



**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:	West Coast Waffles Inc. dba West Coast Waffles c/o Jason Fu 1235 Broad Street Victoria, BC V8W 2A4
Case No:	EH16-015
For the Licensee:	Jason Fu
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Paul Devine
Date of Hearing:	Written Submissions Only
Date of Decision:	October 20, 2016

INTRODUCTION

The Licensee operates a restaurant that is licensed to sell all types of liquor pursuant to Food Primary Licence No. 305053. The business is located in downtown Victoria, and operates under the business name "West Coast Waffles". The Licence is, as are all licenses of this type, subject to the terms and conditions found in the Guide "Food Primary Terms and Conditions: A Guide for Licensees in BC."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The outline of the alleged contravention and the penalty proposed by the Branch is set out in an amended Notice of Enforcement Action ("NOEA") dated May 6, 2016. In summary, the Branch notes that the Licensee has operated its business in downtown Victoria since August 2012. The business location services a weekend demographic as it is open until 6:00 p.m. on weekdays, and 2:30 a.m. on Friday and Saturday nights.

It is alleged that on February 19, 2016 at 7:41 p.m., a liquor inspector visited the premises of the Licensee accompanied by a minor who was engaged by the Branch as part of the Minors as Agents Program ("MAP"). This Program has been in effect since 2011, and came about after changes were made to the *Liquor Control and Licensing Act* ("Act") which allowed the Branch to engage minors for the purpose of testing compliance in respect of the sale of liquor to minors. The changes to the legislation, and the implementation of the MAP were broadly advertised to the community holding liquor licences.

The minor (identified as "Minor Agent #75) was 17 years of age at the time these events took place. The purpose of the visit to the premises of the Licensee was to test its compliance with the obligation not to sell liquor to minor persons. Upon entering the premises of the Licensee, the liquor inspector saw two female staff persons behind a self-service counter. The liquor inspector approached one of the staff members in the company of the Minor Agent and was told that there were two types of draft beer available to order. The liquor inspector and the Minor Agent each ordered a pint of beer. The liquor inspector paid for the beer, and was given a receipt. At no time was the Minor Agent asked for identification. On February 25, 2016 a Contravention Notice was sent to the office of the Licensee.

There is a record of a previous contravention of supplying liquor to a minor approximately 16 months before the current incident. As a result of the prior incident, the licence of the Licensee was suspended for 10 days. For the purpose of the Penalty Schedule under the Regulation, the present incident was treated as a first offence since there was no offence in the preceding year. A monetary penalty of \$7500 was proposed. This is the minimum monetary penalty for a first contravention under Schedule 4 of the Regulation.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the "Act")

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 (the "Regulation")

SCHEDULE 4 ENFORCEMENT ACTIONS MINORS

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
2	A breach of section 33 of the Act (Selling liquor to minors)	10-15	20-30	30-60	\$7,500-\$10,000

EXHIBIT ONE – Book of Documents of the Branch.

POSITION OF THE LICENSEE

The Licensee's submission is provided by Mr. Jason Fu, the owner. He submits that the Licensee does not dispute that a clerk in its employ sold liquor to the Minor Agent as alleged. Nor does the Licensee present a defense of due diligence. Instead, the Licensee submits that a penalty other than a monetary penalty is appropriate. The Licensee

submits that the clerk who sold liquor to the Minor Agent made an honest mistake, and has been terminated. Staff have been educated thoroughly to prevent future occurrences.

The Licensee also submits that a four day licence suspension is a more appropriate punishment for the contravention. First, the previous contravention in 2014 occurred when the restaurant was under different ownership. Second, liquor sales represent a small part of the income of the Licensee, representing 1.5 – 1.7% of total revenue. The monetary penalty is disproportionately large as a result. Finally, the business of the Licensee is struggling because of the present overall economy where it is doing business.

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?

ANALYSIS AND DECISION:

The contravention as alleged by the Branch is not disputed by the Licensee. I therefore find that the allegation that the Licensee sold liquor to a minor on February 19, 2016 contrary to section 33(1)(a) of the *Act* is made out.

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 in question 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 on establishing the defence of due diligence is the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie* (1979) 2 SCR 1299. This decision provides that the onus is on the Licensee to establish due diligence. Further, the contravention in question must not be caused by persons who are the directing mind and will of the Licensee. The Licensee does not raise due diligence, so there is no need to consider the defence further.

The Licensee submits that a suspension of its licence is a more appropriate penalty for the contravention in question. The Branch did not articulate its reasons for selecting a monetary penalty instead of a suspension. The Licensee provides reasons for preferring a suspension as a penalty, including the low volume of its liquor sales as part of gross revenues, and the fact that its business is affected by the local economy so that a monetary penalty is unduly onerous.

I am satisfied that a suspension should be substituted for a monetary penalty based on the reasons provided by the Licensee.

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 these incidents. The contravention is therefore treated as a first incident for purposes of determining penalty.

The contravention in question involving the sale of liquor to a minor is serious. The Branch recognizes that the sale of liquor to minor persons presents a known danger because young minds cannot process alcohol as well as adults. The Branch also recognizes there are public safety concerns as the abuse of alcohol by minors can lead to criminal, anti-social, and destructive behaviour. A penalty is therefore warranted in the circumstances.

The Licensee submits that a suspension is preferred over a monetary penalty, and I have accepted this submission. The Licensee also submits that a four day suspension of its licence would be appropriate. The minimum suspension for a first contravention under the Schedule under the *Regulation*, however, provides for a 10-15 day licence suspension. As earlier noted, where a penalty is found to be appropriate, I am bound by the minimum penalties as set out in the *Regulation*. I conclude that in all of the circumstances, a penalty of a 10-day suspension is appropriate in this case.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Licence for a period of ten (10) days. Pursuant to section 67(2)(a) of the Regulation, the suspension is to commence on the same day of the week that the contravention occurred. As February 19, 2016 fell on Friday, I Order and Direct that the suspension begin on Friday, November 18, 2016 and continue on each succeeding business day until the suspension is completed.

To ensure this Order is effective, I direct that the licence be held by the Branch or the local police from the first day of the suspension on Friday, November 18, 2016 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 police officer, and must remain in place during the period of suspension.

Original signed by

Paul Devine

Date: October 20, 2016

General Manager's Delegate

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

Liquor Control and Licensing Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate