



**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: Alpine-Pacific Leasing Ltd.
dba Shaughnessy's Cove
Licensed Liquor Store
9-7519 Prairie Valley Road
Summerland, BC V0H 1Z0

Case: EH12-024

For the Licensee: Cameron Bond

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: August 23, 2012

Place of Hearing: Kelowna, BC

Date of Decision: September 11, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Alpine-Pacific Leasing Ltd, holds Licensee Retail Store License No. 195233 for the operation of a licensee retail store (LRS), i.e., a private liquor store, with liquor sales from 9:00 a.m. to 11:00 p.m. seven days per week. The LRS is located in Summerland BC and is operated by Local Hospitality Group Inc., a third party operator approved by the branch. Cameron Bond is a principal of the corporate third party operator and appeared as a representative of the licensee (the licensee). The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated April 13, 2012. The branch alleges that on February 4, 2012, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is a \$7,500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

For a first contravention of this type, Item 2 provides a range of penalties: a licence suspension for ten to fifteen days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267*****Supplying liquor to minors**

33 (1) A person must not

(a) sell, give or otherwise supply liquor to a minor,

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

Exhibit No. 1: Branch's book of documents, tabs 1 - 14.

Exhibit No. 2: Licensee's documents.

Exhibit No. 3&4: Branch correspondence dated May 16 and 17, 2005 regarding relocation of the LRS to Prairie Road, Summerland BC together with a copy of the approved floor plans for the new location.

EVIDENCE – THE BRANCH

Witness A, a liquor inspector, testified that in 2011 the branch undertook a "Minors as Agents Program" (MAP) to monitor compliance of the Act prohibiting the sale of liquor to minors by licensed establishments. The program involves the hiring of minors by the branch to test whether individual licensed establishments are willing to sell liquor to a minor. To ensure that all licensees are aware of the program and of their responsibilities under the Act the branch issued a general press release followed by written notification to all licensees that minors under the supervision of a liquor inspector would be visiting government and private liquor stores and attempting to purchase liquor.

On February 4, 2012, the inspector was working in the Summerland area with two other liquor inspectors and a minor agent visiting liquor stores to test whether the subject stores were willing to sell liquor to a minor. They arrived at the LRS at approximately 4:20 p.m. The minor agent, a young woman entered the liquor store first, immediately followed by the liquor inspector. There was one employee in the LRS, a male 40 to 50 years of age. There were no other persons in the store at the time. The inspector observed the minor proceed to the cooler area of the store, pick up a six pack of vodka spritzers, an alcoholic beverage (exhibit 1, tab 11) and proceed to the cashier. The vodka spritzers were purchased by the minor from the cashier. The minor was not requested to produce identification and none was produced by her. The minor left the store with the vodka spritzers and proceeded to the inspector's vehicle where the transaction was documented. The inspector and one of the other inspectors went into the LRS and advised the employee that he had sold liquor to a minor acting as an agent for the branch. The employee said that he was not familiar with the MAP program. The program was explained to the employee and a receipt of the minor's liquor purchase was obtained (exhibit 1, tab 10). A Contravention Notice (CN) was issued to the employee. The inspector made his notes (exhibit 1, tab 8a) and the minor completed the Minor Agent Observation Form (exhibit 1, tab 8b).

A NOEA (exhibit 1, tab 1) was subsequently prepared with a recommendation for a \$7,500 monetary penalty. The inspector was concerned that selling liquor to a minor is a serious public safety issue. The inspector considered that the minimum monetary penalty was consistent with other enforcement actions taken in the MAP program.

In response to questions from the licensee the inspector agreed that the MAP program instructions are for the inspector to enter the licensed establishment first to ensure the safety of the minor agent. He testified that those instructions are not mandatory. He followed directly behind the minor agent. If an issue of safety arose he was prepared to deal with it.

He agreed that there is a human element in judging age which can create an error. He testified that the minor agent in her statement (exhibit 1, tab 8c) wrote that the store employee looked at her as if he was contemplating her age.

The inspector agreed that the employee may have felt comfortable that the minor was of age. He agreed that from the employee's job application the employee was experienced in working in licensed establishments, had held a Serving It Right (SIR) certificate since 1993 and should have known better (see exhibit 2, item 1). He agreed that he had had subsequent conversations with the licensee who expressed concern and took the matter seriously. He testified that the recommendation for the \$7,500 penalty was made because the contravention is considered a public safety issue. The amount of the monetary penalty is included in the Regulations to the Act. It is not dependent upon the volume of liquor sales. He agreed that the amount of the penalty may represent a larger percentage of the total sales for smaller locations. He agreed that there was no public safety issue at the time of the minor's purchase. The public safety issue arises with the results of minors having access to liquor.

[I pause to note that it became apparent during the inspector's evidence that the floor plan provided in evidence (exhibit 1, tab 4) did not match the LRS as it currently stood at 9 – 7519 Prairie Valley Road, Summerland. It was subsequently determined that the floor plan in evidence was that of the previous location for the LRS at 12817 Lakeshore Drive, Summerland. While it was clear that the wrong floor plans had been entered into evidence, the inspector's evidence was clear that the liquor store that he and the minor agent entered and from which the liquor was purchased was located at 9 – 7519 Prairie Valley Road, Summerland. To provide some insight into the issue of floor plans another liquor inspector having further knowledge was called as a witness.]

Witness B, a liquor inspector, testified that in 2007 he assumed responsibility for the geographical area in which the LRS is located. The branch file maintained in the branch's Kelowna office contained the May 2005 correspondence and floor plans shown at exhibits 3 and 4. The correspondence and floor plans relate to the approved relocation of the LRS to its current location on Prairie Valley Rd., Summerland. To the best of his knowledge those floor plans depict the current LRS. The floor plans at exhibit 1, tab 4 depict the previous location on Lakeshore Drive, Summerland. Those plans are incorrectly shown in the branch's automated records retrieval system.

He testified that he met with the third party operator at the Prairie Valley Road location on July 2, 2009 at which time he reviewed the Act, Regulations and the Guide for Licensees (the Guide)(exhibit 1, tab 6) containing the terms and conditions for the LRS license with him. He completed an Inspection and Interview report at that time (exhibit 1, tab 5).

EVIDENCE – THE LICENSEE

Witness C testified that he is the principal of the corporate third party operator. The LRS was first licensed at the Lakeshore Drive location in 2003 and later relocated to the Prairie Valley Road location in 2005. He, as the principal of the third party operator took over the operation of the LRS in the summer of 2009. There have not been any previous infractions. He has held a SIR certificate since 1990.

He first became aware of the February 4th incident the following day. The employee on duty at the time of the incident was experienced having worked in licensed establishments for approximately 19 years previously (exhibit 2, item 1) and had a letter of reference from a previous employer (exhibit 2, item 2). It is not their policy to sell liquor to minors. He has printed out the branch's requirements for dealing with minors and identification from the Guide for Licensees (exhibit 2, item 3) and has had it signed off by all employees. Signs have been placed at the entrance and at the cashier stations. He does not have his employees take written tests as they all hold SIR

certificates obtained by way of written tests. SIR serves as a benchmark for training purposes. Regular staff meetings are held. He and his wife both have 20 years of experience and are aware of the seriousness of serving minors. He took this incident seriously and contacted the liquor inspector by email upon learning of it. The employee completing the sale believed the minor agent to be over 23 years of age. He had a short interaction time with the minor, had a momentary lapse of judgment and made an error. There was no public safety issue at the time of the incident. The employee has since quit his job at the LRS.

SUBMISSIONS – the Branch

The branch's submission is summarized as follows:

Section 33(1)(a) of the Act prohibits the sale of liquor to a minor. The branch developed a "Minors as Agents Program" (MAP) to test licensees' compliance with the Act. All licensees were advised of the branch's program. On February 4, 2012, an underage minor acting as an agent of the branch entered and purchased liquor from the LRS. The photo of the minor agent shows that she was youthful in appearance and there was no attempt to deceive the licensee as to her age. She appears to be under 19 years of age.

The licensee was not duly diligent. It failed to have an effective system in place to prevent the sale of liquor to a minor and failed to provide supervision of its employee to ensure its policies for checking identification were followed. The licensee does not have a training program or written tests for its employees. Signs posted in the LRS are not sufficient in themselves. They must be consistently acted upon.

At the time of the incident the employee on duty was the directing mind of the licensee. He was responsible for checking identification and failed to do so. There was nothing distracting him at the time, he could have easily asked the minor for her identification.

It is a public safety concern to sell liquor to a minor even if no public safety issue exists at the time of the sale. Exposing liquor to minors can lead to irresponsible behaviour and can result in serious consequences. The absence of a previous record of non-compliance does not minimize the seriousness of the contravention.

That the incorrect floor plan was submitted does not change the fact that liquor was sold to a minor. The evidence of inspector A is clear. He observed the sale of liquor to a minor at the location of the licensed LRS on February 4, 2012. The issue of the correct floor plan was resolved during the course of the hearing.

The penalties for the contravention are set by Regulation. In the circumstances the minimum monetary penalty of \$7,500 is warranted.

SUBMISSIONS – the Licensee

The licensee's submission is summarized as follows:

The licensee takes its responsibility seriously and has operated for numerous years without a contravention. An employee of many years experience made an honest mistake. That employee has left employment with the licensee and cannot be located to receive his statement. Judging age by appearance results in a person guessing. If the branch is serious it should have the law require that all persons purchasing liquor provide identification.

The branch should be held to the same standards of accountability as the licensee. The branch documents for the MAP program require that the inspector should enter the licensed establishment before the minor agent to assess risk. That did not occur here. The branch's evidence should be factual. The liquor inspector in his evidence indicated on the floor plans his point of entry into the LRS. The floor plans presented were not accurate. That is highly prejudicial to the licensee.

The proposed \$7,500 penalty is not reasonable, is excessive and unacceptable. It is far in excess of the fine issued for a violation ticket for a similar offence. Licence fees are on a graduated scale but penalties are not. Any penalty imposed should be based on a graduated system or on volume of sales.

The evidence is that an employee made a mistake, inadvertently guessing age, without malice, without threat to public safety and done in an innocent nature. The licensee makes continual steps to improve its operation. Its uses the system of training authorized by the branch.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch and the licensee.

I will deal firstly with the licensee's submission that the branch has made errors in this case which should affect the outcome of the case. The first issue raised by the licensee is that inspector A failed to follow the branch instructions regarding the MAP program by following the minor agent into the LRS rather than preceding her and assessing any risk to her safety. I am satisfied that the branch's instructions to the inspector in this instance are in the way of guidelines only and subject to the inspector's discretion.

Secondly, the licensee has submitted that the incorrect floor plans placed into evidence have been highly prejudicial to the licensee. The licensee did not illustrate in what manner the incorrect floor plans lead to prejudice. I respectfully cannot agree. The branch in its NOEA was clear that the LRS was located at 9 – 7519 Prairie Valley Road, Summerland and was subject of LRS License 195233. Inspector A was clear in his evidence that he and the minor agent entered the Prairie Valley Road location and it was there that the liquor was purchased. That the incorrect floor plans were entered into evidence is regrettable and unfortunate but it is my finding that it has not lead to prejudice to the licensee.

There is no dispute about the age of the minor agent or that she was sold liquor. A copy of the minor's British Columbia driver's license was entered into evidence at exhibit 1, tab 9a and shows her as being 18 years of age on February 4, 2012.

I find on a balance of probabilities that the evidence in this case is that an 18 year old minor entered and purchased vodka coolers (liquor) at Shaughnessy's Cove Licensed Liquor Store at approximately 4:25 p.m. on February 4, 2012. That on its face is a contravention of Section 33(1)(a) of the *Liquor Control and Licensing Act*.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention, if it can be shown 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 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 respondent 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 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)

The evidence is that the licensee does not have a training program for its employees. It relies on hiring employees who have completed SIR training. There is no training or procedures manual which an employee could refer to. The licensee has reproduced a copy of branch information from the Guide and has had employees read and sign off on that information. It is not accompanied by any further instructions or information from the licensee. There are signs posted in the LRS. There is no evidence of a system of supervision to ensure that employees understand and apply the information received.

At the time in question in this case one employee was working in the licensee's liquor store. He was required by law to ensure that a sale of liquor was made only to a person of legal age and not in a state of intoxication or under the influence of liquor. He had the authority to make a determination whether the customer was of legal age and if not satisfied in that regard to refuse the sale. I find that when the contravention occurred he was the directing mind of the licensee.

There is some disagreement in the evidence concerning the apparent age of the minor agent. The evidence is that this agent was 18 years old at the time of the incident. The operator testified that the employee considered her to be over 23 years old and thus of age. I have not had occasion to see the minor agent. She was not called as a witness. I have the photograph at exhibit 1, tab 9b, it is in colour and depicts a young woman. In my estimation she could possibly be of age or could be underage. What is obvious is that she is youthful in appearance and it would be prudent to require her to produce identification in order to make a purchase of liquor. Despite the youthful appearance of the minor the employee completed the sale of liquor to her. He did not request identification nor otherwise satisfy himself that she was of legal age.

Taking a look at the evidence as a whole, the inescapable conclusion here is that the licensee's system was not sufficient to reasonably ensure compliance with the law relating to the prohibition against the sale of liquor to a minor.

In conclusion, I find that the licensee is not entitled to the benefit of the defence of due diligence.

Consequently, I find on a balance of probabilities that on February 4, 2012, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor.

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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Here, the branch, with a concern that minors are being permitted to purchase liquor in licensed establishments has developed a program aimed at determining whether this is occurring and has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives we have in this case an obviously youthful patron being able to purchase liquor without being asked to produce any proof of age. Permitting minors access to liquor can and has resulted in very serious consequences. All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions, and the seriousness of the contravention, I find that a penalty is necessary to ensure future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulations provides a range of penalties for a first contravention of this type. The branch has proposed the minimum monetary penalty suspension for a first contravention of this type. In the circumstances here I find that the minimum monetary penalty of \$7,500 is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the General Manager of the Liquor Control and Licensing Branch on or before October 11, 2012.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: September 11, 2012

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate