



**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, R.S.B.C. 1996, c. 267

Licensee:	Cambie Hotel (Nanaimo) Ltd. dba Cambie Hotel 63 Victoria Crescent Nanaimo, BC
Case:	EH04-112
For the Licensee	Peter K. Jones
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	February 18, 2005
Place of Hearing	Nanaimo
Date of Decision	March 9, 2005

INTRODUCTION

The licensee operates a bar in downtown Nanaimo in a facility known as the Cambie Hotel. The bar is described in Liquor Primary Licence No. 022747. Its hours of operation are 11:00 a.m. to 1:00 a.m. Monday through Saturday, and 11:00 a.m. to Midnight on Sunday. The bar has a patron capacity of 150.

The licensee has operated the bar since March of 2001. The Cambie Hotel is situated in an undesirable part of town, which is frequented by the drug trade, and carefully watched by police.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated October 12, 2004, the branch alleged that on July 23, 2004, the licensee contravened Section 33 of the *Liquor Control and Licensing Act (Act)*: supplying liquor to minors.

Section 4 of the *Liquor Control and Licensing Regulation (Regulation)* establishes prescribed penalties for contravention of the *Act* or *Regulation*. For a first contravention of this section, the range of penalty is four (4) to seven (7) days license suspension and/or \$5,000 to \$7,000 monetary penalty.

PRELIMINARY APPLICATIONS

The licensee made a preliminary application to have the hearing declared a nullity for reasons of denial of procedural or administrative fairness.

The grounds were three-fold:

1. The licensee was not made aware, with certainty, if the minor witness would appear to testify.
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2. The NOEA identified the alleged contravention as "supplying liquor to minor" as distinct from the more detailed allegation of "permitting a minor to consume liquor".
3. The Contravention Notice served on the licensee states that enforcement action may commence within forty-five (45) days of the notice. Such action was not commenced within that time frame.

1. The licensee was advised the night before the hearing that the minor who was involved in the alleged contravention was not yet located. A subpoena was served on the minor's parent who advised that it was forwarded on to the minor. The parent was not in control of the minor and did not know whether or not the minor would attend the hearing.

The licensee argued that it was impossible to mount an appropriate defence without knowing if the minor would testify, and indeed in the event that the minor was not to testify, it was impossible for the branch to prove its case.

The branch argued that the minor was a transient and all reasonable effort was made to locate her. The branch indicated that it could prove its case without the minor. Further, if the licensee required the minor for his defence, he could have issued his own subpoena or otherwise made efforts to secure her attendance.

2. The licensee argued that the NOEA identified the alleged contravention as something different from that, which was described in detail in the minutes of the pre-hearing conference. The alleged contravention changed from "supplying liquor to a minor" (it was acknowledged by the licensee that the language of the NOEA did not include the word *liquor*, but it was accepted as being implicit) to "permitting a minor to consume liquor". The licensee submitted that the two were fundamentally different allegations, and that the registrar, who conducted the pre-

hearing conference, did not have the jurisdiction to change the alleged contravention from that stipulated in the NOEA.

The branch argued that there is no uncertainty as to what allegedly transpired on July 23, 2004. The NOEA utilized the "title" of Section 33 and did not contain the full wording of the section and its subsections. The further detail as to particulars of the allegation, were provided to the agent for the licensee upon his request. There was no error on the face of the NOEA, and no prejudice to the licensee.

3. The licensee argued that as the enforcement action was not taken in a timely fashion, in accordance with the language of the Contravention Notice, enforcement action should be declared a nullity as it is a breach of the obligation to provide administrative fairness.

The branch argued that the language of the Contravention Notice says "the Licensee will generally be notified within forty-five (45) days if enforcement action is proposed". This language is permissive and does not set a fixed time frame within which the Branch *must* act.

I made the following findings:

1. The branch took reasonable measures to attempt to obtain the attendance of the minor witness, and made reasonable efforts to communicate its progress in this regard to the licensee. It is not procedurally unfair to proceed with the hearing. The branch will have the onus of proving the alleged contravention during the hearing.
 2. The Contravention Notice identified the alleged contravention as "supplying liquor to minor". The licensee says that is not the same as "permitting a minor to consume liquor". Section 33 of the *Act* is entitled "supplying liquor to minors". Subsection 33(1)(c) prohibits a person from
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"in or at a place under his or her control, permit[ting] a minor to consume liquor." The title of the section, used in the NOEA is sufficient notice to the licensee of the case he need prepare to meet for the hearing. He knew of the date of the contravention, and had been advised of the issue on the date of the contravention. The test for administrative fairness has been met for the purposes of proceeding with the hearing. I reserved the jurisdiction to rule that there was procedural unfairness to the licensee or that the branch has not met the burden of proof establishing the contravention until the evidence has been heard.

3. Evidence as to the wording of the Contravention Notice with respect to timely notice, and submissions as to the impact of such wording will be considered in the normal course of the hearing of this matter.

RELEVANT STATUTORY PROVISIONS

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.
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ISSUES(S)

- Did the Licensee contravene Section 33 of the *Act*?
- If it is found that the licensee did contravene the Act as alleged, is the Branch's recommended penalty appropriate?
- Was there a breach of administrative fairness in the process leading up to the enforcement hearing?

EXHIBITS

Exhibit No. 1. The branch's Book of Documents.

Exhibit No. 2. Congratulatory letter from branch to licensee dated Dec 1, 2004.

EVIDENCE

The branch produced the following witnesses:

- An R.C.M. Police constable who attended at the establishment on July 23, 2004;
 - A liquor inspector who attended at the establishment on July 23, 2004;
 - A liquor inspector, who testified as to process and procedure after the alleged contravention.
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The licensee produced the following witnesses:

- The server/waitress (server) who was on shift on July 23, 2004, during the alleged contravention;
- The bartender who was on shift on July 23, 2004, during the alleged contravention;
- The controlling shareholder of the licensee.

The Branch's Evidence

The branch proposed that the Book of Documents be Exhibit No. 1. The licensee objected on the basis that the Book of Documents contained previous Contravention Notices, which were not proven. The licensee argued that these were merely allegations to which the licensee was not allowed due process to defend. The branch argued that the allegations were an indication of previous related issues being brought to the attention of the licensee, and proof only of past discussions with the licensee with respect to such issues.

I accepted the complete Book of Documents as Exhibit No. 1. The licensee is entitled to administrative fairness. According to the authorizing legislation, the adjudicator of an enforcement hearing *is* the general manager (delegate) of the branch for the purposes of the hearing. As such, it would be inappropriate to attempt to disabuse myself of the knowledge of such matters, and contrary to the general manager's statutory mandate to act in the best interest of the public. I find that the introduction of this evidence does not in itself amount to unfairness. The weight and proper interpretation to be afforded this evidence may be addressed in submissions.

The R.C.M.Police Constable

The constable testified that the area in which the Cambie Hotel is situated is a "problem area" and subject to many police initiatives.

July 23, 2004, was the first night of Bathtub Days, a festival in Nanaimo, which attracts many persons. On July 23rd, the constable was on uniformed foot patrol in the area. He observed two other R.C.M.Police members doing a drug search of an individual at the front door of the Cambie Hotel and attended to offer his assistance. The liquor inspector came out of the Hotel and indicated that there might be a "drug deal" going on inside. The constables all went inside the bar. In the Cambie Hotel, the liquor inspector identified a patron that she had been informed was a minor. The constable approached the alleged minor and asked for ID. The minor told him she had none, but gave her birth date. The liquor inspector quickly stated that that birth date given, indicated that the patron was 17 years old. The patron recanted and confessed to having lied and adding a year "in the wrong direction". She indicated that she was actually 18 years old and again provided a birth date.

The constable testified that the bar was busy and there appeared to be two staff working. No doorpersons were evident. There was a bartender and a server. The female patron was not in possession of alcohol when the constable confronted her. She looked under age. She was approximately 10 feet from the bar.

The constable did a Canadian Police Information Centre (CPIC) check and confirmed the minor's name and birth date. He confirmed that she smelled of alcohol and she was in his view, intoxicated. He noticed symptoms including glassy eyes and heavy eyelids. He issued her a violation notice and proceeded to notify the bartender that there was an underage patron in the bar. The bartender, according to the constable, was no more than 15 feet from the patron.

The bartender was pleasant and signed an acknowledgment of the Licensed Premise Check (LPC) served upon him by the constable for "minor in liquor establishment". The minor was released.

The Liquor Inspector

The inspector testified that on July 23, 2004, she was responsible for the area in which the Cambie Hotel is situated. The Bathtub Festival has been running for 25 or 30 years and it is the busiest weekend in Nanaimo annually. She had "stepped up" inspections on this night because she knew it would be busy. On the day before, Thursday, July 22nd, she went around to many licensees in the area and warned about door control, minors, and over-service. She attended the Cambie Hotel at 11:00 p.m. on the 22nd and spoke to the bartender who would be on duty on the July 23, 2005. They discussed ID checks and door staff sufficient for the busy night, expected the next day. The bartender said that Bathtub Days did not typically cause the Cambie Hotel to become busy, but that he had prepared nonetheless to have additional servers on shift.

The inspector attended the Cambie Hotel on July 23, 2004, at around 8:00 p.m. She noted what seemed like suspicious activity, and indeed a drug arrest resulted. Her initial observation upon going into the bar was that it was quite busy. There was a group of people at a high table near the bar. The group included one "very young-looking" native female person. She observed the young person consuming what looked like beer. It was in a clear beer mug, yellow in colour, and with foam on top. There was about ¼ of a mug of liquid left in her hand. The others at the table appeared to be drinking similar liquids.

There was one bartender and one server on duty. She saw the server only after being in the bar for a "long time". The server appeared out of the smoking room. The inspector defined "long time" as being "five to seven minutes." She

observed the young woman for about ten minutes. During that time, the woman continued to drink, and no staff members of the establishment approached her.

The R.C.M. Police constable approached and asked the minor for ID. The minor indicated she had none but gave a birth date. The inspector realized that the birth date given indicated that the minor was 17 years old. The inspector so advised, and the minor then indicated she was 18 and gave another birth date. The constable did a CPIC check and confirmed her ID and birth date.

The inspector testified that she asked the minor if she was drinking and the minor confirmed that she was. The minor indicated that she bought one drink herself and that her boyfriend bought the one she was drinking.

The inspector pointed out to the bartender that the patron was a minor. The bartender confirmed that he did not check her ID and that he was extremely busy as the door staff had not come on duty yet. The minor was present when the inspector talked to the bartender about her. The bartender indicated that he did not recall serving the minor alcohol, but that he had served her food.

The inspector prepared a Contravention Notice and later served it on the Cambie Hotel.

The inspector held a Compliance Meeting some time later. At the meeting, they discussed the incident of July 23, 2004, the minor, and the possibility that the general manager of the branch would take enforcement action. Nobody claimed to have checked the minor for ID and nobody claimed that the minor was in the bar for only a short time.

The Licensee's Evidence

The Server

The server testified that she had been employed at the Cambie Hotel for some time. The bar has a policy against serving to minors, and it requires two pieces of ID from patrons who look under 25 years of age.

On July 23, 2004, the server started her shift at 6:00 p.m. She was on alone with the bartender. She was in the smoking room tending to patrons and chatting with her mother, who was in the bar as a patron at 8:00 p.m. When she emerged from the smoking room, she noticed an R.C.M. Police officer talking to the bartender and two officers at the front door. There was no doorman on duty.

She explained the procedure for checking ID, when there is no doorman on duty: She or the bartender check for ID from anyone looking under 25. If the patron goes to the bar, the bartender does it and if the patron sits at a table, she does the ID check. If one of them is unavailable (washroom break etc.) they cover for each other.

The server indicated that there is often no doorman on duty at the Cambie Hotel. She said that one was to be on duty that night, but he would not start work at the door until 8:30 p.m. Until then, minors could possibly enter the bar, but the staff would approach them soon after and they would not be allowed to stay.

She indicated that she has never seen a written policy manual at the Cambie Hotel, nor ever seen the Guide for Licensees. She indicated that her training was such that, when she made mistakes, they were pointed out to her. She had never been warned about, nor tested for, compliance with the over-service rules.

As to the usual staffing of the Cambie Hotel, she testified that typically there is just one server and a bartender. On a busy night there will be two servers and a bartender. The doorman comes on shift at "around 8:30". A second bartender sometimes starts at 9:00 p.m.

She testified that she did not know how long the minor was in the bar, but she had not seen her there until after the constable had approached the minor.

The Bartender

The bartender testified that he was on duty with one server, at the time of the alleged contravention. A doorman was to start on shift at 8:00 p.m. and begin standing by the door at 8:30 p.m. The doorman would typically check for ID and patron intoxication, when he is on duty.

There is a clear line of site from the bar, throughout the whole of the establishment.

At around 8:00 p.m. there were three R.C.M. Police constables in and around the bar. A native woman approached the bar and asked about pizza. He had not seen her before. An officer asked her for ID right away and later informed him that she was under age. The constable wrote the bartender a "white ticket" and the bartender signed it.

When the inspector asked the bartender why the minor was in the bar, the bartender said it was very busy and he didn't know how long she had been there.

The bartender confirmed that the he typically checks for ID from young-looking patrons at the bar and the server typically checks young-looking patrons at the tables.

He testified also that he had much experience working in bars and that doormen are not on duty 100% of the time, but rather when establishments are busy or when there is a cover charge in effect.

He had attended the "Serving It Right" program. He had seen the "Guide" and he understood that it is his duty to ensure no minors enter the premise. He indicated that he fulfills that duty by being vigilant and watching the door from the bar. There is a copy of the "Guide" behind the bar, but he has not been provided with updates or had any discussions about the "Guide" with his employers. He has never been tested by management of the Cambie Hotel, about his knowledge of the liquor laws.

The bartender acknowledged talking to the inspector the on the night before, about being busy on the 23rd, and had planned to have an additional bartender- but only after 9:00 p.m., when he thought the bar would get busy.

There were about fifty (50) patrons in the bar at 8:00 p.m.

After the minor was pointed out to him, the bartender agreed that she looked young enough that she should have been checked for ID. He said that he had not checked the minor for ID and he did not ask the server if she had checked the minor for ID. He did not know where the server was. He testified; "she was running drinks, but [he] did not see her".

He testified he told the liquor inspector that he was very busy, but "because there were only two staff- right at capacity- [he] was not tearing [his] hair out or anything". He confirmed that "to be 110% vigilant, [as to checking ID], yes, [he] was too busy."

Shareholder of the Licensee

The owner testified that the policy toward door control is that it is used and applied for busy periods, as required.

He indicated that past statistics allow the prediction of busy periods, and staffing is managed accordingly.

He indicated that there are regular staff meetings with employees and that there is an "on-line-journal" which is accessible to all for communication with management.

He testified that the decision as to whether or not to have a doorman is based on business economics, and trend. It is not based on when minors might try to enter the premise.

He has spoken with the R.C.M.Police with respect to door control, and drugs in particular. His establishment has a good rapport with the R.C.M.Police.

He was provided with a copy of the Licensed Premise Check (LPC). He knew about the Compliance Meeting that followed the events of July 23, 2004, but did not attend. There was management representation in attendance, and he is always welcome at these things, but he does not routinely attend.

SUBMISSIONS**The Branch**

The branch advocate argued that the minor was in the bar long enough to have been seen. The minor was clearly young enough to require an ID check. No

action was taken by the staff to check her ID. The licensee has an obligation to keep minors out of the bar.

There was nobody working the door. Without door staff, it is impossible to keep minors out of the establishment, which is a requirement of the legislation. Minors could enter the establishment at any time, so the implementation of a door shift only after 8:30 p.m. is inadequate to comply with the *Act*.

The licensee produced no documentary evidence of training manuals, minutes from meetings, or other testamentary documents which would confirm due diligence in an effort to comply with the *Act* and *Regulation*.

The branch argued that as there was no door control, and no apparent check of ID as required by the act, it would be insufficient to impose a minimum penalty and to do so would fall below community standards.

With respect to the delay of more than forty-five (45) days between the Contravention Notice and the NOEA, the branch argued that there is no absolute time frame within which the NOEA must be served and there was no prejudice to the licensee by the suggested delay. The licensee had sufficient notice of the issues to be adjudicated and adequate opportunity to prepare his defence.

The Licensee

The licensee argued that the only evidence of the alleged minor consuming liquor is of the inspector, and that is insufficient to prove the fact. There is nothing in the R.C.M. Police constable's notes that indicated that the licensee provided the alleged minor with liquor.

The licensee argued that he did not "Permit a minor to consume liquor" as required by the *Act*. He submitted that some degree of active participation is required for a finding that the licensee permitted it to happen.

The identity of the alleged minor was not confirmed, and therefore her age and status as a minor was not confirmed. She was not present to testify, and the CPIC check is not conclusive as to identity. The R.C.M. Police constable had the authority to check her purse for identification but he did not do so. There is insufficient evidence to confirm her identity or age.

The notes of the inspector are not consistent with the Reasons for Recommended Enforcement Action, as stipulated in the NOEA. This is indicative of a lack of procedural fairness.

Finally, both the licensee and his staff would suffer considerable hardship if a five (5) day suspension of the licence were to be ordered. The cost would be considerable.

The licensee exhibited due diligence in the operation of the Cambie Hotel. It is contrary to established industry standards to have a door person on duty all of the time, and it is not economically feasible to do so. The system in place for checking ID is satisfactory and is consistent with years of successful practice of the licensee at the Cambie Hotel, as well as his other licensed establishments. Due diligence is a complete defence to the alleged contravention.

The licensee argued that the standard of proof should be greater than the "normal" balance of probabilities. The magnitude of the proposed penalty is significant, and consequently the standard should be raised to "on a preponderance of evidence".

ANALYSIS AND DECISION

I find on the evidence that the alleged minor was indeed a minor. She provided a birth date, though it took two attempts, which was corroborated by the information provided by the R.C.M. Police CPIC check. The constable was satisfied that the minor was properly identified. The liquor inspector was satisfied that the minor was properly identified. The minor did not dispute her age when the constable provided her with a Notice of Offence for being under age. The absence of her testimony provided no impediment to so finding.

I find that the minor was in the bar for a period of time equal to at least ten minutes, prior to any action being taken with respect to her presence. I accept the evidence of the liquor inspector that she observed the minor for approximately ten minutes, and that the minor was not approached during that time by any of the Cambie Hotel staff. This is consistent with the evidence of the server, who testified that she was in the smoking room chatting with her mother for approximately that period of time.

I find that no employee of the licensee checked the minor for ID during her presence in the establishment. This is supported by the evidence of the bartender, who testified that he did not see her until she asked about pizza at the bar (at which time the inspector and the R.C.M. Police constable were present), the server, who testified that she did not see the minor at all, and the inspector, who saw no ID check in ten minutes of observation of the minor.

I find that the minor was consuming liquor in the bar. I accept the evidence of the inspector with respect to her observations of the minor consuming a yellow liquid with foam top, and in a beer mug. I find that this was beer. Given the location (a Liquor Primary licensed establishment), the vessel (a beer mug), the presence of identical looking substances in front of the people sitting with the minor, the time of day (8:30 p.m.), the proximity of the minor to the bar, and the description of the

liquid, it is difficult to imagine it being anything but beer. Further, I accept the evidence of the R.C.M. Police constable that the minor was intoxicated.

Section 33 of the *Act*, stipulates that a person must not:

- (a) sell, give, or otherwise supply liquor to a minor.

The liquor inspector testified that the minor admitted she had bought one beer herself, and her boyfriend bought her another one. I have found that the minor was intoxicated at the time that she made this comment. Accordingly, as she was not available to testify, I cannot rely upon this evidence as being reliable as to the supply of the liquor. Also, I note that the bartender testified that he did not recall selling her a beer. The evidence is not conclusive to establish that the licensee supplied liquor to a minor.

- (b) in or at a place under his or her control, permit a minor to consume liquor.

I find that the licensee did permit the minor to consume liquor in his establishment. The licensee is responsible for what happens in the licensed premise - absent due diligence. He is charged with ensuring that no minors are in attendance, and that no minor is permitted to consume liquor. The minor was in or at a place under the licensee's control and she did therein consume liquor.

The licensee relied on *Ed Bulley Ventures Ltd (c.o.b. Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager)* Appeal No. L-9905 with respect to the meaning of "permit". In considering several decisions of the Court of Appeal of British Columbia, the British Columbia Liquor Appeal Board said:

The interpretation approved by the court is as follows: 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.

We believe that this interpretation and where it falls within the range of meaning that can be attributed to "permits" reflects well the expectations that the legislature has for Licensees and fits well within the purpose and context of the Liquor Control and Licensing Act as a whole.

I agree with the reasoning in that decision. I find, however, contrary to the interests of the licensee, that the licensee did not exercise as high a degree of diligence as it should have in the circumstances. The minor was drinking in plain view of the bartender. She would have been in plain view of the server if the server was in the main bar area to see her. She was drinking with others, within 15 feet of the bar, and in plain view of the door. I find that the establishment was not so busy as to make it difficult to see the minor, had someone been looking.

I find that the contravention of Section 33(1)(c) has been proven. It is however, a complete defence to the contravention if the licensee is found to have exercised due diligence. The licensee has so claimed.

The branch has argued that as a minor can enter the premises at any time during business hours, having a door person on duty only during peak periods of the evening is insufficient door control. The argument is that if it is an offence to allow a minor into the licensed premise, only competent door staff can ensure compliance. The licensee testified that it is neither consistent with the industry standard, nor economically feasible to have door staff during all business hours.

I do not believe that the only way to monitor the ingress of minors is with full-time door staff. I do not believe that the passage of a minor through the door of the establishment would trigger enforcement action in the face of diligence by the staff of the establishment. In the event that a minor did pass through the entrance, and the licensee or his staff promptly took action to require production of ID and remove the minor from the premise, any enforcement action taken would not survive the test of due diligence.

I find that it is not a requirement that a door person be on duty during all operating hours of the licensed establishment, absent a specific condition so indicating on the license. I also find that the opportunity for due diligence in compliance with the requirements of the licensee was available and that the licensee failed to meet that standard. The bartender could have discharged his duty by checking the ID of the minor. If the server was monitoring the bar as she should have been, she may have checked the ID of the minor. Neither of them did so. If the bar was too busy for them to effectively discharge their duties, they failed in that respect. If there were systems or protocol in place to address such an eventuality, the contravention would have been avoided. The licensee failed to adequately monitor his establishment and comply with the *Act*. I find on the facts that the defence of due diligence fails.

The licensee argued that the test for finding a contravention on the evidence is not simply "on the balance of probabilities", but rather is a moving target, affected by the severity of the potential penalty. He claims that the penalty recommended by the branch, takes the burden of proof "to the next level". The licensee did not provide any authority or cogent argument in support of this theory. The penalty suggested by the branch is within the range for a first contravention stipulated by the *Regulation*. The law is settled that the burden of proof to be followed in an administrative tribunal setting is on the balance of probabilities. That is the test that I have herein applied to all findings.

Administrative Fairness

The licensee argued that he was denied due process and that the pre-hearing procedure resulted in a lack of administrative fairness due to the lack of specificity in the Contravention Notice, and an unreasonable delay in issuing a NOEA.

I find that the Contravention Notice adequately defined the matter to be adjudicated. The licensee was notified of the issue contemporaneously with its occurrence. His staff was notified, and signed acknowledgments of receipt of all relevant documents. An R.C.M. Police constable and a liquor inspector discussed the alleged contravention with the bartender and the server. A Compliance Meeting was held to further discuss the matter after the event. A Contravention Notice was served and a pre-hearing conference was held with the licensee. To suggest that there was insufficient notice of the alleged contravention such as to impede the ability to mount an adequate defence is beyond reason. The licensee knew the allegation against him. He knew the case he had to meet. He sought and obtained representation. He is in possession of a copy of the *Act*, and the Guide, and these are otherwise readily available. The section of the *Act* defining the contravention was provided in all relevant documentation.

The Contravention Notice reads in part:

The general manager *may* proceed with enforcement action on the basis of this Contravention Notice. The Licensee will generally be notified within 45 days if enforcement action is proposed. (emphasis added)

The licensee argued that this wording puts an absolute time limit on the issuance of a NOEA and failure to meet that limit makes the NOEA a nullity. The evidence

shows that the NOEA was dated twenty-six (26) days beyond the forty-five (45) days referred to in the Contravention Notice. The licensee submitted an excerpt from Blacks Law Dictionary, which proposes several interpretations of the word "may" as follows:

...usually employed to imply permissive, optional, or discretionary, and not mandatory...however...courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar.

I find that "may" in the context of the Contravention Notice, should be accorded the usual permissive or discretionary meaning, to the end that grammar may not be the master of justice.

I note also, that the plain language of the notice indicates that the licensee will *generally* be notified within forty-five (45) days. I find that the clear meaning of this phrase provides a guideline, not an absolute limitation, regarding when notification may be expected.

Further, in *Kits Cabaret* (EH01-58/59), a decision of the general manager of the Liquor Control and Licensing Branch, dated September 27, 2002, it was held that a delay of 109 days is not unacceptable in "terms of the purpose and nature of the proceedings" (p.11) and the licensee suffered no prejudice as a result of the delay as he had sufficient notice of the issues.

I find in the current case that the licensee has failed to prove unreasonable delay, or that any prejudice has resulted by a delay in issuing the NOEA.

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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a Licensee to transfer a licence

Imposing a 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*.

The range of penalty for a first contravention is four (4) to seven (7) days suspension and/or \$5,000 to \$7,000. The branch recommended a five (5) day suspension.

The licensee testified that a five (5) day suspension was "as good as a whole week" because it would start on a weekend. He indicated that the cost of such a suspension in terms of revenue was approximately \$18,000. The server also testified regarding the hardship that a suspension would cause her. She stated that she supports two children and two adults in addition to herself. She indicated that lost wages from missing five days of work would cause her great financial hardship.

The branch testified that the establishment has had a Compliance Meeting for "fail to request ID from a person appearing under the age of 25" along with two (2) Contravention Notices for the same alleged contravention and one (1) for supplying liquor to minors. The branch argued that understaffing appears to have contributed to a poor compliance record and in this instance, the licensee failed to prepare for a predictably very busy night.

I find that the minimum suspension of four (4) days is an appropriate penalty for this first contravention. The licensee's evidence is that the impact of this suspension will be considerable, and such is the intent of the legislature. The reason for the penalty is to demonstrate that contravention of the protection afforded minors by the legislation is a serious matter. I am satisfied that this penalty will accomplish the intent of the legislature.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Primary Liquor Licence No. 022747 for a period of four (4) days to commence as of the close of business on Thursday, March 31, 2005, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).

I direct that the Liquor Licence No. 022747 for the Cambie Hotel be held by the branch or the R.C.M.Police Nanaimo Detachment from the close of business on Thursday, March 31, 2005, until the licensee has demonstrated to the satisfaction of the branch that the Cambie Hotel has been closed for four (4) business days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 9, 2005

cc: R.C.M.Police Nanaimo Detachment

Liquor Control and Licensing Branch, Victoria
Attention: Gary Barker, Regional Manager,
Vancouver Island/Okanagan/Kootenay Region

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Shahid Noorani, Branch Advocate
