



**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: Royal Nelson Investments Ltd.
dba Royal Inn
330 Baker Street
Nelson, BC V1L 4H5

Case: EH11-165

For the Licensee: Luke Menkes

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Dianne Flood

Place of Hearing: Written Submissions

Date of Decision: July 13, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Royal Nelson Investments Ltd., owns The Royal Inn located in Nelson, BC. At the time of the alleged contravention, October 11, 2011, the Royal Inn was being operated by Royal Nelson Investments. The Royal Inn has a licensed premise known as "The Royal" or "The Royal on Baker", operating under Liquor Primary Licence 028141, with liquor sales permitted from 11:30 a.m. to 2:00 a.m. Monday through Friday, from 10:00 a.m. to 2:00 a.m. on Saturdays and from 10:00 a.m. to midnight on Sunday. The establishment has an interior occupancy load of 185 persons, including the occupancy of the 22 person patio.

The Royal was, at the date of the allegation, operated by Royal Nelson Investments Ltd. Mr. Luke Menkes is the principal of Royal Nelson Investments Ltd. and made a submission on behalf of Royal Nelson Investments Ltd.

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

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated February 6, 2012.

The Branch alleges that on October 11, 2011, the Licensee contravened section 33(1)(c) of the *Liquor Control and Licensing Act* (the "Act"), by permitting a minor to consume liquor. The proposed penalty is a suspension of ten (10) days as falling within the range set out in item 2, Schedule 4, of the *Regulation*.

The Licensee admits the contravention occurred but disputes the proposed penalty. The Licensee submits that the penalty should be the transfer of the licence or, in the alternative, a monetary penalty of \$2,000 or in the further alternative, a combination of the transfer of the licence and a \$2,000 penalty.

RELEVANT STATUTORY PROVISIONS

The *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 and The *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 are the relevant statutory provisions, in particular, the following section:

Supplying liquor to minors

33 (1) A person must not

(c) in or at a place under his or her control, permit a minor to consume liquor.

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention was proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: The Branch's book of documents Tabs 1 -18

Exhibit 2: The Licensee's submission consisting of a six page letter and a copy of "The Royal Policies & Guidelines, version 1.0 – 2012"

EVIDENCE

The facts of the alleged contravention are set out in the Notice of Enforcement Action letter dated February 6, 2012 (the NOEA). The Licensee does not dispute any of the facts set out in the NOEA, but a summary is provided here, to put the decision on due diligence and penalty into context.

At approximately 2:15 a.m. on October 12, 2011, while stopped to attend to a severely intoxicated female on the sidewalk outside the Premises, a Nelson City Police constable ("the Constable") saw a female exiting the premises who appeared to be a minor and to be "drunk", based on her swaying, slurring, having a flushed face and watery eyes. When the Constable requested identification from her, she produced a BCID which obviously did not belong to her; she is much shorter and weighs less than that shown on the BCID presented by her (5'2" vs. 5'8" and 99 lbs vs. 134 lbs) plus she has different coloured eyes (green and not blue) than shown on the BCID. On further questioning, she admitted her real identity, which was that of a minor of 17 years of age, and she was issued a violation ticket for presentation of false identification and for a minor in a licensed establishment. At that point, a second intoxicated young woman approached the Constable and asked for the identification that had been presented to him by the minor, as it belonged to her.

The Constable entered the premises, told the manager that a minor was located in the premises and issued a Police Licensed Premises Check of a section 35 Minor in Licensed Premises. The premises were almost empty by this time.

On October 17, 2011, a liquor inspector attended the premises and talked to the manager and on October 18, 2011, interviewed the manager and the two door staff persons who were on duty on October 11. As a result of these interviews, the liquor inspector reported:

- There were no written policies and procedures for employees.
- Door staff had never attended a staff meeting for their work and seemed to be unaware of the requirement to examine identification carefully to ensure it belongs to the person presenting it.
- The manager made a quick reference to heights when verifying identification, but neither of the door staff mentioned checking heights to verify identification.
- Staff rarely ask for comparison signature samples to verify identification.
- None of the staff referred to the Guide.

Also as a result of those meetings and interviews, the liquor inspector reported:

- The minor entered the premises at about 11:00 pm. with three other young women.
- When asked for identification by one of the door staff persons on duty (door staff #1) the minor presented the BCID belonging to one of the young women she was with.
- The minor was asked for and produced a second piece of identification and door staff #1 compared signatures but did not ask the minor for a sample signature.
- The door staff #1 did not have a flashlight to check the identification.
- The minor was permitted to enter the premises.
- The other three young women with the minor were not asked for identification as they were known to the second door staff person.
- Both door staff persons indicated that the lighting in the area where they check identification was poor.
- The bartender did not ask the minor or the other young women for identification but confirmed with other staff the young women had been “age verified” and took their order.

- The young women were part of a larger group at a table that was buying rounds and a male patron bought drinks for the women.

SUBMISSIONS

The Branch's submission on penalty, as proposed in the NOEA, is a ten (10) days suspension, the minimum suspension set under the Regulation for a first contravention of section 33, selling liquor to a minor. The Branch says this penalty would achieve voluntary compliance, reinforce the seriousness of providing minors with liquor, and can be expected to provide the Licensee with the opportunity to further enhance his existing policies and procedures to ensure that young persons' identification is thoroughly checked. The Branch submits that the proposed penalty would also send a clear message to the community of the seriousness with which the Branch views these matters.

The Branch says the Licensee ought to have been aware of the responsibility regarding checking for identification to ensure minors were not admitted to the premises and were not served liquor.

Mr. Menkes had been the Licensee since December 14, 2010, and has operated the premises since October 28, 2009. Several meetings were held by the liquor inspector with Mr. Menkes prior to the October 2011 incident. More specifically:

- On October 17, 2009, Mr. Menkes attended an interview with the liquor inspector where the importance of checking for identification carefully was emphasized to Mr. Menkes and he acknowledged his responsibility to follow the Guide.
- On December 5, 2009, the liquor inspector attended the premises and reminded Mr. Menkes of his responsibility to supervise his staff and ensure they had read the Guide.

- On January 27, 2010, the liquor inspector attended at the premises and discussed with Mr. Menkes the requirement to check identification carefully and that staff must ask questions about the identification. The liquor inspector explained that he had received information that minors as young as 16 had been attending the premises.
- On February 2, 2010, during a meeting with the liquor inspector Mr. Menkes said he had worked to address the issue of minors attending the premises.
- On February 8, 2010, during a telephone conversation, the liquor inspector again explained to Mr. Menkes the importance of checking identification and verifying its authenticity.
- December 9, 2010, Mr. Menkes again declared his responsibility to understand and follow the Guide and that he must ensure that staff also understand and follow the Guide.

Prior enforcement actions are:

- November 1, 2009 – permit liquor to be removed from the redlined area - \$2,000 penalty.
- July 31, 2010 – permit intoxicated person to remain on premises - 5 day suspension.

Compliance meetings were held on November 2, 2009, March 19, 2010, and November 1, 2011.

The Licensee

The Licensee expressly admits “the complete absence of compliance measures was a result of the inexcusable omissions by the Licensee prior to and up to the date of the contravention”. The Licensee’s submission is that a suspension would not be an appropriate penalty because the premises are now being operated by a third party, (referred to by the Licensee as the “Interim Assignees”), who have now instituted

compliance measures. The Licensee says that in these circumstances, the appropriate penalty should be a transfer of licence. In the alternative, the Licensee suggests a monetary penalty of \$2,000 or in the further alternative a transfer of licence and a monetary penalty of \$2,000.

The Licensee says that on October 7, 2011, the Licensee committed to transferring operation of the business to a third party, with the transfer of operations to be effective December 1, 2011, so that at the time of the contravention, it was the Licensee, not the third party, who had control of the premises. The essence of the Licensee's submission is that for this reason, it should be the Licensee who is penalized (by a transfer or monetary penalty), not the third party.

The Licensee says that the third party has taken over operations and their operational employees have become familiar with the contents of the Guide and the compliance requirements of the Act, the Regulation and the terms and conditions of the licence. The Licensee says that the third party has taken steps to employ staff, implement policies and put in place measures to ensure compliance with the Act, the Regulation, and the terms and conditions of the licence.

The Licensee says the measures that had been developed and implemented by the third party include:

- Detailed job descriptions with a view to exhaustively allocate all duties necessary to comply with the Act, Regulation, and the terms and conditions of the licence;
- A staff training manual to effectively establish and communicate clear expectations of staff with respect to the operational policies and procedures necessary to comply with the Act, Regulation and the terms and conditions of the licence; and,
- Regular meetings with and communication bulletins to staff to articulate and communicate expectations, policies and procedures to staff.

The Licensee says the third party supervises the operational employees for compliance with the expectations, policies and procedures and standards set out in the Guide. More specifically, the Licensee says the third party has:

- Assigned staff so that the most experienced and diligent employees have been assigned door security duties, with instructions to specifically to check identification and assess height and likeness and to scrutinize suplicate signature samples;
- Implemented a policy of random duplicate identification checks on busy nights; and,
- Installed improved entrance lighting, height charts and “ID” charts at the entrance.

The Licensee also says the third party has met with the Chief and several officers of the Nelson Police Department, other local municipal officers such as the City Planner and the Chief of the Fire Department and also with the Branch’s local liquor inspector, and have “received favourable endorsement” from them.

The Licensee says that because in (ordinary) circumstances of a transfer of a licence the Branch allows third parties to operate an establishment in order to avoid business interruption, it would be inconsistent for the Branch to impose a suspension on the third party as a penalty for a contravention that is attributable to the Licensee that occurred prior to the purported transfer taking effect. The Licensee suggests that the penalty ought to be “connected to the responsible operator” (or, perhaps more appropriately here, the irresponsible operator) – the Licensee, and not the third party.

The Licensee says a suspension would stigmatize the establishment, which the third party has worked hard to bring into compliance with the Act, Regulation, and the terms of the licence. A suspension would “infect” the third party with the consequences of a faulty regime (by the Licensee) that the third party had no operational connection with. The Licensee further says it would be counterproductive to the objective of moving the

establishment forward into “a new era of compliance” and the associated messaging of that new era to the local community. Finally, the Licensee says the closure associated with a suspension would impact the employees and the community generally because the premises are a major private sector employer in the area.

REASONS AND DECISION

Findings

The evidence, undisputed by the Licensee, is that a minor was permitted to enter and remain on the premises, that she entered the premises about 11:00 p.m. and was with a group who were consuming alcohol, and was observed by the Nelson City Police to be intoxicated on leaving the premises at about 2:00 a.m. As such, I find that a minor was permitted to enter the premises and permitted to consume liquor on the premises. As such, I find that the contravention occurred as alleged by the Branch and the Licensee has contravened section 33(1)(c) of the Act.

Due Diligence

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. A licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with. As the Licensee in this case has expressly admitted to the complete absence of compliance measures as a result of the inexcusable omissions by the Licensee, the defence of due diligence is not available to the Licensee in this matter.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a 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.

There is no record of a proven contravention of the same type for this Licensee at this premise within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item #2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 -15 day licence suspension and/or a \$7,500 – \$10,000 penalty. As noted above, these are minimums, not maximums.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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.

In determining the appropriate penalty I have considered the submission of the Licensee and find that simply ordering the transfer of the licence, to which the Licensee had already agreed to as part of a business transaction concluded before the contravention, will do nothing to encourage compliance and will not send a message to anyone about the seriousness of providing liquor to minors. The message it would send would, in fact, be the opposite. A Licensee who acts with admitted "complete absence of compliance measures" as "a result of inexcusable omissions" cannot simply transfer a licence and walk away without any consequences.

In response to the Licensee's submission that it is the responsible party, the Licensee, not the third party, who should bear the consequences, I note that the operation of licensed premises cannot be legally transferred or assigned without Branch approval, and if there is an enforcement action pending, a transfer application will not be processed until the enforcement proceedings are completed.

A proposal to transfer the licence of premises when an enforcement action is pending cannot and should not affect the penalty to be imposed; otherwise the transfer of a licence would be a way for a licensee to avoid or limit the consequences of non-compliance. In this case, this enforcement action and the potential penalties were or should have been known to the third party.

This matter must be considered and the penalty imposed without consideration of the proposed transfer. The Licensee was and remains the operator and the third party is simply a transfer applicant, without legal rights or standing in regard to this enforcement process.

Voluntary compliance of all licensees is important in ensuring the integrity of the liquor licensing regime. In giving a message about voluntary compliance, the message needs to be given not only to this Licensee, but to all licensees of the consequences of lack of compliance.

The Licensee claims steps have been taken by the third party to ensure compliance, and specifically refers to the third party implementing detailed job descriptions and responsibilities for compliance, a staff training manual, and regular meetings with and communication bulletins to staff. However, the Licensee gave no specific names associated with the positions and duties assigned or staff experience in relation to them, or any specific evidence as to actual distribution of the staff manual and instruction given in relation to it, or specifics about when or how frequently staff meetings are held or bulletins distributed. Nor were minutes of staff meetings provided or copies of bulletins submitted. Without such evidence, the claims of current compliance seem to be no different than those made by the Licensee in compliance meetings held prior to the contravention.

And while post-contravention activity to ensure compliance is important, it cannot completely absolve the Licensee of consequences for non-compliance; otherwise there would be little reason for licensees to take steps to ensure compliance prior to an enforcement action.

The factors I have considered in determining the appropriate penalty include the past history of warnings by the branch, and the seriousness of the contravention, the threat to the public safety and the well being of the community.

In the two years prior to the offence, the Branch had no less than six interviews or conversations with the Licensee about the need to comply with the T & C, with specific reference on several occasions to serving minors. The Licensee claimed to be in compliance and acknowledged responsibility when in fact there was, as Mr. Menkes now admits, a "complete lack of compliance measures" due to "inexcusable omissions". This is a circumstance that requires delivering a strong message to the Licensee and to the community that compliance requirements are intended to be taken seriously.

Regarding the seriousness of the contravention, a 17 year old minor was permitted entry, with only a cursory identification check made. She was allowed to remain on the premises for up to three hours without any re-checking of identification and to consume liquor to the point where she appeared intoxicated to a police officer.

There is a reason why serving liquor to minors is treated seriously. Serving liquor to minors has potentially serious impacts on the minors in terms of health and safety. Impairment in decision-making and of judgment can have lifelong impacts. Not only is the minor potentially harmed by this, so is the community. For this reason the Regulation sets a significant penalty for even a first offence.

Taking into consideration all of the above and the complete and inexcusable disregard for the need for measures to ensure compliance, the failure to act on repeated warnings and the blatant assurances given that responsibility was known and accepted, that the serving and perhaps over serving of a minor, to give this Licensee and the community as a whole the seriousness of this offence I find this contravention calls for a penalty of a suspension of ten (10) days.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 028141 for a period of ten (10) days to commence at the close of business on Wednesday, August 15, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Nelson City Police from the close of business on Wednesday, August 15, 2012, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.



Dianne Flood
Enforcement Hearing Adjudicator

Date: July 13, 2012

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate