



**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: 613952 BC Ltd. d.b.a. Boss Night
Club
3457 Adanac Street,
Vancouver, BC V5K 2P5

Case: EH09-081

For the Licensee: George Abboud

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: November 24, 2009

Place of Hearing: Vancouver, B.C.

Date of Decision: January 12, 2010

INTRODUCTION

The Licensee operates an establishment in the entertainment district of Vancouver, BC under liquor primary licence #146969. The licence indicates that liquor may be sold from 7:00 p.m. to 2:00 a.m., Monday through Saturday and 7:00 p.m. 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 Notice of Enforcement Action (NOEA) dated August 10, 2009.

The establishment was transferred to a new owner on June 4, 2009 and is operated by an approved third party operator. The third party operator represented the Licensee at the enforcement hearing.

THE ALLEGED CONTRAVENTION

The Branch alleges that on Saturday, June 27, 2009, at approximately 1:40 a.m. (business day of Friday June 26, 2009) the licensee contravened s. 35 of the *Liquor Control and Licensing Act*, R.S.B.C., 1996, c.267 (the "Act") by permitting a minor in a liquor primary premises.

The proposed penalty for contravening s. 35 of the Act is a four (4) day licence suspension, which is within the range of penalty indicated in item 3, Schedule 4 of the Liquor Control and Licensing Regulation (Regulation) for a first offence of this kind.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 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 in prescribed circumstances.

ISSUES

Did the Licensee contravene the Act as alleged? The relevant elements of the contravention require that the patron was a minor, that he was within the licensed establishment, and that the Licensee or its staff authorized or permitted the minor to enter on or be on the premises.

If the contravention occurred, is a penalty required under the circumstances of this case, and if so, what penalty is appropriate?

EVIDENCE

Exhibit #1- The Branch Book of documents.

The Branch provided two Vancouver police officers and the liquor inspector as witnesses. The Licensee presented the head of security and the bar manager, both of whom were in the establishment at the relevant time. The third party operator also presented some testimony. The Licensee did not deny that minors

were present in the establishment, but argued that the Licensee and its staff did not authorize or permit the minor to be on the premises. The Licensee presented this argument as a defence of due diligence.

Vancouver police officer #1

The detective constable testified that he has been a member of the Vancouver Police Department for twelve years and has done hundreds of licensed premise checks (LPCs), including several at the establishment. He attended at the establishment at approximately 1:30 a.m. on June 27th, 2009 with his partner as part of the firearms interdiction team. They entered through the main doors. There were two or perhaps three door persons at stations outside the doors checking identification of patrons. The lighting at the door was adequate to get a good look at patrons' identification and faces as they were granted entry. The officer testified that he entered the establishment and had a good line of sight throughout the premises. He began to walk counter-clockwise through the room when he noticed a group of four patrons, two of whom he recognized from his professional duties. He knew the two patrons were under age. He and his partner approached the group of four patrons and asked them to accompany the officers outside for questioning. Outside the establishment, he asked the two patrons that he recognized how they got in to the establishment and they said they showed fake ID. The two minors produced identification in the form of drivers' licenses that did not belong to them. The officer showed the ID to his partner, who laughed because the photos did not remotely resemble the minors. The other two patrons said they had not been asked for identification. All four of the patrons produced their actual identification, which the officer confirmed were authentic with the aid of his police technical systems. One of the minors was eighteen years of age, two were seventeen years of age, and one was sixteen years of age.

Vancouver police officer #2

This constable testified that he has been a member of the Vancouver Police Department for nineteen years and has done hundreds of LPCs. He attended at the establishment at approximately 1:30 a.m. on June 27th, 2009 with his partner as part of the firearms interdiction team. The establishment is located on a one-way street surrounded by residential high-rise condominiums. The officers were in uniform. They entered through the main doors. He took note of several doormen checking ID. He testified that he was in the establishment approximately ten minutes when he observed his partner walking toward a group of four young-looking men. His partner engaged them in conversation and then the two officers accompanied the patrons outside. There his partner checked the identification of the four patrons. His partner showed him two drivers' licenses that were in the possession of two of the patrons. The photographs looked nothing like the patrons. All of the patrons then produced proper identification and he and his partner confirmed with the aid of the police technical system that they were all minors. The officer recalled that one of the minors said that the minor did not show any ID to the doormen when he entered.

Liquor inspector

The inspector testified that the establishment is in an area primarily of new residential buildings. He said the area was once mostly warehouses but has changed its makeup in recent years. He identified the license at tab 4 of Exhibit #1, the NOEA at tab 1 of exhibit #1, the floor plan identifying the red-lined areas of the establishment at tab 5 of exhibit #1, and the police and interview notes in the exhibit. He also identified the inspection interview sheet and noted that when the license was transferred earlier this year, both the licensee and the third party operator were in attendance at the inspection interview.

The liquor inspector testified as to the relevance and identity of the remaining documents in exhibit #1 and the process leading up to the enforcement hearing. As well, the inspector testified that contraventions involving minors are a serious

public safety concern for the Branch, and the terms and conditions of the license should be fresh in the minds of the licensee and the third-party operator due to the transfer of the license having occurred only twenty-three days before the date of the alleged contravention.

The Licensee's head of security

This witness testified that he was on the premises at all times relevant to the alleged contravention. He testified that he has no specific recollection of the minors being checked for identification but after the issue came to his attention on the night in question, he asked his doormen what happened and they confirmed to him that the minors were checked for identification. The witness said: "I went on the presumption that [the minors] had fake ID. The staff did not tell me what ID." He said he knows that the minors presented fake ID because he is confident that nobody gets into the club without ID. He testified that the door people are responsible for checking ID, not the staff inside the club. He said the bartender and servers do not have to worry about checking because the front door staff "take care of it." He also testified that he has his Serving it Right (SIR) certification as do all of the establishment's other employees. He said there is door protocol, but he does not have a written copy to present at the hearing, and though the security staff has meetings, there are no written agendas or minutes produced. He said there were no testing procedures in place to check on the staff. He also said that the door staff was not tested on its knowledge of the Guide, though he is sure all of the staff is familiar with it.

The Manager

The manager testified that he agrees that there were minors in the club. He said: "If they entered with fake ID then the doorman would not have any knowledge of them being minors. The doorman would assume if they had proper ID that they were 19 years of age." He testified that he has his SIR and he completed the training for it about ten years ago. He has not done any sort of update or additional training. The staff has a manual, but he didn't bring it to the hearing.

He testified that his staff knows the rules respecting minors, but the licensee does no testing. There are meetings held but there are no agendas or minutes produced. He said that the doormen have responsibilities and those are written down, but he did not bring a copy of that document to the hearing.

The Third Party Operator

This witness testified that he believes minors will do anything to get into a club. In response to the evidence that two of the minors had ID that did not match them, he submits that the minors may not have even showed ID. He said in that regard that someone could have let the minors in another door. He said that he cooperates with the police and even though he has only been the third party operator for a short time he was the Licensee before that. He said: "The licensee is really a nominal one. It's really me and it has been me since 2005". The third party operator testified that when he bought the place it was bad. He has cleaned it up. It operates smoothly now. He said that the door staff is trained to disallow entry to a whole party if one of the party fails the ID inspection. He said also that there is always sufficient numbers of patrons outside to fill the place to capacity, so there is no incentive to risk anything by allowing minors in. Nonetheless he had no evidence of what happened beyond what his staff had told him (consistent with their evidence at the hearing. He submitted that his doormen are competent and experienced.

ANALYSIS AND DECISION

I find that the four patrons that the police escorted out of the establishment were minors at the time of the contravention. Both police officers testified to this from the patron's IDs and confirmation on the police CPIC system. The Licensee's witness did not contest this fact.

I also accept the evidence of the police officers that the minors were present in the redlined area of the liquor primary establishment. Again, the Licensee's witnesses do not contradict that fact and there is no evidence to the contrary.

I find that by allowing the minor access to the establishment, through the supervision of the doormen, and by allowing the minors to remain in the establishment without being checked again for identification by the bartenders or any number of other staff members, the Licensee has authorized or permitted a minor to enter on or to be on premises where liquor is sold or kept for sale.

The head of security testified that the doormen checked the minors' IDs in the form of driver's licenses. His evidence is that the doormen told him so. No doorman was presented at the hearing and made available for cross-examination to test that position. I find the unsupported statement that no patrons gain access to the establishment without identification is not specific evidence of whether these minors were checked for ID and produced identification belonging to someone else or false ID, or whether they were asked to show ID at all. I find the head of security testifying that an unidentified doorman told him the minors had been checked is not evidence of the fact on which I can rely.

The police testified that some of the minors told them they had gained access with fake ID and some told them they had gained access without being checked for ID. I accept the officers' testimony that the statements were made, but I have insufficient evidence of the truth of those statements on which to rely. I am unable to ascertain from the evidence whether the minors showed false identification or were not checked at the door. I find on the balance of probabilities, however, that if the minors showed the fake ID that they had in hand, those minors did not resemble the photographs on the cards. In the absence of any evidence to the contrary from the Licensee or the minors, I accept the testimony of both of the officers that the photographs were not remotely similar to the persons presenting them.

One of the police officers noted that the minors were “young looking.” There is no other evidence before me attesting to the apparent age of any of the minors. Absent such evidence I find no reason to conclude that the minors looked anything other than their ages, 16 to 18 years of age. The police testimony is that the minors were in the establishment at least the ten minutes that the police were present. There is no evidence as to how long before that the minors were in the bar. There is no evidence that any of the licensee’s inside employees checked the minors for identification. There is evidence that only the outside doormen have any obligation to keep an eye out for minors in the establishment.

Due Diligence

Due diligence is a complete defence to the finding of a contravention. Essentially, assessing the defence of due diligence requires an examination of the activities of the Licensee’s operating mind to evaluate whether he or she has done all that could reasonably be expected to be done to avoid the contravention. In this case, I find the operating mind was the third-party operator who attended at the hearing. The evidence is that he has control of the establishment and the general manager answers directly to him. There was little evidence to suggest that the general manager is responsible for hiring, firing, training, or monitoring the employees beyond rudimentary supervisory duties. In the event that the general manager could be seen as the directing mind, my conclusion as follows would be the same.

Door persons and other employees must keep alert to the possibility of minors gaining access to the establishment and accordingly check identification. There is little evidence before me that demonstrates a high degree of formal training, or checks on the results of formal training, for these employees. There is evidence of the existence of a policy manual that speaks to issues surrounding minors, but no such manual was presented for my consideration or for the witnesses to reference. There is no evidence of testing employees, and no specific evidence regarding the treatment of minors but for the licensee’s familiarity with its

obligation to exclude minors from the premises. There is no evidence of instruction provided to door staff as to how to check identification and what to do if suspicion arises regarding the identification. There was evidence of staff meetings, but no indication that attendance was recorded or what was on the agendas of those meetings. No minutes were available to help confirm the issues covered in those meetings.

I find the defence of due diligence must fail. The onus is on the Licensee to establish the facts on which this defence could succeed and it has not done so to my satisfaction. I believe this is a case of the operator simply paying too little attention to the obligations he has to meet in order to satisfy the requirements of his license.

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. 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 the public safety and the well being of the community.

The inspector thought it appropriate to pursue enforcement for the allegation, and he indicated that he believes a penalty is required to assure voluntary compliance in the future. I find the inspector is experienced, familiar with the licensee and its operation, and uniquely positioned to provide a reasonable recommendation in this regard. I, therefore, give considerable weight to his expertise and recommendation that a penalty is appropriate in the circumstances. The inspector recommended a four-day license suspension in the NOEA and submitted the following reasons for the recommended penalty: "Although, this licensee has only recently transferred into this liquor licence, the terms and conditions should be fresh in their mind. A 4 day suspension will hopefully send a strong message at this early stage that the Branch will not tolerate contraventions involving public safety."

The inspector and the police officers each indicate the importance of keeping minors out of liquor primary establishments.

There is no compliance history of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents. Accordingly, pursuant to the *Regulation*, Schedule 4, this is a first contravention and the range of penalties for first contraventions is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000- \$7,500.

I find that a penalty is warranted to ensure voluntary compliance in the future. I find that nothing more than the minimum suspension penalty is required. I find that a four day suspension is reasonable and required to bring about voluntary compliance in the future.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Liquor Primary Licence #146969 for a period of four (4) days to commence at the close of business on Thursday, February 4, 2010, 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 #146969 be held by the Branch or the Vancouver Police Department from the close of business on Thursday February 4, 2010 until the licensee has demonstrated to the Branch's satisfaction that the Licensed establishment has been closed for four (4) days.

Original signed by

Sheldon M. Seigel

Enforcement Hearing Adjudicator

Date: January 12, 2010

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver office

Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver office

Attn : Bode Fagbamiye, Branch Advocate