



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

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act RSBC c. 267

Licensee:	Sean James McCormick dba Salty Anchovie Pub Hwy 97 N & Exeter Road 100 Mile House, BC V0K 2E0
Case:	EH07-051
Appearances:	
For the Licensee	James McCormick
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	August 8, 2007
Place of Hearing	100 Mile House, BC
Date of Decision	August 31, 2007

INTRODUCTION

The licensee owns an establishment in 100 Mile House. The establishment holds Liquor Primary Licence No. 031023 and is known as the Salty Anchovie Pub. The red-lined area consists of the lower portion of a flight of stairs and the downstairs level of a building. Upstairs the licensee operates a Food Primary establishment known as the Hoof and Harness. The licence permits liquor to be served from 11:00 a.m. to 1:00 a.m. Monday through Saturday, and 11:00 a.m. to midnight Sunday.

In the late evening of March 03, 2007, a member of the 100 Mile House detachment of the RCMP conducted a licensed premise check (LPC) in the establishment. The inspection revealed a patron in the establishment who was allegedly a minor, and a number of persons who were allegedly intoxicated.

As a result of the inspection, the branch issued Notice of Enforcement Action No. EH07-051 to the licensee.

ALLEGED CONTRAVENTIONS

The branch alleged that on March 03, 2007, the licensee contravened s. 35 of the *Act* by allowing minors in the premises, and s. 43(2)(b) of the *Act* by permitting an intoxicated person to remain in the premises.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, [RSBC 1996] Chapter 267

- 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.

43(2) A licensee or the licensee's employee must not permit

- (a) a person to become intoxicated, or
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the licensee contravene section 35 of the *Act*?
2. Did the licensee contravene section 43(2)(b) of the *Act*?
3. Is a penalty warranted and if so, what is the appropriate penalty to be imposed?

EXHIBITS

Exhibit No. 1: Branch's Book of Documents.

EVIDENCE

The branch called witness "the minor". She testified as follows:

- She was summoned to the hearing by *subpoena* and was therefore required to attend.

- She was under the legal drinking age.
- She attended the Salty Anchovie on March 03, 2007.
- She entered through the front door. Nobody saw her go in.
- She remained in the pub for 8-15 minutes.
- After 15 minutes, she was asked for ID, and not being able to produce any, she was asked to leave.
- She left without some of her belongings, so she went back in to get them.
- When she was leaving again, a constable stopped her while she was walking up the stairs.
- She was very intoxicated, from drinking with her friends "around town" before entering the pub.
- She left her shoes in the pub.
- She confirmed that she was in the pub for 15 minutes the first time.
- When she entered there was no doorman. She walked in; "it is quite a distance to the downstairs portion", and stood at a table with her friends where a birthday party was going on.
- She may have been stopped by the constable while walking in the second time, rather than while walking out. She was intoxicated and therefore does not remember clearly.
- The officer told her she was not allowed in the pub.

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

- She has been a member of the RCMP since 2004.
- She is accustomed to doing LPCs and has been in the establishment three or four times previously.
- She had no specific training on identifying intoxication, beyond her normal police training.
- She was working in the normal course of her duties on March 03, 2007 when she attended the Salty Anchovie.

- She arrived with her partner for the shift, through the main entrance of the pub at 11:48 P.M.
- She noticed a young male, staggering and apparently intoxicated. He urinated outside the pub in the parking lot. She watched as the male entered the premises through the parking lot door and sat at a table with other young males. He moved slowly and stumbled. He appeared intoxicated.
- She felt that the male, if found on the street, would have been lodged in cells because he appeared unable to care for himself.
- The other young males at that table all appeared to be intoxicated by their manners. She advised the licensee that the table of five to seven males should be cut-off from liquor service.
- The licensee advised that those patrons were finished drinking and were leaving the pub.
- She noted several other males in the establishment, some of whom she knew, who were clearly intoxicated. One of them raised his voice to her, demonstrated slurred speech and a flushed face, and was acting out of character.
- Then a patron, patron #1 approached her. He was intoxicated, was slow in his movements, and had a bottle of beer in his hand. He tried to shake her hand, and she formed the opinion he was "trying to hit on her". She therefore avoided him.
- Then she saw the minor coming down the stairs. The minor was grossly intoxicated, dishevelled, and slurring her speech. She asked the minor for identification. The minor provided her birthday and age; 17 years. She said she needed cigarettes and that he father was in the bar.
- She observed a female server approach the minor and ask if the minor had left her shoes in the bar. The server handed the minor a pair of shoes and said she thought they belonged to the minor.

- The constable was going to lodge the minor in a cell, but other young females came to claim the minor and indicated they would take care of her and get her home. The minor left the establishment with the other females.
- The constable was proceeding to the bar to write a contravention ticket, and noticed two males leaving the establishment. It was clear they were intoxicated. She followed them outside to ensure they were not going to drive motor vehicles. They did not go to their vehicles.
- While the constable was outside, patron #1 returned. He was mouthing-off and indicated that he was the father of the minor. The constable advised patron #1 that his minor daughter should not be in the bar partying with him. He was verbally abusive and loud. She told him he would be arrested for creating a disturbance if he did not calm down. He did not, and with the assistance of her partner, patron #1 was handcuffed.
- Patron #1 was clearly intoxicated. He was out of control, had watery eyes, was slurring his speech, and was moving in an unsteady manner.
- Patron #1 was lodged in cells until the next morning and then released. He returned afterward with some flowers and an apology for his conduct.
- She agreed that the conduct of patron #1 could have been consistent with drug use as well as alcohol.

The branch called the liquor inspector. She testified as follows:

- She is the inspector responsible for the establishment
- She identified all of the documents in Exhibit No.1.
- The liquor inspector had multiple telephone conversations with the licensee about the alleged incidents of March 03, 2007. One of those telephone conversations focussed on the possibility of the licensee signing a waiver (accepting a penalty and eliminating the need for an enforcement hearing) for one of the alleged contraventions based on certain acknowledged facts.

- The licensee did not sign the waiver.

The licensee testified as follows:

- The licensee testified that some of the patrons in attendance that night were loud and obnoxious individuals. Their conduct is regularly like that and was not caused by alcohol over-service.
- The Salty Anchovie had a UFC fight on the TV and it was fight night. This usually gets patrons loud and boisterous. Patrons' conduct under those circumstances is not necessarily the same as that produced by over-service.
- The licence allows sales of liquor until 1:00.
- They stopped service at approximately 11:45 because people had already ordered what they would have consumed, and after that they would have just been difficult to handle. There was no financial incentive to keep the staff there and continue serving liquor.
- Mr. S was not over-served. He might have been impaired by drugs. He was waiting for a staff-member to drive him home when the constable provoked him. He only had 7-8 drinks. This was established by patron #1's bar receipt; which was shared with the inspector.
- The steps outside were icy. The patron who allegedly urinated outside was slipping on the way back in to the pub and actually warned me that he could sue me for not clearing the ice. His movements were caused by the slippery conditions, rather than over-service.
- The minor was not in the red-lined area when the police constable saw her. At no time did the constable see the minor in the bar except when the minor was directed by the constable to go back in for her things.
- The pub was only open for three weeks as of March 03, 2007.
- They did not expect it to be that busy on the first fight night. They now have bouncers on the door on fight nights.

- He took issue with the evidence of the inspector as to what was discussed on the phone relating to the possibility of signing a waiver.

The licensee called an employee from the Food Primary upstairs. She testified as follows:

- She finished her shift upstairs and volunteered to drive home anyone who needed a lift from the bar. She was the acting designated driver.
- Another employee drove some of the patrons home.
- There are currently no taxis in 100 Mile House.

SUBMISSIONS

The licensee submitted that the police did not find the minor in the premises, but on the stairs; which is part of the food primary establishment and not part of the redlined area for this license. Therefore, he submitted, the minor was not found in the premises.

When patron #1 left the pub the first time, he was not intoxicated. Shortly after her returned, he was asked to leave. He was likely on drugs, rather than intoxicated. There is no question that he was acting out of character and that is why he was asked to leave. If the constable had not made inappropriate comments to patron #1 about his parenting skills, he would not have been difficult. His conduct was precipitated by the constable's comments. The RCMP constable was at fault for that.

The unruly conduct of several of the patrons was due to their own character; loud and obnoxious. They are like that all of the time. It is not an indication of intoxication or over-service.

ANALYSIS AND DECISION

Minor - s. 35

I accept the evidence of the minor that she was a minor at the relevant time.

I find that the minor walked in through the main door and remained in the licensed area for fifteen minutes before being asked to leave. I find also, that the evidence indicates that she did nothing to hide her presence. She stood in plain sight of the bartender and other staff of the establishment and yet was not asked for identification for fifteen minutes. There is no evidence of crowding or other complication that would provide a reason for the staff of the pub to not notice her for fifteen minutes.

I find that under these circumstances fifteen minutes is long enough to establish that the licensee and its employees did permit her to remain in the pub.

I find, therefore, that the licensee permitted her to remain.

The licensee argued that the police apprehended the minor outside of the redlined area. This does not prevent me from finding on the evidence that the minor was in the premises prior to the constable arriving on the scene.

I note that the minor's second entry to the establishment was with the acquiescence or direction of the police in order for the minor to retrieve her belongings. Her presence in that instance is not a contravention as she was cooperating with a police directive and this second entry therefore qualifies for the exception to the contravention issues under the *lawful excuse* provisions of s. 35(b) of the *Act*.

Intoxication - s. 43(2)(b)

There is evidence of several patrons being intoxicated in the establishment.

I find that patron #1, the minor's father, was intoxicated. I accept the evidence of the police constable in that regard. The evidence of the licensee does nothing to controvert that evidence. It may be that drugs other than liquor were partly or completely responsible for the intoxication, but the *Act* does not make a relevant distinction in that regard. The evidence, however, falls short of establishing that patron #1 was permitted to remain in the establishment in that condition. The uncontroverted evidence is that patron #1 was in the bar on two occasions on March 03, 2007, interrupted by an absence of approximately one hour. The licensee testified that he was not intoxicated when he first left, and that he was asked to leave when he returned. This evidence is not controverted.

There is also some evidence that the young male, first seen urinating in the parking lot, was intoxicated, as well as his associates at the table. I find that the evidence is weak with respect to the condition of these individuals. I accept that some degree of their behaviour may be attributable to the atmosphere of "fight night" and their propensity to loud and obnoxious behaviour. I also find that the constable's evidence of observable characteristics of intoxication with respect to these patrons is less than comprehensive.

Finally, the evidence of the minor is that she was intoxicated, and was in the bar for fifteen minutes, in full view of the bar staff before being ultimately asked to leave. The licensee presented no evidence or argument that suggests that the minor was not intoxicated. I accept the evidence of the minor and find that she was intoxicated when she was in the bar. This evidence is supported by the constable's testimony relating to a server retrieving the minor's shoes from the bar, and the minor's statement that she had not noticed she was not wearing them.

I have already found that the bar staff had ample opportunity to notice and remove the minor long before fifteen minutes had elapsed.

I find, therefore, that the minor was intoxicated and permitted to remain in the establishment as prohibited by s. 43(2)(b).

Both contraventions have been proven.

Waiver discussion

The branch provided evidence and argument with respect to facts as allegedly confirmed or agreed to by the licensee in telephone conversations with the liquor inspector. These telephone conversations occurred after the LPC was executed.

Finding the facts that led to the allegation is the responsibility of the adjudicator conducting the hearing. Statements made by the licensee after the allegation, are not determinative of the facts. I therefore did not consider this evidence.

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*. 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 of s. 35 relating to March 03, 2007, the Branch recommended a four (4) 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 four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

The exclusion of minors from liquor primary establishments is one of the fundamental purposes of the *Act*. I have heard no evidence or submission that would indicate that a penalty for this contravention would not be appropriate.

For the contravention of s. 43(2)(b) relating to March 03, 2007, the Branch recommended a four (4) day suspension.

The range of penalty for a first contravention of section 43(2)(b) of the *Act* in accordance with item 11 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

Over-service is a serious social concern. I find that a penalty for this contravention is appropriate under the circumstances.

The licensee has no prior history of contraventions or enforcement action. Accordingly, I find that the minimum penalty for each of the contraventions is appropriate.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the liquor primary licence No. 031023 for a period of eight (8) days to commence at the close of business on Friday, October 05, 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: August 31, 2007

cc: RCMP 100 Mile House

Liquor Control and Licensing Branch, Victoria Headquarters
Attn: Michael Clark, Regional Manager

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