



**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: The Longhorn Pub Ltd.,
dba Carleton Lodge
4284 Mountain Square
Whistler, BC V0N 1B0

Case: EH11-014

For the Licensee: Don Jordan

For the Branch: Peter Mior

General Manager's Delegate: Sheldon M. Seigel

Date of Hearing: September 15, 2011

Place of Hearing: Whistler, BC

Date of Decision: December 5, 2011

**Ministry of Public
Safety & Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee operates a liquor primary establishment in the Carleton Lodge in Whistler B.C. under Liquor Primary Licence No. 005564. The licence provides that liquor may be served from 9:00 a.m. to 1:00 a.m. seven days per week and that the establishment has a person capacity of 275 persons in the main area and 170 persons on the patio. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*" ("*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch alleges that on November 20, 2010, at approximately 1:30 p.m. the Licensee contravened s. 35 of the *Liquor Control & Licensing Act* (the *Act*) by permitting a minor to enter or be on premises where liquor is sold or kept for sale. The proposed penalty is a four (4) day licence suspension, which is within the range of penalty in item 3, Schedule 4 of the *Liquor Control and Licensing Regulation* (the *Regulation*) for a first contravention of this type.

PRELIMINARY APPLICATION

Counsel for the Licensee raised a preliminary issue. He submitted that the issue was a jurisdictional one and should be determined before any evidence is heard. He submitted that the Branch had provided a book of documents that included a list of alleged past contraventions in Appendix A to the Notice of Enforcement Action (NOEA). He argued that this information should not properly be before the adjudicator as the adjudicator is the delegate of the General Manager of the Branch (GM) and the GM cannot delegate more than what the statute authorizes. Counsel argued that any reasonable reading of s.20 of the *Liquor Control and Licensing Act* (Act) leads to the conclusion that previous contraventions are to be treated differently from mere

allegations, which cannot therefore be considered by the GM's delegate when assessing a penalty for a contravention.

I considered the preliminary application and ruled as follows:

Licensee's counsel has made a preliminary application with respect to the admissibility of a portion of the Branch's materials, specifically the provision of Appendix A of the NOEA as served on the Licensee, and presumably reproduced in the Book of documents the Branch intends to submit for exhibit. The Appendix in question was provided to me with the preparatory materials for this hearing as part of the Branch's file. There was no determination made prior to that time as to whether that material was acceptable evidence for this hearing, though as I indicated, it is in my hands.

As an enforcement hearing adjudicator I sit as the General Manager and I am technically in possession of the Licensee's files, which would of course include any past allegations of contraventions of the act and regulation. In practice however, the GM has determined that an enforcement hearing is appropriate and once that determination has been made, the rules of administrative law must be adhered to. This allows that the examination of what portions of the Branch's file may be considered during the enforcement hearing is appropriate and necessary.

Counsel for the Licensee argues that this matter of evidence that goes to the jurisdiction of the General Manager should be determined before the hearing continues.

I have two concerns at this point:

The Branch has assembled the adjudicator and the Branch advocate geographically at the location of the Licensee at considerable cost to the public. It is incumbent upon me to resolve this matter as efficiently as possible while appropriately dealing with the subject matter. The argument put forth by counsel for the Licensee is cogent and supported by a brief of authorities and a brief of documents that I cannot reasonably digest during the hearing days scheduled. I am reluctant, however, to adjourn the substantive portion of the hearing pending resolution of the evidentiary/jurisdictional issue.

The Branch was not advised in advance of the hearing that this issue would be brought up by the Licensee. The Licensee has not provided his brief of authorities or brief of documents to the Branch. The Branch therefore has no prepared response to the preliminary application, nor could the Licensee reasonably expect it to have.

I find that the hearing will proceed as scheduled. I will ask that any reference to unproven allegations be redacted from the exhibit books or evidence that will be provided to me during the hearing process. I would ask that counsel for the licensee and the Branch advocate refrain from directing witnesses to issues germane to past unproven allegations of contravention of the Act or Regulation.

I order that the Licensee provide copies of his briefs of authorities and documents to the Branch advocate by the end of the business day tomorrow- the last scheduled day of this hearing. I will allow the Branch until the close of business on September 30, 2011, to reply to the application and provide copies of that written reply to my attention by way of the Branch Registrar and to the licensee's counsel. Neither the Branch nor

the Licensee will provide replies or responses to the documents shared with respect to the preliminary application.

Upon receipt and consideration of the Branch's reply, I will consider the application. In the event that I find the redacted Appendix A to be acceptable as evidence for consideration I will obtain the Appendix from the Branch before rendering a decision on the alleged contravention of November 20, 2010.

The Branch and the Licensee provided their submissions and supporting documents as required by the order. The Branch submits: "that in this particular case, unproven contraventions should not be considered for the purpose of determining the penalty but they should not be removed from the record." For this hearing, I have decided that any unproven allegations of previous contraventions will not be part of the evidence and will not be considered for any purpose. Accordingly, for the purposes of this hearing the redacted documentation (Exhibit #1) will remain as is.

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

1. Did the contravention occur?
2. If so, is a penalty warranted under the circumstances?
3. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

- Exhibit No. 1:** Branch's Book of Documents as described above.
- Exhibit No. 2:** Longhorn Saloon Employee manual.
- Exhibit No. 3:** Signed letter re: requirement for liquor compliance (Licensee).
- Exhibit No. 4:** Longhorn meeting minutes Sept 27, 2010.
- Exhibit No. 5:** Longhorn meeting minutes November 1, 2010.
- Exhibit No. 6:** I.D. Checking Guide (Licensee).

EVIDENCERCMP Sergeant

A sergeant from the RCMP testified that he has been with the RCMP for 20 years, has done hundreds of liquor licence inspections, and is familiar with the establishment. He said he attended at the Longhorn at approximately 11:30 pm on November 20, 2010, with a partner as part of a routine foot patrol of the area. They entered through the main doors, under the Carleton Lodge canopy. He saw a doorman standing within 6' of the doors, in what he described as an appropriate location. The sergeant immediately saw

a male who looked to be under age standing near the door. The sergeant mentioned this observation to his partner, who proceeded to the male and requested identification.

As the male attempted to provide his driver license, he fumbled about. The sergeant believed the male was avoiding producing the identification and so he got involved. The male pulled a piece of identification from his wallet and tried to put it back. The sergeant demanded to see it. The male handed him a California driver's license that bore a photograph that did not look like the male. The sergeant indicated that the photo didn't match, and the male then produced proper identification, that indicated that the male was indeed under age (birthdate 1992/08/10). Both RCMP members took the male outside and issued a violation ticket to him for "Minor in liquor establishment." The sergeant testified that the male was small and thin with a medium complexion, and dark hair. The California driver's license was for a larger person, with blond hair and light eyes. The sergeant asked the male if he was alone and the male indicated that he was with a friend. The sergeant then called the establishment's manager, explained what had happened and showed him the California driver's license and the male. The manager agreed that the photo in the identification did not match the male.

The sergeant's partner sought the male's friend. The sergeant testified that the manager told the partner that the male's friend was "in the middle of the bar, at the back." The sergeant testified that the friend was also a minor, and also had someone else's identification (an OHIP card) as well as his own identification on his person, and that he was sitting alone at a table at the back of the bar in the establishment. The sergeant testified that he questioned the minors with respect to the fact that they had been involved in identity theft. The two males indicated that the identities they carried belonged to friends who had loaned them the cards to get into the establishment.

He said that the minors told him they were alone in the establishment, and that they had entered through the main door. The sergeant testified that the manager told him that he had confirmed that the doorman had checked the identification of all of the patrons who came through the main door but that these two males had not been seen at that door.

The second male was also issued a violation ticket. The sergeant identified the copies at Exhibit No. 1, tabs 2-4.

Liquor Inspector

A liquor inspector testified that she has been an inspector for seven years and is familiar with the establishment. She said she has been invited to and has attended the establishment's annual staff meetings for five or six years. She identified Exhibit No. 1. She said that she discussed this allegation with the manager and although he didn't know how the minors entered the establishment, he confirmed that they should not have been let in on the strength of the picture identification of other people. In particular, the inspector said, the manager agreed that the first minor looked nothing like the photo in the California driver's license that he carried. He didn't know if anyone in the establishment saw the minors. The inspector testified that although the establishment's employee training program is robust, "Something fell down [that night]. I don't know what it was, but something did. It was human error." She also said: "[The establishment has] training and education in place, but two people got in who do not look like the individuals in the identification. An incident occurred, so perhaps they are not following up properly."

The inspector testified that she has completed hundreds of inspections of the establishment in seven years, and this is the first time she has issued an enforcement action to the establishment for anything to do with minors. She also testified that she did not speak to anyone about the events of November 20, 2010. She prepared the NOEA from the police information that she obtained. She confirmed that there are two entrances to the establishment: the main one from the Carleton Lodge and the one from the patio. She understood that the minors came in through the main entrance.

Establishment's Manager

The establishment manager testified that he has worked at the Longhorn for seven years and was working on site on November 20, 2010, when the alleged incident took place. He identified Exhibits No. 2, 3 and 4. He said that every staff member has a duty to control the patrons in the establishment at all times and to check identification if they think a patron looks to be under-age. He identified relevant sections of the exhibits listed above that emphasize checking identification and in particular those in Exhibit No. 5. He identified Exhibit No. 6, a contract signed by all employees. He said this contract was signed by the doorman on duty at the main door at the relevant time. He said that even the greeters and door staff working for the establishment have their Serving it Right certificates. He said that on duty he monitors the door persons (hosts) and how they are checking identification and he personally does spot checks on patrons already in the establishment.

He testified that two RCMP members called him out to the front of the establishment on November 20, 2010 to discuss two patrons the police had identified as minors. The manager said that before they were brought to his attention, he did not see those patrons in the establishment. He said that an officer showed him a driver's license that bore a photo that did not look like the patron from whom the officer obtained it. The manager testified that he spoke to the doorman from the main door and was advised that the doorman had not seen either of the two minors before and that he did not recognize the patrons as people he had admitted that night. The manager also testified that he checked with the doorman at the patio door and ascertained that the patrons identified as minors were seated with a large group, all of whom had entered through the patio door and been checked for identification. The doorman from the patio door told the manager that he did not recognise the minors but he had identified the rest of the group. The manager said he suspended the doorman who was working the patio door for failing to catch the minors at the door.

Licensee

A representative of the corporate Licensee testified that he is the president of the Longhorn Pub Ltd, and in practical terms, the Licensee. He testified that the corporate culture of the establishment, as well as all of the other businesses operated by the management of the Licensee, focuses primarily on safety, compliance, and good business. He said that the establishment is operated with an emphasis on comprehensive staff training and compliance with all licensing requirements. He provided evidence of good relations with the Branch, the RCMP, and with the community.

SUBMISSIONS

The Branch submits that two 18 year-old minors were found in the establishment with identification that did not belong to them. They entered the establishment through an entrance monitored by a doorman who let them in despite the fact that they did not resemble the photos in the I.D. that they used to gain entry. He argued that the Licensee and its staff should reasonably have determined that the minors were not of age and the minors should have been denied entry. In the alternative, the minors were visible in the establishment and the Licensee or its employees should have re-checked their identification and removed them from the establishment.

The Licensee submits that they have a robust hiring and training program for management and staff and there is insufficient evidence that the Licensee or its staff permitted the contravention to occur.

REASONS AND DECISION

The evidence establishes that two minors were on the premise where liquor is sold or kept for sale. It is of course reasonable to conclude that the two minors did enter the premise. Much of the hearing was focussed on whether the Licensee or its employee permitted the minors to enter or be there. The Licensee points out that a contravention

of the Act is not an absolute liability offence, in accordance with *R. V. Sault Ste. Marie (city)* [1978 2 S.C.R. 1299]. I agree. Liquor license contraventions attract strict liability. The first step in establishing strict liability is to prove the *actus reus*-meaning that the contravention occurred-on the balance of probabilities. In the case of s. 35, the Branch must demonstrate that a minor entered or was on the licensee's premises. Once the Branch demonstrates that the contravention occurred-i.e. the person in question was a minor and that person entered or was on the premises, then the Licensee has the opportunity to establish a full defense by demonstrating due diligence, meaning that the licensee took all reasonable measures to avoid the contravention.

The word "permit" in this context means that the Licensee failed to prevent the occurrence. The word has a passive connotation. There is no requirement or onus on the Branch to demonstrate that the Licensee actively had knowledge of the particular circumstances of the contravention before it occurred in order to establish the contravention.

The onus to establish the *actus reus* is to show that the minor entered or was on the premises where liquor is sold or kept for sale. The Branch does not bear the onus to demonstrate that the Licensee was negligent or active in permitting the minor on the premises. The fact of the minor on the premises is *prima facie* evidence that the Licensee failed to prevent the contravention.

Because this is a strict liability contravention, the onus then shifts to the Licensee to demonstrate that it was not negligent, that it exercised due care/diligence by taking all reasonable measures to avoid the entry or presence of the minor on the premises. This available defense, due diligence, is what differentiates this strict liability offense from an absolute liability offence, for which no such defense would be available. This is confirmed in *The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch)*, 2011 BCCA 439, where the Court of Appeal upheld the Supreme Court decision in which counsel for that licensee argued that the word *permit* imputes an element of knowledge in the contravention which requires the Branch to demonstrate

that the licensee knew of the contravention. Mr. Justice Rice of the BC Supreme Court dismissed that interpretation with the following commentary:

The petitioner argues that this interpretation is not the law: in order to prove "permitting", the respondent must prove that the licensee, or its directing mind, had knowledge, either actual or imputed, of the unlawful activity.

... The petitioner is incorrect in arguing that the onus is on the general manager to show that the licensee or its directing mind had knowledge, actual or imputed, of the unlawful activity.

And:

The general manager must prove the *actus reus* of the contravention on the balance of probabilities: The onus is then on the licensee to demonstrate on a balance of probabilities that it took all reasonable measures to avoid the contravention.

Cambie Malone's Corp. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch, [2009] B.C.J. No. 1464 para's 51 & 52

DUE DILIGENCE

The Licensee is entitled to a defence of due diligence if it can establish that it did all that it should reasonably have done to put in place systems and policies and implement those systems and policies in order to ensure compliance with the *Act, Regulation*, and the terms of the licence.

The evidence in this case is noteworthy not for what it discloses but for what it does not disclose. The evidence does not establish through which door the minors entered: The RCMP sergeant said the minors told him they entered through the main doors. The Licensee's manager testified that the results of his enquiry showed that the minors entered through the patio doors. Neither of the witnesses' evidence in this regard is more remarkable than the other's.

The evidence does not establish if the minors were alone or part of a large group: The RCMP sergeant said the minors indicated they were alone. The manager said the patio doorman told him they were part a group of ten.

The evidence does not establish if the minors showed identification to get in, and if they did, if they showed their own I.D. or the secondary identification they were carrying: The RCMP sergeant said the minors told him they used the "false" I.D. Neither doorman remembered seeing the minors enter or checking their I.D.

The evidence does not establish how long the minors were in the establishment. There is no evidence that the minors were served any liquor (it is not a condition of this contravention that the minors were served, but service would suggest an opportunity to notice or deal with the minors).

Further, I find the reliability of the critical evidence in question. Each of the witnesses was credible and had reliable memories, however most of the relevant statements were contained in hearsay evidence. The RCMP members relayed information provided by the minors. The manager relayed information provided by the doormen. The minors and the doormen would have provided the bulk of the relevant information, yet neither the minors nor the doormen were at the hearing to have their statements weighed and tested under oath or by cross-examination.

The minors could reasonably have thought they were under investigation by the police for identity theft (the sergeant testified that he thought he was investigating identity theft), and that impression could reasonably have informed the minors' decision to make certain statements about their use of ID at the door. Ultimately, the minors were not under any oath when they made statements to the police, the minors were under-age in an establishment, and the minors were in possession of at least two sets of identification when the police questioned them. I find the hearsay evidence of the statements provided by the minors to be unreliable.

There is direct evidence that the minors were at the moment that the police saw them, generally visible and young enough that the police sought to check their identification. There is evidence that the Licensee is interested in training its staff to identify and exclude minors from the establishment. The lack of specific evidence as to how the minors got in the establishment, how long they were there, and if and by whom the minors were seen once inside the establishment works against the interests of the Licensee, as it is the Licensee that has the burden of establishing that it exercised due diligence if it is to avail itself of this defense. Although the evidence before me speaks to a "robust" training program (inspector), the fact of the minors in the establishment and the lack of specific evidence as to the steps actually taken by the Licensee and its staff to prevent these minors from entering or being in the establishment, indicates deficiencies in testing or execution of any systems that the Licensee designed. Accordingly I cannot find the Licensee duly diligent.

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 may do any one or more of the following:

- 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*. 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 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.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this establishment within the year preceding this incident. Schedule 4 of the *Regulation* establishes prescribed penalties for contravention of the *Act* or *Regulation*. For a first contravention of s.35 the range of penalty is four (4) to seven (7) days license suspension and/or \$5,000 to \$7500 monetary penalty.

I find a four (4) day suspension is reasonable and appropriate under the circumstances.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 005564 for a period of four (4) days to commence at the close of business on Friday, January 6, 2012, 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*).

To ensure this order is effective, I direct that Liquor Primary Licence No. 005564 be held by the branch or the Whistler detachment of the RCMP from the close of business on Friday, January 6, 2012, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 5, 2011

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

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