the Night Club leading to concerns for the safety of the exotic dancers employed by the Night Club. He noted that the manager of the Night Club had been its manager since the summer of 2014 and that he had previously spoken to her about instructing the exotic dancers performing in the Night Club about the prohibition against touching the patrons during their performances.

He confirmed that he had, previous to October 24, 2014, served the manager of the Night Club with two other LPC's involving prohibited dancing by exotic dancers at the establishment. So he believed that the manager of the Night Club was well aware of his concerns about prohibited dancing by exotic dancers employed by the Licensee.

Sgt. A stated that in his opinion the CCTV video surveillance system used by the Licensee was not of sufficient quality. The cameras provided a small camera image with a poor and grainy resolution so that if the lights in the VIP Rooms were turned off, as, he testified, they often were, an observer at the video monitor could not tell what activities were taking place in the room. Nor, he testified, were the cameras in the VIP Rooms pointed at the performing exotic dancer. He noted that it had appeared that the cameras in the VIP Rooms were not being monitored and that it was unclear whether or not the images captured by these cameras were being recorded. It was for these reasons that Sgt. A did the direct inspection of each room rather than use the video monitor to observe the VIP Rooms.

Sgt. A identified among the documents at Exhibit 1 tab 5 a copy of the notes he had made on the morning of October 24, 2014 while speaking to Exotic Dancer A and the Patron. Sgt. A also identified the document entitled "Kitimat Hotel Police Profile" (Exhibit 4) and confirmed that he was the author of that document which he had completed and delivered to the Branch in November of 2014.

On cross examination, Sgt. A confirmed:

- that he believed that Exotic Dancer A was taller than the Patron, but he did not agree that if Exotic Dancer A was kneeling on the Patron's thighs that it would have been quite painful and not at all a pleasant experience for the Patron,
- when questioned about his statement that he was not offered an opportunity by the manager of the Night Club for him to review the footage of the incident the subject of the alleged contravention in the First NOEA, that he had not asked to review the video,
- that there might have been an additional monitor for the video system behind the bar in the Night Club and that a member of the Licensee's staff might have been observing this monitor, but, he testified, that ever since his first visit to the Night Club he had never seen a member of the Licensee's staff use this monitor to observe what was happening in the VIP Rooms and, given the quality of the images on such a monitor, it was his opinion that it would have made it very difficult for such a staff member to properly observe what was happening.

#### Evidence of Inspector A

Inspector A testified that she had been employed by the Branch as a liquor inspector for just under 5 years and was currently assigned to the Surrey regional office. As Liquor Inspector B ("Retired Inspector B") had recently retired, she had assumed responsibility for the issuance of the First, Second and Third NOEA's and the matters related thereto.

Inspector A identified the Licence (Exhibit 1 tab 3) and confirmed that the terms and conditions to which the Licence is subject include the terms and conditions contained in the Guide (Exhibit 1 tab 6). She also identified the redlined floor plan for the Licensee (Exhibit 1 tab 4) and testified that she had required the Licensee to submit an accurate floor plan which properly reflected the existing status quo.

Inspector A identified the First NOEA (Exhibit 1, tab 1) and confirmed that she had issued it. She also identified the copy of Contravention Notice B012149 (the "First Contravention Notice") issued as a result of the issuance of the First LPC. Inspector A testified that this contravention notice was originally issued by Retired Inspector B prior to her retirement.

In her testimony, Inspector A noted:

- the First NOEA set forth the Branch's reasons for pursuing enforcement with respect to the alleged contravention in that the Licensee is responsible for managing and controlling the behaviour of patrons and ensuring the safety of its staff and patrons,
- as exotic dancing was being performed in the VIP Rooms, the Licensee was responsible to ensure that the surveillance cameras installed in the VIP Rooms were monitored so that it could meet this obligation of ensuring the safety of staff, performers and patrons and ensuring that entertainment prohibited under the Licence was not occurring,
- had the Licensee met its responsibility and ensured that such surveillance had been occurring, the alleged prohibited behaviour would have been observed and an intervention action would have taken place by a member of the Licensee's staff prior to Sgt. A entering the VIP Rooms.

Inspector A confirmed in her oral testimony that she believed the recommended penalty of a 4 day suspension appropriate to reinforce the seriousness of allowing prohibited entertainment, with the expectation that the Licensee would treat the enforcement action as an opportunity to further enhance its existing policies and procedures to ensure further voluntary compliance.

#### Prior Similar Facts

The Night Club had come to the attention of the Kitimat RCMP on a number of occasions prior to the incident on October 24, 2014. This previous record, Sgt. A testified, led him on the morning of October 24, 2014 to look behind the curtain of VIP Room 3. In the Kitimat Hotel Police Profile (Exhibit 4) there is reference to four previous occasions relevant to the matter at hand where the Kitimat RCMP were required to attend the Night Club. The relevant entries from Exhibit 4 are as follows:

1. 2014-07-19 Exotic dancer reports being touched by patrons while at Kitimat Hotel - fled establishment and caused a disturbance at a nearby campground.
2. 2014-08-29 Exotic dancer sitting on lap of patron and resting her legs over the patron's shoulder.
3. 2014-09-26 Police witnessed an exotic dancer in VIP area grinding male patron in groin area with buttocks.

4. 2014-10-05 Police witnessed an exotic dancer on stage kneel in front of a male patron and rub her breasts in his face.

Following the incident set out above in paragraph 2, Retired Inspector B prepared and submitted a No Enforcement Action Recommended Report (Exhibit 2). The report states that Retired Inspector B met with representatives of the Licensee to review the rules concerning exotic dancers and inter-patron actions and the penalties which licensees would face when these rules were contravened. The report notes that Retired Inspector B advised these representatives that if another incident were to be reported involving the contravention of these rules that an enforcement action would result.

With respect to the incident referred to in paragraph 4 above, Police License Check B057121 (Exhibit 2) was issued and as a result of this, Retired Inspector B issued Contravention Notice B012148 (Exhibit 2). However, no action was taken with respect to this contravention notice.

#### **EVIDENCE—LICENSEE RELEVANT TO THE FIRST NOEA**

##### Evidence of Exotic Dancer A

Exotic Dancer A testified by telephone. She identified her written statement dated February 2, 2015 (Exhibit 8), confirmed that it was correct, that she had signed this document, and that her signature was witnessed by a party purported to be the Patron.

Exotic Dancer A testified that she had two occupations. The first is that she is a certified ESL assistant working at elementary schools and the second is as an exotic dancer working in establishments throughout British Columbia.

Although she has been an exotic dancer for about three years, Exotic Dancer A testified, October 24, 2014 was the first time she had worked at the Licensee. Prior to this performance, she had never before been sanctioned for touching a patron during her performance and that she was well aware of the prohibition on dancers touching their patrons during their performances. She confirmed that although she was not instructed by the Licensee as to how she should dance in the VIP Rooms, representatives of the Licensee had confirmed orally with her the prohibition against the touching of patrons

during performances, and she had signed a contract with the Licensee which included this prohibition. She advised that she was well aware that if she was caught touching a patron, that she would immediately be terminated.

With respect to the events that occurred on the morning of October 24, 2014, Exotic Dancer A testified:

- she has started her shift at 6:00 PM the night before and had ended it at 4:00 a.m. the following morning,
- she was not drinking with the customers of the Night Club during her shift other than some wine with the other exotic dancers at dinner,
- the Patron's friends had offered to pay the \$50 cost to buy him a dance from her in the VIP room number 3,
- this room is very small, it contains a six foot tall cabinet at the entrance for the dancer's clothes, a coffee table, and two big armchairs,
- one of these armchairs was beside the cabinet and was the one in which the Patron was seated,
- the other armchair was located on the other side of the room facing the armchair in which the Patron sat,
- there are no windows in a VIP Room and there is no other form of light other than the standing lamp which is always left on, as it was, on the morning in question,
- if this light is not left on, the room would be completely dark and neither the Patron nor the exotic dancer would be able to see anything,
- she had completely closed the curtain to the VIP room as otherwise there would have been too much distraction from other customers coming in and out of the other VIP rooms,
- she had been performing her dance for a few minutes when Sgt. A "ripped" open the closed curtain and ordered the Patron to leave,
- Sgt. A informed her that she had been violating the rules as she had touched the Patron,
- at the time of Sgt. A's entry into the room, she was kneeling on the arms of the large arm chair facing the Patron who was sitting in the chair facing her,
- that at no time during her performance did she touch the Patron or did the Patron touch her,

- she did not “press up against’ the Patron and she did not hear the Patron state to Sgt. A that the Exotic Dancer A was “pressing up against me”,
- when Sgt A. stood in the doorway to VIP Room 3 he could only see a portion of the armchair in which the Patron sat as the cabinet partially blocked the view, and that, therefore, the Patron would not have been visible to Sgt A from the doorway,
- if the light in VIP Room 3 was off, as testified by Sgt. A, because there was no other source of light in the room, it would have been difficult for Sgt. A to observe whether or not she was touching the Patron, and
- as the Patron was a 20 year old boy of a very small frame and 5 feet 6 inches in height, while she is a full sized woman, being 5 feet 8 inches tall, if she were in fact kneeling in the lap of the Patron as claimed by Sgt. A, it would have been extremely uncomfortable for the Patron as he would have had to have supported Exotic Dancer A’s full body weight.

Exotic Dancer A confirmed that she had signed a Dancer Agreement Sheet similar to that included in Exhibit 6.

On cross examination, Exotic Dancer A testified:

- the foyer outside VIP Room number 3 was very dark with their being possibly one light fixture in the foyer,
- that there was a video camera in VIP Room number 3 pointed at the customer, but she didn’t know if the Licensee’s staff were watching what was occurring in the VIP Rooms through the monitors attached to the video camera system, but she had certainly seen the police looking at these monitors before,
- she was under the impression that the video images captured by the video camera system were being recorded by system, but she did not ask either the Owner or the manager of the Licensee to review this video to ascertain what had in fact happened in VIP Room number 3 as she didn’t think she had done anything wrong, and
- she was not aware of the Guide and confirmed that the management of the Licensee had never shown it to her directing her specifically to the provisions in the Guide relating to exotic dancers.

### Evidence of the Owner Relevant to the First NOEA

The Owner testified that in October of 2014 the policy of the Licensee was that there was not to be any touching of patrons by exotic dancers performing in the VIP Rooms, nor were there to be any pictures taken. There are signs indicating this no touching policy in the VIP Rooms and on the glass door leading to the foyer of the VIP Rooms, he testified.

The Owner further testified:

- Exotic Dancer A had worked for the Licensee prior to October 24, 2014 and neither on October 24, 2014 nor at any time previous to that time had the Owner received complaints about Exotic Dancer A touching patrons,
- there was a sign above the door to the foyer of the VIP Rooms stating "No Contact with Dancers". The Licensee's policy concerning lap dancing is that it can be close, but no touching. If a dancer or a patron breached this policy, the Licensee would fire the exotic dancer, and if a patron breached this policy, the patron would no longer be allowed into the Night Club,
- each of the VIP Rooms has a camera with its images being seen on monitors so that staff can view what is going on. One of these monitors is in the bar of the Night Club showing all 12 video cameras on the system on the monitor screen so that the bar tender and bouncer can see clearly what is happening in the VIP Rooms. It is his responsibility and that of the bartender to monitor the surveillance cameras. Usually he doesn't check the VIP Rooms during the performance as he doesn't wish to disturb the patrons. He checks the monitors,
- the Licensee's policy is that the floor lamp in the VIP Rooms is always on and that the customers want it that way as otherwise there would not be sufficient light to see the dancer's performance,
- when he is on duty at the Night Club, he walks through the establishment, watching the monitors, checking to ensure a customer is not drunk, and making sure there are no minors in the establishment. The Licensee has a policy to check patrons who appear to be young a few times, something The Owner does regularly, and
- he didn't have any discussions with Sgt. A after Sgt. A finished his dealings with the Patron and Exotic Dancer A in VIP Room 3.

On cross examination, the Owner testified that:

- after the incident with Sgt. A, the Owner showed Exotic Dancer A the rules for the Licensee and asked her if she had broken any of the rules, she denied that she had done anything wrong, so the Owner suspended her until the matter could be clarified, and
- although the Licensee's video surveillance system stores the recorded images for two days, he didn't remember if he had reviewed the video captured and stored from VIP Room 3 on the morning of the incident as he felt under huge pressure as Sgt. A was in the Night Club for 5 hours before the incident.

The Owner identified the document entitled "Kitimat Hotel Employees Working Rule (sic)" (Exhibit 5) ("List of Rules") as being one that he had prepared following a meeting with Retired Inspector B on December 4, 2014. At that meeting, the Owner had advised Retired Inspector B that the Licensee had hand written policies concerning its employees which the Owner showed to each new employee when the employee was hired, but that these policies had not been formally reduced to writing in a printed document. Retired Inspector B requested that he do so and the Owner testified that the List of Rules was this document.

The Owner testified that the List of Rules constituted a written list of working rules for employees of the Licensee, a copy of which document every employee of the Licensee had to sign to acknowledge receipt. This document contains three categories listed as "Manager", "Bouncer and Bartender", and "Dancer". Under the Dancer category, items 9, 10 and 11 state that "Make sure that the dancer sign the contract and follow the liquor control law (sic)", "Dancer never touch the customers when they do stage dance or VIP dance" and "Keep VIP room light always on", respectively.

The document entitled "Dancer Agreement Sheet" (Exhibit 6) ("Dancer Sheet") the Owner testified that he prepared in September of 2014 and subsequently modified it in April of 2015. The Dancer Sheet states in item 23 under the heading "VIP", "Girls may sell the dance as a LAP DANCE, but the customer must have NO contact with the dancer". The document in item 5 under the heading "FINES" states "Broken the liquor law and rules (touch customer, turn off light in VIP)". As well, this document contains

under the heading "NOTES" a paragraph stating "Dancer MUST follow the rules as follow (forced by police and liquor control board)(sic)" which paragraph then contains:

- item 1 which states "Make sure the dancer follow the liquor control law (sic)",
- item 2 which states that "Dancer never touch the customers when they do stage dance or VIP dance.",
- item 3 which states "Keep VIP room light always on.", and
- item 7 which states "Never do anything that is against the Liquor Control Law."

On cross examination, the Owner was shown a record of the compliance meeting that he had had with Retired Inspector B on December 4, 2014 (Exhibit 1, tab 9), he confirmed his signature on the bottom of this document, and testified that following this compliance meeting he had prepared Exhibit 5 because Retired Inspector B had requested that the Owner write out some working rules for the Night Club. When asked if he could produce the handwritten documents which he had used prior to the production of Exhibit 5, he testified that he had thrown the handwritten documents away after the production of Exhibit 5 and that prior to his meeting with Retired Inspector B on December 4, 2014, there had been no typewritten document setting out the rules the Licensee expected exotic dancers to follow when working in the Night Club.

When it was pointed out to the Owner on cross examination that the typewritten document produced as Exhibit 6 appeared to have the date of September 23, 2014 on it he testified that Exhibit 6 was on his computer and when a new exotic dancer came to the Night Club, the Owner printed off a copy of Exhibit 6. When asked why the Owner didn't produce a copy of this document for Retired Inspector B at their compliance meeting on December 4, 2014, the Owner testified it was because Retired Inspector B did not ask for this document or any other documents.

The Owner on cross examination was directed to paragraph 23 in Exhibit 6 which states "Girls may sell the dance as a LAP DANCE, but the customer must have NO contact with the dancer" and was asked what instructions the Licensee gave to the exotic dancers it employed to ensure that they complied with this paragraph, as it would appear difficult for an exotic dancer to perform a lap dance without touching the customer. The Owner in his response was adamant that the instructions given to the

exotic dancer employees of the Licensee were that no matter how close they came to the customer, they were not permitted to touch the customer.

Similarly, the Owner was referred on cross examination to paragraph 11 of Exhibit 6 which states "Drinking with customer's (sic) is tolerated but if this is abused you will be fined." and was asked what instructions were given to the Licensee's exotic dancer employees with respect to this paragraph. He responded that this paragraph was suggested by the agent which supplies exotic dancers to the Licensee and the Owner testified that he didn't quite understand what it means, but suggested that it might mean that that other than the exotic dancers who are permitted to drink with customers who buy them a drink as long as they don't have too much to drink, members of the Licensee's staff are prohibited from drinking with the customers of the Night Club. When asked if he was not sure of the reasoning behind paragraph 11 of Exhibit 6 why he didn't ask Retired Inspector B for her thoughts at the compliance meeting on December 4, 2014, the Owner responded that by the time of this compliance meeting, he did understand the reason for this paragraph.

The Owner testified that the provisions of the Dancer Sheet were the policies of the Licensee on the morning of October 24, 2014 and that he had shown the Dancer Sheet to Exotic Dancer A prior to October 24, 2014.

The Owner testified that it was his responsibility and that of the Licensee's bartender to enforce the hand written rules to which the Licensee's employees were subject on October 24, 2014. However, in November 2014, the Licensee hired a new bouncer whose previous occupation was that of a police officer and whose responsibility in his new role as a bouncer for the Licensee was to explain the rules to the Licensee's employees and to enforce them.

The Owner testified that he had a meeting with Sgt. A and Inspector A on February 17, 2015. Following this meeting, by way of an email dated May 18, 2015 (Exhibit 7), he emailed these parties with a set of documents reflecting the improvements that the Licensee was making in the Night Club with respect to compliance with the Act, the Regulation, the Guide and the Licence. In his email he asked the parties to whom the email was addressed to review the attachments and to approve the same.

The first document attached to this email (Exhibit 7), the Owner identified as a page containing a series of symbols ("Symbols Page"). Included among these symbols were those which indicated that no pictures were to be taken, no weapons were permitted, no fighting was permitted, and that no smoking was permitted. An additional symbol, a copy of which was attached above the glass door between the bar area of the Night Club and the foyer leading to the VIP Rooms, the Owner testified, clearly expressed the Licensee's policy that there was to be no physical contact between patrons and the exotic dancers while the latter were performing.

Following the Symbols Page was a document entitled "Kitimat Hotel House policy" ("House Policy"). The Owner confirmed that he had prepared this document.

Following this document was one entitled "Kitimat Hotel steps on improvement". The Owner confirmed that he had prepared this document, as well, to reflect the steps the Licensee was taking to make improvements in its operations. He highlighted item 8 in this document which stated that the Licensee had ordered a new HD video camera system following the request of Inspector A that the Licensee make the video recording system clearer, including the camera resolution from the VIP Rooms.

On cross examination, the Owner acknowledged that he had seen a copy of the Guide (Exhibit 1 tab 6) and that the last time that he had read it was a couple of years ago. He acknowledged that on page 39, 40 and 41 of the Guide the Branch sets out the rules with respect to the activities of exotic dancers during their time working at the Night Club, but said that he had not shown these provisions to either the exotic dancers or to the Licensee's other employees. The reason for this was that when he had a couple of years ago shown these provisions to employees then working for the Licensee, they hadn't properly understood them, so that after that time he had instead communicated to these employees, his understanding of these rules.

The Owner confirmed on cross examination that he had obtained his Serving It Right certificate a couple of years ago. He was shown the program manual from Serving It Right and testified that he had not instructed his staff based upon the sample house policies contained in the program manual, but that he had provided a copy of this document to each member of the Licensee's staff other than the exotic dancers.

He was shown a copy of the First LPC (Exhibit 1 tab 2) and confirmed that it had the signature of the manager of the Night Club on October 24, 2014 (the "Night Club Manager"). When asked on cross examination why the Night Club Manager was not present to testify as to the events that occurred on October 24, 2014, the Owner testified that he had asked her to attend, but that she had gone to Vancouver as her father was sick, and so she couldn't be present. However, the Owner confirmed that the Night Club Manager had been fired after Christmas in 2014 as she was erratic in her work habits.

### **SUBMISSIONS – BRANCH RELEVANT TO THE FIRST NOEA**

In its submissions, the Branch noted the evidence of Sgt. A to the effect that on October 24, 2014:

- he had observed Exotic Dancer A with her legs on the knees of the Patron in VIP Room #3,
- the lights were out, but that the room was illuminated somewhat from the foyer when he opened the curtain halfway and that there was no doubt in his mind that Exotic Dancer A was kneeling on the thighs of the Patron, and
- the Patron was apologetic and cooperative and told Sgt. A that Exotic Dancer A was "pressing up against me" during the lap dance that the Patron's friends had purchased for him because it was his birthday.

The Branch highlighted Sgt. A's testimony about public safety concerns as a result of the VIP Rooms being unmonitored, as although the VIP Rooms each had video cameras, in all of his visits to the Night Club, Sgt. A testified that he had never observed the Licensee's staff viewing the video monitors to which these video cameras fed. In addition, Sgt. A testified that the video images on the monitors were of poor quality so that even if a staff member had been watching the video, the staff member would have had difficulty seeing what was going on in the VIP Rooms. It was because of these deficiencies that Sgt. A had to go to VIP Room #3 and to open the curtain to see what form of dancing was occurring.

The Branch noted that the evidence is that the camera system in operation at the Night Club on October 24, 2014 had the capability of storing the recorded images. However, Sgt. A was not offered by the management of the Night Club the opportunity to view the stored video following the incident on October 24, 2014 and a copy of this video was not entered into evidence at the hearing. Nor is there any evidence that the Owner did or did not view any such video if it existed.

The Branch also pointed out the similar fact evidence in Exhibit 4 to the effect that prior to the incident on October 24, 2014, there had been reported the occurrence of similar prohibited acts happening in the Night Club of the same nature as that alleged to have occurred on October 24, 2014.

The Branch noted that although the Licensee tendered documents as evidence of the rules in place at the Night Club and through the Owner gave evidence of the Licensee's efforts to enforce these rules, the evidence of the Owner on these documents was contradictory and suggested that neither he, nor, by inference, the balance of the staff of the Licensee understood what these documents meant. Nor did the documents tendered by the Licensee provide any reference to the rules involving adult entertainment in the Guide.

The Branch also noted that Exotic Dancer A is still working at the Night Club. To that end, she had a vested interest in the outcome of this hearing and cannot be considered an objective witness.

The Branch submitted that the Owner is the directing mind of the Licensee, he was present and in charge of the Night Club on the morning of October 24, 2014, and that, therefore, the defence of due diligence is not in law available to the Licensee. Moreover, the quality of staff training and the efficacy of the systems put in place by the Licensee on October 24, 2014 to ensure compliance with its staff with the rules set out in the Act, Regulation and Guide are well below the threshold level required in law to meet a due diligence defence.

The Branch submitted that the elements of the alleged contravention in the First NOEA have been proven on the applicable civil standard of a balance of probabilities and that a penalty of a 4 day suspension as recommended is warranted.

### **SUBMISSIONS – LICENSEE RELEVANT TO THE FIRST NOEA**

The Licensee submitted that it is well aware that the reasoning behind section 50 of the Act is concern for the safety of dancers and patrons. In the 10 to 12 years prior to 2014, there were no allegations of breaches of section 50 Act made against the Licensee. Rather it appears that the close scrutiny of the Licensee and the activities being carried on at the Night Club appear to have started with Sgt. A being transferred to Kitimat.

The Night Club, the Licensee noted, has 12 video cameras, 7 of which are in the area of the VIP Rooms. There are signs indicating that there is to be no touching between an exotic dancer and a patron in both the bar area and the VIP Rooms area of the Night Club. There is a monitor in the foyer of the VIP Rooms and another behind the bar in the Night Club which shows all camera feeds.

The Licensee submitted that Exhibit 6 was created based upon a precedent document in the Owner's computer system and that this document was amended in September of 2014. The Owner testified that it is the Licensee's policy that if an exotic dancer touches a customer, she is fired, and, if a customer touches an exotic dancer, he is asked to leave and is subsequently banned from the Night Club.

The Owner testified that the symbol signifying that there is to be not touching between a patron and a dancer in the Night Club has been posted in various areas of the Night Club for quite some time. This prohibition was included in the hand written rules that were in place at the Night Club prior to December 2014 and that these rules were enforced by the Owner and the bartenders at the Night Club.

The Owner testified that after he had received the First LPC that he had met with Exotic Dancer A and had asked her to recount what had happened and from this conversation he was satisfied that Exotic Dancer A had not touched the Patron. However, he had asked Exotic Dancer A to stop working until the matter was sorted out.

The Licensee submitted that there were policies and procedures with respect to dancers and the prohibition against the dancer touching a patron on October 24, 2014 and that these policies were in place and enforced on that date.

The evidence of Exotic Dancer A is highly credible, the Licensee submitted, she currently holds two jobs, one of which is a certified ESL assistant to elementary schools. Her evidence was that she was given a copy of Exhibit 6 and its contents were explained to her. She was well aware of the no touching policy in both British Columbia and Alberta and that it was a "very strict rule" and that she would be terminated if she ever breached it. She also testified that the no touching rule was also present in the agreement between her and the agency through which she works.

The Licensee in submissions suggested that Exotic Dancer A's description of the layout of VIP Room #3 was creditable. She explained that on opening the curtain, on the left hand wall, one would first see a cabinet, and then a chair where the patron would sit, and that chair faced the opposite wall. At the time Sgt. A opened the curtain, he would only been able to see the Patron's legs and part of the back of Exotic Dancer A, because his view would have been obstructed by the cabinet. He would not have been able to see that Exotic Dancer A's arms and knees were touching the Patron's chair. As well, if the standing lamp in the room had been off, Sgt. A would not have been able to see anything. It made no sense that this light would have been off, as then the Patron would not have been able to see anything either.

Most importantly, the Licensee submitted, it would be painful to have a dancer ostensibly taller than the Patron kneeling on the Patron's thighs.

Exotic Dancer A prepared her written statement (Exhibit 8) and in her testimony confirmed its contents was true.

The Licensee submitted that Exotic Dancer A was aware of the video monitor behind the bar, but that she didn't ask to see the recorded camera footage as she didn't think she had done anything wrong.

In summary, the Licensee submitted, the Owner's and Exotic Dancer A's version of events on the morning of October 24, 2014 are credible and the Branch has, therefore, failed to prove the elements of the contravention.

Finally, the Licensee submitted, in any determination of penalty account should be taken of the subsequent compliance meetings between the Owner, Inspector A, Retired Inspector B and the local RCMP detachment concerning the Licensee's diligent attempt to voluntarily comply with the rules.

## **REASONS AND DECISION RELEVANT TO THE FIRST NOEA**

### **Contravention**

The First NOEA (Exhibit 1, tab 1) was issued following the issuance of the First Contravention Notice (Exhibit 1, tab 2) which, in turn, resulted from the issuance of the First LPC (Exhibit 1, tab 2). In the First NOEA, the Branch alleges that the Licensee was in breach of section 50 of the Act as a result of Exotic Dancer A touching the Patron during her performance in VIP Room 3 in the early morning of October 24, 2014.

The evidence to support the Branch's allegation is provided by Sgt. A who testified that on the night in question he opened the curtain of VIP Room 3 and saw Exotic Dancer A kneeling on the lap of the Patron. Sgt. A testified that although the standing lamp in VIP Room 3 was not turned on, that he had enough light from the foyer of the VIP Rooms to observe Exotic Dancer A and the Patron.

Sgt. A further testified that he subsequently spoke with the Patron after he had left the VIP Room 3 and the Patron had told the officer that Exotic Dancer A had been "pressing up against me".

The Licensee denied the Branch's allegation. The Licensee pointed to the evidence of Exotic Dancer A who denied that she had touched the Patron as alleged by the Branch. In both her oral evidence and in her written statement (Exhibit 8) she was adamant that she was well aware of the "no touching policy". Rather, she testified, she was kneeling

on the arms of the chair in which the Patron was sitting while she was performing the dance purchased for the Patron by his friends.

In support of her claim that she did not touch the Patron during her performance, Exotic Dancer A noted in both her oral testimony and written statement (Exhibit 8) that:

- as the Patron is of a very small body frame and as she is a full sized woman, it would have been extremely uncomfortable for the Patron if she was, as alleged by Sgt. A, kneeling on the Patron's lap,
- given the configuration of the furniture in VIP Room 3, there was a large piece of furniture between the entrance to VIP Room 3 where Sgt. A was standing and the Patron's chair, which piece of furniture partially blocked the view of Sgt. A enabling him to see only the legs of the Patron and Exotic Dancer A's back,
- therefore, Sgt. A was from his position at the door unable to see that Exotic Dancer A was, in fact, kneeling on the arms of the chair in which the Patron was sitting, not on his lap,
- that she was not kneeling on the lap of the Patron and was not touching him, and
- the Patron had never before been for a lap dance and was very taken aback and confused with the commotion and, therefore, would have agreed to whatever Sgt. A was saying, which accounted for the Patron's statement that Exotic Dancer A was "pressing up against me".

In addition, Exotic Dancer A contradicted Sgt. A's evidence when she testified that the light was on in VIP Room 3 during the dance in question as otherwise it would have been completely dark in the room and the Patron would not have been able to see the dance nor would she have been able to properly perform it.

The written statement (Exhibit 8) of Exotic Dancer A states:

I reassure you I did not "press up against" the client that evening he was simply confused and nervous under (Sgt. A) abrupt entry and interrogation.

This written statement was purportedly signed by Exotic Dancer A on February 2, 2015, and her signature on this written statement was purportedly witnessed by the Patron on the same date.

For me to find that the Licensee contravened section 50 of the Act as alleged by the Branch, I must find on a balance of probabilities that Exotic Dancer A during her dance in VIP Room 3 on the morning of October 24, 2014 touched the Patron. I am unable to make that finding.

I found both Sgt. A and Exotic Dancer A to be truthful and compelling witnesses, and in the absence of independent supporting evidence, such as images from video cameras, I can only attribute the discrepancies in their evidence to differences in perspective as to what happened in VIP Room 3 on the morning of October 24, 2014.

From the testimony of both these witnesses and whether or not the light in VIP Room 3 was on or off, it is clear that the lighting in the room was dim at the time of the incident. As well, it is clear that there was furniture in the room which was capable of blocking the view of Sgt. A, making it difficult for him to see completely the chair in which the Patron was sitting.

I therefore find it quite possible that Exotic Dancer A was in fact kneeling on the arms of the chair in which the Patron was sitting, was not kneeling on the Patron's lap, and therefore was not touching the Patron as alleged by Sgt. A in his evidence.

As to the Patron stating to Sgt. A that Exotic Dancer A was "pressing up against me", I find that most likely occurred, but I am wary of putting too much weight on that statement as confirming that Exotic Dancer A was in fact touching the Patron. The Patron when he made this statement was clearly confused and ill at ease when being interrogated by a police officer at an early hour of the morning in what he might have considered to be a compromising situation. This caution is even more relevant if in fact the Patron witnessed the statement of Exotic Dancer A in which she denied touching him and in which she suggested that when this statement was made the Patron was simply confused and nervous.

I therefore find on the evidence before me that the Branch has not proven on a balance of probabilities the occurrence of the contravention as alleged in the First NOEA.

Having made that finding, I dismiss the contravention alleged against the Licensee in the First NOEA.

### **ALLEGED CONTRAVENTION AND PROPOSED PENALTY FOR THE SECOND NOEA**

The Branch's allegations and proposed penalties for EH14-162 are set out in the Notice of Enforcement Action dated January 5, 2015 (the "Second NOEA"). In the Second NOEA, the Branch alleges that on October 28, 2014 the Licensee contravened section 43(2)(b) of the Act by permitting an intoxicated person to remain in the Night Club.

The proposed enforcement action outlined in the Second NOEA is a 4 day suspension of the Licence. Item 11, Schedule 4 of the Regulation sets out a range of penalties for a first contravention of this type as being a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

### **RELEVANT STATUTORY PROVISIONS FOR THE SECOND NOEA**

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

The relevant portion of section 43 of the Act provides in section 43(2)(b):

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

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

Schedule 4  
Enforcement Actions

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

### ISSUES FOR THE SECOND NOEA

The issues for the Second NOEA are:

4. Did the contravention occur?
5. If so, has the Licensee established a defence to the contravention?
6. If the contravention is proven, what penalty, if any, is appropriate?

### EXHIBITS FOR THE SECOND NOEA

**Exhibit 1:** Branch Book of Documents, tabs 1 to 9;

**Exhibit 10:** A copy of a the Serving it Right Certificate of the witness below described as the "Bartender"; and

**Exhibit 11:** A copy of a statement dated May 12, 2015 of the witness below described as the "Bartender".

### WITNESSES FOR THE SECOND NOEA

The Branch called RCMP Constable A ("Constable A") and, with the consent of the Licensee, by video link, Inspector A.

The Licensee called the Owner and the exotic dancer ("Exotic Dancer B") who was the party who was allegedly intoxicated and permitted to remain in the Night Club leading to the contravention alleged in the Second NOEA. In addition, the Licensee called the bartender (the "Bartender") and the bouncer (the "Bouncer") both of whom were on duty at the Night Club when the contravention alleged in the Second NOEA is said to have occurred.

## **EVIDENCE - BRANCH - RELEVANT TO THE SECOND NOEA**

### Evidence of Constable A Relevant to the Second NOEA

Constable A testified that she had been an RCMP Constable at the Kitimat RCMP detachment for 2 ½ years and was on duty and in uniform on October 28, 2014 when at approximately 1:45 a.m. she conducted a licensed premises check at the Night Club.

With respect to the morning of October 28, 2014, Constable A testified:

- upon entry into the Night Club she noted a female on the patio of the Night Club who was yelling and being quite aggressive with a couple of male patrons. Constable A recognized the female as Exotic Dancer B and asked her if everything was OK. Exotic Dancer B claimed that she was OK and that nothing was wrong,
- she then continued with her licensed presence check through the balance of the Night Club and noted that the establishment was not very busy and not terribly noisy,
- she then again heard and saw Exotic Dancer B yelling and telling male patrons to leave her alone and pushing against them. Exotic Dancer B was now in a different area of the Night Club near a sofa close to the bar of the Night Club,
- she approached Exotic Dancer B and again inquired if everything was OK concerned that the male patrons might be harassing Exotic Dancer B. Exotic Dancer B suddenly changed her mood and started laughing and telling Constable A that nothing was wrong,
- At that time, Constable A noticed that Exotic Dancer B was unsteady on her feet and slurring her words together when yelling,

- she then noted that on the floor beside a couch in the bar area of the Night Club was what looked like a very large purse. Sitting on top of this purse in plain view was a bottle of alcohol. The bottle of alcohol was a 375 ml bottle of Royal Reserve rye whiskey (the "Bottle of Liquor") which was  $\frac{1}{4}$  full. When Constable A asked Exotic Dancer B if she owned this purse, Exotic Dancer B in a slurred reply after stumbling up to the couch denied its ownership,
- she then asked the Owner if he knew the owner of the purse and Exotic Dancer B thereupon grabbed at the purse and asked Constable A to speak to her privately in one of the VIP Rooms,
- in VIP Room 3, Exotic Dancer B took possession of the purse with Constable A retaining the Bottle of Liquor. Constable A asked Exotic Dancer B for her identification, and Exotic Dancer B proceeded to rummage through her purse looking for her wallet,
- she noted that while walking to the VIP Rooms, Exotic Dancer B was unsteady on her feet and while rummaging through the purse, Exotic Dancer B appeared very intoxicated,
- she explained to Exotic Dancer B that she was not permitted to have in her possession in the Night Club liquor that was not sold to her by the Night Club and Constable A expressed concern that Exotic Dancer B was much too intoxicated to be in the Night Club, whether Exotic Dancer B was working or not. Following this comment, Exotic Dancer B became upset and advised Constable A that if her boss found out, she would be fired,
- she then left Exotic Dancer B and found the Owner in another part of the Night Club. Constable A gave the Owner the Bottle of Liquor which she had taken from Exotic Dancer B and expressed concern to the Owner that one of the Licensee's exotic dancers had been in possession of the Bottle of Liquor, was really intoxicated, and given the state of her intoxication was definitely not able to care for herself,
- she then advised the Owner that she was going to write up an LPC ticket against the Licensee as the Licensee had permitted an intoxicated person to remain in the Night Club possessing liquor which had not been sold to this person by the Licensee. Constable A advised the Owner that she had to go out to her car to write the ticket and that she would be back,

- while she was in her car in the parking lot writing the ticket, the Owner came out of the Night Club, glanced at Constable A and locked the door of the Night Club. Constable A got out of her car, banged on the door, but no one answered to permit her entry to the Night Club, and
- at about 7:30 p.m. on October 28, 2014, Constable A went back to the Night Club and served Police Licensed Premises Check B 057242 (the "Second LPC") (Exhibit 1, tab 2) on The Owner.

Constable A identified a copy of the notes she had written while she was in the Night Club on the morning of October 28, 2014 and a copy of the occurrence report that she had written when she returned to the RCMP detachment that evening (Exhibit 1 tab 5).

On cross examination:

- when asked how Constable A had formed the impression that Exotic Dance B was very intoxicated, Constable A testified that:
  - it started with Exotic Dancer B's interaction with the male patrons, yelling at them to get away from her, that she was pushing them, that she was slurring her words, and that she was unsteady on her feet,
  - when Constable A spoke with her, Exotic Dancer B had an odour of liquor on her breath,
  - watching Exotic Dancer B walk to VIP Room 3, Constable A noticed Exotic Dancer B was unsteady on her feet,
  - in the VIP Room, Exotic Dancer B sat down with a plop, was swearing, and couldn't understand simple tasks she was being asked to do such as to produce her identification,
- Constable A confirmed that she at no time searched through the purse of Exotic Dancer B,
- when asked if the fact that Exotic Dancer B had had her tongue pierced with a large ball a couple of days before October 28, 2014 could explain why Exotic Dancer B was slurring her words, Constable A testified that she didn't have an opinion as to whether or not this tongue piercing might have resulted in the slurred speech Constable A observed from Exotic Dancer B,
- Constable A confirmed that her notes (Exhibit 1, tab 5) included reference to a "middle lip piercing", but that she couldn't recall noticing that Exotic Dancer B

had a tongue piercing. Nor did she recall Exotic Dancer B stating that the reason she was slurring her words were that she had just had her tongue pierced. Rather, Constable A recalled that Exotic Dancer B was upset because she didn't want to get fired when Constable A spoke to her about her level of intoxication and the Bottle of Liquor,

- Constable A confirmed that she had asked the Owner to take care of Exotic Dancer B, but she agreed that she hadn't seen the Owner do so,
- Constable A confirmed that at no time in the morning of October 28, 2014 did she see Exotic Dancer B drink from the Bottle of Liquor and that the Bottle of Liquor at all times had its top on,
- Constable A also confirmed that at no time did she administer a breathalyzer test to Exotic Dancer B as it was not part of her practice to do so in a liquor establishment and that the only evidence she had of Exotic Dancer B's intoxication was physical evidence,
- Constable A stated that she had before seen Exotic Dancer B at the Night Club prior to the evening of October 28, 2014 and agreed that Exotic Dancer B is known to be an outgoing, happy and bubbly personality,
- When asked how Constable A knew that the Bottle of Liquor had not been sold to Exotic Dancer B, Constable A testified that to her knowledge, full bottles of liquor were not sold by the Licensee at the Night Club, and
- Constable A confirmed that prior to October 28, 2014, there had not been cause to sanction either Exotic Dancer B or the Licensee concerning the behaviour of Exotic Dancer B.

#### Evidence of Inspector A Relevant to the Second NOEA

Inspector A identified the Second NOEA (Exhibit 1 tab 1) and confirmed that she had issued the Second NOEA.

In her testimony, Inspector A identified Contravention Notices B012150 and B012151 (Exhibit 1 tab 1) issued in response to the Second LPC. Contravention Notice B012150, she stated, referenced two contraventions, a contravention of section 43(2) of the Act noted as "Drunkness" and a contravention of section 42(2) of the Regulation noted as "Consumption of liquor in licensed premises". Contravention B012151 contained only

one contravention referencing section 67(3)(b) of the Act noted as “Refuse to permit entry to a peace officer”.

Inspector A in her testimony confirmed that the Second NOEA only deals with one of the contraventions noted in Contravention Notice B012150, namely the alleged contravention of section 43(2)(b) of the Act.

She advised that the reasons for pursuing enforcement was the concern that Exotic Dancer B was permitted to remain in the Night Club having been observed by Constable A to have been intoxicated and being in possession of an entire bottle of liquor. She noted that in order to ensure the safety of Exotic Dancer B if she was in fact intoxicated as alleged, she should have been removed from the Night Club while she was awaiting assistance or a ride home.

The minimum four day suspension is considered appropriate and recommended, she confirmed, as the Licensee is responsible for the patrons in its establishment and the Licensee through the Owner was negligent by not removing a person showing signs of intoxication. The suspension is warranted to reinforce the seriousness of permitting an intoxicated person to remain on the premise and to ensure future voluntary compliance.

Inspector A testified that the Guide is created to add terms and conditions to a licensee’s licence and goes into detail about certain policies giving licensees guidelines written in plain language concerning how to apply the provisions of the Act and the Regulation in order for licensees to better understand how to operate their establishments and how to train their employees.

Technically, she testified, everything in the Guide is a term and condition of a licence. It is published on the Branch’s website and updated regularly to deal with any required changes or clarifications.

Inspector A was directed to page 34 of the Guide which includes the following provision under the heading "Over-service and intoxicated patrons":

You must not let a person who is apparently under the influence of alcohol or drugs enter or remain in your establishment or at a catered event. You must refuse the person service, have the person removed and see that he or she departs safely.

And includes the following assistance to licensees to assist them in determining whether or not such a person is intoxicated:

Physical signs of intoxication:

- red or bloodshot eyes
- dishevelled appearance
- odour of liquor
- unsteadiness on feet
- staggering
- exaggerated care in walking
- slurred speech
- fumbling with small objects such as money

Mental signs of intoxication:

- lack of alertness
- exaggerated emotions
- aggression
- irrationality

Inspector A was directed to page 41 of the Guide which provides:

#### Entertainer Conduct

While professional entertainers may consume liquor in the establishment, employees who provide entertainment (such as a house DJ or house band) may not do so during working hours. As with patrons, it is the responsibility of the licensee to ensure that professional entertainers do not become intoxicated. If an

entertainer becomes intoxicated they must be refused service, removed from the premises and the licensee must see that they depart safely from the establishment. An intoxicated entertainer must not be allowed into the licensed establishment.

And she confirmed that exotic dancers were professional entertainers in the context of the above provision, and that while they are able to consume liquor in a licensed premises while they are providing entertainment, they may not do so to the extent that they became intoxicated.

Inspector A was also directed to page 48 of the Guide, under the heading "Entry of Liquor Inspectors and Police Officers", and noted it read as follows:

It is your responsibility as a licensee to fully cooperate during inspections. You must give liquor inspectors and police officers immediate access to all areas of your establishment, or a catered event, on request. A liquor inspector will show you their official identification if you request; however, you must not do anything to impede a liquor inspector or a peace officer's entry into your establishment or catered event. You must not request personal identification, scan identification, photograph, wand, pat down, or search inspectors or police. It is a serious contravention to refuse or delay in any way providing access to an inspector or police officer, and may result in your liquor licence being cancelled.

When asked on cross examination if her decision to pursue an enforcement action would have been different if she had been made aware that Constable A had not observed Exotic Dancer B drinking from the Bottle of Liquor or if she had been made aware that Constable A had not administered a breathalyzer to Exotic Dancer B, Inspector A testified that it was the signs of intoxication which were relevant to her decision, not whether or not Exotic Dancer B was seen consuming liquor. She acknowledged that she was basing her decision to pursue an enforcement action strictly on the basis of Constable A's observations and interpretation of Exotic Dancer B's conduct.

When further asked on cross examination as to whether or not the fact that two days prior to October 28, 2014 Exotic Dancer B had had her tongue pierced, that her tongue was swollen, and that she also had a lip ring in her bottom lip all of which may have affected her ability to speak, Inspector A testified that her decision was based upon the physical symptoms displayed by Exotic Dancer B as observed by Constable A, and not necessarily what Exotic Dancer B was saying.

## **EVIDENCE—LICENSEE RELEVANT TO THE SECOND NOEA**

### Evidence of Exotic Dancer B

In her oral testimony, Exotic Dance B testified that she had been an exotic dancer for about 8 years, but that her first contract with the Licensee was in May of 2014. She confirmed that although she is represented by an entertainment agency, she contracts directly with the locations in which she entertains.

Prior to October 2014, she testified that she had never been ticketed or sanctioned by the Licensee for being intoxicated at the Night Club.

Exotic Dancer B identified her witness statement dated April 13, 2015 (Exhibit 9) and confirmed her signature on the document and that it was true to the best of her recollection.

She confirmed that she had been given a copy of the Dancer Agreement Sheet (Exhibit 6) by the Owner. In her opinion its contents were self-explanatory as it contains rules similar to other bars in which she had worked. She confirmed that she had signed a copy of this document on April 13, 2015. She also confirmed that on October 28, 2014, she had read and was aware of the portion of this document mandating that dancers must follow the listed 11 rules including:

1. Make sure the dancer follow the liquor control low (sic).
4. Never get drunk.
5. Never bring liquor to the bar that is not from the bar.
7. Never do anything that is against the Liquor Control Law.

On cross examination, Exotic Dancer B was directed to item 11 on the Dancer Agreement Sheet (Exhibit 6) under the heading "WORK" which states:

11. Drinking with customer's (sic) is tolerated but if this is abused you will be fined.

and she confirmed that it was the Licensee's policy that Exotic Dancer B was permitted to drink with the customers of the Night Club, but that she couldn't get drunk. She confirmed that she was aware of this rule on the night of the alleged contravention.

With respect to the events of the morning of October 28, 2014, she testified:

- that normally when she works at the Night Club she stays in a room at the Licensee. However, as she had arrived in Kitimat on October 25, 2014, and as her scheduled performances at the Night Club were not to start until two days later on October 27, 2014, she had stayed with a friend as there was no space available for her to stay at the Kitimat Hotel,
- at about 12:30 a.m. after she had finished her free-lance dance she went to one of the VIP Rooms to retrieve her possessions. She had been storing them there since earlier that evening as she had not been assigned a room upstairs in the hotel. She was intending to bring her possessions up to her newly assigned room, but was stopped by a customer who offered to buy her a drink,
- she had not been drinking during her shift until about 11:00 p.m. when she had about 4 drinks of rye and coke that a couple of customers had purchased for her. She did not order anything from the bar herself,
- that Constable A had been asking if someone in the Night Club was missing a purse. Constable A looked inside the purse and found promotional material relating to Exotic Dancer B, so Constable A knew that the purse belonged to Exotic Dancer B. It was while Constable A was looking through the purse that she found the Bottle of Liquor,
- she then asked Constable A if they could go into the VIP Rooms so as not to make a fuss in the Night Club and have the contents of her purse all over the place,

- The Bottle of Liquor was in her purse as she was going upstairs to check into her room. Constable A did not know that the Bottle of Liquor was in her purse until they went together into the VIP Rooms to go through her purse in private. The Bottle of Liquor was in the purse at the top of the purse, but not in plain view, and could not be seen unless someone went to search the bag. Constable A did not mention the Bottle of Liquor at all before she asked to look in the purse,
- A couple of days previous to October 28, 2014, she had gotten her tongue pierced, so it was swollen and that was possibly why Constable A thought she was slurring her words. Her lip ring she had put in prior to her tongue piercing,
- Constable A had reprimanded her for having the liquor and as she had a linguistic barrier and as she was exhausted after her working shift, she broke down. Constable A didn't listen to her explanation, she had cried, was angry and went to her room upstairs in the hotel,
- she didn't recall Constable A asking her for identification nor did she recall Constable A stating to her that she was "too intoxicated to work",
- Constable A gave her a ticket, not for being drunk, but for having the Bottle of Liquor which was not purchased from the Night Club,
- she did not have the opportunity to explain the source of the liquor to Constable A, she did drink from the liquor bottle with her friends when she stayed at their place, but she did not drink from it in the Night Club,
- she couldn't recall whether or not the Owner met with her following her dealings with Constable A,
- as a result of the incident on October 28, 2014, she was fined, but she was uncertain whether or not the fine was imposed by the police or the Licensee, and
- Constable A did not ask her to take a breathalyzer test.

Exotic Dancer B was shown a copy of the Second LPC and specifically the portion which stated that "Employee very intoxicated in bar yelling and pushing patrons", and she testified that she was not intoxicated and that she has a lot of regular customers with whom she wrestles around and is a bit rowdy, but that she was not fighting with any of the customers.

Exotic Dancer B agreed with the statement on the Second LPC that “she had a 375 ml bottle of Royal Reserve ¼ full on the top of her bag in the bar”, but stated that she was on her way up to her assigned room in the hotel when she got distracted by a customer. She hadn’t been carrying it around all night, she had just grabbed it from the back to go to her room upstairs in the hotel.

On cross examination Exotic Dancer B confirmed that:

- she had drunk single shot 1 or 2 rye and cokes before her last dance and then a couple more after she had finished her last dance. All these drinks were coming from customers between her dance sets, she didn’t order any herself. She had had a maximum of 5 drinks,
- she weighs about 100 pounds,
- earlier during her shift no staff member of the Licensee had raised concerns about how much she had had to drink, and she denied that she was intoxicated as Constable A had testified,
- in her discussions with Constable A, she had not told Constable A about the tongue piercing,
- that although her written statement (Exhibit 9) was dated almost 6 months after the alleged contravention on October 28, 2014 that it was not possible that in the preparation of her written statement due to the time lapse she might have forgotten some of the details, and
- she had never had translation issues with the Owner.

#### Evidence of the Bartender

In her oral testimony, the Bartender testified that she was working at the Night Club on the night of October 27, 2014 and the morning of October 28, 2014 and that prior to October 28, 2014 the Bartender had been working as a bartender at the Night Club for about 5 months. Although there was another bartender working at the Night Club that night, she was the head bartender at that time.

The Bartender identified her written statement dated May 12, 2015 (Exhibit 11), identified her signature thereon and confirmed that it was true.

The Bartender identified the copy of her Serving it Right Certificate (Exhibit 10) and confirmed that she had received this certificate prior to October 28, 2014. She testified that to obtain this certificate, she had had to study and to take an online test and that in the material she had studied and in the online test, there was a focus on ensuring that the Bartender was not to serve customers who appeared to be intoxicated.

With respect to the morning of October 28, 2015, the Bartender testified that:

- she did not serve Exotic Dancer B any drinks, but that she did serve two drinks to a customer and that this customer had given one of these drinks to Exotic Dancer B. Exotic Dancer B was not drunk at this time,
- at no time during the time in question did Exotic Dancer B appear to be drunk, she just appeared to be upset because Constable A had gone through her purse without, in her opinion, Constable A having had any reason to do so,
- Exotic Dancer B was a “Metalhead”, rambunctious, loud and likes to fool around whether with or without alcohol, that this was her personality,
- at no time did she see Exotic Dancer B drinking from the Bottle of Liquor, nor had she seen the Bottle of Liquor until she attempted to go to the VIP Rooms where she saw that Constable A had the Bottle of Liquor,
- she was quite upset herself at what was going on as she was concerned that no rule was broken and had stated to either Constable A or her police officer colleague on October 28, 2014 that they were just looking for anything that would get the Night Club in trouble.

The Bartender confirmed that in October of 2014 the Licensee had had a zero tolerance policy against serving additional liquor to patrons, including exotic dancers, who appeared to be intoxicated and that she had cut people off all the time. She confirmed that this policy was communicated to the Licensee’s staff by the Owner.

On cross examination, the Bartender testified that:

- although she agreed with the contents of her written statement of May 12, 2015, she confirmed that the Owner had prepared her written statement and that he had asked her to sign it,
- when asked about the fact that her written statement said that Exotic Dancer B drank rum and coke, when Exotic Dancer B testified that she drank rye and coke, the Bartender could not explain this discrepancy,

- she also works as an exotic dancer and, at times, works at the Night Club. She was working there on a 2 week contract in May of 2015,
- when asked if she would be surprised to be told that Exotic Dancer B had up to 5 drinks prior to Exotic Dancer B's conversation with Constable A, she stated that she wouldn't be surprised. Exotic Dancer B was a pretty casual drinker. She drinks when she is talking with customers, but she is not crazy. On the night in question, people were coming to the bar to get their drinks, it was possible that some of these customers were supplying drinks to Exotic Dancer B and that the Bartender was unaware of this, so that the Bartender might be unaware of how many drinks Exotic Dancer B did in fact have,
- Exotic Dancer B hadn't started doing her regular shift on the night in question so that she hadn't gone on the Night Club's stage and that she might have been doing privately contracted lap dances in the VIP Rooms. She didn't know as she wasn't managing the girls. It was not her job to look at what was going on in the VIP Rooms on the monitor behind the bar, it was the Owner's job and he had never asked her to look at the monitor to follow what was happening in the VIP Rooms.

On cross examination, the Bartender testified that she had had no additional written training or policies from the Licensee with respect to over-serving customers and assessing customers' sobriety, but that there was regular oral instruction to that effect. She testified that she had seen a copy of the Guide, and that she had discussed some of its provisions dealing with exotic dancers with the Owner. She testified that the Licensee's staff were all aware of the Guide and that they were referencing the Guide so that the Licensee and its staff didn't get into trouble.

#### Evidence of the Bouncer

The Bouncer testified that he was employed by the Licensee in October 2014 as the bouncer for the Night Club and he testified that he had obtained his Serving it Right certificate (Exhibit 12) around October 27, 2014.

On cross examination, when it was suggested to the Bouncer that the date that he received his Serving it Right certificate was in fact February 17, 2015 and that he really didn't have his certificate on October 27, 2014, the Bouncer testified that he couldn't recall when in fact had obtained it.

He testified that he started work about 5:30 p.m. on the evening of October 27, 2014 and ended his shift at 2:00 a.m. in the morning on October 28, 2014. During his shift, he testified that he had seen Exotic Dancer B and in his experience as a bouncer, she was not exhibiting signs of excessive intoxication.

On cross examination when the Bouncer was asked if he had had specific training in security or as a bouncer on October 27, 2014, he testified that he had read books but hadn't taken any courses. When asked if on October 27, 2014 he was registered under the *Security Services Act* as required by the Guide, he testified that he was aware of this requirement and that is why he intentionally read some books, but that he was not registered under this legislation. The Bouncer confirmed that he had still not obtained this license.

Further on cross examination, the Bouncer was directed to the document entitled "150217 Kitimat Hotel steps on improvement" and to item 10 which states:

10. April 22, 2015, two of our employees learn security course online. One of them will take the test and get the security licence.

The Bouncer confirmed that he was one of the employees referred to in this statement, but that he was not the one who took the test.

He testified that he is no longer working as a bouncer for the Licensee.

#### Evidence of The Owner Relevant to the Second NOEA

The Owner identified a copy of his Serving it Right certificate (Exhibit 13) and confirmed that this certificate had been issued to him on February 23, 2013.

In order to secure this certificate, the Owner testified that he had read materials on detecting mental and physical signs of intoxication and on how to determine whether or not a patron was intoxicated. The physical signs of intoxication he was trained to look for, he testified, were that the person's utterances were unclear, that the person had difficulty walking and standing, and that the person's eyes were looking larger than normal. Some of the mental signs were sleepiness and getting mad.

He also confirmed that he was aware of the provisions on page 34 of the Guide with respect to the Licensee's responsibility towards intoxicated persons and that he understood that the provisions of the Guide were incorporated into and formed part of the Licence.

With respect to what occurred on the morning of October 28, 2014, the Owner testified that:

- he was working in the Night Club during the evening of October 27, 2014 and the morning of October 28, 2014. During that time he was on the watch for any patrons who were asleep or drunk, he was checking identification for any patrons who looked young to ensure that there were no minors in the Night Club, and he was alert to ensure that there was no fighting,
- if he had seen a drunk person while he was on duty, he would have instructed the bar tender to stop serving that person liquor and to give the person water,
- the Licensee has a shuttle bus which takes intoxicated persons from the Night Club to the local camp,
- after she had finished her dance at 1 a.m., Exotic Dancer B was on her way upstairs in the hotel when she was stopped by a customer who claimed that she had done such a good job dancing that he wished to buy her a drink,
- based upon his experience and his Serving it Right certification, it was his opinion that Exotic Dancer B was not intoxicated as alleged by Constable A,
- he had at no time during the evening seen Exotic Dancer B drink from the Bottle of Liquor,
- he always checks people who come to the Night Club for liquor, but he checks their purses, not their suitcase,
- he was waiting for Constable A to return from her car outside after writing the ticket, but once all the customers and employees of the Night Club were gone

and all the lights were off and Constable A still hadn't shown up, he closed the door of the Night Club as usual and went upstairs to sleep,

- Constable A came back the next morning, issued the Licensee a ticket and claimed that The Owner had locked her out, and
- he protested against the behaviour of Constable A and that she was "setting me up".

On cross examination, the Owner was asked:

- if he had his license under the *Securities Services Act* and he advised that he didn't have it although he did door security for the Night Club,
- what his Serving it Right training would have told him about the level of sobriety of someone who has had 5 to 6 drinks over the space of between 2 and 4 hours and who weighs 100 pounds, he responded that he didn't remember clearly, but that he was certain that drinking that much during that period would not be appropriate for driving a vehicle,
- if Constable A was investigating a lost purse on the night in question, he responded that he couldn't remember,
- if he remembered Constable A telling him that Exotic Dancer B couldn't be in the Night Club any longer as she had had too much to drink, he testified that he couldn't remember that clearly, but that he did remember that Exotic Dancer B was not drunk as he gave her a key to her room upstairs in the hotel, and
- if during the course of his shift in the Night Club that night while Exotic Dancer B was performing in the VIP Rooms, did he watch the monitor to see her performing, he testified that he didn't remember.

On further cross examination, the Owner was referred to the portion of the written narrative of Constable A as to what had happened on the morning of October 28, 2014 (Exhibit 5) which reads (with the names in the narrative modified):

Constable A advised the Owner that she would be serving a LPC and would be right back. Constable A wrote the ticket up in the police car parked directly out front the doors. The Owner came out, looked at the police car, quickly closed the door and locked it. Constable A went and banged on the door very loudly announcing police however no one answered the door. Constable A found this to

be very disrespectful as even Constable B had advised the Owner not to close the door as Constable A wanted to speak to the Owner.

The Owner testified that this excerpt did not reflect the facts.

The Owner's position was that he did not lock Constable A out of the Night Club on purpose so that she would not issue the Licensee a ticket. When he locked the door, he testified that there were no customers and no employees.

The Owner testified that he had been informed by Retired Inspector B about the complaint of Constable A that the Owner had locked her out and that even though the Owner felt it was very unfair, he had still apologized to Constable A that morning when she came back to serve the Second LPC.

When further questioned, the Owner agreed that it could have been the next evening when Constable A served the Second LPC on him, rather than the next morning as he had previously testified.

#### **SUBMISSIONS – BRANCH RELEVANT TO THE SECOND NOEA**

The Branch submitted that the evidence of Constable A demonstrates that Constable A's attention was first drawn to Exotic Dancer B as a result of the interactions of Exotic Dancer B with male patrons of the Night Club on the patio of the Night Club when Constable A was conducting a licensed premises check of the Night Club on the morning of October 28, 2014.

However, it was not this incident which caused Constable A to be concerned about Exotic Dancer B, but rather confronting Exotic Dancer B a short while later when Exotic Dancer B was again exhibiting similar behaviour of yelling and pushing male patrons. At this later time, Constable A approached Exotic Dancer B and inquired if she was OK. She did this as Constable A noted that as well as this unusual behaviour, Exotic Dancer B was unsteady on her feet.

It was also at this time when Constable A noted the Bottle of Liquor sitting in plain view in what turned out to be the purse of Exotic Dancer B.

When Constable A then accompanied Exotic Dancer B to the VIP Rooms and asked Exotic Dancer B for her identification, Constable A testified that she had observed Exotic Dancer B "fumbling" through her bag to produce the identification, had smelled liquor on the breath of Exotic Dancer B, and had heard Exotic Dancer B state that "she did not wish to get fired".

Constable A then went to the Owner, gave him the Bottle of Liquor, told the Owner that Constable A believed the Exotic Dancer to be very intoxicated and that she was concerned about her safety. She then told the Owner that she was going to her car to write a ticket and that she would be back to serve the Second LPC on the Owner.

Constable A testified that while she was in the police car writing the ticket, she saw the Owner come out of the Night Club, glance at her, and then lock the door to the Night Club preventing Constable A from serving the ticket on the Owner at that time.

The Branch noted that Exotic Dancer B testified that her weight was approximately 100 pounds and that in the space of approximately 3 hours from 11:00 p.m. on the night of October 27, 2014 until confronted by Constable A at 1:45 a.m. on the morning of October 28, 2014 she had drunk about 5 glasses of rye and coke. The Branch submitted that Exotic Dancer B's credibility was compromised by this alcohol consumption.

With respect to the evidence of the Owner, the Branch noted that he performed a number of duties on the evening and morning of October 27 and 28, 2014, including dealing with intoxicated patrons, but in his testimony he couldn't remember checking on the state of sobriety of Exotic Dancer B but he clearly recalled and contradicted the version of Constable A over the issuance of the Second LPC. However, the Branch noted that in his testimony the Owner did not disagree with the evidence of Constable A that she had asked the Owner to take care of Exotic Dancer B and that Exotic Dancer B was too intoxicated to be in the Night Club.

It was the Branch's submission that as none of the evidence provided by the Licensee detracted from the evidence of Constable A that Exotic Dancer B was intoxicated as alleged in the Second LPC, that the Branch has, therefore proven on a balance of probabilities the allegation in the Second NOEA and that a penalty of a suspension of the License for a period of 4 days is justified.

### **SUBMISSIONS – LICENSEE RELEVANT TO THE SECOND NOEA**

The Licensee in its submissions highlighted the fact that Constable A admitted that she had not seen Exotic Dancer B drinking from the Bottle of Liquor, that the Bottle of Liquor was in Exotic Dancer B's purse and not in open view, and that Constable A only discovered the Bottle of Liquor, which was unsealed, but closed, when Exotic Dancer B offered her purse to Constable A to examine.

Constable A admitted that she had had no scientific evidence, such as a breathalyzer, to determine the level of sobriety of Exotic Dancer B, and Constable A acknowledged that at the time of the incident, she didn't know that Exotic Dancer B had had her tongue pierced 2 days previously. The Licensee submitted that this tongue piercing together with the lip ring worn by Exotic Dancer B might have made it more difficult for Exotic Dancer B to articulate her words when speaking with Constable A and this might, therefore, have been mistakenly interpreted by Constable A as being slurred speech.

With respect to the evidence of the Owner, the Licensee submitted that he had obtained his Serving it Right certificate in 2013 and based upon his studying for this certification and his experience as the manager of the Night Club, in his view, Exotic Dancer B was not intoxicated. The Owner had testified that if she had indeed been intoxicated, service to her would immediately have been stopped as it was the Licensee's clear policy that if a patron, including an exotic dancer, were too intoxicated to drive, that the Licensee takes into account community safety by either paying for a taxi or using its own shuttle bus to get patrons safely home.

The Licensee noted that the Owner cooperated with Constable A when she asked him to dump out the Bottle of Liquor and to take Exotic Dancer B upstairs in the hotel.

The Licensee in its submissions, also noted that with respect to the allegation that the Owner locked Constable A out of the Night Club, that the Owner had testified that he didn't know that Constable A intended to return to serve the Second LPC on him and that he had simply waited until the staff and patrons had left for the night and had then locked up the Night Club. He testified that he did not intend to lock out Constable A, that it was an accident, and that he apologized to Constable A the following day.

The Licensee submitted that there is no record of previous incidents involving Exotic Dancer B. The Licensee further submitted that Exotic Dancer B testified that she was aware of the contents of the Dancer Agreement Sheet (Exhibit 6) and of the prohibition against being intoxicated in the Night Club, that she did not purchase any drinks herself on the evening and morning in question, that customers had purchased 1 or 2 drinks before her last dance performance, and possibly 4 thereafter, and that this was over a 2-4 hour period. Exotic Dancer B, the Licensee submitted, was adamant that she was not intoxicated as she clearly recollected all of the events of the incident. She admitted that the Bottle of Liquor was in her purse, unsealed but closed, but that she hadn't drunk from it. She testified that her tongue had recently been pierced and was swollen and that this together with her lower lip ring affected her ability to speak.

With respect to the evidence of the Bartender, the Licensee submitted that she obtained her Serving it Right certificate prior to the night of the incident and that she knew that she was not to serve intoxicated patrons. It was her evidence that she had cut many people off and had zero tolerance for serving additional liquor to intoxicated patrons or staff members.

The Bartender testified, the Licensee submitted, that on the night in question, she had served a patron two drinks, one of which was given to Exotic Dancer B. The Bartender testified that Exotic Dancer B appeared to be upset, but not intoxicated, and that she did not see Exotic Dancer B drinking from the Bottle of Liquor. The Licensee noted that the Bartender had testified that Exotic Dancer B was a casual drinker. The Bartender described the demeanor of Exotic Dancer B as one of having a good time with her customers, she was rambunctious, and that this was probably what drew Constable A's attention to Exotic Dancer B in the first place.

The Bartender testified that she received daily instructions from the Licensee not to over serve.

The Licensee submitted that the elements of the offence set out in the Second NOEA have not been made out by the Branch, but that if the contravention was found to have occurred, that as this was a first offence, a penalty of a 4 day suspension was not reasonable especially in light of the Licensee's subsequent attempts to comply with the Act, the Regulation and the Guide.

## **REASONS AND DECISION RELEVANT TO THE SECOND NOEA**

### **Contravention**

As with the evidence presented with respect to the First NOEA, the evidence before me with respect to the Second NOEA involves conflicting versions as to what in fact occurred.

In hearing the evidence of the witnesses before me, I found the evidence of:

- Constable A credible and to the point,
- Exotic Dancer B self-serving and often contradictory,
- the Bouncer completely unhelpful, and
- the Bartender reluctant.

Most importantly, I found the evidence of the Owner, despite the language difficulty, evasive, contradictory and, on occasions, what appeared to me to be a great stretch of the truth.

As noted in the testimony of Inspector A, Contravention Notices B012150 and B012151 (Exhibit 1 tab 1) were issued to the Licensee in response to the Second LPC. These Contravention Notices dealt with contraventions of sections 43(2) and 67(3)(b) of the Act and section 42(2) of the Regulation referencing, respectively, permitting an intoxicated person to remain in licensed premises, consumption of liquor in licensed premises, and refusal to permit entry to a peace officer.

However, as Inspector A confirmed the Second NOEA only deals with one of the contraventions noted in Contravention Notice B012150, namely the alleged contravention of section 43(2)(b) of the Act that the Licensee permitted Exotic Dancer B while intoxicated to remain in the Night Club.

Although evidence was presented by both the Branch and the Licensee on all three contraventions contained in Contravention Notices B012150 and B012151, I have considered only the evidence relevant to the Second NOEA. This evidence might be summarized as follows:

1. Constable A' s testimony that:
  - a. She first noted the activities of Exotic Dancer B on the patio of the Night Club on the morning of October 28, 2014;
  - b. A short time later, she again noticed Exotic Dancer B close to the bar of the Night Club and observed that Exotic Dancer B was unsteady on her feet and slurring her words together;
  - c. When she went to the Owner to ask him if he was aware of the owner of an open purse she had found sitting on the floor of the Night Club, Exotic Dancer B claimed its ownership and insisted that Constable A accompany her to the VIP Rooms;
  - d. she noted that while walking to the VIP Rooms, Exotic Dancer B was unsteady on her feet;
  - e. once in the VIP Room, Exotic Dancer B sat down with a plop, was swearing, had an odour of liquor on her breath and couldn't understand simple tasks she was being asked to do such as to produce her identification;
  - f. Exotic Dancer B became quite upset expressing concern that she would get in trouble and get fired; and
  - g. she expressed concern to the Owner that Exotic Dancer B was intoxicated and needed care.
2. Exotic Dancer B's testimony that:
  - a. On the morning of October 28, 2014 after she had finished her free-lance dance, she went to one of the VIP Rooms to retrieve her possessions where she had been storing them as she had not, as yet, been assigned a room upstairs in the hotel;

- b. She was intending at that time to bring her possessions up to her assigned room, but was stopped by a customer who offered to buy her a drink;
- c. she has a lot of regular customers with whom she wrestles around and is a bit rowdy, but that she was not fighting with any of the customers on the morning in question;
- d. She had not been drinking during her shift until about 11:00 p.m. when she had drunk single shot 1 or 2 rye and cokes before her last dance;
- e. she subsequently had about 4 drinks of rye and coke that a couple of customers had purchased for her;
- f. she did drink from the Bottle of Liquor with her friends when she stayed at their place, but she did not drink from it in the Night Club;
- g. she weighs about 100 pounds;
- h. she had about 5 drinks over a period of approximately 3 hours, but she was adamant that she was not intoxicated when approached by Constable A;
- i. that it was the Licensee's policy that Exotic Dancer B was permitted to drink with the customers of the Night Club, but that she couldn't get drunk;
- j. she didn't recall Constable A asking her for identification nor did she recall Constable A stating to her that she was "too intoxicated to work";
- k. she didn't recall whether or not the Owner met with her following her dealings with Constable A, but the next day, she was given the LPC issued by Constable A;
- l. she had a lip ring, and a couple of days previous to October 28, 2014, she had gotten her tongue pierced so it was swollen and that was possibly why Constable A thought she was slurring her words; and
- m. As a result of the incident on October 28, 2014, she was fined but she was uncertain as to whether or not the fine was imposed by the police or the Licensee.

The Bartender's testimony that:

- a. Exotic Dancer B was a pretty casual drinker;
- b. Exotic Dancer B was not drunk as alleged in the Second LPC, she just appeared to be upset because Constable A had gone through her purse;

- c. Exotic Dancer B is rumbustious, loud and likes to fool around whether with or without alcohol, as that this is her personality; and
- d. about 1:30 a.m. on October 28, 2014 she served a customer 2 drinks of rum and Coke, one of which the customer gave to Exotic Dancer B.

The Bouncer's testimony that during his shift he had seen Exotic Dancer B on the night of October 27<sup>th</sup> and the morning of October 28<sup>th</sup> and in his experience as a bouncer, she was not exhibiting signs of excessive intoxication.

And finally, the Owner's testimony that:

- a. On the night of October 27<sup>th</sup> and morning of October 28<sup>th</sup> he had been managing the Night Club and that one of his tasks was to check for intoxicated persons and to ensure that they were not served liquor;
- b. that for a person who has had 5 to 6 drinks over the space of between 2 and 4 hours and who weighs 100 pounds, he didn't remember clearly, but that he was certain that drinking that much during that period would not be appropriate for driving a vehicle;
- c. It was his opinion that Exotic Dancer B was not intoxicated as alleged in the Second LPC; and
- d. that he couldn't remember on the night in question:
  - a. if Constable A was investigating a lost purse,
  - b. Constable A telling him that Exotic Dancer B couldn't be in the Night Club any longer as she had had too much to drink, or
  - c. if he had watched the monitor to see Exotic Dancer B performing in the VIP Rooms.

Section 43(2)(b) of the Act has two elements which the Branch must demonstrate to establish liability. The Branch must demonstrate firstly that Exotic Dancer B was in the Night Club as alleged and, secondly, that at the time she was in the Night Club, she was intoxicated.

There is no question on the evidence before me that on the early morning of October 28, 2014 when observed by Constable A that Exotic Dancer B was in the Night Club.

The second element the Branch must demonstrate, namely as to whether or not Exotic Dancer B was, in fact, intoxicated as alleged in the Second NOEA, is a matter of fact as determined by the evidence before me.

However, this evidence must be tested against a standard of proof. It would appear to be the position of the Licensee that this standard of proof is one that requires scientific evidence of intoxication based upon data which is collected at the time of the incident by a breathalyzer or some other similar instrument. In contrast, the Branch takes the position that the standard of proof for the purpose of determining whether or not a person is intoxicated for the purposes of section 43 of the Act is a lesser standard based upon observation.

In support of its position, the Branch points to the Guide on page 34 which identifies for the purpose of assisting licensees a list of some of the physical and mental signs of intoxication.

I note that although neither the Act nor the Regulation contains a definition of what it means to be "intoxicated", section 43(1) of the Act contains a prohibition against a person selling or giving liquor to an intoxicated person or to "a person apparently under the influence of liquor". This suggests that the person serving liquor is to make a determination of the state of intoxication of the patron on the basis of observation as to whether or not the person in question is "apparently" under the influence of liquor, rather than on the basis of scientific evidence.

Such a conclusion can, as well, be applied to section 43(2)(b) which is the section of the Act relevant to the matter at hand. Section 43(2)(b) of the Act prohibits either a licensee or a licensee's employee from permitting an intoxicated person to remain in a licensed area. More definitive wording in the legislation would be required to apply a standard to section 43(2)(b) stricter than that included in section 43(1).

I therefore find that the standard of proof for the purpose of determining whether or not a person is intoxicated for the purposes of section 43(2)(b) of the Act is a standard of proof that is based upon observation at the time of the determination and not one that requires proof of intoxication as demonstrated by data produced by an instrument, such as a breathalyzer.

Constable A in her testimony testified that of the signs of intoxication set out in the Guide on page 34 and referenced above, Exotic Dancer B exhibited the following signs:

1. She exhibited the following physical signs:
  - a. odour of liquor on her breath
  - b. unsteadiness on feet
  - c. staggering
  - d. slurred speech; and
  - e. fumbling with small objects such as money; and
2. She exhibited the following mental signs:
  - a. exaggerated emotions; and
  - b. aggression.

However, Exotic Dancer B, the Bartender, the Bouncer and the Owner all strongly asserted that Exotic Dancer B was not intoxicated, that her slurred speech was attributable to a swollen tongue from a recently installed piercing, and that her behaviour was strictly a demonstration of her normal exuberance with male patrons of the Night Club.

And the Licensee submitted that Constable A did not see Exotic Dancer B drinking from the Bottle of Liquor while in the Night Club and Exotic Dancer B denied having done so, testifying that she had drunk from the contents of the Bottle of Liquor prior to coming to the Night Club.

However, Exotic Dancer B did admit that while in the Night Club she consumed possibly 5 drinks of liquor over approximately a 3 hour period. As well, she acknowledged that her weight was approximately 100 pounds. And the Owner admitted that if a person of that weight had consumed that amount of liquor during that time period, that he would not have permitted her to drive a vehicle.

In addition, I note the evidence of Exotic Dancer B that she had to pay a fine. She could not recall if this fine was imposed by the police or by the Licensee. However, I also note that paragraph 11 of the Dancer Agreement Sheet (Exhibit 6) states that if an exotic dancer abuses the privilege of drinking with customers of the Night Club, that she will be fined.

I accept the observations of Constable A rather than the opinions of Exotic Dancer A, the Bartender, the Bouncer and the Owner, which opinions might be considered to be self-serving. I therefore find that the Branch has satisfied the standard of proof required by section 43(2)(b) and find that on the morning of October 28, 2014 Exotic Dancer A was intoxicated when observed by Constable A.

I therefore find that on a balance of probabilities the Branch has proven that on the morning of October 28, 2014, Exotic Dancer B was intoxicated and that she was permitted to remain in the Night Club contrary to section 43(2)(b) of the Act.

I find that the Branch has proven the contravention included in the Second NOEA.

I turn now to the defence of due diligence.

### **Due Diligence**

As the Licensee has been found to have contravened section 43(2)(b) of the Act, the Licensee is liable unless it can demonstrate 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 prevent from happening activities that might lead to this contravention of the Act, it must ensure that such procedures are consistently in operation and acted upon by its employees.

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

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the

accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

To apply this case to the matter at hand, I must first decide whether or not a "directing mind and will" of the Licensee was present in the Night Club at the time of the contravention. If I so find, the defence of due diligence is not available and the inquiry stops there.

The Owner is both a principal of the Licensee and was the manager of the Night Club on the morning of October 28, 2014. To that end, he is clearly a "directing mind" of the Licensee.

From the evidence before me, the Owner was present in the Night Club during the night of October 27, 2014 and the morning of October 28, 2014. Indeed, his evidence was that one of the purposes for him being present in the Night Club was to ensure that patrons or staff did not become intoxicated, or if they did, that they are looked after safely.

I find that the directing mind of the Licensee was present in the Night Club when the contravention occurred and that therefore, the defence of due diligence fails.

Having concluded that the defence of due diligence fails, I find that the Licensee is liable for the contravention of section 43(2)(b) of the Act as alleged in the Second NOEA.

I address the issue of penalty following consideration of the Third NOEA below.

## **ALLEGED CONTRAVENTION AND PROPOSED PENALTY FOR THE THIRD NOEA**

The Branch's allegations and proposed penalties for EH14-166 are set out in the Notice of Enforcement Action dated January 5, 2015 (the "Third NOEA"). In the Third NOEA, the Branch alleges that on November 16, 2014 the Licensee contravened section 35 of the Act by permitting two minors to enter or be in the Night Club.

The proposed enforcement action outlined in the Third NOEA is a 5 day suspension of the Licence. Item 3, Schedule 4 of the Regulation sets out a range of penalties for a first contravention of this type as being a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

## **RELEVANT STATUTORY PROVISIONS FOR THE THIRD NOEA**

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

Section 35 of the Act provides:

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

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances.

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

Schedule 4  
Enforcement Actions

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
3	A breach of section 35 of the Act [minors on licensed premises]	4-7	10-14	18-20	\$5 000 - \$7 500

### ISSUES FOR THE THIRD NOEA

The issues for the Third NOEA are:

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

### EXHIBITS FOR THE THIRD NOEA

**Exhibit 1:** Branch Book of Documents, tabs 1 to 9;

**Exhibit 12:** Copies of Serving it Right Certificates for four employees of the Licensee;  
and

**Exhibit 13:** A copy of the Serving it Right Certificate for the Owner.

### WITNESSES FOR THE THIRD NOEA

The Branch called Constable A and, with the consent of the Licensee, by video link Inspector A. In addition, with the consent of the Licensee, the Branch called by video link, Minor A, and, by telephone link, Minor B.

The Licensee called the Owner.

## EVIDENCE - BRANCH - RELEVANT TO THE THIRD NOEA

### Evidence of Constable A Relevant to the Third NOEA

Constable A testified that on November 16, 2014:

- she together with RCMP Constables B and C attended the Night Club,
- prior to going to the Night Club, she had noted on a social media post that there were tickets being sold for a “Neon Party” at the Night Club, which event was to commence on the evening of November 15, 2014 and extend into the morning of November 16, 2014;
- as she was approaching the Night Club, she observed that it appeared busier than usual as there were a lot of people outside the venue standing in line and waiting to get in;
- on her way into the establishment, she spoke to the bouncer at the front door and asked him how his night was going. He told her it was really, really busy,
- this bouncer stated that he was alone at the front door and was, therefore, not doing an accurate head count,
- he complained that he needed help in dealing with the patrons at the door, that he had spoken to the Owner about this problem, but that he hadn’t received any assistance,
- inside the Night Club, she noted that it was very busy and quite crowded estimating that there were approximately 150 patrons present,
- she and her colleagues observed two youths (the “Youths”), subsequently identified as Minor A and Minor B, seated at a table closest to the women’s washroom with open bottles of beer in their hands,
- Minor A was known to Constable A and she knew him to be 16 years old,
- she approached the Youths and asked Minor B, whom she did not know, how old he was. He told her he was 17,
- she ordered the two Youths out of the Night Club and as she was escorting them out, they walked by the Owner,
- she took the opportunity of pointing out to the Owner that the two Youths were clearly underage and in the Night Club,
- outside the Night Club, the Youths advised her that they had purchased tickets to the event at the Night Club and that they had not been asked for identification upon entry to the Night Club,

- both Youths confirmed that they were not carrying any personal identification,
- the father of Minor A was contacted by telephone and asked to come and pick up Minor A and to drive him home,
- Minor B's guardian was inside the Night Club and, after being contacted, he arranged with one of his friends who had not been drinking to take Minor B home,
- Minor B's guardian told her that he was unaware that Minor B was in the Night Club,
- she had asked the bouncer to whom she had spoken earlier as to why the Youths had been permitted entry into the Night Club and he claimed that he didn't know how they had accomplished this, but that on the previous night one of the Youths had presented identification to him indicating that he was not a minor, and
- Following this discussion with the bouncer, the Owner came out of the Night Club and claimed, as well, that one of the Youths had produced identification the night before.

On cross examination, Constable A confirmed that:

- she had not seen either of the Youths drinking from the bottles of beer they were holding in their hands in the Night Club, and
- during her conversation with the Youths outside the Night Club she had not asked them if they were in possession of "fake" identification.

Constable A was shown a copy of License Premise Check B 057243 (Exhibit 1 tab 2) ("Third LPC") and identified it as the LPC she had issued and served on the Owner later on in the morning of November 16, 2014 documenting two contraventions of minors being in a liquor establishment contrary to section 34(2) of the Act.

Constable A also identified a copy of her narrative text hard copy (Exhibit 1 tab 5) she had produced on the morning of November 16, 2014.

#### Evidence of Minor A

Minor A testified by video link. His mother was the only other person in the room with him during his testimony.

Minor A testified that:

- his birth date was May 11, 1998,
- on November 16, 2014, he was 16 years old,
- he was a high school student in grade 11;
- he did not have a driver's license;
- he did not now have and had never had false personal identification;
- he was drinking alcohol at a party on the evening of November 15, 2014; and
- later on that evening he left this party, met Minor B at a park about 11:00 p.m., and proceeded to the Night Club.

Minor A testified that just after midnight on the morning of November 16, 2014 there was a line-up of people at the front door of the Night Club. He stated that he joined this line and together with Minor B walked into the Night Club behind a taller person. He testified that there was no staff person of the Licensee at the table at the front door of the Night Club when he walked in and that no one had asked him for identification or had attempted to stop him.

Minor A testified that he was sitting together with Minor B at a table close to the women's washroom in the Night Club. There were bottles of beer on the table, he stated, but he denied that he was drinking from them. He testified that Minor B had gone to the bar of the Night Club and had purchased the beer. He testified that no member of the Licensee's staff had come by while he and Minor B were sitting at the table.

Minor A testified that he had not been in the Night Club before the morning of November 16, 2014 and that he had not been back there since that morning.

On cross examination:

- the suggestion was made to Minor A that the reason that he and Minor B were admitted to the Night Club on the morning of November 16, 2014 was because both he and Minor B had presented false identification to the person at the door. Minor A vehemently denied this suggestion and testified that he had had no false identification in his possession that morning and that he has never had false identification, and

- it was suggested to Minor A that the Night Club had had at least 5 layers of security involving staff members placed in and around the Night Club on the morning of November 16, 2014, and that one or more of these staff members had asked for and had received Minor A's identification. In response, Minor A was very firm that:
  - on the morning in question he had not been asked for identification by any member of the Licensee's staff,
  - he had not been carrying with him false identification on that morning,
  - he had no clue whether or not Minor B had false identification, and
  - he had not seen Minor B at any time being asked for identification by a member of the Licensee's staff.

#### Evidence of Minor B

Minor B testified by telephone.

Minor B testified that:

- his birth date was May 31, 1997,
- on November 16, 2014, he was 17 years old,
- he was a high school student in grade 12;
- he and Minor A were together drinking alcohol prior to the morning of November 16, 2014; and
- he was quite intoxicated by the time he got to the Night Club, so that he couldn't remember clearly what had occurred.

Minor B testified that he remembered meeting Constable A and other RCMP officers in the Night Club on November 16, 2014, but that he didn't remember talking to the police officers, only that they "hailed him out" and then he was driven home.

Minor B couldn't remember whether or not the Night Club was busy on the morning of November 16, 2014. He testified that he had gained admittance into the Night Club by "flashing" two pieces of false identification at the bouncer at the entrance to the Night Club as he walked by.

He further testified that:

- he had had one piece of false identification that he remembered was a driver's license, and remembered throwing it out in the garbage that night after using it. When asked where this false identification had come from he testified that he couldn't remember,
- the bottles of beer that were on the table in front of him when the police officers approached him he had not purchased at the Night Club, but that he had carried them with him into the Night Club,
- Minor A was behind him the whole time as they entered into the Night Club and that it was possible that Minor A did not have false identification,
- the morning of November 16, 2014 this was the first time that he had been in the Night Club and he denied the possibility that that he might have been there the previous evening using the same false identification, and
- When asked if he remember that there was a party going on at the Night Club that night, he testified that he assumed so, that he knew that the Night Club was a strip club, so he assumed that there was a party, but that he didn't recall seeing news of the party and having to purchase a ticket to attend.

#### Evidence of Inspector A Relevant to the Third NOEA

In her testimony, Inspector A identified Contravention Notice B012152 (Exhibit 1, tab 1) as being a contravention notice issued to the Licensee as a result of the Third LPC. Inspector A also identified the Third NOEA (Exhibit 1 tab 1) and confirmed that she had issued the Third NOEA following the issuance of Contravention Notice B012152.

Inspector A confirmed that the reasons for pursuing enforcement against the Licensee stemmed from the Branch's policy that in order to avoid the sale or service of liquor to minors and to prevent exposing them to adult-oriented entertainment or activities, the Branch restricts their entry into licensed establishments similar to the Night Club.

In the matter at hand, the Licensee was holding a Neon Party which required tickets to enter the establishment. Therefore, the Licensee ought to have known the approximate number of people that would be attending this function and that the establishment was going to be busy. As the Night Club features exotic dancers, it should be more diligent in ensuring that minors are not exposed to this type of adult entertainment. The Youths

were 16 and 17 years old and were young looking. It would appear that there was no attempt by the Licensee's door staff or staff inside the Night Club to confirm the age of the Youths. In addition, it would appear that the Youths were able to access liquor inside the Night Club.

The penalty recommended by the Branch was a 5 day suspension to reflect the fact that if the allegations are proven, there were two minors found in the Night Club clearly indicative of a procedural breakdown by security and the lack of diligence on the staff to check the two youthful looking individuals. Inspector A noted that in addition, it appeared that the Youths were able to access liquor in the Night Club suggesting further reason that more than a minimum penalty of a 4 day suspension be imposed.

Inspector A testified that it was believed that such a penalty would encourage both staff and management of the Licensee to become more vigilant in their duties and would encourage voluntary compliance to ensure that such further incidents did not occur. In addition, it would demonstrate to the general public as well as other establishments the seriousness of the offence and how the Branch views and deals with such contraventions.

Inspector A further testified that the alleged use of false identification by one of the Youths does not change the Branch's position for pursuing enforcement action as there was still the requirement on the Licensee to ask for two pieces of identification, with the purpose of the second piece being to verify the authenticity of the first piece of identification.

Inspector A was asked if the fact that the Youths had been drinking before they arrived at the Night Club and admitted to being intoxicated when they entered the Night Club, would have changed her recommendation as to penalty, she said that it would not.

Inspector A testified that there was no compliance history for the Licensee and that is the reason that a minimum penalty had been recommended by the Branch with respect to the First and Second NOEA and would have been so recommended with respect to the Third NOEA were it not for the gravity of the circumstances resulting in the

contravention. She noted the last paragraph on page 3 of the Third NOEA (Exhibit 1 tab 1) which reads in reference to the recommended penalty:

It will also demonstrate to the general public, as well as other establishments, the seriousness of the offence, and is a strong indicator as to how the Branch views and deals with such contraventions.

On cross examination, with respect to the Licensee's compliance history following the contraventions referred to in the First, Second and Third NOEA's, Inspector A was directed to the copy of the record No. C004191 (Exhibit 1 tab 9) of notes of a compliance meeting held on December 4, 2014 between Retired Inspector B and the Owner. Inspector A agreed that everything that Retired Inspector B had requested of the Licensee the Licensee had accomplished, including a list of things that an exotic dancer could and could not do while working in the Night Club.

Inspector A in her testimony was directed to page 29 of the Guide which provides:

Effective November 1, 2009, staff or contractors providing door security in licensed establishments are required to be licensed under the *Security Services Act*.

On cross examination, Inspector A agreed that under the *Security Services Act*, the only employees of a licensee who need to be licensed under this act are doormen or door women.

She also referenced page 30 of the Guide which states:

#### MINORS

You must not allow minors into your establishment unless you have applied for and received special authorization from the general manager.

It is against the law to sell, serve or supply liquor to a minor. You and your staff are expected to put in place effective systems to meet this obligation. If you or an

employee allow a minor to enter your establishment or to purchase liquor, your licensing privileges could be jeopardized and you risk prosecution.

And page 31 which states:

#### ID requirements

You must demonstrate that you are preventing minors from obtaining liquor.

You must do an initial assessment of every patron before allowing them to enter your establishment (if you have door control), or before selling or serving them liquor. When you verify a customer's age, you and your employees must ask for two pieces of identification.

Inspector A highlighted the box on page 31 of the Guide which provides:

#### **Important**

There is an ongoing obligation on the part of a licensee to ensure that minors are not served or sold liquor. A server or bartender cannot rely on the fact that door staff admitted a patron into the licensed establishment as the basis for serving that patron. The server or bartender must also make a determination that the patron is not a minor prior to serving them liquor, or allowing them to remain in the licensed establishment.

On cross examination, Inspector A confirmed a February 17, 2015 meeting with the Owner at the Terrace RCMP office together with Sgt. A and testified that an array of matters were discussed and commitments made by the Owner to ensure that the Licensee gained compliance with the rules contained in the Act, the Regulation and the Guide. She confirmed that the purpose of the Branch pursuing enforcement actions with respect to the First, Second and Third NOEA's was to secure voluntary compliance with these rules, but that the purpose of this compliance meeting was to discuss the findings of a recent inspection of the Night Club and did not relate to the contraventions dealt with in these three NOEAs.

On cross examination, Inspector A agreed that based upon her dealings with representatives of the Licensee, that she is of the view the Licensee is voluntarily attempting to comply with these rules.

## **EVIDENCE—LICENSEE RELEVANT TO THE THIRD NOEA**

### Evidence of the Owner Relevant to the Third NOEA

The Owner testified that he was familiar with the Guide (Exhibit tab 6) and was aware that the terms and conditions of the Guide are part of the Licence and that the Licensee in its operations to be in compliance with the Licence was obligated to comply with the terms and conditions of the Guide.

He testified that prior to November 16, 2014, he had read and had understood the provisions on page 30 of the Guide under the heading “Minors” referred to above. Similarly, he testified that prior to that date he had read and had understood the provisions with respect to the identification requirements to prevent minors from consuming alcohol contained on page 31 of the Guide under the heading “ID requirements” and referred to above.

On November 16, 2014, the Owner testified:

- the Licensee was hosting a DJ Neon Party at the Night Club,
- there were approximately 150 patrons in the Night Club for that event, and
- he worked as manager of the Night Club from 5:30 p.m. that evening until 4:00 a.m. the following morning.

He testified that as a manager, his responsibility was to ensure that:

- the Licensee’s employees were working properly and safely,
- none of the patrons were drunk or sleeping, and
- no minors were present.

He stressed that it was particularly important that there were no minors in the Night Club as he was aware of the provisions of the Guide prohibiting their entry and as he had been told that many times by Retired Inspector B. He testified that in support of

this policy of the Licensee there were stickers on the tables and notices on the wall stating that 2 pieces of ID were required.

On cross examination, the Owner testified that he had sold the tickets to the Neon Party through the Licensee's beer and wine store at a cost of either \$5 or \$10 per ticket, he was unsure of the amount, but that all of the ticket proceeds went to the DJ. He testified that he hadn't advertised the DJ Neon Party online, but that possibly the DJ himself might have done so.

On the night of November 16, 2014, the Owner testified that:

- he had seen both Minor A and Minor B in the Night Club and that he had checked the identification of both Youths,
- Minor B had shown him 2 pieces of identification which gave Minor B's birthdate as 1992. The Owner specifically remembered this as Minor B looked too young for him to be 22 years of age. He remembered that one piece of identification was the picture identification produced by the Government of British Columbia and the other was a BC driver's license,
- he had asked Minor A for identification and he couldn't clearly remember what Minor A had produced for him. But he knew that what Minor A had produced was 2 pieces of qualifying identification which represented that Minor A was clearly not a minor. Based upon this, he ascertained that Minor A was not underage,
- the Youths were sitting at a table in the Night Club near the women's washroom when he had asked them for identification. He noted 2 bottles on the table, but didn't remember what kind of bottles. He testified that he did not see the Youths drinking and that the Youths did not appear to him to be intoxicated,
- that the lighting in the Night Club was not that good where the Youths were sitting, but that he could see them clearly and, in any event, that he had the assistance of a flashlight which he always carries with him and used to check identification,
- there was a sticker on the outside and inside entrance doors of the Night Club and on the bar of the Night Club requiring patrons to produce 2 forms of identification if asked by the staff of the Licensee,

- the bartender on duty that night was fired in December 2014. However, he had told each member of the Licensee's staff that if they served liquor to minors without asking for identification and that if they served liquor to a minor with false identification that they would be fined \$575 and \$230, respectively, and that there were signs stating this at the outside entrance door to the Night Club, and
- when asked as to whether or not he provides training to the staff of the Licensee as to how to identify acceptable identification, he testified that each time Retired Inspector B visited the Night Club, she emphasized the importance of properly checking identification and that he had, in turn, emphasized this to the Licensee's employees.

On cross examination, the Owner testified:

- when asked how he recalled that it was Minor B's identification which stated 1992 and not that of Minor A, he testified that as he had seen Minor A on the video link when Minor A gave his testimony, he realized that it was not Minor A, so it must have been Minor B,
- that he couldn't remember the type of identification that Minor A had shown him, nor could he remember the year of birth stated on that identification, and when asked if it was possible that he didn't ask Minor A for identification, he testified that it was his practice that if he checked one patron's identification, he would have checked the others in the party,
- when he was asked if he had asked the Youths any of the questions that the Guide on page 31 recommend he ask in order to verify the validity of a piece of identification, he responded that he had done so,
- when asked if he had a separate area set aside to check the identification of patrons coming into the Night Club, he responded that that this area was at the entrance door just inside the Night Club. He testified that he had observed the bouncer at the door of the Night Club on the night of November 16, 2014 carefully checking the identification of each of the patrons. Although he had not seen the bouncer checking the identification of Minor B, he had difficulty in understanding how Minor B "flashed" his identification at the bouncer,
- when asked if the person acting as the bouncer at the door to the Night Club that night was licensed under the *Security Services Act*, he testified that he had acted

upon the word of the bartender working at the Night Club that night that the bouncer was indeed licensed and that this bouncer had had previous experience as a bouncer in other cities, and

- he acknowledged that he now realizes what the rules are concerning the requirement to have a person who has a security certificate act as a bouncer.

#### Evidence of the Owner Concerning the Licensee's Ongoing Progress with Compliance

At the request of the Licensee, the Owner was given the opportunity to provide evidence about the Licensee's actions to ensure ongoing compliance with the Act, the Regulation and the Guide following the contraventions leading to the First, Second and Third NOEAs.

The Owner identified the following:

1. An email from the Owner to Retired Inspector B and the Kitimat RCMP representative dated December 8, 2014 entitled "Improvement in Kitimat Hotel Bar" (Exhibit 2) listing improvements that the Licensee had made in the past and intended to make in the future to the Night Club's operations, which email was sent following the compliance meeting held on December 4, 2014;
2. A document entitled "Kitimat Hotel Employee List" (Exhibit 2) which the Owner testified was prepared in response to a request from Inspector A following the meeting on February 17, 2015 at the offices of the Terrace RCMP, which document constitutes a list of the employees of the Licensee as at February 25, 2015 and the numbers of their Serving it Right certificates; and
3. An email from the Owner to Inspector A, Sgt. A and the Kitimat RCMP representative dated May 18, 2015 (Exhibit 7) attached to which is a document entitled "Kitimat Hotel House policy", a document entitled "150217 Kitimat Hotel steps on improvement", and a document containing a number of coloured symbols and referred to in the email as "picture sign to put on the wall to show our customers", with the body of the email asking the recipients to review the attachments and to respond.

With respect to the email referred to in paragraph 3, the Owner testified that he had yet to receive a response from the recipients.

The Kitimat Hotel House policy lists 12 items which the Licensee has already implemented.

With respect to the document entitled "150217 Kitimat Hotel steps on improvement", the Owner testified that he prepared this list for the purpose of showing the improvements of the Licensee on a step by step basis. He noted item #8 in this document which referred to the Licensee ordering an HD video camera system to ensure that the images received from the VIP Rooms was clearer than previously. He also noted item #10 which stated that two of the Licensee's employees had taken the security course online and that one of them intended to secure his security licence as soon as possible.

The Owner testified that after February 17, 2015, he had met with representatives of the RCMP on March 10, 2015 and on May 25, 2015 seeking suggestions for more improvements for the Licensee, which improvements, the Licensee has implemented. The Owner further testified that the Licensee is continuing to make similar improvements to its policies and procedures. He also noted that there have been no complaints by the RCMP about the Night Club for the previous 6 months and that the Kitimat RCMP was happy with the Licensee's performance.

On cross examination, the Owner was asked if he was aware of the Serving it Right Program Manual and he stated that he was and produced a copy. He was asked if the Licensee had made any of its house policies based upon the sample house policies set out in this Program Manual and he testified that as it was easier to copy and paste from the internet than to type material out from the Program Manual, he had preferred to find material from the internet.

### **SUBMISSIONS – BRANCH RELEVANT TO THE THIRD NOEA**

The Branch submitted that the uncontested evidence of Constable A was that on the morning of November 16, 2014 she saw Minor A and Minor B sitting at a table near the women's washroom in the Night Club with two open bottles of beer in front of them. She knew Minor A and was aware that he was 16 years old. When both of the Youths

confessed to her that they were minors, she escorted them out of the Night Club and took steps to ensure that they got home safely.

The Branch also noted the evidence of Constable A that it was quite busy in the Night Club with approximately 150 patrons present and that previous to encountering the two Youths, she had upon entering the Night Club had had a discussion with a male bouncer who had expressed frustration with how busy it was and the fact that he was on his own even after asking the Owner for more help.

The Branch submitted that nothing should turn on the fact that Constable A did not ask the Youths if they had false identification as it would have been highly unlikely that they would have told her if they indeed did have such documents.

The Branch noted that Minor A's testimony was that it was his first time at the Night Club, he was already intoxicated when he arrived, and that he walked in the front door behind other people as part of a line up. He testified that no one had asked him for identification as no one was by the door when he walked in. He testified that he did not use false identification to gain entry and he was adamant that he did not have false identification that evening.

Minor A confirmed that he was sitting at the table with Minor B with open bottles of beer in front of them.

The Branch in its submissions acknowledged that Minor B was a reluctant witness. The Branch noted that Minor B confirmed that he had been drinking with Minor A prior to entering the Night Club, that he had professed to having had false identification which he claimed he showed briefly to the bouncer as he entered the Night Club, and that the bouncer had waived him in.

Minor B acknowledged that they had two bottles of beer on their table, which beer, he testified, the Youths might have brought into the Night Club with them. The Branch pointed out that this in itself was a contravention of the rules, although not part of the contravention under consideration.

The Branch submitted that when questioned as to the nature of the false identification that he was showing on November 16, 2014, Minor B was very vague on this point and finally after some prompting suggested that it was a drivers' licence, but that he had thrown it away that night after using it.

The Branch submitted that although Minor B was a reluctant witness, professed to be intoxicated on the night in question, and was not totally reliable in his testimony, there was no reason for him to misstate what in fact had occurred.

In any event, the Branch submitted, whether or not the minors presented false identification is really irrelevant to a finding of liability on the part of the Licensee in permitting minors in the Night Club.

The Branch in its submissions stressed that the Branch takes very seriously the prevention of the service of liquor to minors and stresses the requirement to ask patrons for 2 pieces of valid identification to ensure that a patron is not a minor. As well, the Branch submitted, there is an obligation imposed upon a licensee under the Guide at page 32 to set aside a well-lit area protected from entertainment noise to properly make an assessment of the validity of the identification offered. This should be done, the Branch submitted, especially for events popular for youth, such as the DJ Neon party occurring on November 16, 2014.

The Branch noted the testimony of the Owner that when he saw the Youths sitting at the table with two open bottles of beer in front of them, he approached them to recheck their identification and asked them to produce their identification. His testimony was that Minor B produced identification stating that he was born in 1992 making him 22 years old and that he couldn't recall the age of Minor A. The Branch submitted that Minor A testified by video link and it was clear that he was young looking and that it would be difficult to suggest that he was close to 22 years of age.

In addition, the Branch submitted, checking identification in an environment of loud music, with laser lights flashing, is certainly not in compliance with the provisions of the Guide.

The Branch submitted that the Owner agreed that the Neon DJ party was attractive to young people and for that reason alone, the Licensee's employees should have been put on notice that they should have been extra vigilant in screening patrons for identification prior to granting them entrance.

The Branch submitted that it had proven the elements of the allegation contained in the Third NOEA and that the recommended penalty of a 5 day suspension should be followed.

### **SUBMISSIONS – LICENSEE RELEVANT TO THE THIRD NOEA**

The Licensee submitted that the essence of the matter was the diametrically opposed evidence of the Youths. The Licensee submitted that it was clear that Minor A's mother was coaching him on the sidelines during his testimony, that she did not want Minor A to admit to carrying a false identification, and that initially she had not wanted him to answer any questions on cross examination.

However, the Licensee submitted, the evidence of Minor B was creditable and should be accepted given that he has given an admission against interest in that he admitted presenting a false identification to the bouncer. This admission against interest tends to lead to the credibility of Minor B's testimony.

With respect to the evidence of the Owner, he described in detail the fact that he had read and understood the relevant terms and conditions of the Guide and confirmed that they constituted part of the Licence and that the Licensee was required to abide by them.

On the morning of November 16, 2014, the Owner confirmed that as part of his responsibilities as manager of the Night Club he was looking for minors and that it was very important based upon his understanding of the requirements of the Guide.

The Licensee submitted that the Owner:

- described the stickers on the doors and the table stating that 2 pieces of identification indicating the year of birth were required,

- as part of his responsibility for keeping a look out for minors, he had testified that he had observed the Youths, that the area was sufficiently lit to be able to make out faces, and that he had again asked Minor B for his identification, suggesting that the two Youths might have been asked for their identification earlier. This, the Licensee submitted, suggested the several layers of scrutiny for minors practiced by the Licensee,
- testified that Minor B had showed him 2 pieces of identification and that he clearly remembered one of them showing a birthdate of 1992. The 2 pieces of identification shown to him were a B.C. identification card and a B.C. drivers' license. He further testified that these 2 pieces of identification were very similar and that they matched one another, and
- had testified that he had asked Minor A for 2 pieces of identification, that Minor A had shown him 2 pieces of identification, but that the Owner could not clearly remember what Minor A had shown him as he was only concerned about the date of birth.

The Licensee further submitted that:

- the lighting in the room did not affect the Owner's ability to see the proffered identification as he carried a flashlight with him to assist him in examining such documents,
- that the Owner recalled 2 bottles of beer on the table at which the Youths were sitting, he couldn't recall if the Youths were drinking from these bottles, and based upon his experience, the two Youths did not appear to be intoxicated,
- it was the Owner's evidence that it was the Licensee's practice to instruct staff to ask any patrons who appeared to be young for identification, and that if they served minors that they would be fined \$575, and that there was a sticker to that effect on the outside door of the Night Club together with a sticker stating that minors would be fined \$230 if they were found to be underage in the Night Club,
- the Owner had testified that he had asked the Youths the questions set out at page 31 of the Guide as being questions recommended by the Branch for licensees to use to ascertain the validity of proffered identification and that the Owner had testified that the Licensee had a specific space set aside for the purpose of checking identification as being the inside door to the Night Club, and

- that the Owner had testified that on the night in question that he had had an opportunity to check what the bouncer was doing and that it was the Owner's understanding that the bouncer on that night had been checking identification carefully and that it would not have been possible to "flash" identification and to walk into the Night Club.

The Licensee highlighted the Owner's evidence to the effect that he carefully trains the Licensee's staff on proper procedures for checking identification as Retired Inspector B always emphasized the importance of doing so.

The Licensee submitted that the allegation contained in the Third NOEA had not been established, but even if it had, the Licensee had established a defence of due diligence in that the Licensee had shown that it had used all reasonable care by establishing a proper system to prevent commission of the contravention and that the Licensee took reasonable steps to ensure the effective operation of that system. The fact that the Youths showed the Owner false identification demonstrated that there was nothing else that the Licensee could have done to verify the identification of the minors or their ages.

In any event, the Licensee submitted, the proposed penalty of 5 days suspension was on the high side and that given how the Licensee attempted to check for identification on the night in question that a minimum penalty of a 4 day suspension would be more appropriate.

#### **SUBMISSIONS – BRANCH RELEVANT TO THE LICENSEE'S COMPLIANCE**

As the Licensee had indicated that it wished to make submissions on the Licensee's compliance activities following the contraventions referenced in the First, Second and Third NOEAs as factors to be taken into account when determining penalties, the Branch was invited to make submissions on the same matter.

The Branch submitted that the Licensee had demonstrated that it had available to it and had referenced many of the publications put out by the Branch in the form of guides to assist a licensee to conduct its operations in compliance with the rules set out in the Act,

the Regulation and the Guide. However, the Branch submitted, the evidence did not demonstrate that the Licensee was making use of these materials.

In any event, the Branch submitted, after the fact conduct should not provide valid grounds upon which a claim for a mitigation of a penalty should be founded.

In determining an appropriate penalty, as well as specific deterrence to the Licensee, the effect of the penalty in the nature of general deterrence must be considered, together with overriding public safety policy considerations.

The Branch submitted that the important point to be noted is that in British Columbia, holding a liquor licence is a privilege and not a right. Licensees are given the opportunity to prosper without any constraints, provided that they do so in compliance with the Act, the Regulation and the Guide.

#### **SUBMISSIONS – LICENSEE RELEVANT TO THE LICENSEE’S COMPLIANCE**

The Licensee submitted that the evidence is clear that following the contraventions alleged in the First, Second and Third NOEAs, that it has bent over backwards to meet first with Retired Inspector B and with representatives of the RCMP with evidence of at least 3 such meetings being presented in November and December of 2014 and February of 2015. During which meetings, the Licensee submitted, it was asked by Retired Inspector B and the representatives of the RCMP to provide proof of certain policies and procedures and the Licensee had immediately responded to the request in typed written form.

The Licensee submitted that it has prepared and provided the Kitimat Hotel Employee List (Exhibit 2) including their Serving it Right numbers, the Kitimat Hotel Employees Working Rules (Exhibit 5), the Kitimat Hotel House policy (Exhibit 7) setting out 12 rules, all of which, but point 9 have been implemented in the Night Club, and a set of symbols demonstrating behaviour prohibited in the Night Club. The Owner is awaiting a response from the Branch for the symbols, although the symbol for no touching has been in the Night Club for some time.

In response to the Branch's submission that the Licensee had not made use of any of the materials for licensees to assist them with compliance in their operations, it was the Licensee's position that it was easier to cut and paste material found on the internet than to adapt these materials into the policies of the Licensee.

The Licensee submitted that after the contraventions detailed in the First, Second and Third NOEAs, the Licensee had:

1. installed a high definition video feed from the VIP Rooms;
2. worked to ensure that one of the bouncers employed by the Licensee was in the process of obtaining his security license;
3. had its representatives meet as recently as May 25, 2015 with the representative of the RCMP at the Licensee's initiative demonstrating the Licensee's attempt to voluntarily comply with the Act, the Regulation and the Guide, at which meeting the representative of the RCMP emphasized the importance of the rule that if there was no identification produced, the patron was not permitted into the Night Club; and
4. in 2015 had had no complaints made against it.

The Licensee submitted that the evidence of post contravention compliance should be taken into account in mitigating the proposed penalties. The Licensee has been and intends to continue to comply with the Act, the Regulation and the Guide.

## **REASONS AND DECISION RELEVANT TO THE THIRD NOEA**

### **Contravention**

In hearing the evidence of the witnesses before me, I found the evidence of:

- Constable A again credible and to the point,
- Minor A straight forward, although possibly influenced by the presence of his mother, and
- Minor B reluctant and evasive.

Most importantly, and most unfortunately, I again found the evidence of the Owner, despite the language difficulty, evasive, contradictory and, on occasions, what appeared to me to be a great stretch of the truth.

In its submissions, the Licensee took the position that the essence of the allegation contained in the Third NOEA is the diametrically opposed evidence of the Youths. I agree that the evidence of the Youths presents contradictions. However, what is not contradicted in this evidence is the fact that both Youths were under 19 years of age on the morning of November 16, 2014 and that at that time they were both in the Night Club sitting at a table with two open bottles of beer on the table in front of them.

I therefore find that on November 16, 2014, the Licensee permitted the Youths to be in the Night Club.

Section 35 of the Act prohibits a licensee from permitting minors to be on premises where liquor is sold unless one of the following 3 conditions exists:

- the minor is accompanied by a parent or guardian and the liquor is sold exclusively for consumption off the premises,
- there exists lawful excuse, or
- in prescribed circumstances.

In the matter at hand, once the Branch has established that the Licensee permitted the Youths to be in the Night Club on the morning of November 16, 2014, the onus then shifts to the Licensee to establish that at least one of these 3 conditions exists.

It is obvious from the evidence before me that neither of the Youths was accompanied by a parent or guardian nor, if the bottles of beer on the table in front of them were in fact sold to the Youths in the Night Club, that it was intended that the consumption of their contents was to be consumed outside the Night Club.

The Licensee has put forward no “prescribed circumstances” applicable to the matter at hand, and I am not aware any such circumstances.

That leaves only the condition of an existence of a “lawful excuse”.

Although it was not framed in this context, I am taking the submissions of the Licensee pointing to the evidence of the Owner that he had checked the identification of the 2 Youths and was satisfied that they were not minors as satisfying one of the conditions

set out in section 35 of the Act. In other words, that the Owner had done everything necessary to establish a “lawful excuse” in that he was thwarted by the Youths presenting false identification.

Referring again to the Licensee’s submission on diametrically opposed evidence, rather than finding the evidence of the Youths to be diametrically opposed, I find the evidence between the Owner and the Youths to be diametrically opposed. In his oral testimony, the Owner clearly stated that prior to them being approached by Constable A he had taken notice of the Youths and had asked each of them for 2 pieces of valid identification. He was clear in his testimony that each of the Youths had produced such identification.

It is to be noted that there is no mention in the testimony of either of the Youths of this encounter with the Owner. Indeed, although the Licensee had ample opportunity to put the Owner’s position to the Youths on cross examination, this line of inquiry was never explored by the Licensee.

In considering the evidence before me, I note:

- Minor A appeared by video link. From his youthful appearance I find it quite credible that he was 16 years old on the morning of November 16, 2014;
- Minor A was adamant that he has never possessed false identification; and
- Although the Owner could well remember details about the proffered identification of Minor B, he had little recollection of that produced by Minor A.

One would have thought that given the youthful appearance of Minor A that the Owner would have taken extra caution in reviewing the identification of Minor A and remembered something about it.

In any event, given the clear contradiction in the evidence before me, I find that the Licensee has not satisfied the onus of establishing a lawful excuse for permitting the Youths to be in the Night Club on the morning of November 16, 2014.

I therefore find that the Licensee contravened section 35 of the Act on the morning of November 16, 2014 by permitting the Youths to be in the Night Club as alleged in the Third NOEA.

Having found the contravention I turn now to the defence of due diligence.

### **Due Diligence**

Having found that the Licensee contravened section 35 of the Act, the Licensee is liable unless it can demonstrate 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 prevent from happening activities that might lead to this contravention of the Act, it must also ensure that such procedures are consistently in operation and acted upon by its employees.

Reference was made above to the case of *R v. Sault Ste. Marie* (1979) 2 SCR 1299 concerning the defence of due diligence.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and further clarified the application of the defence of due diligence as defined by the Supreme Court of Canada in *Sault Ste. Marie* in the context of the sale of liquor to a minor contrary to the Act.

Although the matter at hand deals with permitting minors on a licensed premises rather than the sale of liquor to minors, the rationale of the *Beverly Corners* case is of assistance in the present instance. The *Beverly Corners* case provides that the defence of due diligence when the matter involves the sale of liquor to a minor is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when

the sale is made), then the questions to be considered and answered are whether the Licensee had:

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

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

### Directing Mind

In the matter at hand, I find that:

1. the Owner was on the morning of November, 16, 2014 a directing mind of the Licensee and present in the Night Club,
2. the Owner was aware of the presence of the Youths in the Night Club at that time as was clear from his evidence, and
3. the Owner permitted them to remain in the Night Club contrary to section 35 of the Act.

I therefore find that the defence of due diligence is not available to the Licensee and the inquiry stops here.

However, in its submissions, the Licensee made much of its efforts following November 16, 2014 in furtherance of complying with the Act, the Regulation and the Guide.

Although, I acknowledge that these submissions were made with respect to penalty mitigation, I would direct the Licensee's attention to the second stage of the test in the *Beverly Corners* case above cited. The Licensee will note that this second stage requires a licensee to implement adequate training and other systems to ensure such compliance and then to take reasonable steps to ensure the effective application of this training and

the operation of these systems. In other words, good intentions, no matter how noble, are not sufficient.

I would suggest that if the Licensee is serious in its desire to comply with the rules set out in the Act, the Regulation, the Guide and the Licence that rather than continuing to express strongly worded platitudes of good intentions, that it immediately implement staff training and other systems at the Night Club ensuring such compliance and at the same time put in place steps to ensure the ongoing efficacy of these systems. Such implementation would clearly demonstrate the Licensee's professed sought for compliance.

## **PENALTY**

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulations and/or the terms and conditions of the Licence, I may do one or more of the following:

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

I am not bound to order the penalty proposed in the NOEA's. 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.

### **Penalty for the Contravention under the Second NOEA**

The prohibition against a Licensee permitting an intoxicated person to remain in a licensed premise is established to ensure the safety of intoxicated persons in order to avoid the possibility of further liquor consumption by that person and to avoid the possibility of harm to that person and to other patrons or staff.

The factors that I have considered in determining the appropriate penalty in this case include: the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

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

There is no record of a proven contravention of the same type as set out in the Second NOEA for the Licensee within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 11 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a 4 day suspension and/or \$5,000 monetary penalty for a first contravention. The Branch in the Second NOEA has recommended a 4 day suspension. I find this penalty to be reasonable and appropriate to encourage future voluntary compliance from the Licensee, and to ensure specific and general deterrence in society at large.

### **Penalty for the Contravention under the Third NOEA**

As with the Second NOEA, the factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the Branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

There is no record of a proven contravention of the same type as set out in the Third NOEA for the Licensee within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 3 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4 to 7 day licence suspension and/or a \$5,000 to \$7,500 monetary penalty.

I find that a penalty is warranted for the contravention under the Third NOEA.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a 4 day suspension and/or a \$5,000 monetary penalty for a first contravention. The Branch in the Third NOEA has recommended a 5 day suspension.

The Branch has consistently indicated to licensees that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The Branch considers this a significant public safety issue because:

- The effects of alcohol on growing bodies and developing minds
- The effects on individuals and society of irresponsible drinking behaviour learned at an early age
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult; therefore, liquor has a more intoxicating effect on minors
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault, and theft

The contravention in the Third NOEA does not involve the sale of alcohol to minors. However, it does involve the act prohibited by section 35 of permitting minors to be on premises where liquor is sold. Therefore, the Branch's position on sale of liquor to minors as above stated is relevant to the matter at hand.

Given the importance of ensuring minors do not have easy access to liquor, given the importance of ensuring that minors do not have access to adult oriented entertainment or activities, and given what appears to me on the evidence before me to be a flagrant disregard by the Licensee of the rules and regulations involving minors in licensed establishments, I do not find a 5 day suspension to be a sufficient time of suspension with respect to both specific deterrence for the Licensee and general deterrence for the industry.

I would contrast the matter at hand to those enforcement situations where a staff member of a licensee when faced with a busy environment and under pressure to serve customers has mistakenly served liquor to a minor without asking for identification, and a minimum penalty of a 10 day licence suspension is imposed upon the licensee. With respect to the contravention included in the Third NOEA, although it did not involve the service of liquor to minors, it did involve minors accessing both liquor and adult entertainment in an environment where it appeared that both the Licensee's bouncer and the Owner mistakenly permitted the Youths for a period of time to sit with two open bottles of beer in front of them at a table in the Night Club which featured exotic dancers. This contravention is much more egregious than the simple oversight of an overworked staff member. At the very best this is gross inattention to the necessary compliance rules by two staff members of the Licensee.

To encourage future voluntary compliance from the Licensee, and to ensure specific and general deterrence to members of the industry, I believe that the maximum penalty of a 7 day suspension for a first offence of this nature as provided for in item 3 of schedule 4 of the Regulation is warranted in this instance.

## **ORDER**

As I have found that the Branch has proven the contraventions alleged in the Second NOEA and in the Third NOEA and as I have found that a suspension of the Licence is warranted for periods of 4 days and 7 days, respectively, I order pursuant to section 20(2) of the Act, that Liquor Primary Licence No. 005538 be suspended for a period of 4 days and for a period of 7 days, such suspensions, in accordance with the provisions of section 66(1)(3) of the Regulation, are to run consecutively for a period of 11 days to commence at the close of business on Saturday, September 5, 2015, and to continue each succeeding business day until the total of the suspensions are completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the Kitimat RCMP from the close of business on Saturday, September 5, 2015, until the Licensee has demonstrated to the Branch's satisfaction that the total of the suspensions have been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

*Original signed by*

\_\_\_\_\_  
R. John Rogers  
General Manager's Delegate

Date: August 5, 2015

cc: Liquor Control and Licensing Branch, Surrey Regional Office  
Attn: Rupi Gill, Regional Manager

Liquor Control and Licensing Branch, Nanaimo Regional Office  
Attn: Cristal Scheer, Branch Advocate