



**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: Central City Brewing Company Ltd.
dba Central City Liquor Store
170 Central City, 13450 102 Avenue
Surrey, BC V3T 5X3

Case: EH12-053

For the Licensee: Murray Lott, Delta Law Office

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: October 17 & November 7, 2012

Date of Decision: December 4, 2012

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

The licensee, Central City Brewing Company Ltd, operates Central City Liquor Store located in Surrey, BC. The licensee holds Licensee Retail Store License No. 195237 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 pm 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 March 29, 2012. The branch alleges that on March 14, 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 \$7500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

Item 2 provides a range of penalties for a first contravention of a license suspension for ten to fifteen days and/or a monetary penalty of \$7500 - \$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, has Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit No. 1: Branch's book of documents, tabs 1 - 13.

Exhibit No. 2: Licensee's book of documents.

Exhibit No. 3: Licensee's written submissions.

EVIDENCE – THE BRANCH

Witness A testified that on March 14, 2012, he was 17 years old, was working with a liquor inspector (witness B) and acting as an agent of the Liquor Control and Licensing Branch (the branch) in attempting to purchase liquor from liquor stores in the Surrey area. At approximately 3:26 p.m. he entered the Central City Liquor Store (Central City) (the store) where he proceeded to the cooler area, picked up a six pack of beer and took it to the cashier. The liquor store was somewhat busy; there was a line up at the cashier with persons in front of and behind him. The female cashier engaged him in small-talk conversation, completed the sale of the beer to him and gave him a free 50 ml bottle of whiskey. She did not request, nor did he produce any identification. He left the liquor store and proceeded to the liquor inspector's vehicle where he completed his observation report and a handwritten statement of the event (exhibit 1, tabs 3 & 4).

On cross-examination, Witness A testified that he recalled seeing signs posted inside the liquor store that two pieces of identification were required. He ignored the signs. He agreed that he was aware that in his circumstances he would not be arrested and charged.

Witness B testified that in 2011 he was employed as a liquor inspector by the branch when 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 involved the hiring of minors by the branch to test whether individual licensed establishments are willing to sell liquor to a minor. The minors were provided with training by the branch in making observations and writing notes and reports. To ensure that all licensees were 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.

Witness B said that on March 14, 2012, he was working with another liquor inspector and a 17 year old male employed as an agent (witness A) by the branch visiting liquor stores to test whether the subject stores were willing to sell liquor to a minor. The inspector entered Central City at approximately 3:26 p.m. shortly followed by the minor agent. The minor was observed to proceed to the coolers area, pick up a six pack of beer and proceed to the cashier. The beer was purchased by the minor from a female cashier. The inspector and the minor agent left the store with the beer and proceeded to the inspector’s vehicle where the transaction was documented. The inspector made his notes (exhibit 1, tab 2) and the minor completed his notes and the Minor Agent Observation Form (exhibit 1, tabs 3 & 4).

The inspector accompanied by another liquor inspector entered the liquor store at approximately 3:50 p.m. and spoke with a person believed to be the store manager (witness D). They discussed the sale of liquor to the minor agent and served a contravention notice (CN) to the manager (exhibit 1, tab 6). He provided his contact information to the manager if further information was required.

A NOEA was prepared with a recommendation for a \$7500 monetary penalty to reinforce the branch's mandate and the seriousness of selling liquor to a minor. The inspector was desirous that the monetary penalty would encourage the licensee to enhance existing practices to ensure future voluntary compliance.

The inspector testified that he was not familiar with the policies and practices of this licensee as the establishment is not located within his geographical area of responsibility. He was present on the occasion of March 14th as part of the MAP program. He testified that he was not aware that the establishment had been subject of a previous alleged contravention which proceeded to an enforcement hearing wherein it was determined that the licensee had been duly diligent. He testified that he would have proceeded with this alleged contravention and enforcement proceedings nonetheless as the circumstances of the previous findings could have changed in the interim. He is familiar with the concept of the defense of due diligence but considers that it is an issue to be raised by a licensee during the course of an enforcement hearing before an adjudicator. He agreed that the apparent basis for the MAP project was that liquor was being sold to minors either because the staff was insufficiently educated or there was an undue emphasis on profit. He was unable to say whether either was true in this instance. He was unable to offer advice of any improvements that the licensee could make other than to emphasize to its employees the importance of not selling liquor to minors.

EVIDENCE – THE LICENSEE

Witness C testified that she has been employed at the liquor store for the past four years and holds a Serving It Right Responsible Beverage Service (SIR) certificate. On March 14th she was a night shift cashier, working from 3 – 11 p.m. and was probably engaged in stocking shelves at the time of the incident. Since that time she has replaced the cashier responsible for the sale of liquor to the minor (witness F) and is currently the day cashier responsible for ensuring that the store is ready for opening at 9 a.m. and that the cash floats necessary to the operation of the store are in place. She is also the cashier responsible for operating the back cash till, the busiest in the store and is responsible for the training of new staff.

She identified the photos of signage placed in several locations in the store at the entrances and point of sale areas advising of the requirement for two pieces of identification (exhibit 2, file 2, several tabs). She identified the sensomatic tags that are placed on all liquor products with the exception of 6 packs of beer (exhibit 2, file 2, tabs 9, 10 & 14). These tags are designed to prevent the theft of liquor wherein any tagged product not properly purchased will trigger an audible alarm as it is removed from the premises. She testified that despite the sensomatic system there are still some thefts and attempted thefts, primarily grab-and-runs by underage males. Mall security is notified on those occasions. The store also utilizes a video security system which is monitored by the general manager in his office (exhibit 2, file 2, tab 18).

She testified that she is aware that liquor cannot be sold to a minor and has been taught at the store how to identify minors, check identification and refuse service. She has been shown proper identification and has viewed videos from the branch on that subject. The store has pamphlets (exhibit 2, file 1, tab 1 various pages), a policy and procedures manual (exhibit 2, file 1, tab 2) and staff meetings on the subject. Staff meetings are held every two to three months wherein issues regarding minors are discussed as well as any new issues. The policy of the store prior to the incident was to require identification of persons appearing to be 25 and under. It is now persons

appearing under 30. She requires identification from customers except for regulars who she knows to be of age. Customers can become irate, particularly if they are refused service. Management always supports staff in these instances. She was recently assaulted by a female customer when she was refused service because of insufficient identification. It doesn't deter her from doing her job. She will request identification 5 to 10 times a day and will reject identification approximately twice a day.

She is familiar with the MAP initiative by the branch. The general manager (witness E) brought it to the attention of staff and they viewed materials forwarded to the store outlining the program (exhibit 2, file 1, tab 1 various pages). Staff was advised that it could lead to a fine or suspension for the business and that an employee could be separately charged and fined and would lose their job if liquor was sold to a minor.

She testified that March 14th was a Wednesday. Wednesdays are particularly busy because it is the day when the store receives its liquor supply. The liquor is brought into the store on 12 to 14 skids which are placed at the back of the store as it does not have a storage area separate from the retail area. Staff is responsible for tagging all of the liquor and stocking it onto the shelves while maintaining service to customers. It gets busier in the afternoon with lineups of customers resulting. She knows the employee (witness F) responsible for selling the liquor to the minor on that date. She was the best employee at the store, ran the busiest cash till and checked identification. That employee's mother had recently passed away and she had taken some time off, something she normally never did. Additionally a close friend had recently passed away unexpectedly. She would sometimes be crying at work a couple of times a day. She seemed sad, distracted, and not normal. Everyone at the liquor store knew that she was distraught. She continued to do her job. Following the incident with the minor agent she was suspended and then fired from her job at the liquor store.

The witness testified that with the firing of the employee making the sale to the minor she has assumed the responsibility for training new employees. All have SIR certificates. The employees read the policy and procedures manual and sign-off on it. They are provided with an identification tool kit which provides information on identification requirements (exhibit 2, file 1, tab 4). Once their training is completed they work with another employee and then are monitored by other staff. The cash tills now have coded buttons which are used to record if there has been two pieces of identification presented or where it is not, and where an intoxicated patron has been identified.

Witness D testified that he holds a SIR certificate, has been employed at the liquor store for approximately five years and has been the assistant manager for the past two and a half years. He has responsibility for ordering product, scheduling and overseeing staff and reports to the general manager (witness E). He spends the majority, 75 – 80%, of his time on the floor of the store. He oversees the training process which is currently carried out by witness C and was previously carried out by the dismissed employee (witness F). Employees are instructed to request two pieces of identification from persons appearing to be under 25 years of age. He keeps an eye on cashiers to see that they are following the store policies and procedures and are requesting identification. He will check identification himself if he sees a young appearing patron or will request another employee to do so. He keeps the store signage up to date. He is aware of the MAP program and doesn't agree with its underlying basis. Staff sign-off on the store policies and procedures and are reminded of their responsibilities. There is no profit in selling liquor to minors given the risk of significant penalties.

He recalls March 14, 2012. He was working day shift; it was a busy day with a large liquor order to be tagged and stocked and a relatively busy customer day. He was stocking shelves at the time of the incident. The cashier making the sale to the minor was assisting with the liquor stocking and also looking after the back cash till. She was an experienced employee, hard working, conscientious, reliable, had an exemplary record and was one of their best employees. She was responsible for the training of

new employees and for ordering non-liquor products. She was very thorough in her work. She was having some emotional problems with her mother being very ill with cancer and had recently lost a friend. On occasion things would get to her and she would talk things over with one of the staff or a regular customer and would take a few moments to compose herself. He was advised of the sale to the minor agent when two liquor inspectors spoke with him a short time afterwards. He did not speak to the employee at that time as it was the end of her shift. He was surprised that she did not check the agent's identification. It was a discretionary decision and she made a mistake. She was suspended the next day and subsequently fired as the store has a zero tolerance policy regarding the sale of liquor to minors.

He testified that since the incident they have continued being vigilant and have made ongoing efforts to comply with the requirements of the law. They have developed the Identification Tool Kit (exhibit 2, file 1, tab 4) to provide pointers to staff. They have also introduced coded one-touch buttons on the cash tills to record the number of occasions when two pieces of identification have been provided and accepted or have been refused as well as incidents of intoxication and violence. A six months analysis of these statistics reveals 17,836 occasions when patrons were requested for two pieces of identification and 641 occasions when service was refused because of insufficient identification. These statistics are used as a tool to ensure that all staff is involved in the process as the statistics can record what actions have been taken by each employee. He testified that the store could require identification from all customers regardless of apparent age. This however would not be in the interest of the best customer service as it would annoy those customers obviously of age.

He testified that they did not test staff following their training period but observed them carrying out their duties. It has never been suggested by the branch that they test staff. The store does not engage other testing procedures such as hiring secret shoppers. It has never been suggested by the branch that they should. It may be a good idea to do so in the future.

Witness E testified that he previously worked for the provincial government Liquor Distribution Branch (LDB) for 21 ½ years where he had been a senior store manager for 10 years prior to becoming the Central City liquor store general manager for the past five and a half years. He developed the liquor store Policy and Procedures Handbook from LDB materials (exhibit 2, file 1, tab 2) shortly after his arrival and updates it as necessary. Following the incident of March 14th he obtained and reviewed LDB materials regarding checking identification. He modified it for Central City liquor store use as the Identification Tool Kit (exhibit 2, file 1, tab 4) and provided copies to all staff. Staff meetings are held on Saturday mornings approximately every two months. The March 14th incident was fully discussed at the following meeting.

He is familiar with the MAP program developed by the branch. The hospitality industry association had brought it their attention and forwarded information received from the branch (exhibit 2, file1, tab 1). Store management advised their employees of the program and reinforced with them their policy and procedures for checking two pieces of identification.

Central City has better security processes than the LDB government liquor stores (GLS). Central City uses sensomatic tags on all liquor products to deter thefts whereas GLS do not, nor do they attempt to apprehend liquor thieves. As a result minors will obtain liquor from GLS through a grab and run whereas this is minimized at Central City. Minors will often make arrangements outside of liquor stores to have willing adults purchase liquor on their behalf. GLS do not monitor the outside of their stores for such activities whereas Central City does. Central City does not use a secret shopper program. It has never been suggested that they do so.

He testified that the cashier making the sale of liquor to the minor (witness F) was a good employee, one of their best. She was aware of the MAP program and the store policy and procedures and had signed-off on them (exhibit 2, file 1, tab 1). She was having personal problems at the time of the incident. She was noticeably upset and not fully focused. She couldn't afford to take time off and they did not wish to cause her

financial hardship by taking her off the job. If her duties had been restricted to only stocking product it would have required having an additional person to handle the cash till. He was concerned but she assured him that she was okay. On March 14th he had left work prior to the incident with the minor. It was brought to his attention the following day by the assistant manager (witness D). The cashier making the sale was interviewed and suspended and then fired on instructions from the owner.

Asked about the policy of providing complimentary 50 ml bottles of whiskey to customers he testified that these were provided by the liquor manufacturers and were kept at the cash tills to prevent their theft. They were to be given only to those customers purchasing the manufacturer's products. One should not have been given to a customer purchasing only beer.

Witness F testified that she has a SIR certificate. Prior to working at the liquor store she had worked as a server and bartender for approximately 21 years. She then worked at the liquor store for five and a half years, latterly as the head supervisor with responsibility for training new employees, opening the store, maintaining cash and bank records and working as a day shift cashier. She was aware of the MAP program. Management had all employees sign-off on the information received about the program (exhibit 2, file 1, tab 1) and instructed them to request two pieces of identification from all young persons. She is familiar with the store's policy and procedures handbook and used it in training new employees. She and all other employees signed off on the handbook (exhibit 2, file 1, tab 1). She was well aware that liquor could not be sold to a minor and that any employee doing so would lose their job. She was very strict about requesting identification and was known as the "ID Nazi" because she would require identification from everyone including staff. There were signs throughout the store advising that customers must be 19 years of age and two pieces of identification would be required. The store policy had changed over time from requesting identification from all persons appearing to be under 19 years to requesting identification from all persons appearing to be under 25 years.

She testified that she was working day shift on March 14, 2012. She was going through a difficult time as she had lost her best friend of 17 years in January and suffered the loss of her mother on February 28th. She should not have been working that day because of what she was dealing with. She had taken her regular time off and management had offered her additional time off but she was too loyal to stay away from work. The day was busy as they had just received a large liquor order which had to be stocked. She was required to assist with the stocking and to complete sales for customers at her cash till. She was constantly running back and forth. Management did not like to see a line-up of customers waiting to be served at a cash till.

She recalls the minor agent. She believed that he was of age and completed the sale of beer to him and gave him a complimentary 50 ml bottle of whiskey which the store had received from a liquor representative. She was giving them out to all customers. She agreed that the minor agent did not appear to be over 25 years of age and that she did not follow the store policy of requesting identification. She testified that there was just too much going on in her head with the large liquor order and her difficulties over her recent losses. She made a very poor judgment call. She was informed the following day that she had sold liquor to a minor agent and was subsequently fired.

Witness G testified that he is the president of the corporate licensee. The liquor store is part of a restaurant, pub and brewery operation owned by the corporate licensee. The liquor store has been licensed since 2003 and has moved locations and been expanded over the years. It currently has one the largest gross sales of private liquor stores in the province and has been recognized with awards from liquor industry associations.

Theft of liquor is a big issue for liquor store operators. Central City has taken steps to greatly reduce the opportunities for the theft of liquor and consequently their losses are minimal. Government liquor stores have no controls to prevent thefts and suffer very large losses. Theft from liquor stores is the primary method by which minors obtain liquor. The Central City security system is known within the community resulting in very few attempts by minors.

His office is located upstairs of the liquor store. He has a monitor on his desk on which he can see the operation of the store. He looks at the monitor from time to time, spending on average half hour to one hour per day. He watches for minors, shoplifters and customers waiting too long at a cash till. If he sees a problem which needs to be addressed he will direct staff to it.

He is familiar with the MAP program. It has been developed on the basis that minors are being sold liquor either because of inadequate staff training or an over emphasis on profit. That is not the case at Central City. Staff is properly trained and is aware that selling liquor to a minor will result in the loss of their job. All staff have SIR certificates which require them to be tested on their knowledge. The store continually reviews their policies and procedures and makes changes if necessary. The severity of the penalties levied by the branch consisting of monetary fines and/or licence suspensions greatly outweighs the opportunity for profit from sales to minors.

He knows the employee responsible for the sale to the minor (witness F). She was a good conscientious employee who worked hard and enjoyed her job. He had seen her request identification from customers on numerous occasions. He was unaware that she was under emotional distress at that time. If he had known she was under stress but appeared to be in control he would not have intervened. She had made one mistake and it was a difficult decision to fire her, however not doing so would have undermined the store's policies.

He was upset that the liquor inspector did not make any inquiries regarding the store's policies and procedures and its operation prior to taking enforcement action. No one from the branch ever spoke to store management to suggest any changes to their operation. Guilt was assumed without getting all of the facts. He would have preferred the liquor inspector speak to him on the day of the occurrence. He was unaware that the inspector had spoken with the assistant manager following the incident on that day.

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" and advised all licensees that it would be used to test their compliance with the Act. On May 14, 2012, a 17 year old minor agent of the branch entered and purchased liquor from Central City Liquor Store. The minor agent was youthful in appearance and there was no attempt to deceive the licensee as to the minor's age. The minor purchased liquor without being requested to produce identification. The employee making the sale had emotional problems at the time. This was known by management yet she was assigned her normal duties and responsibilities.

The licensee has policy and training manuals but does not have a system in place to monitor and test staff compliance. Due diligence is specific to the time of the contravention. A previous decision regarding due diligence five years ago is not evidence of due diligence at the time of this contravention. Establishing due diligence is the responsibility of the licensee and not the branch.

Selling liquor to a minor is a serious public safety issue and can have serious consequences to the minor and to the community. In the circumstances, the minimum monetary penalty of \$7500 is warranted.

SUBMISSIONS – THE LICENSEE

Counsel made a written submission (exhibit 3) and an oral presentation. Counsel's submissions are summarized as follows:

The cashier making the sale of liquor to the minor agent was not the directing mind of the licensee. Due diligence is established when it is shown that those persons responsible for the policy and practices were duly diligent in attempting to prevent the sale of liquor to minors. Indicia establishing due diligence in this case are: all staff were trained and held SIR certificates; signage regarding identification requirements were posted throughout the store; staff meetings were held reinforcing identification requirements; licensee guides, manuals and bulletins were signed-off by staff; experienced management supervised and supported staff in performing their duties; store policies and practices were in place to prevent theft and to prevent adults purchasing liquor on behalf of minors; store policies requiring persons apparently under 25 years of age to produce identification; store policy was to dismiss any employee selling liquor to a minor.

The licensee was found to be duly diligent in a previous hearing decision regarding an identical alleged contravention. The branch has not provided any evidence of deterioration of the licensee's policies or practices since that earlier decision. Nor has the branch provided any evidence of necessary changes to the licensee's policies or practices which would improve its ability to prevent the sale of liquor to minors. The licensee has strengthened its policies and practices since the time of the earlier decision.

The branch failed to conduct any investigation into the circumstances of the alleged contravention. It failed to consider the previous decision where the licensee was found to be duly diligent.

The majority of instances of minors obtaining liquor are through thefts from liquor stores, not through the failure to require them to produce identification. The licensee here has established procedures which have been successful in preventing or minimizing theft from the liquor store. This is in contrast to the government liquor stores who suffer thefts of liquor on a daily basis. This licensee practices due diligence whereas the GLS do not. The branch should require that all liquor stores follow the practices and procedures of this licensee if it is truly interested in preventing the sale of liquor to minors.

The branch approach is to proceed directly to enforcement in these types of cases. It does not meet with the licensee to look for cause and solution to the problem and to consider whether the licensee is doing all it can to prevent the problem from occurring. The branch should be directed to do so in the future and should not take enforcement action without first investigating and considering whether due diligence applies.

REASONS AND DECISION

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

I find on a balance of probabilities that the evidence in this case is that a 17 year old minor, youthful in appearance, entered and purchased liquor (beer) at the Central City Liquor Store at approximately 3:26 p.m. on March 14, 2012. The minor was not requested to produce any identification nor did he produce any identification. 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)

At the time in question in this case, I find that the directing mind of the licensee was the assistant manager (witness D). He was on site and was responsible for the supervision of the staff working in the liquor store. From the evidence, he and all store staff were, at the time of the alleged contravention, busily engaged in stocking the large liquor order received that day as well as ensuring that customers wishing to purchase liquor were served. There was a need to stock the liquor products without delay as they were contained on skids within the retail area. That customers were to be served without delay was an important consideration for staff that had been mandated by management. This was well known by the employee responsible for the sale of liquor (witness F) to the minor agent. She took her responsibilities seriously as she rushed between assisting in stocking the liquor products and attending to customers at her cash till, described as the busiest in the store. She was somewhat preoccupied at the time dealing with the emotions resulting from the recent deaths of her mother and her best friend of many years. She readily admitted this in her testimony and testified that she probably shouldn't have been working that day but was there out of loyalty.

I have had opportunity of observing the minor agent during his appearance as a witness. It is possible that he may have been of age; it is equally possible that he may have been younger. He was certainly youthful in appearance and it would have been prudent to request him to produce identification. Despite the youthful appearance of the minor the subject employee completed the sale of liquor (beer) to him. She did not request identification nor otherwise satisfy herself that he was of legal age. She also provided him with a 50 ml complimentary bottle of whiskey, contrary to store policy.

That the subject employee was suffering from emotional stress was well known to management and other staff. She had been noted to lose her emotional control for short periods of time then regain composure. The general manager testified that he believed that she was able to carry out her responsibilities. He did not wish to require her to take time off as it would have had an adverse financial impact on her. He did not wish to moderate her duties by having another employee cover the cash till as that would require having another employee working, thus presumably increasing store costs.

This licensee has made considerable efforts to attain compliance by, amongst other things, providing training, developing policy and procedure and employee conduct manuals, conducting staff meetings to remind staff of their responsibilities and providing notices about identification requirements throughout the store. However it could have, through its managers, alleviated the circumstances at the time of the alleged contravention by requiring the subject employee to take time off, with or without pay, by moderating her duties or requiring that she receive close supervision while she was suffering from emotional distress. It chose to do none of these and as a consequence I find is not entitled to the benefit of the defence of due diligence.

In conclusion, I find on a balance of probabilities that on March 14, 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 have 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, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

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 \$7500 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 (Seven Thousand Five Hundred Dollars) to the general manager of the Liquor Control and Licensing Branch on or before January 7, 2013.

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: December 4, 2012

cc: Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

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