



Ministry of Public Safety
and Solicitor General

**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: 685946 B.C. Ltd. dba Chieftain Hotel
38005 Cleveland Avenue
Squamish, BC V0N 3G0

Case Number: EH08-032

For the Licensee: Rajinder Kaur Nijjar and Bupinder Nijjar

For the Branch: Tanya Cogan

Enforcement Hearing Adjudicator: K. McIsaac

Date of Hearing: June 17, 2008

Place of Hearing: Squamish, BC

Date of Decision: July 4, 2008

INTRODUCTION

The licensee, 685946 B.C. Ltd., operates the Chieftain Hotel in Squamish BC. There are four liquor licenses within the hotel and it is the hotel's pub (pub) under Liquor Primary Licence No. 139161 that is the subject of this hearing. The pub is licensed to serve liquor from 11:00 a.m. to 1:00 a.m. Monday to Saturday and 11:00 a.m. to midnight on Sunday. 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 an amended Notice of Enforcement Action (NOEA) dated April 10, 2008, the Liquor Control and Licensing Branch (branch) alleges that on March 18, 2008, the licensee contravened the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act), section 33, supplying liquor to minors. The branch recommends a ten (10) day licence suspension. If it is found that the licensee did not contravene section 33, the branch alleges, in the alternative, the licensee contravened section 35, allowing minors in the premises, and recommends a four (4) day licence suspension.

RELEVANT STATUTORY PROVISIONS

Sections 33 (1) and 35 of the Act read:

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 purposes 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.

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, on March 18, 2008, supply liquor to a minor in the pub contrary to section 33 of the *Act*?
2. If so, will the defence of due diligence excuse the licensee from a finding of a contravention under section 33?
3. If the licensee contravened section 33, what penalty, if any, is appropriate in the circumstances?
4. In the alternative, if the licensee did not contravene section 33, did the licensee allow minors in the pub contrary to section 35 of the *Act*?
5. If so, will the defence of due diligence excuse the licensee from a finding of a contravention under section 35?
6. If the licensee contravened section 35, what penalty, if any, is appropriate in the circumstances?

EXHIBITS

- Exhibit No. 1: Branch's book of documents
- Exhibit No. 2: Chieftain Hotel, Incident Log dated March 18, 2008
- Exhibit No. 3: Chieftain Hotel, "Our Mission Statement"
- Exhibit No. 4: Chieftain Hotel, "To Serve or Not to Serve: Bar Policies for Customers and Staff"
- Exhibit No. 5: Licensee's DVD showing video clips of bar area on the evening of March 18, 2008

EVIDENCE

I heard the testimony from the following witnesses:

- One of the two RCMP constables who was on duty on the night of the alleged contravention
- The liquor inspector whose area of responsibility includes the pub
- The representative of the company holding the Liquor Primary Licence (licensee)
- The licensee's husband and the grandfather of one of the minors

I also viewed a series of still frames from a video taken from a camera mounted behind the bar and focused on the bar counter and cash register.

These are the facts as I have determined them:

On March 18, 2008, at 8:59 p.m. two RCMP constables entered the pub and observed two males playing pool, close to the entrance. Most of the eleven other patrons were in the smoking room at the opposite end of the pub, near the bar. The officers, recognizing the two males, approached them to confirm their

identification and ages. The officers observed two short glasses with orange liquid on the table beside the pool table. One appeared full and the other approximately $\frac{3}{4}$ full. The patrons acknowledged the drinks belonged to them and made it known to the officers they were there to drink and play pool.

The officers escorted the males outside and confirmed both were underage. One was 18 years old, born in October 1989, and the other 16 years old, born in May 1991. There is no dispute the two patrons are minors.

The officer spoke to the bartender who was the only staff member in the pub at that time, and asked her if she had served the two minors. The bartender informed the officer that she served a third person who purchased two drinks for the minors. When asked where the person was, she said he was not in the pub. One of the officers checked the entire bar but the male was not located. The bartender informed the officer that she requested identification from the person, but he took the drinks back to the table before she could confirm his identification and age. The bartender also informed the officer that she was just about to request identification from the minors when the officers entered the bar.

The officer testified that she found the bartender difficult to deal with and unwilling to take responsibility for the incident. According to the officer, the bartender informed her that she couldn't be responsible for everything that happened in the bar.

At 9:20 p.m. the officer issued the bartender a Police Licensed Premises Check for allowing a minor in the premises (Act s.35) and supplying liquor to minors (Act s.33).

I accept the RCMP constable's account of the incident at the bar on March 18, 2008, and found her testimony to be straightforward and consistent.

The licensee's only dispute with the officer's account of events was whether they were on a routine bar walk or attended the pub because they received a telephone call about the minors. The licensee's husband suggested to the officer that the fact that she was not carrying her ticket book and had to send for it, proves they were not on a routine bar walk. The officer maintained they were on a bar walk and I accept her explanation that on a bar walk they may not carry all the documents they might need, as their bags would become too heavy.

The constable testified that every year the RCMP detachment identify initiatives to carry out in the community. This year they decided to address the problem of minors consuming liquor. She said the police are concerned with youths becoming inebriated and being out of control, passing out, being in fights and causing mischief in the community. The initiative involved conducting more bar walks and increased enforcement as well as keeping files on each bar in town. The officer testified that she and her colleagues have put in overtime dedicated to liquor enforcement with youth.

The constables reported the incident to the liquor inspector who conducted an investigation. On March 20, 2008, the liquor inspector held a compliance meeting attended by the general manager of the establishment. The manager informed the liquor inspector that it was the bartender's second shift in the pub and that she was working alone. They discussed video surveillance and the manager confirmed that the camera was only behind the bar and focused on the cash and not on the patrons. The general manager made a commitment to hold regular staff meetings and ensure all staff were educated in the legislative requirements regarding minors and intoxication.

The licensee brought evidence in order to establish that the person who purchased the drinks was a third person and not one of the minors.

A video, taken over the course of approximately 10 minutes, shows a selection of still frames taken of the bar area at the time of the incident and in particular, it shows the person purchasing the drinks for the minors. The time is recorded at the bottom of each frame.

The first few frames show the person near the bar area at 8:50:06 p.m. The following frames show the person standing near the bar as two other patrons are served. At 8:53:16 the person is served and two drinks are visible on the bar in front of the person. In the next frame at 8:53:30, the person has left the bar and the drinks are gone. There is no dispute that the drinks purchased by the person in the video clips are the same drinks belonging to the minors when the officers entered at 8:59 p.m.

The licensee also brought as a witness, the grandfather of one of the minors. After viewing the video clips the grandfather testified that the person purchasing the drinks for the minors could be his grandson; however, he was not certain, as he found the images unclear.

The licensee testified that she and the assistant manager were in the hotel on the day of the incident. As they are involved in all aspects of the hotel business, neither of them was in the pub on a continual basis that day. She said she received a telephone call earlier in the day from a person informing her of a minor in the premises. No minor was located. Later in the day the licensee said she went into the pub to use its washroom as it was close to her office, and observed two officers by the smoking room. She did not approach them as the assistant manager said to her he thought it was only a routine check. It was only after she left the hotel for the day that the assistant manager called to inform her that the officers had issued a ticket in the pub.

The licensee testified she trained the bartender, informing her of the legislation as well as the pub's policies. She said it was the bartender's second shift on the evening of the incident and she did not return to work afterwards. The licensee said the bartender made a mistake in allowing the person to take drinks from the bar without checking ID.

The licensee described the systems in place in the pub. All employees have taken the course, "Serving it Right." She reviews the establishment's mission statement and bar policies (Exhibits 3 and 4) with each employee and provides them with a copy. A binder containing these documents is located near the bar. There is an ID scanner and laminated signs regarding ID on the door and wall by the pool table. A camera in her office gives an overview of the bar area and she is also able to view it from her home. The licensee meets with the staff once or twice a month and sends memos. She also indicated that she insists that the staff request identification from patrons who appear under 19 years of age. The licensee said it is difficult to retain bartenders and this was their seventh in the pub. Given their modest income from the pub, they can only afford to hire a door person on Friday and Saturday.

The licensee's husband testified that he and his wife bought the hotel in July 2005. As developers, they are most interested in the land around the establishment. Since taking over they have refurbished the nightclub, cleaned up the hotel rooms and renovated the lobby and restaurant. He said the establishment has off track betting and therefore does not attract a younger crowd. The smoking room is now shut down which has sent many of their patrons to a nearby establishment with a patio.

I accept this aspect of the licensee's evidence regarding the incident in the pub, the systems in place and the improvements they have made to the hotel.

SUBMISSIONS

The licensee's husband submitted they were set up. He said the bartender did not get a chance to confirm the ages of the minors because the police followed the minors into the establishment. He said he believed a nearby establishment planned the incident as it views the pub as competition. The fact the officers did not bring a proper ticket book shows they had not planned to go to the bar, and the earlier call that day suggests to him that the officers received a call informing them about the minors in the establishment. The licensee's husband also referred to a previous incident in 2007 in which he believes the liquor inspector followed an intoxicated person into the bar. He said he feels they have been singled out and the punishment is unfair.

The licensee's husband said the licensee, as the administrator, is well aware of the legislation. She writes memos to her staff and goes over it repeatedly. With respect to the incident, the licensee's husband submitted that no one saw the individuals drinking.

The licensee submitted she has taken all steps to prevent contraventions, for example, eliminating extra doors in and out of the pub. She said the bartender did not serve the liquor to the minors and they only took one step inside the establishment before the officers arrived. The licensee said she feels guilty about the incident because she was in the premises both times and her office is only a few feet away.

DECISION

I find the licensee's husband's suggestion that the incident was somehow planned, mere speculation and without substance. Regardless, the reason the officers attended the pub has no bearing on this decision and is beyond the scope of this hearing's legal mandate. This hearing's authority is limited to determining on a balance of probabilities, if a licensee has contravened the *Act* or *Regulations* and, in this case, whether the licensee contravened section 33 of the *Act* by supplying liquor to the minors.

There is no dispute the two drinks poured by the bartender and sold to the person seen in the video, were the drinks found in the minor's possession when the officers entered the pub. This was acknowledged by the bartender and the minors also acknowledged the drinks belonged to them. Whether or not the bartender served the drinks to a third person or to one of the minors, she had a legal obligation to ensure the minors were not underage and that liquor was not served to them.

Regarding the purchaser of the drinks, the evidence is insufficient to establish if the person purchasing the drinks was one of the minors or a third person. The grandfather could not say for sure if the person was his grandson and the officers were outside the establishment for a few minutes providing the opportunity for a patron to exit the premises from one of several exits, before the officers returned to interview the bartender.

I find on a balance of probabilities, the drinks in the minor's possession contained liquor. There is no evidence the bartender suggested that the drinks she poured for the minors were other than alcohol. She also did not object to the contents of the ticket issued to her that states, "Two minors found inside pub playing pool. Both with liquor from bar in their possession." The bartender also provided a

signed statement that said in part, "A fellow (not the 2 minors) ordered 2 drinks, paid for them, sat them down."

As liquor is generally what is dispensed at the bar, and there is no suggestion from the bartender or the minors that the drinks were not liquor, I find it more likely than not the drinks in the possession of the minors contained liquor.

The licensee submitted the bartender had no time to ID the minors before the officers arrived. I find this not to be the case.

The bartender had a legal obligation when the drinks were ordered, to ensure the purchaser was not a minor before she served the drinks. She requested his identification, indicating some uncertainty about his age, and although no ID was produced, the bartender poured the drinks and allowed them to leave the bar without confirming his age. The bartender also intended to ID the minors. However, from the time the person was served at 8:52 p.m. to 8:59 p.m. when the officers entered the bar, the bartender had not checked their identification or even approached them. It may only have been a short time before the officers arrived, but I find the bartender had an obligation to immediately follow the drinks to their destination and establish the minors' identification and age before the drinks were in their possession.

As for the licensee's submission that no one observed the minors drinking the liquor, there is no legal requirement for the minors to be seen consuming the liquor for there to be a contravention. It is sufficient that the liquor that is sold or supplied by a licensee is found in the minor's possession and that is what happened here.

Given the evidence, I find on a balance of probabilities, the licensee contravened s.33 of the *Act* by selling or supplying liquor to minors.

Due Diligence

The defence of due diligence, if successful, will completely exonerate a licensee from having contravened the Act. The licensee must demonstrate, on a balance of probabilities, that it took all reasonable steps to prevent the contravention.

In the leading case of *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 p. 1325, Dickson J sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence, see *Tesco Supermarkets v. Natras* [[1972] A.C. 153].

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC (para 25), set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the Act.

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in Plaza clarified that the directing mind need not be an officer or director of the licensee:

It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee. (para 27)

Therefore, the licensee must establish on a balance of probabilities that the bartender was not the directing mind of the licensee at the time of the incident and, that it

- a. Implemented adequate training and other systems to prevent the contravention, and
- b. Took reasonable steps to ensure the effective operation of the system.

I find the bartender was the directing mind of the licensee in relation to that part of the licensee's operations in connection with the contravention. Although it was only her second shift, I find she was the person in charge of the bar's operation. The bartender was the only employee in the pub and when the officers arrived, she did not call for assistance or defer to someone higher in authority. The assistant manager and the licensees who were in the hotel and aware of the presence of the officers, did not approach or offer their assistance to the bartender or officers.

Having found the bartender was the directing mind of the licensee, the defence of due diligence fails.

However, if I am wrong and the bartender is not the directing mind, I find the defence still cannot succeed.

Since owning the hotel, the licensee has made extensive changes to improve the hotel including the pub. The licensee trains the employees and reviews the legislative requirements and the bar policies with them. She conducts regular meetings with the employees and also reminds them of their obligations by memo. However, on the evening of the incident I find the systems in place were not sufficient to prevent the contravention.

The bartender may have received training with respect to her duties and responsibilities regarding minors; however, her actions on the evening of the contravention indicate to me she did not fully understand her legal obligations regarding minors, and was not prepared to be in charge of the pub or without supervision. The bartender's failure to ensure that minors were not served liquor, her uncooperative behaviour toward the officers and her comment to them that she was unwilling to take responsibility for the bar, lead me to conclude the pub was not adequately staffed so as to prevent the contravention.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, 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 *Liquor Control and Licensing Regulation, B.C. Reg. 244/2002* (Regulation). On the other hand, I am not bound by the maximums and may impose a higher penalty 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 a first contravention of this type, the range of penalty is a 10 to 15 day licence suspension and/or a monetary penalty of \$7,500 to \$10,000.

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 and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

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. However, this is a serious contravention as it involves minors. Supplying liquor to minors is a significant public safety issue because of the effect of alcohol abuse on growing bodies and developing minds. A minor lacks the capacity to metabolize alcohol in the same manner as an adult resulting in a more intoxicating effect causing out of control behaviour and public mischief.

I find in the circumstances a penalty is warranted to ensure voluntary compliance in the future and find the branch's recommended minimum ten (10) day suspension appropriate in the circumstances.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 139161 for a period of ten (10) days to commence as of the close of business on Monday, July 28, 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 (Regulation s.67).

I direct that the licence be held by the branch or the RCMP, Squamish Detachment, from the close of the business on the Monday until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

K. McIsaac
Enforcement Hearing Adjudicator

Date: July 4, 2008

cc: Squamish RCMP Detachment

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Tania Cogan, Branch Advocate