



**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: 415807 B.C. Ltd.
dba Sandpiper Liquor Store
15595 Marine Drive
White Rock, BC V4B 1C9

Case: EH12-048

For the Licensee: Bill Lawrence and Judy Baker

For the Branch: Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: September 6, 2012

Place of Hearing: Surrey, BC

Date of Decision: October 29, 2012

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

415807 B.C. Ltd. (the "Licensee") operates a retail liquor store located at 1235 Johnston Road in White Rock B.C. under Licensee Retail Store Licence Number 195291. The Licensee does business under the name "Sandpiper Liquor Store." The licence is, as are all liquor licenses issued in B.C., subject to the Terms and Conditions set out in "A Guide for Liquor Licensees in British Columbia."

The Liquor Control and Licensing Branch (the "Branch") issued a Notice of Enforcement Action on March 21, 2012 (the "NOEA"). In the NOEA, the Branch alleged that on Monday, March 12, 2012, the Licensee sold liquor to a minor contrary to section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act"). The minor to whom the liquor was sold was involved in the Branch's "Minors as Agents Program" ("MAP"). MAP operates under an amendment to the *Act* which was brought into force in 2010. It allows the Branch to employ minors as agents for the purpose of testing compliance with the prohibition against selling liquor to minors. Licensees were advised of the program by way of a letter from the General Manager of the Branch in February 2011, and by a further announcement contained in the "Liquor Line" published in March 2011.

The proposed penalty for the alleged contravention was a \$7500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). This Item provides a range of penalties for a first contravention of this type consisting of a licence suspension for 10-15 days or a monetary penalty of \$7500 to \$10,000.

The Licensee disputes both the contravention and the proposed enforcement action. I was appointed as a Delegate of the General Manager for the purpose dealing with this matter.

Appearing for Licensee were the Corporate Owners of the facility.

EVIDENCE

Evidence - The Branch

The Branch bears the onus of calling evidence on the balance of probabilities sufficient to support the proposed enforcement action. To this end, the Branch produced a book of documents marked as "Exhibit One". The Branch also called two witnesses, a minor who is involved as an agent in the MAP program (identified as "Agent 21"), and Liquor Inspector A.

AGENT 21

Agent 21 testified that he was born on July 8, 1994. He was working with the Branch on March 12, 2012. At that time, he was 17 years of age. On this day, he was engaged in working with Liquor Inspector A, and another liquor inspector. They were engaged in checking the compliance of retail liquor stores in not selling liquor to minors. The Licensee was one of the establishments visited on the day in question.

Agent 21 identified his BC Drivers Licence and his Care Card to confirm his age. He identified the clothing that he was wearing on March 12, 2012, which was shown in a redacted photograph contained in Exhibit One.

Agent 21 testified that he went inside the Licensee's store after Liquor Inspector A entered the store. He walked to the cooler inside the store, and selected a 6 pack of beer. He took the beer to the till where the clerk that was on duty said "Hi, how are you?" Agent 21 paid for the beer with \$15.00 cash and was given change. The clerk asked him if he wanted a bag for the beer. The clerk did not ask if Agent 21 had identification at any time during the sale. The store was not busy at the time the transaction took place. He and Liquor Inspector A were the only people in the store at the time.

After the beer was purchased, Agent 21 prepared an "Observation Form" detailing the events that had taken place inside the store. He also prepared a "Minor Agent Statement" which explained these events in his words. Both of these documents were contained as tabs in Exhibit One.

In cross-examination, Agent 21 agreed that he plays sports, and is husky in build. It was suggested that he looked older than his actual age. He said that he was asked for identification about 80 to 90% of the times that he has attempted to buy liquor while employed as an agent in the MAP program.

LIQUOR INSPECTOR A

Liquor Inspector A testified that the proposed \$7500 penalty is in the minimum contained in the Schedule for a first contravention. The Branch takes sales to minors very seriously. The proposed penalty was for a first time contravention with no prior history. Liquor Inspector A recommended the minimum penalty to ensure future compliance.

Liquor Inspector A is involved in the MAP program. On March 12, 2012, she was the lead inspector for her team. She took photocopies of the identification produced by Agent 21, and explained the program to him again. They visited several stores together with another liquor inspector. She and Agent 21 went into the Licensee's store shortly after 3 pm. She saw Agent 21 go to the cooler and select a six pack of beer. She was in the area when the clerk rang up the sale. Liquor Inspector A was able to confirm that the clerk did not ask for identification from Agent 21.

Afterwards, Liquor Inspector A wrote up a Contravention Notice and gave it to the clerk inside the store. She asked if there was a manager present, and he said no. The clerk said that he had heard of the MAP program. He was told that he had contravened the *Act* by selling to a minor. The clerk was told to have the owner of the store contact her as soon as possible. The beer was later tagged and photographed for evidence.

Liquor Inspector A confirmed that the Licensee received instruction on its obligations under the *Act* when it received its licence in 2004. Contained in those instructions was information about the prohibition against the sale of liquor to minors.

In cross-examination, Liquor Inspector A was asked if there were other government programs where minors are used to confirm compliance. The Liquor Inspector was aware of a similar program to check for compliance with respect to the sale of tobacco to underage customers. Liquor Inspector A also confirmed that the quantum of the penalty contained in the Schedule found in the *Regulation* is the same for all licensees including government liquor stores. She advised that 10 stores were visited by her team on March 12th. Agent 21 was asked for identification at eight of the stores that were visited.

Evidence – The Licensee

The Licensee submitted that it employs a manager who has been responsible for running the liquor store since its inception in 2004. The liquor store is separated by 4 km from a pub which is also operated by the Licensee. The store manager trains new employees, who work with her directly for the first 3 to 4 days of their employment. The store manager has also taken steps to identify underage patrons. For example, she has posted pictures of students who are graduating from high schools in the area serviced by the liquor store to assist the clerks in identifying minors. She has collected fake identification used by minors attempting to purchase liquor, and provided them to the local police agencies.

The Licensee stated that its employees are taught to ask for identification, and this is stressed continuously. Anyone who looks to be under the age of 25 is asked to provide identification prior to allowing liquor to be sold.

There is a system of discipline used by the Licensee in its facilities which applies to employees wearing improper clothing at work, for serving or selling liquor to minors, and for serving intoxicated patrons. The Licensee says that its training, policies, and procedures go beyond what is expected.

The manager of the liquor store was not called as a witness. Nor were the written employee policies, log books or other records of the Licensee produced. The Licensee said that the records were produced in evidence in an earlier hearing. Since the records were not produced for this hearing, however, I find that they do not constitute evidence on the proposed enforcement action.

The employee that was involved in the incident with Agent 21 is no longer employed by the Licensee as he quit his employment. It was therefore not feasible for the Licensee to call him as a witness. While hearsay, the Licensee testified that the employee stated that Agent 21 was husky, and appeared to be mature in appearance. He thought Agent 21 was over the age of 19 years. The employee said he must have had a "brain melt". He knew the procedures for not selling liquor to minors but had not requested identification.

Further, before the Licensee hired this employee, his references were checked. He was said to be someone who was reliable and who followed rules. The Licensee submits it has sufficient policies and procedures in place to make its staff aware of their responsibilities. For example, selling tobacco to underage customers is also prohibited. Minors as agents have been used in unsuccessful attempts to purchase tobacco products from the Licensee. The Licensee submits that this demonstrates it is diligent in enforcing its policies on sales to minors.

SUBMISSION OF THE LICENSEE

The Licensee submitted it is aware that selling liquor to minors is a serious offence. The Licensee has policies and procedures in place to train its employees to avoid these improper sales. It submits that the employee who served Agent 21 had been properly trained. The Licensee also submits that it goes above and beyond its obligations to ensure that its employees do not sell to minors.

ANALYSIS AND DECISION

The issues before me are first, was the offence as alleged by the Branch made out? If so, the second issue of whether the defence of due diligence was made out by the Licensee arises. If due diligence is not shown, the third issue to determine is what penalty, if any, is warranted?

Agent 21 produced evidence that he was 17 years of age at the time that he purchased liquor from the Licensee. The sale to Agent 21 was also witnessed by Liquor Inspector A. The program under which minors are used as agents has been authorized by a regulation which amended the *Liquor Control and Licensing Act* in 2010. Section 34(5) of the *Act* now provides that it is not an offence for a minor who is contracted by the General Manager to test the compliance of a licensee in respect of sales to minors. Further, this program was publicized by the General Manager to make all of the Licensees aware that they might be tested in this manner.

I am satisfied that Agent 21 was employed in accordance with section 34(5) on March 12, 2012, and while so employed, an employee of the Licensee sold him alcohol consisting of a six pack of beer. He did not ask for and act upon identification produced at the time of the sale.

From my observation, Agent 21 looked to be about his stated age. He certainly would be questioned about his age in the proper application of the Licensee's policy to ask all customers who appear to be under the age of 25 for identification prior to selling them liquor. In any event, as the Branch argued, the offence in the *Act* is for the sale of liquor to minors. The manner in which employees of the Licensee comply with the *Act* is the responsibility of the Licensee.

I am satisfied that the clerk who was employed by the Licensee on March 12, 2012, sold liquor to Agent 21, a minor, without first asking for identification, and so the offence for which the NOEA was issued has been proved on a balance of probabilities. The remaining issues are whether a defence of due diligence was made out by the Licensee, and if not, was the penalty recommended by the Branch appropriate in the circumstances?

Due Diligence

The defence of due diligence may vitiate a penalty proposed by the Branch. There must, however, at a minimum be evidence to establish that the offence happened despite diligent steps taken by the Licensee to prevent its occurrence. The onus is on the Licensee to establish that it acted with due diligence.

The requirements for the defence of due diligence are found in the leading case from the Supreme Court of Canada in *R. v. Sault Ste. Marie* (1979) 2 SCR 1299. The requirements to establish the defence are set out in the judgment of Mr. Justice Dickson at page 1331:

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.

From this, it is clear that the Licensee must provide affirmative evidence that it has proper training, systems, and procedures in place to prevent the commission of the offence of selling liquor to minors. The Licensee failed to call any affirmative evidence to support its submission that the sale of liquor to a minor runs contrary to the training and supervision of its employees. The store manager who trained the clerk that sold liquor to Agent 21 was not called as a witness. None of the written policies or procedures of the Licensee were introduced to support its assertion of their existence. There was no evidence of any procedures taken to test compliance by clerks of the Licensee after they have been trained. In sum, the evidence falls well short of establishing that the Licensee acted with due diligence.

I am satisfied that the offence of selling liquor to a minor on March 12, 2012, is established. Remaining is the issue of the appropriate penalty.

PENALTY

Pursuant to section 20(2), 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 Notice of Enforcement Action. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound by 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 primary goal of the Branch in bringing enforcement action and imposing penalties is to achieve voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven history of compliance, a past history of warnings by the branch and/or police, the seriousness of the contravention, the threat to the public safety, and the well being of the community.

The recommended penalty of \$7500.00 is the minimum monetary penalty prescribed in Schedule 4 of the *Regulation* for a first offence. The size of the minimum penalty (and indeed the minimum suspension of 10 days) reflects the seriousness that is attached to a breach of section 33 of the *Act*.

I conclude that in all of the circumstances, the minimum monetary penalty which is prescribed in the *Regulation* is necessary and proper to ensure future compliance by the Licensee with respect to the provisions of the *Act* prohibiting the sale of liquor to minors.

ORDER

Pursuant to section 20(2) of the *Act*, and Schedule 4 of the *Regulation*, I find that the Licensee is required to pay a monetary penalty of the sum of Seven Thousand Five Hundred Dollars (\$7500) to the General Manager of the Liquor Control and Licensing Branch on or before November 30, 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

A. Paul Devine
Enforcement Hearing Adjudicator

Date: October 29, 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