



DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267

Licensee:	BYO Holdings Ltd. dba Pebble Beach Golf & Recreation Centre aka Major League Sports Bar & Grill 45025 Wolfe Road, Chilliwack, BC
Case:	EH03-079
Appearances:	
For the Licensee	Dennis Coates, Q.C. Kirsten Tonge, Articled Student Stacy Robertson, Lawyer Glen Beveridge, Licensee's Representative
For the Branch	Peter K. Jones
Enforcement Hearing Adjudicator	Edward W. Owsianski
Date of Hearing	October 28 - 30, 2003
Place of Hearing	Surrey, B.C.
Date of Decision	January 27, 2004

INTRODUCTION

The licensee, BYO Holdings Ltd. operates the Pebble Beach Golf and Recreation Centre (aka Major League Sports Bar and Grill) at 45025 Wolfe Road, Chilliwack BC. The licensee holds both Food Primary and Liquor Primary liquor licences within this establishment. This hearing deals with the operation of those areas covered by Liquor Primary Licence No. 131947 and will be referred to as the bar area. The licence permits the sale and consumption of liquor during the hours of sale from 10:00 A.M. to Midnight Monday through Thursday , from 11:00 A.M. to 1:00 A.M. on Friday and Saturday and from 11:00 A.M. to Midnight on Sunday. The licence permits 125 patrons in Area 1 and 30 on the patio.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Liquor Control and Licensing Branch has alleged:

1. that on or about January 18, 2003, minors were supplied with and permitted to consume liquor on the licensed premises, contrary to section 33 (1) (a) and (c) of the *Liquor Control and Licensing Act*, (the *Act*) and has recommended a licence suspension penalty of a four (4) day suspension to commence on a Saturday. The *Regulations to the Act* (the *Regulations*) at Schedule 4 provide for a range of penalties for a first contravention of this nature of a licence suspension of four (4) to seven (7) days and a monetary penalty of \$5000.00 to \$7000.00.
 2. that on or about January 18, 2003, the licensee or its employee permitted a person to become intoxicated, contrary to section 43(2)(a) of the *Act* and has recommended a license suspension penalty of a ten (10) day suspension to commence on a Saturday. The *Regulations to the Act* at Schedule 4 provide for a range of penalties for a first contravention of this nature of a licence suspension of four (4) to seven (7) days and a monetary penalty of \$5000.00
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to \$7000.00. In recommending a suspension penalty longer than that provided for in Schedule 4 the branch is utilizing the provisions of section 20(2.1)(b) of the Act.

Sections 33, 43 and 20(2.1) of the Act state as follows:

Supplying liquor to minors

33 (1) A person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
- (c) in or at a place under his or her control, permit a minor to consume liquor.

(2) Subsection (1) does not apply if liquor is

- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
- (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
- (c) given or otherwise supplied to a minor in accordance with the regulations.

(3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly

- (a) has it in the actual possession or custody of another person, or
- (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.

(4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.

(5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant

- (a) required that the person produce identification, and
- (b) examined and acted on the authenticity of the identification.

(6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

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43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(2) A licensee or the licensee's employee must not permit

- (a) a person to become intoxicated, or
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Action against a licensee

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

- (a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or
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(b) suspend a licensee's licence under subsection (2) (d) for a period longer than that provided for in the prescribed schedule of suspensions.

ISSUES

1. Burden of proof.
2. Jurisdiction of the General Manager to take action under section 33 of the Act.
3. Whether the licensee contravened Sections 33 and/or 43 of the *Act* on or about January 18, 2003?
4. If so, are the recommended penalties appropriate in the circumstances?

EXHIBITS

- 1 – Book of documents
 - 2 – Serving It Right 'Licensee' Program Manual
 - 3 – Handwritten statement
 - 4 - Typewritten statement
 - 5 – Handwritten statement of witness F
 - 6 – Typewritten statement of witness F
 - 7 – Handwritten statement of witness G
 - 8 – Typewritten statement of witness G
 - 9 – Handwritten statement of witness H
 - 10 – Typewritten statement of witness H
 - 11 – Serving It Right 'Server' Program Manual
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EVIDENCE - The Liquor Control and Licensing Branch

A **Corporal from the Chilliwack Detachment of the R.C.M. Police** testified that on January 19, 2003, at approximately 12:31 A.M. he attended at the scene of a serious motor vehicle accident. The accident involved a single motor vehicle containing a driver and two passengers and had occurred at approximately 12:20 A.M. The front seat passenger was unconscious and had suffered the most serious of the injuries. The driver of the vehicle had liquor on his breath and the passenger compartment smelled strongly of liquor, however there was no evidence of liquor in the vehicle at the time. A search of the vehicle several days later revealed a partial case of beer containing both full and empty bottles wrapped in a sleeping bag in the trunk.

The corporal testified that subsequent investigation revealed that the three occupants of the vehicle had been drinking previous to the accident at a local establishment, the Major League Bar at the Pebble Beach Recreation Centre (the Major League), arriving at approximately 7:00 P.M. and leaving between 11:45 P.M. and Midnight. The Major League is located approximately 17 to 20 minutes driving time from the accident site leaving little time for the vehicle and occupants to have stopped between the establishment and the accident site. He determined that the driver and rear seat passenger were 18 years of age and the front seat passenger, 19. He checked the identification of the driver at the time of the accident and did not find any false identification.

The corporal attended at the Major League on February 5, 2003, and spoke with the owner who advised him that the three occupants had been drinking at the establishment prior to the accident. They had not been checked for identification that night as they were known to staff and had produced identification on previous occasions showing that they were of legal drinking age. They were part of a large group of approximately 30 patrons. When the group departed an empty liquor bottle (spirits) was found on the floor in the vicinity of their tables.

The corporal issued a Licensed Premises Check form (exhibit 1, tab 3) to the establishment with a copy to the Liquor Control and Licensing Branch together with a report of the incident (exhibit 1, tab 7).

Witness A, the rear seat passenger of the vehicle involved in the accident, testified that he was 18 years of age at that time. He has been in the Major League on approximately 20 occasions during the past two years. During those times he had twice been asked for and had produced identification, a driver's license which had the year of birth altered to appear as 1981 rather than 1984. In his opinion, the alteration was not well done and would be noticeable upon examination.

On January 18, 2003, he had gone to the Major League with two male and two female friends arriving approximately 6:30 – 6:45 P.M. and departing approximately 11:30 – 11:45 P.M. with the two male friends. He was not asked for nor did he produce identification at the establishment. He and his friends were part of a group of 30 – 40 persons gathered to bid farewell to a friend departing for New Zealand. He ordered and drank one or two pitchers of beer during dinner. Following dinner more pitchers of beer were ordered and consumed. He was unable to say the total amount of beer consumed. After dinner he commenced drinking shooters, approximately 25 to 30 in total. He paid for his meal and liquor at the bar by Interact, a total of approximately \$145.00. He testified that he felt that he was drunk at the time of paying his bill. He was unable to recall the state of sobriety of the friend who was driving, the other friend, also a passenger in the vehicle, threw up outside after leaving the establishment and was drunk. He testified that all liquor consumed at the establishment was purchased there and he did not see any liquor brought in by patrons, however knows this to have occurred in the past.

The witness referred to a statement that he gave to an accident investigator in February, 2003, (exhibit 1, tab 5). He explained that at page 5, lines 85 and following; although the waitress suggested that his friend, who was nodding off, be taken outside to wait, this was not done for approximately 30 – 45 minutes and was not further pursued by the waitress. He testified; that sometime later, a friend who works at the establishment told him the names of the waitresses who had served his table the night in question. This same friend also told him that he had offered to drive the other passenger home, but that the offer had been declined. The witness recalled the driver of the vehicle telling him earlier in the evening that his mother would pick them up at the establishment. He also recalls playing a game of “rock, paper, scissors” with the other passenger to determine who would occupy the front passenger seat of the vehicle. He testified that this game could be played in a state of intoxication.

Witness B, a friend of the parents of witness A, testified that she knows witness A and knew him to be 18 years of age on January 18, 2003. She was a patron at the Major League on that date between 9:30 and 10:50 P.M. She first noticed him after she sat down in the establishment as he was making his way to the bar. From her observations she believed him to be “pretty well drunk”. He was not staggering, but it was like “he was walking on air, big steps, really light”. She noticed him a second time when he was returning from the bar with a drink. Later when she went to the bar to pay her bill in preparation to leaving, he was ahead of her paying his bill. He appeared “not only worse, but really drunk”, his eyes were glassy. She testified that she has not worked within the hospitality industry or received training in recognizing intoxication, but is aware of the manner in which the consumption of liquor affects people with the level of intoxication increasing with the number of drinks consumed.

The witness testified that she had provided a statement to an investigator during February 2003, (exhibit 1, tab 6). She had agreed to provide a statement only if the other couple in attendance that night did as well. They did not. She testified

that she told the investigator that she did not believe that the bar should be responsible for kids drinking. The investigator did not put that into the statement.

Witness C, the driver of the vehicle involved in the accident, testified that on January 18, 2003, he was 18 years of age. On that date, at approximately 7:00 P.M. he drove two male and two female friends to the Major League where they were all planning on having dinner. They entered through the restaurant area and sat within the bar area. He does not believe that he was asked to produce identification. After arriving he learned that a friend was having a going-away party there that night. He recalls having dinner during which he did not consume any liquor, but recalls very little following other than that he was involved in a motor vehicle accident.

The witness testified that he has been in the Major League on approximately 10 to 15 occasions within the past year, sometimes in the restaurant, other times in the bar area. He has ordered and consumed liquor in each of the areas. He recalls being asked if he had identification on only one occasion. He testified that he was not required to produce it, but only asked if he had it. He had an altered drivers license with the date of birth scratched off to produce if necessary.

Witness D, the front seat passenger of the vehicle involved in the accident, testified that on January 18, 2003, he was 19 years of age. On that date he went to the Major League with several friends, arriving at approximately 7:30 P.M. and sitting in the bar area. He testified that he has been to the Major League on one or two occasions in the past as a minor. On one occasion he was requested to produce identification and when he was unable to do so, had to sit in the underage area. He was not asked for identification on January 18, 2002. He does not recall whether he ate a meal or not. He recalls consuming liquor, both beer and shooters, but can't recall how much, except that it was quite a bit and that he was drunk upon leaving. He needed assistance to get to the bar to pay his bill and fell down outside. He had been falling asleep inside and at one

point a female staff member told him that he was passing out and that he had to go home. He did not leave for approximately one-half hour as he had to pay his bill and wait for his friends. He had made an earlier payment in cash and just prior to leaving paid with his Interact card. He had difficulty entering the code number for the card. He recalls that the bill was approximately \$50.00 and that the tip was \$42.44 which is the code number for the card, he believes that he must have entered it more than once. He recalls being assisted to leave the bar, but is unable to remember by whom. Once outside, he fell down. He went over to his friend's vehicle and played a game of "rock, paper, scissors" with the other passenger for the front seat.

The witness testified that he drinks liquor on most weekends, on Friday nights, with friends and often gets intoxicated. This is done at friends homes or parties. He didn't start going to bars until he was close to 19 years old. He recalled speaking to a friend who works at the Major League and who offered him a ride home on January 18, 2003, however, he declined as he wished to leave with the friends with whom he arrived. He did not recall speaking with a waitress outside of the establishment nor that there was an arrangement for the them to be picked up by his friend's mother at the end of the night. He does not know the names of any of the waitresses who served him at the establishment on that night.

An **expert witness** testified that he is the author of numerous published articles regarding drug and alcohol levels and impairment and that he has been qualified as an expert witness in court proceedings in the provinces of British Columbia, Alberta, Saskatchewan and Manitoba on the effects of alcohol and drugs on the human body. His qualifications are shown in an attachment to his report at exhibit 1, tab 11. He was qualified for these proceedings as an expert on the effects of drugs and alcohol on the human body.

The witness referred to a five page report dated October 2, 2003, which he submitted to the Liquor Control and Licensing Branch (exhibit 1, tab 11). The

report utilizes the blood alcohol concentration level for each of the occupants of the vehicle involved in the accident to determine the amount of alcohol consumed by each person and their state of sobriety at the time of the accident which he was advised had occurred at 12:30 A.M. He testified that there would be minimal differences had he used a time of 12:20 A.M. The blood alcohol level for each person is then compared with a standardized chart (exhibit 1, tab 11 at page 3) used to determine the "Stage of Alcohol Influence" and the "Clinical Signs/Symptoms" which would be exhibited. The standardized chart was developed many years ago, has been published in numerous scientific articles, is used in training police officers and has been independently verified by himself.

In the case of the rear seat passenger (witness A) the blood alcohol level was calculated from the Ethanol level of 43 mmol/L provided in an FVHR Laboratory Services Report (exhibit 1, tab 8) of a sample taken from the person at 1:43 A.M. on January 19, 2003. It equates to a blood alcohol level of approximately 164 – 179 mg% (milligrams of alcohol in 100 millilitres of blood) at the time that the sample was taken and utilizing elimination rate calculations a blood alcohol level in the range of 176 – 203 mg% at the time of the accident. To reach this level a male person weighing 150 pounds would have the minimum equivalent of approximately 6.1 – 7.2 bottles of beer or 9.2 – 10.8 ounces of spirits present in the blood at that time. This minimum quantity can vary by an increase of up to 50% more.

In the case of the driver of the vehicle (witness C) the blood alcohol concentration was provided by an R.C.M. Police Forensic Laboratory Services Report (exhibit 1, tab 9 at page 2) as being 225 mg%. It is assumed that the sample was taken at 1:43 A.M., the same time as that of the rear seat passenger (witness A). Utilizing elimination rate calculations the blood alcohol level at the time of the accident would be in the range of 237 – 249 mg%. To reach this level a male person weighing 220 pounds would have the minimum equivalent of approximately

12.1 – 12.8 bottles of beer or 18.2 – 19.1 ounces of spirits present in the blood at that time. This minimum quantity can vary by an increase of up to 50% more.

In the case of the front seat passenger of the vehicle (witness D) the blood alcohol level was calculated from the Ethanol level of 71 mmol/L provided in a FVHR Laboratory Services Report (exhibit 1, tab 10 at page 2). The witness testified that at the time of preparing his report he assumed that the sample utilized by the FVHR Lab was taken at 3:25 A.M. He is now aware that it was taken at 1:30 A.M. The witness then proceeded to recalculate the blood alcohol level from the ethanol level. It equates to a blood alcohol level of approximately 283 – 291 mg% at the time the sample was taken and utilizing elimination rate calculations the blood alcohol level at the time of the accident would be in the range of 293 – 311 mg%. To reach this level a male person weighing 160 pounds would have the minimum equivalent of 10.9 bottles of beer or 16.4 ounces of spirits present in the blood at that time. This minimum quantity can vary by an increase of up to 50% more.

The witness testified that the blood alcohol levels of all three persons would place them within the 3rd (“Excitement”) and 4th (“Confusion”) stages of alcohol influence at the time of the accident and they would show obvious signs of intoxication. If the calculations were extrapolated back to 11:30 P.M. or Midnight the blood alcohol levels would be increased as there would have been less time for alcohol to be eliminated and thus the signs of intoxication would be even greater. The witness testified that there is a danger in extrapolating back too long from the time that the samples were taken as the further back there is less accuracy in the blood alcohol concentration levels calculated. Going back one hour the levels are reasonably accurate, within 10 – 20 mg%, back 2 hours the levels could vary within 20 – 40 mg% and back three hours the variance would be within 40 - 80 mg%.

The youthful ages of the individuals would increase the level of intoxication due to slower metabolizing of alcohol compared to an adult, less physical tolerance to alcohol than an adult and less experience in learning how to mask the signs of intoxication than an adult. A 19 year old drinking alcohol on a regular basis for one to two years would still not reach the tolerance levels of an experienced adult drinker. Asked how the level of intoxication of the three persons would affect their ability to meaningfully play the game of "rock, paper, scissors" the witness advised that at stage 3 ("Excitement") the affects of the intoxication would be noticeable, at the 4th stage ("Confusion") they would play the game very poorly.

Responding to a hypothetical question of an 18 year old male consuming 12 bottles of beer and 25 ounces of spirits over a 4 hour period the witness calculated that the blood alcohol level of the person would be 742 mg% which would lead to his death.

The witness testified that he was familiar with the "Serving It Right: The Responsible Beverage Service Program" licensee and server Manuals (exhibits 2 and 11). The information provided in the manuals is reasonably accurate and sufficient to allow a person to determine levels of intoxication.

EVIDENCE - The Licensee

Witness E, an insurance consultant testified that he was contacted by the owner of the Major League to interview employees of the establishment regarding an incident which had occurred several weeks previously. He subsequently interviewed four employees and took their statements regarding the incident. The statements were handwritten at the time of the interview and typed later.

The witness read into the record the statement of a female bartender unable to be present at the hearing (exhibit 3-handwritten, 4-typed). She stated that she has been employed at the establishment one night a week, off and on for the

past two years. She has taken the "Serving It Right" course and was working at the Major League from 6:00 P.M. to closing on January 18, 2003. It was a busy night and she spent most of her time behind the bar. She does not recall anything out of the ordinary occurring. They call a cab or get a ride for persons who are drunk. She has, on occasion, asked people for their keys when they are too drunk. A few days later she took a call from a woman who advised that she was the mother of a minor who had gotten drunk in the bar the previous Saturday and had been in an accident. She wished to speak with the manager. A message was taken for the owner to call her. The statement is signed and dated February 4, 2003, 6:35 P.M.

Witness F, testified that she was employed at the Major League for approximately 11 years, leaving employment on January 25, 2003. She was working as supervisor and head bartender January 18, 2003, from 10:30 A.M. to closing and has provided a statement regarding that night (exhibit 5-handwritten, 6-typed). She holds a "Serving It Right" certificate. The witness testified that she is able to identify intoxicated persons by observing for such signs as; the person becoming a nuisance, becoming more vocal than others, staggering when they get up, becoming loud. She will often talk with a person to observe their condition. If a person becomes intoxicated she will send them home, ensuring that they do not drive. She will put them in a taxi or call police if necessary. She has found underage persons in the establishment. She cuts up their identification and calls the police. She is able to recognize false identification, she looks for things like the dates being covered up, the photograph not appearing similar, signatures not matching. Staff know that picture identification is necessary and if a person cannot produce picture identification they are not served. A single piece of identification is sufficient unless there is some uncertainty with it, if so more identification is requested. Identification is not checked of regular patrons known to be 19 year or older. There is no written policy, but it has been verbally discussed with staff. There is no doorman employed at the establishment, it is the responsibility of the server to check for

identification. If the server is busy someone else may be asked to check. The person will not be served until that has been done. Servers monitor for intoxication by the mannerisms of the patrons and the number of drinks served. This can be difficult with large groups and where pitchers of beer are ordered.

The witness testified that between 9:00 and 9:30 P.M. of January 18, 2003, she assisted the server for table 33 by taking a virgin ceasar drink to the table. No one in the group appeared to be underage and the server said that she had checked their identification. Sometime between 11:00 and 11:30 P.M. she noticed one of the males from the table stand up as his friends were paying the bill. He appeared to be intoxicated. She had not noticed his condition while he remained sitting. She watched them leave the building. They didn't go to the parking lot but sat on the stairs. She spoke with them and asked if they were driving. They said "are you crazy, of course we won't drive". One said that his mother and step-father were coming to pick them up and drive their vehicle home. The witness went back inside. When she looked outside later, they were gone and she assumed that their parents had come to get them. Later in her shift one of the servers brought her an empty whisky bottle that she said was found under table 33. The witness gave the empty bottle to the owner. She testified that on rare occasions people will bring their own liquor into the establishment, they are told to leave if discovered.

Witness G testified that she is a server employed at Major League for the past two and a half years. She holds a "Serving it Right" certificate. She looks for signs of intoxication; namely: slurred speech, less eye contact, blood shot eyes, and stumbling when they stand up.

The witness testified that she was working January 18, 2003, from 4:30 P.M. until closing. She recalls five persons, three males and two females coming in at approximately 5:30 P.M. and sitting at table 33. She did not request their identification as she had served them on previous occasions and had checked

their identification. The last time being approximately one month previous when she had requested and received identification from them, one piece of identification from each person. She could not recall exactly what the identification was, probably a driver's licence. The identification did not appear false to her. She is aware that the new requirements are two pieces of identification if the person appears to be under 19 years old. On January 18, 2003, they all had dinner. As the establishment was busy she was unable to give them her full attention. The males in the group were drinking pitchers of beer. She served a round of six shooters to the group. One of the males from the group paid his bill at approximately 9:45 P.M. She believes it to be approximately \$100.00 with a \$10.00 tip. The bill included drinks he purchased for others. He did not exhibit any signs of intoxication. She did not serve the table after that time, she does not know who did, they may have gone to the bar or shooter bar themselves. The other two males made payment by Interact at the bar later in the evening. One appeared a little more intoxicated than the others. During the course of the evening the number of persons at the table increased and four tables were pulled together. She did not see anyone falling asleep nor did she talk to a person who was nodding off during the course of the evening. She provided a statement regarding that night (exhibit 7-handwritten, 8-typed).

Witness H, testified that on January 18, 2003, he was employed at the Major League as a bartender and worked from 6:00 P.M. to closing. He provided a statement regarding that night (exhibit 9-handwritten, 10-typed). He had been employed at the establishment for approximately seven years, as a bartender for the past year, previously as a cook. As a bartender, he worked at the main bar and was responsible for the establishment's smooth operation, the control of persons having too much to drink, serving drinks, and checking identification. Underage persons are more of a problem in the restaurant than in the bar area. If a person of young appearance comes to the bar he will ask for two pieces of identification, if they are at a table he will request the server to ask. If a person

comes on a regular basis he would not ask again for their identification. He received on the job training from his supervisor (witness F) and on most occasions works with a supervisor. On January 18, 2003, he did not hold a "Serving It Right" certificate and although he had received training in beverage service with a previous employer in Alberta, he had not received any training related to the over-service of alcohol or signs of intoxication. He feels capable of recognizing intoxication in individuals by observing how a person walks, talks and acts and looks for signs through their body language. If he sees an intoxicated person he will ask if they need a taxi. However, if they choose to drive he can't do much about it.

The witness testified he recalls that at approximately 11:00 to 11:30 P.M. January 18, 2003, he processed Interact transactions for two males from table 33 as the Interact is located at the main bar. The transaction took approximately five minutes. They were not visibly intoxicated and were not slurring their words. They were joking with him and seemed O.K. Although he made about 70 Interact transactions that night he recalled this one because they made a joke about their server.

The licensee representative testified that he is a 50% owner of the corporate licensee, BYOU Holdings Ltd. which also owns and operates another establishment known as Major League Too. He has worked in the hospitality industry for 30 years and holds a "Serving It Right" certificate. Staff training for the two establishments is done by the head bartender of each location. Training includes what to look for regarding over-service and rules for checking identification. There are no training materials on acceptable identification, staff are told to accept either a driver's license or a BC Identification card. The "Serving It Right" materials are used for training in recognizing intoxication. Staff have the authority to cut-off a table from further liquor service if necessary. An employee spends a month with the head bartender at Major League Too, followed by a month with the head bartender at Major League (witness F),

following which the employee is on their own. Generally, he or the head bartender is present on each night. The establishment does not hold staff meetings, communication with staff is done on a one to one basis if a problem arises. The clientele at Major League are sports minded as it is located in the midst of several sports fields and sponsors sports teams. Clientele average 25+ years of age. False identification is not a real problem owing to the age of the clientele. The establishment does not engage in cheap drink nights as that practice attracts kids. Liquor prices at the establishment are the most expensive in town. There are no one dollar beer nights. Pitchers of beer may on occasion be reduced by \$1.00 to \$11.75 from \$12.75. There are no 2 for 1 shooter specials. Shooters may on occasion be reduced to \$3.75 from \$4.50. Margaritas specials may be offered at \$3.95 for a 17 ounce glass containing 1 ounce of alcohol.

The witness testified that on January 18, 2003, he went to Major League at approximately 10:00 P.M. Upon arrival he walked through the establishment, said hello to people he knew and checked the men's washroom. No problems were observed. It was a fairly busy night. He did not notice the group of persons at table 33, there was nothing unusual, he didn't observe anyone having too much to drink. He recalls seeing the head bartender (witness F) following three people outside. He poked his head out to see if there were any problems, there were not. He saw her speaking with them as they sat on the stairs. She told him later that they were waiting for a ride to arrive and she was satisfied that they would not be driving. He did not know any of the three persons. He received an irate phone call from one of their mothers the following Monday advising him that two were 18 years of age and the third 19. He believes that they must have had false identification. He was told that one has an older brother who looks like him. An empty whisky bottle found under table 33 didn't come from the establishment as they do not stock that brand. There are infrequent occasions when people do bring in their liquor, usually in a "mickey" bottle. He has heard from others in town that the three people had been to other bars.

He testified that he accepts the practice of staff not re-checking for identification of regular customers when identification has been shown on previous occasions. To do so only annoys people. He has not experienced a situation where a police officer or liquor inspector have requested to see the identification of a customer. There have not been a lot of visits by police or inspectors. This is the first infraction brought to his attention in 30 years. A previous Contravention Notice for not having an employee on duty with a "Licensee" designated "Serving It Right" certificate (see exhibit 1, tab 1 at page 9) occurred as a result of his leaving the establishment for a short period of time when there were no customers present. The problem has been rectified by having all employees accredited with the "Licensee" designation. The bartender, who testified that he did not have a certificate, was told upon moving into the position to get one. He did not and it was not followed up. Staff have not been instructed to pay particular attention to groups of young patrons. Minors have not been a problem at either of his establishments. He agreed that it can be difficult for staff to monitor the amount of liquor that is being consumed by an individual in a large group ordering pitchers of beer, particularly on a busy night. If a person becomes loud or appears intoxicated a server can check the bill to see how much liquor has been served and can cut-off further service if necessary.

SUBMISSION and ARGUMENT

The Licensee

Counsel in their written and oral submissions referred to the following cases:

- Ed Bulley Ventures, decision of the Liquor Appeal Board, June 28, 2001
 - Whistler Mountain Ski Corp., decision of the BC Court of Appeal, July 12, 2002
 - Merlin's Cabaret Ltd., decision of the General Manager LCLB, February 22, 2002
 - Bridge St. Billiard Café, decision of the General Manager LCLB, October 31, 2001
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- Argyle Place, decision of the General Manager LCLB, February 21, 2001
- Monkey's Restaurant, decision of the General Manager LCLB, December 20, 2001

Burden of Proof – Counsel submitted that the branch must prove the ‘actus reas’ of the regulatory offences beyond a reasonable doubt.

Authority of the General Manager under Section 33(1) - Counsel submitted that the alleged contravention of section 33(1) of the *Act* should not have been heard in this forum as section 33(6) provides for a fine of not less than \$500.00 on conviction.

“Permit” - Counsel submitted that sections 33(1)(c) and 43(2) (a) require evidence that the licensee “permit” the impugned activity. The word “permit” was considered by the Liquor Appeal Board in the case, *Ed Bulley Ventures Ltd.*, “a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.”

Due Diligence – Counsel submitted that the licensee is entitled to the defence of due diligence pursuant to the BC Court of Appeal decision in the Whistler Mountain case.

Contravention of Section 33

Counsel argued that the evidence of the licensee and its employees supports a system of diligence with respect to minors on the premises. The licensee has provided guidance to its employees concerning the service of liquor to minors. Minors found in the bar area are either seated in the restaurant area or requested to leave the premises. The supervisor (witness F) on duty the night of

January 18, 2003, took her job seriously and had in the past destroyed fake identification and lectured minors trying to sneak into the bar area. The server (witness G) for the table occupied by the two minors and their 19 year old friend testified that she recognized them from previous visits when all had produced identification indicating that they were of age. Consequently, she did not require identification on the night of January 18, 2003.

Counsel drew our attention to the General Manager's decision in *Merlin's Cabaret*, a case also involving false identification where it was accepted that the licensee had policies and procedures in place and its employee took their responsibilities seriously to ensure minors did not enter the bar area. Consequently, a contravention was not found. Likewise in the *Bridge St.* case where false identification had been presented and examined by the licensee's employee.

Contravention of Section 43

Counsel submitted that the term "intoxication" is subjective. Persons attend a licensed establishment for the purpose of consuming alcoholic beverages and from the first drink are becoming intoxicated. It is not practical to expect a licensee or its employees to guess when a person is a short distance away from being intoxicated. Common sense dictates that the duty on a licensee or its employee to cease further liquor service or evict arises at the point of intoxication and not before. In this case, it was not possible for staff to count the number of drinks being consumed by a patron as a result of the large group and people moving around. There were few signs of intoxication in evidence and none prior to the person (witness D) standing up from the table. The two other patrons (witnesses A & C) did not appear intoxicated to the employees when they paid their bills. Two of the patrons (witnesses A & D) were able to play "rock, paper, scissors" at the end of the night, a game requiring comprehension and dexterity.

Counsel challenged the evidence provided by the expert witness. It is based upon assumptions by the expert witness on the amount of alcohol consumed by the three patrons and the time period during which it was consumed. The conclusions could differ if the assumptions were incorrect. Further, the toxicology report for witness D (exhibit 1, tab 10 at page 2) indicates that Cannabinol was detected in his urine. Liquor or drugs could have been consumed in the vehicle by the three occupants following their departure from the establishment and prior to the accident occurring. Blood alcohol levels derived from samples taken at 1:30 A.M. may not accurately reflect the condition of the persons when leaving the establishment.

Counsel submitted that the issue of intoxication and minors often arise as a result of cheap drinks night. That is not the case here. The licensee and its employees demonstrated due diligence. The training and supervision of its employees were undertaken by the licensee. The supervisor on duty (witness F) sought and received assurance that the three patrons would not be driving from the establishment.

Counsel drew our attention to the General Manager's decision in the *Argyle Place* case where an intoxicated person presenting no control issues was allowed by the bartender to remain awaiting a ride. The General Manager decided that the employee acted reasonably in the circumstances and consequently no contravention was found. In the *Monkey's Restaurant* case the General Manager found no contravention where on two occasions persons who had been drinking at the establishment, appeared to be intoxicated and required assistance to stand and leave the premises.

Penalty

Counsel submitted that the recommended penalties of a four (4) day suspension for the alleged contravention of section 33 of the *Act* and ten (10) days for the

alleged contravention of section 43 of the *Act* are too harsh, unreasonable in the circumstances and without precedent. Counsel cited the Liquor Appeal Board in *Ed Bulley Ventures*; “While the Act imposes duties on those who are allowed to sell alcohol, it does not make licensees insurers for problematic behaviours that can arise from consumption and over-consumption of alcohol, but not caused by it.”

REASONS AND DECISION

Burden of Proof – Counsel has argued that the branch has the obligation to prove the allegations on the criminal standard of ‘beyond a reasonable doubt’. I do not agree. This issue has been thoroughly argued in previous decisions of the general manager and it has been consistently held that the burden of proof on the branch is that of the civil standard of ‘on a balance of probabilities’. I find that the burden of proof on the branch is ‘on a balance of probabilities’.

Authority of the General Manager under section 33(1) of the Act

Counsel has argued that the provisions found in section 33(6) of the Act require that the issues should be tried in a different forum. Although not specific to which forum he was suggesting, I expect that counsel meant the provincial court system where the issues would be considered as alleged provincial act offences. I do not agree. The effect of section 33(6) is simply to set the minimum limit of a fine in the event that a prosecution is successful under the *Offence Act*. This section has no bearing on enforcement action under s. 20. Section 20 (1) of the *Act* provides authority for the General Manager to take action for, amongst other things, a licensee’s contravention of the *Act*. Subsection (2) outlines the actions that the General Manager may take.

Contravention of Section 33

Counsel has argued that the licensee’s actions with regard to preventing minors from purchasing and consuming liquor on the premises establishes sufficient diligence on its part. The licensee provided guidance to its employees

concerning minors, minors when located were removed from the bar area and in the case of the three patrons involved in these allegations, they were previously known to the employees and had all been required to produce identification on previous occasions. The evidence that the identification produced was noticeably falsified was unreliable.

I do not agree that the licensee has acted with sufficient diligence to entitle it to a defence to the alleged contravention. I accept that the licensee's employees have checked the identification of the three patrons in the past and I accept that the identification was of sufficient quality to appear authentic. I do not accept the evidence of witness A or C on this point. Witness A is, at the least, prone to hyperbole in recalling the amount of liquor he consumed on the night in question, as evidenced by the response of the expert witness to a hypothetical question concerning that approximate amount of liquor. Consequently, I do not accept his evidence that the alteration to his identification was obviously noticeable. Witness C testified that he had not been asked to produce identification on past visits to the establishment. I have to consider that in light of Witness C's inability in recalling events surrounding the night of January 18, 2003.

While I accept that identification had been required and produced in the past, I do not agree that that provides sufficient diligence on the part of the licensee and its employees. I have had opportunity to observe the three patrons when they appeared as witnesses. All three appear young, all could be 18 or 19 years of age. Witness A because of his slight build is particularly youthful in appearance. I am aware that falsified or outright fake identification is a problem for licensees. It has on occasion been found by employees of this establishment. Consequently, I believe that in the circumstances of this case, three youthful persons, their identification should have been required and carefully examined when they presented themselves as patrons for the purchase and consumption of liquor on January 18, 2003. Further, although it was not argued in this case I believe that the test of due diligence includes the requirements of section 45 (2)

and (3) of the *Regulations* to the *Act* which came into effect on December 2, 2002. Those requirements were not met here. The provisions of section 45 are as follows:

45 (1) For the purposes of section 33 (5) of the Act, identification includes the following:

- (a) a passport;
- (b) a driver's licence that displays a photograph and the date of birth of the holder;
- (c) an identification card, issued by a government agency, that displays a photograph and the date of birth of the holder.

(2) A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or (b) selling or serving liquor to the person.

(3) The pieces of identification required under subsection (2) must include (a) one piece of the identification referred to in subsection (1), and (b) one other piece of identification that displays the person's name and at least one of the person's signature and picture.

Here the server who was primarily responsible for checking the identification of the three patrons on January 18, 2003, relied on her recollection of having checked a single piece of identification produced by each of the patrons on a previous occasion. That identification for two of the patrons turned out to be false in that they were only 18 years old at the time. Had the server insisted upon seeing two pieces of identification as required by the *Regulations* when the three patrons attended at the establishment, ordered and consumed liquor on January 18, 2003, it is possible that their true ages may have been determined.

In conclusion, I find that the licensee has "permitted" minors to enter the establishment and to purchase and consume liquor by not exercising as high a degree of diligence it should have in the circumstances and has contravened sections 33(1)(a) and (c) of the Act.

Contravention of Section 43

Counsel has argued that the licensee has demonstrated due diligence. The licensee provided training for its employees. It utilized the Licensee and Server Manuals of the "Serving It Right" program which provided information including the effects of alcohol consumption, identifying the signs of intoxication and providing strategies to prevent and deal with intoxicated persons. There was no evidence of any of the three patrons becoming intoxicated until witness D stood up at which time appropriate action was taken by the supervisor. Counsel disputes the conclusions reached by the expert witness as it was based on faulty assumptions and subject to extrapolations made from the time that samples were collected, back to the time of the accident and later to the time the three occupants left the establishment. Liquor or drugs could have been consumed in the interim. The two passengers were, upon leaving the establishment, able to engage in a game requiring comprehension and dexterity.

I do not agree that the licensee or its employees were sufficiently diligent in the circumstances surrounding this allegation. There is evidence both through the patrons and the employees of a considerable amount of liquor being consumed by the group which included the three occupants of the vehicle in the accident. The amount of liquor and the youthfulness of the patrons required increased attention by staff. Yet, the evidence is that neither the server nor the supervisor gave particular attention to the group from 9:45 P.M. until they were preparing to depart and one of the group upon standing up displayed signs of intoxication. It appears that during this interim period the group obtained their liquor by themselves through the shooter bar or the main bar without intervention.

I prefer and accept the evidence of the expert witness to that of the licensee witnesses. The expert witness testified that the blood alcohol concentration levels of the three occupants of the vehicle in the accident were sufficient to cause obvious signs of intoxication in them while at the licensed establishment. I

am satisfied that the information that the expert based his conclusions on was sufficiently accurate to the circumstances of the events of the night. The expert used blood alcohol concentration levels derived from ethanol levels in the case of witnesses A and D, and the blood alcohol concentration level provided to him in the case of witness C, to determine the approximate amount of liquor consumed by each of the individuals and the state of sobriety/intoxication of each at the time of the accident and at 11:30 P.M. or Midnight. I am satisfied that because of the relatively high blood alcohol concentration levels for each of the individuals any inaccuracies occurring as a result of the extrapolations made from the time that the samples were taken back to the time of the accident and back to 11:30 – Midnight, there would not be a significant change in their placement in the 3rd or 4th “Stage of Alcohol Influence” nor the “signs/symptoms” of intoxication exhibited at the time of the accident or when at the establishment.

There is further evidence of noticeable signs of intoxication in the testimony of witness B. It was obvious in her demeanor that witness B was a reluctant witness to the proceedings. She felt that she had been misled into providing a statement and was of the strong belief that the establishment should not be facing these alleged contraventions. Yet, she provided her evidence in a straight forward manner. I accept her evidence as reliable.

In my opinion the playing of a simple game like “rock, paper, scissors” does not demonstrate a lack of intoxication on the part of the participants.

While there is some evidence of liquor not purchased at the establishment being consumed there, the empty whisky bottle found under the table after the large group had departed, it is merely speculative that any of that liquor was consumed by the three patrons. It is speculative as well that the three occupants of the vehicle consumed any liquor in the time between leaving the establishment and the accident. There is no evidence what effect, if any, the presence of

Cannabinol in the urine of witness D would have had on his demeanor whilst at the establishment.

In conclusion, I find that the licensee has “permitted” a person to become intoxicated by not exercising as high a degree of diligence it should have in the circumstances and has contravened section 43 (2)(a) 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 have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

The branch’s primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

There is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident ("compliance history"). Therefore, this contravention, if proved, would be considered a first contravention for the purposes of the Penalty Schedule.

Section 33(1)(a) and (c) The branch has recommended a licence suspension penalty of a four (4) day suspension to commence on a Saturday. The Regulations to the Act at Schedule 4 provide for a range of penalties for a first contravention of this nature of a licence suspension of four (4) to seven (7) days and a monetary penalty of \$5000 to \$7000.

The sale of liquor to a minors and allowing minors to consume liquor in a licensed establishment are significant public interest issues which can have grave consequences for individuals, families and communities. The public expects that a licensed establishment will operate within the law and requires regulatory agencies responsible for overseeing their operation to act within their authority to ensure that licensee's are held to high standards of legality and responsibility. I have considered that this is an experienced licensee with a good record preceding this incident, however in the circumstances of this case, two minors, 18 years of age, both youthful in appearance, I am satisfied that a penalty is necessary to achieve future voluntary compliance. I concur with the branch's recommendation of a four (4) day suspension penalty to commence on a Saturday.

Section 43 (2)(a) The branch has recommended a license suspension penalty of a ten (10) day suspension to commence on a Saturday. The Regulations to the Act at Schedule 4 provide for a range of penalties for a first contravention of this nature of a licence suspension of four (4) to seven (7) days and a monetary penalty of \$5000 to \$7000. In recommending a suspension penalty longer than that provided for in Schedule 4 the branch is utilizing the provisions of section 20(2.1)(b) of the Act.

Intoxication is a serious public interest issue which can have grave consequences for individuals, families and communities. The public expects that a licensed establishment will operate within the law and requires regulatory agencies responsible for overseeing their operation to act within their authority to ensure that licensee's are held to high standards of legality and responsibility. I have considered that this is an experienced licensee with a good record preceding this incident. However, in the circumstances of this case, three young persons, two of whom were minors, drinking excessive amounts of liquor to the point of intoxication in a licensed establishment, I am satisfied that a significant penalty is necessary to ensure future voluntary compliance and to protect the public interest. I do not however, concur with the branch recommendation of a ten (10) day suspension, a penalty greater than the range for a first contravention of this type. I am satisfied that a penalty at the top of the range for a first contravention of this type, a licence suspension of seven (7) days, is appropriate.

ORDER

I suspend the liquor licence for four (4) business days starting as of the close of business Friday, March 5, 2004, and continuing on successive business days until the suspension is completed. I suspend the liquor licence for a further seven (7) business days commencing upon the completion of the aforementioned suspension and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (section 54(1) of the Regulations to the Liquor Control and Licensing Act.)

Since I do not know whether the establishment would normally be open seven (7) days per week as of March 5, 2004, I do not know what the business days will be. To ensure that this order is effective, I direct that the liquor licence be held by the Branch or the Chilliwack Detachment of the R.C.M.Police from the close of business Friday March 5, 2004, until the licensee has demonstrated to the Branch's satisfaction that the licensed establishment has been closed for eleven (11) successive business days. A suspension sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: January 27, 2004

cc: R.C.M.Police Chilliwack Detachment

Liquor Control and Licensing Branch, Surrey Office
Attention: Mike Clarke, Regional Manager,

Liquor Control and Licensing Branch Victoria Office
Attention: Peter K. Jones, Advocate
