



**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:	Sportsman Hospitality Investments Ltd. dba Sporty Bar & Grill PO Box 113 Port Hardy, BC, V0N 2P0
Case:	EH15-005
For the Licensee:	Alfons Bauer
For the Branch:	Hugh Trenchard
General Manager's Delegate:	R. John Rogers
Date of Hearing:	September 14, 2015
Date of Decision:	October 1, 2015

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

Sportsman Hospitality Investments Ltd. (the "Licensee") owns and operates Sporty Bar and Grill at 8700 Market Street, Port Hardy, BC (the "Establishment"). The Licensee holds Liquor Primary Licence number 200120 (the "Licence"). According to the terms of the Licence, the Licensee may sell liquor from 11:00 a.m. to 2:00 a.m. Monday through Saturday and from 11:00 a.m. to Midnight on Sunday.

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"). The Licence also contains the following condition:

- Family Foodservice term and condition permits minors accompanied by a parent or guardian in all licensed areas until 10 PM when meal service is available

Mr. Alfons Bauer, a principal of the corporate Licensee, appeared at the hearing as the representative of the Licensee (the "Licensee's Representative") and gave evidence of the Licensee's policies and procedures.

## 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 dated February 18, 2015 (the "NOEA") (Exhibit 1 tab 1).

The Branch alleges that on November 27, 2014 the Licensee contravened section 35 of the *Liquor Control and Licensing Act* (the "Act") by permitting a female minor (the "Female Minor") to enter or be in the Establishment after the 10:00 p.m. time limit provided for in the Licence. Item 3, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out the range of penalties for a first contravention of a breach of section 35 of the Act as being a 4 to 7 day Licence suspension and/or a \$5,000 to \$7,500 monetary penalty. The Branch proposes a monetary penalty of \$5,000.

For the purposes of this hearing, and in accordance with section 6.1 of the Act, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by section 20 of the Act and sections 65-69 of the Regulation.

## 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.

### *Liquor Control and Licensing Regulation, B.C. Reg. 244/2002*

#### Schedule 4 Enforcement Actions

##### Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
3	A breach of section 35 of the Act ( <i>minors on licensed premises</i> )	4-7	10-14	18-20	\$5,000-\$7,500

## 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?

## EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 11.
- Exhibit 2: A photocopy of the page from the Canadian Passport of the Female Minor which contains a picture of the Female Minor and her birthdate.
- Exhibit 3: Hard copies of images from CCTV cameras located both inside and outside the Establishment.
- Exhibit 4: A CD containing images captured by CCTV cameras located both inside and outside the Establishment.
- Exhibit 5: The sworn affidavit of LAB ("LAB"), an employee of the Licensee.
- Exhibit 6: The sworn affidavit of SSN ("SSN"), an employee of the Licensee.
- Exhibit 7: A photocopy of the notes of BF, a patron of the Establishment on November 27, 2014.
- Exhibit 8: A copy of a document entitled "Memorandum #8" and dated January 24, 2015.
- Exhibit 9: A copy of a document entitled "Memorandum #9" and dated March 10, 2015.
- Exhibit 10: A copy of a letter dated April 14, 2015 from the Licensee's Representative to the Branch.
- Exhibit 11: A copy of a picture of signs located at the entrance to the Establishment.
- Exhibit 12: A copy of a picture of a sign located at the emergency exit from the Establishment.
- Exhibit 13: A copy of a document entitled "Checking ID's"

## WITNESSES

The Branch called three witnesses:

1. The RCMP Constable who attended at the Establishment on November 27, 2014 (“Constable A”);
2. NT, a representative of the British Columbia Ministry of Children and Family Development; and
3. A liquor inspector (“Inspector A”).

The Licensee’s Representative testified on behalf of the Licensee.

## EVIDENCE—BRANCH

The Licensee’s Representative confirmed that the Licensee accepted the facts as they are set out in the NOEA as to what occurred in the Establishment on November 27, 2014.

### The NOEA

The facts in the NOEA might be summarized as follows:

- On November 27, 2014 at approximately 23:18 hours Constable A conducted a license premise check of the Establishment following an anonymous tip that an underage female was in the Establishment;
- Constable A found the Female Minor in the Establishment in the red-lined area of the Establishment within which liquor is permitted to be served;
- Constable A escorted the Female Minor out of the Establishment;
- Constable A returned back into the Establishment and issued the Licensed Premise Check No. B 090645 (Exhibit 1 tab 3) to the Licensee’s employee, SSN;
- The CCTV camera footage from the CCTV cameras located in the Establishment shows the Female Minor entering the Establishment at approximately 22:15 hours; and
- This CCTV camera footage further shows:
  - There was no staff member of the Licensee assigned to the door to ensure that minors were not entering the licensed area of the Establishment after 10:00 p.m.;

- After the Female Minor had entered the Establishment, no staff member of the Licensee attempted to check her age; and
- The Female Minor remained in the Establishment for approximately 1 hour prior to being escorted outside by Constable A at 23:21 hours.

### **Constable A**

In his testimony, Constable A stated:

- He has been a member of the Port Hardy RCMP detachment since November 2007 and that as part of his duties he has been to the Establishment on at least 60 occasions;
- During these visits, the only time he has observed a minor in the Establishment was on November 27, 2014;
- He is familiar with the Female Minor and she is a high risk youth; and
- That Exhibit 2 is a true picture of the Female Minor contained in her passport and based upon the date of birth set out in this passport, he testified that the Female Minor was 18 on November 27, 2014.

### **NT**

In her testimony, NT confirmed that she is the Supervisor for the Ministry of Children and Family Development (the "Ministry") for Northern Vancouver Island and has worked for the Ministry since 2003.

NT identified Exhibit 2 as a photocopy of a page from the passport of the Female Minor and testified that the original passport from which this photocopy was taken is in the possession of the Ministry. NT confirmed that the picture of the Female Minor in Exhibit 2 is a true likeness of the Female Minor.

### **Inspector A**

Inspector A testified that she has been a liquor inspector working for the Branch since 2006. She is currently working in Victoria.

She identified the NOEA (Exhibit 1 tab 1) and testified that it had been prepared by liquor inspector B (“Inspector B”) who is responsible for the area of Vancouver Island where the Establishment is located. She testified that Inspector B was currently on leave.

Inspector A confirmed that Inspector B had prepared and had forwarded the NOEA (Exhibit 1 tab 1) to the Licensee. She identified the document at Exhibit 1 tab 4 as Contravention Notice B018073 (“Contravention Notice”) issued by Inspector B on December 8, 2014 and sent by registered mail to the Licensee. She further identified the three documents in Exhibit 1 tab 10 purporting to be records of compliance meetings between Inspector B and a representative of the Licensee.

Inspector A also confirmed that the documents in Exhibit 1 tab 10 had all been signed on behalf of the Licensee by CK who had attended these meetings as the representative of the Licensee.

Inspector A identified Exhibit 1 tab 9 as a document entitled “Legal Entity Summary” and confirmed that this document stated that CK ceased to be a shareholder of the Licensee on October 31, 2014, at which time he was replaced by the Licensee’s Representative.

## **EVIDENCE—LICENSEE**

The Licensee’s Representative testified on behalf of the Licensee. He identified Exhibits 5 and 6 as affidavits of the Licensee’s staff who were working in the Establishment on November 27, 2014 and Exhibit 7 as notes of a patron of the Establishment who witnessed the Female Minor in the Establishment on the night in question.

The Licensee’s Representative’s testimony, as confirmed by Exhibits 5, 6 and 7 was:

- Earlier on the evening of November 27, 2014, a private wine and food event was held at the Establishment;
- Following this event, LAB, the manager of the Establishment, drove the Licensee’s Representative home and was, therefore, not present when the Female Minor entered the Establishment; and

- Although there had been bouncers at the door of the Establishment earlier in the evening, after the private event concluded at about 10:30 p.m., as the Establishment was not busy, these bouncers were no longer on duty.

Since he had taken CK's position with the Licensee on October 31, 2014, the Licensee's Representative testified that he had been working to improve the operating standards of the Establishment as is evidenced by:

- Exhibit 8 which is a memorandum to staff of the Licensee with respect to the necessity of staff members requesting proper identification from patrons;
- Exhibit 9 which is a memorandum to staff of the Licensee dealing with the rules respecting minors in the Establishment;
- Exhibit 10 which is a letter he wrote to the Branch confirming that since November 27, 2014, the Licensee:
  - has on a number of occasions prevented minors from entering the Establishment;
  - has installed signage at the entrance to the Establishment (Exhibit 11) advising patrons that identification will be required;
  - has alarmed the emergency exit from the Establishment (Exhibit 12) to ensure that minors are not able to enter the Establishment through this door; and
  - has ordered new camera equipment to ensure proper CCTV coverage throughout the Establishment; and
- Exhibit 13 which are written instructions to staff of the Licensee as to the importance of checking patrons for identification prior to serving them and how this process should be accomplished.

The Licensee's Representative testified that all staff members of the Licensee have their Serving it Right Certificates and have been instructed to always to check for identification prior to serving patrons. He stated that on Wednesdays, Friday and Saturday nights the Licensee now employs bouncers for the entry doors to the Establishment and that these bouncers use people counters when there are special events at the Establishment.

In addition, the Licensee's Representative testified, the Licensee keeps an incident log behind the bar and every staff member is expected to record in it events happening in the Establishment. There is, as well, a binder with staff memos, similar to those in Exhibits 8 and 9, with all staff members being required to sign acknowledging receipt of these memos.

## **SUBMISSIONS – BRANCH**

The Branch submitted that the Licensee has admitted to the occurrence of the facts leading to the issuance of the Contravention Notice, as such facts were outlined in the NOEA and further supplemented by the testimony of Constable A.

The Branch submitted that the policy and procedures material used by the Licensee to train its staff has come into existence following November 27, 2014 and should not, therefore, be considered as establishing a defence of due diligence.

The Branch submitted that although as of October 31, 2014 the Licensee's Representative has taken over from CK as the operator of the Establishment as set out in the Legal Entity Summary (Exhibit 1 tab 9), the majority ownership of the Licensee did not change at that time. For this reason, the Branch submitted, the notes of the three compliance meetings (Exhibit 1 tab 10) are relevant to the matter at hand.

In conclusion, the Branch submitted that the offence had been proven on a balance of probabilities and that the Licensee had not made out a defence of due diligence

As to the matter of penalty, the Branch submitted that as this was the Licensee's first contravention, the minimum recommended penalty of \$5,000 was reasonable and appropriate.

With respect to the Licensee's request that if a penalty was imposed that it be in the form of a suspension and not a monetary penalty, the Branch took no position.

## **SUBMISSIONS – LICENSEE**

The Licensee's Representative acknowledged that the Female Minor had been in the Establishment on November 27, 2014.

However, the Licensee's Representative submitted that in its actions both before and following this incident it had in place and has put in place policies and procedures to ensure that minors are not permitted in the Establishment after 10:00 p.m.

The Licensee's Representative submitted that following the Licensee's Representative taking over from CK, operations at the Establishment are being run in a much more professional basis. He submitted that the incident on November 27, 2014 was a mistake by a member of the Licensee's staff when the manager of the Establishment was driving the Licensee's Representative to his home.

The Licensee's Representative submitted that it had established the defence of due diligence and was, therefore, not liable for the contravention. However, if such were found not to be the case, the Licensee's Representative requested that if a penalty were imposed that it be in the form of a suspension with such suspension be served during the month of January 2016 when the Licensee intended to renovate the Establishment.

## **REASONS AND DECISION**

### **Contravention**

The Licensee through the Licensee's Representative has admitted that a contravention of section 35 of the Act occurred on November 27, 2014 in permitting the Female Minor to enter and remain in the Establishment. I find that none of the exceptions contained in section 35 of the Act apply, and that, therefore, the Licensee contravened section 35 of the Act by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale.

I turn now to the defence of due diligence.

## Due Diligence

As the Licensee has contravened section 35 of the Act, the Licensee is liable unless it can demonstrate that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensee must not only establish procedures to identify and prevent from happening activities that might lead to this contravention of the Act, it must ensure that such procedures are consistently in operation and acted upon by its employees.

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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the Act (see paragraphs 41 to 44).

Although the matter at hand deals with a different section of the Act, the reasoning of the BC Supreme Court is of assistance. To modify the Court's reasoning to apply to this matter, the Court states that the defence of due diligence is to be considered in two stages:

1. Whether the employee who permitted the Female Minor to be in the Establishment was a directing mind of the Licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who took such action or failed to take such action was not a directing mind of the Licensee (and there is no requirement that a “directing mind” must be on the premises when the contravention occurs), then the questions to be considered and answered are whether the Licensee had:
  - a. implemented adequate training and other systems to prevent the contravention (permitting minors to be on the premises); and,
  - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on the Licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

### Directing Mind

As both the Licensee’s Representative and the manager, LAB, were absent from the Establishment when the Female Minor was on the premises, I find that the directing mind of the Licensee was not present at the Establishment during the incident on the evening of November 27, 2014 and that the directing mind of the Licensee did not, therefore, permit the Female Minor to attend and remain on the premises.

I move to the second part of the analysis as set out in *Beverly Corners*.

### Implementation of Adequate Training and Systems and Effective Application and Operation of these Systems

I accept the Licensee's Representative's testimony that the Licensee is in the process of upgrading and improving the operating policies and procedures for the Establishment and that it has been in the process of doing so since the Licensee's Representative has come on the scene. However, prior to November 27, 2014, as the Licensee's Representative has admitted, none of these policies had been reduced to writing. Nor was there evidence before me of staff meetings or of ongoing procedures, such as staff testing, to ensure that the Licensee's staff fully understood what was expected of them.

With respect to the training of employees, I find that there is little evidence concerning the training given to new employees or updated training for existing employees.

The test for due diligence is not perfection. The test is whether a Licensee has implemented adequate training and other systems and taken reasonable steps to ensure the application of this training and the operation of its systems in a consistent and effective manner.

I have no doubt on the evidence before me that the Licensee and all members of its staff are working to improve its operations since the advent of the Licensee's Representative and to ensure compliance with the Act, the Regulation and the Guide. It is the goal of the Branch to achieve such compliance.

However, unfortunately for the Licensee, good intentions are not sufficient to meet the test for due diligence. The onus is the Licensee to prove that it has met this test and on the evidence before me, I find that the Licensee has not met this test and proven the defence of due diligence on a balance of probabilities.

Having concluded that the defence of due diligence fails, I find that the Licensee is liable for the contravention of section 35 of the Act and I turn now to the issue of penalty.

## 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 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 NOEA. 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.

I find that a penalty is warranted here.

The factors that I have considered in determining the appropriate penalty in this case 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. Although I acknowledge that the Licensee's Representative has taken over from CK and has testified to bringing in a new regime of compliance to the Licensee, it was noted by the Branch that the majority ownership of the corporate Licensee has not changed. Therefore, I find that the evidence of past compliance meetings is relevant to the matter at hand.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress a licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for the Licensee within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 3 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4 to 7 day Licence suspension and/or a \$5,000 to \$7,500 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum for a first contravention, which is either a \$5,000 monetary penalty or a 4 day suspension of the Licence. The Licensee has requested that if I find that a penalty is warranted that I impose a suspension rather than a fine. Under the circumstances presented at the hearing of this matter, I find this to be a reasonable request.

Any penalty imposed must be sufficient to ensure compliance in the future. I find that the minimum penalty of a four day suspension of liquor licensing privileges is necessary, appropriate and reasonable.

## **ORDER**

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence Number 200120 for a period of four (4) days to commence at the close of business on Thursday, November 5, 2015 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 RCMP Port Hardy Detachment from the close of business on Thursday, November 5, 2015 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.

*Original signed by*

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R. John Rogers  
General Manager's Delegate

Date: October 1, 2015

cc: Liquor Control and Licensing Branch, Victoria Regional Office  
Attn: Stephen Hitchcock, Regional Manager

Liquor Control and Licensing Branch, Victoria Regional Office  
Attn: Hugh Trenchard, Branch Advocate