



**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:	HJH Holdings Ltd. One 20 Pub 8037 – 120 th Street Delta, BC V4C 6P7
Case Number:	EH07-097
For the Licensee:	Avram Shaff
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	K. McIsaac
Date of Hearing:	October 23, 2007
Place of Hearing:	Surrey, BC
Date of Decision:	December 14, 2007

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, HJH Holdings Ltd., operates One 20 Pub ("Pub") under Liquor Primary Licence No. 124091. The Pub, located in Delta, BC, is licensed to sell liquor Monday to Thursday from 11:00 a.m. to 1:00 a.m., Friday and Saturday from 11:00 a.m. to 2:00 a.m. and Sunday from 11:00 a.m. to midnight. It has a licensed capacity of 251 and the licence is subject to terms and conditions that include the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTION

By Notice of Enforcement Action ("NOEA") dated July 5, 2007, the branch alleged that on June 22, 2007, the licensee contravened section 35 of the *Liquor Control and Licensing Act*, ("Act") by allowing a minor on the premises.

The branch recommends a four-day suspension of the liquor licence. This is the minimum penalty for a first contravention of this type as set out in Schedule 4, Item 3, of the *Liquor Control and Licensing Regulation* ("Regulation").

RELEVANT STATUTORY PROVISIONS

Section 35 of the *Act* states:

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. If so, what is the appropriate penalty, if any?

EXHIBITS

- Exhibit No. 1: Branch's book of documents
Exhibit No. 2: Copy of driver's licence of R. L.

EVIDENCE

At the hearing, I heard the testimony of the minor involved in the incident, the liquor inspector and the licensee's representative, the general manager of One 20 Pub. The following are the facts as I have determined:

On the evening of June 22, 2006, the minor entered One 20 Pub with four friends and proceeded to a table where they were served alcohol. The minor did not order alcohol, nor was he served alcohol, but was handed a drink by one of his friends. At the hearing he acknowledged that his drink was alcoholic and said he thought it was a rum and coke. After some time, the youths, observing a friend entering the premises, moved to the door to greet him.

The minor estimated his arrival at the pub at approximately 10 p.m. I find he likely arrived sometime before 10 p.m. as he and his friends entered the premises without being stopped or asked for ID by the doormen who started their shift at 10 p.m.

At approximately 10:22 p.m., the liquor inspector entered the establishment for a routine inspection. I accept his account of the incident as reliable. He has been a liquor inspector for many years, is familiar with the establishment and he made notes during and shortly after the incident. The general manager of the pub also acknowledged and confirmed that the inspector's account of the circumstances that evening was accurate.

According to the liquor inspector, he observed a staff member at the door checking ID of patrons entering the pub. He then walked through the premises to determine the condition of the patrons and their ages. The inspector estimated there were from 100 to 125 patrons in the pub but did not count them as the pub was well below its licensed capacity. After approximately 10 minutes he observed the group of five youths near the entrance and in particular, two youths who appeared to be underage. As he was assessing the group of youths, he overheard them making fun of some patrons who were entering and joking about having their ID checked. At this time, the general manager approached the liquor inspector and introduced himself. The liquor inspector informed the manager that he wanted to check the ID of the two youths he had been observing.

The first youth's driver's licence confirmed he was not a minor. When the second youth presented his driver's licence, the inspector asked him to remove the licence from his wallet. As the youth handed it to him, the licence felt thicker than usual. A second document was underneath and, when the youth was reluctant to let go, the liquor inspector advised him that he wanted to see both documents. The second document was also a driver's licence.

The first driver's licence belonged to a person born in 1986 and the photo did not look like the minor. The minor admitted to the liquor inspector that it was not his licence and that it belonged to a friend. The second licence belonged to a person born in 1989 and accurately depicted the minor. The minor acknowledged that it was his proper licence and that he was 17 years old. The liquor inspector then directed the minor and the general manager to a booth to discuss the incident. He also interviewed the doorman. Before he left, the liquor inspector issued a contravention notice.

There was some dispute as to whether the minor ordered and was served nachos. The minor testified that he was served nachos and paid cash. The general manager submitted the minor was not served nachos and had no contact with any staff. I find on a balance of probabilities the minor was served nachos. It was a busy evening and the general manager was occupied looking after three sections of the establishment including the restaurant and liquor store and was not in the pub area on a continual basis to observe the actions of the servers. I also find the manager's assertion self-serving and not supported by evidence from the server or any staff person.

Despite having lied at the time of the incident to the manager and liquor inspector about being checked for ID, I found the minor's evidence credible. At the hearing he admitted he had not told the truth and admitted he had not been checked for ID. The minor said he was now telling the truth because he was under oath.

Although I found the general manager's evidence self-serving at times, I accept his evidence regarding his position as general manager. The manager's employment at One 20 Pub began approximately one month before the incident. He manages the pub, liquor store and restaurant and is responsible for making sure there are adequate staff and supplies. He says it has been busier lately and tries to staff adequately but it is unpredictable. From 9 p.m. he runs food, checks

liquor and food supplies, washes dishes and said he has even prepared an order of fries. When he started his employment, the general manager implemented several changes in the pub such as employing doormen to check ID, keeping the lights turned up longer so ID is more visible and changing the music from heavy hip hop to more enjoyable music. He says that although sales are down the establishment has improved. The changes in lighting and music have reduced fighting and have attracted fewer underage patrons.

The general manager testified that the staff have taken the Serving it Right course and are trained to ID everyone. There are signs regarding ID posted on the back wall, near the staff schedule. The manager said that before 10 p.m., when the doormen begin their shift, the bartender or server would ask patrons for ID if they are served. If a person does not order food or drink the staff may not assess them or ask for ID, especially if it is busy as on the night of the incident.

The manager informed the liquor inspector that he intended to provide flashlights and mechanical counters for the doormen. By the time of the hearing however, he had not provided flashlights because the lighting was better and the doormen no longer needed them. Further, he had not introduced mechanical counters because the establishment was always well below capacity.

ANALYSIS AND DECISION

The licensee does not dispute that the minor was in the establishment. However, the licensee submits it did not contravene section 35 of the *Act* because the minor was not “permitted” to enter or to be on the premises. He says the minor was not “permitted” because he did not order food or drink or have any contact with staff. As he had no contact with staff, he would not be assessed or asked for ID. In fact, he says, the minor snuck in, avoided staff and was being shielded

by the group of youths. The general manager submits it would be unfair for the premises to be shut down because the minor avoided staff.

As I have already concluded that the minor was served nachos, the general manager's reasoning cannot apply and even if the minor was not served, I do not accept his reasoning.

The meaning of the word "permit" in section 36(2) of the *Act*, was discussed by the previous Liquor Appeal Board in *Ed Bulley Ventures Ltd. (c.o.b. Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager)* [2001] B.C.L.I. No. 5, Appeal No. L-9905. The words in section 36(2), "must not authorize or permit", are similar in section 35.

Section 36(2) reads:

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 conduct, or
- (c) a device used for gambling to be placed, kept or maintained.

The Board adopted the reasoning of the Court of Appeal in *Calais Investments Ltd. (Flamingo Motor Hotel) v. General Manager, Liquor Control and Licensing (L-9330, July 14, 1994)*. The Board stated:

The interpretation approved by the court 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. We believe that this interpretation and where it falls within the range of meaning that can be attributed to “permits” reflects well the expectations that the legislature has for a licensee and fits well with the purpose and context of the *Liquor Control and Licensing Act* as a whole.

Applying this interpretation to the present case, the question is, whether the licensee exercised as high a degree of diligence as it should have in the circumstances.

The defence of due diligence is available to a licensee and, if successful, is a complete defence to a contravention under the *Act*. In order to prove the defence, the licensee must establish that,

1. The employee involved in the contravention was not the directing mind of the licensee;
2. It exercised all reasonable care by implementing adequate training and other systems to prevent the contravention; and,
3. It took reasonable steps to ensure the effective operation of the system.

(see: *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299, p. 1325; *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248)

I find the general manager was the directing mind of the licensee at the time of the contravention. He was the person in charge and, as manager of the pub, liquor store and restaurant, is responsible for all aspects of the establishment such as making sure there is adequate staff and supplies, training staff and dealing with problems that arise.

I was impressed with the efforts of the general manager who, in the first month of his employment, implemented positive changes in the pub to reduce fighting and discourage underage patrons. However, despite these recent changes, I find the systems in place on the night of the contravention were insufficient to prevent the contravention.

I find the training of the staff inadequate. Staff attended the course "Serving it Right" and there is a sign regarding ID, posted at the back, near the staff schedule. The general manager says he has instructed everyone to check for ID and he makes sure everyone is checked for ID. However, his testimony that a person may not be assessed and asked for ID if they do not order food or drinks, falls short of the degree of diligence that may reasonably be expected from a licensee to ensure minors are not allowed on the premises. Whether a person is served alcohol or nachos or not served at all, the licensee has a duty to implement reasonable measures to ensure that patrons in the premises are not underage. Adequate training for staff must include the ongoing observation and assessment of patrons within the sphere of their duties, including those that are not served. In this case, the staff and the general manager failed to adequately assess the group of youths to determine if any appeared to be underage.

I do not accept the general manager's submission that the minor avoided staff and was shielded by his friends. The minor was in the premises well over a half hour and the liquor inspector was able to observe and assess the minor after being on the premises for approximately 10 minutes. Also, the inspector's evidence is that one of the doormen informed him that he did not check the minor's ID but noted him on the premises at the beginning of his shift. The general manager testified that the doorman informed him he did not observe the minor. I prefer the liquor inspector's evidence. I find the general manager's evidence self-serving in this regard and he did not present evidence from the

doorman or any other staff person to support his assertion. He said the doorman refused to testify and left his employment.

The evidence that staff may have been too busy to assess the minor also leads me to conclude that staffing was inadequate that evening, particularly as the pub was well under capacity.

For these reasons, I find the licensee did not exercise as high a degree of diligence as it should have in the circumstances and the defence of due diligence fails.

I find, therefore, the licensee contravened section 35 of the *Act* on June 22, 2007, by permitting a minor to enter and to be on the premises of One 20 Pub.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* 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 by the minimums set out in Schedule 4 of the *Regulations*. However, 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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

Permitting minors in a licensed establishment that serves primarily alcohol is a serious contravention, as it increases the probability for the minor to access liquor. Minors lack the knowledge and experience to consume liquor responsibly and as a consequence, their judgment is more easily impaired. This lack of knowledge and impaired judgment may lead to more serious issues possibly resulting in criminal behaviour resulting in serious injury or death.

In the licensee's favor, there is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Also, the general manager has begun to implement changes in the pub to discourage underage patrons.

Accordingly, pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Item 3, this is a first contravention and the range of penalties for first contraventions is four to seven days suspension and/or a monetary penalty of \$5,000-\$7,500.

The proposed penalty is a four-day suspension. I find this an appropriate penalty in the circumstances and sufficient to encourage future voluntary compliance and the implementation of appropriate policies and staff training to prevent future contraventions of this type.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 124091 for a period of four (4) days to commence at the close of business on Thursday, January 10, 2008, 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*).

The suspension sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer. A member of the Delta Police Department will be requested to attend the premises, take possession of the liquor license and hold it in safekeeping during the term of the suspension.

[ORIGINAL SIGNED]

"Kathleen McIsaac"
Enforcement Hearing Adjudicator

Date: December 14, 2007

cc: Delta Police Department

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate