



**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: The Longhorn Pub Ltd.
dba Carleton Lodge
4284 Mountain Square
Whistler, BC V0N 1B0

Case: EH11-014

For the Licensee: Donald Jordan, Q.C.
Taylor Jordan Chafetz

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Place of Hearing: Written Submissions

Date of Decision: May 16, 2012

INTRODUCTION

The Licensee operates a liquor primary establishment in the Carleton Lodge in Whistler B.C. under Liquor Primary Licence No. 005564. The licence provides that liquor may be served from 9:00 a.m. to 1:00 a.m. seven days per week and that the establishment has a person capacity of 275 persons in the main area and 170 persons on the patio. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (the "Guide").

This is a rehearing of a previous enforcement hearing. The Branch held an enforcement hearing on September 15, 2011, and issued a decision on December 5, 2011. The Licensee applied to the B.C. Supreme Court for judicial review of the decision. On February 2, 2012, the Supreme Court (No.S-118769, Vancouver Registry) issued a consent order as agreed by the Branch and the Licensee, which stated "The petition is allowed and the decision of the enforcement hearing adjudicator dated December 5, 2011, is set aside and the matter is remitted to the General Manager, Liquor Control and Licensing Branch for rehearing before a different adjudicator" and that "the rehearing will proceed by way of written submissions."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch alleges that on November 20, 2010, at approximately 11:30 p.m. the Licensee contravened s. 35 of the *Liquor Control and Licensing Act* (the *Act*) by permitting a minor to enter or be on premises where liquor is sold or kept for sale. The proposed penalty is a four (4) day license suspension, which is within the range of penalties in item 3, Schedule 4 of the *Liquor Control and Licensing Regulation* (the *Regulation*) for a first contravention of this type.

There is no dispute that minors were found on the premises on the night in question. The Licensee disputes the contravention, submitting that the Licensee did not “permit” or “authorize” the minors to be there and that the Licensee took reasonable care to prevent this.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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.

ISSUES

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

EVIDENCE

The evidence for the purposes of this rehearing is:

- The transcript from the first hearing, as recorded by counsel for the Licensee and as agreed by the Branch representative.
- The exhibits from the first hearing

The transcript included the testimony of the Branch witnesses, an RCMP sergeant and a liquor inspector, and of the Licensee's witnesses, the Licensee's General Manager of Night Operations ("the Licensee's GM") and the President of the Longhorn Pub Ltd.

EXHIBITS

Exhibit No.1: Liquor Control and Licensing Branch documents (tabs 1 to 10)

Exhibit No.2: The Longhorn Saloon Employee Manual

Exhibit No.3: The Longhorn Saloon employee agreement

Exhibit No.4: Gibbons Hospitality Group – meeting minutes – September 27, 2010,
with oath

Exhibit No.5: Gibbons Hospitality Group – meeting minutes – November 1, 2010,
with oath

Exhibit No.6: I.D. Checking Guide

I have also reviewed the Licensee's Book of Documents which was part of the first hearing but was not marked as an exhibit. The Licensee's Book of Documents consists of the *Act*, the *Regulations*, the Enforcement Hearing Rules, Enforcement Process, Compliance and Enforcement Policy and Procedures Manual – Desk Reference and Field Reference dated March 2011, the Guide for Liquor Licensees (excerpt included in Branch's Book) and the Liquor Primary Licence (also included in Branch's book of Documents).

SUBMISSIONS

The Licensee submits that the evidence demonstrates that the Licensee took all reasonable care to ensure that they were not “authorizing” or “permitting” minors to be on the premises. The evidence further shows that the Branch’s liquor inspector accepted the fact that minors were on the premises as establishing the contravention of section 35 and that she did not address the concept of reasonable care of the Licensee as required by section 35. The Licensee cites the following as evidence in support of the reasonable care exercised by the Licensee:

- On a daily basis, the General Managers and Shift Managers take an oath to ensure compliance with the Act. (Transcript, page 33)
- The Licensee brings in the police and the liquor inspectors constantly to go over and over the requirements of the Act and in particular matters related to the admission of minors. (Transcript, pages. 53 and 54)
- The Licensee has a Host Training Manual which is used in addition to the Longhorn Employee Manual (exhibit 2). This Host Training Manual is specifically for the hosts (doormen) and includes a short questionnaire that is intended to repeat the information in the literature they are required to review before being hired. (Transcript, pages 34 to 36)
- All hosts are required to check the ID of all persons on the premises who look under the age of 25 (although legislation has changed to remove this requirement, the Licensee retains this as a guideline to ensure compliance). (Transcript, page 36)

- The Licensee provides an ID Checking Guide (exhibit no.6) which gives samples of various forms of identification from every state in the United States, every province in Canada, the territories, federal identification cards and a host of others (Transcript, page 36). The liquor inspector was aware of this document used by the Licensee (not a Branch document) and agreed that it was very good for establishments to have. (Transcript, page 27)
- All employees are required to sign an agreement to comply with the requirements under the Act and the regulations. (Transcript, page 38 and exhibit no.3)
- New hires go through a “walk about” or training seminar with a veteran staff member who reviews the “Host Training Checklist” with the new employee and are initially required to host inside the room before working at the door and they are then paired again with another veteran staff member to work a shift with that member before working on their own. (Transcript, pages 38, 39)
- Hosts are given tips and tricks to authenticate IDs. (Transcript, page 39)
- As part of his job, the General Manager of Night Operations (“the Licensee’s GM”) does six month reviews of employees as well as monitoring how they check IDs on an ongoing basis (Transcript, page 39). He supplements this with spot checks at least once a night and, on high volume nights, may do at least five spot checks. (Transcript, page 40)
- The Licensee’s GM confirmed the President’s evidence that others will do spot checks as well. (Transcript, page 40)
- The Licensee holds meetings with its own employees every Sunday night after their last shift where they sit down and touch on the “three pillars”: overcapacity, service of minors and intoxication. (Transcript, page 40)

- There have never been any complaints from either the RCMP or representatives of the Branch about the lighting at any of the ID checking locations. (Transcript, page 42)
- The Licensee's GM gave evidence about his conversation with the host who, according to the Licensee's GM, admitted the minors to the premises. After that conversation, the Licensee's GM ID'd everyone at the group table that the host said was at the table where the minors had been sitting. In cross-examination, the Licensee's GM reiterated his assertion that the Licensee has a "very immersive training program" and that "we do our best to ensure these mistakes don't happen". (Transcript, page 48)
- The Licensee had five Hosts on shift on the night in question. (Transcript, page 50)
- The Licensee's GM testified that none of the spot checks which he conducts on a regular basis have ever identified a minor. (Transcript, pages 51 to 52)

The Branch advocate submits that the Licensee was not duly diligent in preventing the presence of the minors. He identified several key deficiencies in the Licensee's operating systems:

- Door Control - although it was unclear which entrance the minors entered, as there were doormen at both entrances, whoever checked them for ID did not do a thorough enough job since the photos on the false ID they were carrying did not clearly depict the minors in question.

- Employee Manuals - The Licensee's Employee Manual contains mostly housekeeping rules and does not articulate procedures to deal with minors and ID checks, nor does it define any procedures to deal with and remove minors. The Host Training Manual makes a one paragraph reference to the subject of minors and contains no procedures on verifying identification.
- Licensee's Questionnaire for employees – this does not properly highlight the importance of ensuring minors do not enter the premises in the first place, rather than its emphasis on service of liquor to minors as the point of verification of identification.
- No record of staff meeting – there was no evidence that the events of the night in question were reviewed with staff after the incident – important to ensure future compliance.
- Incident Log Book – there was no evidence that the Licensee trained its employees to use an Incident Log book. The Licensee's GM testified that he did not complete an incident log for the November 20, 2010, incident but that he sent an email to the Licensee detailing what had occurred. This email communication was not entered into evidence and the Branch submits that an adverse inference should be drawn from this omission.

REASONS AND DECISION

I find that there were minors on the premises on the night in question. The fact of the minors on the premises is *prima facie* evidence that the Licensee permitted the minors to enter on or to be on the premises on November 20, 2010.

Liquor licence contraventions attract strict liability. Once the Branch has established the contravention of permitting minors on the premises, the onus shifts to the Licensee to demonstrate, on a balance of probabilities, that the Licensee took all reasonable care to prevent the occurrence.

Due Diligence

Due diligence is a complete defence. If the Licensee can show that it was duly diligent in taking reasonable steps to prevent the presence of the minors on the night in question, then there is no contravention. The 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.

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, 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 respondeat 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.

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 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 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 are, in fact, responsible for that part of the licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

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

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. *If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person 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 'directing mind and will' of the licensee.

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely *whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons.* That inquiry requires, of course, consideration of *who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.*

(My emphasis in italics)

I find that the policies and procedures of the Licensee, along with the implementation of those policies as provided by the evidence of the Licensee's GM, clearly demonstrate that the Licensee took reasonable care to ensure minors are not on the premises.

I find that the evidence of the liquor inspector shows her knowledge of the systems put in place by the Licensee to prevent contraventions such as the presence of minors. She has found the Licensee to be responsive to any of her suggestions for improvements over her time working with them and to be "very reasonable and very cooperative." The liquor inspector testified that this was the first notice of enforcement action for the presence of minors in her seven years of conducting inspections of this establishment. (Transcript, page 23).

I find that the “directing mind” of the Licensee on the night in question was the Licensee’s GM and that he had been duly diligent in preventing the admission or presence of minors on the night in question, through the spot checks, general supervision of staff and regular emphasis on the importance of and process to follow when requesting identification of minors.

As to how the minors entered the establishment, there was some conflict in the evidence on this. The RCMP Sergeant testified that he did not see where the two minors had been sitting in the pub and that he was not aware as to whether they were part of a larger group (Transcript, pages 13, 14). The RCMP Sergeant also accepted the answers from the minors that they had entered through the front door.

The RCMP Sergeant and an RCMP Corporal (also present but did not testify) met the first minor at the front door of the establishment, when the minor was heading to the washroom, and requested identification as he appeared to be younger than 19. The RCMP Corporal then proceeded inside to find the first minor’s friend and bring him to the front door entrance. Both minors had their own identification as well as identification belonging to someone else that showed an age older than 19. The RCMP Sergeant issued violation tickets to both minors. The minors did not testify.

The Licensee’s GM testified that, after making inquiries of the doormen at each entrance (the patio entrance and the front door entrance) that he concluded the minors had entered through the patio door entrance. After the RCMP left, the Licensee’s GM spoke with the doorman at the patio door entrance who stated that he had requested identification from both men and that they had been part of a larger group. The doorman did not testify.

I am satisfied, from a review of the evidence, that the Licensee not only had policies in place designed to avoid the admission of minors to its premises, but that the Licensee enforced these policies in a meaningful way - through its training of staff, regular spot checks, daily and other meetings which included its review of the importance of compliance with the *Act*, emphasis on tips for verification of ID, and the availability of a well lit area to examine ID.

I note the comments of the Branch advocate with respect to deficiencies in the employee manuals but I find that, on a review of all the evidence, including the training given to the employees, the use of the daily oath, the ID checking guide, constant reminders from supervisors re. the importance of checking for minors and the well-lit area for checking ID, the Licensee has met the onus of establishing due diligence. I recommend that the Licensee train its employees to keep an Incident Log book as this helps to document the details for the Licensee and the Branch when an event such as the one on November 20, 2010 occurs.

I agree with the Licensee that the defence of due diligence does not require perfection. The conclusion as to whether or not a licensee has proven the defence of due diligence is fact-specific. The nature of the evidence to support this finding in any particular case must be significant and of a high calibre for a licensee to meet the onus of demonstrating its due diligence.

In the present case, the liquor inspector agreed that the Licensee had effective policies in place for training and education of staff and further that the lack of any previous contraventions with respect to minors indicated these policies were being implemented. Because there were minors admitted on the night in question, she concluded that there was inadequate follow-up with these policies. I find that the evidence of the Licensee's GM, along with the liquor inspector's testimony about the Licensee's record, do not support a conclusion that the policies were ineffective nor that they were being sloppily implemented. The Licensee's GM's testimony about his regular spot checks never

identifying a minor within the premises further demonstrate that this was a “one-time error” on the part of this doorman – and that it was not because of inadequate training, but purely because “mistakes happen.”

I wish to emphasize that the reference above to the comment that “mistakes happen” is not an invitation to licensees to use this as a standard defence when faced with an allegation of a contravention. On the particular facts of this case, the “directing mind” did not “permit” the presence of these minors.

ORDER

I conclude that, on November 20, 2010, minors were on the premises where liquor is sold or kept for sale. I find that the licensee has successfully proven, on the balance of probabilities, a defence of due diligence. Therefore the contravention has not been proven.

Original signed by

Nerys Poole
Enforcement Hearing Adjudicator

Date: May 16, 2012

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate