



**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:	The Lanarkshire Group Holdings Ltd. d.b.a. Ocean Port Hotel 37991 2 nd Avenue Squamish, BC VON 3G0
Case:	EH09-076
For the Licensee	Scott McQuade
For the Branch	Peter Mior
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	November 6, 2009
Place of Hearing	Squamish, B.C.
Date of Decision	November 17, 2009

INTRODUCTION

The Licensee operates an establishment in Squamish, BC under liquor primary licence #029543. The licence indicates that liquor may be sold from 11:00 a.m. to 1:00 a.m., Monday through Thursday, noon to 2:00 a.m., Friday and Saturday, and 11:00 a.m. to midnight on Sunday.

The licence is, as are all liquor primary licences issued in the province, subject to the terms and conditions contained in the publication: *Liquor Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia* (Guide).

The Branch's allegations and proposed penalties are set out in the Notice of Enforcement Action (NOEA) dated August 5, 2009.

Appearing for the corporate licensee was the primary shareholder and operating executive of the company (Licensee).

THE ALLEGED CONTRAVENTION

The Branch alleges that on Thursday, July 16, 2009, at approximately 9:45 p.m. the licensee contravened s. 35 of the *Liquor Control and Licensing Act*, R.S.B.C., 1996, c.267 (the "Act") by permitting a minor in a liquor primary premises.

The proposed penalty for contravening s. 35 of the Act is a four (4) day licence suspension, which is within the range of penalty indicated in item 3, Schedule 4 of the Liquor Control and Licensing Regulation (Regulation) for a first offence of this kind.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 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 in prescribed circumstances.

ISSUES

Did the Licensee contravene the Act as alleged? The relevant elements of the contravention require that the patron was a minor, that she was within the licensed establishment, and that the Licensee or its staff authorized or permitted the minor to enter on or be on the premises.

If the contravention occurred, is a penalty required under the circumstances of this case, and if so, what penalty is appropriate?

EVIDENCE

Exhibit #1- The Branch Book of documents.

The Branch provided one of the two minors alleged to have been in the establishment, the liquor inspector, and an RCMP constable as witnesses. The Licensee presented the doorman and bar manager, both of whom were in the establishment at the relevant time. The Licensee did not deny that a minor was

present in the establishment, but argued that the Licensee and its staff did not authorize or permit the minor to be on the premises. The Licensee presented this argument as a defence of due diligence.

Liquor inspector

The inspector testified that the establishment is in an area of mixed commercial, industrial, and residential buildings. She identified the licence at tab 10 of Exhibit #1, the NOEA at tab 1 of exhibit #1, the floor plan identifying the red-lined areas of the establishment at tab 9 of exhibit #1, and the notes she took following her telephone interviews of the minors (tabs 7 & 8 of exhibit #1) and the bar staff and management (tab 6 of exhibit #1).

The liquor inspector testified as to the relevance and identity of the remaining documents in exhibit #1, and the process leading up to the enforcement hearing.

Minor

A minor testified that she was eighteen years old on July 16, 2009. She said she attended the establishment with one of her girlfriends on that occasion. She said she had been drinking at home and was drunk when she arrived. She said she used a single piece of ID belonging to someone else who was of age to get in, and that she showed that piece of ID to the doorman. She said the doorman looked at it and let her in without any further questions or asking to see another piece of ID. She said the ID was not modified and bore the photograph of another person. She also testified that her friend was not asked for ID at the front door on that occasion.

The minor testified that the bar was not busy and that after approximately ten minutes, she and her friend left the establishment to walk around the park for a while with some of their friends whom they met outside. She said that she drank more liquor in the park. The minor returned to the establishment some time later and entered through the patio door with another individual. She said the two of

them were not checked for ID at all on this occasion. She went to the bar and ordered an alcoholic beverage for herself and some mix for her friend. The bartender did not ask for ID. Then she went to a table where her friend was sitting and gave the mix to her friend and sat down. Her friend used a mickey that she had in her bag to make a mixed alcoholic beverage with the mix. The minor testified that her friend was also a minor. They drank for about ten minutes and then an RCMP officer came in and enquired as to their ages. The officer escorted them out of the bar. She lied to the RCMP officer about her name and age and indicated that she had ID in her car, but when the officer escorted them out, she confessed her true name and age. She said the RCMP officer checked her purse for further ID but not her friend's purse because her friend was not carrying one. She said she did not have the fake ID when the police checked her bag because she lost it in the park.

RCMP Constable

The constable testified that he has been an RCMP member for some time and has been in the establishment some fifty times while on duty. He said that he was in uniform and saw minors in the park near the establishment and ascertained that some of their friends were in the establishment. He went to the establishment and entered through the main doors. He observed a bartender, a doorman, an adult entertainer, and only a few patrons. He observed two patrons emerging from the washroom with drinks. They seemed young to him and so he approached and asked for ID. They indicated that they had none on their persons but that there was ID in their car outside. He decided to accompany them outside, where they provided him with false names and birthdates. On further questioning, the females conceded they had lied and provided what the officer concluded were their correct names and birthdates. One of the females was 17 years old and the other 18 years old. The constable said that he went through the purse belonging to one of the minors looking for ID but found none.

The constable indicated that there are no obstructions to any line of sight in the establishment, and any of the staff could have seen the minors at all times while they were present.

The Doorman

The doorman testified that he arrived at 9:00 p.m. for his regular shift and that the establishment was very slow. He said the manager was already there. Within two minutes of his arrival a taxi pulled up and three females emerged and entered the establishment. He said he checked ID from all three of them and in each case saw a driver's license and a care card. He testified that about fifteen minutes later, the RCMP officer came into the establishment and escorted two of the females out. He said they were at a table of three when the police officer engaged them in conversation. He testified that the females only came into the establishment once while he was there.

He also testified that all of the staff members can see everyone in the establishment at all times as there are no obstructions and it is basically one rectangular room. He said on the night of July 16 there were only about seven or eight patrons in the establishment. He said that the manager would have been responsible for checking ID from people entering through the patio doors. He is primarily responsible for checking ID from people entering only through the main doors.

The doorman testified that he received no training from the management of the establishment. There is no policies and procedures manual, but he knows how to do his job. There is an occurrence book behind the counter.

The Manager

The manager testified that when he arrived, the doorman was already on duty at his post. He said two females were sitting at a table across the room. He identified the two females as the ones the RCMP officer later escorted out of the

establishment. He said that from the bar “you can see the whole room. It is all on one level. A quick sweep of your eyes and you can see every entrance and every patron, there is no hiding spots.” He testified that he did not see the doorman check the ID of the females as they were in the establishment before he arrived. He said there is a logbook behind the bar. After the police escorted the females out of the establishment, the doorman told him that the girls had their ID checked on arrival.

ANALYSIS AND DECISION

I find that the patron was indeed a minor at the time of the contravention.

I also accept the evidence of the minor and of the RCMP constable that the minor was present in the redlined area of the liquor primary establishment. There is no evidence to the contrary.

I accept the evidence of the minor and of the RCMP officer that the minor was consuming liquor while in the licensed establishment.

The question then turns to whether the Licensee or its staff permitted the minor to enter or be in the establishment. The definition of “permit” is defined in *Ed Bulley Ventures Ltd* [2001] B.C.L.I. No.5. Simply paraphrased, that case asks: Did the licensee and its employees observe as high a degree of diligence as they should have in the circumstances in order to prevent the contravention from occurring? I find that the Licensee did not. This is a finding distinct from whether or not the Licensee has available to it the defence of due diligence. My reading of *Ed Bulley Ventures* satisfies me that the question of whether the Licensee permitted something to occur is a question of whether the component elements of the contravention have occurred.

I find that by allowing the minor access to the establishment, through the supervision of the doorman, and by allowing the minor to remain in the establishment without being checked again for identification by the bartender or any number of other staff members, the Licensee has authorized or permitted a minor to enter on or to be on premises where liquor is sold or kept for sale.

The doorman testified that he checked the minor's ID in the form of a driver's license and care card. The minor testified that she had no such ID on her person. The RCMP constable looked through the minor's bag and found no such ID. The constable also said that the minor's friend had no bag with her (which speaks against the minor "handing off" the ID to her friend). The doorman testified that he did not question the minor about her birth date or check her signature or any number of other methods of verifying that the ID belonged to her.

The bartender did not ask the minor for ID. The establishment was almost empty and all of the patrons could be seen by all of the staff. The minor was in the establishment for fifteen minutes with a friend who was likely also a minor, and there were five staff members working the room. There is no evidence of anyone but the doorman asking for ID, and no evidence of any of the staff asking the doorman if the minor(s) were checked for ID until after the police intervention. When he first entered the room, the RCMP constable immediately identified the two females as likely to be under-age

This fact scenario satisfies the test in *Ed Bulley Ventures*. Accordingly I find the Licensee did not have as high a degree of diligence as they should have in the circumstances in order to prevent the contravention from occurring, and did therefore permit the minor to enter on or be on the premises.

Due diligence is a complete defence to the finding of a contravention. Essentially, assessing the defence of due diligence requires an examination of the activities of the Licensee's operating mind to evaluate whether he or she has done all that could reasonably be expected to be done to avoid the contravention. In this case, I find the operating mind was the Licensee who attended at the hearing.

There is no evidence before me that demonstrates any degree of formal training, or checks on the results of formal training for door persons and other employees who check identification. There is no evidence of the existence of a policy manual. There is no evidence of testing employees, or of the licensee's familiarity with its obligation to exclude minors from the premises. There is no evidence of instruction provided to door staff as to how to check identification and what to do if suspicion arises regarding the identification.

The only evidence that the minor was checked for ID came from the doorman. His evidence is not corroborated by any other witness. There is a difference of opinion as to whether the manager was in the room when the minor(s) entered. The ID that the doorman says he checked was not in the possession of the minor when her purse was searched by the RCMP.

I find the defence of due diligence must fail. The onus is on the Licensee to establish the facts on which this defence could succeed and it has not done so to my satisfaction.

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 license

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

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

The inspector thought it appropriate to pursue enforcement for the allegation, and she indicated that she believes a penalty is required to assure voluntary compliance in the future. I find the inspector is experienced, familiar with the licensee and its operation, and uniquely positioned to provide a reasonable recommendation in this regard. I, therefore, give considerable weight to her

expertise and recommendation that a penalty is appropriate in the circumstances. The inspector recommended a four-day license suspension in the NOEA and submitted the following reasons for the recommended penalty, "The penalty is required to reinforce the Licensee's need to come into compliance with the terms and conditions of their license. This penalty would be sufficient to achieve voluntary compliance in the future."

The inspector and the RCMP constable each indicate the importance of keeping minors out of liquor primary establishments, particularly ones with adult entertainment, as does this establishment.

There is no compliance history of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents. Accordingly, pursuant to the *Regulation*, Schedule 4, this is a first contravention and the range of penalties for first contraventions is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000- \$7,500.

I find that a penalty is warranted to ensure voluntary compliance in the future. I find that nothing more than the minimum penalty is required as I find the Licensee will be affected by the penalty and work on its systems in order to ensure future compliance. I find that a four day suspension is reasonable and required to bring about voluntary compliance in the future.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Liquor Primary Licence No. 029543 for a period of four (4) days to commence at the close of business on Wednesday, December 16, 2009, 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*). I direct that liquor licence No.029543 be held by the branch or the Squamish RCMP Detachment from the close of business on Wednesday, December 16, 2009 until the licensee has demonstrated to the Branch's satisfaction that the Licensed establishment has been closed for four (4) days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 17, 2009

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate