



**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:	Sub Zero Liquor Store #3 Inc., dba Boone Liquor Store 140 Schoolhouse Street Coquitlam, BC V1M 3A5
Case:	EH07-155
For the Licensee:	Barry Carter
For the Branch:	Tania Cogan
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	February 26, 2008
Place of Hearing:	Surrey, BC
Date of Decision:	April 16, 2008

INTRODUCTION

The licensee operates a Licensed Retail Liquor Store (LRS), Licence No. 195392, in Coquitlam. The LRS has been in business since 2005. Its hours of operation are 9:00 a.m. to 11:00 p.m. seven days per week.

On August 16, 2007, a telephone complaint was made to the Liquor Control and Licensing Branch (Branch) alleging that the LRS sold liquor to a minor. That minor allegedly provided the complainant's daughter with liquor in sufficient quantities that the daughter was hospitalized with alcohol poisoning.

On August 17, 2007, the complainant made a similar call to the local police.

The branch and the police each investigated the allegations.

As a result of its investigation, the branch issued a Notice of Enforcement Action against the licensee. The NOEA was dated November 16, 2007.

ALLEGED CONTRAVENTIONS

The branch alleged that on August 16, 2007, at approximately 9:30 p.m. the licensee supplied liquor to a minor contrary to section 33 of the *Liquor Control and Licensing Act* (Act).

The branch proposed a ten day suspension for the contravention.

RELEVANT STATUTORY PROVISIONS

See Appendix A.

ISSUES

The issues are:

1. Did the licensee or its employee contravene s. 33 of the *Act* by providing liquor to a minor?
2. In the event that the licensee provided liquor to a minor, did it exercise due diligence?
3. In the event that the licensee is found to have contravened s. 33 of the *Act*, is a penalty warranted and if so, what is the appropriate penalty?

EXHIBITS

Exhibit No.1: Branch's book of documents.

Exhibit No.2: Licensee's package of photographs generated by the LRS security camera(s).

Exhibit No. 3: Licensee's book of documents.

EVIDENCE

The witnesses included a police constable, the minor who purchased the liquor from the LRS, a liquor inspector, and an officer of the corporate licensee (executive).

The documentary evidence included the contents of the exhibits including a statement of the licensee's employee who allegedly sold the liquor to the minor on August 16, 2007 (Exhibit No. 3).

Police Constable

The police constable testified that on he was on patrol on August 16, 2007, when he received a dispatch to investigate the allegations of a youth having purchased liquor from the LRS. He spoke to the manager of the LRS, who advised him that the complainant had called the LRS to complain about selling liquor to a minor.

The constable spoke to the minor who advised as follows (Exhibit No. 1, tab 5):

- On the 16th of August 2007, he walked into the LRS to purchase a bottle of liquor.
- At no time was he requested to produce identification.
- He had no identification on him at the time.

The constable testified that the minor was 6'2" or 6'3" tall and had facial hair. He issued the minor a violation ticket for "purchase by minor" (Exhibit No. 1, tab 6).

The Minor

The minor testified that his date of birth was August 16, 1990, and that on August 16, 2007, he celebrated his seventeenth birthday. On that day, he drove to the LRS with two friends. His friends waited in the car. He entered the LRS and approached an employee who was stocking shelves. He asked for "two mickeys" and the employee gave them to him. Then he went to the cashier and paid for the liquor with a debit card. He was not asked for identification. He left the LRS, drove with his friends to a park, and there he drank the liquor with his friends to celebrate his birthday. As a result of drinking the liquor, one of the girls was taken to the hospital.

He also testified as follows:

- He advised the constable in a meeting, that he went to the LRS to purchase alcohol.
- He gave the liquor receipt to the constable.
- He told the constable that he had no ID on him when he was in the LRS.
- He knew it was against the law for him to purchase liquor.
- He had his real identification with him in the LRS. But he was not asked for ID.
- He has no preference as to which alcohol to drink. He may have asked for the highest proof of alcohol they had at the store.
- He was in the store for a couple of minutes. He paid for the alcohol with a debit card. He was not nervous in the store.
- He and his friends drank in the park for about an hour. He thought his female friend was 15 or 16 years old. She was one of the friends in his car. He drove her home after the park. She was drunk. Her mother took her to the hospital.

Liquor Inspector

The liquor inspector testified that she received a call from the complainant who indicated that her thirteen year old daughter had been drinking and was in critical condition in the hospital with alcohol poisoning (Exhibit No. 1, tab 3). The inspector investigated by talking to the minor who had allegedly purchased the liquor. The minor confirmed that he purchased the liquor in the LRS and drank it with his friends (including the complainant's daughter) in a park. She also spoke with the officer of the licensee and together they viewed the security video from the LRS. The video showed a male with a goatee, wearing a baseball cap backwards. The video shows the male speaking with a clerk who was stocking shelves and then proceeding to the cashier's desk where he handed the cashier a card. The cashier swiped the card through a data port and returned it to the male, who left the LRS.

The inspector identified all of the relevant documents in Exhibit No. 1. She noted that the licensee applied for a new licence in 2005 and at that time she conducted the LRS inspection (Exhibit No. 1, tab 7) and went over the licensee's responsibilities. She said she conducted her normal presentation about the prohibition on serving minors. She testified that another inspection was done when the LRS relocated in 2006 (Exhibit No. 31, tab 8) and again, the prohibition regarding serving minors was discussed.

The inspector identified provisions of the Guide for Liquor Licensees of licensed retail stores (Exhibit No. 1, tab 11), which by reference is included in the LRS licence (Exhibit No. 1, tab 9). The provisions of the guide specify that minors are allowed in the LRS only when accompanied by a parent or guardian, and that it is against the law to sell, serve, or supply liquor to a minor. The inspector also identified provisions in the guide that elaborate on the procedure to be employed to verify a customer's age.

Finally, the inspector testified that neither the licensee nor the LRS has any compliance history on file for contraventions found or allegations made, other than relating to August 16, 2007.

Licensee's Corporate Officer

The officer of the corporate licensee (executive) testified that the licensee owns and operates ten liquor primary establishments, two food primary establishments and eight licensed retail liquor stores as well as a ski resort and a hotel in British Columbia. He said that the licensee has a total of more than four hundred employees.

He also indicated that he cooperated completely with the inspector when advised of the allegation relating to August 16, 2007. He provided video surveillance footage and talked with the inspector. He investigated the allegation through the licensee's director of operations and the LRS manager. The executive pursued the cashier who was involved, though she had ceased to be an employee shortly after the allegation (she was terminated for reasons unrelated to the contravention), and interviewed her. The cashier provided a written statement regarding the event (Exhibit No. 3, tab 4).

The executive indicated that after reviewing the surveillance video, he "would have made the same call that [the cashier] had." He also said, "We looked ourselves in the mirror. Did she do anything wrong in accordance with what we expected her to do? And no, was the answer." Finally, he said, "When I got [the NOEA] I was upset and flushed. I was upset that enforcement was being taken when I didn't think it was warranted...Also, I felt like I was duped by a young man..."

The executive testified that the licensee uses a two-day orientation period when hiring a new employee during which the new employee shadows a more experienced one. The trainer uses a checklist and the employee handbook as tools. The employees attend at least quarterly meetings, for which no minutes are kept, and often a manager makes notes available for employees who do not attend.

The executive also indicated that he did not know how long the cashier was employed with the licensee, where she worked prior to being employed by the licensee, and whether she had any training prior to working at the LRS. He also indicated that he noticed the name of the LRS's manager on the cashier's hiring record. He did not know if the licensee's general manager was involved in the cashier's training, or if anyone quizzed her on her knowledge of the rules or policy after her training.

He testified that he now knows that the minor purchased liquor at the LRS, that the minor provided the liquor to a thirteen year old friend, and that the thirteen year-old's blood/ alcohol level was deemed to be four times the legal limit.

He said that if employees commit gross neglect they are terminated as a result, but the cashier was not terminated for her conduct on August 16, 2007, because the contravention was only alleged.

SUBMISSIONS

The branch submitted that the evidence clearly indicates that the contravention occurred as alleged, and that a significant penalty is warranted. The branch advocate argued that the contravention was a serious and grievous matter that resulted in the alcohol poisoning of a very young girl and could easily have resulted in death. The severity of the incident and its consequences, the branch submitted, should outweigh the licensee's otherwise clean compliance history and a significant penalty should send a message to the licensee to ensure future compliance.

The licensee submitted that the minor looked much older than his actual age and the cashier acted reasonably.

The licensee did not deny that the evidence supports the sale of liquor to a minor, but rather that the licensee acted with due diligence and should not be found to have contravened the *Act*.

The licensee submitted that if a penalty is found to be warranted, a monetary penalty more closely fits the result of a close call (as to whether to ask for ID) made by the cashier.

ANALYSIS AND DECISION

Most of the evidence indicates that the cashier handed the liquor to the minor. The minor testified that the employee that was stocking the shelves handed it to him. The photographs presented (Exhibit No. 2) do not clarify that matter. There is no doubt that the minor was supplied liquor by one of the licensee's employees, and in fact, there is no evidence or submission to the contrary.

The minor testified that he was celebrating his seventeenth birthday on August 16, 2007. He said that he drove to the LRS with his friends, purchased liquor inside the LRS, and drove to a park where he drank the liquor with his friends. He also testified that the complainant's daughter was one of the friends in the car with him, and one of the friends drinking the liquor in the park with him. He said that he drove her home from the park, and that she was later taken to the hospital.

The minor also testified on one occasion that he had no identification with him in the LRS, and on another that he did have some identification with him. The evidence is uncontroverted that he was not asked for identification before being served or at any other time while in the LRS.

I find that the minor was seventeen years of age on August 16, 2007, and that he attended the LRS on that day. I find that inside the LRS, the minor had a conversation with an employee who was stocking shelves, and then proceeded to the cashier's station where a second employee, the cashier, served him. The cashier provided him with liquor, and accepted payment from him by way of debit card.

The minor did not accurately recollect some of the details of the events inside the LRS, including whether or not he was carrying identification and whether the cashier or the other employee handed him the liquor. However, I find the critical evidence of his date of birth, attendance at the LRS on August 16, 2007, his purchase of the liquor, and the notable lack of any request for identification reliable. I also accept his evidence that he drove to a park with his friends, drank the liquor, and drove the complainant's daughter home afterwards.

The written statement of the cashier (Exhibit No. 3, tab 4) says:

At no time during my conversation with this customer or in his appearance and actions while he was in our store, did I see or observe any reason to feel he was not of legal age to buy alcoholic beverages. I am in the habit of requesting identification from any customer who may possibly be under age, and didn't feel this customer fell into that category.

Having "no reason to feel [the customer] was not of legal age" is not the test for whether or not a licensee or licensee's employee should ask for verification of age. The test is whether there is any reasonable possibility that the customer or patron is under age. If there is any such possibility, the customer should be asked for identification. The employee stated that she did not feel that this customer "may possibly be under age." She was wrong, as he was a full two years under age.

I find the contravention occurred, subject only to a consideration of due diligence on the part of the licensee.

Due diligence

If due diligence is established, it is a complete defence to the contravention.

The onus is on the licensee to establish on a balance of probabilities that it took all reasonable steps to prevent the contravention.

The test is twofold:

- Did the licensee implement adequate training and other systems to prevent the contravention, and
- Did the licensee take reasonable steps to ensure the effective operation of the system?

The executive said (after viewing the video) that he would have made the same decision as did the cashier, and that the cashier did not do anything wrong in accordance with what the licensee expected her to do. I find that statement to be relevant evidence of a lack of adequate training and other systems put in place by the licensee, as it indicates that any system in place in the establishment was not designed to catch situations such as this. Due diligence requires doing all that is reasonable to ensure compliance with the terms of the licence and applicable legislative scheme. The minor was two full years younger than the required age to receive service in the LRS. He presented at the hearing as a mature seventeen year old, but a seventeen year old nonetheless. I recognize that he appeared clean-shaven at the hearing and the evidence establishes that he had facial hair on August 16, 2007. I find that while facial hair may add to the minor's appearance of maturity, it does not make so much of a difference that a cashier in a LRS could have reasonably conclude that the minor could not possibly be under age. I note also that at the time of the hearing, the minor was six months older than he was on the date of the contravention.

For the licensee to effectively argue that adequate training and other systems were in place to prevent the contravention would in this case require:

- Significant evidence that the minor was so mature looking that no person in the position of the cashier could reasonably conclude other than that he was nineteen years of age or older, or
- That the cashier was equipped to act appropriately with respect to the licensee's obligations by reason of her selection, previous training and experience, thorough briefing, updating, and testing of her knowledge and protocol, and simply failed to so act.

I find that the evidence falls well short of the former. The above quoted statements made by the executive (he wouldn't have asked for ID either, and the cashier did nothing wrong in accordance with what is expected of her) speak against the latter. Further, there is insufficient evidence of the latter (selection, training and experience, briefing, updating, and testing), to establish a reasonable code of conduct by the licensee such as to protect the licensee from the cashier's actions or lack thereof. I note as one small example of the licensee's lack of adequate systems, that the licensee's only evidence of a policy manual, is its current *Handbook for All Employees* (Exhibit No. 3, tab 5, p. 11) that was presented for this hearing. It describes a process for verifying legal age of patrons that was eliminated by regulation six months before the contravention and a year prior to the hearing.

The licensee did not demonstrate that it trained the employees of the LRS such that those employees were equipped with the ability to make decisions consistent with the licensee's obligations. I find that such training would have been reasonable to prevent the contravention that occurred, and therefore, I find that the licensee did not discharge its onus.

Further, having reviewed the still photographs (Exhibit No. 2) reproduced from the video surveillance and having had the opportunity to observe the minor during his testimony, I find the cashier's conclusion that the minor could not possibly be under age was not reasonable.

The executive said that he felt duped by the minor. The evidence is uncontroverted that the minor walked in to the LRS, conversed with a clerk, preceded to the cashier, conversed with her, received and paid for liquor. There is no evidence of any contrived behaviour or scheme utilized by the minor that would support the executive's view. The licensee's staff simply failed to comply with the *Act*, and do what they were obligated to do.

When asked, the executive testified that he did not know if the cashier had any experience or training prior to being employed at the LRS. I choose to draw an adverse inference from the executive's answer. The cashier might have been a poor choice of employee due to a complete lack of experience and training for the position, or she might have been an employee who, by virtue of her lack of background required comprehensive training by the licensee. The executive testified that he did not know the answer to a question that I find is relevant to the issue of due diligence. The question was foreseeable. The licensee was represented by counsel. The executive was prepared for every other question put to him during the hearing. Further, the evidence discloses that the executive had access to all records of employment, management, and the cashier, after the contravention notice was served and he testified that he saw the cashier's file and hiring record.

I find that the cashier had insufficient experience and training to effectively act in the role that the licensee gave to her. As there is insufficient evidence to establish on the balance of probabilities that the licensee implemented adequate training and other systems to prevent the contravention, the defence of due diligence must fail.

The clerk also had an obligation to request identification **to establish that the minor was of age**. The evidence is uncontroverted that the minor had a discussion with a clerk (who was re-stocking shelves) prior to purchasing the liquor. The guide instructs that minors are not permitted in a licensed retail store unless accompanied by an adult. I find that the evidence supports this omission as a second error and not as a confirmation that the cashier's behaviour was reasonable.

This act of nonfeasance by a second employee is further confirmation that the licensee did not have an effective system of policy and implementation in place to prevent contraventions of the *Act*, *Regulation*, and terms of the licence.

I find the contravention of s. 33 of the *Act* did occur.

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 the 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 licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

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

For the contravention of s. 33 of the *Act* relating to August 16, 2007, the branch recommended a ten (10) day suspension.

The range of penalty for a first contravention of section 33 of the *Act* in accordance with Schedule 4 of the *Regulation* is ten (10) to fifteen (15) days suspension and/or a monetary penalty of \$7,500-\$10,000.

Selling liquor to minors is a serious social concern. I have heard no evidence or submission that persuades me that forgoing a penalty for this contravention would be appropriate under the circumstances.

The licensee operates a large number of licensed establishments, and has done so for some time. This is the first contravention, and indeed the first allegation against the licensee under any of his licenses. This exceptional record should be commended.

The contravention is a serious one, and this is supported by the penalty schedule, which requires a minimum licence suspension of 10 days or a monetary penalty of \$7,500.

As between a monetary penalty and a suspension, I find that a suspension is more appropriate. The minor had only that day turned seventeen. Two of the licensee's employees failed to err on the side of caution and simply request confirmation of the minor's age. This very small and usual step would have likely avoided any resulting issues. The danger of putting liquor into the hands of unsupervised minors is foreseeable. The results of so doing are also foreseeable.

I have considered the severity of the results of the contravention, and the licensee's otherwise clean history, and find that the minimum suspension for a first contravention of this nature is the appropriate penalty.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the LRS Licence No. 195392 for a period of ten (10) days to commence at the close of business on Wednesday, May 14, 2008, 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*).

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 16, 2008

cc: Coquitlam RCMP

Liquor Control and Licensing Branch, Surrey Regional office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Tania Cogan, Branch Advocate

APPENDIX A

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

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.