



**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: 0833224 B.C. Ltd.
dba East Side Mario's Cranbrook
1201 Cranbrook Street N
Cranbrook, BC V1C 3S6

Case: EH15-031

For the Licensee: Michelle A. Rosser
Farris, Vaughan, Wills & Murphy LLP

For the Branch: Cristal Scheer

General Manager's Delegate: Edward Owsianski

Date of Hearing: Written Submissions

Date of Decision: August 21, 2015

INTRODUCTION

The Licensee, 0833224 B.C. Ltd. (the "Licensee") operates a food primary establishment known as East Side Mario's Cranbrook, located in Cranbrook BC. The Licensee holds Food Primary Licence Number 143072 (the "Licence").

The Food Primary Licence is issued for the sale and consumption of all types of liquor in establishments with a primary focus on the service of food. 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"). Food primary establishments are permitted to have minors in the licensed area, but are not permitted to sell, serve or allow the consumption of liquor to/by a minor.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated April 30, 2015. The branch alleges that on March 9, 2015, 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 and does not pursue a due diligence defence. The licensee submits that mitigating facts ought to be considered in the determination regarding what penalty, if any, is warranted in the circumstances of the case.

It was agreed by the branch and the licensee that the hearing would proceed by way of written submissions.

For the purposes of this hearing, and in accordance with section 6.1 of the *Act*, 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: The branch's submission contained in the NOEA.

Exhibit 2: The branch's book of documents, tabs 1-12.

Exhibit 3: The licensee's written submission.

EVIDENCE—BRANCH

The branch's evidence is summarized from the Narrative portion of the NOEA.

On March 9, 2015 two liquor inspectors accompanied by a 17 year old minor agent were carrying out MAP inspections in Cranbrook to test the compliance of several licensed establishments including East Side Mario's. The inspectors and the minor agent entered the establishment at 9:00 p.m. There were nine other patrons inside and a further male patron followed behind them. The inspectors and the minor agent were seated in a booth by a male employee. The male employee left, returning a few minute later and joked about the group ordering three rye and coke, a jug of beer and a bottle of wine. One of the inspectors responded in jest, "Sound [sic] good". The male employee pretended to leave as a female server arrived. Both inspectors ordered water, the minor agent ordered a bottle of domestic beer. The server quickly returned with the drinks, placing the bottle of beer in front of the minor agent and the water in front of each inspector. The inspectors documented the transaction and left the establishment with the minor agent. The licensee was later informed of the contravention and a Contravention Notice was issued.

EVIDENCE—LICENSEE

The establishment caters to families and a mature clientele. It is known as a family-friendly casual dining restaurant which typically serves families with younger children. The kids make noise and have fun while the parents have a drink and dinner. It does not target or generally attract high risk clientele such as the three men on March 9, 2015. It has operated for six years with no prior proven contraventions. The servers are aware of the requirements for checking the age of patrons prior to serving them liquor. The

licensee has taken all reasonable steps to put measures into place which would normally prevent the contravention from occurring.

The occurrence of March 9, 2015 was not a normal situation. The establishment was not busy but there were nine other patrons when the inspectors and the minor agent arrived, shortly followed by another patron. There were only two servers, one was the manager, the other an inexperienced female server who was being trained by the manager. The manager spoke briefly with the inspectors and minor agent joking with them about what they wished to order. He was told that they did not wish to order drinks right away. He withdrew to allow the female server to take their order and left the table as he was under the impression that they did not want to order alcoholic beverages. He was momentarily distracted by other matters and attended at the bar to pour a beer, which was the beer ordered by the minor agent. His failure to supervise the server while he poured the beer resulted in the contravention.

Within minutes the manager returned to the three men to check on their orders only to find that they had left the establishment. Had he returned a minute sooner or had they remained at the table longer he would have noticed the contravention and would have taken the beer from the minor agent.

SUBMISSIONS—BRANCH

In pursuing enforcement the branch considered that the sale of liquor to a minor is a significant public safety issue 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; therefore 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

In this case the minor agent was only 17 years old, appeared his age and made no attempt to deceive or mislead in order to make the purchase. The establishment was not busy at the time and neither of the two employees made any attempt to check the identification of the minor agent.

The \$7,500 minimum monetary for a first contravention is recommended to reinforce the seriousness of the contravention and ensure future voluntary compliance.

SUBMISSIONS—LICENSEE

The licensee submitted that liquor was served to the minor agent, not on account of a failed system, but because a long serving and well trained manager was momentarily distracted while pouring the beer for the minor agent. The manager had two to three minutes to pour the beer and return to supervise the server and check on the orders given to her. Within that short time the server had served the beer and the three men had left the establishment.

In the circumstances a monetary penalty is not warranted and would be excessive and unfair. A compliance meeting would effectively promote voluntary compliance with liquor licensing rules and would be more effective to assist the licensee in anticipating and creating solutions for potential problems particularly those which a licensee may face when training new servers.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch and the licensee.

Contravention

I find on a balance of probabilities that the evidence supports that a 17 year old minor was served a beer (liquor) at East Side Mario's in Cranbrook on March 9, 2015. The minor was not requested to produce any identification nor did he 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

The licensee has not argued a due diligence defence nor is there sufficient evidence to reasonably make a finding of due diligence. We do not know, for example, if the licensee has 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. Likewise we do not know what training the licensee provides for new employees and whether the licensee has any procedures in place to ensure that the employees have absorbed the training and are putting it into practice.

Giving consideration to all of the above I find, on a balance of probabilities, that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on March 9, 2015, 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. I do not agree with the licensee's submission that there are mitigating circumstances in this case sufficient to make a penalty unwarranted. The manager should have recognized that the minor agent was youthful in appearance. He should have questioned the server which patron had ordered the beer and whether she, the server, had requested identification from the patron and was satisfied that the patron was of legal age. That he did not was not only a missed training opportunity but gave rise to the contravention. The time to ensure that a patron is of legal age is prior to the service of the liquor. It is not something to be followed up later, albeit within a few minutes.

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 for a first contravention of this type. I do not agree with the licensee that a monetary penalty would be excessive and unfair. 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 Monday, September 28, 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: August 21, 2015

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Stephen Hitchcock, Regional Manager

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