



**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:	Caprice Hospitality Inc. dba Caprice Nightclub 965 Granville Street Vancouver V6Z 1L3
Case:	EH15-079
For the Licensee:	Dennis Coates & Jessica Moon
For the Branch:	Jay Blackwell
General Manager's Delegate:	Nerys Poole
Date of Hearing:	April 21 and 22, 2016
Date of Decision:	May 20, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Caprice Hospitality Inc. dba Caprice Nightclub (the "licensee") owns and operates a nightclub, with liquor primary licence number 300401 (the "licence") at 965 Granville Street in Vancouver (the "nightclub"). The nightclub is located in an area referred to as the Entertainment District in Vancouver where many of the larger nightclubs are located. The licensee operates the nightclub and several other establishments under a management company, This Is Blueprint Management ("Blueprint").

According to the terms of its licence, the licensee may sell liquor from 9:00 a.m. to 3:00 a.m., from Monday to Sunday.

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. Dennis Coates, licensee's legal counsel, and Jessica Moon, assisting legal counsel, presented the licensee's case at the hearing. Reference to the "licensee" in this decision includes licensee's legal counsel as the legal representative of the corporate licensee.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated March 15, 2016 (the "NOEA").

The branch alleges that on June 27, 2015, the licensee contravened section 67(3) of the *Liquor Control and Licensing Act* (the "Act"), by refusing to permit entry to a peace officer.

Schedule 4 of the *Liquor Control and Licensing Regulation*, (the "Regulation") sets out a minimum penalty of 15 days for a contravention of section 67(3). The branch is proposing a penalty of 15 days.

The licensee accepts the facts of the incident that led to the alleged contravention as described in the NOEA, with the exception of the police officers' basis for requesting entry. The licensee raises two issues to dispute a finding of a contravention of section 67(3).

- 1) The licensee submits that the branch has proceeded under the wrong section of the Act and that the appropriate section to allege this contravention is section 20(1)(a) as a "failure to comply with a term or condition of the licence." The appropriate penalty range for a contravention of section 20(1)(a), as set out in Schedule 4, is one to three days.

The licensee does not dispute my authority to substitute the appropriate section if I am in agreement with its submission on this issue.

- 2) The licensee submits that it has a defence of due diligence to the contravention.

NOTICES OF ENFORCEMENT ACTION

The branch issued several NOEAs related to the alleged contravention. They are:

- NOEA no.1, dated August 20, 2015, alleging a contravention of section 67(3) (Exhibit 2)
- NOEA no.2, dated October 20, 2105, alleging a contravention of section 73(2)(b) (Exhibit 1 tab 1(c))
- NOEA no.3, dated March 15, 2016, alleging a contravention of section 67(3) (Exhibit 1, tab 1 (a))

This hearing has proceeded on the basis of NOEA no.3 dated March 15, 2016 (the "NOEA"), alleging a contravention of section 67(3).

As a result of an oral submission from the licensee's counsel to the branch registrar on the applicability of section 67(3), the branch issued NOEA no.2, alleging a contravention of section 73(2). The licensee's counsel then sent an undated written submission to the branch arguing against the use of section 73(2) on the facts of this incident. The branch

then determined that section 67(3) was the correct section and issued the final NOEA, dated March 15, 2016.

On April 4, 2016, the licensee submitted a second written submission, with the first written submission attached, to the branch registrar. I received this second written submission from the branch registrar on April 4, 2016, asking if I wished to make a preliminary decision on this issue before the hearing. I notified the branch registrar that I would not deal with this as a preliminary issue for decision but would determine the issue after I heard the evidence in the hearing. Both the licensee and the branch made submissions on this issue at the hearing.

The branch issued several Contravention Notices, which were amended for various reasons, including the changes to the section of the Act alleging the contravention. (Exhibit 1, tab 2)

Each of the issued NOEAs refers to an alleged contravention of section 44(1)(a) of the Regulation that was related to the June 27, 2015 incident. The licensee signed a waiver for this contravention and paid the \$1000 penalty. This contravention therefore forms no part of this hearing.

RELEVANT STATUTORY PROVISIONS

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

Right to search

67 (1) A peace officer who, on reasonable and probable grounds, believes that liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes may, subject to subsection (2), enter or search, or both, for the liquor where the peace officer suspects it to be, and may seize and remove liquor found and the packages in which it is kept.

(2) For the purposes of this section, a peace officer may without a warrant

(a) search any person, and

(b) enter or search, or both, anywhere except a residence.

- (3) A person commits an offence if the person
- (a) obstructs or attempts to obstruct an entry or search by a peace officer under this section, or
 - (b) refuses or fails to admit immediately a peace officer demanding entry anywhere under this section.

Action against a licensee

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

- (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

Power to retain documents and inspect books and premises

73 (1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager may

- (a) require a licensee to produce records the licensee is required to keep under this Act,
- (b) inspect any of the following:

...

- (iii) licensed establishments, and records, liquor and other things associated with the operation of the establishment, and

- (c) require an employee or patron of a licensee to produce identification.

...

(1.5) The general manager, when acting under the authority of this section, may request and receive the assistance of a peace officer.

(2) Without limiting any other provision of this section, a licensee must

...

(b) allow the licensed establishment to be inspected under this section, immediately upon being requested to do so by the general manager,

(i) at any time provided for in the terms and conditions of the licence, and

(ii) without limiting subparagraph (i), at all reasonable times.

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

Cancellation of licences

69 (1) Subject to subsection (2), the general manager must cancel the licence of a licensee if

...

(b) contrary to section 67 (3) of the Act, the licensee

(i) obstructs or attempts to obstruct an entry or search by a peace officer under section 67 of the Act, or

(ii) refuses or fails to immediately admit a peace officer demanding entry under section 67 of the Act, or

(c) contrary to section 73 (2) (b) of the Act, the licensee neglects or refuses to allow premises to be inspected when and as required under section 73 (2) (b) of the Act.

...

(4) The general manager may refrain from cancelling a licence or cancelling an endorsement if the general manager is satisfied that it is in the public interest to refrain from cancelling the licence or endorsement, as the case may be, and the general manager

- (a) suspends the licensee's licence or endorsement, as the case may be, in accordance with Schedule 4, and
- (b) imposes other enforcement actions referred to in section 20(2) of the Act that the general manager considers appropriate.

Schedule 4

45	<p>A breach or section 20 of the Act by permitting the sale, service or consumption of liquor while the licensee's licence is under suspension,</p> <p>or</p> <p>A breach of section 67(3) of the Act, by</p> <ul style="list-style-type: none"> (a) obstruction or attempting to obstruct an entry or search by a peace officer under section 67 of the Act, or (b) refusing or failing to admit immediately a peace officer demanding entry anywhere under section 67(3) of the Act, <p>or</p> <p>A breach of section 73(2)(b) of the Act by neglecting or refusing to immediately allow premises to be inspected</p>	<p>If a licence is not cancelled or transferred in accordance with section 69 of the regulation, at least 15 days</p>	
46	<p>Any breach of any provision of the At, the regulations or the terms and conditions of the licence not specifically referred to in this Schedule</p>	1-3	\$1000-\$3000

ISSUES

1. Does section 67(3) apply to the alleged contravention here and if no, what is the appropriate section and penalty under Schedule 4?
2. Did the contravention occur?
3. If I make a finding that the contravention occurred under the Act, has the Licensee established a defence to the contravention?
4. If there is no defence to the contravention, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: Branch Book of Documents, tabs 1 to 15
- Exhibit 2: NOEA no.1 dated August 20, 2015
- Exhibit 3: excerpt from Compliance and Enforcement Policy and Procedures Reference Manual
- Exhibit 4: "Illicit Alcohol in British Columbia" from towardtheheart.com
- Exhibit 5: Large map showing the layout of the nightclub
- Exhibit 6: Business Standards –Blueprint
- Exhibit 7: Employee Code of Conduct –Blueprint
- Exhibit 8: Job Description for General Manager –Blueprint
- Exhibit 9: Job Description of Director of Operations – Blueprint
- Exhibit 10: Resume of consultant
- Exhibit 11: Employee Information Sheet for assistant manager, with start date of December 1, 2011
- Exhibit 12: Adelphia Group Business standards sign-off sheet, signed by assistant manager on January 16, 2012
- Exhibit 13: Employee Information Sheet for the General Manager, with start date of July 16, 2012
- Exhibit 14: Adelphia Group New Employee Signature form dated July 16, 2012, for the General Manager; adherence to Code of Conduct and Fire and Emergency Evacuation Procedures
- Exhibit 15: Signed adherence to the Code of Conduct and Business Standards dated July 16, 2012, signed by the General Manager
- Exhibit 16: Salary Employee Signature Form signed by the General Manager, dated Jan.20, 2016

WITNESSES

The branch called three witnesses:

- The liquor inspector who issued the Contravention Notices and signed the NOEAs (the "liquor inspector")
- A Vancouver Police Department police officer who was at the nightclub on June 27, 2015 ("VPD officer 1")

- A Vancouver Police Department police officer who was at the nightclub on June 27, 2015 (“VPD officer 2”)

The licensee called three witnesses:

- The licensee’s representative and overall manager of the operations of the nightclub and other licensed establishments operated by Blueprint (the “licensee’s representative”)
- A consultant/advisor to the nightclub’s corporate management (the “consultant”)
- Director of Operations for Blueprint (“Director of Operations”)

None of the licensee’s witnesses were in the nightclub at the time of the alleged contravention. In the narrative of the events on June 27, 2015, reference is made to a person with the same family name as the licensee’s representative. This person claimed to be in charge at the time the police were trying to gain entry and he identified himself to the police as “the owner/manager.” According to the licensee’s representative, he is a cousin of the licensee’s representative and he was working as an assistant manager at the time. He is no longer working at the nightclub. I refer to him as “the assistant manager” throughout this decision. The assistant manager was terminated and did not testify.

ORGANIZATION OF DECISION

First, I describe the events of June 27, 2015 that are not in dispute. Then, I address the section 67(3) issue with an account of the branch’s evidence of the reasons for the police demand to enter. I summarize the submissions on this issue from the licensee and the branch and finally provide my analysis and conclusions on the section 67(3) issue. Next, I address the licensee’s evidence of due diligence, the submissions of the licensee and the branch on due diligence and finally my reasons and decision on the defence of due diligence.

FACTS

As noted above, the licensee stated it was not disputing the facts of the alleged contravention. With the exception of the evidence about the basis of the police officers' request to enter, the licensee accepts the facts as set out in the NOEA and in the testimony of the VPD officers.

As there is reference to both LED and the Caprice in the narrative of the events, the NOEA explains the connection between these two. Originally, there were two clubs with separate entries, one called Caprice and the other LED. On March 19, 2012, both areas merged under the Caprice name and patrons are free to move from one area to another. Both areas are under the one licence. The author of the NOEA notes: "There is some confusion with the club name by patrons and police who are unaware of the change to LED as LED signage has not been fully removed and is visible outside."

At approximately 4:00 a.m. on June 27, 2015, three Vancouver Police Department officers were on duty and in full uniform patrolling the area of 900 Granville Street. As they were walking by the nightclub, they heard music playing quite loudly and, through a window, they observed a number of people inside the nightclub. They saw a staff member open the front door and let a number of people inside. As more people were approaching the door, the staff member looked around, saw the police and then ducked back inside slamming the door in the face of the rest of group of people trying to gain entry. VPD officer 2 asked the group of people where they were going and they replied that they were going to the LED for the after-party. VPD officer 2 asked if they were staff and they said no, they were friends of the manager and had been invited to party.

Police continued to knock at the door with no response. The music was turned down and eventually turned right off. VPD officer 2 looked through the window and saw about 20 to 25 people leaving out the rear door. At this time a third VPD officer who did not testify began walking south on Granville Street and noted four people coming out the front door. When they saw him, they immediately retreated back into the nightclub. The third VPD officer continued walking south and saw nine people coming out of the

rear lane behind the nightclub onto Nelson Street. He asked these people where they were coming from and they said the LED.

VPD Officer 1 had continued knocking on the door. As there was a window in the door, people inside were able to see him. A male eventually opened the patio door at the south portion of the nightclub. He stood in the doorway blocking entrance with his body. VPD Officer 1 asked the male who he was. The male replied that it was none of his business and asked what the officer wanted. VPD officer 1 explained that he needed to speak with the owner/manager of the nightclub who was on duty for the night. The male stated that he was the owner/manager (described in this decision as the assistant manager).

VPD Officer 1 explained to the assistant manager that the three VPD officers had observed people coming and going from the nightclub and that they were not allowed to be inside the nightclub drinking at this time - now 4:15 a.m. VPD Officer 1 explained that he needed to enter to complete a liquor inspection. The assistant manager stated: "You cannot come inside this club." VPD Officer 1 again explained to the assistant manager that he needed to enter but was again refused entry. VPD Officer 1 requested identification from the assistant manager to confirm that he was in fact the owner/manager. The assistant manager repeatedly refused to provide identification to VPD officer 1 but eventually handed it over to VPD officer 2. The assistant manager stated there was no one illegally inside the nightclub. VPD officer 1 stated he would like to enter and to view the video system. The assistant manager refused entry saying: "I will not let you inside the club and you will not be viewing the video surveillance."

At this point, VPD officer 1 consulted with the other VPD officers and they made the decision to report the incident to the branch for follow-up rather than escalate the already difficult situation. The VPD officers left the nightclub area about 4:25 a.m.

On July 13, 2015, the liquor inspector, the branch regional manager and a VPD detective met with the licensee's representative to discuss the police reports. The licensee's representative provided them with the video footage of the inside of the nightclub at the time of the alleged contravention. The liquor inspector viewed the video footage, confirming people were inside the nightclub after 3:30 a.m.

BRANCH EVIDENCE RELATING TO THE BASIS FOR REQUEST TO ENTER

The VPD officers testified about their reasons for requesting entry to the nightclub. As the basis of the licensee's argument re: section 67(3) is that the police officers did not have the reasonable and probable grounds required under this section to request entry, I have set out their evidence in some detail. I make findings of fact with respect to this issue to help determine the appropriateness of the use of section 67(3).

At the hearing, VPD Officer 1 stated that his purpose in banging on the door of the nightclub was because he believed they were having an after party and that the nightclub staff was still selling or providing liquor to the people inside. The fact that there were people inside the nightclub after the required closing time formed the basis for the contravention of section 44(1)(a). The licensee admitted this contravention when it signed the waiver. VPD Officer 1 stated that he asked to come inside when the assistant manager came to the door because he believed there were people inside who were consuming liquor.

While VPD Officer 1 was standing at the door, he could see about eight people inside the nightclub, some holding drinks. He stated he did not know if they were being sold the liquor or if they had brought it in themselves.

On cross-examination, VPD Officer 1 maintained that he believed liquor was being consumed inside the nightclub and therefore consumed unlawfully because it was after the closing time of 3:30 a.m. In response to a question about whether VPD Officer 1 believed that there was illicit liquor, i.e. liquor that had not gone through the Liquor Distribution Branch process, VPD Officer 1 testified that the people entering after closing time may have brought in their own liquor. He stated he did not know whether they had brought in their own liquor or whether the nightclub was selling the liquor to them. He stated that his purpose in entering was partly to determine this. When asked if he had seen any backpacks on the people entering after hours, he stated yes, he saw a couple of the people at the side entrance go in with backpacks and that, from what he observed, no one searched them at the entrance. He stated that the people who were questioned about where they were going stated that they were going to an after-party. He said, from his experience, people entering clubs are normally patted down or

searched when they have backpacks. He saw none of this. He expressed his concern that there may also be liquor being consumed that was from outside and not from the nightclub liquor supply. He said he had a multitude of concerns and that this was just one of them.

In his direct testimony, VPD Officer 2 responded to a question specifically about section 67(3) and how it related to their request to entry. He stated:

I believed that there was a high likelihood of an after hours party or something of that nature, for which there was no authorization granted. We were being refused entry and we were unable to seize or have access to any kind of liquor that may have been unlawfully possessed by persons inside the licensed premises.

The branch issued NOEA no.1, dated August 20, 2015, soon after the incident and before any question about the applicability of section 67(3). This NOEA included the same paragraphs found in the subsequent NOEAs, under the heading "The Elements of the Alleged Contraventions":

The police explained that they need to enter the establishment to complete a liquor inspection and the manager responded to police officers 'you cannot come inside this club.'

The police explained to Manager that they believed liquor was possessed for an illegal purpose that he had to allow Police entry. Manager said to Police that they were not coming into the club.

The Manager said to police that no one was illegally inside the bar. Police said, let them come inside and check and also that they would like to view the video system to confirm what they believed, which was there was illegal service of liquor inside the bar.

The above paragraphs in the NOEAs repeat the words of VPD Officer 1 in an email to the liquor inspector dated July 8, 2015 (Exhibit 1, tab 8 (c), just over a week after the incident, where he stated:

“I explained that I needed to enter the establishment to complete a liquor inspection and he said to me: ‘you cannot come inside this club.’ I explained to him that where I believed liquor was possessed for an illegal purpose that he had to allow me entry. He said to me that I was not coming into the club.

...

and also that I would like to view the video system to confirm what I believed, which was there was illegal service of liquor inside the bar.

...

It is my belief that liquor was illegally possessed by {assistant manager’s name}, that liquor was being served to persons outside hours of service, that I was illegally not allowed entry to check on the establishment and that I was obstructed in the duties I am legally allowed to perform.”

LICENSEE’S SUBMISSION ON SECTION 67(3)

The history of the three NOEAs is set out above. At the hearing, the licensee took no exception to my jurisdiction to amend the NOEA to replace section 67(3) with another section of the Act, if I agreed with its submission.

The licensee submits that section 67(3) deals with the obstruction of a search and seizure by a peace officer who has reasonable grounds to believe that liquor is unlawfully possessed or kept, or kept for unlawful purposes. The licensee says that the incident on June 27, 2015 was not in the course of a search and seizure of liquor that was unlawfully possessed or kept or kept for unlawful purposes.

The licensee does not dispute that the police officers had the authority to request entry under the circumstances. However, the licensee submits that the police officers obtained their authority to enter the nightclub pursuant to the Liquor Primary Licence Terms and Conditions as set out in the Guide that form part of the terms and conditions of the licence.

If the authority is obtained pursuant to these terms and conditions, the licensee says that the appropriate section for this alleged contravention is section 20(1)(a) of the Act, which allows the General Manager to take action against a licensee for its failure to comply with a term or condition of the licence. The minimum penalty for a contravention of section 20(1)(a) of the Act is found in item 46 of Schedule 4 – one to three days.

Page 54 of the Guide (Exhibit 1, tab 13) states:

ENTRY OF LIQUOR INSPECTORS AND POLICE OFFICERS

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, liquor storage area, Temporary Use Areas, 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's or peace officer's entry into your establishment, liquor storage area, or a 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.

The licensee agrees that police officers have a broad and ongoing right to enter and inspect a licensed premises pursuant to the Terms and Conditions and the licensee has an obligation to cooperate and allow entry of police officers.

In contrast, the licensee submits, section 67 only gives police officers the right to enter and search for liquor that is unlawfully possessed or kept and only if the police officers have reasonable and probable grounds of such unlawful possession of liquor. With respect to the incident on June 27, 2015, the licensee submits that there is no evidence that the police officers requesting entry to the licensee's premises had reasonable and probable grounds to believe that liquor was unlawfully possessed or kept, or possessed or kept for unlawful purposes by the licensee.

In its cross-examination of VPD Officer 1, the licensee questioned him about his belief at the time and, in his oral submission, expressed surprise as to whether or not the officer actually made the statement to the assistant manager about his belief that “liquor was possessed for an illegal purpose.”

The licensee submits that the true purpose of section 67(3) is to search and seize illicit liquor. The licensee submitted Exhibit 4, titled “Illicit Alcohol in British Columbia” from an unknown source (website: towardtheheart.com), dealing with the harms caused by illicit alcohol. He also submitted an excerpt from the branch’s Compliance and Enforcement Policy and Procedures Reference Manual on the illicit liquor section 18 (Exhibit 3). The licensee argues that a police officer must have the belief that there is “illicit liquor” on premises in order to establish the reasonable and probable grounds under section 67(3). The licensee says there is no allegation that the liquor was not purchased in accordance with the Liquor Distribution Branch process and therefore no suggestion of illicit liquor on the premises. He distinguishes between ‘illicit’ and ‘unlawful’. The licensee submits that a belief that liquor may have been unlawfully sold after hours cannot form the basis for reasonable and probable grounds under section 67(3); there must be a belief that illicit liquor is on the premises.

The licensee referred in his written submission to a B.C. Supreme Court decision, *R. v. Wilson*, 2014 BCSC 2509 (“*Wilson*”) at paragraph 25, where the court summarizes the law on what constitutes “reasonable and probable grounds” for a police officer to search for the lawful possession of liquor under section 67 of the Act. The court stated that the “reasonable grounds to believe standard requires something more than mere suspicion.” The licensee also cites a provincial court case, *R. v. Craig* 2003 BCPC 0139, where the court held that a police officer who saw four sealed bottles of liquor and one unsealed bottle in an open box in the accused’s vehicle, did not constitute “reasonable and probable grounds” under section 67 of the Act.

In the final paragraph of its written submission, the licensee says:

Without some evidence a police officer has reasonable and probable grounds to believe that liquor is unlawfully possessed or kept, any right to inspect liquor primary premises would originate from the Terms and Conditions. It follows

that any obstruction [of] such right of entry of a police officer, would be a contravention of the Act in accordance with section 20(1)(a) and not section 67(3).

In his oral submissions at the hearing, the licensee said that the police statements about the possibility of liquor being possessed for an illegal purpose are merely attempts to “shoehorn” the justification for the request to enter under section 67(3). The licensee says there is no evidence to meet the test under section 67(3). He submits the police officer’s basis for the request to enter was because of their belief that there might be consumption of alcohol after the closing time, not because they believed there might be illicit alcohol.

BRANCH’S SUBMISSION ON SECTION 67(3)

The branch did not provide a written submission prior to the hearing and made an oral submission on this issue at the hearing.

The branch submits that section 67(3) applies to the alleged contravention. The evidence from VPD Officer 1 is that he had a multitude of concerns about the nightclub at the time of his request to enter, including a failure to search backpacks which may have included illicit liquor being brought into the premises.

The section of the Guide referred to by the licensee on entry of liquor inspectors and police officers is a summary, in plain language, of sections of the Act. This section simply reiterates the intent of section 67(3) which is to ensure licensees allow police officers to enter when they have reasonable and probable grounds to believe that “liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes” as set out in section 67(3).

The branch included a list of six enforcement cases with five waivers and one hearing decision (Exhibit 1, tab 12), all of which were contraventions of section 67(3) and submitted that the branch has used the appropriate section.

ANALYSIS AND CONCLUSION ON SECTION 67(3)

Findings of Fact

Based on the evidence of the VPD officers, I find that they had a “multitude of concerns” on the morning of June 27, 2015 when they attended the nightclub and demanded entry.

The VPD officers saw people entering the nightclub after closing hours. They saw a staff member opening the door and allowing entry to those people after hours. Some of these people were wearing backpacks. The officers did not observe anyone searching these backpacks. There were other people trying to enter the nightclub after hours. When questioned, these people stated they were not staff, that they were friends of the manager who had invited them to an after party at the nightclub. The VPD officers, although not able to enter, were able to see the inside of the nightclub through a window. They observed up to 25 people inside, some of whom appeared to be consuming.

I accept this evidence of the police officers and find that they were justified in demanding entry to the nightclub. I further find that VPD Officer 1 explained his reason for requesting entry to the assistant manager as being his belief that liquor was possessed for an illegal purpose and that he believed there was illegal service of liquor inside the bar.

The Law

The licensee does not dispute that the police officers had the right to demand entry and that they were illegally refused entry. The licensee’s submission is that section 67(3) is not the appropriate section to allege the contravention here, that the appropriate section is section 20(1)(a) as being a contravention of a term and condition of the licence.

The elements of a contravention under section 67(3) are:

- 1) refusal to allow entry to a peace officer, and
- 2) peace officer must have reasonable and probable grounds to believe that

- a) liquor is, anywhere or on anyone, unlawfully possessed or kept, OR
- b) liquor is possessed or kept for unlawful purposes

Application of the Law to the Facts and Conclusions

As noted, there is no dispute that an employee of the licensee refused entry to a police officer. Nor does the licensee dispute that the police officer had the right to demand entry. However, the licensee says this right to demand entry is found in the terms and conditions of the licence, not in section 67(3).

I note the branch's reference to other decisions that have dealt with section 67(3) contraventions. I have not referred to any of these in my conclusions on this issue as the fact that the branch has used this section in previous situations that may be similar to the facts of this case does not mean that the branch has used the correct section here. It may only mean that no one has challenged the use of this section in similar circumstances.

I have found that the VPD officers had a multitude of concerns when they were requesting entry to the nightclub, some of which related to the potential for illicit alcohol to be on the premises, others of which related to the potential for the unlawful sale of liquor. As the VPD officers were not permitted entry, they were not able to establish if either of these were occurring. They made their observations and had reasonable and probable grounds to believe that they might be occurring, which led to their request for entry.

I find that, based on the *Wilson* decision, a "reasonable belief" is all that is required in searches of individuals as stated at paragraph 25, citing several higher court decisions. I find it unnecessary to draw any conclusions about whether the standard applied to individuals in criminal cases is the same standard applicable to searches under the Act. I find the VPD officers here had a reasonable belief, based on their observations, that liquor may have been "unlawfully possessed or kept" or that liquor was "possessed or kept for unlawful purposes." My conclusions on the VPD officer's belief is based on my

findings noted above with respect to observations of backpacks, comments about an after party, and observations of individuals inside the nightclub.

The licensee has attempted to restrict the use of section 67(3) to suspicion about illicit liquor, i.e. liquor that has not been bought through the Liquor Distribution Branch process. Although I have found that the VPD officers here had some suspicion about the potential for illicit liquor, I conclude that section 67(3) applies to the unlawful possession of liquor. When I questioned the licensee about whether or not the sale of liquor after hours was unlawful, he agreed it was, but said the licensee had not been charged with this contravention. I expect the licensee was not charged with this contravention as there was no proof of the unlawful sale because the VPD officers were denied entry and therefore had no way of obtaining evidence of any unlawful sale. However, the fact that the licensee was not charged under this section of the Act does not preclude the VPD officers' reasonable belief that there was the unlawful sale of liquor.

Section 38(3) of the Act describes two ways in which the sale of liquor can be unlawful: a) not being purchased through the Liquor Distribution Branch and b) not being sold in accordance with this Act, the regulations and the terms and conditions of the licence. I do not agree with the licensee that section 67(3) applies only to the first part of this section and therefore precludes a belief that the unlawful sale of liquor may be occurring and thus justifies a demand for entry.

With respect to the paragraphs in the Guide that address refusal of entry to police officers, I agree that the Guide here is intended to be a plain language summary of sections 67(3) and 73(2)(b) of the Act. The final sentence in this section of the Guide refers to the seriousness of these contraventions (i.e. refusing entry) and the potential for cancellation of the licence, as set out in item 45 of the penalty schedule for contraventions of section 67(3). I find that this section of the Guide does not create a separate contravention, i.e. a contravention of the terms and conditions under section 20(1)(a), as submitted by the licensee.

I conclude that section 67(3) is the appropriate section to use in the circumstances of this case. I turn now to the defence of due diligence.

LICENSEE'S EVIDENCE OF DUE DILIGENCE

The licensee's witnesses testified about the management structure, policies, procedures, practices and training in the various establishments operated by Blueprint. As noted, none of the licensee's witnesses were present at the nightclub on the evening in question. None of the licensee's witnesses were able to explain the behaviour of the assistant manager on June 27, 2015.

Management Structure

The licence for Caprice Nightclub indicates that it was issued to Caprice Hospitality Inc. The branch submitted a legal entity summary for Caprice Hospitality Inc. with two shareholders with the same family name, neither of whom is active in the operation of the business, according to the licensee's representative. He stated that he and his brother (with same family name) operate the business for his mother and uncle who are listed as the two shareholders.

The licensee's representative stated that Blueprint manages the Caprice Nightclub, four other nightclubs, four pubs and three licensed retail stores. The licensee submitted no documents showing the ownership of Blueprint, which was formerly known as "Adelphia Group Inc.". Adelphia Group Inc. ("Adelphia") appears as a header on some of the licensee's documents.

The licensee's representative stated he is not directly involved in the day to day operations. The Director of Operations of Blueprint and to the General Manager of the nightclub are responsible for the daily operations. The General Manager of the nightclub reports to the Director of Operations. The licensee's representative explained that, despite the statements the assistant manager made to the police, he was not an owner nor a manager.

The Director of Operations has worked for Blueprint or its predecessor for 14 years, first as a bar manager, then general manager and for the last eight years at head office for Blueprint.

Job Descriptions

The licensee submitted two job descriptions (Exhibits 8 and 9). The licensee did not submit a job description for the assistant manager.

The General Manager's job description states:

"You are responsible for the overall successful and profitable management of all operations, training, hiring decisions, marketing and promotions, cost effective maintenance, capacity decisions, identifying and training managers, promotions, short and long term strategic planning, and supporting the community you serve."

Under Responsibilities and Tasks of the job description:

"Directly responsible for training, monitoring, providing feedback to all staff and managers. Ensure that all staff maintains the highest level of customer service."

The Director of Operations' job description states:

"Your position is responsible for the overall successful and profitable management of all Bar, Nightclub and Liquor Retail Stores. You have overall responsibility for all operations, training, hiring decisions, identifying and training managers, short and long term strategic planning, effective policy development, cost effective maintenance, product mix and purchase, inventory control, and supporting the community you serve. You are also responsible for managing overall liaison with the Blueprint Management Marketing Department."

Licensee's Record in the Industry

The licensee's representative spoke of his involvement in the industry over a period of 19 years and emphasized there have never been any issues before this. He is responsible for the oversight of five nightclubs, four pubs and three licensed retail stores and has an

exemplary record. He stated he and his managers do not condone what happened on June 27, 2015.

The consultant expressed his opinion about the nightclub's operations and the other operations managed by Blueprint. He stated that Blueprint leads the good management practices in the business of bars in Vancouver. Generally, there has been a huge improvement in the management of establishments in the last 15 or 20 years and many of them operate much better than in the past. Because of his background with the police, the consultant stated he has no interest in working with any group who do not conform to the law and who are not willing to improve. He said the Blueprint group is always willing to change, to adopt solid management practices and to address any problems that may arise from time to time. In every instance where he has been involved with this group, they have been willing to correct any problems.

He agreed with the licensee that the incident on June 27, 2015 was definitely an anomaly in the operation of this nightclub and that it was a violation of their policies, practices, and procedures and, as such, it was appropriate for management to terminate the assistant manager.

Written Policies and Guidelines

The licensee's representative described the policies and guidelines that they have developed and amended over the years. The licensee initially developed the policies in 2006/2007 with the help of one of their employees at the time who had formerly worked with the Vancouver Police Department as a policy writer. This employee is mentioned in the licensee's documents as "senior manager of Adelpia Group." Many of the present-day policies have evolved from this initial work. The senior manager of Adelpia Group retired in 2013.

The consultant also testified about the creation and revision of the policies of the nightclub. He has been involved with the family who owns the nightclub since about 1997 and has continued his involvement until today. He assisted in establishing standards of operations under the Act and emphasized the importance of hiring good people, training them, monitoring them and using the progressive discipline model to

ensure standards are maintained. He introduced the management to the senior manager of Adelphia Group, who started as a general manager of one of the nightclubs and proceeded to create many of the corporate policies that exist today, with some modifications. Management continues to ask the consultant for advice today, particularly on police or branch issues.

The Director of Operations added in his testimony that Blueprint has hired a consultant company with human resources expertise to do some of the policy writing. This person has taken over some of the policy writing, updating the policies, creating best practices for hiring, training and discipline and helping new employees as they start. She did not testify.

The licensee's representative testified about the document titled "Business Standards, This is Blueprint Management." (Exhibit 6) He stated that all managers receive this document at the time of hiring and that they are required to sign, stating they "have read, understand and agree to the Business Standards."

The Business Standards document states that it is "intended for all salaried employees and all managers and supervisors working under This is Blueprint Management Ltd. ("Blueprint"). . . It is the responsibility of all managers and supervisors, with final responsibility resting with the direct supervisor to ensure our Business Standards are implemented and practiced at all of our operations."

This six page document sets out a number of high level principles and then addresses various subjects under the following headings:

- Fair Treatment of Individuals
- Workplace Safety
- Corporate Policy and Procedures
- Drugs and Alcohol
- Regulatory Compliance
- Antitrust Laws and Fair Competition
- Business Courtesies
- Confidential Information
- Financial Reporting and Records

- Conflicts of Interest
- Protecting Assets
- Political Public Activities and Contributions
- Agents, Consultants and Representatives of Blueprint
- Government Investigations

Under Corporate Policy and Procedures, there are two sentences:

Blueprint has adopted many policies, procedures, memos, guidelines and compliance documents that deal in greater detail with all company policies and procedures.

All employees are expected to be guided by and follow all corporate policies and procedures and all managers are expected to ensure such compliance.

Under Regulatory Compliance, one paragraph:

We are subject to a variety of Federal, Provincial and Municipal laws and regulations that are enforced by numerous agencies. We depend on all employees to uphold Blueprint's regulatory reputation. It is the responsibility of all managers to be aware of and in compliance with such laws and regulations and to ensure that all staff are also in compliance. Any employee concerns about regulatory compliance should be immediately communicated to a supervisor.

Under Government Investigations, one paragraph:

Blueprint is committed to complying with all applicable laws, rules, and regulations and providing full cooperation with all such inquiries authorized by law. Senior management should be immediately informed of any such investigation. Remember, also, never destroy any record that you even anticipate may become part of a government inquiry, audit, review, or investigation. Or any record that may become part of any type of litigation.

The licensee's representative and the Director of Operations testified about the Employee Code of Conduct document (Exhibit 7). The senior manager of Adelphia Group created this document, which is used for all employees and is part of the training program followed by the Director of Operations and the General Manager.

The introduction to the 12 page Employee Code of Conduct document states:

The purpose of this document is to ensure that all employees understand the corporate expectations for employee conduct, performance and behavior in all of the workplaces owned by This Is Blueprint Management. With consistent organizational understanding of such expectations, employees will be offered a positive employment experience that also meets the needs of This Is Blueprint Management.

This Is Blueprint Management recognizes the value of its employees by qualifying them as the most important asset to the organization. It is critical for employees of This Is Blueprint Management to recognize that each individual staff member in the organization is the face of the organization and ultimately contributes to the organization's success. As a result, employee conduct is of utmost importance.

The requirement to comply with the Employee Code of Conduct is a condition of employment. Employees who fail to comply with this code may be subject to disciplinary action up to and including termination of employment.

The sub-sections of this document are:

- Customer/Client Service
- Innovation, Ideas and Efficiencies
- Duty of Loyalty/Avoiding Conflict of Interest/Confidentiality
- General Expectations with sub-headings:
 - Work Schedule
 - Job Descriptions
- Workplace Behaviour with sub-headings:
 - Theft
 - Harassment
 - Discrimination
 - Breaches of Fire and Emergency Evacuation procedures
 - Consumption of alcohol or non-prescribed drugs while working and/or arriving at work impaired by alcohol or drugs
 - Insubordination
 - Smoking in a non-smoking area at work

- Conduct in Hospitality Work Environments with sub-headings:
 - Serving It Right
 - Red Line
 - Breaks and Complimentary Provisions
 - Dress Code
 - Name Tags
 - Off-limit Areas
 - Use of a business or personal phones
 - Social Media
 - Business Telephone
 - Personal Items and Personal Storage
- The Disciplinary Process

The Serving It Right section has three pages devoted to issues arising from alcohol service. All employees, including bar and club managers, must have their Serving It Right certificate (or equivalent from other jurisdictions). A copy of all employees' Serving It Right certificate must be kept in an employee's personnel file and the number of the certificate must be kept on a list with the establishment's liquor licence.

This section refers to potential liability issues, with respect to the condition of the premises, conduct of patrons, activities conducted on the premises, conduct of patrons after leaving premises and use of force by staff. It notes the guiding legislation as the Liquor Control and Licensing Act, the Occupiers Liability Act and the Criminal Code of Canada and states:

In addition to the legislation, case law – a judge's interpretation of the legislation – is an important consideration. It is a good idea for managers and staff members to have a general understanding of the laws and occasional training may be offered on them. However, in all cases, common-sense prevails in complying with the legislation and the documentation of incidents that may result in liability.

Two more paragraphs elaborate on the design of the Act and its purpose of maintaining orderly operation of all licensed establishments, with reference to the establishment's right to refuse entry to minors and intoxicated persons. Reference is made to the potential liability of the establishment for service to intoxicated individuals.

Reminders of the indicia of intoxication are set out, with reminders to all staff members not to serve if they note them and, if security staff remove a guest, the security staff "must document the incident in their daily log as soon as possible before the end of the shift. The staff member must initial the notation in the daily log and add additional comments if necessary." Further guidance is given on how to safely remove a guest from the premises. The following at page 8 stresses the importance of documentation:

Ensure all conversations and actions are documented in the daily log. If a guest is a witness to an event, obtain their name, address and telephone number. Burn any serious incident from surveillance cameras onto a CD. A serious incident is any incident that has the potential to result in civil or criminal liability. Any use of force is a serious incident."

Finally, under this Serving It Right section, security and other staff are reminded to follow the laws re: refusing service to minors, avoiding over-service, removing intoxicated people and ensuring the safety of all guests.

The final section in this document is 'The Disciplinary Process' which explains progressive discipline, through the use of verbal warnings, written warnings, suspension and termination.

Signing the Business Standards and the Code of Conduct

As noted in these policy documents, all employees are required to understand and agree to the requirements in the above-referenced documents.

The Director of Operations testified about the annual review for all employees and that all employees are required to sign these forms on an annual basis, stating they have read and understood the Business Standards and Code of Conduct documents. When

questioned further about the annual reviews in cross-examination, the Director of Operations admitted that, prior to the incident, there definitely were some gaps that they were not being held accountable for doing them every year or they were not done with every employee. He stated that in this last year, they have formalized it a bit, with scheduling. He said that, prior to July 2015, they would have documented these annual reviews, but not on the same level as they do since the incident. He had none on this file. He stated he was not the person doing nightclub reviews more than two years ago.

The licensee submitted no documentary evidence to indicate staff or managers were signing these forms on an annual basis prior to January 2016. The General Manager signed one on January 20, 2016, with the Director of Operations signing as the manager/supervisor. (Exhibit 16)

The only document signed by the assistant manager indicates adherence to the Business Standards, with no mention of the Code of Conduct (Exhibit 12):

I, [name of assistant manager] have read, understand and agree to adhere to The Adelpia Group Business Standards.

January 16, 2012, at Vancouver BC
[signature of assistant manager]

[name and signature of the Senior Manager, the Adelpia Group]

and a note at the bottom stating: "This signed document is kept on the employee's personnel file."

Exhibits 13, 14, 15 and 16 are all documents signed by the General Manager who did not testify. The General Manager signed Exhibit 14 on July 16, 2012:

I, [name of General Manager] have read, understand and agree to adhere to The Adelpia Group Employee Code of Conduct and Fire and Emergency Evacuation Procedures,

July 16, 2012 at Vancouver
[signature of General Manager]

signature of Manager

and the same note that “this signed document is kept on the employee’s personnel file.”

The two Employee Information Sheets for the assistant manager and for the General Manager include a blank space for the employees’ Serving It Right number. Neither the General Manager’s nor the assistant manager’s Employee Information Sheets have a Serving It Right number noted in this space. The licensee submitted no evidence to indicate that either the assistant manager or the General Manager had their Serving It Right.

Hiring and Training

The licensee’s representative stated he was not involved with the day to day hiring. The Director of Operations is involved in hiring any management level employees while the General Manager is responsible for hiring employees like servers. The Director of Operations stated that he and the licensee’s representative were responsible for hiring the General Manager.

The licensee’s representative stated that the Director of Operations was responsible for training the General Manager and that both the Director of Operations and the General Manager were responsible for training the staff at the nightclub. The Director of Operations stated he was not involved in training the nightclub staff, that the General Manager was responsible for this training.

The Director of Operations explained that the senior manager of Adelpia Group was involved in the hiring and training of staff before he retired in 2013. This former employee hired the assistant manager who started in 2011. The assistant manager’s sign off on the Business Standards (Exhibit 12), dated January 16, 2012, shows the senior manager, Adelpia Group signing as the manager/supervisor.

The Director of Operations stated that the General Manager uses a specific training package for his staff which includes the Code of Conduct policy document. New employees receive a package which includes the job description, any backup documents such as work plans that change from position to position. The licensee did not submit this package or examples of this as evidence, other than the Code of Conduct and the two job descriptions as noted.

In response to a question about the assistant manager's duties, the Director of Operations stated that the assistant manager helped out with the liquor orders, with closing down the nightclub and working on the floor on busy nights. Prior to this incident, there had been no problems with the assistant manager. When asked if he would know about any problems, the Director of Operations said he would know, as there was nothing else on his file.

Meetings with Management and Staff

The General Manager and the Director of Operations meet on a weekly basis. The Director of Operations meets with all managers from the various establishments under the control of Blueprint. The Director of Operations stated that the weekly meetings are with all the general managers from the five clubs, four pubs, and three licensed retail stores. They discuss products, upcoming events, recapping of the week before, any visits from agencies (city, fire, branch, and police), any issues that may have occurred in the establishments, as raised by the general managers.

The Director of Operations helps shape the discussion for the annual general meetings held by Blueprint and he presents any changes to policies at that time.

Pre-shift Meetings

The Director of Operations stated that the General Manager holds pre-shift meetings with the nightclub staff. These pre-shift meetings occur about 15 minutes before opening and are an opportunity for sharing information. They include discussions of any major changes to procedures, including close-out practices, etc. The Director of

Operations occasionally attends these pre-shift meetings. When asked how often, he said the last one he attended was about three to four months ago.

Log Book

The Code of Conduct document, as noted above, emphasizes the importance of keeping a daily log. The licensee did not enter any examples of the daily log, nor any written report from the staff present on the night of the incident.

Practice for Dealing with Police Officers and Liquor Inspectors

If police officers or liquor inspectors arrive on the premises, the doorman or security at the front are responsible for dealing with them. The doorman will notify management of their presence. If they indicate it is just a walkthrough, management assigns one security guard to them as they walk through the nightclub. If there are issues raised, they may speak to the manager on duty. The rules of the nightclub are that liquor inspectors and police may come and go as they wish and staff are instructed to assist as much as possible. The licensee's representative emphasized that managers know the rules and sign off on them.

Process at Closing Time

With respect to the process at closing time, the licensee's representative stated all employees were trained in the steps leading to closing the nightclub. At 3:00 a.m., staff put on the bright lights, they stop all liquor and they begin the process of encouraging people to leave so that there are no more patrons inside the nightclub by 3:30 a.m. Staff will sometimes assist with arranging taxis but he noted that this can often be difficult as taxis have a shift change at 4:00 a.m.

Person(s) Responsible for Nightclub on June 27, 2015

On the night of the alleged contravention, the General Manager was not at the nightclub. According to the staff schedule for that night, both the General Manager and the assistant manager are listed as being on duty at the nightclub on June 26/27, 2015.

(Exhibit 1, tab 7(c) Neither the licensee's representative nor the Director of Operations could explain why the General Manager was not there or whether he was there at all that night. The licensee's representative could not recall why he was not there; he just knew he was not there. The Director of Operations thought the General Manager may have been at the Venue nightclub, another of Blueprint's establishments, but he wasn't sure. None of the staff working on June 27, 2015 testified.

Post Incident

The licensee's representative, who was recalled to testify after the consultant and Director of Operations had testified, stated that the assistant manager notified the General Manager that he had a run-in with the police. The licensee's representative further stated that the General Manager did not notify him of the incident, that he first heard about it from the VPD liquor liaison who notified him about the report that she had received.

The assistant manager had worked in various capacities for the licensee since December 1, 2011 (Exhibit 11) On July 14, 2015, the licensee's representative met with the assistant manager and personally terminated him. The meeting with the assistant manager occurred the day after the licensee's representative met with the branch to discuss the incident. The assistant manager was the licensee's representative's cousin, and has no ownership interest in Blueprint or the nightclub. The licensee submits that this termination demonstrates how seriously the licensee takes this contravention.

When asked about the retraining that may have taken place after the incident, the consultant stated it was standard practice to document this meeting and any retraining. He said he was not involved in creating the documentation for this, but he expected it to have been done.

The Director of Operations stated that an incident such as this one on June 27, 2015 would be communicated to all the managers working for Blueprint and that it would be used as a learning opportunity.

SUBMISSIONS ON DUE DILIGENCE – BRANCH

The branch agrees with the licensee that the directing mind was not present at the time of the incident on June 27, 2015. The branch notes the good record of the licensee and commends the licensee's operators for their involvement and commitment to the Bar Watch program.

Neither the branch nor the licensee has an explanation for the behaviour of the assistant manager on the night in question. It appears to be an anomaly as described by the consultant and the licensee's representative.

The branch agrees with the comments of the licensee that the evidence necessary to prove a defence of due diligence argument in the case of a section 33(1)(a) contravention – service to minors – will vary from the evidence required for a defence of this contravention. Daily or regular reminders to staff on ensuring they make requests for ID are one example of the type of evidence that will help establish a due diligence defence for a contravention of serving minors. Such daily reminders are unlikely to occur when dealing with a clear rule for the operation of the establishment, such as the procedures to follow when closing down.

However, in the present case, the branch says that there is an absence of documentation for the training of the assistant manager or for training generally of new hires. The licensee presented no records to document topics for discussion at its meetings, either management or pre-shift meetings.

The branch says that the only way to succeed with a defence of due diligence is to provide documented evidence to support the policies. Exhibits 6 and 7 are high level policy documents with a variety of topics. There should be more documented evidence relating to policies and procedures with respect to closing time. The onus lies with the licensee to prove a defence of due diligence. The licensee here has failed to provide sufficient documented evidence of training and implementation of its policies. Therefore, the branch says that the defence must fail.

SUBMISSIONS ON DUE DILIGENCE – LICENSEE

The licensee notes the branch's agreement on the issue of the directing mind and makes no further submissions on this.

The licensee relies on several decisions to argue that the licensee has met the onus of establishing due diligence, with policies and practices similar to these decisions:

- *Cascadia Brewing Company Ltd. dba Rogue Kitchen & Wetbar*, EH15-068, December 9, 2015 ("*Cascadia*")
- *Central City Brewing Company Ltd., dba Central City Liquor Store*, 2013 BCSC 2301 (December 13, 2013) ("*Central City*")
- *Rayman Investments & Management Inc. dba Coal Harbour Liquor Store*, EH11-139, January 23, 2013 ("*Rayman*")
- *Irish Times Pub Co.Ltd. dba Irish Times Pub & Oyster Bar*, EH13-086, April 16, 2014 ("*Irish Times*")

Cascadia dealt with a contravention under the Minors as Agents Program. The hearing delegate found that the licensee in *Cascadia* met the onus of establishing the defence of due diligence and therefore found no contravention. The licensee here submits that its operations have a similar "culture of compliance" as was found on the evidence in the *Cascadia* decision. The contravention of serving a minor occurred because the employee failed to follow the policies of the *Cascadia* licensee. The licensee says this is what occurred here.

The B.C. Supreme Court decision, *Central City*, is a judicial review of the decision of a hearing delegate. The court found that the hearing delegate erred in concluding the licensee had not met the test of establishing due diligence. The court noted that the hearing delegate focused on the employee's failure to follow the program rather than focusing on whether or not there were deficiencies in the program.

The licensee notes that, similar to *Central City*, the licensee has an effective operation as demonstrated by its history in the industry operating a variety of establishments with no contraventions prior to this. The licensee's representative and the Director of Operations explained the system they have in place with respect to the steps to follow at closing time. Staff are expected to follow this and unfortunately, on June 27, 2015, did not.

Rayman also involved a contravention that resulted from the Minors as Agents Program. The hearing delegate found that the licensee had established a defence of due diligence. The cashier in *Rayman* who served the minor was given a two week suspension, not dismissed. In this case, the licensee dismissed the assistant manager even though he was his cousin.

The *Irish Times* decision involved two minors who were in the pub, with liquor in front of them. The licensee refers to page 22 of the *Irish Times* decision that states that "the test for due diligence is not perfection." The licensee states that the best evidence of due diligence is the fact that this licensee has operated in the industry with no contraventions for 20 years. The licensee's representative strongly expressed the embarrassment this incident has caused to their operations and to the family's reputation, as well as their continued relationship with VPD and other agencies.

As one of the founders of Bar Watch, the licensee's representative has been very diligent in ensuring he operates all his establishments in accordance with the laws. The licensee notes that in terms of operating establishments like the nightclub here, these are some of the toughest establishments to run and to ensure compliance with the laws. The licensee stated that to have a perfect record in the nightclub/cabaret business is almost impossible, because of the nature of the business and the clientele they attract.

The licensee reviewed the operational procedures with respect to closing time. At 3:00 a.m., the lights come on and music stops or quietens. This is the first indicator to the patrons of the nightclub that it is time to leave. The licensee says every bartender follows this practice and it has become routine and automatic. It is not something like service to minors, where staff needs to be constantly reminded to check for ID. Service ends and the patrons are given the signal to leave. Staff know and follow this practice

and do not need daily reminders as it is just the normal routine of the nightclub at closing.

The licensee has no explanation for why the assistant manager did what he did. The licensee says it was completely contrary to their practice and procedures. The assistant manager had been employed in the nightclub for over three years and up until the night of June 27, 2015, had followed the practices and procedures with respect to closing time. For whatever reason, the assistant manager chose to break from the established procedures, which was stupid, and he suffered the consequences.

In conclusion, the licensee says it has established the defence of due diligence and therefore, I should find no contravention here.

REASONS AND DECISION

Contravention

The licensee has admitted the facts of the contravention. I find that the licensee contravened section 67(3) on June 27, 2015 by refusing entry to a peace officer.

I turn now to the defence of due diligence.

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 BC 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 *Liquor Control and Licensing 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; 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.

As set out in *Beverly Corners* above, the three questions to answer here are:

1. Was the assistant manager who committed the contravention the directing mind?
2. If no, did the licensee implement adequate training and other systems to prevent the contravention on July 27, 2015?
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 branch and the licensee both agreed that the assistant manager was not the directing mind of the licensee and that the directing mind was not present in the nightclub on June 27, 2015. I agree with this and turn to the next question.

2. Adequate Training and Systems

The licensee's witnesses testified about training for new employees. There was some inconsistency in the testimony as to who was responsible for the training of managers and employees below them. I accept the evidence of the Director of Operations as to his role in the training and find that the General Manager was responsible for training the nightclub staff. The job description for the General Manager confirms that he is "directly responsible for training. . ."

As the licensee did not call the General Manager to testify, I heard no evidence from the person responsible for training the nightclub staff. I heard no evidence about the hiring and training of the assistant manager in December of 2011, as the senior manager of Adelphia Group who witnessed his Business Standards form retired in 2013 and did not testify.

The licensee presented its Business Standards policies and its Code of Conduct policies as representing what employees are expected to know and the policies they are expected to adhere to. The Business Standards policies emphasize that employees are expected to be guided by and follow all corporate policies and procedures and all managers are expected to ensure such compliance. The document refers to "many

policies, procedures, memos, guidelines and compliance documents that deal in greater detail with all company policies and procedures.” The licensee did not submit these additional documents in evidence. I find that, without evidence of such additional policies, I am unable to conclude that such policies exist.

I find that the statements in these two policy documents are generally at a high level and, in some cases, do not provide sufficient guidance to staff. An example of this is the paragraph in the Serving It Right section of the Code of Conduct policy, which talks about the guiding legislation, including the Act, and then states “common sense prevails in complying with the legislation and the documentation of incidents that may result in liability.”

The licensee presented no documentary evidence of training procedures or steps in training new employees. The Director of Operations described a specific training package for new employees as containing the employee’s job description and any backup documents such as work plans. The licensee submitted the job descriptions for the General Manager and the Director of Operations, but no job description for the assistant manager.

I find that the licensee has not provided me with sufficient evidence about its training programs to draw any conclusions with respect to adequate training of its nightclub staff.

Despite the high level aspect of the two corporate policies presented, I find that the licensee has some significant guiding principles in place for its employees, particularly in the Serving It Right section of the code of conduct policy, and that its employees are provided with these at the time of hiring.

I turn now to the question as to whether the licensee has taken reasonable steps to ensure the implementation of its policies and operation of its systems.

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.

The Director of Operations testified that:

- The General Manager holds pre-shift meetings with staff
- He holds meetings with all managers of the various establishments on a weekly basis.
- Employees are required to re-sign adherence to the Business Standards and Code of Conduct forms on an annual basis, although documentary evidence and the Director's answers in cross indicated that this practice was mainly followed after the incident.

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

- No Serving It Right numbers for either the assistant manager or the General Manager, despite the very clear requirements in the Code of Conduct policy
- No signed form by the assistant manager, stating he had understood, read and would adhere to the Code of Conduct policies
- No documented evidence that the Business Standards and Code of Conduct forms were being signed on an annual basis prior to the incident
- Failure on the part of the General Manager to follow the requirement in its written policies to immediately notify the licensee's representative or the Director of Operations of the serious incident on June 27, 2015
- No documented evidence or written record of the incident nor any testimony from person in charge (i.e. the General Manager) as to what occurred on June 27, 2015
- No documents for pre-shift meetings to indicate what is discussed

- No documented evidence of a daily logbook as required by the Code of Conduct policy
- No documentation of any retraining of staff, that occurred after the incident, despite the testimony of the consultant that it would be standard practice to document this

I find that the licensee has not demonstrated that it has taken reasonable steps to ensure the effective application of its stated policies and the day-to-day operation of its systems.

A licensee has the right to call whomever it chooses to make its case. I make no adverse inference from the failure to call the General Manager who was listed as one of the witnesses at the beginning of the hearing. However, I note that the General Manager, as the key person in charge of the nightclub, as the person who is listed as being on duty on June 27, 2015, as the person responsible for training and pre-shift meetings, may have assisted in providing further evidence of the licensee's procedures, practices and training.

The onus is on a licensee to establish the defence of due diligence on a balance of probabilities. The licensee, therefore, is responsible for providing the evidence to help establish the defence. Documentation, including any signed documents, are significant pieces of evidence that may help demonstrate a licensee's due diligence. If key witnesses are unavailable or not called for whatever reason, as was the case with the assistant manager, the General Manager, the senior manager of Adelfia Group, it becomes even more crucial for the licensee to provide the documents to prove its due diligence.

Despite the statements of the licensee's witnesses about how effective its policies have been, despite the evidence of the exemplary record of this licensee, I find that the licensee has not demonstrated that it has effectively applied its stated policies. Signed documents and complete information about employees and their Serving It Right numbers are essential evidence to help establish the defence.

The licensee has submitted several cases, arguing in its submission that there are similarities to the policies and procedures here and that I should therefore find due diligence. Although the goal of the branch general manager and his delegates is to promote consistency in the administration of the enforcement regime, I am not bound by other decisions of the general manager, as they are fact-dependent. Court decisions provide guidance on the application of the law to this regulatory regime.

I have found significant weaknesses in the present case that distinguish this case from the facts of the cases provided by the licensee.

Cascadia's "culture of compliance" was demonstrated with evidence such as the 109 page training manual including the one page Black and White Rules that emphasize important reminders like ID checks, the testimony of the server who served the minor agent about the training she had received, the white board notices for pre-shift meetings, etc. The hearing delegate in *Cascadia* noted "the large body of evidence about the procedures for employing its staff and training them and listed this on page 24, with a subsequent list on how these systems are effectively applied. The hearing delegate noted at page 25 that "the licensee does not pay lip service to these requirements but instead, reinforces their application in practice."

The licensee's representative testified that they emphasize the importance of complying with liquor laws and other legislation, as set out in their policies and in their practice of ensuring employees have read these policies. As noted however, the licensee has not presented evidence to demonstrate consistent application of its policies.

The B.C. Supreme Court in *Central City* noted the hearing delegate's error in focussing on "the failure of the employee to follow the program rather than any deficiency in the program itself." In the present case, I have focussed on the licensee's failures in implementing its stated policies, not on the assistant manager's disregard for the rules on June 27, 2015.

In *Rayman*, the licensee notes that the clerk who sold the liquor to the minor agent received a two week suspension and was not immediately dismissed. Here, the assistant manager was terminated. Setting aside the differences in due diligence evidence presented in *Rayman* and here, I note that this contravention demonstrates a blatant disregard for the law by the assistant manager and warrants the most severe disciplinary sanction. i.e. termination.

Finally, the licensee has relied on *Irish Times* to repeat the oft stated premise that the test for due diligence is not perfection. Although the hearing delegate noted where the licensee in *Irish Times* might make some improvements, she found that the licensee had taken reasonable steps to ensure the application and operation of its systems (page 25).

The licensee says that their long-time reputation and their history of compliance with liquor laws in this industry demonstrate their due diligence. The test for due diligence is not whether or not a licensee can demonstrate a history of compliance with the liquor laws, but whether a licensee can demonstrate that the licensee “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.” (per Dickson J. in *R v. Sault Ste. Marie* cited above).

I agree that there are differences in the nature of the evidence required to demonstrate due diligence in service to minors contraventions and with the contravention here. Evidence of daily reminders, regular testing of employees, use of secret shoppers, etc. all assist in demonstrating due diligence in service to minors contraventions. I accept the evidence of the licensee’s representative and its consultant that this clearly was a one-off anomaly and out of character for this assistant manager who had been employed for over three years. However, I have noted above the serious weaknesses in the evidence of the specifics of training of employees and in the failure to provide me with critical documentary evidence, such as the signed form by the assistant manager showing adherence to the code of conduct policy. The onus to demonstrate due diligence remains with the licensee to produce documentary evidence of its training and evidence of consistent application of its policies. It has failed to do so here.

The licensee emphasized that the actions of the assistant manager were not the actions of the licensee and were completely contrary to everything the licensee stands for. The licensee is responsible for the actions of its employees. As stated in the Guide under Your Role as a Licensee: "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." Without sufficient evidence to establish a defence of due diligence, in law, it is the licensee who must pay the consequences of a contravention.

It is the responsibility of the licensee to ensure it has the written policies, that it effectively applies them, that it trains its staff on these policies and procedures and that, when faced with a contravention such as this one, is able to demonstrate, with sufficient documented evidence, that it has done its job to prevent such contraventions from occurring. I agree that the test of due diligence is not perfection. I find that the licensee, in its evidence of due diligence, has fallen well below perfection and has not demonstrated it implemented adequate training and other systems to prevent the contravention nor has the licensee demonstrated that it has taken reasonable steps to ensure the effective application of that education and the operation of those systems.

I find that the licensee has not met the onus of establishing the defence of due diligence. I therefore find a contravention of section 67(3) of the Act.

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 factors that I have considered in determining the appropriate penalty and whether a penalty is warranted 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.

I am required to consider all of the above factors. If I were considering only the first two, I would conclude that a penalty is not warranted. Despite my findings on the weaknesses in the evidence to demonstrate due diligence, I find that the licensee has operated the nightclub with respect for the liquor laws and, in a business that is often fraught with challenges, has established itself as a responsible member in this industry. I find the licensee's representative to be very sincere in his statements about the shock he and the other members of his management team experienced as a result of this incident. Given the past history of the licensee, I find the events that occurred on July 27, 2015 to be an anomaly in an otherwise clean record.

However, I must also consider the remaining three factors in deciding whether a penalty is warranted. A contravention of refusing entry to police officers is an extremely serious one. The severity of this contravention is demonstrated by section 69 of the Regulation which requires the general manager of the branch to cancel a licence unless he is satisfied that it is in the public interest to refrain from doing so. The branch has

recommended the lesser penalty in Schedule 4 of the Regulation, i.e. a 15 day suspension.

The refusal to allow entry to police officers represents a blatant disregard for the law. Apart from describing this incident as an anomaly, I heard no explanation as to how this could have occurred. I heard nothing from the General Manager who was supposed to be on duty that night. I heard no testimony from the other staff who were listed as being on duty. It is possible the staff left before being aware that the assistant manager was planning to invite people to an after party and before the police officers knocked on the door. It is possible that any staff who were there were not comfortable in challenging the assistant manager. I find that the contravention here could have resulted in serious public safety issues, including unregulated consumption of liquor and intoxication. The hours of a licensed establishment are set in consultation with the community. Ignoring these restrictions can affect the well-being of the community. I find that the licensee's clean record does not absolve it of a penalty, given the seriousness of this contravention. I find that a penalty is warranted in the circumstances.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is the recommended 15 day suspension for a contravention of section 67(3). I find this to be reasonable and appropriate and will serve as a reminder to the licensee, its staff and to the public, that such contraventions have serious consequences.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence number 300401 for a period of 15 days to commence at the close of business on **Friday, June 24, 2016** and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Vancouver Police Department from the close of business on **Friday, June 24, 2016** until the licensee has demonstrated to the branch's satisfaction that the suspension has 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

Nerys Poole
General Manager's Delegate

Date: May 20, 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