



**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: Mark Hotel Co. Ltd. dba Sam Steele Inn
12 8th Avenue S
Cranbrook, BC V1C 2K3

Case: EH09-012, EH09-003

For the Licensee Richard Smeland

For the Branch Olubode Fagbamiye

Enforcement Hearing Adjudicator Sheldon M. Seigel

Date of Hearing June 3 & 4, 2009

Place of Hearing Cranbrook, B.C.

Date of Decision June 23, 2009

INTRODUCTION

The licensee operates an establishment in Cranbrook under liquor primary licence #006856. The licence indicates that liquor may be sold from 11:00 AM to 1:00 AM, Monday through Saturday and 11:00 AM to midnight on Sunday.

The licence is, as are all liquor primary licences issued in the province, subject to the terms and conditions contained in the publication *Liquor Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia* (Guide).

The Branch's allegations and proposed penalties are set out in the Notices of Enforcement Action (NOEA) dated January 26, 2009 and January 14, 2009.

Appearing for the corporate licensee was the primary shareholder and operating executive of the company (licensee).

THE ALLEGED CONTRAVENTIONS

The Branch alleges that on January 17, 2009, the licensee contravened s. 50 of the *Liquor Control and Licensing Act* (Act) and the Guide by allowing a prohibited act or prohibited entertainment. The proposed penalty for contravening s. 50 is a four (4) day suspension of the liquor licence.

The Branch also alleges that on December 31, 2008, the licensee contravened s. 33 of the Act by supplying liquor to a minor. In the alternative the Branch alleges that the licensee contravened s.35 of the Act by permitting a minor in a liquor primary premises. The proposed penalty for contravening s.33 is a ten (10) day suspension of the liquor licence. In the event that the Branch is unable to prove the contravention of s.33, the Branch proposes a four (4) day suspension of the liquor licence for contravention of s. 35 of the Act.

All of the proposed penalties are within the range provided in Schedule 4 of the Liquor Control and Licensing Regulation (Regulation) for a first offence of the respective kind.

RELEVANT STATUTORY PROVISIONS

LIQUOR CONTROL AND LICENSING ACT

[RSBC 1996] CHAPTER 267

Supplying liquor to minors

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 purpose 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.

(2) Subsection (1) does not apply if liquor is

- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
- (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
- (c) given or otherwise supplied to a minor in accordance with the regulations.

(3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly

(a) has it in the actual possession or custody of another person, or

(b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.

(4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.

(5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant

(a) required that the person produce identification, and

(b) examined and acted on the authenticity of the identification.

(6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

Minors on licensed premises

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.

Entertainment

- 50** (1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.
- (2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued.

Liquor Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia (at page 17)

Exotic dancers/strippers/adult-oriented performers may not:

- engage in live, realistic or simulated sex acts, or in any acts involving coercion or violence, either simulated or real
- insert any object into, or extract any object from, the vagina or anus
- urinate or defecate while performing
- touch, share food and beverages, or pass objects to members of the audience
- touch or share food and beverages with other performers
- consume liquor immediately prior to a performance, during a performance or between performances
- dance/perform on table tops or other areas outside the approved areas
- deliberately engage a patron(s) in an adult-oriented performance or activity

ISSUES

Did the licensee contravene the Act as alleged?

If the contraventions occurred, are penalties required under the circumstances of this case, and if so, what penalties are appropriate?

EVIDENCE

S.50 Prohibited Act/Entertainment (s. 50 Act)

The Branch produced two eyewitnesses to the event that is the subject of this allegation. The eyewitnesses are RCMP officers. The officers each testified that they were present in the establishment on January 17, 2009 acting in an undercover capacity and doing surveillance for the purposes of identifying criminal code violation and liquor infractions in licensed establishments. The establishment was chosen for surveillance as part of a general enforcement scheme. The establishment was not targeted for any distinct reason. One of the officers was a member of another regional detachment, and participated because he was unknown in Cranbrook. As of January 17, 2009 he had been a member for less than two years and had never done a licensed premise check (LPC) in an establishment with adult entertainment. The second officer had been an RCMP constable for five and a half months as of the relevant date. He is a member of the local Cranbrook detachment.

The constables entered the establishment and sat at a table directly opposite the front of the stage, across the room in what was previously the smoking room. From there they watched an exotic dancer performing on stage. They were separated from the stage by a floor to ceiling pane of glass, once the smoking room wall. One of the officers estimated they were approximately twelve feet from the place where the dancer allegedly performed the prohibited act. The

other officer estimated they were ten to fifteen feet away. There was no obstruction to the constables' view of the performance.

One of the officers testified that he observed the dancer with "a birthday candle. A small one that you would see at a kid's party- the thickness of a pencil." He said that the dancer was seated on the floor of the stage with her legs spread toward him. She "had her hands in front of her groin area and put the candle in her vagina so the wick was out and she lit it and held her hands up" out of the way. He said she had her hands out of his line of sight for less than twenty seconds. He noted that he did not see the insertion, as the dancer's hands were blocking his view. He also noted that there was a bartender behind the bar (to the side of the stage) for whom the "strippers body would have been sideways and it would have been difficult for the staff member to see". The constable was unable to say what colour the candle was or if the dancer lit it with matches or a lighter because her hands were in the way. He did say that the portion protruding from the dancer was less than a couple of inches. He did not recall whether the dancer had any tattoos or body jewellery.

The second officer testified that he observed the dancer with a candle in her vagina and her arms and legs spread out. He said she "took a match and lit the candle, let it burn and then threw it to her right, where it hit the wall. She got the candle and the matches from a blanket she was sitting on." He said the candle was approximately 1cm in diameter and she held it in her vagina for fifteen seconds. He also could not identify the colour of the candle. He testified that the dancer "waved it out (before she) chucked it to her right."

The officers each testified that they did not disclose their identities or provide a contravention notice to the establishment staff on that occasion, but rather advised the liquor inspector of their observations. The delay was intentional and was designed to ensure the continued ability of the members to work undercover.

The liquor inspector testified that he telephoned the licensee on January 21 and advised of the alleged contravention. The inspector also testified that he understood there was surveillance video at the establishment that would have documented the stripper's actions.

The inspector identified the documents in Exhibit #1- the Branch's book of documents and described the enforcement process undertaken in this instance.

The bartender testified that she was on duty at the time of the allegation. She was behind the bar while the dancer performed. She said that patrons in the old smoking room would have had an unobstructed view, better than she would have from the bar. She also said that she did not have particular recollections of the dancer's show on that occasion, but indicated that she has seen the particular dancer perform in the past and that the dancer always does the same show. The bartender said that the dancer's show includes lighting matches and sticking them on her body, but no insertion. She was confident that there was no candle involved in the act, and that the dancer typically sticks a lit match near her vagina and then waves it out and throws it away.

The bar manager testified that she was present on the said occasion but did not remember watching the dancer perform. She indicated that the dancer had been there a week and over the course of the week the manager watched the show on several occasions. She said the dancer put matches on her nipples and clitoris ring but that there was no insertion and no candle in the act. The bar manager also testified that all of the dancers sign a contract, that they know the rules regarding what is allowed and what is not allowed, and that no insertion of any object is allowed. She said there is a running loop of surveillance video that would capture the activities on stage, but the loop is two days long and would have been recorded over on January 19, 2009.

The exotic dancer testified that she removed her clitoris ring some time before January 17, 2009. She said:

I use matches in my act. It is hard enough to get naked on stage. I have never used a candle on stage in two years - ever. I have danced a lot. More than twenty places. No place would allow me to have a candle in their show - the wax is a problem. And I would not put anything in my vagina on stage. That's retarded. I'm not going to lose my job. It's not legal. That's f*cking movie star porn.

The dancer said that she uses the matches to light on fire. She splits the match in two parts, licks it and sticks it on her breasts and near her vagina. She lights each match and then after a few seconds, blows or waves it out. She demonstrated the technique by splitting, licking, and sticking a match on her forearm.

S.35 Minors (s. 33 Act)

The Branch provided two constables, the minor, and the liquor inspector with respect to this allegation. The licensee provided a bartender and the bar manager. The licensee provided argument and some evidence.

The RCMP officers each testified that they arrived together just after 10:00 pm on December 31, 2008, in uniform and in patrol cars. They noted the absence of any door staff. Inside, the bar appeared to be staffed by a single employee, who was situated behind the bar. The bar was not busy. The first constable recognized an individual patron, with whom she has had numerous past dealings, standing beside the bar. She knew from past issues that the individual was a minor. She observed the minor drink from a bottle of Budweiser beer. She said: "He took a five to eight second chug, then he put it down." She said that the patron observed the uniformed officers, finished the beer, put the bottle

down on the bar, and began to walk toward the rear exit. The constable approached the minor and escorted him outside through the front entrance. There she checked his identity with Prime and CPIC police systems and confirmed his birth date. She issued the minor a violation ticket for purchasing or consuming liquor in a licensed establishment while under age. The constable identified the ticket as well as her notes and the second officer's notes in Exhibit #1. She identified the minor as having scruffy hair, red bloodshot eyes, and an odour of liquor on his breath. The constable indicated that when she was finished with the minor, she went back into the bar and spoke to the bartender. The bartender advised that she was the only employee on duty at the time. The constable testified that the bartender claimed she did not serve the minor.

The second officer testified that there was one employee behind the bar and a dancer in the premises with about ten patrons. She watched the first officer apprehend the minor and escort him outside. She identified her notes and the police reports in Exhibit #1. She did not see the minor drinking the beer, but saw it on the bar from where he had begun to move when the first officer began to go after him. She heard the minor tell the first officer that he was drinking from the beer bottle. She noted that the bartender and the minor were directly across the bar from each other, but she did not see the bartender and the minor converse or look at each other.

The minor testified that he was seventeen years old on December 31, 2008. He acknowledged that he was in the establishment at the relevant time. He said he was only inside for two minutes and the bartender did not see him. In the statement he provided to the police, he indicated that his cousin bought him the Budweiser beer. In the hearing he testified that he was drinking from his cousin's beer at the bar.

The liquor inspector testified as to the relevance and identity of the remaining documents in exhibit #1. In particular, he identified the notes of a third constable who attended at the incident but was unable to attend the hearing due to professional obligations. The third constable's notes indicate that the bartender was in conversation with the minor.

The licensee called the bar manager. She testified that she is in charge of hiring and firing staff, the inventory, and the day to day operation of the establishment. Her intention is to keep staffing to a bare minimum. She hires and trains the staff. Whoever is on shift "usually opens the place."

She testified that as a result of the infraction, she fired the bartender for supplying liquor to a minor on the premises. She said it was the establishment's policy to fire someone if they serve a minor or if "there is a minor and the employee knows they are in there." She said she only put one staff member on duty on the night in question. As she was expecting a slow night, ("we are not a new years bar") she felt that one staff member could control the establishment alone. She described the bartender on duty on December 31, as "junior, a less experienced person. She works day shifts when it is not busy and stuff like that. [more experienced people] handle the night shifts as that is when things come up." In answer to why her employee did not check the minor's identification, she said: "I think [the employee] was in the bathroom."

The bartender testified that she was twenty-three years old On December 31, 2008 and has her Serving it Right certificate. She said she returned from the bathroom and she saw four or five patrons and four female police officers at the bar issuing a ticket. She confirmed that while she was in the bathroom there was nobody in the establishment to watch the door, check ID, or monitor the liquor. The front door was open to the public. She said the bar had no written polices but she and the manager talked about minors "and stuff" for about a week. If she got stuck on anything she could call the manager. There was no other training. She already knew what the legal age limit was, she said.

SUBMISSIONS

S.50 Prohibited Act/Entertainment (s. 50 Act)

The Branch submits that the contravention occurred as alleged, that the RCMP officers clearly saw the candle inserted in the dancer's vagina contrary to the Act and Guide, and that the licensee is responsible for the actions of its performers. The Branch further asserts that it should be entitled to an adverse inference as to the contents of the surveillance video as the video would have by all accounts captured the dancer's act and the licensee chose not to provide that evidence.

The licensee submits that the contravention did not occur as alleged. The licensee also used the floor plan of the establishment as reproduced in Exhibit #1 to demonstrate that the RCMP officers were approximately twenty feet from the dancer. He also testified as to the officer's table being that distance from the dancer.

S.35 Minors (s. 33 Act)

The Branch submits that a single employee was supposedly in control of the establishment at the time of the contravention. That employee either failed to check the minor's ID or she was not present in the red lined area when the minor came in and in that case passively allowed the minor to consume liquor in the premises. The Branch says that the elements of the contravention have been established by the evidence and the licensee has not established due diligence.

The licensee provides copies of signs indicating that minors are not welcome in the establishment (Exhibit #2) and denies that the staff-member on duty knew about the minor in the premises. The licensee says the minor was only there a short time and was not served any liquor and the bartender did not have an

opportunity to see the minor and take action because the police were on the scene and with the minor so fast.

ANALYSIS AND DECISION

S.50 Prohibited Act/Entertainment (s. 50 Act)

Any suggestion of adverse inference to be drawn from the absence of the licensee's surveillance video can be dispensed with. I accept the uncontroverted evidence that the video surveillance system is on a two day loop and any data thereon would be lost 48 hours after it is recorded. The licensee was not informed of the allegation until the telephone call made by the inspector on January 21, 2009, four days after the alleged contravention. The RCMP officers chose not to break their cover to serve the contravention notice on the spot, and that seems a reasonable decision. The Branch served notice of the allegation in a reasonable time, but one that did not allow for preservation of the relevant video data. The licensee had no access to the video evidence whether favourable or otherwise.

After close examination of the licensed establishment floor plan and consideration of the evidence, I find the position of the table at which the RCMP officers were seated to be closer to twenty feet removed from the position of the dancer than the ten to fifteen feet the officers recollect.

I find the dancer's evidence to be credible and compelling. I do not believe that she would be prepared to insert a candle into her vagina onstage as alleged. I find that there are two possible explanations for what the RCMP members saw, or believed they saw. The first explanation is that the dancer inserted a small candle into her vagina, and lit it while her hands obscured those actions from view of the officers. Then she removed the candle, waved it out, and tossed the candle away. The alternative explanation is that the dancer stuck a match in the

manner described, on the surface of her skin near her vagina, again while obscuring the officers' view of that activity by her hands, lit it and then showed it before waving it out and tossing it aside. The difference in terms of the show presented to the RCMP members would be a matchstick with a flame on the surface of her body outside her vagina or a one cm diameter candle with a burning wick protruding from her vagina.

I find that from approximately twenty feet away, through a pane of glass, in a normally lit bar, the similarity in appearance between the two alternatives is too close to establish on a balance of probabilities that one or the other actually occurred. The fact that the officers could not see the insertion or attachment and the lighting of the item, and that the extinguishing and discarding of the item is consistent with either explanation further clouds the question of what really happened. I find that the fact that neither officer could say what colour the candle was supports the possibility of the alternate explanation (match on the surface).

The corroborated evidence that the dancer regularly used matches externally in her act, and the relative inexperience of the officers involved, especially with respect to establishments with adult entertainment, lends further confidence to my conclusion that I cannot find that the contravention occurred as alleged.

S.35 Minors (s. 33 Act)

I accept the evidence of the alleged minor and the police officers and find that the patron was indeed a minor at the time of the contravention.

I also accept the evidence of the minor and the two officers that the minor was present in the establishment at the bar, which is in the red-lined area of the liquor primary establishment.

I accept the evidence of the first officer and of the minor that the minor did drink liquor (Budweiser beer) while in the licensed establishment.

As to the third constable's notes, this is not a court process and I do not have to be bound by the formal court rules of evidence. Accordingly, I am able to consider the truth of the statements provided in writing by the third constable notwithstanding her not being in attendance, and it being hearsay evidence. A constable in attendance has identified the notes produced by the third constable and the liquor inspector has identified the emails and faxes (tab 6) that carried that information to him. I accept that these notes did originate as indicated with the third constable, but the content of those notes causes me some concern. The witnesses testifying at the hearing did not observe any conversation between the bartender and the minor and cannot say whether the two were in contact with each other. The bartender denies having seen the minor in the bar. The minor also denies having been seen by the bartender or conversing with her. Only the third officer indicates a contact between the bartender and the minor, and she is not present for cross examination by the licensee. Under the circumstances, with the knowledge of the bartender as to the minor's presence being in issue, I find it would be unreasonable to rely on the submitted evidence of the absent member in this regard. I feel the licensee would be denied a fundamental right of cross examination on a fundamental issue relevant to the commission of the alleged contravention.

While I cannot find on the balance of probabilities that the minor purchased the beer from the bartender on duty that night, I do find that the minor was in plain sight as is evident by the evidence of his location and the immediacy with which the officers observed him on entering the establishment. He was standing in front of the bar and was either seen, or should have been seen, by the bartender who was charged with monitoring the establishment.

I find that the licensee contravened s.33(1)(c) of the Act as it permitted the minor to drink in the establishment.

The definition of "permit" is defined in *Ed Bulley Ventures [2001]* BCLI #5. Simply paraphrased, the case asks: Did the licensee and its employees observe as high a degree of diligence as they should have in the circumstances? I find that intentionally planning for a single employee to be responsible for and staffing a liquor primary establishment for an entire night does not demonstrate an acceptable degree of diligence. The single employee/bartender testified that she did not see the minor in the bar. I find that based on the minor's location and the police observation of the bartender across the bar from the minor, this is not a particularly credible position. In the event that the bartender did not see the minor enter the establishment or situate himself at the bar or drink from a bottle of beer, I find that too indicative of an insufficient degree of diligence. I note also that the bartender said that when she has to go to the bathroom (as she testified she had done just prior to the expulsion of the minor) the bar is left unsupervised.

The manager testified that she is responsible for staffing the establishment and did schedule the bartender as the only staff member on duty on December 31, 2008. I note that the manager effectively confirmed that the bartender either served the minor or knew the minor was in the establishment when the manager said that she fired the bartender as "it is our normal policy to fire someone if they serve a minor or if they knew a minor was in there." The manager also indicated that the single staff member that she sent to operate the establishment that night was inexperienced, junior, and by implication not able to "handle things when they come up."

Further, I find that the evidence of the manager and the licensee confirms that at the time in question, the manager was the operating mind of the establishment. As such, the manager intended for the bartender to be the only person supervising the bar, and she clearly knew that at times, such as when the

bartender had to go to the washroom, there would be no supervision or monitoring of the bar whatsoever. I note that with the bartender in the washroom there was neither control over ingress into or egress from the establishment, nor over the liquor, taps at the bar, or fridges.

I also find that the evidence discloses no system of adequate training or programs designed to instruct the staff on how to prevent service to minors and other contraventions.

I find that the licensee and its management did not have effective control of the establishment.

I find that the licensee did, through its staff, permit the minor to drink in the establishment by failing to provide adequate control over the door, the patrons, and the liquor in the licensed establishment during operating hours. I find that any suggestion of due diligence fails.

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 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 by the minimums set out in Schedule 4 of the *Regulation*. 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 NOEA.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance.

Schedule 4 of the *Regulation* establishes prescribed penalties for contravention of the *Act* or *Regulation*. For a first contravention of s.33, the range of penalty is ten (10) to fifteen (15) days license suspension and/or \$7,500 to \$10,000 monetary penalty.

The Branch recommended a ten day suspension in the NOEA and submitted the following reasons for the recommended penalty:

A suspension penalty is being recommended to ensure future voluntary compliance. Although the licensee appears to be trying to comply, it is apparent that not all staff understand the serious public safety issues created when minors are permitted to enter and consume liquor in a licensed premise, especially one that offers adult entertainment. It is felt that the minimum penalty for this contravention will help to ensure all staff comply. The penalty falls within the range set out at Schedule 4 of the Regulations, Item 2.

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"). Accordingly, pursuant to the *Regulation*, Schedule 4, this is a first contravention.

The fact that the establishment's manager felt it acceptable that the bar be operated by a single employee, and further that she considered it an acceptable defence to the allegation of a minor drinking in the establishment that the employee was in the washroom, indicates that the licensee's management does not take the responsibility inherent in operating such an establishment seriously in terms of public safety.

I find that a penalty is warranted in order to attempt to secure voluntary compliance in the future.

I find the appropriate penalty for the contraventions is a ten (10) day suspension.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Liquor Primary Licence No. 006856 for a period of ten (10) days to commence at the close of business on Tuesday, July 28, 2009, 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*). I direct that liquor licence No.006856 be held by the branch or the Cranbrook RCMP Detachment from the close of business on Tuesday July 28, 2009 until the licensee has demonstrated to the Branch's satisfaction that the Licensed establishment has been closed for ten (10) days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 23, 2009

cc: Cranbrook R.C.M.P.

Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate