



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

In the matter of

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

And in the matter of

A referral back from the British Columbia Liquor Appeal Board

Licensee: A.M.P.M. Holdings Ltd. &
Saylor Enterprises
dba Oasis Hotel
10662 King George Hwy.
Surrey, BC

Case: EH02-091

Appearances:

For the Licensee Joseph M. Doyle, Counsel

Enforcement Hearing Adjudicator Suzan Beattie

Date of Written Submissions June 14, 2004 & November 19, 2004

Date of Decision January 17, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
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INTRODUCTION

This is a referral back from the British Columbia Liquor Appeal Board (LAB) of a decision I rendered on March 5, 2002. The LAB remitted the matter back to the General Manager on June 18, 2003, for consideration of the defence of due diligence for the contravention of permitting a minor to enter or be on premises when liquor is sold contrary to section 35 of the *Liquor Control and Licensing Act and Regulation*.

LEGAL FRAMEWORK

Due Diligence

It is accepted that the defence of due diligence applies to contraventions under the *Act*. In addition to considering the licensee's submission based on *Whistler Mountain ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)* 2002 BCCA 426 (July 12, 2002), [17 – 41], I also gave consideration to *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248 (February 23, 2004), a case involving alleged illegal conduct. In that case, the Supreme Court stated:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 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 were 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.

On the first aspect, whether the employees who committed the contraventions were directing minds, I agree with the licensee that the directing mind was the

manager on duty. The employees were a doorman, a staff person selling beer from a beer tub and a coat check person. There was no evidence linking these employees to the supervision or the management of the licensee's operation. Additionally, there was no evidence linking the impugned action of permitting a minor entry to the 'directing mind.'

The second aspect, which is the sole issue for this reconsideration, is whether there is evidence that the licensee was duly diligent in attempting to prevent for the contravention of permitting a minor to enter or be on premises when liquor is sold contrary to section 35 of the *Liquor control and Licensing Act and Regulation*.

LICENSEE'S SUBMISSIONS

Burden of Proof

The licensee's first argument is that the burden of proof for contraventions of the *Liquor Control and Licensing Act & Regulation* is currently in a state of flux. It pointed to conflicting decisions from the Supreme Court of B.C. in *Zodiac Pub Ltd. v B.C. (General Manager, Liquor Control & Licensing Branch)* 2004 BCSC 96; *532871 B.C. Ltd. (cob The Urban Well) v. B.C. (Liquor Control & Licensing Branch, General Manager)* 2004 BCSC 127 and *New World Entertainment Investments (cob Richard's on Richards v. British Columbia (Liquor Control and Licensing Branch, General Manager)* 2004 BCSC 616

Due Diligence

Next, the licensee submitted that the test it must meet is whether it took all reasonable measures with respect to avoiding liability. It posed the issue as whether, at the time the particular minor entered the premises, had the licensee taken all reasonable care to prevent the particular minor from entering the premises at the particular time.

The licensee reviewed the evidence from the hearing on November 1, 2001, as well as the Liquor Appeal Board decision of June 18, 2003, in its submissions of June 14, 2004, and November 19, 2004. In particular, in its June 14, 2004, submission the licensee outlined the following as supporting its position that it demonstrated due diligence.

- Constable M made only one note of any difficulty in the premises, and that was at Door 4. It was because of Door 4 and Door 4 alone, that a licensed premise check was filled out. The licensee emphasized in its submission that:

It is absolutely critical to note that Constable M had no concerns about any other parts of the premises, and noted that all other doors were locked, secured and/or patrolled. He saw no minor on the premises. He did not see this particular minor on the premises. He had [the manager on duty] lock Door 4, then Constable M went to his car.

- the licensee maintained that it was clear on Constable M's evidence that, in his view, locking Door 4 solved the problem, and it solved the problem of having too few staff for too many unlocked doors. Constable M observed no other problems. The licensee continued by submitting that:

Thus, based on Constable M's own evidence, at the time he went to his car (before this particular minor got in), ***the licensee had taken all reasonable measures.***

(emphasis in original)

- The licensee summarized its reliance on Constable M's evidence as follows:

Of great importance, note that Constable M was satisfied with the measures taken and the staff on duty *once Door 4 was locked and*

prior to the particular minor at issue gaining access. In assessing due diligence, surely the licensees, having complied with the direction of Constable M, had “taken all reasonable care” – they certainly had taken all measures as directed by an RCMP officer who had turned his mind to the very issue. With respect, the licensees are entitled to rely upon the fact they met all the standards imposed upon them by Constable M, and submit this to be conclusive proof of due diligence.

(emphasis in original)

- With regard to the evidence of Constable C and Constable J, the licensee questioned why these officers did not arrest the minor for being intoxicated in a public place when they first encountered the minor at the back of the premises.
 - The licensee also relied on the fact that the doorman at Door 2 did, on the evidence of the bartender, reject the minor as having no identification. The fact the minor had no identification was corroborated by the evidence of Constable C and Constable J. As a result, the licensee stated that the security at Door 2 worked which is indicative of due diligence.
 - In summary, the licensee in its June 14, 2004 submission relied on the fact that, by the time Constable M wrote the license premises check, Door 4 was locked, which solved the only problem Constable M identified (with Door 4 locked, the staffing problem was also eliminated). The licensee stated that it was complying with the *Act* as of the time Door 4 was locked, which was prior to the minor’s entry in its premises. The licensee submitted that it is entitled to rely heavily upon having met the standards imposed upon it by Constable M. It argued that it has established the defense of due diligence.
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- In its November 19, 2004 submission, the licensee referred to the transcript of the hearing on November 1, 2001 and the evidence of the manager on duty who the licensee agreed is the “directing mind”. It submitted the transcript illustrated the following security measures, policies and procedures were in place at the particular time.

(1) staff stationed at Door 6

In direct examination, the manager stated that security staff was at Door 6 (the main entrance) at all times on April 28, 2001.

(2) appearance of the particular minor and the experience of staff

In direct examination, the manager stated that, from his experience dealing with his security staff or bartending staff, the minor was not the kind of person, given her apparent looks, who would be able to get into the premises.

(3) identification measures taken at doors in general

In direct examination, the manager stated that, in the ordinary course of events, if adults were coming through Door 4, a bouncer or a door security person would ID individuals - even if they were over 50 or 60 years of age. However, people wouldn't necessarily get ID'd if the bouncer saw that person leave the pub, go into the lobby, and then come back into the pub.

(4) policy existence, familiarity, training and meetings.

In cross examination, the manager stated there are “house rules” that were put in place before his time. These house rules are

provided to staff who sign and date the document. As well, maybe once every 2 – 3 months there are staff meetings. The manager agreed there is nothing in writing in the house rules supporting a policy to ID patrons 60 years old.

- (5) log book entry and follow up with doorman

The manager testified that the house rules have a section dealing with “Follow up with staff in a logbook”. This section of the rules stated:

As soon as an incident has been taken care of, management will have a debriefing session, it helps everyone learn from the experience, it will also give management a chance to reinforce or improve our policies and procedures in case there’s a next time

The manager acknowledged that he did not hold a debriefing session with staff, except to tell the bartender they were written up. The manager said he also spoke with the doorman at Door 2 where the minor was denied entrance. He did not obtain a statement from the bartender, the doorman at Door 6, the staff person selling beer from a beer tub, or the coat check person. He did write that he received a licensed premise check and that there was a minor at the back door (Door 2) in his manager’s logbook

In its November 19, 2004, submission, the licensee argued that when all the evidence is considered, it is clear that it has proven the defense of due diligence on a balance of probabilities. It submitted there is a significant body of evidence consistent with the conclusion that it had a system in place, that the system was satisfactory to Constable M, and that the system had worked at Door 2 in relation to the same minor. The licensee argued that this body of evidence is also

relevant to the reasonableness of its policies and procedures. The licensee stated that, at the time the minor entered its premises, it had taken all reasonable measures to ensure she did not enter the premises.

Alternatively, the licensee suggested that, even with the policies and procedures in place and despite the situation being acceptable to Constable M, an employee may have had a lapse for a “temporary moment.” It submitted that, consistent with the reasoning in *Plaza Cabaret* (supra) and *R. v C.C. Eric James Management Ltd., 2000, B.C.P.C. 178*, such a momentary lapse did not disentitle it from relying upon the defense of due diligence – it tried, and it did the best it could *reasonably be expected to do*. (emphasis in original)

ANALYSIS

Burden of Proof

This issue of the burden of proof has been thoroughly argued in previous decisions of the general manager, and it has been consistently held that the burden of proof on the branch is that of the civil standard of ‘on a balance of probabilities’. I find that the burden of proof on the branch is on a ‘balance of probabilities’. (See: *New World Entertainment Investments Ltd., doing business as Richard’s on Richards v General Manager, Liquor Control and Licensing Branch*, Madam Justice Gill, April 23, 2004 [12].)

Due Diligence

A recent decision, *Haney Hospitality Ltd.*, EH03-170, July 27, 2004, considered evidence of due diligence relating to an allegation that a licensee permitted a minor to be in the premises. In the *Haney Hospitality* case, the Adjudicator referred to a list of preventive measures enumerated in court decisions involving minors purchasing cigarettes. The list of evidence to establish the defense of due diligence considered by the Court in the *C.C. Eric James Management Ltd.* (supra) included:

- oral training and written materials for new employees;
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- an automatic computer prompt reminding employees of the age issue;
- posting of signs about the legal age;
- posting of communications from the Health Board;
- using decoy purchasers;
- posting an earlier violation notice;
- verbal reminders to employees;
- isolating one till run by an experience employee for cigarette purchases; and
- instruction to employees to request identification from anyone appearing to be under 25 years old.

Another tobacco case included in *Haney Hospitality* was *R. v. 348095 B.C. Ltd.*, 2003 B.C.P.C. 58. In this case, the Court found that due diligence had been made out based on the following factors:

- New employees were given oral instructions about the law;
- New employees were required to sign acknowledgements of the employer's instructions;
- The employer used "Shop Watch" to check whether employees were following instructions;
- Employees who did not comply were disciplined;
- Signs required by legislation were prominently posted in the store.

Although the contraventions before me of permitting a minor on the premises differs from the tobacco cases, I agree with the Adjudicator in *Haney Hospitality* that the list of factors considered by the Courts in the tobacco cases is helpful in considering the evidence of due diligence in the case before me.

In this case, the licensee has made two main submissions to establish the defense of due diligence: first, that it is entitled to rely upon having met the standards imposed upon it by Constable M and second, that it had a system of policies and procedures in place designed to ensure a minor was not permitted on the premises. I will deal with each submission in turn.

Reliance on standards imposed upon it by Constable M

I start my analysis by clarifying that the standards imposed upon licensees are contained in the *Act*, the *Regulation* and the terms and conditions of its licensee as outlined in the Guide for Liquor Licensees in British Columbia (Guide). Police officers, such as Constable M, Constable C and Constable J play an important role in protecting the public and regulating and monitoring the sale of liquor in licensed establishments.

As noted in the Guide, police officers make regular, unannounced visits to licensed establishments. When walking through an establishment, police officers are looking for evidence of any contravention. If police notice a contravention they record it on a Licensed Premises Check form and give one copy of the form to the licensee and one copy to the branch.

In my decision of March 5, 2002, I outlined the actions of Constable M, Constable C and Constable J on pages 3 - 5 of the decision as follows:

I will summarize the evidence and my findings of fact based on a balance of probabilities. I note at the outset that there are discrepancies in the evidence between the five witnesses.

There are six entrances and exits to the Oasis Hotel. Of interest in this hearing are the following four entrances and exits.

Door	Location	Security
1	South-east corner	Locked with chains and "panic" hardware
2	East corner (patio and bar)	Locked with chains and "panic" hardware – doorperson [1.] station
4	West corner (Cornet Lounge/ Lobby / Interac machine)	Doorperson station
6	South-West corner (main entrance)	Doorperson station

On April 28, 2001, Constable M of the Surrey R.C.M.P. detachment conducted an inspection of the Oasis Hotel Pub, commonly known

[1.] Personal information severed pursuant to the Freedom of Information and Protection of Privacy Act.

as the Sahara Club. During his "walk-by," Constable M observed that Door 4 was unlocked and unmanned. He also observed that persons entering the pub through this door were not being checked for identification.

Constable M spoke with the manager. Approximately one month previously, Constable M had found another door unlocked and unmanned. Constable M felt a Licence Premises Check was now warranted, as this was the second occasion he found a door unlocked and unmanned. When he was told that only three door persons were working at the time, Constable M expressed his opinion that the licensee had inadequate door staff for a Saturday evening.

After ensuring that Door 4 was locked, Constable M returned to his patrol car and commenced to write a Licence Premise Check. The Licence Premise Check, which was issued on Sunday, April 29 at 00:02, states:

"Police observed door to lobby unlocked and unattended. 3 to 4 people entered bar freely from same door w/o being I.D.'d. One underage female inside removed and lobby locked. Inadequate # of door staff for Saturday night."

Constable C and Constable J, two Surrey R.C.M.P. officers, discovered the under-aged female referred to in Constable M's Licence Premise Check during their routine inspection of the Oasis Club on Saturday, April 28, 2001. The events surrounding the under-aged female commenced at approximately 23:45 on Saturday April 28, 2001 and concluded with the under-aged female in the Surrey R.C.M.P. detachment office on or before Sunday, April 29 at 00:14.

As this excerpt from the March 5, 2002, decision illustrates, Constables M, C and J were conducting regular walk by inspections when they found evidence they believed warranted filling out a Licence Premises Check. The fact that, as a result of the Constables attendance at the establishment, the minor was removed from the premises and that Door 4 was subsequently locked, is not evidence of due diligence on the part of the licensee.

I cannot accept the underlying premise of the licensee's first submission that the standards imposed upon it are the standards of the Constables. Rather, the Constables, along with liquor inspectors, are enforcing the *Act, Regulation, and Guide*. When, as in this case, contraventions are recorded, the fact that the minor is removed by the Constables and that Door 4 is locked at the request of a Constable does not resolve the alleged contraventions. The alleged contraventions are further investigated and, as in this case, a contravention notice is issued, enforcement action is recommended and, if the licensee chooses not to sign a waiver, the recommended enforcement action will be reviewed at an enforcement hearing.

It follows that I reject the licensee's submission that it is entitled to rely heavily upon the fact it locked Door 4, thus resolving Constable M's initial concern and also resolving Constable M's concern about the inadequate staffing levels, as evidence that it established a defence of due diligence.

System of policies and procedures

The licensee argued that the transcript illustrated evidence of five security measures, policies and procedures that form a significant body of evidence consistent with its submission that it had a system in place that constituted reasonable measures to ensure that a minor did not enter its premises. In the alternative, the licensee submitted it did the best it could reasonably be expected to do.

In my view, the appropriate test is that stated by the Court in *Eric James Management Ltd.*, supra, as follows:

[6] A useful question to keep in mind, and perhaps another way of expressing the test when reviewing the actions of an employer in a case such as this, is what else might the employer have done to prevent the commission of this offence. If it is possible to identify and articulate

preventive actions which are reasonable, and which common sense demands in the circumstances faced by the employer, and which were not undertaken, then the defense of due diligence would not protect the employer.

Referring to the licensee's specific submissions on the evidence of their security measures, policies and procedures evidence, I note the following:

(1) staff stationed at Door 6

There is no dispute that a doorman was stationed at the main door (Door 6) on April 28, 2001. As noted in my decision dated March 5, 2002, at page 9:

I accept the evidence of Constable C and Constable J that the intoxicated female minor was 6 to 10 feet from the doorman at Door 1[sic] (the main door). As well, there was a coat check person and a female staff member selling beer from the beer tub in close proximity to the female minor. There was no evidence of any measures taken to remove the intoxicated female minor.

I pause to note that the above excerpt contains a typographical error by referring to the main door as Door 1 instead of Door 6 (see also chart in earlier excerpt).

The attendance of a doorman does demonstrate some due diligence. I find that the mere attendance of a doorman, without further evidence of the actions taken by the doorman to identify or remove the minor, does not completely assist the licensee in demonstrating due diligence.

(2) appearance of the particular minor and the experience of staff

I accept the manager's testimony that, given the description of the minor, it was not possible to mistake her for being 19 or older. I also accept his evidence that, based on his experience with his door security and bartending staff, the minor

would not have been allowed in his establishment even if she had false identification (which it was admitted she did not).

However, I do not accept that this evidence assists in demonstrating due diligence.

(3) identification measures taken at doors in general

In his testimony, the manager stated that, in the ordinary course of events, if adults were coming through Door 4, a bouncer or a door security person would ID individuals who were over 19 or 21, over 30 years old, and even individuals 50 or 60 years of age. I find this evidence is self serving and lacks credibility. On the evening in question, Constable M observed Door 4 to be open and unmanned. He also observed persons entering the pub through Door 4 who were not being checked for identification. I do not find the totality of the evidence assists the licensee in demonstrating a defence of due diligence based on established policies and procedures requiring employees to check identification.

(4) policy existence, familiarity, training and meetings.

The evidence at the hearing included a letter dated May 8, 1996, from the licensee's lawyer to the branch attaching a copy of the Employee House Rules. The manager testified that these house rules were put in place before his employment with the licensee. He confirmed that the house rules are provided to staff who sign and date they have received the document. There was no evidence the manager updated these house rules. The manager also testified that approximately every 2 – 3 months there are staff meetings. No evidence was led about specific topics or agendas for these staff meetings.

I do not find the evidence of the manager assists in demonstrating a defence of due diligence. I follow the general comments made in the *Haney Hospitality* case (supra), and find it is not enough to enter into evidence house rules dated in 1996 or to state there are staff meetings every 2 – 3 months to find a defense

of due diligence. Rather, the licensee's evidence should include, for example, documentation of updating the house rules, discussion of rules at meetings, discussions of problems encountered, demonstration that staff received ongoing training as well as policy updates reflecting the changes in the *Act and Regulation* since 1996.

(5) log book entry and follow up with doorman

The evidence of the manager was that he did not follow the house rules dealing with the log book on the evening of April 28, 2001, or thereafter. He stated he did not hold a debriefing session with staff, except to tell the bartender they were written up. The manager said he also spoke with the doorman at Door 2 where the minor was denied entrance. He did not obtain a statement from the bartender nor from the doorman at Door 6, the female staff person selling beer from a beer tub or the female coat check person. He did write that he received a Licence Premise Check and that there was a minor at the back door (Door 2) in his manager's logbook. This evidence on its own is not helpful.

In my view, this evidence with respect to the log book entry and follow up with doorman does not assist the licensee. In this case I accept that the minor looked remarkably young. She was found by Constable C and Constable J standing inside Door 6 approximately ten feet from the doorperson and in view of both the female staff person selling beer from a beer tub as well as the female coat check person. In my view, every employee is responsible for ensuring that minors are not permitted to remain on the premises. The fact that neither the doorperson, nor the two female staff persons took action is an indicator of lack of proper training.

In summary, I have considered each of the licensee's specific submissions on security measures, policies and procedures and find that, individually and collectively, these measures fall short of demonstrating evidence of due diligence.

I find on the totality of the evidence the licensee did not have adequate security measures, policies or procedures in place at that time to establish a defense of due diligence for the contravention of permitting a minor to enter or be on premises when liquor is sold contrary to section 35 of the *Liquor Control and Licensing Act and Regulation*.

ORDER

I confirm the Order made in my decision dated March 5, 2002, as follows:

For the contravention of section 35 of the Liquor Control and Licensing Act on April 28, 2001, I impose a licence suspension of two (2) days

The branch agreed to a temporary stay of the licence suspension pending resolution of these proceedings. As the licensee was not successful in proving a defense of due diligence, the branch is removing the stay of the licence suspensions.

I order the licence suspension of two (2) days to commence as of the close of business on Friday, February 18, 2005, 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 54(1) of the *Regulation*). As I do not know what days will be "business days" for the licensee, I direct that the Liquor Licence No. 9459 be held by the branch or the R.C.M. Police Surrey Detachment from the close of business on Friday, February 18, 2005, until the licensee has demonstrated to the branch's satisfaction that it has been closed for two (2) business days.

The suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or R.C.M.P. Constable. A member of Surrey R.C.M. Police or the branch will attend the premises, take possession of the liquor licence and hold it in safekeeping during the term of the suspension.



Suzan Beattie
Enforcement Hearing Adjudicator

Date: January 17, 2005

cc: R.C.M. Police Surrey Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Mike Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Shahid Noorani, Branch Advocate
