



BRITISH COLUMBIA

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

A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267

Licensee: Avalon Land Corporation
dba Avalon Motor Hotel
1025 Marine Drive
North Vancouver, BC

APPEARANCES

For the Licensee:	Dennis Coates, Q.C. Legal Counsel Kirsten Tonge, Articled Student Fraser Boyer, Managing Partner, Avalon Land Corporation
For the Branch:	Peter K. Jones, Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Case No.	EH03-049
Date of Hearing:	September 3, 2003
Place of Hearing:	Vancouver, B.C.
Date of Decision:	December 9, 2003

Introduction

The licensee operates a drinking establishment within the facility known as the Avalon Motor Hotel ("Avalon"), under a Liquor Primary Licence No. 213296. There has been a pub in this location for many years, however, it was rebuilt and the current establishment opened in September 2001.

The liquor licence permits hours of operation from 11:00 A.M. to 1:00 A.M., seven days a week. The licensed capacity is 125 patrons inside. The licence shows a permitted capacity of 30 patrons on the patio, however, due to recent renovations, the permitted capacity on the patio has been decreased.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action dated May 27, 2003, the branch alleged that on March 17, 2003, the licensee permitted unlawful conduct (patrons smoking marijuana on the patio) contrary to section 36(2)(b) of the *Act*. The branch recommended a licence suspension of ten (10) days, commencing on a Monday and continuing on successive business days until completed.

Schedule 4 of the Liquor Control and Licensing Regulations, BC Reg. 608/76, Enforcement Actions, provides a range of licence suspensions and monetary penalties for each contravention. Under Schedule 4, Item 8, the range for a contravention of section 36(2)(b) is 10 to 15 day suspension, or \$7,500 to \$10,000 monetary penalty.

Compliance History

There is no record of prior contraventions, offences or enforcement actions of this type ("compliance history") for this licensee or this establishment within the year preceding this incident. Therefore, this contravention, if proved, would be considered a first contravention for the purposes of the Penalty Schedule.

On October 30 and October 31, 2002, the branch issued Contravention Notices for alleged contraventions of permitting unlawful activities, also arising from patrons smoking marijuana. The branch also issued Contravention Notices for alleged contraventions relating to advertising and intoxicated patrons. The branch did not pursue enforcement action on any of those allegations.

Issues

1. Did the licensee 'permit' patrons to smoke marijuana:
 - a) has the branch demonstrated that the substance was marijuana?
 - b) Has the licensee successfully defended against the charge of having 'permitted' unlawful conduct?
2. If the contravention occurred, is the branch's recommended enforcement action appropriate?

Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Large scale floor plan
Exhibit No. 3	Four photographs of the Avalon
Exhibit No. 4	Inspector Tremblay's marked floor plan
Exhibit No. 5	Compliance & Enforcement Manual, Disorderly or Riotous Conduct, revised March 2003
Exhibit No. 6	Staff list for March 17, 2003
Exhibit No. 7	Policy statement of Avalon Alcohol & Drug Awareness
Exhibit No. 8	Extract from incident log of Avalon from March 17, 2003
Exhibit No. 9	Photographs from original licensing file

Applicable Statutory Provisions

Prohibition against gambling

- 36** (1) In this section, "gambling" does not include anything done under the authority of
- (a) a licence issued under section 207 (1) (b) or (f) of the *Criminal Code*, or
 - (b) an enactment referred to in section 207 (1) (a) of the *Criminal Code*.
- (2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment
- (a) gambling, drunkenness or violent, quarrelsome, riotous or disorderly conduct,
 - (b) any unlawful activities or conduct, or
 - (c) a device used for gambling to be placed, kept or maintained.
- (3) An activity permitted under the authority referred to in subsection (1) may be restricted, cancelled or prohibited in a licensed establishment by order of the general manager.

Evidence

The branch's witnesses were three liquor inspectors. The licensee's witnesses were the managing partner (the 'manager') and another licensee who is a prominent member of hospitality industry, who testified to the standards within the industry.

In November 2002, following the branch's concerns about patrons smoking marijuana, the licensee reduced the size of the patio by about half, removing part of the fence and the bushes along the sidewalk. The patio is not visible from the sidewalk but is open and visible at the entrance to the Avalon. Inside the Avalon, there are two frosted glass doors which together form the entrance to the patio. The doors are full length and the word AVALON is etched length-wise down each door. The letters are clear glass in the otherwise frosted glass. From the photographs at Exhibit No.3, it is obvious that one cannot see through the frosted glass, except for silhouettes; it is possible to see small portions of the patio through the clear glass letters.

Branch evidence

Two of the liquor inspectors testified that they smelled an odour of marijuana as they were walking on the sidewalk, beside the patio. One inspector went to the patio and observed two patrons smoking a 'joint'. He said he watched them for about two minutes and saw them passing the joint back and forth. He then found the manager and pointed out the two patrons, who had returned inside and joined a group by the band. The inspector testified that the manager's response was – "How am I supposed to police that?", The inspector suggested that they replace the frosted glass doors with clear glass so the bartender and other staff would have a clear view of the patio, and that they have door security on the patio at all times.

Neither the inspector nor the manager approached or spoke with the patrons.

The undisputed evidence is that there were approximately 50 patrons and 5 staff on duty.

Licensee's evidence

The licensee's first witness, the other licensee, spoke to the industry standards for door security, patron surveillance and preventing patrons from smoking marijuana. He testified that historically only cabarets have door security all night, every night. The size of the establishment usually dictates the degree of door security required and, for example, neighbourhood pubs with seating capacity of 65 patrons have not, historically, used door security.

Concerning patios, he testified that it is standard practice that servers watch the patios. With the current smoking regulations, patios are smoking areas. He testified that he does not have surveillance cameras on any of his patios, or inside the bars, except at the door. He said that patrons smoke marijuana and it

is hard to locate the responsible people because the cigarettes are lit usually for no more than three minutes. If his staff is able to locate the person smoking, the person is required to leave; sometimes it is necessary to call the police. However, he also stated his experience that the police have no interest in stopping people from smoking marijuana.

The licensee's second witness, the managing partner (the 'manager'), is also the Director of Operations for another corporate licensee and is responsible for managing five brew pubs, plus the Avalon. He stated that establishments with patios have problems controlling marijuana smoking and that it is common practice to instruct servers to police the patios. He testified about the policies and practices at the Avalon and his other establishments, regarding patrons smoking marijuana and using other controlled substances. He produced Exhibit No. 7 from a manual he uses in all his establishments and noted the instruction to staff that if a patron is caught with any type of drug, the patron is expelled from the bar.

The manager testified that part of the incidents in October 2002, involved a young patron who lit a 'joint' in front of a police officer. He referred to the patio changes made as a result of those incidents and indicated that the plan at Exhibit No. 2 is prior to the renovations. He testified that he had discussions with the regional manager about the incidents in October 2002, and about the patio renovations and the need for more door security. The regional manager suggested that he have door security every night. The manager testified that it would be unusual for any similar establishment to have door security every night but he agreed to increase door security on busy nights. He testified that he knew he was looking at the possibility of a 10 day closure and \$7,500 penalty so he was prepared to do whatever the branch required. He testified that the regional manager was content with his proposals and that the meeting was a success.

Although the liquor inspector testified that in November 2002 the branch had also recommended replacing the frosted doors leading to the patio and installing surveillance cameras, the manager testified that the first time he heard those suggestions was at this hearing.

The manager testified that the bartender on duty this night was later dismissed for reasons not related to this incident. He also testified that the Avalon continues to have problems with patrons smoking 'joints'. He observed that smoking marijuana is common place in society and, if people are prepared to light up in front of a police officer, one has to anticipate that they will do it in a licensed establishment, even in front of an employee. The staff removes anyone who is caught with controlled substances. He testified that the municipality does not want the Avalon to close the patio because the patrons would then be on the street for their smoke breaks and would cause a disturbance to the neighbours.

Submissions

The branch

The advocate submitted that the evidence was clear that patrons were smoking on the patio, the inspectors identified the odour as marijuana, and the licensee did not have staff on the patio to prevent the conduct. Although the licensee's witnesses characterized smoking marijuana as common place in today's society, it remains an illegal activity and the licensee has responsibility to ensure patrons do not smoke it.

In *Ed Bulley Ventures Ltd. (c.o.b. Planet Sports Lounge)*, June 28, 2001, LAB L-9905, the Liquor Appeal Board adopted a definition of "permit" in relation to contraventions under the Act. This definition has been applied by the branch in the more recent case *Plaza Cabaret Ltd.*, October 31, 2002, Case #EH0s-05/19:

The interpretation approved by the courts is as follows: a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the

licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.

The advocate submitted that the onus is on the licensee to demonstrate that they exercised due diligence. Given that the licensee knew there were problems on the patio, did the licensee take reasonable steps to prevent the occurrence of illegal conduct? The advocate submitted that common sense dictates that the doors should be clear so staff can see the patio and so it does not become in essence a very private area. If the door was clear glass and if there were surveillance cameras, patrons would be less inclined to smoke marijuana. Given that the licensee did not take adequate steps, the licensee failed by acquiescence to ensure that this conduct would not occur. The manager's statement that he cannot control what goes on outside is indicative of the licensee not being particularly concerned about controlling what goes on outside.

The Licensee

The licensee's first submission is that section 36 refers only to gambling offences and, since the terms and conditions contained in the Guide to Liquor Licensees are not included in section 36, there is no statutory basis for the alleged contravention.

Secondly, the critical part of the alleged contravention, section 36 (2) (b), is that the licensee must not authorize or permit. There is nothing in the evidence to suggest that the licensee authorized patrons to smoke marijuana on patio. The licensee' full submission on this aspect is set out below.

Thirdly, the branch is bringing this allegation at a time when the Federal Government is looking to legalize marijuana smoking and possession. In this sense, there is a real issue of whether it is an unlawful activity.

The licensee' fourth submission involves the burden of proof. He suggests that under section 36, the burden of proof should be beyond a reasonable doubt. In particular, in order to demonstrate that the substance was marijuana, the burden of proof should be beyond a reasonable doubt. He submits that it is not enough for the branch inspectors to wander by an area and say - that smells like marijuana – and take that as conclusive evidence that it was marijuana. The strongest evidence is that there was an odour. Only one inspector saw the patrons on the patio. There were no witnesses to the conversation between the inspector and the bartender – the comment attributed to the bartender may be incorrect, may have been taken out of context, or may be incomplete.

Permit, Authorize, Due Diligence

The licensee notes that issues around due diligence and issues around permitting are similar, and his submissions relate to both.

The licensee takes issue with the inspector writing up the contravention notice without truly determining whether a contravention occurred. That is, the inspector did not consider whether the licensee had 'permitted' the conduct. There is nothing in the evidence to suggest that the licensee authorized patrons to smoke marijuana on patio.

Although the inspector suggested that clear doors would provide greater visibility, the licensee submits that no one suggested that having a clear line of sight is a requirement, or that having clear doors would provide a clear line of sight for the bartender. In some establishments, the patios are on the roof.

The licensee submits that the inspector's suggestion of doormen seven days per week is just not reasonable. If it is not a busy night, there would be no reason for a doorman. The evidence from the other licensee was useful in trying to give an idea of the standard of what is normal and in operating a bar like this one. He

noted that servers patrol. Depending on the nature of the clientele and the location of the bar, licensees determine whether to install surveillance cameras. It is questionable whether a camera would have detected this problem.

The licensee noted that the liquor inspectors did not attempt to find the patrons who had been on the patio, they did not provide descriptions and the incident lasted a very short time. The licensee's staffing was adequate for the number of patrons – 5 staff for 50 patrons. The licensee has already made changes to the patio to solve this problem and a noise problem.

The licensee submitted, given those facts, it cannot be seriously suggested that the licensee did not exercise a high degree of diligence within the parameters of the *Ed Bulley* decision.

Reasons and Decision

For the reasons that follow, I find that the branch has not substantiated the alleged contravention.

On the appropriateness of the charging section, I do not agree with the licensee's interpretation. I note that section 36(2) (a) refers to gambling, but (b) refers to "any unlawful activities or conduct." The heading of the section may be misleading, but the body of the section is clear.

I find that the branch has not substantiated that the licensee permitted the conduct. This is a difficult evidentiary area. The fact is that patrons were smoking a substance which in all likelihood was marijuana. The licensee admits that patrons smoke marijuana both inside and outside the bar. The staff is instructed to remove anyone caught smoking. But, smoking a 'joint' takes very little time – the evidence was three minutes - and even when staff smell the substance, it takes some time to find the source.

The licensee made alterations to the patio following the October 2002 incidents. The licensee also met with the branch's regional manager who, according to the licensee, was content with the outcome of the licensee's action and their discussions. The branch did not present evidence to the contrary, such as any written advice from the branch about ways to improve the situation.

I accept the licensee's evidence that staff is given clear policy direction not to permit any controlled substances. I also accept that there will be instances when patrons have controlled substances. Not every instance is proof that the licensee permitted it or was not diligent in preventing it.

I think it goes too far to suggest that every establishment with a patio – which now is clearly the smoking area – needs also to have door security or constant surveillance. I think that puts too strong a burden on a licensee, particularly when there are not many patrons. In those instances, the regular staff should be sufficient to police conduct. Admittedly, not all illegal conduct will be caught. But, that is the case even when there is full time security. Most establishments are not able to police all patrons at all times. For example, a Karaoke cabaret that has separate rooms, obviously, does not have an employee in the room at all times. In my view, it would be inequitable to require establishments with patios to have full time security. In this case, I am satisfied that servers patrol the patio on a regular basis and that there is some ability to see patrons on the patio through the clear portions of the glass.

I am satisfied that this licensee has taken reasonable measure to ensure that controlled substances are not permitted. If the licensee detects an increase in the incidence of controlled substances, the degree of diligence required may be greater.

Given my conclusion, I have not found it necessary to address all of the licensee's submissions.

Order

I find that the branch has not substantiated that the licensee permitted unlawful conduct.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: December 9, 2003

cc: Vancouver Police Department, Liquor Coordinator

Liquor Control and Licensing Branch, Vancouver Office
Attention: Wendy Jones, A/Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter K. Jones, Advocate
