



**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:	Merlin's Cabaret Ltd. dba Boom Boom Room 1208 Wharf Street Victoria, BC V8W 3B9
Case:	EH06-019
For the Licensee:	Peter K. Jones
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 1, 2006
Place of Hearing:	Victoria
Date of Decision:	May 15, 2006

INTRODUCTION

The licensee owns and operates a nightclub in Victoria, B. C. The establishment is known as the Boom Boom Room. It holds Liquor Primary Licence No. 050182.

The Victoria Police Department, along with the Liquor Control and Licensing Branch (the branch) and the Victoria Bylaw Office initiated a project on the business days of September 30, 2005, and October 14, 2005, to determine if minors in the community were being served liquor in licensed establishments in the City of Victoria.

The project consisted of the use of a 17-year-old female, a 20-year-old female auxiliary police officer (handler), and a plain-clothes undercover police team. The 17-year-old and the 20-year-old attempted to gain entry to liquor primary establishments and sought to be served liquor, while the police team provided support.

Early in the morning of October 15, 2005, (the business day of October 14, 2005) the minor was allowed admission to the Boom Boom Room and was allegedly served liquor.

The branch issued a Notice of Enforcement Action (NOEA) for supplying liquor to a minor contrary to Section 33 of the *Liquor Control and Licensing Act* (the *Act*).

ALLEGED CONTRAVENTIONS

On October 14, 2005, the licensee allegedly contravened Section 33 of the *Act* by supplying liquor to a minor as set out in the NOEA, Contravention Notice No. B007045.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Supplying liquor to minors

- 33(1) A person must not
(a) sell, give or otherwise supply liquor to a minor

ISSUES

1. Did the Licensee supply liquor to a minor?
2. Did the Licensee exercise due diligence in its activities such as to excuse it from a finding of contravention?
3. If the contravention is proven, is a penalty appropriate in the circumstances, and if so, what is the appropriate penalty?

PRELIMINARY MATTERS

The branch requested that the identity of the minor not be disclosed publicly during these proceedings in the interest of her security.

I ruled that all reference to the minor would be by her initials only, both during the process and in all written documentation relating to the process.

The representative of the licensee submitted a written brief of preliminary submissions. It included applications for dismissal of the allegations on the grounds that:

There had been no alleged contravention of permitting a minor into the establishment, and therefore a reasonable assumption can be made that

the branch acknowledged that the establishment exercised due diligence in verifying the identification of the minor.

It is common knowledge, that ID is checked at the door to ensure that minors are denied entry. The interior lighting is subdued. To determine if a patron inside the cabaret appears to be under the age of 25 is not practical or realistic. Accordingly, the reliance is on the door staff to check identification.

The identification of the minor was verified, found to be acceptable, and she was allowed entry. Once inside the cabaret, no further check of identification was required before serving her liquor.

But for the identifying case header, the document is identical to the one submitted by the licensee in *Palomino's The Rock'n Horse Cabaret Ltd. dba Evolution*, EH06-018, April 27, 2006. I dismissed the application on the grounds stipulated in *Evolution, supra*, and in particular as stated in that case:

An enforcement hearing adjudicator has no jurisdiction to dismiss an allegation of contravention, or to terminate an enforcement process prior to or without a hearing. An enforcement hearing adjudicator is a delegate of the general manager for the purposes of conducting and adjudicating upon allegations of contravention, and some specific licensing functions. This jurisdiction is not inherent, but granted by the general manager. An enforcement hearing adjudicator has no authority to dismiss an allegation of contravention or to terminate an enforcement process without or prior to a *viva voce* hearing, or in some cases a hearing by written submissions. (*Evolution* page 6)

EXHIBITS

Exhibit No. 1	Branch's Book of Documents
Exhibit No. 2	Photocopy of four pieces of identification
Exhibit No. 3	Photocopy of the rear of driver's licence shown in Exhibit No. 2

EVIDENCE

The branch called the handler by conference call. She testified as follows:

- She was the handler of a minor attempting to get admission and service at liquor establishments.
 - The minor was identified as MK.
 - She was at the relevant time employed with the branch and the Victoria Police Department under contract to participate in this operation. The object was to inspect liquor establishments for compliance with entrance and service restrictions to minors.
 - Early in the morning hours of October 15, 2005, she arrived at the Boom Boom Room with MK. She was checked for ID at the door, paid the cover charge for her and MK, and they walked in.
 - She ordered a Corona beer.
 - She noted MK talking to a male patron and the bartender, and then she noted MK with a Corona beer.
 - She did not see who paid for MK's beer.
 - The bartender had a clear line of sight to MK.
 - The lighting outside the door was bright. The lighting inside the club was dim.
 - She identified her notes in Exhibit No. 1.
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The branch called MK. She testified as follows:

- Her birthday is ^[1], 1988. On October 15, 2005, she was 17-years-old.
- Her eyes are brown, she is 5'11" or 180 cm, and she was 170 lbs on October 15, 2005.
- She was working with the police and the handler on October 15, 2005.
- She was given false identification by the police and advised to attempt to gain admission to a number of clubs and order a beer in each. The ID featured a description of someone with totally different height, weight, eye and hair colour.
- She returned the ID at the end of each night of work.
- She identified Exhibit No. 1 and Exhibit No. 2 as copies of that ID.
- She attended at the Boom Boom Room on October 15, 2005, at approximately 1:20 a.m.
- The doorman asked her for two pieces of ID. She produced it.
- He looked at it and then let her into the club. He did not turn it over to look at the descriptors. He did not ask her about her appearance or age or ask her to produce a signature. He did not pass it to any other employees, or put it through a scanner.
- The handler paid for her cover charge.
- She was inside the Boom Boom Room for a short time when a male patron approached her and asked if he could buy her a drink. She said, yes.
- The man and she went to the bar.
- The bartender made eye contact with her.
- She said to the bartender, "Can I get a Corona?"
- "The bartender nodded to me and left and came back and gave me a Corona. He did not ask me to produce any identification. The man paid

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

for the Corona. The bartender looked at me and placed the drink on the counter right in front of me and I picked it up and left."

- She identified her notes in Exhibit No. 1.
- Outside the bar, the lighting was good where the ID was checked.
- She noticed a sign outside the club requiring two pieces of ID for entry.
- Inside the bar, the lighting was dim.
- She did not pay for the beer. She did not see the male patron pay, but she assumed that he did.

The branch called a sergeant of the Victoria Police Department (VPD). He testified as follows:

- He has been with the VPD for 26 years. His primary duties include management of issues with bars in Victoria. He was the creator of the project (with a minor and a handler) that was in operation on October 15, 2005.
- He recruited MK.
- He provided her with ID that looked nothing like her and had considerably different personal descriptors on the back of the driver's licence.
- The team attended the Boom Boom Room at approximately 1:20 a.m. on October 15, 2005, with the minor, the handler, and four under cover officers for support and protection.
- He identified the Occurrence Report and the Licensed Premise Check in Exhibit No. 1.

On cross-examination, the sergeant was asked about the history of the Boom Boom Room. He provided the following testimony:

- The history of the Boom Boom Room's cooperation with the VPD is not very good.
 - The Boom Boom Room has a reputation for open drug dealing.
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- "The security system is set up to protect them from us- it is difficult for us to work and gain intelligence."
- "There is a culture of non-compliance and they are very good at it."

The branch called the Compliance and Enforcement Officer (C & E officer). He testified as follows:

- He issued the relevant Contravention Notice.
 - The police Licence Premise Check gave rise to the issue.
 - He served the Contravention Notice on the management of the Boom Boom Room.
 - He interviewed employees of the Boom Boom Room after the alleged contravention with regard to training and procedures and was satisfied that there were insufficient measures in place to prevent the contravention, which had allegedly occurred. He determined also that there was no due diligence on the part of the licensee.
 - The employees indicated that there were procedures being put in place that were not there when the alleged contravention occurred.
 - He was advised some time afterward that new policies were put in place by the Boom Boom Room, and that the staff had "signed off" on them. This was "well after the fact."
 - A procedures manual from the licensee was provided to him on December 6, 2005.
 - He proceeded with enforcement action notwithstanding the new policies in place, because he believed the public safety was at risk.
 - Had the new policies been in place before the contravention was alleged, his opinion of the necessity of enforcement action would not necessarily have been different.
 - Though there have been no contraventions found against the Boom Boom Room, a large number of contraventions have been alleged.
 - Management of the club has been cooperative with him.
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- He identified all of the relevant documents in Exhibit No. 1.

The licensee called the manager of the Boom Boom Room. He testified as follows:

- He was present on the Friday night in question.
- The club was busy that night.
- He is involved in management and training of employees.
- All employees, but for the bus boys, have authority to check ID inside the club.
- On a typical Friday night, he wanders the floor, looks through the room, and ensures bus people pick up glassware, deals with inspectors and police, and does occasional ID checks.
- In a night, he would check 5-10 (later quoted to be 5-25) people for ID inside the club.
- He has found minors in the club before.
- "It is easy if you have a good piece of ID to get in. The fine should be hefty to the minor, to slow this down."
- There are signs outside and inside, indicating the requirement of two pieces of ID for entry.
- He has turned in lots of false ID to the police in the past. He disagrees vehemently with the sergeant's characterization of the management of the club. He often asks the police for help but does not get it.

The manager presented a bag of 150 pieces of ID, and indicated that the ID was confiscated from patrons in the past six weeks. He testified that he seized 40 of those personally from inside the club.

The manager read from correspondence of one of the bartenders who were on duty that night. He quoted the correspondence as follows:

If I think a patron is under 19, I ask for ID, but it is rare that I have to as we discuss this at staff meetings. It is in the manual and I was given tests. I know customers are screened in ID outside. It is rare that I have to ask for ID in the bar. One of my responsibilities is checking and asking for ID as customers can sit at the bar and order drinks.

The licensee called the general manager of the Boom Boom Room. He testified as follows:

- He has been involved with every bar in the City over the last 27 years.
 - He oversees the operation but leans toward business interests, such as ordering supplies and hiring.
 - He is involved in staff meetings and training.
 - The Boom Boom Room uses books and experts to train door staff.
 - The instructions are that doormen check for ID. The entrance is set up like a bank so that the patrons have to walk a maze so the doormen can check for intoxication, dress code, etc. They check ID before patrons are allowed in.
 - The staff manual has clear guidelines about how to check ID.
 - "MK looks like she would be of age. I would not be alerted to anything. The photo on the driver's licence, it is a reasonable facsimile, both young, white females, not Caucasian with Oriental ID. No alarm bells. If she had no ID, a manager would be called and he would make the call. I would not have checked her inside."
 - He has had positive interaction with the sergeant who testified to the contrary.
 - There are ten or more video cameras, which provide videotape of the activities, inside the club and at the door. The tapes are on seven-day loops.
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SUBMISSIONS

The Branch

The branch submitted that the evidence of the contravention was not challenged. There was no evidence from the bartender contradicting the evidence of MK that she was served liquor in the bar. There was no explanation for this lack of evidence and an adverse inference should be drawn.

Diligence at the door is not enough as confirmed in *Evolution, supra*. There was no evidence that any effort was made to check for ID at the bar, where the minor ordered liquor.

In *Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch* (2006 BCSC 417), the court held that assessing age is a subjective exercise, but that does not afford a defence to a licensee and is not suggestive of due diligence. A licensee must use extreme caution and in the absence of something approaching absolute certainty, ID should be asked for in every single case.

The Licensee

The licensee submitted that common business practices in the hospitality industry require only that reasonable measures be taken to comply with the terms and conditions of the licence. There was no intent to supply liquor to a minor.

The licensee submitted that, "There was no operating mind on the part of the licensee to knowingly or willingly supply alcohol to a minor."

Due diligence was exercised with the ID check at the front door of the club. The bartender checks for ID as well if he considers it necessary, as does the wait staff and management.

There is an onus upon a minor attempting to gain access to the club not to break the law. The onus should not be on the licensee.

A minimum suspension would produce a \$50,000 loss of income to the licensee and result in staff being laid off for that four-day period. Therefore, as the consequences are severe, the balance of probabilities should therefore be very high in making a determination of this nature.

Sandman, supra, does not apply, as there was absolute certainty in the mind of the bartender that MK was over the age of 25.

In order to be charged with serving a minor, there must be three ingredients of a contract: offer, acceptance and consideration. Someone else paid for the drink and therefore, the contract was not effective, as the consideration was not paid by MK.

The licensee has an exemplary record. Due diligence was exercised at the door, and there is no past enforcement record or compliance history.

New policies were put in place after the allegations and the licensee should be allowed to work with voluntary compliance.

A \$5,000 penalty should be considered as an alternative and more appropriate penalty in the event that a finding of contravention is made, and a penalty is determined to be appropriate.

ANALYSIS AND DECISION

This is the third decision resulting from the same fact situation involving the police use of MK as a minor, equipped with a handler for the purposes of gaining entry and service of liquor in a licensed establishment. The decision in *Evolution, supra*, was available to the licensee prior to the hearing. The decision in *Carlton Cabaret Ltd. dba Carlton Club Cabaret* May 3, 2006 (EH06-023) had not yet been published at the time of the hearing.

The facts were substantially the same in all three cases. The minor, the handler, the C & E officer, and the police sergeant, were the same individuals in each case. The testimony of each was also significantly the same in each case, but for the *minutiae* of time and place. The various licensees also shared the same representative, who unfortunately utilized predominantly the same arguments.

I accept the evidence of MK, the handler, the sergeant, and the C & E officer and prefer it to the evidence of the manager and general manager of the licensee where inconsistent therewith.

In deciding this matter, I lean heavily on the analysis and decision in *Evolution, supra*, and adopt the following conclusions from there as applicable to this case (All quotes are from *Evolution, supra*, unless otherwise indicated):

The Contravention

The alleged contravention is one of supplying liquor to a minor. The evidence that MK was at all relevant times a minor and that the bartender supplied her with liquor in the licensed establishment during the normal course of business were not disputed. I find that the contravention has been proven. (*Evolution*, page 14)

The bartender was the only one in a position to contradict the evidence of MK that she was served liquor, and yet he was not called to testify. The licensee provided no answer as to why he was not called. The general manager of the licensee read-in a statement of the bartender, but that statement was not tendered as an exhibit. I find this evidence unreliable and accord it no value.

Much evidence and argument was submitted relating to the identification checked and used to gain entry at the front door of the establishment. While this might speak to issues relating to a defence of due diligence, it does not address the components of the contravention on the facts. (*Evolution*, page 14)

The evidence indicated that it is easier to determine if a person looks under the age of 25 outside the door where the lighting is better than inside at the bar. I agree with this. Ease, however, is not the test under the law. The bartender, as an employee of the licensee, has a continuing obligation to refuse service to a minor and it is at the time of the request for service, wholly his obligation to satisfy that obligation.

It is contrary to the *Act* to provide liquor to a minor. The fact that an establishment has allowed a minor entry does not affect in any way the establishment's continuing obligation to refuse to serve a minor, or to check for identification as prescribed, if the individual appears to be under the age of 25.

The bartender had an obligation to ask for prescribed identification if the individual appeared under the age of 25. I find on the evidence that MK did appear under the age of 25.

The bartender had an obligation to refuse service to a minor. I find that the bartender did supply liquor to a minor.

The Licensee submitted that it is unreasonable to expect staff to determine "in dim lighting that someone appears under the age of 25". The Licensee is the master of his domain. The law requires precisely this determination. If the discharge of the Licensee's legal duty is inhibited by the Licensee's choice of lighting, then the Licensee will be held accountable for the results. (*Evolution*, page 15)

I note that no surveillance tapes were tendered as evidence.

Due Diligence

Due diligence is a complete defence to the allegations if established on the evidence. I find that there is little credible evidence of any diligence on the part of the Licensee. The defence fails.

The representative of the Licensee submitted that due diligence was exhibited by the doorman in evaluating the false ID in the possession of the minor. I have already decided that the events at the door are not the events in issue in this hearing. Although the central issue occurs at the bar, the Licensee's argument might be interpreted as a submission that the doorman's actions are indicative of the Licensee's due diligence in refusing entry to minors. The Licensee argued that eleven of the twelve licensed establishments allowed the minor entry after producing false identification. He submitted that those numbers suggest that it was reasonable to allow her entry to the bar. Again, I disagree. The doorman did not turn over the false driver's license to review the physical descriptors listed thereon. He did not question her about her hair colour. He did not ask her to

produce a signature. He did not quiz her about her birth date or birthplace. I find that even the doorman did not exercise due diligence or demonstrate appropriate training or experience in the discharge of his duties. (*Evolution*, pages 16-17)

Further, the manager testified that he had collected 40 pieces of false ID from inside the club in six weeks. The club is open seven days per week. At his estimated rate of random checking inside the club, that equates to almost one minor caught inside the club per day from among the small number of persons checked.

I find this confirms an ineffective door-check system. This finding is supported by the testimony of the manager who said, "*The photo on the driver's licence, it is a reasonable facsimile, both young white females, not Caucasian with Oriental ID. No alarm bells.*"

I find that the bartender served the minor without consideration of her age or identity. I find that she looked younger than 25 years old and as such, the bartender was obligated to check identification as prescribed by the Regulation. She was 17 years of age, and carrying ID that did not match her observable physical characteristics. She was not asked for ID by the bartender and she was provided with liquor. (*Evolution*, page 17)

The licensee further submitted that common business practices in the hospitality industry require only that reasonable measures be taken to comply with the terms and conditions of the licence.

No evidence was tendered to indicate common practices in the hospitality industry, and no law was argued to suggest that less than the letter of the law is required to comply with the terms of the licence. This submission fails.

The licensee submitted: "There was no operating mind on the part of the licensee to knowingly or willingly supply alcohol to a minor."

No legal argument was made that supports a proposition that "knowingly or willingly" is a component of the contravention. I find that it is not, and accordingly this submission fails.

The licensee submitted that there is an onus upon a minor attempting to gain access to the club not to break the law, and that the onus should not be on the licensee.

No legal argument was put forth to support the relevance of this argument. The licensee has a positive obligation to refuse service to a minor. This submission fails.

The licensee submitted that a minimum suspension would produce a \$50,000 loss of income to the licensee and result in staff being laid off for that four-day period. Therefore, as the consequences are severe, the balance of probabilities should therefore be very high in making a determination of this nature.

No evidence of projected financial loss or staff consequences was presented in the hearing. Further, the submission that a consequential change in the burden of proof would occur as a result of the possible consequences is wrong in law:

It is long settled law that the ability of the object of the penalty to bear the burden of the penalty is not proper subject matter for consideration. The issuance of a penalty should always be

accompanied by the utmost solemnity and care. To distinguish the level of effort or consideration to be devoted to the award by virtue of the magnitude of the impact of the penalty would be to place the process into disrepute. (*Evolution*, pages 19-20)

The licensee submitted that *Sandman, supra*, does not apply, as there was absolute certainty in the mind of the bartender that MK was over the age of 25.

This was not borne out by the evidence. This submission fails.

The licensee submitted that in order to be charged with serving a minor, there must be three ingredients of a contract: offer, acceptance and consideration. Someone else paid for the drink and therefore the contract was not effective, as the consideration was not paid by MK.

This is wrong in law. There is no applicability of contract law to the alleged contravention:

There is no requirement for a contract or any of the components of a contract to be established to find a contravention. I find that the provision of liquor to a minor, whether by sale, gift, or simply making the liquor available to the minor is sufficient to establish the required *actus* of the contravention. (*Carlton Club*, pages 16-17)

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 have the discretion to order one or more of the following enforcement actions:

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

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*.

The range of penalty for a first contravention of Section 33 of the *Act* in accordance with Item 2 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000. The branch has recommended the minimum suspension of four (4) days.

The licensee submitted that it has an exemplary record, and there is no enforcement record or compliance history. I find that the licensee does not have an exemplary record. I find that the evidence of the sergeant was preferable to that of the manager and general manager of the licensee with respect to the licensee's history and approach to liquor law compliance.

I accepted evidence from the sergeant on cross-examination by the representative of the licensee that I would not have accepted as relevant on examination-in-chief. The representative of the licensee insisted upon this line of questioning even when offered an invitation to desist, and accordingly I allowed the evidence in order to afford the licensee every opportunity to mount a defence of its own design.

Further, a licensee's compliance history including allegations, not later substantiated, is by legislative scheme permitted for the purposes of penalty consideration.

The licensee submitted that new policies were put in place after the allegations, and therefore the licensee should be allowed to work with voluntary compliance. I do not accept on the evidence that the policies implemented by the licensee are adequate or taken seriously enough by the management of the licensee to effect a change in the licensee's approach to compliance.

I find that a penalty is warranted in the circumstances of this case. I accept that providing liquor to a minor is an activity that endangers the safety and security of the public in general, and minors in particular.

The licensee submitted that a \$5,000 penalty should be considered as an alternative and more appropriate penalty to suspension. I disagree. In light of all of the evidence, I find that a five-day suspension is appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 050182 for a period of five (5) days, to commence as of the close of business on Thursday, June 8, 2006, 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 the Liquor Licence No. 050182, be held by the branch or the Victoria Police Department from the close of business on Thursday June 8, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

[Original Signed]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 15, 2006

cc: Victoria Police Department

Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Vancouver Island/Okanagan/Kootenay

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