



BRITISH
COLUMBIA

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: Steel Toad Brewing Company Ltd.
97 East 2nd Avenue
Vancouver, BC V5T 1B3

Case: EH15-065

For the Licensee: Tim Charron

For the Branch: Jay Blackwell

General Manager's Delegate: Nerys Poole

Date of Hearing: February 17, 2016

Date of Decision: March 11, 2016

Liquor Control and
Licensing Branch

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INTRODUCTION

Steel Toad Brewing Company Ltd. dba Steel Toad Brewing Company (the "licensee") owns and operates a liquor primary establishment, with liquor primary licence number 306146 (the "licence") at 97 East 2nd Avenue in Vancouver.

According to the terms of its licence, the licensee may sell liquor from 11 a.m. to midnight, Sunday through Thursday and 11:00 a.m. to 1:00 a.m. on Fridays and Saturdays. An endorsement on its licence includes the following:

"Family Foodservice term and condition permits minors accompanied by a parent or guardian in all licensed areas until 10 p.m. when meal service is available."

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

Mr. Tim Charron, one of the owners of the establishment, appeared as the licensee's representative at the hearing.

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the "Act") on May 23, 2015, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program ("MAP"). The licensee admits that its employee sold liquor to the minor agent. However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated June 10, 2015 (the "NOEA") (Exhibit 1, tab 1).

The Branch alleges that on May 23, 2015, the licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 2, Schedule 4, *Liquor Control and Licensing Regulation*). The branch proposes a monetary penalty of \$7,500.

RELEVANT STATUTORY PROVISIONS

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

Supplying Liquor to Minors

- 33(1) A person must not
 - (a) sell, give or otherwise supply liquor to a minor.

ISSUES

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

EXHIBITS

- Exhibit 1: Branch's Book of Documents
Exhibit 2: Sealed photo of Minor Agent and photocopy identification
Exhibit 3: Steel Toad Employee Handbook
Exhibit 4: Steel Toad Rules and Regulations

ORDER TO DELETE ANY REFERENCE TO MINOR AGENT'S NAME OR OTHER IDENTIFYING FACTORS

With the agreement of the parties, a copy of the minor agent's photo and identification were placed in an envelope and marked as Exhibit 2, with a notation that it is not to be unsealed or disclosed without a court order. Exhibit 2 has been sealed to protect the identity of the minor agent. At the hearing, the branch provided the licensee and its

witnesses with an opportunity to view the photo of the minor agent and identification with birth date. The minor agent did not appear as a witness for the branch.

WITNESSES

The Branch called one witness:

- The liquor inspector who wrote the NOEA and was present at the establishment on May 23, 2015 (the “liquor inspector”).

The licensee called three witnesses:

- A director of Concord Security (“Concord director”)
- A second owner of the establishment (the “second owner”).
- The Assistant General Manager who was working in the establishment on May 23, 2015 (the “Assistant General Manager”).

The Concord director gave evidence about the contractual relationship between Concord and the licensee. The second owner and the Assistant General Manager gave evidence about the management of the establishment and its policies and procedures, as well as the implementation of those policies and procedures.

The General Manager of the establishment (the “General Manager”) was present at the time of the contravention but no longer works there and did not give evidence at the hearing. The bartender who served the minor agent (the “bartender”) no longer works at the establishment and did not give evidence at the hearing. The doorman, who opened the door to the minor agent, (the “doorman”) continues to be an employee of the contracted security company in other locations and did not give evidence at the hearing.

FACTS

The Licensee accepts the facts of the contravention as set out in the NOEA (Exhibit 1, tab 1) and in the testimony of the liquor inspector.

On May 23, 2015, two liquor inspectors attended the establishment with a minor agent employed by the Branch under the MAP. At the start of the shift, the female minor agent was photographed and her identification viewed and photocopied to confirm that she was 17 years old on May 23, 2015 (Exhibit 2). The purpose of attending the establishment with the minor agent was to test compliance with the Act's prohibition against selling liquor to minors. The Branch implemented the MAP in 2011, after the Act was amended to allow the Branch to employ minors as agents for this purpose.

The establishment is licensed as a liquor primary establishment and possesses a liquor primary licence. A liquor primary licence prohibits the sale of liquor to minors at any time. Minors however may be on the premises under the family foodservice term and condition on this particular licence, which permits minors to be on the premises until 10:00 p.m. daily, if accompanied by a parent or guardian.

At approximately 8:02 p.m., the minor agent entered alone through the front doors of the establishment and proceeded to pass by the doorman who opened the door for her. The doorman did not ask her for identification. The minor agent found a vacant seat at the bar and sat down. The two liquor inspectors were standing approximately twenty-five feet from the minor agent and had a clear and un-obstructed view of the minor agent and the bartender. The bartender gave the minor agent a drink and food menu. The minor agent requested a Caesar. The bartender provided the Caesar to the minor agent at approximately 8:05 p.m. At no time did the bartender request identification from the minor agent to verify her age.

Once she had been provided with the Caesar, the two liquor inspectors approached her and she then left the establishment and returned to the vehicle outside where she completed the minor agent observation form and the minor agent statement form. (Exhibit 1, tab 5)

The liquor inspector asked to speak with the General Manager who appeared and identified himself. The liquor inspector advised the General Manager of the details of the contravention regarding the sale of the liquor to the minor agent. The General Manager provided the name of the bartender and informed the liquor inspector that the bartender had worked in the establishment for one month.

The liquor inspector issued the contravention notice (Exhibit 1, tab2). The General Manager signed the notice to acknowledge service.

On June 1, 2015, the liquor inspector spoke to Tim Charron and advised him of the contravention and of the process which would follow.

LICENSEE'S EVIDENCE

The Contravention

As noted, the licensee does not dispute the facts of the contravention. In their testimony, the licensee's witnesses added further information about the incident on May 23, 2015.

The Assistant General Manager at the time of the contravention testified at the hearing. He no longer works for the licensee, having left in November of 2015, for reasons unrelated to the contravention. He has worked in this industry for almost 15 years. He reported to the General Manager.

Both the General Manager and the Assistant General Manager were present on the evening of May 23, 2015 and conducted the pre-shift meeting held at the beginning of the shift on that evening. He stated that the bartender was present for this pre-shift meeting. He testified about what was said at the meeting with respect to the staff's obligations to request identification. He said most of the meeting was about that. He said the General Manager referred to the MAP and that sooner or later, their establishment would receive a visit. He said the General Manager emphasized the importance of requesting ID of anyone under 30 and that two pieces of ID must be shown. He further emphasized that, even with the door personnel instructed to do this, servers and bartenders were also expected to request ID, particularly because minors were permitted entry if with a parent or guardian.

When asked about the reaction of other staff when they heard about the contravention, he stated it was one of shock, fear and disappointment. He said the ownership reacted similarly, with shock and disappointment. He said the employees in the establishment were a close-knit team and were very disappointed that one of them had made this mistake.

The second owner testified about the contravention, although he was not at the establishment that evening. He watched the establishment's CCTV video footage showing the minor agent entering the premises, sitting at the bar, and being served the Caesar. He stated that the doorman was being the ultimate ambassador, opening the door and welcoming in a pretty girl. He clearly forgot the instructions to ask for ID. The second owner agreed the minor agent looked under age and was surprised she was even as old as 17 years.

Concord Security's Policies, Procedures and Training

Contractual Relationship

The Concord director explained that the second owner contacted his company to arrange for door security personnel for the establishment. Their contract negotiations began during 2013, as the establishment had been scheduled to open earlier than it actually did. The establishment eventually opened in October of 2014. The licensee contracted with Concord to provide services at the front door, to greet patrons as they entered and to ask for identification to ensure minors were not coming in without a parent or guardian.

When the licensee approached Concord at the time of entering the relationship, the second owner explained to the Concord director that they wanted more than a strong arm bouncer type. They were looking for door personnel who would act more like an ambassador, be aware of the concerns with respect to adhering to the liquor laws, and generally be smart enough to act appropriately and respectfully with the patrons attending the establishment. The Concord director stated that the licensee paid a premium for the door personnel, approximately 20% above the going rate for door personnel.

Concord Security currently contracts to provide door security with about six establishments similar to the licensee's. They also provide security at special events like beer gardens, etc.

Hiring and Training

When hiring personnel to work as doormen in this establishment, the Concord director discussed the main points that the licensee was looking for in these personnel. These included an ability to identify any patrons behaving badly, to identify minors and ask for the appropriate ID, to identify any gang behaviour and to maintain peace, if necessary, outside the establishment. They looked for employees who had experience in liquor establishments. Once he had interviewed and selected potential door personnel, the second owner would also interview them, emphasizing the priorities of the establishment and the importance of compliance with liquor laws.

The Concord director explained that all their employees receive about forty hours of training regardless of where they are assigned. This includes four hours of liquor specific training. The Concord director stated that the security personnel would also receive an additional twenty hours of on-site training, where they would review all the standard operating procedures used in their training. The second owner would usually review some specific items with any new Concord employees. The second owner also testified that the Concord personnel would receive about 24 hours of on-site training, usually three 8-hour shifts.

Policies and Procedures

Concord Security has developed standard operating procedures that include checking ID of anyone who appears to be under 30. If the person wishing to enter is a minor, the doorman is supposed to direct that information to the hostess. The licensee provided no written documentation of Concord's policies or training manuals.

Post-Incident

After the incident on May 23, 2015, the Concord director spoke with the doorman who had permitted entry to the minor without checking for ID. He said the doorman could give no explanation for his conduct. The doorman admitted the facts as described by the liquor inspector and as seen on the CCTV.

When asked what happened to the doorman who admitted the minor agent, the Concord director said he had re-assigned him to another security job, but not to another licensed establishment.

As a result of this incident, the licensee severed its relationship with Concord Security.

Licensee's Policies, Procedures and Training

The Assistant General Manager and the second owner testified about the licensee's policies, procedures, practices and training.

Training

The second owner stated that they generally tried to hire people who were already experienced in the industry. Management was prepared to pay more for these people and to provide them with benefits in order to try and reduce turnover.

With respect to training new staff, the Assistant General Manager stated a senior staff member – he or the General Manager or another senior staff - generally shadowed new hires for four shifts. The second owner described the shadowing of new hires as a “guided work experience.” He said, when he was on the floor, he often reviewed the rules with staff and asked if they had requested ID of people he thought were under 30. Senior management relied on the General Manager to ensure staff were adequately trained. With respect to ongoing training, the second owner said management would observe staff and the door personnel and review ID requirements as needed.

When asked in cross-examination about ongoing training, the Assistant General Manager said they gave staff quizzes about food and mixing drinks. In response to a question about quizzes on identification of minors, he said that staff had signed off on this at the time of hiring.

When asked about how often staff would request ID, the Assistant General Manager said "constantly." They did not discuss what sorts of things to look for when determining whether someone appeared to be under 30. The second owner did not agree with training on specifics as to what to look for when determining if someone is under 30. The practice in their establishment is to observe staff and make sure they are being diligent in asking for ID. He did regular informal reviews with both security personnel and staff, asking about their duties and often asking if they asked for ID and if not, why not. The security personnel answered sometimes that he had seen the server/hostess check, therefore he did not.

Written Policies

The licensee has a policy of requiring all employees to request two pieces of identification of anyone who appears to be under 30. The Assistant General Manager said they emphasized to all employees that it was their responsibility to check for ID even though the doormen were required to check ID as well. This was important as minors were allowed into the establishment with a parent or guardian but were not allowed alcohol. The second owner repeated this policy and emphasis on this to their employees.

The Assistant General Manager identified the Employee Handbook (Exhibit 3) and stated that he was involved in its preparation. His involvement was primarily in the preparation of the sections for the general training of bussers and servers. The General Manager had prepared the information about responsible liquor service.

The Employee Handbook is a 34 page document dated at the bottom 09.08.14. The handbook includes policies on privacy, workplace safety, work attendance, dress code, promotion, sexual harassment and discrimination, a code of conduct, types of disciplinary action, compensation and benefits.

A section in the handbook titled Important Policies includes "Responsible Liquor Service" at page 6. This section states that all servers and bartenders must have their Serving It Right certificates. Employees must demonstrate that they are preventing minors from obtaining liquor. Employees are required to do "an initial assessment of every patron before selling or serving them liquor. This applies even though we have door control." This section does not refer to the policy of requesting ID of anyone who appears to be under 30.

Employees must ask for two pieces of identification. The first piece must be:

- Issued by a government agency (e.g. a passport or drivers licence) and
- Include the person's name, birth date, and picture

The second piece must:

- Include the holder's name (e.g. a credit card or Care Card), and
- Include the person's signature and/or picture

If the customer is unable to produce two pieces of acceptable identification, the employee must refuse entry and/or service. The policy describes examples of ID issued by a government agency and also refers to the new BC Services card now in circulation. It describes types of acceptable secondary ID.

The final sentence on this page is:

"If the person cannot produce two pieces of acceptable identification that proves they are 19 or older, *you must refuse service.*" (italics and underlining in original)

Page 13 of the Employee Handbook refers to the use of Mystery Guests who will dine in the establishment at varying times "to observe and report back to the management and ownership on our Service, Employees, Management, Facilities and Product." There is no reference to using mystery guests for the purpose of checking on the ID policy. None of the licensee's witnesses referred to the use of mystery guests or secret shoppers to check on employees' compliance with the ID policy.

Page 27 of the Employee Handbook has a section on “Disciplinary Action and Termination of Employment” and refers to the use of progressive discipline of employees, setting out the steps for such disciplinary actions. The final section on this page sets out incidents that could lead to immediate dismissal of an employee. These include but are not limited to the following:

- Theft or unauthorized possession of company property, another employee’s property or a guest’s property.
- Deliberate damage of company property.
- Altering guest cheques, credit card transactions or point of sale transactions.
- Requesting or questioning any form of gratuity from a guest.
- Providing services/products free of charge without specific management consent.
- Reporting to work under the influence of drugs or alcohol.
- Possession, use or sale of drugs while on company property.
- Courtesy or disregard for a guest.
- Criminal convictions.

Failure to ask for identification is not listed as a cause for immediate dismissal. The second owner stated that they did not terminate the bartender. The bartender remained in their employ for a few more shifts before leaving on his own accord.

The final page of the Employee Handbook is an “acknowledgement” page, with a signature line and a date line. Exhibit 3 contains an undated and unsigned acknowledgement page (p.34). The licensee did not submit any pages signed by employees. The employee must certify that he has read and fully understood the entire Employee Handbook and that he agrees to comply with all of the company policies, rules and regulations and that any violation of the rules and regulations may subject him to disciplinary action and/or termination of employment. Page 33 states under “Acknowledgement”:

Once you read your Handbook and thoroughly understood its contents please read, sign and return the “Acknowledgment Form” on the following page.

The acknowledgement form includes the following:

"I understand that it is against the law to serve liquor to minors. I will ask for two pieces of ID from every patron that appears 30 or under, and understand what constitutes two pieces of valid identification."

The second owner identified an undated document titled "Steel Toad Rules and Regulations" which states: (Exhibit 4)

We hold 2 different licenses: Food Primary and Liquor Primary

Liquor Primary: Pub, patio, mezzanine lounge

Minors are not allowed in these areas unless accompanied by a parent or legal guardian. After 10:00 pm they are not allowed in at all.

In other words, a minor may come in with their parents or guardians. A minor cannot come in with their friends who are over 19. No, it does not matter if they don't plan on drinking, they simply can't sit in those 2 areas.

If a minor comes, they can sit upstairs in the restaurant area, or in the hallway, but they are not allowed in the pub or on the patio.

Food Primary: Mezzanine and Hallway

Minors are allowed in these areas, even without accompaniment of parents or guardians.

Rules for ID'ing

Our policy is we ID guests aged 30 and under. They must have two pieces of ID. The first must be government issued (driver's license, passport, etc.). The second must support the first, and include a signature (credit card, debit card, Care Card).

If they do not have two pieces of identification them, we can't allow them in the pub or on the patio.

The second owner said he has seen this document (Exhibit 4) in the manual, and behind the bar. He could not say whether he had seen it on the pre-shift board. The Assistant General Manager did not comment on this document.

Pre-shift Meetings and Daily Reminders

The Assistant General Manager stated management held pre-shift meetings with staff every day before each shift. They always mentioned the ID policy. They held these meetings near a white board in the kitchen. He and/or the General Manager wrote notes on the board as reminders to staff about specials, drinks, etc. The board usually included a reminder about the importance of requesting two pieces of ID of anyone appearing to be under 30. The second owner was a little vaguer about whether or not there was a reminder re. IDs on the shift board all the time.

The licensee does not keep agendas for pre-shift meetings, only notes on the board in the kitchen. They do not keep minutes of these pre-shift meetings.

The Assistant General Manager stated that he and the General Manager held a pre-shift meeting on the day of the contravention. The bartender attended this meeting. The General Manager emphasized the ID requirements and the licensee's policies at this meeting. The Assistant General Manager said the General Manager was aware of the MAP and wanted all staff to realize the importance of compliance with the liquor laws, including ensuring staff request ID of anyone appearing to be under 30.

The Assistant General Manager stated he often checked with a server about whether or not he/she had requested ID of a particular customer or he would just ask for ID himself. If a customer did not have ID, they would ask him/her to move to the restaurant side of the establishment or to leave. Management was fully supportive of this practice and encouraged them to do this.

The second owner testified that he often asked staff to explain their duties including the policy on requesting identification. He did this with the security personnel as well as with their own employees. He often heard the General Manager repeating their policy on identification to staff and reminding them about the MAP.

Signage

When asked about signage around the establishment, the Assistant General Manager referred to the liquor licence by the front door. He also said the pre-shift notes on the board included the reminder about IDing people under 30.

The second owner stated that they would have included any signage required by the liquor inspector when he initially inspected. There are no signs re. ID at the computer pay stations. The licensee did not provide any photos of signage. When asked a question about signage in cross-examination, the second owner stated that every employee is aware of the ID requirements and if not, he/she should not have been hired.

The Guide and MAP

The Assistant General Manager said he was familiar with the Guide (Exhibit 1, tab 10). He learned much of the information in the Guide over his years working in the industry. He was aware of MAP and how the program works. Someone had told him about MAP but he hadn't seen any documentation from the branch about it.

The second owner testified that he had heard the General Manager emphasizing the MAP to staff and that the branch could be sending in under-age people at any time to test the licensee's compliance with the liquor laws.

Log Book and Incident Reports

The Assistant General Manager stated they did not keep a log book. The licensee does not keep a log book nor a record of incidents. The second owner stated they would have to fill out too many incident reports if they recorded all incidents of asking for ID.

Post-Incident

The licensee terminated its contract with Concord Security after the incident.

The second owner did not speak to the bartender after the incident. He said they were waiting to hear about the consequences from the branch before dealing with the bartender. He was “persona non grata” with the rest of the staff. He thought the bartender only worked a few more shifts after the May 23, 2015 incident and then left on his own accord.

The second owner said they have not made any other changes since the incident as he believed they were doing all they could do.

SUBMISSIONS – BRANCH

The branch notes that the licensee agrees with the facts of the contravention as set out in the NOEA.

With respect to the defence of due diligence, the branch makes no submissions on the issue of the directing mind. With respect to the licensee’s policies and procedures, the branch submits that there is some evidence of verbal reminders and policies with respect to requesting identification of those who appear to be under 30. However, there are weaknesses in the licensee’s evidence with respect to consistent implementation and training on its policies. The branch says the evidence falls short of establishing due diligence. The proposed penalty of \$7500 is the minimum for a first contravention of this kind and is appropriate and reasonable given the concerns about serving liquor to minors as noted in the NOEA.

SUBMISSIONS – LICENSEE

The licensee submits that it has met the standard of due diligence. The licensee says that the standard is not one of perfection.

The contravention here was committed by an employee who had been working for only one month in the establishment, had just got out of the orientation training, had signed the acknowledgement at the end of the employee handbook, and had received a reminder about the importance of requesting identification at a pre-shift meeting that same day.

With respect to the doorman, the licensee states they did not get what they paid for here. The doorman failed in his duties and as a consequence the licensee terminated its relationship with the Concord Security company. The licensee stated that, despite emphasizing to Concord and paying a premium for their services, the system did not work in this case and this was the fault of Concord who has admitted their fault here.

With respect to failure to train employees on what to look for when assessing customers to determine if they are under 30, the licensee submits that training on things like dress, appearance, etc. could be misleading in that it is the overall assessment of the individual, not specifics about types of clothing or mannerisms, that will lead to consistent implementation of the ID policy by its employees. There is no evidence before me that there is some objective standard on appearance and other physical characteristics that should be used in training employees.

The licensee points out that in the case before me, there is no doubt the minor agent was under 19 from her physical appearance and no amount of training on assessing different physical characteristics would have resulted in the bartender doing the right thing here. Despite all the training and reminders, the bartender made a mistake and failed to ask for ID of a patron who appeared to be under age, and definitely under 30.

If I find against the licensee on the issue of due diligence, the licensee submits that a \$7500 fine will have a huge financial impact on its operations. The licensee further says, even if I find the evidence falls short of establishing due diligence, I should nevertheless consider this evidence and the licensee's efforts to implement an effective system and determine that a penalty is not warranted here.

REASONS AND DECISION

Contravention

The licensee has admitted that an employee sold liquor to a minor but that its policies, procedures and training all establish a defence of due diligence.

I find that an employee of the licensee sold liquor to a 17 year old minor on May 23, 2015.

Due Diligence

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

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

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

The B.C. Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence 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.

The answer to these two questions depends on the evidence presented. Both of the issues under the second part of the test are factual.

As set out in *Beverly Corners* above, the three questions I must answer are:

1. Was the employee who committed the contravention the directing mind?
2. If no, did the licensee implement adequate training and other systems to prevent the sale of liquor to minors?
3. Did the licensee take reasonable steps to ensure the effective application of that education and the operation of those systems?

1. Directing Mind

The licensee submitted that the bartender was not the directing mind. The branch made no submissions on this. I find that the General Manager was the directing mind. He was responsible for the supervision and training of the employees and he wrote much of the Employee Handbook. At the time of the incident, the General Manager was on site but not in the vicinity of the doorman nor the bartender. Given his appearance shortly after the contravention when the liquor inspector asked for him, I assume he was in a back

office away from the main area of the establishment. At any rate, I find that the employee who sold the liquor was not the directing mind of the licensee, and that the General Manager was not present in the bar area at the time of the contravention.

Having established that the bartender who served the liquor was not the directing mind, I turn to the two questions in the second part of the test as laid out in *Beverley Corners*.

2. Adequate Training and Systems

The licensee had a number of training systems and policies in place at the time of the incident, with respect to checking for identification of minors. These include:

- Training of new hires comprised of four shifts of senior staff shadowing new employees plus a de-brief session and the signing of the Employee Handbook acknowledgement page.
- Training of doormen by Concord Security which includes 4 hours on liquor training and some interviews with the second owner.
- A written policy in the Employee Handbook to ask for two pieces of ID and, if the guest is unable to provide this, the server must refuse service.
- An acknowledgement signing page for all new employees to sign after reading the Employee Handbook. The acknowledgement page includes the requirement of asking for ID of guests who appear to be under 30.
- Requirement that all employees have Serving It Right certificates.
- One page “Steel Toad Rules and Regulations”, undated, outlining how to deal with minors entering the establishment, the rules about where minors are allowed in the establishment and rules about requesting ID of anyone appearing to be under 30.

I find some weaknesses in the licensee's evidence of its training systems and policies:

- No specific training sessions for new hires, other than having senior staff shadow them for four shifts.
- Employees are required to acknowledge they have read and understood the Employee Handbook but management does not review the main points in the book nor is there any written or verbal testing to ensure they have read and understood.
- The section in the Employee Handbook on Responsible Liquor Service (p. 6) requires employees to do an initial assessment of patrons, but does not say to ask for ID of anyone appearing to be under 30.
- Limited evidence of any ongoing staff training – the testimony about pre-shift meetings indicated they reminded staff about identification at these meetings.
- The Steel Toad Rules and Regulations (Exhibit 4) is undated – limited evidence as to how this document is used. According to the second owner, this is kept behind the bar and may be in the manual.

Despite the above-noted weaknesses, I conclude that the licensee has policies in place and has provided some training to its employees on responsible liquor service and identification of minors.

3. Effective Application and Operation of its Systems

A licensee must not only demonstrate it has policies in place and has provided the necessary training to its employees, it must also demonstrate that it has taken reasonable steps to ensure the effective application of that education and the day-to-day operation of those systems.

Evidence of the effective application of its systems include:

- Pre-shift meetings with staff and reminders about checking for identification.
- Pre-shift meeting notes posted on white board – usually with specific reminders about checking for identification.
- Awareness by senior management of the Guide and MAP and reminders to staff about MAP.
- Regular informal reviews with staff and with the Concord Security personnel.

I find some weaknesses in the licensee's evidence on the effective application and operation of its systems:

- No documentation showing the bartender signed and dated the acknowledgement form.
- No documented evidence of the type of training used by Concord, with respect to liquor service and no documentation showing the Concord employee signed anything similar to the acknowledgement form or that such forms even exist for the Concord employees.
- No evidence that the Concord doorman attended pre-shift meetings.
- Failure to ask for ID is not included in the list of actions that may result in dismissal or even progressive discipline (p.27 of Employee Handbook).
- No evidence of post-incident discussions with staff.
- No copies or photos of white board notes used in the pre-shift meetings.

- No photos of signage; very limited testimony about the types of signage in the establishment.

The onus is on a licensee to establish the defence of due diligence on a balance of probabilities. Therefore, the onus is on the licensee to produce all documentation to help establish the defence. Documentation, including any signed documents, are significant, especially when key witnesses are not available to testify. Neither the General Manager who was responsible for training and overall supervision of staff, nor the bartender who served the minor agent, testified. I draw no conclusions about due diligence based on the absence of these witnesses. I understand the difficulties a licensee may face in compelling reluctant witnesses who are no longer in their employ. The absence of testimony from key witnesses means licensees must be diligent in producing all documented evidence to support its position. Signed documents provide evidence that the licensee is applying its stated policies.

A critical missing piece of evidence here is the acknowledgement form signed by the bartender who had been hired only one month before.

I heard some testimony and submissions on the question of the importance of training staff on what to look for in order to determine if someone is under 30 or not. I agree with the licensee that pointing out specifics of physical features to determine someone's age can be misleading and may lead to mistakes. I also agree that there is no evidence before me to demonstrate an objective standard for assessing one's age. However, discussions of why a staff member has requested ID or not requested ID of a guest, and why a staff member may think someone appears to be under 30 or over 30, can help staff to make these judgement calls. Further, encouraging staff to request help from management when in doubt or, when dealing with a reluctant guest, will assist in ensuring minors will not be served. The licensee's evidence about one on one interactions on the floor between senior management shows they were discussing why or why not a particular server or door personnel asked for ID. Discussions in a group setting about what staff perceive as under 30 can also assist staff in making these determinations.

I do not agree with the second owner or the licensee's submission that they have done everything they can do to establish due diligence. Some additional tools or systems that have been used by other licensees to establish an effective application of its systems and policies are:

- Logbook or incident reports to record incidents.
- Written agendas and/or minutes of meetings.
- Written quizzes of staff that include reminders about steps for effective identification requests.
- Immediate dismissal as a consequence of not requesting ID.
- Use of secret shoppers to monitor staff.
- Reminders on pay stations about ID and inclusion of a system that shows the legal birthdate a person must have to be served alcohol.
- Clear signage in an establishment to alert guests and to remind staff about the ID requirements.

This is not an exhaustive list of what is required to establish due diligence, nor is it a mandatory list of what a licensee must demonstrate in order to establish due diligence. I point out the above merely as suggestions the licensee might wish to consider in improving the operation of its systems.

I find that the licensee and the witnesses were very well meaning and sincere in their belief that they had done all they could do to prevent such a contravention from occurring. The second owner stated in his testimony that "in our mind, we are doing the things we need to do."

Despite the second owner's belief that they have done everything they need to do, I find that the licensee has not established the defence of due diligence. I make this finding partly because of the weaknesses I have identified above in the licensee's implementation of its policies. The lack of documentary evidence, as noted above, is not the sole reason for my conclusions on due diligence. In the circumstances of the contravention here, there was not just one employee who failed to follow the policies and made a mistake, there were two: the doorman and the bartender. Combined with

the weaknesses in the evidence, the fact of two failures leads me to conclude that the systems and policies were not being adequately enforced or monitored.

With respect to the doorman's mistake, I note the licensee's submission that this was the fault of Concord: "it was exclusively and entirely the fault of Concord who admitted that." The licensee stated that a 12 year old could walk into the establishment and have a meal and that there was nothing particularly noteworthy about that. This may be true of the food primary restaurant upstairs but is not true of the liquor primary facility downstairs where the minor agent entered. As a lone 17 year old female who looked well under 30 years of age, the door personnel was required by the policy to ask for identification and did not do so. Unfortunately for the licensee, the bartender then failed to follow the policies as well and did not ask for ID.

The licensee must establish the defence of due diligence, whether it is demonstrating its own policies and their implementation or the policies of a contracted company and their implementation. If the licensee enters into a contract with a company to provide personnel for its establishment, it remains the licensee's responsibility to ensure these personnel are well trained and regularly reminded about their duties with respect to liquor laws.

The Guide (Exhibit 1, tab 10, page 11) sets out the role of a licensee:

You are legally responsible for understanding how the Act, its Regulations, and the specific terms and conditions of your licence affect the operation of your establishment, and for complying with the Act, its Regulations, and the terms and conditions of your licence and authorizations.

You are also responsible for making sure your employees follow B.C.'s liquor laws and the terms and conditions of your licence, even when you are not on site.

I find that the licensee has failed to ensure the effective application and the operation of its systems. I therefore find that the licensee has not established a defence of due diligence.

Having found that the licensee has not established a defence, I find that the licensee contravened section 33(1)(a) of the Act on May 23, 2015 and I turn to the question of penalty.

PENALTY

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

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

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The branch has consistently indicated that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the branch considers this a significant public safety issue:

- 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, and
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault, and theft.

The Minors as Agents program demonstrates the branch's intention to ensure that licensees are not serving or selling liquor to minors. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives, a seventeen year old minor was able to enter this liquor primary establishment on her own, without being asked for ID by the doorman who admitted her, and once seated, to purchase alcohol from the bartender, who also failed to request identification of this minor.

I have considered the submission of the licensee with respect to penalty. The licensee submits that a \$7500 fine will have a huge impact on its operations. The licensee provided no financial information to support this claim. The licensee says further, even if I find the evidence falls short of establishing due diligence, I should nevertheless consider the evidence and the licensee's efforts to implement an effective system and determine that a penalty is not warranted here. Given the weaknesses that I have identified in the licensee's application of its systems and given the very significant societal concerns about service of alcohol to minors, I find that a penalty is warranted here.

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

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

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 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 2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a \$7,500 monetary penalty for a first contravention. I find this to be reasonable and appropriate given the importance of ensuring minors do not have easy access to liquor, to encourage future voluntary compliance from the licensee and to ensure specific and general deterrence in society at large.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before **April 15, 2016**.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Nerys Poole
General Manager's Delegate

Date: March 11, 2016

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager

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