



**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:	Ruttan Enterprises Ltd. dba Wells Gray Inn 228 East Yellowhead Hwy Clearwater, BC V0E 1E0
Case:	EH12-071
For the Licensee:	Jeff and Bonnie Ruttan
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	February 13, 2013
Place of Hearing:	Kamloops, BC
Date of Decision:	July 11, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

The Corporate Licensee, Ruttan Enterprises Ltd. (the "the Licensee") owns and operates an establishment known as the Wells Gray Inn in Clearwater, BC. The Licensee holds Licensee Retail Store Number 192170 (the "Licence"). According to the terms of its Licence, the Licensee may sell liquor from 9 am to 11 pm, Monday through Sunday.

The Licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication " Licensee Retail Store Licence Terms and Conditions - Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action (the "NOEA") dated June 18, 2012.

The Branch alleges that on April 12, 2012, the Licensee contravened Section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act"), by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is payment of the sum of \$7,500 dollars (item 2, Schedule 4, *Liquor Control and Licensing Regulation*) (the "Regulation"). The range of penalties for a first contravention of this type is a 10 to 15 day Licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

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. Was the Licensee duly diligent?
3. If the Licensee was not duly diligent, is a penalty warranted under the circumstances or, in the alternative, should I exercise my discretion and order that no penalty is necessary?
4. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted and considered:

Exhibit 1: The Branch's book of documents, Tabs 1 to 14 inclusive.

EVIDENCE – THE BRANCH

The Branch's sole witness was the Regional Inspector for the Branch. He had worked previously as a liquor inspector for three years before assuming his current position. In his former position, the Regional Inspector had inspected most of the types of facilities licensed by the Branch including UBrews, liquor and food primaries, and licensed retail stores ("LRS"). The main issues of concern in the inspections were sale of liquor to minors, overcrowding, and public safety problems.

The Regional Inspector had previously been responsible for the Branch's Minors as Agents Program ("MAP") in the Southern Interior and Vancouver Island regions. MAP is a program that has been used by the Branch following legislative changes which permitted the hiring of persons under the age of 19 to test the compliance of licensees in selling liquor to minors.

On April 12 2012, the Regional Inspector was running MAP in the Clearwater area with another liquor inspector, and a minor who was acting as a minor agent under contract with the Branch. Before setting out to visit the LRSs in the area, the minor agent attended at the office of the Branch, where he was photographed. His identification was copied as well; it confirmed that the minor agent was under the age of 19 on the date of the proposed inspections.

The two inspectors and the minor agent attended at the Wells Gray LRS to test compliance at about 5:30 pm. The Regional Inspector testified that he went inside first and pretended interest in some of the products for sale inside the store. He testified that the store was small and well lit. He did not recall seeing any signs or posters regarding age restrictions inside the store. The interior of the store presented a clear line of vision to the clerk at the cash register. There were no other customers inside the store.

The Regional Inspector testified that he observed the minor agent entering the store shortly behind him. He watched the minor agent select a six pack of Molson's Canadian beer, and take it to the clerk at the cash register. The distance between the clerk and the minor agent was close, separated only by the sales counter. The Regional Inspector was also near to the sales counter. He watched as the minor agent gave the clerk \$20, and he saw that she gave back change, following which the minor agent left the store with the beer. The Regional Inspector was able to observe that the minor agent was not asked for ID at any time. No receipt was given for the beer sale. In all, the sale to the minor agent took only about 30 seconds.

Shortly after the sale concluded, the Regional Inspector followed the minor agent out of the store. Once outside, the beer that had been purchased by the minor agent was identified as liquor, and a seizure tag was placed on it. Both the Regional Inspector and the minor agent completed notes about the incident. Afterwards, the two liquor inspectors went inside the store and told the clerk that she had sold liquor to a minor. She said she was aware of MAP, and was concerned that she would be personally fined.

The Regional Inspector then telephoned a principal of the Licensee, who was upset about the incident. He asked the Regional Inspector if he felt badly about being involved in MAP. The Regional Inspector told him it was part of his job to ensure that the sale of liquor to minors did not occur. Later the Regional Inspector spoke with the principal, and reviewed the MAP with him. The Regional Inspector testified that the principal was upset and left before the Regional Inspector finished his discussion. The principal also refused to take the Contravention Notice ("CN") that the Regional Inspector had prepared. The Regional Inspector left the LRS shortly before 6 p.m.

Later the Regional Inspector drafted a Notice of Enforcement Action ("NOEA"). A review of past history of the Licensee included a three day licence suspension for a December 17, 2005 incident of permitting a minor to be on the licensed premises, and a compliance meeting on June 3, 2003.

Documents were requested from the Licensee about the incident but none were produced. In particular, no training documents or incident logs concerning the contravention were produced, and there was no incident report from the clerk who sold the liquor to the minor agent.

The Regional Inspector noted that for a first contravention under the schedule to the *Regulation*, the penalty for selling liquor to a minor is a monetary penalty of \$7500 or a 10 to 15 day licence suspension. He testified that the reason enforcement action was pursued against the Licensee was due to the problems caused by the sale of liquor to minors. A LRS sells liquor for off-site consumption where there is no control over the quantities consumed. Minors have difficulty metabolizing alcohol, and can become involved in public disturbances, so public safety is a concern. As well, the clerk at the LRS had articulated concerns about the Branch's enforcement of the program, and so raised question about whether it was taken seriously. The Regional Inspector also had a concern about the lack of policies in place to prevent a recurrence of the sale of liquor to minors. All of these contributed to his decision to pursue enforcement action.

The Regional Inspector acknowledged that the range of penalties for a first contravention was high, which reflected the serious public safety concern for this type of activity.

In cross examination, the Regional Inspector confirmed this was treated as a first contravention for the LRS under Schedule 4 of the *Regulation* because there had been no other similar contravention during the previous year. In response to a question as to why he had not come to the Licensee first instead of setting it up to fail, the Regional Inspector advised the MAP was designed to test compliance. He said the Branch does not have sufficient resources to go to every store to check compliance.

In re-examination, the Regional Inspector explained that the role of the Branch is to work with Licensees. The services of the Branch are available by telephone, and assistance will be provided to develop tools such as policy manuals or staff policies.

EVIDENCE – THE LICENSEE

Ms. Bonnie Ruttan testified on behalf of the Licensee. She asserted that all staff are hired with Serving it Right certification. They are trained in staff meetings to check for ID and for intoxication. Training in the LRS is provided by working with another staff member. There is a total of 60 staff employed in the pub and the LRS; five of these work in the LRS, and they can also work in the kitchen and restaurant. Ms. Ruttan testified that she spends time with employees before they are trained, and the training is completed by more senior staff members. There are video cameras inside the store at all times. Compliance testing is not formally done. There is a log book to record incidents of intoxication or where marked money is used, but not for incidents involving the sale of liquor to minors.

In cross-examination, Ms. Ruttan confirmed she was not at the store when the contravention occurred. Video surveillance footage was reviewed, however, and the contravention was confirmed. The clerk was working alone at the time without supervision. Ms. Ruttan testified that the LRS occupies part of the building, and activities inside the store are monitored on video primarily to ensure staff safety.

Ms. Ruttan stated she became aware of the contravention when she was called by the Regional Inspector that evening. She agreed the Licensee does not have written policies on how to confirm the ID of customers that may be minors. There is no staff training manuals, and no tests are administered on policies or procedures. The Licensee does not keep incident reports. There is a log book but it did not record the incident with the minor agent.

Ms. Ruttan testified that staff meetings are conducted and agendas are circulated to staff for these meetings. She agreed that none of these were produced to the Branch for the hearing. No documents were produced regarding the training of staff. As well, while the employee who was involved in the incident still works for the Licensee, she was not called to testify about her training.

SUBMISSIONS – THE BRANCH

The Branch submits the three elements of the contravention have been made out. The Licensee does not dispute the fact that liquor was sold to a minor. As far as due diligence is concerned, the evidence must establish its existence at the time of the contravention. The evidence must show that the Licensee was duly diligent because it had developed systems to prevent a contravention from occurring, and had also taken reasonable steps to ensure their implementation. In this case, no written policies were produced, and apparently the Licensee does not have such policies. In the circumstances, a contravention occurred, and a penalty is warranted to bring the Licensee into compliance.

SUBMISSIONS – THE LICENSEE

The Licensee acknowledged that it was aware of the MAP but simply “screwed it up”. The Licensee would like to have the Branch work with it to deal with the problem rather than move to enforcement. It submits that the liquor inspector that previously worked for the Branch did not levy penalties for infractions under the legislation.

The Licensee maintains that it tries hard to train its staff. The clerk who sold liquor to the minor agent slipped up, and everyone has learned a lesson not to repeat the mistake again. While the store did not have incident reports before, it does keep them now.

If fined, the Licensee says that it will shut down as it does not have enough resources to pay the financial penalty. This will result in the loss of a significant employer in a community with a high rate of unemployment. The Licensee did not, however, wish to consider a suspension instead of a financial penalty because it would be upsetting to the locals.

REASONS AND DECISION

Contravention

The Branch has the onus of establishing the contraventions as alleged in the NOEA. In view of the admissions of the Licensee, and on the uncontroverted evidence of the Regional Inspector, it would appear that the individual who purchased liquor from the Licensee was an underage minor. He was supplied liquor by the Licensee consisting of six cans of beer. No request was made for him to produce identification. The minor remained in possession of the beer until it was logged as evidence by the liquor inspectors. Based on this evidence, I am completely satisfied that the three elements of the contravention of selling liquor to a minor, contrary to section 33(1) of the *Liquor Control and Licensing Act*, are proven as alleged. A person, the Licensee, sold or supplied liquor to a person who was a minor. Indeed, the Licensee does not dispute the contravention.

Due Diligence

The defence of due diligence is available to the Licensee if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The onus is on the Licensee to provide the evidence necessary to establish the defence of due diligence. The leading case on the defence of due diligence is the Supreme Court of Canada decision in *R. v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. set 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 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 willful 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.

Based on this case, the defence of due diligence first requires evidence to establish that the Licensee has procedures in place to train its staff to deal with the issues that may arise in the sale of liquor to the public. For the LRS, the primary issues are the sale of liquor to minors and sale of liquor to intoxicated customers. The second requirement to establish due diligence is evidence that the procedures which have been developed are reinforced by continuous and regular training of staff. The Licensee must demonstrate that its procedures are understood and acted upon by its staff. Normally, the procedures are reduced to writing and staff signify their training by signing and dating them.

The Serving It Right Program manual published by the Branch recommends the use of written house policies to make everyone's role in their administration clear. The policies should be communicated to staff, and staff should sign off to confirm that they were read and understood. It also recommends that the policies be reinforced at regularly scheduled staff meetings.

In this present case, the Licensee did not produce any written policies that it uses for the purpose of training its staff, and in cross-examination, it admitted it had no such policies. In particular, there was no evidence that the Licensee had written policies on how to check the ID of customers. There were no staff training manuals or tests administered on the policies or procedures of the Licensee.

At the time of the contravention, the Licensee did not keep incidents reports. There is a log book but it did not record the incident with the minor agent. While there was some evidence that staff meetings are held, and agendas are circulated to staff for these meetings, none were produced for the hearing. The employee who was involved in the incident, while still employed, was not called to testify about her training.

I conclude therefore that there is no credible evidence the Licensee has acted with due diligence. The clerk who sold to the minor agent was apparently experienced, and the light was good on the day in question. The store was not crowded. The clerk simply failed to ask for ID from an apparently youthful customer. In the circumstances, the defence of due diligence must fail.

PENALTY

I turn now to consider penalty. Pursuant to section 20(2) of the *Liquor Control and Licensing Act* ("Act"), 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:

1. Take no enforcement action
2. Impose terms and conditions on the licence or rescind or amend existing terms and conditions
3. Impose a monetary penalty on the licensee
4. Suspend all or any part of the licence
5. Cancel all or any part of the licence
6. 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.

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.

There was no record of a proven contravention of the same type for the Licensee at this establishment within the preceding 12 months of this incident. This is therefore treated as a first contravention under Schedule 4 set out in the *Regulation*. The range of penalties, as earlier noted, is fairly high consisting of a \$7,500-\$10,000 monetary penalty and/or a suspension of the Licence for a period of 10-15 days. The size of the penalties underscores the legislative perspective that selling liquor to minors constitutes a serious public policy issue. The evidence of the Branch is that liquor consumption is dangerous to minors personally because of their difficulty metabolizing alcohol. The behaviour of minors under the influence of alcohol also represents a danger to public order, and may also unnecessarily engage police resources to deal with these problems.

The monetary penalty was recommended to ensure compliance in future. The MAP had been widely advertised to retail store licensees, so its existence should not have been a surprise to the Licensee. Indeed, the clerk who sold to the minor agent was aware of the MAP. The Licensee's main concern is for the cost of the penalty for a first contravention under the Schedule to the Regulations. The Licensee, however, advised that a suspension would not serve its business interests in preference to monetary penalty.

In the circumstances, I conclude that a monetary penalty of \$7,500 is necessary to ensure the voluntary compliance of the Licensee to enforce the provisions of the *Act* dealing with 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 (\$7,500) to the General Manager of the Liquor Control and Licensing Branch. In view of the financial concerns expressed by the Licensee, and their potential impact on staff, I order that the monetary penalty be paid on or before August 31, 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

A. Paul Devine
Enforcement Hearing Adjudicator

Date: July 11, 2013

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