



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: Manchester Public House Inc.
dba Manchester Pub & Eatery
1941 West Broadway Street
Vancouver, BC V6J 1Z3

Case: EH14-157

For the Licensee: Dave Kershaw and Steve Jennings

For the Branch: Cristal Scheer

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: April 28, 2015

Place of Hearing: Vancouver, BC

Date of Decision: June 9, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Manchester Public House Inc. operates the Manchester Pub & Eatery located in Vancouver BC. Dave Kershaw and Steve Jennings are the principals of the corporate licensee and appeared as the licensee's representatives. The licensee holds Liquor Primary Licence Number 304880 for the operation of the Manchester Pub & Eatery, with liquor sales from 9:00 a.m. to 1:00 a.m. Sunday through Thursday and 9:00 a.m. to 2:00 a.m. Friday and Saturday.

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").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated December 16, 2014. The branch alleges that on November 22, 2014, 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 \$7,500 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 licence suspension for 10 to 15 days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee does not dispute that liquor was sold to a minor but argues that it was duly diligent.

For the purposes of this hearing, and in accordance with section 3 of the *Regulation*, the General Manager has delegated to me, the undersigned Hearing Delegate, the powers, duties and functions provided to the General Manager by section 20 of the *Act* and sections 65-69 of the *Regulation*.

Minors as Agents Program (MAP)

The branch had undertaken a “Minors as Agents Program” (MAP) to monitor compliance of the *Act* prohibiting the sale of liquor to minors by licensed establishments. The project involved the hiring and training of minors by the branch to test whether individual licensed establishments are willing to sell liquor to a minor. Care was taken by the branch to ensure that the underage minors appeared to be their actual age and no attempt was made to deceive or mislead in order to make a purchase of liquor. The minors were provided with training by the branch in making observations and note taking.

To ensure that all licensees were aware of the program and of their responsibilities under the *Act*, the branch issued written notification to all licensees that minors under the supervision of a liquor inspector would be visiting licensed establishments and attempting to purchase liquor.

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 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, tabs 1-13.

Exhibit 2: Copy of the minor agent's photograph and identification.

Note: these items were ordered to be placed in a sealed envelope, to be opened only upon an order of the Supreme Court of British Columbia or the undersigned Hearing Delegate (see below).

Exhibit 3: Copy of the branch publication, "Liquor Primary Terms and Conditions, A Guide for Liquor Licensees in British Columbia, April 2014" (the Guide).

Exhibit 4: Licensee's book of documents tabs A – C.

Order to delete any reference to minor agent's name or other identifying factors

With the agreement of the parties a copy of the minor agent's photo and identification were placed in an envelope and marked as Exhibit 2, with a notation that it is not to be opened unless required by law. Exhibit 2 has been sealed to protect the identity of the minor agent. At the hearing, the branch provided the licensee with an opportunity to view the photo of the minor agent and identification with birth date. The minor agent did not appear as a witness for the branch.

EVIDENCE—BRANCH

The branch called two liquor inspectors as witnesses.

The Liquor Inspectors testified that, on November 22, 2014, they were working with a 17 year old minor agent of the branch visiting several licensed establishments in the city of Vancouver to test whether liquor would be sold/served to the minor agent. A photograph was taken of the minor and her identification prior to the inspection (Exhibit 2).

The minor entered the Manchester Pub at approximately 5:40 p.m., followed by the inspectors five to ten seconds later. The minor took a seat at a table near the front entrance. The inspectors sat at a nearby table within nine to ten feet of the minor agent.

The establishment was not busy with few other patrons inside. The minor was approached by a female server and, following a short conversation, the female departed, shortly returning with a bottle of Smirnoff Ice (an alcoholic beverage, i.e. liquor) and a glass which she placed on the table in front of the minor agent. The inspectors then signalled the minor to leave the premises which she did.

Liquor Inspector #1 then spoke with the server, asking her if she was familiar with the MAP program. The server replied that she was not. The inspector explained the program to her and advised her that she had served liquor to a 17 year old minor and that it was a contravention of the Act. The inspector asked for the server's Serving It Right certificate (SIR). The server was unable to provide it. It was later determined that the server held a valid SIR certificate. The inspector asked to speak with the owner or manager. Neither was on site. She spoke to the general manager on the phone, advising him what had taken place and that she would contact him the following week. The inspector completed a Contravention Notice (exhibit 1, tab 2) and provided a copy to the server. Liquor Inspector #2 paid for the alcoholic beverage sold to the minor, took a photo of it (exhibit 1, tab 6) and requested that it be disposed of. The inspectors left the establishment, proceeded to their vehicle and made notes of the incident (Exhibit 1, tab 4).

In her evidence, Liquor Inspector #1 referred to further documents contained within Exhibit 1:

- Tab 3, the liquor licence for the Manchester Pub. The inspector testified that it is a term and condition of this license that minors accompanied by a parent or guardian are permitted in the licensed areas until 10 p.m. when meal service is available.
- Tab 5, minor agent's Observations Form and Statement
- Tab 7, floor plan for the Manchester Pub
- Tab 8, inspection and interview document for the Manchester Pub
- Tab 12, branch publications and correspondence to licensees regarding the MAP program.

- Exhibit 2: Copy of the minor agent's photograph taken November 22, 2014 prior to the inspection and copies of her identification.
- Exhibit 3: Copy of the branch publication, "Liquor Primary Terms and Conditions, A Guide for Liquor Licensees in British Columbia, April 2014" (the Guide). The inspector referred to excerpts related to: The Role of a Licensee; the Serving It Right Responsible Beverage Service Program; Minors; Identification Requirements; and Verification of Identification.

The inspector prepared a NOEA (Exhibit 1, tab 1) with a recommendation for a \$7,500 monetary penalty. The branch considers the contravention of selling liquor to a minor to be a serious matter which can affect the safety of the minor and have a negative impact on the community. The minimum monetary penalty is considered necessary and sufficient for future compliance.

Cross-examination

The inspectors testified that was no previous history of non-compliance for the pub. There had been no previous contraventions under the MAP program. They agreed that it is common for liquor inspectors and police officers to make inspections of licensed establishments. The numbers of inspections were often dependent upon the location and history of operation. They were unaware of the number of inspections for the Manchester Pub.

EVIDENCE – LICENSEE

At the commencement of the hearing the licensee conceded that on November 22, 2014 liquor was sold to a minor. The licensee called three witnesses to testify at the hearing: the Bartender, the Server, and the General Manager.

Bartender

The Bartender testified that he has been employed at the Manchester Pub for seven months and was working at the time of the incident November 22nd. He has worked within the hospitality industry for four years and holds a SIR certificate. He previously

worked within management for a large national restaurant chain where he was trained how and when to request identification from a patron. He has a good understanding of the liquor laws particularly those relating to identification requirements.

He testified that he is familiar with the pub's training manual at exhibit 4, tab A. The general manager went over it with him the first day on the job. At page 14 of the manual it reads that two pieces of identification are required from all persons who appear under the age of thirty. The general manager reminds staff of this requirement on a daily basis. He is familiar with the two printed notices, "Staff may be fined \$575 for selling liquor to minor" which are located at the staff sign-in location and the main servers' station (exhibit 4, tabs B1 and B2). Management has made it clear and he is aware of the seriousness of serving liquor to a minor. He believes that management has done everything possible regarding identification. The clientele for the pub are primarily sports fans in their late 20's to mid 30's. There has never been a minor served liquor in the pub.

Cross-examination

He testified that he is not familiar with the Guide published by the branch nor the new BC Services identification card. He has not received any written tests from management. They do not employ secret shoppers at the pub. Neither he nor the server requested identification from the minor.

Server

The server testified that she has been employed at the Manchester Pub for ten months. She has worked within the hospitality industry for eight years and holds a SIR certificate. She has a good understanding of the liquor laws particularly those relating to identification requirements and minors.

She is familiar with the pub's training manual at exhibit 4, tab A, including page 14 where it reads that two pieces of identification are required from all persons who appear under the age of thirty. The general manager reminds staff of this requirement on a daily basis. She is familiar with the two printed notices, "Staff may be fined \$575

for selling liquor to minor” which are located at the staff sign-in location and the main servers’ station (exhibit 4, tabs B1 and B2). Management has made it clear and she is aware of the seriousness of serving liquor to a minor. Having worked at the pub and other licensed establishments she is experienced in requiring identification from patrons.

She testified that she served the minor agent on November 22nd. She was setting up for a busy night. The minor was her first customer, she sat at a table and presented herself in a mature way, she didn’t look young or act young. She, the server made a mistake and did not request any identification from the minor. She had never served a minor prior to this.

Following the incident the issue was discussed with all staff. She expected to be fired but instead received a written warning and was suspended for a week. She became the role model and the champion for the requirement of all servers to request identification.

Cross-examination

She agreed that the only way to know a person’s age is to check their identification. Pre-shift meetings are normally held with a manager at the beginning of a shift. She could not recall whether a pre-shift meeting was held prior to her starting on November 22nd. She testified that she had previously seen the branch publication, the Guide. It may have been at a previous employer. The only written material she recalls seeing at the pub was the training manual. She is not aware of the new BC Services identification card. She has not received any written tests while employed at the pub.

General Manager

He testified that he has been the general manager of the pub for the past two years and was a manager within the principals’ group of companies for two years prior. He has a total of 15 years within the hospitality industry, holds a SIR certificate for which he was re-tested six years ago at the requirement of a previous employer. He knows and understands the liquor laws. As the general manager he is responsible for hiring, training and scheduling of staff and the daily operation of the pub.

He is familiar with exhibit 4 tab A. It is the staff orientation and training manual. He goes thru it with staff on their first day and has them sign-off on it. Both the bartender and the server read and signed-off the document. The policy of the pub is to request identification of all patrons less than 30 years of age. It is his responsibility to ensure that all staff follows the pub's policies. Staff are reminded on a daily basis during pre-shift meetings. He ensures that all staff have SIR certificates. The notices in exhibit 4 tab B have been posted in the two locations for approximately 18 months. The owners of the pub have made it clear the seriousness of serving minors and the requirements of checking identification. He developed and implemented a "Liquor Contravention Prevention Strategy" (exhibit 4 tab C). There have been no other incidents of serving minors or other contraventions at the pub. Clientele are mostly males in their late 20's and early 30's. Police officers do a walk-thru once or twice a month. The liquor inspector has made only three inspections. The operation is known to be well controlled with well trained staff.

He was not present at the time on November 22nd. The incident occurred despite staff being well trained. It was a moment of weakness by a staff member. He had done his due diligence in training staff. Upon learning of the incident he notified the owners then went to the pub and talked to the staff. The server had worked at the pub for seven months and had always been good at checking identification. It was considered a lapse of judgement on her part. She was not fired but was given a written warning and suspended for a week. She is now the advocate and champion for checking identification and minors.

Cross-examination

Asked about the Guide, the General Manager testified that he is familiar with it. He has read it and shared it with staff. He is familiar with the sections on identification. A copy is kept in his office. He is aware of the new BC Services identification card.

Asked about the training process he testified that during a new employee's first shift he goes through their orientation and training manual with them and lays out the expectations for them. The employee is shadowed for the remainder of the shift. On the second shift he reiterates the requirements with the employee and the employee is then

further shadowed for the remainder of the shift. No written tests are administered. Staff are told to request two pieces of identification from all persons appearing to be under 30, no exceptions. This is constantly reinforced. Staff are told that youths under 19 can accompany a parent into the pub. This practice is allowed by their licence but if the pub is too busy they discontinue this practice as it may be too difficult to properly monitor the minor.

He attended a training session at the branch with the local liquor inspector approximately a year ago. He watched a video and discussed the terms and conditions of the liquor licence and the MAP program. The session was educational and proactive, it was not punitive.

SUBMISSIONS – BRANCH

The branch submitted that the licensee has admitted that liquor was sold to a minor acting for the branch under the MAP program on November 22, 2014. The minor was served liquor without being requested to produce identification. If the licensee is to prove due diligence it must show that it took reasonable steps to prevent the contravention by establishing procedures and constantly acting on those procedures. The onus is on the licensee to establish reasonable care.

Here the licensee has not been duly diligent. There is a lack of specificity regarding the training and other systems to prevent the sale of liquor to minors. The licensee has failed to take reasonable steps.

SUBMISSIONS – LICENSEE

The Serving It Right, Responsible Beverage Service program is the government standard for providing information to staff regarding the liquor laws. Manchester Pub has clear policies regarding identification and minors. Staff are familiar with the training manual and the requirement of checking the identification of persons under 30. The general manager administers training and coaches staff almost daily. Manchester Pub takes its responsibilities seriously. There is a permanent notice to staff of the fine for serving a minor. The pub has a clean enforcement record and the branch recognizes that

it is operating properly. The educational meeting with the liquor inspector was voluntary and not part of an enforcement process. There is a good relationship with liquor inspectors. The licensee is a member of Barwatch.

The licensee has provided due diligence to warrant no enforcement action but rather an enforcement meeting with staff to reinforce the training. There should not be a \$7500 monetary penalty.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and the Licensee Representatives.

Contravention

I find on a balance of probabilities that the evidence supports that a 17 year old minor entered and purchased liquor at the Manchester Pub on November 22, 2014. The minor was not requested to produce any identification nor did she 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 Law

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 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 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 training 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 reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Findings of fact and applying the law to the facts

I find that the server who made the sale of liquor to the minor was not the directing mind of the licensee. There was no directing mind of the licensee on the premises, nor did there need to be. The defence of due diligence is not to be denied on that basis. The inquiry must continue to determine

- a. whether the licensee had adequate training and other systems in place to prevent the sale of liquor to minors, and
- b. whether the licensee took reasonable steps to ensure the effective application of that training and those systems.

Does the licensee's evidence, once weighed and considered, meet the test of what a reasonable person would expect of procedures to prevent the sale of liquor to minors and ensuring that those procedures are consistently acted upon and problems are dealt with?

In determining what a reasonable person would expect, it is valuable to be reminded that selling liquor to minors is a significant public safety issue and it needs to be prevented because of:

- the effects of alcohol on growing bodies and developing minds
- the effects on individuals and society of irresponsible drinking behaviour learned at an early age
- a minor's lack of capacity to metabolize alcohol in the same manner as an adult, so that liquor has a more intoxicating effect on minors, and
- liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft

At the time in question in this case a server and a bartender were working in the Manchester Pub. The server approached the 17 year old minor agent seated at a table, took her order and served her, all within the space of a very few minutes. There was no request by the server or the bartender to see her identification nor did the minor produce any identification.

The licensee's written policies and procedures relating to compliance with the legal requirements surrounding the operation of a licensed establishment with the sale and service of liquor are few and brief. They consist of one sentence within the orientation and training manual; "Two pieces of ID are required for all guests who appear under the age of thirty who intend on consuming alcohol." There are two notices posted inside the pub advising staff that they may be fined for selling liquor to a minor.

The evidence of the General Manager is that he trains new employees, including the subject server using the pub's orientation and training manual. He stresses the policy requirement of two pieces of identification from all persons appearing under the age of thirty. There is no training related to assessing a person's age. The general manager testified that he went over the branch publication the Guide with all new employees, including those sections relating to identification. I have great difficulty with this assertion. It is very self-serving and differs from the evidence of the bartender and the server. The bartender testified that he was not familiar with the Guide; the server believed that she had been shown it by a previous employer. Consequently I give that portion of his evidence no weight.

On the evidence provided, the pub's training process did not assist employees in determining the apparent age of patrons. Nor did it assist employees in determining whether the identification being shown was authentic. Unfortunately it is not uncommon for identification to be altered, fraudulent, or be that of another person. Employees should be assisted in establishing procedures to make a reasonable determination of the authenticity of the identification.

I have not had the opportunity to meet the minor agent as she did not appear as a witness. I have seen her photograph at Exhibit 2. I find that she is obviously youthful in appearance and it would be prudent to require and carefully examine her identification prior to selling or serving her liquor.

The pub has not established a formal method of testing its employees on the requirements of the job. All must have a valid SIR certificate and once the employee has gone over the orientation and training manual and completed two shadow shifts the training is completed. There is no formal testing or ongoing review of the employee's knowledge or performance. There is no evidence of an ongoing system of supervision to ensure that employees are meeting the requirements related to the sale and service of liquor.

Verbal reminders on their own, even on a daily basis, can become stale if they are not followed up on a practical level. A sign posted for a period of time may soon be overlooked. That an employee holds a SIR certificate is not sufficient to warrant that the employee retains the required information and puts it into practice.

While this contravention deals only with the sale of liquor to a minor, I find it curious that, in examining the orientation and training manual the only instructions related to compliance with liquor laws related to the service of liquor, and identification requirements, are that every customer appearing under thirty and wishing to order liquor must show two pieces of identification. The manual is silent on other important issues, such as the requirements regarding intoxication, overcrowding, hours of sale, authorized identification and other regulatory matters.

Giving consideration to all of the evidence I find, on a balance of probabilities,

- a. the licensee has not implemented adequate training and other systems to prevent the sale of liquor to minors, and
- b. has not taken reasonable steps to ensure the effective application of that training and those systems.

I find that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on November 22, 2014, the licensee contravened section 33(1)(a) of 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 *Regulation* 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 compliance. Among the factors that I considered in determining the appropriate penalty in this case are: 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.

Due to a concern that minors are being permitted to purchase liquor in licensed establishments, the branch has developed a program aimed at determining whether this is occurring. The branch 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.

It is clear that allowing consumption of liquor by minors contrary to the *Act* is a serious contravention giving rise to significant public safety concerns. Early learned behaviour with respect to abuse of alcohol and less effective metabolism of alcohol by minors cause liquor to be a factor in many crimes committed by youth, including assault and driving offences.

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 compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulation* 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 \$7,500 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 to the General Manager of the Liquor Control and Licensing Branch on or before Thursday, July 9, 2015.

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
General Manager's Delegate

Date: June 9, 2015

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Cristal Scheer, Branch Advocate