



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: Delta Lion Pub and Bistro Ltd.
dba Big Pete's Liquor Store
8473-120th Street
Delta, BC V4C 2L7

Case: EH13-082

For the Licensee: Greg Mahony

For the Branch: Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: November 21, 2013

Date of Decision: December 19, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee operates a Licensee Retail Store (LRS) doing business as "Big Pete's Liquor Store" in Delta, B.C. under Licensee Retail Store Licence number 195270. The LRS operates from 9 a.m. to 11 p.m. seven days a week. The Licensee is represented by Mr. Greg Mahony, the owner of the LRS.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the "Guide").

The LRS operated by the Licensee is licensed to sell packaged liquor to the general public. Under the terms of the Guide, minors are only allowed in the premises when accompanied by an adult parent or guardian. Further, it is against the law to sell, serve or supply liquor to a minor.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch (the "Branch") began a "Minors as Agents Program" (the "MAP") in 2011. The *Liquor Control and Licensing Act* (the "Act") was amended to allow the Branch to employ minors for the purpose of testing compliance with the requirement of the legislation against selling liquor to minors. Licensees were notified about the program by the General Manager of the Branch in February 2011.

On April 13, 2013, a MAP inspection was conducted at the business premises of the Licensee. A 17 year old male identified as Agent #44 was engaged by the Branch for the purpose of testing compliance on the evening in question.

The Branch alleges that in the afternoon of April 13th at about 4:45 p.m., Agent #44 entered the LRS and purchased a six pack of canned beer. He was not asked for identification by the sales clerk employed by the Licensee. Subsequently, a Contravention Notice was issued by one of the two Liquor Inspectors who was working with the minor agent.

The Branch issued a Notice of Enforcement Action (NOEA) on May 10, 2013. In the NOEA, the Branch alleged that the Licensee was in breach of section 33(1)(a) of the Act, which prohibits selling, giving, or otherwise supplying liquor to a minor. The NOEA alleges that, since the person who purchased the liquor was a minor, was in possession of the liquor, and was supplied liquor by a sales clerk employed by the Licensee, the contravention under the legislation was made out. No efforts were made by the clerk to ask for identification. Further, the Licensee had been apprised of the MAP some time prior to the events in question.

A monetary penalty of \$7,500 was proposed. This is at the low end of the penalty range set out in Schedule 4, item 2 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The penalty range for a first contravention (no prior contravention within the previous year) is \$7,500-\$10,000 monetary penalty and/or a licence suspension of 10-15 days.

The monetary penalty was considered appropriate in this case to reinforce the seriousness of selling alcohol to minors. The proposed monetary penalty was considered to be necessary to enhance existing policies and procedures to ensure future compliance with this provision of the Act.

The Licensee does not dispute the fact that liquor was sold to a minor as alleged by the Branch in the NOEA. Instead, the Licensee submits that it exercised due diligence in the conduct of its business, as its nine years of previously unblemished record attests.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

33 (1) A person must not

(a) sell, give or otherwise supply liquor to a minor...

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

ISSUES

1. The Licensee conceded that the contravention occurred as alleged, but raises the issue of whether it acted with due diligence to prevent the occurrence of the contravention.
2. If due diligence is not established, the issue for consideration then is what penalty, if any, is appropriate in the circumstances?

EXHIBITS

- Exhibit 1:** Book of Documents of the Branch
- Exhibit 2:** Picture and ID of Agent #44 (sealed)
- Exhibit 3:** Staff Policies
- Exhibit 4:** Employee Sign-in Sheet
- Exhibit 5:** Picture of White Board in Staff Room

EVIDENCE – BRANCH

The evidence of the Branch was provided by a Liquor Inspector identified in this decision as Liquor Inspector 1. The NOEA that was prepared and sent to the Licensee on May 10, 2013 was identified by Liquor Inspector 1. He also testified about the implementation of the MAP program which began with changes to the Act in 2010. This allowed the Branch to employ minors to check up on the compliance of licensees on their obligation not to sell liquor to underage individuals. Licensees in the Province were advised of the program beginning in 2011.

Liquor Inspector 1 testified that on April 13, 2013 he was involved in checking compliance of licensee retail establishments by the use of a minor who was identified as "Agent #44" (Minor Agent). Prior to beginning the compliance testing, he confirmed that Agent #44 was 17 years of age. At about 4:45 in the evening of April 13, 2013, a visit was made to the establishment of the Licensee. The Minor Agent went into the store closely followed by the Liquor Inspector. Liquor Inspector 1 testified that he observed the Minor Agent select six cans of beer from a cooler in the store. The Minor Agent was

then seen to purchase the product without being asked for identification by the clerk employed by the Licensee.

Liquor Inspector 1 testified that he left the store shortly after the Minor Agent. Once outside, he and the Minor Agent prepared documents to record details of the event. A Contravention Notice was prepared and given to the clerk in the LRS that had sold the beer to the Minor Agent.

The Liquor Inspector testified that when he prepared the NOEA, a monetary penalty of \$7,500 was proposed. There was no prior history of similar contraventions by the Licensee. The monetary penalty was necessary, however, in view of the serious consequences of selling liquor to minors both for public safety, and for the safety of the underage individuals who buy and consume liquor.

EVIDENCE – LICENSEE

The Owner of the licensed establishment and the Clerk who sold liquor to the Minor Agent both provided testimony.

Clerk

The Clerk testified that she had worked a shift at the pub which is also operated by the Licensee. She had agreed to work an evening shift on the night in question at the LRS. She arrived there shortly before the Minor Agent entered the store. The Clerk testified that she was somewhat flustered having just arrived at store, and did not exercise normal caution when selling to the Minor Agent. Immediately after he left the store, she commented to the other clerk that she should have asked him for ID.

The Clerk testified that she has worked for the Licensee since 2005. For the first few years, she worked at the LRS. She now works mainly at the pub. She testified that when she started her employment, she was made aware of the policies of the Licensee with respect to checking for identification, and for other matters pertaining to the sale of liquor. The Clerk testified that the Owner constantly reminds her and other staff to check for identification. There is a sign at the till in the store which reminds staff about the requirements for proper identification.

Owner

The Owner testified that new staff members are acquainted with the policies of the LRS when they begin their employment. These policies include the requirement to check for identification for anyone who appears to be under 30 years of age. While there is no ongoing training, the Owner testified that he constantly reminds staff of their obligation to check for identification. There is a sign-in sheet at the LRS which staff must initial on each shift that reminds them of checking for two pieces of identification. Further, the white board in the staff room has at the top in large letters "2 piece ID check please!!".

The Owner testified that there is one full-time staff person working at the LRS. Other staff work part-time, and are primarily students. He testified that there has been no other incident in the nine years of operation of this store. Further, he had been advised by a liquor inspector that there had been a MAP inspection of the store in April 2012, and the store was found to be in compliance. The Owner testified that he works six days a week, and constantly reminds his staff about checking for identification.

SUBMISSIONS – BRANCH

The Branch submitted that all of the licensees in the Province were notified about the initiation of the MAP before the program was initiated. Further, the Act had been amended with respect to the obligation concerning the sale of liquor to a minor. The former legislative requirement was to ask for ID from any customer that appeared to be under the age of 25. The current legislative requirement is to avoid the sale of liquor to a minor.

As noted in the BC Supreme Court decision *Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch*, 2006 BCSC 417 at paragraph 30, assessing age is a purely subjective exercise which is impossible to determine with a consistent degree of success. It is an insufficient exercise of due diligence to ask if a person appears to be under or over the age of 25. In the absence of anything approaching certainty as to a person's age, identification should be obtained in every single case.

The Branch submitted that the policy of the Licensee to check for ID for anyone that appeared to be under the age of 30 was flawed. In this case, the Minor Agent was 17 years of age but was not asked for identification. A reasonable person would ask for identification if there was any doubt about the age of a customer. This is the kind of staff training the Licensee should establish.

The policies and procedures that the Licensee uses are inadequate, the Branch submitted. They do not state the purpose or importance of checking for identification. They do not contain any instructions on how to assess the age of a customer. The Licensee does not have systems in place to test the understanding of its staff about their obligations in the sale of liquor on an ongoing basis. There are also no systems in place to monitor staff performance.

As outlined in the evidence of Liquor Inspector 1, the sale of liquor to a minor is a public safety issue. Minors are not able to metabolize alcohol in the same fashion as adults, and excessive imbibing of alcohol has resulted in injuries to the minors who engage in the activity as well as damage to the public.

SUBMISSIONS – LICENSEE

The Licensee submits that asking for identification is a matter of interpretation. The staff that are employed by the Licensee consistently follow its policies on checking customers for identification. Further, the Licensee takes its obligations seriously. The nine year history without an incident previously demonstrates that its policies are more than adequate. The record speaks for itself.

REASONS AND DECISION

Contravention

The Licensee does not dispute the occurrence of the contravention as alleged by the Branch. I therefore find that the contravention of selling liquor to a minor contrary to section 33(1)(a) of the Act has been established.

Due Diligence

The Licensee is entitled to a defence against the proposed penalty action 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 establish this defence. The Licensee must not only establish that it has procedures in place to identify and deal with problems, it must demonstrate that it took reasonable steps to ensure that those procedures were consistently acted upon, and that problems were consistently addressed.

The leading case on the defence of due diligence 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 respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The Clerk who sold liquor to the Minor Agent is a long-term employee. Her employment began in the LRS but is now mainly confined to the pub which is also operated by the Licensee. She does not have an ownership interest in the business, and does not perform any management functions. The Licensee submits that she is not the directing mind of the business. I agree, and so find. The issue that remains to decide is whether the Licensee acted with due diligence in accordance with the tests set out above.

The tests for establishing due diligence as set out in *Beverly Corners Liquor Store Ltd.*, *supra* require the Licensee to establish that it has implemented adequate training programs and other systems to prevent the occurrence of a contravention, and that it has effectively implemented these systems. The evidence about training programs and other systems includes the initial training that employees receive when they are hired concerning the policies of the Licensee, which policies include asking for ID. The other systems described in the evidence include the reminder to ask for ID which is contained in an employee sign-in sheet, and the white board in the staff room which reminds staff “2 piece ID check please!!”

There was no evidence of systems for the ongoing training of staff. For example, there was no evidence of formal meetings with staff to discuss liquor sales issues. Nor is there evidence of ongoing staff training programs. This is especially concerning where much of the staff of the LRS is comprised of part-time employees, mainly students.

There was no evidence of systems in place or procedures to ensure compliance by staff members who would be obliged to operate the LRS on their own. There were no systems or procedures to check up on or to monitor staff to ascertain their compliance with their obligations under the Act concerning the sale of liquor to minors or to intoxicated customers. The Clerk who failed to ask for ID from the Minor Agent is an experienced staff person, so the risk of less experienced employees committing the same mistake is self-evident.

I acknowledge that the Owner works long hours but he must be in two different places because he also operates a pub. Because of the failure to have effective systems and procedures in place for the ongoing training and compliance oversight of its staff, I am unable to find that the Licensee acted with due diligence to prevent the occurrence of the contravention for which a monetary penalty is proposed.

PENALTY

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums, and may impose higher penalties when it is in the public interest to do so.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; 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. Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

In this case, there is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. There was no history of warnings for similar conduct by the Branch or by the police. The sale of liquor to a minor, however, is considered to constitute a serious public safety issue. Therefore, I find that a monetary penalty is necessary to acknowledge the contravention, and to encourage the Licensee's future compliance with the Act and the Regulation.

I find that this is a first contravention for the purposes of Schedule 4 of the Regulation, and for the purpose of calculating a penalty. Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type consisting of a 10-15 day licence suspension and/or a \$7,500-10,000 monetary penalty. I conclude that the minimum monetary penalty for a first contravention in the amount of \$7,500 is appropriate to the circumstances of this case.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before January 20, 2014.

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
General Manager's Delegate

Date: December 19, 2013

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