



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: Brigantine Inn Ventures Ltd.
dba The Lion Rampant Private Liquor Store
c/o Andrew Abernathy
6777 Beaumont Avenue
Duncan, BC V9L 5X4

Case: EH16-022

For the Licensee: Andrew Abernathy
Bruce Findlay

For the Branch: Hugh Trenchard

General Manager's Delegate: Paul Devine

Date of Hearing: August 8, 2016

Date of Decision: September 28, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Brigantine Inn Ventures Ltd. (the "Licensee") operates a licensee retail store ("LRS") doing business as "The Lion Rampart Private Liquor Store" under Licence No. 195205 (the "Licence"). The Establishment is located at 6777 Beaumont Avenue, Duncan, British Columbia. The Licence specifies hours of liquor sales daily to be seven days a week from 9:00 a.m. to 11:00 p.m.

The Licence is, as are all such liquor licences issued in the Province, subject to the terms and conditions explained in the publication "Licensee Retail Store Licence Terms and Conditions – A Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch ("Branch") specified its allegations and proposed penalty against the Licensee in a Notice of Enforcement Action (NOEA) letter dated March 18, 2016. The Branch alleges that on March 16, 2016 a compliance inspection was conducted in the Duncan area to test the compliance of retail stores selling packaged liquor for offsite consumption.

The Liquor Inspectors involved in the compliance inspection utilized a person who was a minor in accordance with the "Minors as Agents" Program that the Branch implemented in 2011. Changes in the Liquor Control and Licensing Act (the "Act") allow the Branch to engage minor persons to test compliance with the obligation of licensees not to sell liquor to underage individuals. The Minor Agent who was used on the day in question was 17 years of age at the time.

It is alleged that at about 4:32 p.m. on March 16, 2016 the Inspectors engaged in an inspection of the LRS business of the Licensee. The Minor Agent was observed by one of the Liquor Inspectors to enter the premises of the Licensee and to attempt to purchase a 6 pack of beer (cans). A cashier rang in the purchase without asking for ID from the Minor Agent.

After the Minor Agent left the store, two Liquor Inspectors returned to advise the clerk that was involved in the transaction that she had sold liquor to a minor. She was asked to produce a Serving It Right (“SIR”) certificate. The clerk advised she did not have a SIR certificate but instead had taken a course in Quebec. While she completed a course in that province, she did not receive a certification to confirm this.

A Contravention Notice was issued. The Licensee was also informed that the Branch intended to pursue enforcement action consisting of a ten-day licence suspension. This was the minimum suspension penalty under Schedule 4, item 2 of the *Liquor Control and Licensing Regulation* (“*Regulation*”), and reflected the fact that this was a first offence for the Licensee.

POSITION OF THE LICENSEE

The Licensee does not dispute that a clerk in its employ sold liquor to the Minor Agent as alleged. Instead, it intends to pursue a defensive due diligence. For this reason, the evidence concerning the breach of the liquor legislation will be limited in scope.

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

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

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 book of documents.
- Exhibit 2: Branch Policy Directive No: 09-03 (Server Requirement for Servers Relocating to B.C.)

EVIDENCE

The Branch called one of the two liquor inspectors that was involved in the MAP incident on the day in question. The Inspector reviewed and confirmed the changes to the governing legislation which now permit the use of underage persons to test the compliance of licensees with respect to the obligation not to sell liquor to persons who are minors. As well, he reviewed correspondence from the General Manager of the Branch which was sent to licensees in the Province concerning the MAP program. The Inspector testified that the visit to the licensed retail store operated by the Licensee was part of a compliance check of such retail outlets in the Duncan area. The visit to the facility occurred at about 4:30 p.m. The Minor Agent entered into the store after one of

the liquor inspectors, and was observed to purchase a six pack of beer without being asked for identification.

After the Minor Agent left the store, two liquor inspectors entered into the store and spoke to the clerk about the sale of liquor to a minor. The clerk was not able to produce a Serving It Right certification upon request. She stated that she had completed a course in Québec but had not been provided with a written certification. Upon discussion with the Licensee, the Inspector was informed that the Licensee was unaware of the obligation to require the SIR certification from its retail store employees.

The Inspector decided to proceed with penalty enforcement because of the public safety concern about selling liquor to minors. The 10-day suspension was selected because of the low volume of liquor sales by the Licensee. It was thought that a fine would be excessively punitive in the circumstances.

The Branch introduced in evidence as Exhibit 2 the April 6, 2009 Policy Directive of the Branch No. 09-03. This sets out the acceptable certification of servers who relocate from other provinces in order to exempt them from the requirement to obtain a SIR certification. The Service in Action certification from Québec satisfies this requirement.

EVIDENCE OF THE LICENSEE

The Licensee does not dispute that liquor was sold to an underage person. The evidence of the Licensee was provided by one of the two principles of the Company. He testified that the Licensee felt that the sale to a Minor Agent program was akin to a sting operation, a form of entrapment. Further, the proposed suspension was excessively penal in view of the small size of the business of the LRS. The LRS is part of a facility that also includes a pub. Both were purchased by the current ownership in 2014. The staff were inherited from the previous owner. At this time, the Licensee hired a new manager with 12 years of experience in the industry, and who had previously been employed by a large liquor vendor. The Manager hires and trains employees for the LRS and the pub. New staff receive a three-day training program, two days of which are mainly observation. Point of Sale ("POS") forms part of the initial training.

Unfortunately, the Manager was on holidays and so was not available to testify during these proceedings.

The Licensee testified that it operates in a small suburban community outside of the town of Duncan. Staff were instructed to ask for identification from anyone who appears to be under the age of 25. Since the MAP incident, the policy has been changed now to ask for ID if the individual customer appears to be under the age of 30.

There is a CCTV system in the LRS. Staff who work there are mature. The clerk that was involved in the MAP incident is a local, someone who knows people in the community. She had received training as a police officer in Québec. She advised the Licensee when she was hired that she had received training in Québec for one day in order to allow her to sell beer and wine in grocery stores and gas stations there. She did not receive a certificate following this training. The Clerk, however, was unable to appear at the hearing to testify because she had another job in the community during the day.

The policies of the Licensee are imparted to staff verbally, not in writing. The Manager goes over these policies on a one-to-one basis with staff. There are signs in the LRS advising customers that identification will be requested from anyone appearing to be under the age of 25. There have been no signs put in place to advise customers of the new policy to check identification from anyone who appeared to be under the age of 30. The Licensee stated that it was unaware of the requirement that a staff have a SIR certificate or its equivalent in order to work in the LRS.

The Licensee acknowledged in cross-examination that it does not use incident logs for the staff of the LRS. Meetings with staff are conducted on a one on one basis. Staff are tested verbally but written tests are not used to verify comprehension. There was no training of staff in identifying the age of customers. The Licensee did not produce copies of its staff policies.

Due Diligence

The Licensee is entitled to a defence against the proposed penalty 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. At page 1331 in the reported decision, Dickson, J. sets out the test of due diligence as follows:

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 *Act*. The Court found that the defence of due diligence is to be considered in two stages. First, was 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.

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

implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors) and had 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.

Analysis

The evidence indicates that the Clerk who sold liquor to the Minor Agent did not have the necessary degree of express or implied authority to “design and supervise the implementation of corporate policy” which would constitute her being a directing mind of the Licensee, as described in the *Beverly Corners* decision. The Branch did not argue otherwise. Accordingly, I find that the Clerk who sold the liquor to the Minor Agent was not a directing mind of the Licensee. I find that the Management of the Licensee had no direct role in the sale of the alcohol to the Minor Agent when that incident took place.

Since there is no evidence that a directing mind committed the contravention in question, I must consider the second stage of the due diligence analysis. The defence of due diligence requires that a Licensee demonstrate that it took reasonable steps to try to ensure that a contravention does not occur. The exercise of due diligence does not guarantee that a contravention will never occur. The operation of due diligence will, however, minimize the likelihood of a contravention occurring.

The analysis of what is adequate or reasonable must take place in the context of public policy considerations and the potential consequences that drive the prohibition against the sale of liquor to minors.

These include:

1. the effects of alcohol on growing bodies and developing minds;
2. the effects on individuals and society of irresponsible drinking behaviour learned at an early age;

3. a minor's lack of capacity to metabolize alcohol in the same manner as an adult; and
4. liquor is a significant factor in many crimes committed by youth.

The Licensee did not provide significant evidence about the programs that it has in place to prevent the occurrence of the type of contravention that occurred in this case. Key witnesses who might have provided some of that evidence were not available. The programs for training and supervision of staff were not described in any detail. No written policies were produced. There was no evidence about what was discussed in initial staff training except that it entailed a period of observation. POS training was described but there was no evidence of training of staff to comply with the *Act* in matters such as the sale of liquor to minors. Nor was there evidence of regular meetings with all staff to discuss issues related to compliance with the requirements of the *Act*. Tools such as an incident log book are not used by the staff in the LRS. Staff are not required to complete written tests to demonstrate competence, and there was no evidence of discussions about or tests about age identification. After initial training, there was no evidence of follow-up supervision to ensure that staff were diligent in asking for identification from customers who appeared to be under the age of 25 (now 30) years of age.

It is noteworthy that the Licensee was unaware of the requirement that employees in the LRS are required to hold an SIR certification. The clerk was involved in the MAP incident did not provide a certification which would comply with the Policy Directive of the Branch in order to exempt her from the SIR certification requirement in the British Columbia.

There is scant evidence of systems being used by the Licensee to assist its staff to avoid contravening the *Act*. Accordingly, I am unable to find on the evidence that the Licensee has satisfied the requirements of the defence of due diligence.

PENALTY

I turn now to consider 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 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 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 Licensee submits that a waiver of penalty is appropriate because of the small size of its operations. A penalty of a suspension or a financial penalty would be unduly onerous in the circumstances. Advertising a penalty to the customers of the LRS in the small community in which it operates might also be detrimental to future business.

The fact of the penalty structure that is applicable to all licensees in the Province is known or ought to be known by businesses that are involved in the sale of liquor. There is no mechanism in the existing Schedule in the *Regulation* to reduce the size of the penalty based on factors such as the size of the business of the Licensee. In some circumstances, a waiver of penalty might be appropriate where the breach in question was caused by excusable inadvertence or where due diligence was almost but not quite established.

None of these grounds for waiver of penalty are evident in the facts before me. Neither the clerk who was involved in the MAP incident or the Manager who was responsible for training staff were called to provide evidence. I found there was no evidence of due diligence with the staff of the Licensee, and there is similarly no basis for considering waiver of penalty.

The Licensee regarded the use of a Minor Agent as akin to a “sting” operation. There is nothing in the evidence to suggest that the Clerk who sold liquor to the Minor Agent was somehow induced to do something different in the performance of her normal sales activities. Further, the MAP program has been in effect for several years now. The existence of the Program has been widely advertised by the Branch. The application of the Program should therefore be of no surprise to the Licensee. As well, the consequences of an adverse experience can be avoided by proper staff training.

The Licensee agreed that if a penalty was found to be appropriate, a suspension was preferred over a monetary penalty. The minimum suspension for a first contravention under the Schedule calls for a ten-day license suspension. 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 March 16, 2016 fell on Wednesday, I Order and Direct that the suspension begin on Wednesday, October 26, 2016 and continue on each succeeding business day until the suspension is completed.

To ensure this Order is effective, I direct that the Licence of the LRS be held by the Branch or the local police from the first day of the suspension on Wednesday, October 26, 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 LRS by a Branch inspector or police officer, and must remain in place during the period of suspension.

Original signed by

Paul Devine
General Manager's Delegate

Date: September 28, 2016

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