



**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:	Steamers Pub Inc. dba Steamers Pub (Victoria) 570 Yates Street Victoria, BC V8W 1K8
Case:	EH06-020
For the Licensee:	Peter K. Jones
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 29, 2006
Place of Hearing:	Victoria
Date of Decision:	June 16, 2006

INTRODUCTION

The licensee owns and operates a bar in Victoria, B.C. The establishment is known as Steamers Pub. It holds Liquor Primary Licence No. 006442.

The Victoria Police Department, along with the Liquor Control and Licensing Branch (the branch) and the Victoria Bylaw Office conducted an undercover project on the business days of September 30, 2005, and October 14, 2005, to determine if minors were being served liquor in licensed establishments in the City of Victoria.

The project consisted of the use of a 17-year-old female (MK), a 20-year-old female auxiliary police officer (handler), and a plain-clothes undercover police team. MK and the handler attempted to gain entry to liquor primary establishments and sought to be served liquor, while the police team provided support.

On September 30, 2005, the minor was allegedly allowed admission to Steamers Pub, without having two pieces of ID checked, and was allegedly served liquor.

The branch issued a Notice of Enforcement Action (NOEA) for failing to request ID contrary to Section 45(2) of the *Liquor Control and Licensing Regulation* (the *Regulation*), and for supplying liquor to a minor contrary to Section 33 of the *Liquor Control and Licensing Act* (the *Act*).

PRELIMINARY MATTERS

The branch requested that the identity of the minor not be disclosed publicly during these proceedings in the interest of her security.

I ruled that all reference to the minor would be by her initials only, both during the process and in all written documentation relating to the process.

ALLEGED CONTRAVENTIONS

On September 30, 2005, the licensee allegedly contravened Section 45(2) of the *Regulation* by failing to check two pieces of ID as prescribed, and allegedly contravened Section 33 of the *Act* by supplying liquor to a minor, as set out in the Notice of Enforcement Action (NOEA) and the Contravention Notice No. B007048.

RELEVANT STATUTORY PROVISIONS

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

Section 33(1) A person must not

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

Liquor Control and Licensing Regulation, BC Reg. 244/2002

Section 45(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.

ISSUES

1. Did the licensee supply liquor to a minor?
 2. Did the licensee fail to check two pieces of ID as required by the *Regulation*?
 3. Did the licensee exercise due diligence in its activities such as to excuse it from findings of contravention?
 4. If one or both of the contraventions are proven, are penalties appropriate in the circumstances, and if so, what are the appropriate penalties?
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EXHIBITS

- Exhibit No. 1 Branch's book of documents.
- Exhibit No. 2 Page 1: Photocopy of four pieces of identification.
Page 2: Photocopy of rear of drivers licence on
page one.
- Exhibit No. 3 Statement of a consultant, dated March 29, 2006.
- Exhibit No. 4 Licensee's policy manual.

EVIDENCE

The branch called a sergeant with the Victoria Police Department (VPD). He testified as follows:

- He is the operations officer for the VPD. In particular, he is responsible for operations involving bars, crowd issues, and liaison with liquor establishments.
 - He is the director of the relevant ID check police project.
 - He spent considerable time looking for a suitable minor who was physically and emotionally able to participate in a program such as this.
 - He chose the minor identified as MK.
 - He met with MK and her parents and all agreed to enter into a service contract.
 - He sorted through many packages of identification in the possession of the police department, looking for one that did not resemble MK in any way.
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- He found a package of ID that described an individual physically very different from MK. The physical descriptors: hair colour, eye colour, size, and weight, were completely different.
- Exhibit No. 2 contains a copy of that ID and a copy of the reverse side of the drivers licence.
- Four officers were trained for this project. The goal was to ensure the safety of MK and the handler.
- MK's role was to present the "false" ID and attempt to gain entrance to the establishment. Once inside, MK would attempt to be served liquor.
- The handler is a police reservist.
- On September 30, 2005, he met with the four-trained officers, MK, and the handler, at the police station for a briefing. There he gave the package of ID to MK.
- He expected MK to be intercepted in all of the bars because of the dissimilar ID, but that did not happen.
- Steamers was the first establishment they visited in the police initiative.
- MK looks today as she did on September 30, 2005.
- Steamers Pub is not known to be a problem establishment, nor have there been previous allegations of service to minors at Steamers, of which he was aware.

The police sergeant identified all documents with which he was familiar in Exhibit No. 1, including the notes at tabs 5-7.

The branch called MK. She testified as follows:

- Her birth-date is June 1, 1988. She was 17 years of age on September 30, 2005.
 - She has brown eyes, is 180 cm or 5'11" in height and was 170 lbs. on September 30, 2005.
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- Her hair is brown with blonde streaks. On September 30, 2005, she looked as she does now. Her hair colour and style are the same. She is dressed similarly.
 - She is a high-school student.
 - She worked with the Victoria police under contract on September 30, 2005.
 - Her job was to go into a bar with a handler to see if they checked her ID properly, and to see if they asked for ID when she ordered a drink.
 - She attended 12 establishments as part of this project, on two occasions.
 - She was provided with the false ID by the Victoria police.
 - There were four pieces of ID including Drivers Licence, CareCard, Social Insurance Card and a Bankcard.
 - She had no other ID with her on those occasions.
 - She confirmed that Exhibit No. 2 contains copies of the ID that she was given.
 - Steamers was the first establishment she visited within the program.
 - She was advised to take notes after leaving each bar.
 - She arrived at Steamers at approximately 7:00 p.m. There were three people at a counter at the front. It was a well-lit area.
 - One male checked one piece of the identification she was carrying. He was reading a magazine and talking to a girl beside him. He asked for ID and then skimmed the drivers licence she had in her wallet. He did not ask that it be taken out of the wallet.
 - She and the handler were allowed admission.
 - They went to the bar. There was a lady behind the counter who made eye contact with her. MK asked for a Corona beer. The lady behind the bar handed it to her. MK paid for the beer and after standing there for a while, went into the washroom.
 - There was no discussion with the bartender except for asking for the beer.
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- She and the handler left the bar with the undercover police officers that were in the bar.
- They went to a police car where they made notes. She identified her notes and those of the handler at tabs 6 and 7, respectively, of Exhibit No. 1.
- The bar was not crowded as it was the beginning of the night.
- She was admitted to 11 of the 12 bars she visited with the police initiative.

The branch called the handler. She testified as follows:

- Her birthday is December 2, 1984.
 - She is employed with the police department as a reservist and under contract.
 - She has branch experience as an agent regarding under-age identification checking and has been trained by the branch.
 - On September 30, 2005, she was working with the police as a handler for MK in a project designed to report on liquor licensee's practices of checking the identification of minors.
 - She accompanied MK for security because MK was a minor. She also reported on ID checks on herself.
 - She started the shift on September 30, 2005, at the Victoria police station following a briefing.
 - MK was given false ID.
 - She identified Exhibit No. 1 as containing copies of the false ID.
 - MK looked the same then as she does today.
 - She (the handler) was carrying her own proper identification.
 - When MK and she entered Steamers, there was no line-up. She was asked for one piece of ID and she handed the employee her drivers licence. He looked at it and handed it back. He did not look at her face after he looked at the ID. He did not compare the photo to her or turn over the drivers licence.
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- She was not asked for further ID.
- She and MK went to the bar and ordered drinks.
- The bartender did not ask for identification from either of them.
- They were not asked for ID by anyone else in the bar.
- There was a branch sign on the wall advising that two pieces of ID were required for liquor service.
- They went into the washroom and then left the bar.
- They went to the police car and made notes. Her notes are at tab 7 of Exhibit No. 1.

The branch called a Compliance and Enforcement Officer (C & E Officer). He testified as follows:

- He was not assigned to Steamers Pub at the relevant times.
- He was the author of a letter identified at tab 8 of Exhibit No. 1 (p. 9) dated January 11, 2005, praising Steamers for passing a minor's inspection. Such letters were sent out as educational mechanisms to engender voluntary compliance with the new *Regulation*.
- About 13 of the 19 letters sent out to bars were positive. About six of them were accompanied by Contravention Notices.
- During the 10 years he was responsible for Steamers as a C & E officer, he does not remember a Contravention Notice having been served.

The branch called another Compliance and Enforcement Officer (C & E officer). He testified as follows:

- He has been a C & E officer for two years. He is now responsible for the area in which Steamers Pub is situated.
 - Issues involving minors and over-service are important public safety concerns to the branch.
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- Minors are not seasoned or knowledgeable about alcohol consumption.
 - He now has knowledge of the project in which MK and her handler were participating.
 - He issued a Contravention Notice to Steamers on November 10, 2005.
 - He issued it in person and interviewed the licensee.
 - He asked a series of questions and recorded the licensee's response. These are recorded at tab 8, Exhibit No. 1.
 - He was advised that there was no company policy manual at Steamers and there were minimal training records available.
 - He was advised that Steamers had undertaken considerable changes to policy and staffing to deal with problems at the door. The changes had been planned but not implemented at the time of the allegations.
 - He was advised that the consultant had been hired to make recommendations for change at the door.
 - He interviewed the consultant and concluded there were not adequate steps, processes, procedures, and training, in place in regards to due diligence to prevent the contravention from occurring when it did.
 - There was no similarity whatsoever between MK's appearance and the characteristics described in the ID that she was carrying.
 - He interviewed the one establishment that did not allow MK entry during the initiative. The door staff there advised that MK did not match her ID, so it was confiscated and she was denied entry.
 - Based on his investigation, he recommended enforcement action to the branch.
 - There was a Compliance Meeting with the licensee on February 21, 2005, resulting from a February 12, 2005, allegation of contravention. It was the second allegation since 1996.
 - There was no Compliance Meeting scheduled as a result of the alleged contraventions of September 30, 2005.
 - MK did appear to him clearly to be under the age of 25 years.
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The C & E officer identified all relevant documents in Exhibit No. 1.

The licensee called the consultant. He testified as follows:

- He is an employee of another bar.
- He knew about the police initiative as MK tried unsuccessfully to gain access to the bar in which he works.
- He trains doormen in physical skills and monitors their performance.
- He is familiar with the licensee.
- The licensee asked him to observe the door staff at Steamers and make recommendations.
- The licensee was aware that the door staff was not being diligent with respect to its assigned duties.
- He verbally reported to the licensee that the door staff was lacking in competence.
- He recommended that Steamers hire a particular individual to head up security and then train the door staff.
- The licensee did hire that individual.
- He provided a statement and identified it as Exhibit No. 3.
- He was hired to do the consultation on September 29, 2005.

The licensee called the bar manager. He testified as follows:

- He has been the bar manager for two and a half years.
 - He works mostly days but some evenings too.
 - He spent "a lot of door-time around September '05, and certainly a night per month otherwise."
 - When there is door staff on shift, it does most of the ID checking.
 - There is no door staff during the day so he is accustomed to asking for ID when he works.
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- He has checked for ID; "probably half a dozen or ten times when I have been working evenings."
- "Around the time that the consultant came in, the door staff was not doing a good job, so we decided to put in a whole new staff."
- Prior to the undercover operation, Steamers had meetings once every two weeks, with the licensee, bar staff, and the head of door security, but not the doormen.
- Steamers hired the head doorman that the consultant recommended. He is an expert in martial arts and has a martial arts studio. Some of the new doormen trained there.
- The average customer of the bar is about 23 to 25 years of age.
- The new head doorman is an experienced person. It was a full time job. He was there for just over a year. He trained the door staff weekly at his studio.
- "At the time we were served with the Licensed Premise Check, we were taking steps to get new door staff hired."

The licensee called a bartender. He testified as follows:

- He has been employed by Steamers for four and a half years.
 - He was first a doorman and then a bartender.
 - He was trained by previous employers.
 - He works five nights per week.
 - "If there is door staff, I tend to just let the door guys do it (check ID)"
 - "In the years I have checked ID, going back a year, I have checked not too often, but on occasion- probably once per week."
 - He was trained by the new head doorman in the art of punching.
 - There was not really any new training for the bar staff or servers after the consultant's review.
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The licensee testified as follows:

- He has operated the bar for 11 years and owned it for 10.
- He is involved in training staff and hiring.
- He has been subject to routine police and branch inspection since he purchased Steamers, but has only one contravention predating the allegations - for overcrowding the patio.
- Steamers did not have a policy manual until just before this hearing.
- Exhibit No. 4 is the new policy manual.
- He hired the consultant on September 30, 2005, received the consultant's report on October 5, 2005, and hired the new door manager on October 8, 2005.
- The new door manager was paid \$18.00 per hour and the new door staff he hired were paid \$11.00-\$12.00 per hour. That compares to \$8.00 per hour that he paid the old door staff.
- "Immediately after [the contravention] we had a meeting and we went over what had happened. We talked about it and said that if in doubt- check it out (with respect to checking ID)".

SUBMISSIONS

The branch submitted that as both MK and the handler were asked for only one piece of identification at the door, the contravention was clearly not a single unexpected event but rather representative of an inadequate system. Further, the branch submitted that neither MK nor the handler was asked for ID at any other time in the establishment including when ordering drinks at the bar. Accordingly, the contraventions were proven and the licensee cannot rely on a defence of due diligence because the evidence discloses insufficient process to prevent the contraventions from occurring.

The branch argued that firing the door staff was not sufficient action to account for the deficiencies in compliance, and that there was an over-reliance on door staff to ensure that minors are not allowed to purchase liquor.

The licensee acknowledged that only one piece of ID was requested in the case of each of MK and the handler, and that MK was both a minor and served liquor.

The licensee submitted that due diligence is a fair defence in this case because the licensee exhibited appropriate care and caution. He indicated that prior to the allegations there were no problems of any kind expressed by the branch or by police regarding minors. With respect to supplying liquor to minors, the licensee has no prior history of contraventions. He argued that "due diligence is measured in part by procedures in place, but also by enforcement history."

The licensee submitted that; "the door staff were not acting in a professional manner and the standards of professionalism including the checking of ID was not met." More experienced people were then hired, and the problem was solved. Accordingly, the licensee submitted that due diligence was observed in proactively addressing the situation.

The licensee also argued that it is inappropriate that two allegations were made in this case, relating to Section 45(2) of the *Regulation* and Section 33 of the *Act*, whereas only the Section 33 contravention was alleged in the case of *Palomino's The Rock'n Horse Cabaret Ltd. dba Evolution* (EH06-018, April 27, 2006), which arose out of a virtually identical fact situation.

Finally, the licensee argued that a Compliance Meeting was not conducted relating to the allegations of September 30, 2005, and accordingly the licensee was not allowed an opportunity to voluntarily comply with the *Act* and *Regulation*.

ANALYSIS AND DECISION

Based on the evidence, I find:

- MK was at all relevant times, a minor.
- MK did at all relevant times appear to be under the age of 25.
- Both MK and the handler were allowed admission to Steamers Pub on September 30, 2005, without being required to produce two pieces of identification.
- Neither MK nor the handler was asked to produce identification at all once inside the establishment.
- MK was served liquor at the bar.

The licensee objected to the fact that two allegations were made in this case, Section 45(2) of the *Regulation* and Section 33 of the *Act*, whereas only the Section 33 contravention was alleged in the case of *Evolution*, above, which arose out of a virtually identical fact situation. The licensee's objection was presumably one relating to arbitrary enforcement.

An enforcement adjudicator has authority granted under the *Act* by the operation of the delegation of the general manager of the branch. That authority permits an adjudicator to make determinations at the enforcement hearing but does not grant authority to decide what matters may be before the adjudicator. The licensee presented no authority that directs or informs me with respect to arbitrary enforcement in an administrative tribunal. I find there is no evidence before me to find any misapplication of process relating to multiple allegations or inconsistent application of that process.

The licensee complained of the lack of a Compliance Meeting. The branch has no obligation to provide such a meeting. The licensee has the onus of compliance with the *Act* and *Regulation*. The fact that the branch has a stated

desire of obtaining voluntary compliance and actively works toward that goal does not obligate the branch to conduct meetings prior to issuing a Contravention Notice.

The licensee's bar manager testified that he had checked for ID "half a dozen or ten times" in the two and a half years that he worked there in the evenings. By his testimony, he spent "a lot of door time around September '05" in the evenings and at least another 30 nights. The *Regulation* requires that anyone who looks under 25 years of age must be asked for two pieces of ID. The bar manager also testified that the average customer of Steamers is 23-25. If the average customer looked their actual age, employees would therefore, be required to check ID 100% of the time. I find it unreasonable on the evidence that in the minimum of 30 occasions that the bar manager worked nights, only 6-10 times did he come across someone who looked under the age of 25. I therefore find that the bar manager did not regularly exhibit compliance with the requirements of the *Regulation*.

Similarly, the bartender testified that although he works five nights per week, he checks an ID perhaps once per week. In light of the evidence relating to the average age of the clientele, I find the bartender also failed to regularly exhibit compliance with the Section 45(2) of the *Regulation*. This is evidence of something less than due diligence.

At the time of the alleged contravention, Steamers was undertaking a review of its door staff. It was found wanting, but was changed only after the allegations. I find that the licensee was addressing inadequacies in its systems, but at the time of the allegation those inadequacies were significant. While it is admirable that the licensee was in the process of taking action to address his staffing problems, the evidence discloses that the steps were undertaken only after allowing an unsatisfactory situation to exist. The obligations of a licensee to the terms and

conditions of its licence, and to the public in general, are significant and cannot be allowed to lapse without accountability.

The door staff at the time of the contravention was by all accounts not delivering on their obligations. I find that in spite of the licensee's own initiatives to improve upon the situation, it did allow an inadequate situation to exist at the time of the allegations.

These findings lead to an inescapable conclusion that the licensee was not exercising due diligence at the relevant time.

In considering a defence of due diligence in *Small House Ventures Inc., dba Lucky Bar* (EH06-013, May 25, 2006), the general manager said:

In examining the defence of due diligence, reference must be made to timing in two respects:

The diligence must have been evident from systems and policies in place at the establishment at the time of the alleged contravention. This disentitles the Licensee from claiming that actions taken in response to the alleged contravention are indicative of systemic diligence. The systems and policies must be scrutinized as at the moment of the contravention.

The discipline metered out to the doorman after the allegations came to light, do not affect the assessment of due diligence. It might however be properly considered when considering penalty.

The diligence must relate to the occurrence on which the alleged contravention is based. The training and procedures followed by a bartender or server must be considered when assessing diligence related to the allegation of supplying liquor to a minor. The training and procedures followed by a doorman must be considered when assessing diligence related to the allegation of failing to request ID in accordance with the regulations, or allowing a minor to enter a licensed premise.

The reasoning in *Lucky Bar*, applies to this matter. Further, in order to successfully defend against an alleged contravention on the basis of due diligence, there must be a proximate relationship between the systemic approach to compliance and the alleged contravention. It is insufficient to argue that the licensee is generally a competent manager, well meaning, and without malicious intent.

I accept the evidence that there were no policies and procedures manual in place at Steamers at the time of the contraventions. While this is not determinative of a lack of due diligence, the absence of such a manual makes the licensee's onus of establishing diligence more difficult. I find there is insufficient evidence of adequate training of door and bar staff to support a defence of due diligence on the part of the licensee.

I emphasize that the onus of establishing due diligence lies entirely with the licensee who seeks to use it as a complete defence to the allegations.

The history of the licensee's behaviour, the quality of his management practices generally, and the existence of a relatively clean compliance history does not in itself establish due diligence such as to exonerate him from a finding of contravention.

I believe that the evidence discloses that Steamers is not a problem establishment, however, the systems in place at the time of the contravention were insufficient to afford the licensee a defence of due diligence.

The licensee argued that due diligence is measured in part by reference to enforcement history. While the enforcement history might be useful to counter a defence of due diligence in the event of a chequered history, I do not accept that the opposite is true. The absence of allegations levelled in the past is not evidence of due diligence.

I find both of the contraventions have been proven.

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 the 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*.

The range of penalty for a first contravention of Section 33 of the *Act* in accordance with item 2 of Schedule 4 of the *Regulation* is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000-\$7,000. The branch recommended the minimum suspension of four (4) days.

The range of penalty for a first contravention of Section 45(2) of the *Regulation* is a suspension of one (1) to three (3) days and/or a monetary penalty of \$1,000 - \$3,000. The branch recommended the minimum monetary penalty of \$1,000.

I find that a penalty is warranted for supplying liquor to a minor in the circumstances of this case. I accept that providing liquor to a minor is an activity that endangers the safety and security of the public in general, and minors in particular.

I have considered the evidence with respect to the licensee's replacement of the door staff, and the procurement of a new policies and procedures manual. I find that these changes represent a positive direction for Steamers. However, I find these changes to have occurred too late to exonerate the licensee from responsibility for the contraventions. I find a four (4) day suspension to be appropriate for the contravention of Section 33 of the *Act*.

I also find that a penalty is warranted for failing to request ID in accordance with the *Regulation*. I find that a monetary penalty of \$1,000 is appropriate for the contravention of Section 45(2) of the *Regulation*.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 006442 for a period of four (4) days, to commence as of the close of business on Thursday, July 13, 2006, 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 further order the licensee to pay a monetary penalty of one thousand dollars (\$1,000) relating to Liquor Primary Licence No. 006442. The monetary penalty must be paid no later than the close of business on Thursday, July 13, 2006.

To ensure this Order is effective, I direct that the Liquor Licence No. 006442, be held by the branch or the Victoria Police Department from the close of business on Thursday, July 13, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 16, 2006

cc: Victoria Police Department

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

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