



**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: 637241 B.C. Ltd.
dba The Liquor Store at the Village
2253 South Island Hwy
Campbell River, BC V9W 1C4

Case: EH11-126

For the Licensee: Dennis P. Coates, Q.C.
Mair Jensen Blair LLP

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: February 21, 2012

Place of Hearing: Victoria, BC

Date of Decision: March 29, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Ltd, operates The Liquor Store at the Village located in Campbell River, BC. The licensee holds Licensee Retail Store License No. 194655 for the operation of a licensee retail store, i.e., a private liquor store, with liquor sales from 9:00 a.m. to 11:00 p.m. seven days per week. 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 August 26, 2011. The branch alleges that on August 17, 2011, 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,

PRELIMINARY ISSUE

At the commencement of the hearing counsel for the licensee submitted that he had requested of the branch that the Deputy General Manager in charge of compliance and enforcement (DGM, C&E) for the branch be made available as a witness. This resulted in an exchange of emails with the branch Registrar (exhibit 3). This request was refused by the branch. Counsel's position was that the branch has no published standard of due diligence for contraventions of this type. The branch has a responsibility to put forth a standard of due diligence which a licensee could take and apply to its operations. The DGM, C&E could provide evidence of what is necessary on the part of the licensee to satisfy the branch that the licensee is operating properly in cases such as these.

The branch disagreed and refused to make this witness available. The branch's position is that the DGM has no firsthand knowledge or evidence to provide about this contravention. The defense of due diligence is the licensee's to prove and there is no way for the branch to prescribe that. It is the hearing delegate's responsibility to hear evidence and argument on the issue of due diligence and make a decision.

I have considered the arguments of counsel for the licensee and the branch. It is my decision that it is not incumbent on the branch to provide direction to a licensee on due diligence. Due diligence is a defense available to a licensee based on the evidence presented. Whether due diligence has been proven is a decision for the hearing delegate to make after having considered all the relevant evidence and argument pertaining to the case at hand. I find that the DGM, C&E does not have any relevant evidence to provide as a witness therefore, I am not prepared to order his appearance.

ISSUES

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

EXHIBITS

1. Branch's book of documents, tabs 1 - 15.
2. Copy of minor's (agent #1 contracted by the branch) photograph and identification. [Note: these items were ordered to be placed in a sealed envelope, to be opened only upon an order of the Supreme Court of British Columbia or the undersigned hearing delegate.]
3. Copies of a series of emails exchanged between counsel for the licensee and the branch registrar.
4. Three black and white photocopies of photographs.
5. Plastic pin-on badge, "I Ask FOR 2PIECES OF ID".
6. Two page document, "Requesting ID and Minors/Intoxicated Patrons/Disorderly Conduct
7. Two page document, "PROCEDURES FOR ENSURING STAFF CHECKING ID".
8. Copy of licensee's internal emails.
9. Copies of emails with attachments exchanged between staff of legal counsel for the licensee and BC Liquor Distribution.

EVIDENCE – THE BRANCH

At the commencement of the hearing the licensee conceded that on August 17, 2011, liquor was sold to a minor and no identification was requested from the minor.

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. Care is taken by the branch to ensure that the underage minors appear to be their actual age and no attempt is made to deceive or mislead in order to make a purchase of liquor.

On August 17, 2011, witness A was working in the Campbell River area with another liquor inspector and two minor agents visiting private and government liquor stores to test whether the subject stores were willing to sell liquor to a minor. She was working directly with Minor Agent #1, a 17 year old male. They arrived at The Liquor Store at the Village at approximately 4:30 p.m. She entered the liquor store first, shortly followed by Minor Agent #1. There were two employees in the liquor store, a male and female. She observed the minor proceed to the rear of the store, pick up a six pack of beer and proceed to the cashier. The beer was purchased by the minor from the female cashier while the male employee looked on. There was no conversation between the minor and the cashier during the sales transaction. The minor left the store with the beer and proceeded to the inspector’s vehicle where the transaction was documented. The inspector made her notes (exhibit 1, tab 2) and the minor completed the Minor Agent Observation Form (exhibit 1, tab 3).

A total of ten liquor stores were visited by the inspectors and agents on that date, eight were licensee retail stores, two were government liquor stores. The Liquor Store at the Village was the only liquor store where two pieces of identification were not requested and liquor was sold to one of the minor agents.

The principal of the corporate licensee was later advised of the alleged contravention and a contravention notice was issued.

A request was made to the licensee for documents which were subsequently received (exhibit 1, tab 13).

A NOEA was 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.

The inspector testified that her report did not deal with the issue of due diligence. She may do so in some instances, it depends upon the nature of the issue. Here she requested and received documents as shown in exhibit 1, tab 13. She will consider any manuals provided by the licensee. A licensee can have manuals and signage but it also needs to demonstrate that employees are following the rules. She does not consider due diligence issues as that is a decision for the hearing delegate to make.

EVIDENCE – THE LICENSEE

Witness B testified that she is knowledgeable about the hospitality industry having spent many years managing liquor licensed pubs and liquor stores. She is currently the regional manager of a group of private liquor stores located throughout the province. She is responsible for setting up their operations and designing staff training. Each store is managed by a resident manager. Large stores have an assistant manager or supervisor present on every shift. She makes regular visits to each store. She is not employed by the Liquor Store at the Village.

She testified that in her experience staff hiring and training begin with background checks followed by additional training on top of that received through the "Serving it Right" (SIR) program. There should be store policies in place that there are no liquor sales to minors. Staff should be told of the consequences and reminded daily. Any person appearing to be under 19 years of age should be required to produce two pieces of identification. Employees should be reminded regularly through signage placed throughout the store, badges worn by employees, flash notices on computer screens and daily sign-off sheets. Employees should be reminding each other. It is a never ending process. Store operators have to be vigilant that employees are checking identification. There must be hands-on management and supervision.

In her experience minors will initially attempt to purchase liquor from establishments. Her goal is to ensure that the establishment develops a reputation for not selling to minors thus resulting in them not coming back. Stores with poor reputations can be turned around.

The liquor licensee association has developed processes to assist their members: badges for employees with a reminder to check two pieces of identification, booklets illustrating out of province identification, and a computer program to scan driver's licenses for authenticity.

Her stores used to require that all persons appearing to be under 25 get checked for identification. Now they require that all persons appearing to be under 30 years old show two pieces of identification. The only infallible process would be to require all persons to show identification. At one time young persons under 30 years of age were hired as clerks at licensee retail stores. Now, most clerks hired are older because of the challenge of checking identification.

Witness C testified that she is the principal of the corporate licensee. She is not a full time resident of Campbell River but has the ability to monitor the liquor store's operation through remote access of the store video security system. The store is operated by a full time manager who is responsible for the hiring and training of staff. The manager of the adjacent liquor primary establishment makes daily visits to the store. The store employs ten full or part time staff. It has approximately 110,000 sales transactions per year and has been open since December 2007.

When hiring new employees the manager does a background check, interviews for suitability, considers previous experience, and ensures that the applicant has a SIR certificate. All new employees receive training, particularly regarding minors attempting to purchase liquor, things to look for and how to check identification. Each new employee must read and sign-off on the store rules regarding checking of identification (exhibit 6). The rules require that all persons appearing to be under 30 years of age must be checked for identification. New employees first begin working with other employees to see if they can handle the job. If they are not suitable they are not hired.

The store has notices posted at the cash registers regarding the requirement for two pieces of identification (exhibit 4). There is a sign at the front door stating "no minors allowed". Liquor branch bulletins sent to licensees are circulated to staff and posted on the bulletin board. The manager regularly reminds all employees of the need to check identification and makes random checks two or three times a week to observe whether staff are doing as they are trained. She has access to the store video security system to observe employee performance. The store uses minors as secret shoppers from time to time to monitor whether staff is following the store policies. Store policy includes staff monitoring each other to ensure that identification is checked.

At the time of the incident on August 17th a shift change was taking place. The manager had left to do some banking and then proceeded home. She was uncertain but believed that the female employee was just completing her shift, and the male employee was just starting his. The employees contacted the manager and also herself at home and advised them of the occurrence. The manager attended at the store. The employee was sent home and a replacement employee called in. The two employees present at the time of the incident were subsequently terminated from employment.

The witness testified that she had recently seen the minor agent. She felt that he looked over 19 years of age but agreed that he should not have been sold liquor. She felt that each case was a judgment call on the part of the employee and thus subject to some error. It is not possible for a licensee principal to be present at all times. This is the first instance of a minor being sold liquor at the store. The manager's records reflect that there are 20-26 instances a week where minors are refused sales. The only change that could be made would be to require all customers regardless of their apparent age to produce identification.

SUBMISSIONS – the Branch

The branch advocate'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 August 17, 2011, a 17 year old minor agent of the branch entered and purchased liquor from The Liquor Store at the Village. The minor agent was youthful in appearance and there was no attempt to deceive the licensee as to the minor's age. Two employees were present at the time of the sale transaction; neither took any action to prevent the sale. All either had to do was to request the minor agent to produce identification.

The policy documents presented by the licensee were undated or unsigned. The licensee could have presented signed documents. The licensee did not present any evidence of the training received by employees. The licensee did not present any evidence as to how employees were to determine age. The licensee did not present any evidence of how staff was tested.

On August 17, 2011, the licensee was tested through the MAP program and failed the test. In the circumstances the minimum monetary penalty of \$7,500 is warranted.

SUBMISSIONS – the Licensee

Counsel's submission is summarized as follows:

The issue in this case is whether the licensee is entitled to the defense of due diligence. Due diligence is not defined. Previous cases have found that due diligence is putting into place reasonable systems and policies and implementing those to ensure compliance. This does not require perfection. Mistakes are made. The issue here is whether the policy and procedures are reasonable to prevent an occurrence. Previous cases have found that written tests for employees are not necessary where written instructions can be referred to by employees.

It is relevant to consider what process is followed in government liquor stores. Exhibit 9, an email from the (Province of British Columbia) Liquor Distribution Branch states that store employees must request two pieces of identification from persons appearing to be under 25 years of age. All employees are informed of this policy when hired. This represents a fairly minimal requirement. The branch Guide for Licensees advises licensees to put an effective system in place to prevent the sale of liquor to minors. These are not particularly helpful as government guidance.

Previous cases have found a contravention where a licensee knew or ought to have known that a contravention could occur. That is not the case here. There is nothing in the history of the Liquor Store of the Village that the licensee ought to have known that a contravention would occur. The licensee carried out its own tests to determine if its system was working.

Here the evidence of the licensee principal is that the minor agent appeared to be over 19 years of age.

In assessing due diligence consideration should be given to the actions of the licensee:

- signage as depicted in the photos at exhibit 4;
- the written policies at exhibits 6 & 7 which are signed-off by staff;
- the hiring process;
- employee training;
- new employees work with other clerks before they are allowed on their own;
- the store turns away 20–26 persons a week who don't have sufficient identification;
- this is the first incident in all of the liquor sales made at the store;
- the manager monitors staff performance via the video security system;
- there are regular reminders to staff to check identification;
- the employee who made the sale had only been employed for two months, she had been trained and was an acceptable employee, the sale was made at the end of her shift; [I pause to note that there is some confusion in the evidence of which employee was finishing their shift and which was commencing their shift. It was obvious in the evidence of witness C that she was uncertain. The best evidence is found at exhibit 8, an email from the male employee dated August 18th, the day following the incident. It indicates that he left work at 4:45 p.m. Thus I find that the female clerk who made the sale was at the beginning of her shift, not the end.]
- both employees were subsequently fired.

The licensee has met the test of due diligence as outlined in previous decisions.

REASONS AND DECISION

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

There is no dispute about the age of the minor agent or that he was sold liquor.

I find on a balance of probabilities that the evidence in this case is that a 17 year old minor entered and purchased beer (liquor) at The Liquor Store at the Village approximately 4:30 p.m. on August 17, 2011. 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)

While there is evidence that the licensee has a training process in place for new employees there is no direct evidence of how that program was implemented in this instance. The only evidence presented was that of the licensee principal who advised that she believed that the liquor store manager sat down with a new employee and discussed the duties with the new employee and that the employee understood her responsibilities. There is no direct evidence that the employee on duty, a new employee of two months duration, received sufficient training to allow her to assess a customer's age and then to require proper identification. There is evidence that the liquor store has written policies in place directing employees when to request identification and the policies are signed off by all employees. There is no direct evidence that the subject employee read

and signed off those written policies and recognized their importance. The evidence of the licensee principal was that she believed that all new employees first worked with another employee to ensure they were capable of the job. There is no direct evidence here of when that occurred with the subject employee nor that the other employee was competent to provide the necessary oversight. Signage and reminders are a useful part of a licensee's program to promote compliance but cannot stand alone.

At the time in question in this case two employees were working in the licensee's liquor store. One, a male was in the process of finishing his shift. The other, a female was just commencing her shift. She 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. She 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 she was the directing mind of the licensee.

There is some disagreement in the evidence concerning the apparent age of the minor agent. The liquor inspector testified that minor agents were chosen to be young in appearance, reflecting their actual age. This agent was 17 years old at the time of the incident. The licensee principal testified that she saw the minor agent and believed that he was over 19 years of age. I have not had occasion to see the minor agent. He was not called as a witness although I understand that he was available to be called if requested by the branch or the licensee. I have the photograph at exhibit two, it is black and white and depicts a young man. In my estimation he could possibly be 19 years old. What is obvious is that he is youthful in appearance, obviously well under 30 years old and it would be prudent to require him 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 him. She did not request identification nor otherwise satisfy herself that he was of legal age. Neither did the other employee present at the time.

Taking a look at the evidence as a whole, the inescapable conclusion here is that the licensee's program 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.

In conclusion, I find on a balance of probabilities that on August 17, 2011, 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 April 27, 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: March 29, 2012

cc: RCMP Campbell River

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate