



**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 RSBC c. 267

Licensee: Haney Hospitality Ltd.
dba Haney Motor Hotel
22222 Lougheed Hwy.
Maple Ridge, BC V2X 2T2

APPEARANCES

For the Licensee: Dennis Coates, Q.C.
Michael Jahnke, Owner and
General Manager

For the Branch: Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

File No. EH03-116

Dates of Hearing: February 11 and 12, 2004

Place of Hearing: Surrey, B.C.

Date of Decision: May 13, 2004

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8

Telephone: 250 387-1254
Facsimile: 250 387-9184

Location:
Second Floor, 1019 Wharf Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

Introduction

Haney Hospitality Ltd. operates the Haney Motor Hotel ("the Hotel) with three liquor licences:

Tommy's Pub No. 017240,

Caddy Shack Cabaret No. 139071, and

Licensed Retail Store (LRS) No. 194234, the subject of this hearing.

The Hotel is located in an area of mixed commercial and residential. The LRS has been in operation since August 1996. As of July 30, 2003, the LRS moved to another larger location within the Hotel and the branch issued an amended licence and approved the updated floor plans. The LRS licence at all times has permitted operating hours from 9:00 A.M. to 11:00 P.M., seven days per week.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action (NOEA) dated August 13, 2003, the branch alleged that on July 5, 2003, the licensee contravened section 33 of the *Liquor Control and Licensing Act* by supplying liquor to a minor.

The prescribed penalties for this contravention are contained in *Liquor Control and Licensing Regulation*, Schedule 4, item 2. The ranges of penalty for a first contravention are four (4) to seven (7) day licence suspension and \$5,000 to \$7,000 monetary penalty.

The branch's recommended enforcement action is a seven (7) day licence suspension.

Compliance History

There is no record of prior contraventions, offences or enforcement actions ("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.

The following is chronology from the branch's file contained in Exhibit No. 1.

In 1996 the branch issued a warning letter concerning minors in the LRS. In 1996 the police issued a Licensed Premises Check (LPC) for cheap drinks and overcrowding in the Caddy Shack lounge. In 1998 the police issued a LPC for minors in "Tommy's cabaret." In 1999 the branch wrote a letter to the licensee about overcrowding, exotic dancers, and free drinks in the pub and the lounge. In 2001, the branch issued a Contravention Notice to Tommy's citing two (2) patrons without identification and two (2) patrons who were intoxicated. In February 2002, the branch issued a Contravention Notice to the Caddy Shack for "patron participation with exotic dancer." In March 2002, the branch issued a Contravention Notice to Tommy's cabaret for failing to verify proper identification.

On April 23, 2002, at the licensee's request, the branch's liquor inspector conducted a compliance meeting. The people attending for the licensee were the manager, two (2) bartenders, marketing manager, bar manager and head waitress.

In June, August, September 2002, and April 2003, the branch issued Contravention Notices for improper advertising. On April 28, 2003, there was another compliance meeting attended by the licensee's general manager. On May 23, 2003, the police issued a LPC for disorderly conduct in the parking lot at closing time.

The branch did not pursue enforcement action for any of the previous alleged contraventions.

Issues

1. Did the licensee contravene section 33 by selling liquor to a minor?
 - a. If yes, did the employee require and examine identification from the minor? Or
 - b. Has the licensee demonstrated due diligence in attempting to prevent the contravention?
2. If the licensee committed the contravention, is the recommended penalty appropriate?

Exhibits

Exhibit No. 1	Book of Documents, tabs 1 - 29
Exhibit No. 2	Parking lot diagram
Exhibit No. 3	Ticket for entrance to Tommy's
Exhibit No. 4	Staff schedule for October 27, 2003
Exhibit No. 5	Memo to door staff dated February 9, 2002
Exhibit No. 6	Security and doormen manual
Exhibit No. 7	Sample acknowledgement of employee having read manual
Exhibit No. 8	Doorman duties and responsibilities
Exhibit No. 9	Written statement by an employee/witness
Exhibit No. 10	Affidavit of owner/manager, dated January 22, 2004

Applicable Statutory Provisions

See Appendix A

Evidence

The branch witnesses were a police officer and a liquor inspector. The licensee's witnesses were the manager of Tommy's, the manager of the LRS, an employee of the LRS, the general manager/owner and a licensee of another establishment.

The police officer testified that at the time of this incident he had been the Garibaldi High School liaison officer for approximately three (3) years. He had concerns from students' comments about minors obtaining liquor from the Hotel so he undertook an inspection project. Due to time constraints, he was not able to begin the project until the school year ended.

His first inspection was on Saturday, July 5, 2003, at approximately 6:30 P.M. He was in an unmarked police van in the parking lot of the LRS within view of the doors. Within a couple of minutes of arriving, he saw a van he recognized as belonging to some students. He watched a young man ("the minor") come out of the LRS with a twenty-four (24) pack of beer, get in the van and the van drive off. He followed it out onto the Lougheed Highway and pulled it over.

The officer testified that all three (3) occupants were students at his high school and all three were minors. The minor was in the passenger seat with the case of beer between his feet. The only identify he produced was a Social Insurance Number. The officer ran a computer check on the minor, found he had been issued a driver's licence, and was satisfied he was who said he was. His date of birth was February 21, 1986, which made him seventeen (17) years old.

The officer testified, that the minor told him he had not been asked for identification at the LRS. The officer did not check his wallet or frisk him – he accepted his statement that he did not have other identification with him. He stated, that he believed he did not have grounds to search him for identification, and because he recognized them as students he was not concerned that they might be giving false names. Since he was not arresting anyone, he had no grounds to search.

The officer seized the case of beer and let the minors leave. The officer said that the detachment does not usually charge minors for possession.

The officer returned to the parking lot and radioed for another police vehicle to bring some Licensed Premises Check forms. He continued surveillance in the parking lot. He said that there was a steady flow of traffic and people through the LRS.

The officer recognized another young person leaving the LRS with a case of beer and getting into a vehicle. The officer used the emergency lights to pull the vehicle to a stop within the parking lot. The young man, who purchased the beer identified himself, said he was twenty (20) years old and did not have any identification with him. He also said his mother was an employee at the Hotel, he was known to the other staff, and he was not asked for identification when he purchased the beer. He was not able to say which female employee had sold him the beer. The officer ran his information through the computer and was satisfied he was who he said he was. The officer allowed them to leave.

The officer went into the LRS, was told the manager was not present, and spoke with the most senior employee. That employee indicated surprise at his suggestion that young people were being served without producing proper identification. She did not recall the young people from his descriptions.

The officer issued a Police Licensed Premises Check.

The officer testified that he has done inspections at Tommy's. His most recent was in January 2004. He described the crowd as being very young. He asked about twenty (20) people for identification and there were no problems. He has never found any minors during his inspections. He is aware that there is a lot of false identification circulating and he has seen some very sophisticated false identification.

The liquor inspector introduced documents in Exhibit No. 1 relating to the licensee's compliance history. Concerning this incident, she testified that she

initially wrote a Contravention Notice (CN) alleging one contravention of 'supply to minors (section 33)' and then she issued a second CN adding 'minors in premises (section 35)' and 'fail to check 2 pieces of ID (section 45(2)).' Because the branch considered the failure to check ID as part of the overall incident, only the one contravention was pursued in the NOEA.

After issuing the CNs she received a letter from the LRS manager enclosing copies of letters of reprimand signed by the employees on shift at the time of this incident (Exhibit No. 1, tab 29).

The liquor inspector recommended the seven (7) day suspension because there were two (2) infractions within one hour and she believed the higher penalty would impress upon the licensee how seriously the branch views these contraventions. The inspector did not base her recommended penalty on the police officer's report of comments by students.

The licensee's evidence

The manager of Tommy's produced a number of documents for Tommy's to illustrate the licensee's procedures to ensure that staff asks for two (2) pieces of identification. The staff schedule, Exhibit No. 4, is headed with "all patrons must have 2 pieces of ID. Please check everyone." The door staff memo, Exhibit No. 5, states that everyone must produce government issue ID. The security and doormen manual, Exhibit No. 6, has a section on minors which details acceptable identification and procedures. Exhibit No. 7 is an acknowledgement signed by an employee of understanding and agreeing with the rules. Exhibit No. 8 is further door security procedures, produced after the requirement for two (2) pieces of identification was legislated. There is a sign at Tommy's telling patrons they need three (3) pieces of photograph identification.

The manager testified that everyone now is required to produce identification. However, he also stated that if his best friend came without his identification, he would let him in. If a staff member or a relative is unable to produce identification to the door security, the manager will become involved and decide whether to let the person in.

The current manager of the liquor store testified. He started as manager in October 2003, replacing the manager who was employed in July 2003. Previously, he was employed at the Caddy Shack for four (4) years. He said that the staff at the LRS were in place prior to his employment and they had signed the acknowledgement of the house rules. He testified that he has regular staff meetings, that it is management policy that everyone who looks under 25 years old must show two (2) pieces of identification, and that the required signage for identification is posted.

An employee of the LRS testified. Her employment began at the LRS in January 1997. She also worked at a government liquor store for two (2) years. Through the government position, she was provided with training on dealing with minors, intoxicated patrons, etc. At the government store, the policy had been to require identification from anyone who appeared under 30 years old and she implemented that policy at the LRS.

She testified that on the evening of July 5, 2003, the LRS was very busy with a constant stream of customers. She was aware that the police were in the parking lot and that they were asking customers if they had been asked for identification. She testified that she was surprised by the police saying they had served a minor, because she thought they were being extra careful.

The employee also testified that she looked at the video surveillance tape for that evening, but was not able to see the transaction the officer was referring to. In her opinion, the minor must have 'slipped through' and possibly had fake

identification with him. She stated that they get as many as two (2) to three (3) customers with fake identification on a busy night. She also testified that they get a few minors trying to buy liquor every day.

The employee was familiar with the second young person, whose mother worked as a daytime manager at Tommy's. She testified that she has refused him service, even though she knows him. She did not recall serving him that evening.

Exhibit No. 9 is a statement the employee prepared on February 6, 2004, for the hearing; the manager typed it for her to sign. In it she did not mention the police in the parking lot. She testified that she did not know why she did not include that information. She also testified that she signed the discipline letter, although she did not believe that she had served a minor.

The other employee who was working on July 5, 2003, is no longer employed with the licensee.

A licensee from another establishment testified for the Hotel. He has been in the hospitality industry for 20 years including pubs, restaurants and liquor retail stores. He testified that his practice is to have staff meetings approximately every ten (10) days and he does one-on-one staff training. He acknowledged that false identification has become more realistic. He discussed policies and procedures from a management perspective and noted that the most a licensee can do is put them in place, educate the employees, provide supervision, and hope that employees comply.

The owner manager of the Hotel testified and produced an affidavit that he previously prepared for submission to the branch in January 2004. Attached to that are copies of the Haney Hotel Beer and Wine Store house rules, an employee acknowledgement of the rules dated October 23, 2002, notes from a

staff meeting on August 5, 2003, concerning the new LRS, and other related documents. He testified that he has meetings with the managers weekly and he occasionally attends their weekly staff meetings.

The owner/manager testified that house rules have been in effect for years, that they are updated and customized for each department (Tommy's, Caddy Shack and LRS), all employees have to sign the house rules and the copy is placed in their files. In December 2002, the new rules about requiring two (2) pieces of identification came into effect. He acknowledged that the house rules attached to his affidavit do not state the requirement for two (2) pieces of identification, but he stated that the required signs were posted. The house rules indicate the importance of checking identification for anyone who appears under the age of 25 and states that employees are responsible for the people they serve.

The owner/manager testified that he was very concerned about the July 5, 2003, incident and was involved in writing the discipline letters. He looked at the surveillance video, but couldn't tell who the minor was. He explained the video system was a four (4) second time lapse that recorded an image and then paused four (4) seconds before recording the next image. Since the move, the former manager has left and he has not been able to find the video. There is a new video system in the new store. He stated that in the old store, they did not use 'spotters' – customer decoys - to check up on the staff because there simply was not enough room.

He also stated that the employees keep an eye on the parking lot and if they see minors approaching adults to purchase liquor for them, they intervene and ask the minor to leave. He is aware of the sophistication of false identification and indicated that in a six (6) month period, the hotel staff have confiscated about 150 pieces of false identification.

Since this incident, the owner/manager has stressed to the staff that checking for identification and preventing minors from entering is the most important aspect of their jobs. An employee who allows a minor in will be dismissed.

Submissions

The licensee stressed that there is no evidence that the minor was not asked for identification, or that he did not produce false identification. The police officer did not search the minor to see if he had other identification with him. The licensee is at a considerable disadvantage not having the minor called to give testimony. An aspect of the branch's allegation is whether the licensee had been diligent in trying to prevent an incident like this, but the branch did not investigate that before issuing the NOEA. Neither the branch nor the police asked to see the video.

The licensee submitted, that it was unrealistic to suggest the minor had gone to the LRS with only a SIN card, and that the more credible suggestion is that young people don't mind losing their SIN cards, so that is what they keep on hand to show to the police. The licensee also submitted that the incident with the second young person is not relevant to this alleged contravention.

The licensee referred to a number of cases involving minors purchasing cigarettes. One test the courts have used to indicate whether a vendor has sufficient procedures in place to meet the onus of due diligence, is whether there are other preventative measures that could have been in place (*R. v. C.C. Eric James Management Ltd.*, 2000, BCPC 178). In that case, the court also held that failure by an employee to require identification is not conclusive, but that one must look at the actions by the employer to determine whether the employer has a defence of due diligence. In *R. v. 348095 B.C. Ltd.*, 2003 BCPC 58, the court found that due diligence had been made out based on the following factors:

- New employees were given oral instructions about the law;
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- 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.

The licensee submitted that it also met most of those factors through training, staff meetings, posted signs, house rules, and staff discipline.

Reasons and Decision

Procedural Issue

The licensee submitted that it was not appropriate to require the licensee to address both the substantive allegation and submissions on penalty at the same time, and asked that the hearing on penalty be adjourned until after I rendered my decision on penalty.

Counsel has made this type of application before, and I have declined. I indicated that my reasoning has not changed and I declined for those same reasons. Those reasons are set out in *Greater Vancouver Professional Driver's Association*, EH01-035/036, April 29, 2002:

I declined the application on the grounds that the branch's procedure does not prejudice the licensee. In this venue it is not necessary to obtain the decision on the substantive allegations first for reasons that follow. The branch provides ample advance notice of both the substantive allegations and the recommended penalty. The licensee knows "what offences he is answerable for at the time he is making his submission on the question of penalty." The range of penalty is set by *Regulation*. The licensee is able to lead evidence on, and speak to, penalty factors including the degree of culpability, the nature of the contraventions and mitigating circumstances or conduct.

Further, it is open to the licensee to make alternative submissions on penalty. For example, the licensee can argue there should be no penalty and give reasons. And the licensee can argue, in the alternative, if the adjudicator finds a penalty is appropriate, it should be other than what the branch has proposed – this is not affected by the branch's practice of proceeding directly to penalty submissions following the substantive case.

Substantive Issues

It is clear from the evidence that a minor purchased beer from the LRS. That is a contravention of section 33. The licensee defends against this allegation by saying that employees always ask for identification and that the licensee's policies and procedures demonstrate due diligence.

Section 33(5) defence

Under section 33(5), it is a defence to show that the employee required the minor to produce identification and examined and acted on the authenticity of the identification (section 33(5)). In *Liquor Control and Licensing Branch v. Lonsdale Hotel Inc.*, 2002 BCCA 436, the Court of Appeal considered an appeal by the branch from a decision of the Liquor Appeal Board (LAB). The LAB found that the licensee had established a defense to a contravention of section 35, based on the factors set out in section 33(5). The LAB and the Court of Appeal referred to an earlier Court of Appeal case, *Twilight Zone Cabaret v. Liquor Control and Licensing Branch* (1995), 5 B.C.L.R. (3rd) 280, in which the court stated:

In my opinion, there is no failure to comply with the requirements of s. 35 if the defendant is able to satisfy the tribunal of those two things, namely, that he required that the person produce identification and that he examined and acted on the authenticity of the identification.

Following that direction, the LAB stated that:

... the tribunal should ask whether it is satisfied that the licensee has required that a person produce identification and that the licensee has examined and acted on the authenticity of the identification. The court also says that the tribunal must be satisfied that the process of examining

and evaluating the identification is as full and complete as the *Act* requires.

In the *Lonsdale* case, the police officer detected false identification on two (2) minors while they were inside the establishment, was able to compare the similarity of the people to their false identifications, was able to identify them to the licensee staff, and issued violation tickets to the minors.

The significant weakness I see in the branch's evidence in this case, the Haney Hospitality case, is that there was no investigation by the officer at the time, such as taking the minor back to the store. When the officer told the employee of the problem, she had no way of identifying the minor. She testified that she watched the video, but was not able to determine which transaction was referred to. In the event that the young person had produced identification, that is a credible statement. Additionally, I have noted that the branch did not call the minor to testify at the hearing. That would have been of assistance in determining what actually happened.

I find it difficult to accept the police officer's assurance that the minor was telling the truth about not having other identification with him. The minor admitted to having committed an offence by going into the LRS and purchasing liquor and may have had reason to be untruthful about false identification. I also find it difficult to accept the inference that he thought his SIN would be acceptable identification, and the further inference that he did not have false identification on him.

Concerning the second young person, the only evidence is again that of the police officer reporting what he was told. However, in that case, I find it is probable that the young person was known to the staff, so it is not compelling evidence from which to conclude that the employees routinely did not ask for identification. The fact that he was sold liquor without producing identification does not assist me in assessing the probabilities about the incident with the

minor. I am troubled by his statement, that he could not remember which employee served him – apparently there were only two (2) and it was a matter of moments between his purchase and his discussion with the officer. Even if he did not remember which server, he might have recalled which till, or line-up, or might have remembered if he had gone back into the LRS. Although the police officer thought a contravention had occurred, he did not investigate further by taking the young man back into the LRS and that presents difficulty with the evidence.

I find weaknesses with the licensee's evidence as well. For example, although there was a surveillance video, it was not produced either before or during the hearing. The evidence of the employee on duty on July 5, 2003, lacked credibility in some respects. Although she testified that she knew the police were outside and, therefore, staff were being extra careful, that is not included in her written statement. Further, although she denied having served the minor, she signed the discipline letter and was not able to provide an explanation for why she signed it. The second employee also signed a discipline letter and since both of them could not have served the minor, I am not attaching great weight to those letters as evidence of the contravention.

The employee testified that she always asks for identification, but we do not know that the minor or the young man was served by her. The most the licensee can say is, our policies and procedures require employees to see proper identification, but we do not know what occurred in this instance because we could not identify the minor.

Finding

Once I determine that a minor was served, my next determination must be whether the licensee asked for and acted on proper identification. If the licensee did, then section 33 has not been contravened (*Twilight*).

The licensee's defence against this alleged contravention is hampered by the branch's lack of evidence. There was opportunity for the police officer to have completed a more thorough investigation by taking the minor back to the LRS or in some way identifying the minor to the staff. Similarly, the officer could have been more thorough in investigating the second incident. By not collecting more evidence or providing more evidence to the licensee at the time, the officer effectively prevented a conclusive determination of whether the licensee required the minor to produce identification. I am not prepared to find that the licensee did not request identification based on the police officer's testimony of what the minor told him. In light of the frailty of the officer's evidence, it may have been advisable for the branch to call the minor as a witness at the hearing.

I appreciate that the licensee might have been able to supply the evidence of the video and, therefore, it could be said that it was within the control of the licensee to produce evidence. However, I am not prepared to conclude that the video would have identified the transaction. Two (2) of the licensee's witnesses testified to having watched the video and not having been able to identify the transaction. The LRS employee testified that she always asks for identification.

The evidence for the branch is solely the officer's statement of what the minor told him. Based on the evidence before me, I find that the balance of probabilities favours the licensee, and I accept that the employee probably asked for and acted on proper identification, as per section 33(5).

Accordingly, I find that the branch has not demonstrated a contravention under section 33 of the *Act*.

Due Diligence

If I had determined that the licensee had not asked for identification, my next determination would be whether the licensee acted with due diligence. Given my finding, it is not necessary to consider the evidence and submissions on that point.

ORDER

The case against the licensee is dismissed.

Original signed by

DATE: May 13, 2004

M. G. Taylor
Enforcement Hearing Adjudicator

Appendix A

Liquor Control and Licensing Act

Supplying liquor to minors

- 33** (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,
 - (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
 - (c) in or at a place under his or her control, permit a minor to consume liquor.
- (2) Subsection (1) does not apply if liquor is
- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
 - (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
 - (c) given or otherwise supplied to a minor in accordance with the regulations.
- (3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly
- (a) has it in the actual possession or custody of another person, or
 - (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.
- (4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.
- (5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant
- (a) required that the person produce identification, and
 - (b) examined and acted on the authenticity of the identification.
- (6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.
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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.

Liquor Control and Licensing Regulation**Minors**

45 (1) For the purposes of section 33 (5) of the Act, identification includes the following:

- (a) a passport;
- (b) a driver's licence that displays a photograph and the date of birth of the holder;
- (c) an identification card, issued by a government agency, that displays a photograph and the date of birth of the holder.

(2) A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before

- (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or
- (b) selling or serving liquor to the person.

(3) The pieces of identification required under subsection (2) must include

- (a) one piece of the identification referred to in subsection (1), and
- (b) one other piece of identification that displays the person's name and at least one of the person's signature and picture.

(4) A licensee must not allow a minor to have liquor in his or her possession in the licensed establishment unless the licence issued for that establishment is a food primary licence or a liquor primary licence for a stadium and the minor is working as a server in the establishment.
