



**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: Cinemod Enterprises Inc.
dba Liquids Liquor Store
106 – 2395 Gordon Drive
Kelowna, BC V1W 3X7

Case: EH13-091

For the Licensee: Domenic Panucci

For the Branch: Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: Written Submissions

Date of Decision: February 24, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee operates a Licensee Retail Store (LRS) under the name "Liquids Liquor Store" in Kelowna, B.C. under Licence number 195259 (the "Licence"). The LRS operates from 9:00 a.m. to 11:00 p.m. seven days a week. The Licensee is represented by Mr. Domenic Panucci, 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" (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 24, 2013, a MAP inspection was conducted at several licensed retail stores in the Kelowna area. A minor who was 18 years of age at the time, and was identified in these proceedings as Minor Agent # 29, was used by the Branch for the purpose of testing compliance on the evening in question.

The Branch alleges that, on the night in question at about 6:50 p.m., Minor Agent # 29 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 were working with Minor Agent #29.

The Branch issued a Notice of Enforcement Action (NOEA) on June 4, 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.

A monetary penalty of \$10,000 was proposed in the NOEA. This proposed penalty is within 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 a \$7,500–\$10,000 monetary penalty and/or a licence suspension of 10-15 days.

According to the NOEA, the monetary penalty was considered appropriate in this case to reinforce the seriousness of selling alcohol to minors. There was a proven contravention of the same kind in the compliance history of the Licensee, although it took place more than 12 months prior to the present occurrence. 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 the proposed penalty is too severe given the circumstances of the situation, and should be replaced with an enforcement meeting and warning.

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. In view of the Licensee's concession that the contravention occurred as alleged, the first issue for consideration is whether the Licensee acted with due diligence to prevent the contravention.
2. If due diligence is not established, what penalty, if any, is appropriate in the circumstances?

EXHIBITS

Exhibit 1: Book of Documents of the Branch.

Exhibit 2: Un-redacted picture of Minor Agent #29. This picture was provided to me at my request, and delivered sealed to protect the identity of the Minor Agent.

EVIDENCE – BRANCH

The evidence and submissions of the Branch are contained in the NOEA, and in supporting documents related to the contravention. The field notes of the Liquor Inspector describe an alleged contravention on April 24, 2013 when Minor Agent #29 was sold a six pack of beer without being asked for identification. An Observation Form completed by the Minor Agent, and an accompanying written statement, indicate that alcohol was sold without a request for identification. A Contravention Notice was issued to the Licensee by one of the liquor inspectors involved in the MAP inspection on the evening of April 24, 2013.

Documents provided by the Branch indicate that the Licence to the LRS was transferred to the present Licensee in September 2010. There is also documentary evidence of a prior occurrence of sale to a minor on February 3, 2012 (the "Prior Contravention"). A penalty of \$7,500 was assessed for the prior Contravention after the Licensee signed a waiver on May 1, 2012.

EVIDENCE – LICENSEE

The Licensee provided a video from the CCTV camera which is located inside the LRS. The video depicted the sale which was made to Minor Agent #29.

As well, the Licensee provided a letter from the clerk that sold the liquor to the Minor Agent (the “Clerk”). The Clerk advised that he has worked in the industry for over 11 years, and was working alone when an individual, who was later identified as a Liquor Inspector, entered the store. The Liquor Inspector asked about Malbec wine, and the Clerk took him to the back of the store to show him the stock. Meanwhile, the Minor Agent entered the store, so the Clerk returned to the sales counter.

According to the Clerk’s letter, the Liquor Inspector then came to the counter with a bottle of Malbec wine, and they engaged in a further conversation about these wines. The Liquor Inspector remained at the counter while a sale was processed to Minor Agent #29. The Clerk stated that the Minor Agent appeared to be over 25 due to his height, broad shoulders, and because he had a baseball cap pulled low over his forehead. The Clerk stated he felt pressured during the sale because both men stood side by side during the sale to the Minor Agent. After the sale was completed, the Liquor Inspector said he had left his wallet in the car, and left the store.

SUBMISSIONS – BRANCH

The submissions of the Branch are contained in the NOEA. 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 Branch submits that the contravention under the legislation is established. 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.

SUBMISSIONS—LICENSEE

The Licensee submits that the proposed penalty of \$10,000 is too severe in the circumstances of this case. The store has a long-established policy of requiring ID from customers who appear to be under 25 years of age. There is signage in the store on the policy, and staff are regularly reminded of the policy during staff meetings, memos, and communications.

The Licensee submits that the Clerk who sold to the Minor Agent is very experienced, having worked at liquor stores including both private sector, and for the Liquor Distribution Branch. He is mature at 61 years of age, and has been an excellent employee.

The Licensee submits that the video surveillance camera shows that the position of the Liquor Inspector pressured the Clerk into making a quick sale. In the circumstances, the penalty should be reduced to a warning.

REASONS AND DECISION

Contravention

Section 33(1)(a) of the *Act* provides that a Licensee must not sell 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 Licensee admits that the contravention occurred as alleged. I, therefore, find that on April 24, 2013 the Licensee contravened section 33(1)(a) of the *Act* when it sold liquor to Minor Agent #29, a person who was under the age of 19 years at the time.

Due Diligence

The licensee is entitled to a defence 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:

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 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.

In this case, the Licensee did not argue that it acted with due diligence. While there was a submission about the Licensee's policy to ask for ID from any customer who appears to be under 25 years of age, no evidence of this policy was provided. Instead, the Licensee submits that the proposed penalty should be waived in the circumstances of this case. The onus is on the Licensee to provide evidence of due diligence. Since no such evidence was provided, I find that the defence of due diligence is not made out.

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: the circumstances of the contravention, whether the Licensee has 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.

There no record of a proven contravention of the same type for this Licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and for the calculation of a penalty. Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10-15 day licence suspension and/or a \$7,500 - \$10,000 monetary penalty.

The severity of the penalties that exist for the sale of liquor to minors speaks to the seriousness with which this contravention is viewed. The Branch recognizes that minors have difficulty metabolizing liquor, and excess consumption may be dangerous to them and to the public as a whole. While there is no evidence of a contravention by the Licensee within the 12 months prior to the current contravention, there was a similar occurrence in February 2012. This is taken into account when considering the range of the penalties applicable to a first contravention within the past 12 months. A prior history of a similar contravention would normally justify a penalty higher than the minimum in order to encourage future compliance.

The Licensee submitted the age of the Minor Agent was made more difficult to ascertain because he was wearing a baseball cap low over his forehead. I have reviewed the CCTV video tape provided by the Licensee, and also reviewed an un-redacted picture of Minor Agent #29. I agree that wearing a baseball cap pulled low over his forehead could create difficulty in visually assessing the age of Minor Agent #29. This type of situation, however, is a normal function of determining a customer's age because minors may try to mask their appearance by wearing hats, hoodies, scarves or other camouflaging garments. A licensee must still take the steps necessary to ascertain the age of its customers. If there is any doubt, ask for ID.

On the other hand, it is the stated policy of the Branch that it does not attempt to fool licensees in its implementation of the MAP. I conclude that the steps taken in this case fall short of that policy. To be clear, I do not find evidence that there was a deliberate attempt to mislead the Licensee about the age of the Minor Agent. I do find that the manner in which the Minor Agent was dressed potentially made it more difficult for the clerk who served him to assess his age. To this extent, the dress of the Minor Agent was inconsistent with the policy of the Branch.

If there was no history of a prior contravention, it might be an appropriate case for imposing no penalty. In view of the prior contravention, I find instead that it is appropriate to reduce the penalty to the minimum in the prescribed range.

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 March 25, 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: February 24, 2014

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

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