



**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:	McGuire Lake Inn Inc. 551 Trans Canada Hwy NE Salmon Arm, BC V1E 4P1
Case:	EH06-130
For the Licensee	Rory Jarvis
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	Feb 28, 2007
Place of Hearing	Salmon Arm, BC
Date of Decision	March 16, 2007

INTRODUCTION

The licensee owns a licensed establishment in Salmon Arm. The establishment holds Liquor Primary Licence No.120631 and is known as "Jiggers Pub". The licence permits liquor to be served from 11:00 a.m. to 2:00 a.m. Monday through Saturday and 11:00 a.m. to midnight Sunday.

The corporate licensee was represented at the hearing by the bar manager. Prior to the manager's appearance, the licensee provided the branch with correspondence authorizing the manager to speak on behalf of the licensee.

In the early morning of June 15, 2006, a member of the Salmon Arm RCMP conducted a Licensed Premise Check (LPC) in the establishment. The inspection revealed a patron in the establishment who was allegedly a minor.

As a result of the inspection, the branch issued Notice of Enforcement Action (NOEA) #EH06-130 to the licensee.

ALLEGED CONTRAVENTIONS

The branch alleged that June 15, 2006, the licensee contravened s. 35 of the *Act* by allowing minors in the premises.

RELEVANT STATUTORY PROVISIONS

- 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.

ISSUES

1. Did the licensee contravene section 35 of the *Act*?
2. Is a penalty warranted and if so, what is the appropriate penalty to be imposed?

PRELIMINARY MATTERS

1. The branch intended to call the patron who was allegedly a minor (“minor”) as a witness. The licensee objected and sought an order that the minor be prohibited from testifying on the grounds that her testimony would be unreasonably prejudicial.
2. The branch intended to call the minor's friend (“friend”) as a witness by teleconference. The friend was allegedly present with the minor at all relevant times. The licensee objected and sought an order that the friend be prohibited from testifying on the grounds that her testimony would be unreasonably prejudicial.

The issue is whether the minor or the friend should be allowed to testify in light of late notice provided to the licensee that the branch wished to call them.

The relevant history is as follows:

There was a pre-hearing conference call on December 13, 2006. There is a difference of opinion among the advocate and the licensee as to whether or not the minor was referred to in the list of possible witnesses during that conference. The licensee is certain that the minor was not mentioned. The advocate has no

specific recollection of mentioning of the minor, but stated unequivocally that it is his practice to include any minor in cases of this nature - notwithstanding that he has not usually contacted the minor by this early stage of the proceedings.

I find both the licensee and the advocate to be completely credible in this regard and I have no doubt that each believes what he has stated to be true. There is no way of determining whether the licensee missed the reference during the conference, or if the advocate neglected to do what he customarily does.

The branch followed up the conference with a confirmation letter that included a list of potential witnesses to be called in the forthcoming hearing. That list did not include the minor.

The letter includes the following phrase:

“Failure... to identify witnesses within the time frame set may result in the evidence being ruled inadmissible by the adjudicator”.

On February 14, 2007, the branch provided disclosure to the licensee. That disclosure did not include reference to the minor.

The licensee then sought and obtained legal counsel. As a result of that counsel, the licensee determined that he was prepared to represent himself at the hearing.

On February 22, 2007, the advocate, in preparing for the hearing, noticed that the minor was not included in the disclosure sent to the licensee. As he had fully intended to call the minor and had spoken with her in that regard, he contacted the branch registrar immediately.

The branch then sent a notice by facsimile that it intended to call the minor.

The licensee claims that he had no opportunity to discuss the matter with the minor on the night of the allegation, and was not presented with that opportunity by police. The manager did not have an opportunity to talk to the minor prior to the hearing, as he was unaware that she was to be called as a witness until February 22, 2007.

The licensee sought out further legal counsel. Its counsel was unavailable due to a previous commitment (trial) but advised the licensee that it was not fair that the licensee be unable to prepare to defend the case against it.

The branch advocate provided phone numbers for the friend to the licensee for purposes of its access to her, on or after February 22, 2007.

The licensee tried unsuccessfully to reach the friend.

Prior to the hearing, the licensee contacted the branch and sought an adjournment of the hearing in order to obtain legal counsel on the matter of cross-examination of the minor, and otherwise to prepare for the minor's testimony. The licensee indicated that in the alternative it would object to the admissibility of the evidence of the minor, at the commencement of the hearing.

The branch registrar denied the adjournment application.

I find that the licensee was not provided with sufficient notice of the branch's intention to call the minor, to prepare itself for cross-examination or obtain legal counsel in that regard.

The notice sent to the licensee indicates that failure to provide notice or disclosure by the appropriate dates may result in evidence being ruled inadmissible. That provision is permissive rather than directive, and I have considered the implications of that distinction with respect to the overriding

jurisdiction of the general manager of the branch. I find it appropriate, however, to rule the evidence of the minor inadmissible in this instance. I find that to allow it would prejudice the licensee in that it would fail to allow sufficient opportunity for the licensee to mount a defence to that anticipated evidence.

With respect to the issue of the friend, the licensee submitted that by teleconference and without preparation, there would be no way of assuring that the friend was indeed the individual present on the night in question. The licensee indicated that the manager would recognize the face of the friend, but this confirmation of identity would not be available to teleconference.

In light of the ruling that the minor will not testify, I find the argument of the licensee to be sensible. Absent someone to confirm the identity of the friend, I find her identity would present a critical impediment to the acceptance of her testimony. Therefore, I find that the friend will be prohibited from testifying in this hearing.

I ordered that the hearing proceed without these witnesses.

3. The branch sought an adjournment of the hearing in light of my ruling on the branch witnesses.

The branch submitted that under the circumstances, it would be appropriate to allow the licensee time to contact the witnesses and prepare for the hearing.

The licensee submitted that it had sought an adjournment and was denied. In the ruling the registrar advised that the hearing would not now be adjourned for any reason. The licensee attended at the stipulated time and place and is ready to proceed. The licensee argued that it would be unfair to provide an adjournment to the branch at this time. Further, the licensee submitted that its

liquor licence is soon to be transferred, and this process would be further delayed by an adjournment.

It is clear to me that the branch wants to have the minor testify. The licensee sought an adjournment to allow precisely this to occur. The branch denied the licensee's application. I have found that to allow the witnesses to testify would be prejudicial to the licensee.

In light of that decision, the branch now wishes to adjourn for the same purpose for which the licensee originally sought the adjournment.

I find that the branch knew of the possibility of this outcome (a finding that the witnesses will not be permitted to testify) when they refused the adjournment application and invited the licensee to make further application at the hearing.

The branch and the licensee have each gone to considerable lengths to proceed to this hearing. I find the hearing will proceed as scheduled.

EXHIBITS

Exhibit No.1: Branch's book of documents.

EVIDENCE

The branch called a constable of the RCMP. He testified as follows:

- He has been a member of the RCMP in Salmon Arm for three years.
- Part of his regular duties is to do LPCs of bars in Salmon Arm.
- He has conducted more than 100 LPCs. Many of which were in Jiggers or Live Wire.
- He has done more than fifty LPCs in Jiggers.

- On June 15, 2006, he attended Jiggers and found a minor in the establishment.
- On that occasion, he entered through the main doors.
- There was no door staff on duty when he entered.
- He walked the length of the bar and stood by the dishwashing station, observing the patrons.
- The bar was not particularly busy.
- He noticed two female patrons by the washroom door. They looked to be under age. They appeared to be 16 or 17 years old.
- There was no staff near the female patrons.
- He approached the females and asked for identification.
- He asked them to step outside because of the noise.
- There was no staff at the door when he exited the bar.
- He recognized one of the girls and knew her to be 16 years old. She (the "minor") looks her age.
- The female he did not know produced ID and he dismissed her.
- The minor did not produce ID.
- The minor told the constable her name. It was the name he expected to hear.
- She told him she was 16 years old.
- He took no further action to identify her or her date of birth because he was familiar with her, and had confirmed her identification and birth date in the past. He was certain of her identity and that she was a minor.
- The minor and he were on good terms. "She understood my role." The minor accompanied him to the police cruiser where he gave her a ticket for being under-age in a bar.
- She confirmed her birth date for the violation ticket.
- The minor confirmed that she had been served a "Greyhound" mixed drink in the bar.
- The minor advised that she had not been asked for ID by the bar staff.

- After releasing the minor to his partner, the constable re-entered the bar through the main doors.
- There was no door staff when he entered.
- Inside the bar he approached the bar manager and informed the manager that a minor was found in the bar.
- The bar manager said that the minor had produced false ID.
- The bar manager confirmed that the minor had been served a drink after producing ID at the door.
- The bar manager asked to have an opportunity to confront the minor. The constable advised that she had been ticketed and released.
- The constable had arrested the minor previously, had met with the minor's mother as a result of that arrest, and had found her in a bar without identification on another occasion in the past.

The constable identified the documents and notes in Exhibit No.1 with which he was familiar.

The licensee called the bartender. She testified as follows:

- She has been employed at Jiggers for 13 years.
- She has never been "written up" or had a problem with the police.
- Jiggers is the busiest bar in Salmon Arm.
- All of the patrons of the bar look under-age to her.
- She has been instructed to ask for ID of anyone who looks to be under 25 years old.
- Once she caught a patron with a fake ID.
- She heard that the ID that someone presented in the bar once was fake.
- She has been told that if she takes someone's ID in good faith believing it to be correct, she is not responsible beyond that.
- If the ID looks to be in order, she takes it to be "true".

- The bar manager asked if she had checked the ID of the two girls. She said she did.
- One of the girls, not the minor - ordered drinks and provided a debit card. The bartender checked her ID.
- The minor came back in after the police escorted her out.
- The manager checked the minor's ID when she came back in.
- She recognized the minor and ran to tell the bar manager that she had been removed by the police.
- The minor ran out of the bar after that.
- The minor's friend came back in. The friend said the minor had fake ID.
- The minor gave two pieces of fake ID. The bartender accepted them at face value. The minor looked young, but not more so than the other patrons.
- She saw the police come in, but not the removal of the minor.
- She knew the minor was removed because another employee told her so.
- She usually only checks ID for people at the bar. The servers check patrons on the floor.
- She is not sure if the two females ordered drinks at the bar.
- She can't see anything beyond the bar. It was a busy night.
- She was not sure the female who came back in was the same female that the police removed.
- If she is in the washroom, she'll ask for ID in the washroom. She'll ask for ID anywhere in the bar.
- There were one or two doormen on duty at the door that night.
- She saw doormen on duty when the police officer came in.
- She has never confiscated ID, but a waitress did once, and the manager did so once.
- She has kicked hundreds of patrons out of the bar for being under-age.

- "Sometimes the under-age people come in when the doorman is in the washroom or something gets broken and the doorman is taking care of that."
- "I don't know how many people were in the bar that night. I can't see over the kids at the bar. I can only see what is right in front of me."
- If a doorman goes to the washroom or something gets broken another doorman will back him up.
- "We usually hire a doorman on busy nights and Wednesdays and weekends"
- "A person can walk into any bar in town because there is no door staff at any bar in town. And nobody asks for ID."

The licensee called the bar manager. He testified as follows:

- He did not know about the incident until the police wrote up the LPC ticket.
- He questioned the staff. They advised him that "they checked everyone for ID."
- He did not tell the police constable that the minor presented false ID.
- The bartender was very busy.
- He checked the ID of the female that the police officer returned to the bar with. He is not sure that was the minor.

SUBMISSIONS

The licensee submitted:

- For 10 years, the bar has been the busiest in Salmon Arm and the liquor inspector is very happy with them.
- The police have done many LPCs and not found much.
- The bar is one of the only places in town that employs doormen.

- The bartender was an experienced employee. She is honest and has a respectable reputation in the community. The minor has a reputation for lying, and her friend admitted that the minor used fake ID.
- "We were not to blame at all. We did the best we could to ask for ID."

ANALYSIS AND DECISION

I accept the evidence of the RCMP constable. I find that the patron described as the minor was indeed a minor at the time of the LPC. I find that the RCMP constable did find the minor in the establishment. Therefore, the contravention has been proven.

The defence of due diligence is a complete defence to the contravention if I find on the balance of probabilities that the licensee did all that it could reasonably have done to prevent the contravention from occurring.

I find that the licensee has not demonstrated any credible evidence of due diligence.

The RCMP constable walked through the entrance three times without seeing an employee of the licensee posted at the door.

The bartender provided contradictory evidence regarding her knowledge of the identity of the minor, whether she checked the minor for identification, whether the minor was indeed at the bar, and whether she could or would check for ID for a patron who was not in front of her at the bar. The bartender also was inconsistent in her testimony regarding whether a patron could walk into the bar when the doorman was in the washroom, or if there is a backup staff member tending the door when the doorman absents himself from his post.

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 license or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

For the contravention relating to June 15, 2006, the branch recommended a two (2) day suspension.

The range of penalty for a first contravention of section 35 of the *Act* in accordance with Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000-\$3,000.

The exclusion of minors from liquor primary establishments is one of the fundamental purposes of the *Act*. I find that imposition of a penalty is appropriate under the circumstances.

I find that a three (3) day suspension of the liquor primary license is supported by the history of this licensee. Although this is the first contravention of this type noted in the past 12 months, an earlier contravention of this nature was alleged to have occurred in 2004. A compliance meeting was held with the licensee regarding minors gaining entry to the establishment following that allegation.

A suspension will re-enforce the importance of having door staff on duty at the door at all times during operating hours to ensure an identification check is conducted of those patrons appearing to be under age. The recommended penalty falls within the range as set out in Schedule 4 of the *Regulations*, (item 3) for a first contravention.

I find that a three (3) day suspension is appropriate for this contravention.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 120631 for a period of three (3) days to commence at the close of business on Thursday April 12, 2007, 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 *Regulations*).

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 16, 2007

cc: R.C.M.Police Salmon Arm Detachment

Liquor Control and Licensing Branch, Victoria Headquarters
Attn: Ron Rodrigue, Regional Manager

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