



**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:	The Bird of Paradise Pub Inc. dba Bird Cold Beer, Wine & Spirits 4291 Glanford Avenue Victoria, BC V9B 4R4
Case:	EH12-091
For the Licensee:	Diego Trozzo
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	February 26, 2013
Place of Hearing:	Victoria, BC
Date of Decision:	June 19, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, The Bird of Paradise Pub Inc., holds Licensee Retail Store Licence Number 195312 for the operation of a licensee retail store known as Bird Cold Beer, Wine & Spirits located in Saanich, BC. Liquor sales are permitted from 9:00 a.m. to 11:00 p.m., seven days a week.

The Licensee is, as are all retail liquor stores licensed in this province, subject to the terms and conditions explained in the publication “Licensee Retail Store Licence Terms and Conditions – A Guide for Liquor Licensees in British Columbia” (the “Guide”).

Diego Trozzo is the principal of The Bird of Paradise Pub Inc. and appeared as the licensee’s representative during the course of the hearing (the “Licensee”).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch (the “Branch”) specified its allegations and proposed penalties against the Licensee in a Notice of Enforcement Action (the “NOEA”) letter dated June 14, 2012. The Branch alleges that on April 20, 2012, the Licensee sold liquor to a minor employed in the “Minors as Agents Program” (the “MAP”). The Branch proposes a penalty of \$7,500 on the basis that this is a first contravention for the Licensee.

The Licensee disputes the findings and penalty proposed in the NOEA, and so I was appointed pursuant to section 20 of the *Liquor Control and Licensing Act* (“Act”) as a Delegate of the General Manager to hear the matter. A hearing was scheduled for February 26, 2013. The Licensee attended the hearing and presented evidence and argument in respect to the enforcement action.

RELEVANT STATUTORY PROVISIONS

1. *Liquor Control and Licensing Act* (“Act”) sections 20 and 33(1)(a)
2. *Liquor Control and Licensing Regulation*, Schedule 4, Item 2.

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1:** Branch’s book of documents
- Exhibit 2:** CD of Video footage from LRS
- Exhibit 3:** Licensee’s Book of Documents

EVIDENCE – THE BRANCH

Liquor Inspector A

Liquor Inspector A noted that the Licensee is bound by the Guide, which includes being responsible for compliance with the law even when the Licensee is not on site. The Guide also sets out the requirements for checking ID of customers. The significant feature of a licensed retail store is that it sells liquor for consumption off site. There are public safety concerns if the Licensee sells liquor to minors.

Liquor Inspector A testified that on April 20, 2012 he was involved in the Minors as Agents Program. This program had been described by the General Manager in correspondence which was distributed to retail store licensees in the province. Before going out to visit stores in the region, the identification of the minor agent was photographed. The Inspector was accompanied by two other liquor inspectors and the minor agent as they visited the facilities of licensed retail stores (LRS) in the Saanich area.

Shortly after 5 p.m., the LRS of the Licensee was visited. Liquor Inspector A testified that he went into the store and was followed shortly afterwards by the minor agent. The store was not crowded and there was a clear line of sight to the single clerk that was working in the store at the time.

The minor agent selected four cans of Strongbow, a product that contains alcohol, and went to the counter where the clerk was waiting. Liquor Inspector A said that he overheard the clerk telling the minor agent the price of the product. At no time did the clerk ask for identification. The Inspector only heard the clerk ask the minor agent if she wanted a bag. The minor agent then left the store with the cans of Strongbow.

The Inspector and the minor agent returned to the vehicle parked outside the store. There they completed the reports on the events inside the store, and also logged the Strongbow as evidence. The Licensee was later contacted by telephone. He was advised that a Contravention Notice had been prepared and was going to be sent to him. The Inspector also made a request for documents from the Licensee. The Inspector prepared a Contravention Notice and the NOEA of June 14, 2012.

Liquor Inspector A testified that a penalty of \$7,500 was recommended. This is the minimum monetary penalty under the *Regulation* for a first contravention. The penalty was recommended because selling liquor to minors represents a serious public safety problem. Liquor consumption is dangerous to minors personally, and may also be dangerous to public order. The penalty was recommended to ensure compliance in the future. The MAP had been widely advertised to retail store licensees, so its existence should not have been a surprise to the Licensee. As well, there had been issues regarding the sale of liquor to minors at the establishment previously.

EVIDENCE – THE LICENSEE

The Licensee

Diego Trozzo testified that he has been in business for 9 ½ years. He operates his business in accordance with his moral beliefs not to bend the rules in order to make profits, and requires his staff to follow his lead.

The Mission Statement for his business was contained at Tab 1 of his documents. The focus of the business is on customer satisfaction. The Licensee testified that violations of the rules by staff subject them to warnings and possible termination of employment. Selling to minors or to anyone who appears to be under 30 can result in termination of employment. The Licensee testified that he has more of a cushion than the age 25 policy suggested by the Branch. All staff have their Serving it Right certification. The policies of the Licensee include expressly checking for ID, and not selling liquor to intoxicated patrons.

The Licensee testified that he is on site every day. On the day of the contravention, there were 2 managers and 3 clerks at work in the LRS. It is situated below the pub. The LRS is small, only 780 square feet in size.

The Manager

The manager of the pub and the attached LRS (the "Manager") at the time of the contravention testified on behalf of the Licensee. His duties included human resources, and he helped out behind the till when needed.

The Manager testified that he hired the clerk that sold liquor to the minor agent. When she was hired, she had to read and become familiar with the Licensee's policy manual. She had the Serving it Right certification required for employment. There is a conference room in the licensed establishment. The Manager said that he went through the Licensee's policies and procedures with the clerk, and she knew the first priorities were to ID anyone that appeared to be 30 and under, and not to sell to intoxicated patrons.

The Manager testified the newly-hired clerk was young herself but able to ascertain the ages of patrons and took her work seriously. She had recently come from out of province and needed her job. He was very surprised when he learned she did not ask the minor agent for ID. He worked in a small office near the clerk's station, so he could see and hear what was going on in store as he ordered stock. The Manager testified that the clerk always asked for ID, and was not shy. She spoke her mind and was strong-willed.

The Manager testified that he worked for the Licensee for 6 months. During that time, there were two staff meetings for the LRS staff. Staff meetings were conducted twice a month for staff in the pub. In the meetings, management reviewed the law and discussed new products. The focus was not on sales. The Manager testified he was told that staff had to adhere to the Licensee's policy manuals. The Licensee did the best it could and was very surprised by the result.

In cross-examination, the Manager stated that he left the pub at the end of May 2012. He was working upstairs when the incident occurred, and there was usually one clerk working in the store. There was no supervisor in the store at time of the incident. He had reviewed the video taken when the minor agent was in the store, and it was clear the clerk failed to ask for ID. While one can review the CCTV video from the cameras inside the LRS on a monitor in the pub, the Manager said it is not routinely monitored. The CCTV is used primarily to deter theft, not for staff monitoring. In the evening, a manager from the pub goes through the store on a routine basis. There is also someone working in the cigar store that is adjacent to the LRS. The cigar store is on the left of the entrance to the LRS, and both facilities share the same entrance. While staff in the cigar store previously had no formal role to make sure staff in the LRS are checking ID, they are doing more of it now.

The Manager testified that there are 5 clerks who rotate employment in the store. He acknowledged that the manual used to train staff has not been revised since 2007. When the clerk who was involved in the incident with the minor agent started employment in February 2012, she was not given a copy of the manual, and she did not sign off to confirm that she had been trained to understand its contents. There is no information in the manual about who enforces the requirement to ask for ID, and it does not explain how ID is verified or who to report to if a customer is underage. The Manager acknowledged there is nothing in the manual about how to assess the age of a customer, although this was discussed verbally with staff.

The Manager agreed that there were no written tests to check or assess staff on checking ID or on selling liquor to minors. While the Guide was available for review by staff, it was never formally reviewed with any of them.

The Manager testified that the clerk who sold liquor to the minor agent had attended one staff meeting before the incident. There were no attendance sheets, agendas or minutes kept for these staff meetings. The clerk received a reprimand letter following the incident. He acknowledged the clerk did not do an incident report about the incident with the minor agent. There is a log book at the counter for staff and managers to enter incidents but service refusals are not logged.

The Manager testified that he did not formally engage a secret shopper to test compliance by staff in the store. He sent a young relative into the store twice. She had no special training for the role but she was asked for ID by the clerk involved in the minor agent incident. No formal records were kept about when these visits took place.

SUBMISSIONS – THE BRANCH

The Branch submits that the contravention of selling liquor to a minor contrary to section 33(1) of the *Act* is proven. The minor agent was undoubtedly underage, was sold liquor by the Licensee, and the fact she was in possession of liquor is not disputed, as she left the store with four cans of Strongbow. The three elements of the contravention are made out and the contravention is therefore proven on the balance of probabilities.

As for due diligence, the Branch says that the relevant conduct is that which took place at the time of the contravention. The Branch does not expect perfection; the question is did the Licensee act reasonably? In order to establish this, the Licensee must show it had appropriate procedures in place to train staff, and there was an effective system for the operation of these procedures.

The Branch says there were deficiencies in the systems of the Licensee. Written policies are not enough. There needs to be evidence of effective measures that staff act upon. Here the policies have not been updated since 2007. They do not set out who enforces age verification or how to verify ID. There are no procedures or further steps to take if no ID or fake ID is presented. There is no training guide to train staff how to assess age or review ID. It is not enough to point to written policies, the Licensee must show they have been acted upon. In this case, the failure by the clerk was failing to act on the appearance of the minor agent and ask for ID. This is evidence of no training or of ineffective training in how to assess the age of patrons.

The Branch submits that the operation of the Licensee's systems are not effective given the sale of liquor took place when the clerk had ample time to interact with the minor agent. The store was not overcrowded, the lighting was good, and the clerk dealt directly with the minor agent when the purchase was made. There was also no effective supervision in the store on the night in question. No supervisor came into the store during evenings to check on the clerks. The clerk who sold to the minor agent was not monitored or supervised in any other fashion. Under the Guide, the Licensee is liable for the conduct of its employees even when not present. Evidence of regular testing of staff is needed in order to establish due diligence. While the clerk had her Serving it Right certification, there was no written testing of her specific knowledge and no tests were developed.

As well, the Branch says that there was no incident report filed about the failure to ID the minor agent, and no evidence was provided from the clerk to explain why she failed to ID the minor agent. If she is not available, other staff could testify about their training, and explain why this was an aberration. As well, there was no documentary evidence produced about the informal safe shopper program instigated by the store manager. The Serving it Right Guide points out the importance of reviewing the Guide with staff. It also contains steps on how to check for ID. While there may be some evidence of

reasonable steps for training staff, there was insufficient evidence about the procedures and training used in practice.

The Branch submits the sale of liquor to minors is a public safety issue. This has been discussed with the Licensee in previous compliance meetings. The MAP was announced in advance by the General Manager, so the Licensee was not taken by surprise. The legal obligation on the Licensee is to prevent minors from purchasing liquor. It is not checking ID, although this can be a defence to a contravention. The evidence of good intentions is outweighed by public policy concerns about the sale of liquor to minors. A \$7,500 penalty is warranted to ensure the Licensee comes into voluntary compliance.

SUBMISSIONS – THE LICENSEE

The Licensee does not agree it has a history of non-compliance. It has 32 years of business history. During this time, there were many inspections and little evidence of problems. There was an earlier intoxication complaint. The Licensee came before the Branch and was found to be non-compliant but no penalty was applied. On a second occasion, there was a penalty applied but it was later defeated. The Licensee submits that given the number of inspections that have been undertaken at its premises, it has been very compliant.

Regarding written tests, the Licensee submits that its staff have the Serving it Right certification. This is the test given by government; if they fail, it is a failure of government too.

The Licensee does a tremendous amount of interaction with staff verbally. There are only 5 staff members, so written records are not required. The Licensee submits that the system of checking for identification is designed to fail because staff must ID people older than them. When young people are dressed up, they can look much older.

The Licensee said there was no malice here, and no intent to sell liquor illegally for profit. It was just a mistake on appearance. The LRS is not a public hazard. The Licensee is a “hands on” manager and does not take this kind of contravention lightly.

The Licensee referred to the decision of a Delegate of the General Manager in *Rayman Investments & Management Inc., dba Coal Harbour Liquor Store* EH11-139 (“*Coal Harbour*”). The Licensee submitted that it does a lot of the same things in its business. While the Licensee’s procedures were not documented as well as in *Coal Harbour (supra)*, there were a lot of direct parallels.

The Mission Statement in the “Policies and Procedures Guide” of the Licensee which was produced as part of Exhibit 3 (the “Policies”) has a focus on customer satisfaction, not making money. The Licensee submits that the Policies set out the requirement for checking ID at page 5, and it requires the employees to check ID for anyone appearing under 30 years of age. The Policies stipulate that it is “the law” to require ID from anyone appearing under 25. The Licensee requires ID for sale to anyone who appears under 30 because it wanted more of a cushion than only checking patrons that appeared to be under 25. In this way, the Licensee submits that its Policies are stricter than those of the Branch. On page 17 of the Policies, staff are told not to sell liquor to intoxicated patrons. On page 26 of the Policies, staff are advised that any violations of the legal requirements will be the subject to termination or warnings. Tab 2 of Exhibit 3 reproduces the Serving it Right Certifications for all staff of the Licensee. All staff must have this certification.

The clerk who sold liquor to the minor agent was described as young but someone who took her work seriously. The Licensee testified that he was very surprised she did not ask the minor agent for ID. He had seen her in action, and she always asked for ID. She was not shy, was strong-willed, and spoke her mind. The Manager had seen her ID customers while he was working in a small office situated near the clerk station. From this vantage point, he could see and hear what was going on in store as he ordered stock.

A copy of a letter of reprimand dated April 24, 2012 was provided in Tab 3 of Exhibit 3. The clerk who sold to the minor employed in the MAP was given a written reprimand for selling to someone "who appeared to be under the age of 25" without asking for 2 pieces of ID. The last page contains a list of people who were working on the day of the contravention. Two managers worked that day, and 3 clerks worked as well.

REASONS AND DECISION

Contravention

The Branch has the onus of establishing the contravention as alleged in the NOEA. In view of the admissions of the Licensee, and on the uncontroverted evidence of Liquor Inspector A, it would appear that the individual who purchased liquor from the Licensee was an underage minor. She was supplied liquor by the Licensee consisting of four cans of Strongbow. Further, the minor was in possession of liquor until it was logged as evidence by the liquor inspectors. Based on this evidence, I am completely satisfied that the contravention of selling liquor to a minor contrary to section 33(1) of the *Liquor Control and Licensing Act* is proven as alleged. 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 licensee must first establish that it has procedures in place to identify and deal with problems that can occur in making sure that its staff enforces the law in respect of the sale of liquor to the public. Second, it must also ensure that those procedures are consistently acted upon and problems are dealt with. These requirements are set out in the leading case of *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 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 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.

In this case, the Licensee has a body of policies that it uses for the purpose of training its staff. The policies appear to be somewhat out of date. Section 33(1) of the *Act* sets out the contravention of selling liquor to a minor as follows:

A person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
- (c) in or at a place under his or her control, permit a minor to consume liquor.

The defence to selling liquor to a minor is set out in the following terms in section 33(5) of the *Act*:

It is a defence to a charge under this section if the licensee satisfies the Branch that, in reaching the conclusion that the person was not a minor, the licensee:

- (a) required that the person produce identification, and
- (b) examined and acted on the authenticity of the identification.

The contravention under the *Act* no longer focuses on requiring identification from anyone who appears to be under 25, but instead focuses on the requirement not to sell, give or otherwise supply liquor to anyone who is a minor. Nevertheless, while outdated, the Licensee does have policies in place to train staff on the requirement not to sell liquor to minors.

The policies are, however, deficient in the manner in which they train the staff of the LRS on assessing the age of patrons. In fact, there are no written guidelines or training in respect of this important aspect of the job. While the Licensee suggests that there is ongoing verbal training of staff, the clerk who was involved in the incident with the minor agent had attended only one staff meeting after her hire. There are no written tests administered to staff regarding their responsibilities in respect of the sale of liquor to minors. Staff are also scheduled to work alone in the evening with very little in the way of supervision or follow-up testing to make sure they are compliant with their obligations.

The Licensee compared its procedures to those of the licensee in the decision of a delegate of the General Manager in *Coal Harbour (supra)*. I am not bound by the findings in any prior decision of the Branch as each case is decided on its own facts. Nevertheless, the facts in the above decision are different from those before me. The licensee in *Coal Harbour* was found to be duly diligent with respect to a contravention in selling liquor to a minor agent. The licensee had written policies which the staff signed off on. The staff were warned about the MAP, and signed off on their acknowledgement about the warning. Video surveillance was in place during times when supervision was absent, and the footage was reviewed from time to time to ensure that staff complied with their obligations in the sale of liquor.

None of the steps outlined above from *Coal Harbour Liquor (supra)* formed part of the normal procedures of the Licensee. As noted by the Court in *Aztec Properties Company Ltd.* 2005 BCSC 1465 at paragraph 18:

An establishment may well have a general policy, but if the directing mind on site at the relevant time ignores it, or makes no effort to see that it is enforced, it can hardly be said that the mere existence of a policy is sufficient to demonstrate due diligence. In fact, that is what happened here. The adjudicator just did not accept that on the day in question, Aztec, through the steps that it had taken to prevent being over person capacity, had exercised due diligence.

The same analysis is apposite to the issue of the application of the policies of the Licensee. The policies exist on paper but there was scant evidence that staff were trained on them on an ongoing basis. The staff of the Licensee did not sign off to indicate they had been trained on the policies of the Licensee. Nor were records kept of training sessions, including the one session attended by the clerk who sold to the minor agent.

The Licensee submitted that the failure of staff to ask for ID was a failure of the Serving it Right certifications of its staff, and so was a governmental responsibility. The Guide, however, makes it clear that it is the ongoing responsibility of the Licensee to make sure that staff follow the liquor laws of the Province. A Serving it Right certificate is a required first step but possession of the certificate does not relieve the Licensee of ensuring that its staff are continuously trained and supervised regarding their obligation of compliance with the provincial liquor legislation.

The onus is on the Licensee to establish due diligence, and on the basis of the lack of staff training and supervision, I am not satisfied that the onus is satisfied. Therefore, a defence of due diligence is not available to the Licensee in this case.

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 would be treated as a first contravention under Schedule 4 set out in the *Regulation*. The range of penalties for a first contravention are fairly high, consisting of a \$7,500-\$10,000 monetary penalty and/or a suspension of the Licence of the Licensee for 10-15 days. The size of the penalties reflects the view of the General Manager that selling liquor to minors constitutes a serious public safety issue. The evidence is that liquor consumption is dangerous to minors personally because of their difficulty metabolizing alcohol. Behaviour of minors under the influence of alcohol also represents a danger to public order, and can tie up 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. The Licensee, however, requested consideration of a

suspension instead of a monetary penalty due to the impact of the latter on its business. The Branch did not object to imposing a suspension instead of a monetary penalty.

I conclude that in all of the circumstances, a penalty of a suspension of the licence of the Licensee for 10 days will be sufficient to ensure its future voluntary compliance with the *Liquor Control and Licensing Act* and the *Liquor Control and Licensing Regulation*.

ORDER

Pursuant to section 20(2) of the *Act*, for the finding of a contravention of section 33(1)(a) of the *Act*, I order a suspension of Licensee Retail Store Licence Number 195312 for a period of ten (10) days to commence at the close of business on Thursday, July 25, 2013, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the Branch or the Victoria jurisdictional police from the close of business on July 25, 2013, until the licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

A. Paul Devine
Enforcement Hearing Adjudicator

Date: June 19, 2013

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