



**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:	Sandman Hotel Langley, Inc. dba Sandman Hotel (Langley) aka the Shark Club 8855 – 202 Street Langley, BC
Case:	EH04-158 & 169
For the Licensee	Brian Coleman, Q.C. Kirsten Tonge
For the Branch	Sonja Okada
Enforcement Hearing Adjudicator	Edward W. Owsianski
Dates of Hearing	May 9, June 3, & July 27, 2005
Place of Hearing	Surrey, BC
Date of Decision	September 1, 2005

INTRODUCTION

At the time of the alleged contraventions the licensee, Sandman Hotel Langley, Inc. operated the Sandman Hotel (Langley) at 8855 – 202 Street Langley, BC. The hotel contained a food and beverage establishment known as the Shark Club for which the licensee held a Liquor Primary Licence and a Food Primary Licence. Through an agreement with the licensee, the details of which were not presented during the hearing, the Shark Club was operated as a separate business entity by other persons. Although it was operated as one business entity the Shark Club is divided into two distinct licensed establishments for liquor licensing purposes by the Liquor Control and Licensing Branch (LCLB or the branch), one a Liquor Primary Licence, the other a Food Primary Licence. The hearing dealt exclusively with the operation of the Liquor Primary Licence.

Liquor Primary Licence No. 178849:

Effective Date: June 18, 2004

Expiry Date June 30, 2005

Hours of Sale:

Noon – 2:00 a.m. Monday to Saturday, 11:00 a.m. – Midnight on Sunday

Capacity: Area 1, 195 Patrons, Patio 32

Terms and Conditions:

- This licence is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensee in British Columbia'.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the branch.
- Patio extension permitted as outlined in red on the official plan, patio capacity must be taken from inside capacity when patio in use.

ALLEGED CONTRAVENTIONS AND RECOMMENDED ENFORCEMENT ACTION

The branch's allegations and recommended enforcement actions are set out in Notice of Enforcement Action EH04-158 dated December 6, 2004, and Notice of Enforcement Action EH04-169 dated December 15, 2004.

EH04-158

The branch alleges that on August 29, 2004, the licensee contravened Section 44 (3) of the *Liquor Control and Licensing Regulation* by allowing persons to consume liquor in the licensed establishment beyond ½ hour after the time stated on the license for the hours of liquor service. The recommended enforcement action is a four (4) day suspension of the liquor license.

EH04-169

The branch alleges that on September 1, 2004, Licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two (2) pieces of identification from a person appearing to be under the age of 25 before allowing her to enter the licensed establishment, or before selling or serving liquor to her. The recommended enforcement action is a \$3000 monetary penalty.

Schedule 4 of the *Regulation*, provides a range of licence suspensions and monetary penalties for each contravention.

For the contravention of Section 44(3) of the Regulation the penalty range at item 26 of the Schedule is a four to seven day licence suspension and/or a five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty for a first contravention.

For the contravention of Section 45(2) of the Regulation the penalty range of the Schedule at item 4 is a one to three day licence suspension and/or a one thousand (\$1,000) to three thousand (\$3,000) monetary penalty for a first contravention.

The licensee disputes the contraventions.

Section 44(3) of the Regulation states as follows

(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

Section 45(2) and (3) of the Regulation state as follows:

(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.

ISSUES

1. Whether the licensee has contravened Section 44(3) and/or Section 45(2) of the Regulation.
2. If so, whether the penalties recommended by the Branch are appropriate?

EXHIBITS

The following exhibits were presented:

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|----------------------|---|
| Exhibit No. 1 | LCLB Book of Documents |
| Exhibit No. 2 | Page 10 (amended) of Agent Performance Report |
| Exhibit No. 3 | Agent Performance Report 2004 |
| Exhibit No. 4 | Licensee Book of Documents |
| Exhibit No. 5 | Liquor Inspector's typewritten notes |

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

EH04-158

Allegation of Permitting After Hours Consumption of Liquor, s.44(3) Regulation

An R.C.M. Police Constable (the constable) testified that at approximately 2:00 a.m. on August 29, 2004, he was dispatched to the Sandman Hotel to assist in the arrest of a

male ejected from the licensed area known as the Shark Club. The male was subsequently escorted away by another police officer, however the constable remained in the area to provide a police presence as the parking lot was filling up with persons leaving the establishment at closing time. Shortly thereafter he was flagged down by staff from the establishment and alerted to the presence of two groups of males who appeared to be preparing for a confrontation. He called for back-up officers to attend in the event that assistance was necessary. He observed several intoxicated persons coming from the Shark Club and was concerned that staff inside were losing control. He felt that he should address the problems with the manager of the Shark Club. He was unable to do so until the parking lot problems had been brought under control following which he entered the establishment at approximately 2:45 a.m. for the purpose of speaking with the manager. Inside, several staff were cleaning the licensed area and he saw three males seated at an elevated pedestal table on which were three glasses of what appeared to be freshly poured beer. He noted one of the males consuming from one of the glasses. He asked them if they were “serving/drinking” [the constable could not recall exactly which word was used but was certain that it was one or the other] “after hours”, one responded in the affirmative. He located the manager seated in the far corner of the licensed area. He advised the manager of his observations of the three persons seated in the licensed area drinking beer after hours and provided a description of the three persons to him. The manager responded that they were his remaining door staff, doormen who had not yet gone home. He told the manager that a report would be sent to LCLB. At this point he was summoned to assist another police officer to deal with a suspected impaired driver out in the parking lot. He intended to go back into the establishment to continue the discussion with the manager however by the time he had dealt with the suspected impaired driver the doors of the establishment were locked.

He testified that he made notes of the incident approximately 1 – 2 hours later and prepared a report prior to going off shift at 6:00 a.m. (notes and report at Exhibit 1, tab 4). A Licensed Premise Check form (LPC) was later completed and provided to the establishment (Exhibit 1, tab 3). The notes, report and LPC were subsequently sent to the area liquor inspector.

He testified that he was impressed with the demeanour of the manager who appeared to be genuinely interested in dealing with the problems. During their conversation, the manager did say that "this was grey area" which the constable felt referred to the general practice of staff drinking after hours. He advised the manager that it was not a grey area but 'black and white' in that it was not permitted.

EH04-169

Allegation of Failing to Request Two Pieces of Identification, s.45(2) Regulation

The Branch employs persons as agents who are between the ages of 19 and 25 years of age to assist in determining whether a licensee is complying with Section 45 of the Regulation. Testimony was received from two such agents, both female and 19 years of age at the time of the alleged contravention. The agents testified that on being hired by the branch they were provided with training by their supervisor which included an outline of the duties of the job, how to make observations and were provided with a binder which contained the relevant provisions of the Act and Regulation. They testified that on September 1, 2004, the date of the alleged contravention, they were assigned to check licensed establishments in the greater Vancouver area. Photographs of each agent were taken during the evening prior to commencing their duties. The photograph at Exhibit 1, tab 8, accurately depicts one of the agents. The photograph at tab 9 depicts the other agent wearing a hat which she testified was removed prior to entering this establishment. They both testified that the photographs accurately depict that they were wearing more make-up and different hairstyles at that time than during their testimony at this hearing.

They were driven to the establishment in a vehicle operated by their supervisor who remained in the vehicle while they went inside, entering at approximately 9:15 p.m. There being no doorman or hostess at the door they took a seat in the licensed area. The establishment was not busy and there were approximately 20 other patrons. They were soon approached by a female server who asked them if they wanted a menu. They declined and each ordered a liqueur and coke. The server obtained their drinks from the bar and served them to the agents. They each took a sip of their drinks to confirm that they were alcoholic beverages and left the drinks mostly unconsumed,

departing the establishment at approximately 9:25 p.m. They rejoined their supervisor in the vehicle. They each completed an "Agent Observation Report" (Exhibit 1, tabs 8 and 9) which was given to their supervisor. They testified that in their private lives they are asked for identification 80/85 - 90% of the time which is normally at night clubs

The agents testified that during their time in the establishment they were not questioned about their age nor requested to produce identification by the server or any other staff member although they did have identification available if so requested. Their evidence differed as to whether the establishment had a sign posted advising of the requirement to produce identification. One of the agents testified that she saw such a sign whereas the other agent testified that she did not, but agreed that it was possible that the sign was there but she had missed it.

The Project Manager for the branch's Identification Compliance Project testified that as project manager she was responsible for the hiring, training and supervision of the agents employed by the branch for the project. The selection criteria were for young looking students, at least 19 years of age with an interest in enforcement programs. During the hiring process she assessed their youthful appearance and often asked for the opinion of other branch employees. Each agent was provided training on the scope of the project, applicable legislation, note taking, use of the agent observation forms and exhibit documentation. Agents were told to dress youthfully and appropriately for the geographical area and the type of establishment to be visited. They were told not to wear a lot of makeup and not to attempt to appear older than their ages.

The project was carried out through all areas of the province. She travelled with the agents, facilitating transportation, co-ordinating the establishments to be visited and collecting the Agent Observation Reports. She was provided with a list of establishments to be visited from the areas' liquor inspectors. Once an establishment had been visited the agent observation reports were provided to the regional manager and the liquor inspector responsible for the area in which the establishment was located. The inspector had the responsibility to review the report and determine the course of action to be taken. She produced an overall report on the project (Exhibit 1,

tab 10, clearer copy at Exhibit 3). The report contains statistical information for the project and each individual agent. Following completion of the report an error was noted at page 10 which resulted in an amendment to correct the error (Exhibit 2).

She testified that she was at the Sandman Hotel with the agents on September 1, 2004, but remained outside of the establishment and later received their Agent Observation Reports.

A liquor inspector (the inspector) testified that she is responsible for the geographical area in which the establishment is located.

She was not present at the Shark Club on August 28, 2004, when the alleged contravention of after-hours consumption was to have occurred. She received a copy of the LPC (Exhibit 1, tab 3) issued by the police officer (the constable) to the establishment and a copy of his report (Exhibit 1, tab 4). She subsequently issued a Contravention Notice (CN) to the establishment (Exhibit 1, tab 3). She completed an Enforcement Action Recommended Report (EAR) (Exhibit 1, tab 2) in which she recommended that enforcement action be taken. She was concerned that the events of the night indicated that a lack of control at the establishment was having an adverse effect on the community. She recommended the minimum four day suspension for this type of contravention which she felt was necessary to obtain voluntary compliance. She felt that the minimum \$5000 monetary penalty would not have the required effect and could be seen as the cost of doing business. A Notice of Enforcement Report (Exhibit 1, tab 1) was subsequently issued.

She likewise was not present at the establishment on September 1, 2004, when the branch's agents visited the establishment. She received copies of their Agents Observations Reports (Exhibit 1, tabs 8 & 9) and issued a CN to the establishment (Exhibit 1, tab 7). She completed an Enforcement Action Recommended Report (EAR) (Exhibit 1, tab 6)) in which she recommended that enforcement action be taken. She was concerned that failing to request identification can lead to minors having access to liquor which is a significant public safety issue. She recommended the maximum \$3000

monetary penalty for a first contravention of this type because of the lack of diligence on the part of the licensee in checking identification and its past history of problems, particularly with minors. She felt that the monetary penalty would be effective and that a suspension was not necessary. A Notice of Enforcement Report (Exhibit 1, tab 5) was subsequently issued.

The inspector expressed her concerns with not being able to complete a Compliance Meeting with the manager of the establishment. Following the receipt of the LPC and police report regarding the August 29, 2004, incident she contacted the manager of the Shark Club to discuss the problems identified. A Compliance Meeting was commenced at the establishment on October 6, 2004. It was adjourned at the request of the manager and was to be completed at branch offices when the area manager for the establishment came to town. Despite her efforts to have the Meeting continued, she was unsuccessful (Exhibit 1, tab 25). She testified that she has since met with the manager and the area manager which is what she had been trying to accomplish for some time.

The liquor inspector testified that she is responsible for maintaining the branch records for this licensed establishment. The liquor licence has been issued to the same corporate licensee since 1997 (Exhibit 1, tabs 16 & 17). [I pause to note that there is a third party agreement between the corporate licensee and the principals of the Shark Club allowing the Shark Club to operate the licensed areas. The agreement was not presented at the hearing.]

The inspector testified that she is aware of other problems occurring at the establishment and referred to copies of documents from branch files.

The records document problems occurring at the establishment:

- February 9, 2001 CN issued for minor in premises and contravention of term & condition (Exhibit 1, tab 18)
 - March 11, 2001 CN issued for supplying liquor to minors and permitting intoxication (Exhibit 1, tab 19)
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- May 16, 2002 CN issued for reduced liquor pricing and permitting gambling (Exhibit 1, tab 20)
- October 4, 2003 CN and LPC issued for overcrowding (Exhibit 1, tab 21)
- October 29, 2003 CN issued for failure to post the current liquor licence (Exhibit 1, tab 22)
- October 12, 2003 CN for overcrowding (Exhibit 1, tab 23) The CN lead to an enforcement hearing resulting in a contravention being found but no penalty imposed, (Exhibit 1, tab 26) which was subsequently upheld on judicial review (Exhibit 1, tab 28).
- December 13, 2003 CN for permitting a minor on the premises and failing to request 2 pieces of identification. (Exhibit 1, tab 24). The CN lead to an enforcement hearing resulting in a two day suspension ordered for permitting a minor on the premises (Exhibit 1, tab 26) which was subsequently upheld on judicial review (Exhibit 1, tab 28).

EVIDENCE - THE LICENSEE

The bar manager for the Shark Club testified that he has been employed at the establishment for approximately five years, the past two and a half years as bar manager. He is responsible for the general operation of the bar which includes the supervision of four bartenders and a porter, managing the cash flow and making staff aware of not overserving patrons.

Standard operations for closing the bar involves the DJ making 'last call for liquor service' at 1:45 a.m. At 1:55 a.m. the DJ announces the last song which signifies the last opportunity to purchase drinks. At 2:00 a.m. the DJ announces 'thanks for coming' and the lights are turned on. At this point the bar manager announces to staff 'no more booze' which signifies the end of liquor service. Any staff caught serving after hours are subject to discipline by way of a severe reprimand. Open tabs are collected and bar staff commence cleaning the bar area, bussing staff the patron areas. The doormen (inside security personnel) wait about five minutes then begin moving patrons towards

the front door. It's a routine process for staff, the sooner they are finished the sooner they go home. They are normally finished by 2:15 a.m., 2:20 a.m. at the latest, even for busy nights.

He was working August 29, 2004, at the time of the alleged contravention but did not see the security staff drinking. He is aware that there was an altercation on the parking lot at closing time and that the inside security personnel went outside to assist in dealing with the problem. This delayed the closing/clean-up procedures. Security staff are not permitted to consume liquor during their working hours. Any employee serving a security person would be subject to a reprimand and the security company contacted to replace the security person. Patrons will sometimes purchase a jug of beer for the security staff to consume after they are off shift. It is permitted as long as the purchase is made before 1:59 a.m. Security normally finish their duties about 2:15, they are then permitted to consume the beer but it must be finished and the glasses removed by 2:30 a.m.

The establishment contracts out the security duties. There are two security companies involved, one providing security inside, the other the outside, particularly the parking lot areas. There has been a recent change in security companies, the company previously providing the outside security now performs the security functions inside and out. This took place approximately a month ago, the reasons for which he does not know. The inside security personnel have responsibility for checking identification at the front door and moving patrons out at closing time. Security personnel are on duty seven night a week, starting at 7:00 or 8:00 p.m. until closing. Prior to the security personnel starting their duties there is a hostess or manager at the front door. The number of personnel increases for Thursday, Friday, Saturday and special events. Approximately six months ago, they operated without front door security on Sunday to Wednesday. That didn't last long and they reverted back to seven days a week.

He was not working the night of September 24, 2004, the date of the alleged contravention for failing to request two pieces of identification. He is aware that signs have been posted at the front door and inside the establishment advising of the

requirement for two pieces of identification. Staff have been told that the establishment has a zero tolerance policy for staff not requesting two pieces of identification.

The establishment maintains a staff training manual (Exhibit 4, tab 9) which is updated as required. Staff, including the managers, are required to sign that they have read the manual and if they operate contrary to the rules are subject to reprimand. Page 9 of the manual deals specifically with the requirement of requesting two pieces of identification from persons appearing under 25 years of age. Page 8 makes it clear that staff are not to consume alcoholic beverages or be under the influence of alcohol while on shift. He agreed that it does not specifically address after hours consumption of liquor by staff. New staff with previous experience have a two week on the job training period, inexperienced staff a longer period. Staff meetings are held quarterly to update staff on changes to the rules and policies.

As bar manager he will occasionally come from behind the bar and walk the floor looking for overserved or underage persons as will the on duty managers and security personnel. If a suspected underage person is noted, he or one of the other managers will escort the person outside and check their identification. If the person does not have identification or is found to be a minor, inquiries are made to determine which staff or security personnel are responsible. Reprimands or policy changes are made to prevent recurrences.

The general manager of the Shark Club testified that he has been employed at the establishment for approximately two years. He was first hired as the assistant general manager then promoted to the general manager's position six months later. His responsibilities are to oversee all aspects of the operation including the hiring and training of staff. All staff have 'Serving it Right: Responsible Beverage Service' certification' which acquaints them with LCLB rules and Regulations. All receive an orientation and floor training and are advised of the requirements for dealing with minors, overservice and checking the identification of patrons appearing under 25 years of age. A "Hire Pack" (Exhibit 4, tab 9) is provided to and signed off by each employee. It includes the identification requirements and is updated as necessary. New

employees are hired after interviews with the general manger and assistant general manager and are placed on three months probation. Staff manuals have been developed, are regularly updated and are kept in the work areas. Regular staff meetings are held every sixty days. Incident logs are maintained by the head doorman, managers and the on-duty manager. Staff may be reprimanded or terminated for incidents depending upon the seriousness. Theft, a breach of the policy sign-offs or consistent problems are grounds for automatic termination.

The Shark Club contracts with a private security company for security personnel who start work at 8:00 p.m. seven days a week. At the start of their shift they survey the room for any problems, including young appearing persons and count the number of persons present. A hostess covers the front door until 9:00 a.m. Two security personnel are posted at the door and are responsible for controlling the line-up, checking incoming patrons for identification and intoxication. Persons appearing to be under 25 years of age are required to produce two pieces of identification, if they are unable to do so, they are not allowed in. Five security personnel are posted inside, walking the floor, controlling the room. They operated without security personnel for a period of 6 – 7 months on Sunday to Wednesday, however have since returned to seven days per week.

He was working August 29, 2004, at the time of the alleged contravention. It was an average busy Saturday night. There had been an altercation outside at closing time. At approximately 2:50 a.m. he was sitting at the far end of the room doing the cash receipts when an R.C.M. Police officer came to see him. The officer told him that there were three people at the stand-up table with beer. He told the officer that that was impossible, the room had been emptied by 2:15 a.m. and no one was permitted to consume liquor after 2:30 a.m. He does not recall telling the officer that the three persons were doormen and would never say that it was “a grey area”. The general manager testified that he had walked by the area in which they were seated at approximately 2:15 a.m. and there was no one at the table at that time. Liquor consumption by staff or patrons is not permitted after 2:30 a.m. Security staff are not permitted to consume liquor while on duty. On occasion someone may purchase a beer

for the security personnel prior to the end of the end of sales hours which is then consumed by the security personnel once they have finished their duties and before 2:30 a.m. The officer did not tell him at the time that the three persons were security personnel. The officer came back two to three weeks later to have the LPC signed, he told the officer at that time the three persons were doormen employed by the security company. He did not make any notes of his conversations with the officer.

Subsequent to that night he asked the doormen what had happened. They told him that a regular customer had purchased the a jug of beer for them prior to closing which they were drinking after they had cleared the patrons from the room by approximately 2:10 – 2:15 a.m. They were alerted to an altercation occurring outside and went to assist following which they returned to finish their beer. He contacted the security company who supplied the three doormen. The company was advised that two of the doormen were to be assigned to other duties and not to return back to this establishment. His inquiries lead him to believe that the third doorman had not been consuming the beer and consequently was not requested to be reassigned. He is now an employee of the establishment in charge of inside floor security. About a month ago the security company was replaced.

He testified that closing procedures start at 1:45 a.m. with 'last call'. Liquor service is ceased at 2:00 a.m. Patrons are gradually moved forward from the back of the room with their drinks followed by staff who start cleaning the room as the patrons move forward. Bussers are responsible for the clean-up and may be assisted by the servers once they have completed their cashing out and the security personnel once the room has been cleared of patrons.

He testified that he was not working on September 1, 2004, the date of the alleged contravention for not requesting two pieces of identification. There was a duty manager in charge in his absence. The establishment has a policy that two pieces of identification must be checked of persons appearing under 25 years of age and staff breaching the policy are fired. Signs advising of the requirements are posted at the front entrance and inside the establishment. There should have been a doorman

present at the time of the alleged contravention. He did not learn of the incident until sometime in late October/early November as the notification from the branch went to the head office for the hotel and not to the Shark Club. He investigated the incident and determined the identity of the server who served the agents without requesting identification. She had been working at the establishment for a little over a year at the time. She had originally been hired as a busser, then as a server once she turned 19. She was fired as a result of the incident. September 1, 2004, was a Wednesday, a slow night, a doorman should have checked the agents for identification if he believed they were under 25 years of age. He spoke with the doorman on duty at the time, who had no recollection of the occurrence. The general manager is confident that the doorman does not allow persons into the establishment without requesting identification. [I pause to note that during the course of the hearing this doorman was identified as one of the three security personnel noted by the police officer sitting at the table with three glasses of beer and who was later made an employee of the Shark Club.] The general manager testified that it is difficult for young staff to judge if a person is 25 or 26 years of age or older. They have changed the policy and now require staff to check the identification of all persons appearing to be under 30.

The general manager testified that he tries to maintain a good relationship with the area liquor inspector. He has attended Compliance Meetings with her in the past and does not stall in meeting with her. He tries to find a time which will work for both he and the inspector. Meetings have been set in the past in which the inspector was unable to attend. On another occasion he was unable to attend as he was the only manager on duty at the establishment. She declined meeting with him there. She then sent the CN to the licensee before leaving on holidays.

The general manager of the security company (security general manager) contracted by the shark Club to provide door and inside security testified that he has been in the security industry for 10 years of which five have been with this company. He has been the security general manager for the past four years. The company provided security personnel to the Shark Club for approximately one and a half years which included the period of August and September, 2004. Security personnel at the

Shark Club covered both door and inside security. The company holds a provincial security licence as do its employees. The company provides basic and ongoing training for its employees. It has approximately 300 employees of which 35 – 40 are fulltime employees primarily assigned as security in night clubs. The company has developed its own employee manual (Exhibit 4, tab 10) which is provided to all new employees. Monthly meetings are held and on-site debriefings as necessary following any major incidents. The personnel assigned to the Shark Club are under the direction of an on-site supervisor. [I pause to note that the on-site supervisor identified by the security general manager was the same security person identified as one of the doorman sitting at the table with glasses of beer after hours on August 29, 2004, and the security person responsible for being at the door on September 1, 2004, when the branch's agents entered. He is the person later hired by the Shark Club as an employee.] The security general manager was not made aware of the two alleged contraventions until approximately a month ago when he was contacted about appearing at the hearing. The president of the security company may have dealt with the matter.

He testified that he was not aware of the incident on August 29, 2004. Security personnel are not permitted to consume liquor before or during their shifts and are terminated if found to be doing so. The issue of consuming liquor following their shift has not been addressed as it has never occurred prior to this incident. Security personnel are prohibited from accepting gifts or gratuities, this would include accepting a beer after completing their shift. The company does "integrity testing" from time to time and employees not following the rules are terminated. He is unaware if the company took any action concerning the security personnel on duty at the Shark Club on that date as it falls within the responsibility of the company operations manager. He believes that they are still employed with the company.

He is not familiar with the incident of September 1, 2004. He testified that it can be difficult for security personnel to distinguish whether a person appears to be younger than 25 years of age. Employees are told that if there is any question about a person's age then request their identification. This can on occasion aggravate some people but that's too bad.

LICENSEE SUBMISSIONS

Counsel for the licensee provided copies of the following precedents:

- R. v. C.C. Eric James Management Ltd., 2000 BCPC 178.
- R. v. 348059, [2003] B.C.J. No. 493.
- R. v. 611016 Saskatchewan Ltd., [2004] SKPC 135.
- Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch) 2002 BCCA 426.
- The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch 2004 BCSC 248.
- Woody's Pub v. B.C. (Liquor Control and Licensing Branch), (2005) EH04-092
- The Plaza Cabaret Ltd. dba Plaza Cabaret. (Liquor Control and Licensing Branch), (2005) EH02-005/019
- Six Mile Pub Ltd. dba Six Mile Pub (Liquor Control and Licensing Branch) Decision (2005) EH04-183
- The Roxy Cabaret Ltd. dba Roxy Cabaret (Liquor Control and Licensing Branch) Decision (2005) EH04-031
- Skybar Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch) 2005 BCCA 235.
- 504174 N.B. Ltd. dba Choo Choo 's v. (Minister of Public Safety) 2005 NBCA 18

Counsel submitted that there is no argument on the facts. On August 29, 2004, two or three persons were in the establishment consuming liquor after hours. On September 1, 2004, two persons were allowed to enter the establishment and to purchase liquor without being requested to produce identification. The issue to be determined in this case is whether the licensee exercised due diligence.

He submitted that *Whistler* (supra) makes it clear that the defence of due diligence is applicable to this case. In *Plaza* (supra) it is clear that in considering due diligence one

must look to the actions of the directing mind, not of the individual employee who may have been at fault. Here the Shark Club is a large company with a number of procedures in place which are diligently followed:

- New employees are usually persons having previous experience. Persons without experience begin at a junior position and are advanced when they obtain experience.
- Staff are hired after two interviews then undergo orientation and training and are provided with a binder of materials. They attend regularly held staff meetings and incidents are discussed with them.
- The establishment maintains a policy manual which is regularly updated.
- Management staff are responsible for monitoring activities within the establishment and follow up if they see a problem.
- The server at fault for not checking identification on September 1, 2004, was fired. Because the establishment had not been notified in a timely way of the incident it was too late to take any further action.
- The security company was told to reassign the two security personnel known to have consumed liquor.

Counsel drew our attention to several Tobacco Act cases (*Eric James Management* (supra), *348059 BC Ltd.*(supra) and *611016 Saskatchewan Ltd.*(supra)) which involved charges against retailers for the sale of tobacco products to underage persons. Due diligence was held where the accused retailers met the test outlined by the Supreme Court of Canada in *R. v. Sault St. Marie* (1978) 40 C.C.C. (2d) 353.

Each of the cases examined the steps taken by the directing mind of the accused corporation and it was found that due diligence had been established. Counsel drew a parallel to the steps taken in those cases and the evidence provided at this hearing. He submitted that due diligence has been proven. In *Plaza (BCSC)*(supra) the court sent the case back to the branch for a reconsideration of, who was the directing mind on the night in question, and had that person or persons taken reasonable steps to prevent the unlawful activities. The branch in its reconsideration in *Plaza (LCLB)* (supra)

considered the policies and procedures of the licensee and the security systems employed by the licensee and found that due diligence had been established. Counsel submitted that most of the things done by the licensee in *Plaza (LCLB)* (supra) were also done by the licensee in this case.

Counsel referred to the branch decision in *Woody's Pub* (supra). In that case the agent did not appear to be under 25 years of age and no contravention was found. In *Six Mile Pub* (supra) the adjudicator concluded that the agent looked younger than 25 years of age. He submitted that adjudicators should refrain from this practice. Here, the photographs show the agents dressed up thus making a dramatic change in their appearance from the time of the hearing. He submitted the Regulation is a bad one and the adjudicator should be loath to exercise his own judgement unless there is overwhelming evidence of a contravention. People can look younger or older than their actual age. It's a subjective judgement call. The statistics show that the agents were asked for identification less than 50 % of the time which would indicate that they look over 25. Because of the difficulties in assessing a person's age the licensee now requests identification from persons appearing under 30. He submitted that no penalty should be assessed unless there has been a blatant disregard of the law. This licensee has only two previous proven contravention prior to the date of these incidents; October 2003 for overcrowding and December 2003 for permitting a minor on the premises. This is further evidence of its diligence.

REASONS AND DECISION

1. Whether the licensee has contravened Section 44(3) and/or Section 45(2) of the Regulation.

(a) Section 44(3) Regulation – After Hours Consumption of Liquor

The evidence presented by the branch is that on August 29, 2004, at approximately 2:45 a.m. three persons were noted seated at a table on which were glasses of beer. One of the persons was observed consuming from one of the glasses. This was not

contested or refuted by the licensee. I am satisfied that on August 29, 2004, a person consumed liquor in the establishment beyond ½ hour after the time stated on the licence for the hours of liquor service.

(b) Section 45 (2) Regulation – Fail to Request Identification

The evidence presented by the branch is that on September 1, 2004, two agents employed by the branch, 19 and 20 years of age respectively entered the establishment, purchased and were served liquor without being asked about their age or requested to produce identification. The licensee has submitted that the photographs of the agents taken just prior to their attendance at the establishment show the agents dressed up and wearing makeup and thus depict them as being older than their actual age and older than they appeared while giving evidence during the hearing. I have had the opportunity of observing the agents during their testimony at this hearing and viewing the photographs taken on the day of the alleged contravention. It is evident in the photographs that the makeup and dress of the agents was suitable for a night out and differed from their appearance at the hearing. However, I am satisfied that there is nothing in their appearance as depicted in the photographs that leads me to believe that either of the agents looked other than their real ages. I find that the agents, who were 19 and 20 years old at the time of the alleged contravention, were persons appearing to be under the age of 25 years and were not requested to produce two pieces of identification upon entering the establishment and purchasing liquor.

(c) Due Diligence

I find that the general manager employed at the time of the alleged contraventions was the directing mind of the licensee. His responsibilities were to oversee all aspects of the operation including the hiring and training of staff. As the court in *Plaza* (supra) stated:

“Such person need not be an officer or director of the licensee. It would be the individual ...who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation ‘directing mind and will’ of the licensee.”

Counsel for the licensee drew our attention to several Tobacco Act cases (*Eric James Management* (supra), *348059 BC Ltd.*(supra) and *611016 Saskatchewan Ltd.*(supra)) which involved charges against retailers for the sale of tobacco products to underage persons. Due diligence was held where the accused retailers met the test outlined by the Supreme Court of Canada in *Sault St. Marie* (supra). I have considered counsel's argument.

Each of the judges in the aforementioned decisions quoted from the decision of the Supreme Court at pp 377-8:

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. **(my emphasis added)**

(i) Section 44(3) Regulation – After Hours Consumption of Liquor

The evidence is that a police officer entered the licensed area of the establishment at approximately 2:45 a.m., a time at which the consumption of liquor in the establishment was to have ceased. He observed several staff cleaning up the area and also observed three persons seated at a table on which there were three glasses of beer. One of the persons was observed consuming from one of the glasses. He brought this to the attention of the general manager who was seated in the far corner of the licensed area. The officer's evidence was that the general manager told him that the three persons were doormen who had not yet left and that the issue of staff drinking after hours was "a grey area". The officer shortly afterwards recorded his observations and the general manager's comments in his notebook and completed a report a few hours later before going off shift. The evidence of the general manager was that he was unaware of the three persons at the table, they had not been there earlier when he had walked by. He was thus unaware that the three were doormen until some time later and thus could not have told that to the officer. He denied that he would ever say that it was "a grey area".

I prefer the evidence of the officer. He recorded his observations and the general manager's comments in his notebook shortly thereafter. There is no reason to believe that he may have invented the comments. The evidence of the general manager was given strictly from memory almost ten months after the event. The evidence leads me to believe and I so find that the general manager either approved of the afterhours consumption or was wilfully blind to its occurrence. This does not support a finding of diligence on the part of the licensee.

Further, the Supreme Court required that there must be established a proper system to prevent commission of the offence "and" the taking of reasonable steps to ensure the effective operation of the system. This a two step process. I accept that the hiring practices and the training provided and the policies set, both of which were reinforced at regular meetings by the licensee and the security company were sufficient to make employees and security staff aware that liquor consumption in the establishment must cease by 2:30 a.m. and that this requirement applied equally to all persons. That said, I am not satisfied that the licensee took adequate measures to ensure the effective operation of the system. The evidence of the general manager is that discipline will be undertaken where warranted and there is some evidence of that occurring. In this instance it was not within his authority to discipline the doormen but he did instruct the security company to reassign two of them away from his establishment. [I do note the somewhat strange result that the third doormen who was present at the time was later hired as an employee by the establishment. I say strange because at the time of this alleged contravention he was a supervisor at the establishment on behalf of the security company and as such should have had some responsibility in seeing that his subordinates obeyed the law.] I do not find that these were adequate measures to ensure the effective operation of the system. The licensee may argue that there was an additional measure, the presence of managerial staff to observe and deal with any problems noted. While the evidence supports the existence of management staff who may from time to time observe what is occurring and intervene where necessary the evidence does not support that as being effective. Here the general manager was present, knew or should have known what was occurring, yet took no action. Other

employees were observed in the area cleaning up yet no effort was made to alert the manager to the problem. Other managers onsite were not heard from.

In the result I find that the defence of due diligence has not been made out by the licensee.

(ii) Section 45 (2) Regulation – Fail to Request Identification

The evidence is that two persons appearing to be under the age of 25 were allowed into the establishment and to purchase liquor without being requested to produce two pieces of identification. The Supreme Court required that there must be established a proper system to prevent commission of the offence “and” the taking of reasonable steps to ensure the effective operation of the system. This a two step process. I accept that the placing of signs at the entrance and within the establishment, the hiring practices and the training provided and the policies set, both of which were reinforced at regular meetings by the licensee and the security company were sufficient to make employees and security staff aware of the requirement to check two pieces of identification of persons appearing to be under 25 years of age. That said, I am not satisfied that the licensee took adequate measures to ensure the effective operation of the system.

The evidence of the general manager is that discipline will be undertaken where warranted and there is some evidence of that occurring, the server was fired. The licensee may argue that there were additional measures taken, security staff were hired to control the entrance and licensed area and there are managerial staff to observe and deal with any problems noted. I do not find that these were adequate measures to ensure the effective operation of the system. While the evidence supports the existence of management staff who may from time to time observe what is occurring and intervene where necessary the evidence does not support that as having occurred in this instance. Further, there was no door control and the two young persons entered, took a seat, ordered and were served liquor without being asked for identification. Business was slow at the time with approximately 20 patrons in the establishment. [I do note once again that the security person who was to commence door control duties

prior to the time that this incident occurred was not disciplined, but was subsequently hired as an employee by the licensee.] I note that in two of the cases referred to by counsel for the licensee, the accused corporations took measures to test the effectiveness of their systems. In *348059 BC Ltd.*(supra) the employer paid for “Shop Watch” to regularly check if employees were following the rules. In *611016 Saskatchewan Ltd.*(supra) the employer installed a video camera to monitor the interactions between the employees and a customer when purchasing cigarettes and if he thought that identification should have been requested but was not he followed up with the employee. Here, the licensee is aware of the difficulties for staff in determining whether a person is under 25 years of age, yet has not sought advice or training which may be available through industry consultants or organizations, nor has it employed any effective systems to monitor whether the regulatory requirements are being met.

In the result I find that the defence of due diligence has not been made out by the licensee.

In conclusion I find that:

- on August 29, 2004, the licensee contravened Section 44 (3) of the *Liquor Control and Licensing Regulation* by allowing persons to consume liquor in the licensed establishment beyond ½ hour after the time stated on the license for the hours of liquor service;
- on September 1, 2004, Licensee contravened section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two (2) pieces of identification from a person appearing to be under the age of 25 before allowing her to enter the licensed establishment, or before selling or serving liquor to her.

2. Penalty

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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 licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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 *Regulation*.

In considering whether a suspension penalty is warranted I note that there is no record of prior contraventions, offences or enforcement actions of these types for this licensee or this establishment within the year preceding these contraventions ("compliance history"). Therefore, the contraventions are considered as first contraventions for the purposes of the Penalty Schedule.

The *Act* and *Regulation* provides the discretion to the general manager whether or not to take action against a licensee for the licensee's contravention of the *Act* or *Regulation*.

Counsel for the licensee has argued that no penalty should be assessed unless there has been a blatant disregard of the law. This licensee has only two previous proven contraventions prior to the date of these incidents; October 2003 for overcrowding and December 2003 for permitting a minor on the premises.

The evidence of the liquor inspector in reviewing the record for the licensee revealed several instances where Contravention Notices were issued regarding the operation of the establishment. I have considered these, not as evidence of previous contraventions but as evidence that the branch's concerns were brought to the attention of the licensee. There are two proven contraventions prior to the date of these incidents; October 2003 for overcrowding and December 2003 for permitting a minor on the

premises. In light of the record for this licensee, I am satisfied that a penalty for each contravention is necessary to ensure future voluntary compliance.

(a) Section 44(3) Regulation – After Hours Consumption of Liquor

For the contravention of Section 44(3) of the Regulation the penalty range at item 26 of the Schedule is a four to seven day licence suspension and/or a five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty for a first contravention. I am satisfied that the minimum four day licence suspension is appropriate in the circumstances of this case. It should serve to bring home the importance of operating within the requirements of the law to the licensee, management, staff and security personnel of this establishment.

(b) Section 45 (2) Regulation – Fail to Request Identification

For the contravention of Section 45(2) of the Regulation the penalty range of the Schedule at item 4 is a one to three day licence suspension and/or a one thousand (\$1,000) to three thousand (\$3,000) monetary penalty for a first contravention. Adjudicators acting on behalf of the general manager of the branch have consistently found that the minimum monetary penalty of one thousand dollars (\$1000) to be appropriate in cases of first contraventions where the branch has employed the use of agents acting on its behalf. I am satisfied that the minimum one thousand dollar (\$1000) penalty is appropriate in the circumstances of this case.

ORDER

For the contravention of Section 44(3) of the *Regulation*, after hours consumption of liquor, I order that Liquor Primary Licence No. 178849 be suspended for four (4) business days commencing the close of business Friday, October 7, 2005, until the suspension is completed. “Business Day” means a day on which the licensee’s establishment would normally be open for business (Section 67(1) of the *Regulation* to the *Liquor Control and Licensing Act*).

For the contravention of Section 45(2) of the *Regulation*, failing to request identification from a person appearing to be under 25 years of age, I order that the licensee pay a monetary penalty of \$1000.00 (one thousand dollars), to be paid to the general manager of the branch on or before Thursday, October 6, 2005.

Since I do not know whether the establishment would normally be open seven (7) days per week as of October 8, 2005, I do not know what the business days will be. To ensure that this order is effective, I direct that Liquor Primary Licence No. 178849 be held by the branch or the Langley Detachment of the R.C.M. Police from the close of business Friday, October 7, 2005, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for four (4) successive business days. A suspension sign notifying the public shall be placed in a prominent location in or at the establishment by a liquor inspector or police officer.

Original signed by

Edward Owsianski
Enforcement Hearing Adjudicator

Date: September 1, 2005

cc: R.C.M. Police Langley Detachment

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Advocate
