



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF**

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act RSBC c. 267

Licensee:	C & J Enterprises Ltd.
Case:	EH06-170
Appearances:	
For the Licensee	Andries Raschdorf, third party operator
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	February 21, 2007
Place of Hearing	Prince George
Date of Decision	March 5, 2007

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee owns a licensed establishment in Prince George. The establishment holds liquor primary license #004885 and is known as the Generator Cabaret. The license permits liquor to be served from 9:00 AM to 3:00 AM seven days per week.

The establishment was at all relevant times under the control of a third party operator. The third party operator of the Licensee appeared at the hearing by written authorization of the Licensee, which authorization was acknowledged by the Branch.

In the evening of October 20, 2006 a member of the Prince George RCMP conducted a licensed premise check in the establishment. The inspection revealed a minor in the establishment.

As a result of the inspection, the Branch issued Notice of Enforcement Action #EH06-170 to the licensee.

A contravention hearing was held. During the hearing, it became apparent that the Licensee had a surveillance videotape of the night of the alleged contravention. The tape had not been shared with the Branch. It was agreed that the tape would be viewed at the establishment as part of the hearing and that submissions of the parties would be accepted following the viewing. The hearing moved to the establishment, portions of the tape were viewed, and the parties provided submissions as a result of the viewing. I note that both parties expressed satisfaction with the portions of the tape that we viewed, and agreed that no further viewing was required.

ALLEGED CONTRAVENTIONS

The Branch alleged that October 20, 2006, the Licensee contravened s. 35 of the Act by allowing minors in the premises.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, [RSBC 1996] Chapter 267

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances.

ISSUES

1. Did the Licensee contravene section 35 of the Act?
2. Is a penalty warranted and if so, what is the appropriate penalty to be imposed?

PRELIMINARY MATTERS

The parties alerted me to an error in the documentation. The alleged contravention occurred on October 20, 2006, at 11:30 pm as indicated on page one of the NOEA. The date is incorrectly identified as October 21, 2006 on page

two of the NOEA. The parties agreed that the reference on page two should be read as October 20, 2006.

The Branch provided a description of the efforts made to procure the attendance of the minor at the hearing. This was described as "exhaustive" and included the issuance of a *subpoena* and the services of the RCMP and a process server. The Licensee responded by acknowledging that the minor was in the establishment at the relevant time and took no issue with the minor not being in attendance at the hearing.

The Branch submitted a book of documents and indicated that it contained all of the relevant documentation relating to the establishment's history with the Branch, and the process relating to the current allegation. The Licensee acknowledged familiarity with the package and consented to the inclusion of the contents as an exhibit.

EXHIBITS

Exhibit #1: Branch's book of documents. (Submitted by the Branch)

Exhibit #2: Two page hard copy of email correspondence between the constable and the adjuster. (Submitted by the Licensee)

Exhibit #3: Certificate of Indian Status Card. (Submitted by the Licensee)

Exhibit #4: Four page hard copy of email correspondence between the bar manager and the Licensee, and the head doorman and the Licensee. (Submitted by the Licensee)

Exhibit #5: Surveillance videotape of October 20, 2006 (Submitted by the Licensee)

EVIDENCE

The Branch called a constable with the RCMP. He testified as follows:

- He has been a member of the RCMP since July 2005.
- He is familiar with licensed premise checks and has been doing them since his commission in Prince George in July 2005.
- He typically inspects for intoxication, minors, and over-service.
- Minors are one of the "big three" because he deems minors' drinking to be a problem in the community.
- He often sees very young people leaving liquor establishments in Prince George.
- On October 20, 2006 he attended the Generator Cabaret for a routine LPC.
- He had attended the Generator Cabaret to conduct LPCs approximately five times in the past.
- He entered through the main doors off of Third Avenue.
- He did not recall if there was a door person on duty, but he suspects there was, because otherwise he would have made a note of the absence of door staff.
- The establishment was not busy.
- He noticed a party of young-looking patrons at the back of the downstairs portion of the room.
- One of the young appearing patrons had a Budweiser beer in her hand. He observed her drinking from the bottle.
- He approached the patron and asked her for identification.
- The other patrons in the party dissipated when he began to talk to the female.
- The patron ignored his request for ID. She began to walk away. He followed and repeated his request. The patron indicated that her friend

had her ID and proceeded to the bar area. The constable followed her there.

- At the bar, the patron said she did not have any identification. The constable asked her to step outside the establishment.
- Outside, the patron identified herself and stated her date of birth.
- The constable entered the data into the electronic data system in his patrol car. There were extensive electronic entries. He asked her about the specifics of some of the noted events and she had detailed knowledge of those events. There was no doubt that she had correctly identified herself.
- He has had contact with the minor since that occasion and he has no doubt as to her identity.
- The minor indicated that she was 17 years old on October 20, 2006. The police data unit confirmed that she was 17 years old.
- The constable asked the on-duty manager how the minor gained access to the establishment. The manager indicated that the minor came in before the doorman was on duty.
- The constable asked the minor how she gained access to the club. The minor indicated that she had come in before the doorman was on duty.
- Each of the manager and the minor were alone with the constable when they offered their explanations of the minor's entry to the establishment.
- He described his efforts to find and serve the minor with a *subpoena* to attend the hearing.

The Branch called the liquor inspector. He testified as follows:

- He has been an inspector for two and a half years.
- The current licensee has owned the establishment since the 1980s.
- The current third party operator has operated the establishment since August 2005.
- He was not present for the LPC.

- He first became aware of the incident when the constable faxed a copy of the LPC to his attention.
- He discussed the contravention with the constable and obtained the constable's notes.
- He is familiar with all of the documents in tab #1, and he identified them.
- He spoke to the third party operator who advised that he was going to take measures to ensure that minors were not allowed in to the establishment in the future.
- About four weeks later, the third party operator advised the inspector that a staff member of the establishment had on an occasion previous to October 20, 2006 seized a copy of false ID from the minor. That ID is exhibit #3.
- He recommended the maximum suspension for a first contravention of this nature because he had received a number of complaints about minors in this establishment in the past and he had a meeting with the third party operator about minors in the club on February 10, 2005 (tab 22, exhibit #1) prior to this allegation. He also noted that the establishment has a significant history of contraventions.

The third party operator testified as follows:

- He was not present at the establishment at the time of the alleged contravention.
- He talked to his staff and his opinion resulting from that is that the minor was indeed present in the club, but she gained entry with false identification.
- He prides himself on being strict about minors not getting into the club.
- Exhibit #3 is a card that was left on the bar by the minor on an occasion prior to October 20, 2006.

- Exhibit #4 consists of two letters from the staff who were on duty on October 20, 2006. They could not testify because one of them is in Alberta and one has another job, but they provided letters on his request on the eve of the hearing.
- There is a videotape of the security camera images taken on October 20, 2006. The tape can only be viewed with specialized equipment. There is such equipment at the establishment.
- The tape has not been shared with the Branch because it was not conclusive. It is impossible to identify the minor in the tape.
- "There is a 90% chance that if you come in after 10:00 there is someone on the door."
- The club has confiscated a stack of ID from various patrons (about 50 pieces of ID were presented but not included in evidence).

SUBMISSIONS

The third party operator claimed that he should not be held responsible for the history of contraventions prior to him taking over management of the establishment. He pointed out that there have been few problems since he started running the club in August 2005.

He also submitted that because the minor left someone else's ID on the bar on a previous occasion, she clearly was accustomed to using fake identification to gain entry to the bar.

The letter from the bar manager indicates that the bar opened on time at 9:00 pm on October 20, 2006, and that a door person was part of the starting staff. The author indicated that the bar is strict about not letting minors in, and the door staff had temporary replacements available when they have to go for bathroom

breaks. He submitted that the video confirms that the minor gained entry with false identification.

The letter from the head doorman indicates that the minor had been checked for ID the week before October 20, 2006, and also on October 20, 2006. He stated that he observed the doorperson check the minor's ID. He also said that the bar is very strict on checking for two pieces of ID.

The Licensee submitted that the surveillance videotape shows that the door staff does its best. "People get through, but they do everywhere." He also submitted that most of the people walking in the front door without being checked are probably returning to the club after already being admitted. He pointed out the chain that was sometimes across the isle inside the door, and the door person who was near the door playing pool or in the coat check area.

The Branch submitted that the minor was in the bar and drinking beer. The Branch also submitted that while the Licensee said the minor gained entrance with false ID, the statement is inconsistent with the inspector's evidence of what the Licensee told him early in the investigation.

The author of one of the letters dated February 20, 2007 told the inspector on October 20, 2006 that the minor gained entry to the club before the door staff was on duty. The branch argued that the letters should be given little weight as the authors were not available for cross-examination and did not affirm the truth of the statements contained therein.

The Branch submitted that the Licensee relied on the videotape, but that videotape shows people walking into the establishment without being checked for ID.

Regarding penalty, the Branch indicated that the Licensee has a long history of allegations, which are listed at tab 21 of Exhibit #1. One of these includes a past allegation of minors in the premises. A contravention meeting was held with the third party operator as a result. The Branch submitted that the history of the Licensee is relevant to penalty and the fact that a third party operator took over management of the establishment before this contravention does not affect the appropriateness of considering the Licensee's past history.

ANALYSIS AND DECISION

The Licensee did not dispute that the minor was in the establishment at the alleged time.

Absent due diligence, I must find that the contravention occurred as alleged.

Due diligence is a complete defence to an alleged contravention if established by the Licensee.

The Licensee is a layperson and was not represented by counsel. He spoke to due diligence, notwithstanding that the technical term of art was not used. His evidence and submissions in that regard were intended to show that management "does the best job [they] can".

The test for due diligence is whether the Licensee took all reasonable steps to comply with the requirements of the license and thereby avoid a contravention of the Act, Regulation, or license terms.

I find that the Licensee did not exhibit all reasonable steps to comply with the licensing requirements and avoid a contravention.

I accept the evidence of the constable that both the bar staff and the minor advised him that the minor gained entry to the establishment when there was no door person at the door. The phrase used was "on duty". I find that to mean, in this specific context, on station at the front door. The videotape shows a staff member playing pool while the club was open, and sitting in the coat check area. The Licensee indicated that this individual was on duty as doorperson at the time. He indicated that it was not unusual for her to be playing pool at the beginning of her shift as the door was not busy and she could see it from where she was. I find that it was possible for a patron to enter the establishment without being noticed, while the door person was playing pool or otherwise occupied.

Further, I find that the video shows a number of individuals entering the bar without being approached by any staff member or producing identification. Some of the patrons entered when the chain was not in place across the isle. Some of the patrons entered when the chain was in place and were allowed in by the door person without an ID check. At least one person entered by undoing the chain and replacing it once inside. One person simply hopped over the chain and entered the establishment. Another three individuals approached the chain together; two of them were checked for ID, while the third was not.

I find the testimony of the Licensee; "[t]here is a 90% chance that if you come in after 10:00 there is someone on the door," to be supportive of the likelihood that the minor did enter when there was no door staff at her post, as indicated by the evidence of the police constable with regard to the statement of the minor and the bar manager. The inverse of the Licensee's statement is that if one enters the bar after 10:00 there is a 10% chance that there will not be someone monitoring the door. I find this to be less than adequate supervision of the establishment.

I find the letters (exhibit #4) produced by the Licensee to provide no credible evidence. They were produced the day before the hearing, are to some extent inconsistent with evidence provided in a contemporaneous fashion (bar manager to inspector on the night of the contravention), and their authors were not available for cross-examination. I give these letters no weight.

The evidence with respect to the minor's previous use of false ID was inconsistent. The evidence was both that the ID was confiscated and that it was left behind in error. I find that this evidence is not persuasive of the argument that the minor was accustomed to using false identification.

I accept the evidence of the inspector and the constable as reliable and to the extent that it is in conflict with the evidence of the Licensee, I prefer the evidence of the constable and inspector.

Accordingly, I find that the contravention has been proven. I find that the minor was permitted in the premises contrary to s. 35 of the *Act*.

I find that the defence of due diligence has not been established by the evidence.

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 license or rescind or amend existing terms and conditions

- Impose a monetary penalty
- Order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

For the contravention relating to October 20, 2006, the Branch recommended a three (3) day suspension.

The range of penalty for a first contravention of section 35 of the *Act* in accordance with Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000-\$3,000.

The Licensee argued that the third party operator has managed the establishment with little issue for a period of time and should not be tainted by the history of the Licensee predating that occupation. This argument is contrary to established law. The Supreme Court in *Empress Towers Hotel v. B.C (GM of LCLB)* 2006 BCSC 325 confirmed that the past history of a Licensee should be considered in an enforcement hearing notwithstanding the intervening assumption of management by a third party operator.

Contraventions involving minors are a serious public safety concern. To avoid selling or serving liquor to minors and exposing them to adult oriented activity, the Act restricts their entry into licensed establishments. I have heard no evidence that indicates the appropriateness of forgoing a penalty in this case.

A three-day suspension of the liquor primary license is supported by the history of this Licensee. Although this is the first contravention of this type noted in the past 12 months, an earlier contravention of this nature was alleged to have occurred on December 29, 2004. A compliance meeting was held with the Licensee regarding minors gaining entry to the establishment following that allegation.

A suspension will re-enforce the importance of having door staff on duty at the door at all times during operating hours to ensure an identification check is conducted of those patrons appearing to be under age. The recommended penalty falls within the range as set out in Schedule 4 of the Regulations, (item #3) for a first contravention.

I find that a three (3) day suspension is appropriate for this contravention.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the liquor primary licence No. 004885 for a period of three (3) days to commence at the close of business on Thursday April 12, 2007 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 *Regulations*).

To ensure this order is effective, I direct that the liquor license be held by the branch or the RCMP from the close of business on Thursday, April 12, 2007, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 5, 2007

cc: Prince George RCMP

Mike Clark, Regional Manager
Liquor Control and Licensing Branch

Shahid Noorani Branch Advocate,
Liquor Control and Licensing Branch