



**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: Salco Management Ltd.,
dba Best Western Inn – Kelowna
2402 Hwy 97 North
Kelowna, BC V1X 4J1

Case: EH09-109

For the Licensee: Greg S. Salloum

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: George C.E. Fuller

Date of Hearing: Written Submissions

Date of Decision: May 10, 2010

INTRODUCTION

The corporate licensee, Salco Management Ltd., (the licensee) owns and operates an establishment known as the 97 Street Pub within the premises of the Best Western Inn in Kelowna, BC. The licensee holds Liquor Primary Licence number 160999. The hours of sale are 9:00 a.m. to 2:00 a.m., Monday to Saturday, and 9:00 a.m. to midnight on Sunday. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*A Guide for Liquor Licensees in British Columbia*".

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The branch's allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated December 21, 2009.

The branch alleges that on September 29, 2009, the licensee contravened section 35 of the *Liquor Control and Licensing Act*, by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale. The proposed penalty is a four day suspension of the liquor licence (Item 3 of Schedule 4, *Liquor Control and Licensing Regulation*). The branch also alleges that on September 29, 2009, the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty for this contravention is also a four day suspension of the liquor licence (Item 11, of Schedule 4, *Liquor Control and Licensing Regulation*).

The licensee does not dispute that the two contraventions occurred. However, it disputes the proposed penalties. The branch and the licensee agreed that the hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

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

Minors on Licensed Premises

- 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.

Drunkenness

- 43** (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.
- (2) A licensee or the licensee's employee must not permit
- (a) a person to become intoxicated, or
 - (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the contraventions occur?
2. If so, are penalties warranted under the circumstances?
3. If penalties are warranted, what are the appropriate penalties?

EXHIBITS

- Exhibit 1: Branch's book of documents, Tabs 1 - 15.
- Exhibit 2: The licensee's February 18, 2010, submission.
- Exhibit 3: The branch advocate's letter of February 23, 2010, together with submission and attachments.
- Exhibit 4: The licensee's reply of February 26, 2010.

EVIDENCE AND SUBMISSIONS

As previously indicated, the licensee does not dispute that the contraventions occurred as alleged by the branch. Accordingly, in view of the fact that the material facts alleged are unchallenged, the evidence can be summarized as set out below.

The branch's evidence and submissions are summarized as follows:

At approximately 11:25 p.m. on September 29, 2009, members of the Kelowna R.C.M.P. detachment conducted an inspection at the Best Western Inn – Kelowna, and, in particular the licensed premises known as the 97 Street Pub. The establishment appeared to be full and there were two employees who were working as door persons. The R.C.M.P. Constable asked those door people what their count was and they could not provide that information, nor could they advise with regard to what the capacity was, and consequently, they were referred to the pub manager.

Shortly after entering the premises, a young male patron was observed walking from the rear of the establishment towards the front. He was walking in a slow and deliberate manner. The lead R.C.M.P. officer requested identification from the patron. At this time, it was noted that the door staff were approximately five feet away from the patron. The patron was not attempting to leave, nor was he being directed to leave, notwithstanding the fact that he was in full view of the door and bar staff as he made his way through the establishment.

It was further noted that the male patron was so unsteady on his feet that he had to be held up by the lead R.C.M.P. officer who was speaking with him. The patron presented signs of intoxication whereby his speech was slurred, he had difficulty focusing his sight and attention and his reactions were very retarded.

When asked for identification, the patron produced a BC driver's licence which was noted to be in poor shape and appeared to have been altered. The licence purported to declare that the holder was 21 years of age. Furthermore, when the photograph on the driver's licence was compared to the patron who produced it, it was clear that they looked nothing like each other and were clearly not the same person. The patron advised that he had presented the identification to the door staff when he had entered the establishment.

A request was made of the patron to disclose his real name and for him to accompany the lead R.C.M.P. officer outside. At this time, it was again noted that the patron had slurred speech, blood-shot, droopy eyes, liquor on his breath and was having difficulty standing. Upon exiting the establishment, the patron advised that he was 18 years of age. At that point, he attempted to run away from the officer, but due to his highly impaired state, he was unable to run in a straight line and was quickly apprehended, handcuffed and placed in the police cruiser.

The lead R.C.M.P. officer re-entered the establishment in order to speak with the manager. A demand was made to produce the liquor licence and the pub manager indicated that the same was on the wall. When the licence could not be located, the pub manager told the officer that he did not have it. He made no attempt to search for the licence, nor did he request any employees to locate the licence. In the officer's view, the pub manager appeared more concerned with serving liquor than attempting to locate the requested document. The pub manager was advised if he did not produce the licence that he could no longer serve liquor.

In order to complete the inspection, the pub manager was asked to accompany the lead R.C.M.P. officer outside. Once outside the premises, the officer showed the patron to the pub manager and also the identification used by the patron to gain access to the establishment. The pub manager advised the lead R.C.M.P. officer of his opinion that the minor should not have been allowed to enter the establishment with that poor quality piece of identification.

While this conversation was ensuing, an employee of the establishment came outside and provided the lead R.C.M.P. officer with the valid liquor licence, explaining that the document had been found behind a television and was hidden by a stuffed animal.

The branch states that, as a liquor primary establishment's main focus is on the purchase and consumption of liquor, minors are not permitted in for public safety reasons. Exposure to, and the consumption of liquor can have devastating affect on the minds and bodies of minors. Liquor consumption by minors is a strong contributing factor to many criminal offences. Minors attending adult surroundings can become targets of adults' intent on criminal activities.

In this case, the minor was permitted entry into the establishment despite having a very poor quality piece of false identification. In fact, the pub manager readily acknowledged that the minor should not have been admitted into the establishment after showing the poor quality identification which he presented. Furthermore, the lead R.C.M.P. officer was less than impressed with what he considered to be a casual attitude and lack of concern on the part of the pub manager with respect to the location of the liquor licence when a request for it was made by the officer. In the officer's view, the pub manager was more intent on selling liquor than he was on conducting a serious search for the licence.

With regard to the contravention of section 43(2)(b) of the *Act*, the branch makes the same observations as set out above with regard to the section 35 contravention, but further observes that the minor was at a level of intoxication such that his basic motor functions were affected and he could not care for himself. In fact, the minor had to be lodged in the R.C.M.P. cells until he became sober enough to care for himself. In the lead R.C.M.P. officer's opinion, the patron was intoxicated to the point where his basic motor functions were affected and he was taken to jail as he was so intoxicated.

In light of all of the above, the branch submits that suspensions of four days each for contraventions of sections 35 and 43(2)(b) of the *Act*, respectively, are appropriate and necessary to ensure that the licensee's staff is adequately trained and aware of their responsibilities. Each of these suspension penalties fall within the penalty range set out in schedule 4 of the *Regulation* for a first contravention.

The licensee's evidence and submissions are summarized as follows:

In its letter to the branch of February 18, 2010, the licensee begins by responding to the allegation that the management failed to respond in a serious way and to the request by the lead R.C.M.P. officer to produce the establishment's liquor licence. The licensee offers by way of excuse that police attendance at the establishment is a regular occurrence, and therefore, it is understandable that a pub manager would not immediately respond to requests made by liquor licensing officials. The clear implication is that the need to attend to business has a higher priority than liquor licensing concerns.

The licensee says that, in fact, the pub manager did look for the liquor licence as did other bartenders. The search eventually located the licence behind a BC Lottery Commission terminal, and it was promptly provided to the officer.

The licensee further submits that management has worked very hard to run the business properly and its record for lack of contraventions is a testament to that fact. The licensee does admit, however, that the doorman did not do “due diligence” to ensure that the information and picture were truly that of the individual using the I.D., and states that “as per the law, it is not acceptable.”

The licensee says that the events that took place, and the potential repercussions, have highlighted for its doormen, servers and bartenders the necessity of being extra vigilant in checking identification. Additionally, management has reviewed all procedures and policies with pub employees in order to ensure that the situation does not happen again. Finally, the Licensee advises that it has created additional steps to ensure doormen and wait staff have the necessary knowledge and tools to do the job efficiently and effectively.

The licensee advises that the underage and intoxicated patron was not served by any of the establishment’s staff. He may have come to the establishment in that state, or beverages may have been purchased for him by friends.

The licensee concludes its submission by again relying on its lengthy record of 15 years of compliance and that the pub manager has worked hard to ensure all regulations regarding licenses and policies are adhered to. The licensee acknowledges that the pub erred in admitting an intoxicated minor into the establishment and, in view of the fact that the minor was not served alcohol, the licensee seeks leniency as this is the establishment’s first offence.

REPLY OF THE BRANCH

The branch notes that the licensee admits to its lack of diligence in its own submission. The guide is clear and provides that licensees are obligated not to allow intoxicated persons to enter or remain in their licensed premises. The patron in this case was a minor who exhibited clear signs of intoxication which were immediately apparent to the attending police officer. The patron was within a few feet of the door person and was in clear view of staff, yet the licensee took no steps to deal with the situation.

The licensee failed to adequately supervise its staff and, essentially, the licensee permitted the alleged contraventions to occur.

The branch further submits that the licensee was not duly diligent in preventing the alleged contraventions and that due diligence must commence before and not after the alleged contravention. In this case, it is submitted that the licensee failed to disclose any training program it has in place for staff to reinforce the need for compliance of the terms and conditions of its licence. The licensee in this case has not disclosed any written policies and procedures which address the subject of minors and intoxication, nor has the licensee articulated the steps it took in supervising its staff in light of the contraventions. Although the licensee indicated that it has created additional steps to ensure that the doormen and the wait staff have the necessary knowledge and tools to do their jobs efficiently and effectively, these steps were taken after the contraventions occurred and not before.

The licensee did not disclose any documentation to the effect that it implemented training and other systems in order to prevent the contraventions, nor did it take reasonable steps to ensure the effective operation of the system to keep out a minor with questionable identification and to promptly remove an alleged intoxicated patron who was in clear view of the staff on the night of the contraventions.

The branch further submits that the absence of a compliance history in no way minimizes the seriousness of the contraventions. The risk to public safety which is evident in permitting an intoxicated person to remain in a licensed establishment is considerable. Intoxicated persons cannot care for themselves and pose a risk to others.

Accordingly, the two, four day suspensions for permitting a minor in its establishment and for permitting an intoxicated person to remain, for a total of eight days licence suspension, is warranted in order to reinforce the need for the licensee to come into voluntary compliance with the terms and conditions of its licence.

LICENSEE'S RESPONSE TO THE BRANCH'S REPLY

The licensee says that the doorman did not fully enforce due diligence on this occasion and this amounted to negligence on the doorman's part. Due to the fact that this doorman worked at other establishments, he would have understood the legalities of his position, but on this occasion he failed in his due diligence. It is necessary for a manager to delegate responsibilities. On this occasion, a poor decision by the doorman not to persist with further questioning caused this contravention to occur. As a result, his employment was terminated which has sent a strong message that has been reviewed with other doormen and staff.

The licensee has adopted a "zero tolerance with minors" policy. By employing experienced doormen and regularly reviewing policies and communications on responsibilities, with the exception of this one occasion, the establishment has been successful in preventing minors from entering. This contravention is but one instance of human error and poor judgment by one employee. Accordingly, the licensee wishes the proposed penalties reduced.

DECISION AND REASONS

The licensee has admitted the contraventions. Accordingly, having considered all of the evidence, I find that on September 29, 2009, the licensee contravened sections 35 of the *Liquor Control and Licensing Act* by permitting a minor to enter on or to be on premises where liquor is sold or kept and contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise applied.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

The leading case is: **R v. Sault Ste. Marie** (1978) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of **Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch** (2004) BCSC 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the *Act*:

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of section 36(2)(b), it must prove, on a balance of probabilities each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who are, in fact, responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities." (para. 25)

The court in **Plaza Cabaret** clarified that the directing mind need not be an officer or director of the licensee:

“It would be the individual or individuals, perhaps the general manager or shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of ‘directing mind and will’ of the licensee.” (para. 27)

Here, I find that the directing mind of the licensee at the time of the contraventions was the pub manager who, according to the licensee’s submissions, has been in Kelowna and acted as a manager since 1992 and in the 97 Street Pub since 2004. He was on site and in charge at the time of the contraventions.

The licensee, in its submissions, makes reference to the fact that:

“Management has reviewed all procedures and policies with all pub staff to ensure the situation does not happen again. We have created additional steps to ensure doormen and wait staff have the necessary knowledge and tools to do the job efficiently and effectively...with employing experienced doorman and a regular review of policies and communications on responsibilities, our business has done due diligence to prevent minors from entering with exception to this one situation”.

The licensee, however, has failed to lead any evidence or documentation identifying procedures, policies or staff training which were in existence at the time of the contraventions. The fact that the licensee has, since the contraventions, attended to increasing employees’ awareness regarding these matters is laudatory, however, it also constitutes an acknowledgement that adequate measures were not in place at the time of the contraventions.

Accordingly, I am left to conclude that the licensee had not developed adequate policies or procedures for the guidance of staff, nor had it provided staff with formal training on the liquor licence requirements.

The “Guide”, excerpts of which are found at Exhibit 1, Tab 11, provides information on intoxication and lists twelve indicia of physical and mental signs of intoxication. There is no evidence that staff was made aware of the “Guide” and its provisions.

That a patron may have ingested alcohol prior to entering a licensed establishment, and thus quickly become intoxicated is well known. In my view, a diligent licensee would have a system in place to ensure that employees have adequate knowledge of the signs of intoxication, and how to evaluate and assess a person suspected of being intoxicated. A diligent licensee would have a system in place to oversee the conduct of employees to ensure that they are carrying out their duties in compliance with the licensee’s instructions. That does not appear to have occurred in this case.

As a result, I find that the licensee has not met the test for due diligence.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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

The branch's primary goal in bringing enforcement action and imposing penalties is the achievement of 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.

There is no record of prior proven contraventions, of the same types for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulations*, Schedule 4, Section 1(1)(b), the branch has treated these instances as first contraventions. The fact that these are first contraventions, and the licensee has no compliance history, however, is only one consideration in determining whether penalties are warranted. The range for a first contravention of these types is a licence suspension of four to seven days, and/or a monetary penalty of \$5,000.00 to \$7,000.00.

Although any breach of the *Act* or *Regulations* could be considered serious, I find that these particular contraventions, in combination, fall at the upper end of the seriousness scale. This is not a case where a minor inadvertently and momentarily wandered over a red line. Here, the evidence discloses that the minor who was on the establishment's premises was also the very individual who was in a highly intoxicated state, to the point that he had to be lodged in police cells in order that he did not present a danger to either the public or himself.

What is also particularly disturbing about this case is the fact that the licensee has attempted to shift the obligation to exercise due diligence away from the licensee and onto the doorman. It is the licensee that is accountable to the branch for its compliance with the *Act* and *Regulations*. This basic misunderstanding of the licensee's duty to

exercise due diligence by providing employees with clear policies and procedures and ensure that those policies and procedures are actually being carried out by staff is a serious error which requires corrective measures.

Any penalty imposed must be sufficient to ensure compliance in the future. In the circumstances of this case, I find that the minimum suspension penalty is adequate in order to encourage future voluntary compliance. Accordingly, a four day suspension for each of the two contraventions is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 160999 for a period of eight days, to commence as of the close of business on Monday, June 7, 2010, and to continue each succeeding business day until this 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*).

To ensure that this Order is effective, I direct that the Liquor Licence be held by the branch or the Kelowna R.C.M.P. detachment from the close of business on Monday, June 7, 2010, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: May 10, 2010

cc: RCMP Kelowna Detachment
Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate