



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: 0859088 B.C. Ltd.
dba The Cabin Restaurant and General Store
c/o Deanna Kyncl & Sahel Sobhani
56345 Beaumont Road
Vanderhoof, BC VOJ 3A3

Case: EH16-049

For the Licensee: Deanna Kyncl
Sahel Sobhani

For the Branch: Hugh Trenchard

General Manager's Delegate: Paul Devine

Date of Decision: November 15, 2016

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION:

The Licensee operates a food primary facility near the community of Vanderhoof under License Number 306621. Under the terms of the Licence, the Licensee is authorized to sell all types of liquor with a primary focus on the service of food between the hours of 9 a.m. and midnight from Monday-Sunday inclusive.

The Food Primary Terms and Conditions Guide ("Guide") published by the Liquor Control and Licensing Branch ("Branch") is applicable to licences of this type. The Guide outlines the requirements of the Liquor Control and Licensing Act ("Act") and the Liquor Control and Licensing Regulations ("Regulations") that apply to the serving and consuming of liquor in food primary establishments.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY:

The allegations of the Branch are set out in the Notice of Enforcement Action ("NOEA") dated May 24, 2016. The Branch alleges that on April 23, 2016 at about 4:40 p.m. two minors aged 16 and 17 respectively were served alcohol without first being asked for identification. The minors were employed by the Branch under the "Minors as Agents Program" or "MAP". As a result of changes to the Act made in 2010, the Branch is able to engage the services of minors to test the compliance of licensees with the prohibitions against the service of alcohol to individuals under the age of 19.

Two liquor inspectors employed by the Branch were conducting a MAP inspection in the Vanderhoof area on the day in question. The Minor Agents reported that they had been seated in the restaurant operated by the Licensee and provided with menus. They were asked by a server if they wanted to start with drinks, and each ordered a beer. The server provided two open cans of beer, and the Minor Agents were not requested to produce identification.

One of the liquor inspectors marked the beer cans that were served to the Minor Agents for identification. A discussion ensued with the two owners of the facility who were in the restaurant at the time.

The Branch elected to proceed by way of enforcement action given the seriousness of the issue of selling liquor to minors. A monetary penalty of \$7500 was proposed. This is the minimum monetary penalty set out in the Regulations for first a contravention of section 33(1)(a) of the Act which prohibit the sale of liquor to minors.

EVIDENCE:

EXHIBIT 1: Book of Documents of the Branch

EXHIBIT 2: October 3, 2018 Note from Server involved in MAP incident

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 defense of due diligence. For this reason, the evidence concerning the contravention of the Act was 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 PENALTY SCHEDULE

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

ORAL EVIDENCE OF THE BRANCH:

The Branch called one of the two liquor inspectors that was involved in the MAP inspection of the Licensee's restaurant. The Inspector had also performed the final inspection when the Licensee obtained a liquor license for the restaurant in September 2015. At that time, the final inspection included providing information about the Act and Regulations. Included was a discussion with the owners about the MAP, about being mindful of service to patrons who might be intoxicated, about use of an incident log to record incidents pertaining to service of alcohol, and about serving minors.

On April 23, 2016, the inspectors were engaged in compliance checks in Vanderhoof with two minors that had been engaged by the Branch for this purpose. Prior to setting out on the inspections, the minors were photographed and their identification was confirmed. Both were under the age of 19. There was also a discussion about safety concerns that might arise during the course of the inspections. The inspections of the businesses in Vanderhoof were to be conducted on a random basis.

The inspector testified that he remained in the car while the other inspector accompanied the Minor Agents inside the restaurant operated by the Licensee. Afterwards, he was informed of the sale of liquor to the Minor Agents. He went inside, and discussed the incident with the two owners of the restaurant. He also prepared and issued a Contravention Notice advising the Licensee that it had been involved in a breach of the Act by supplying liquor to minors.

The inspector testified that he prepared and sent to the Licensee the NOEA dated May 24, 2016. There were no prior contraventions concerning the sale of liquor to minors, and so the incident was treated as a first contravention. Nevertheless, penalty action was recommended because of the public safety concerns raised by the sale of liquor to minors. A monetary penalty of \$7,500.00 was proposed as the minimum monetary penalty under Schedule 4 of the Regulations.

The inspector testified that he did not recommend a suspension of the licence for the restaurant in part because he was advised that the Licensee was applying for a rural agency liquor store licence. The monetary penalty therefore resolved the issue of the contravention sooner.

In response to a question from one of the owners, the inspector opined that the monetary penalty would improve compliance by the Licensee in future.

EVIDENCE OF THE LICENSEE:

The evidence of the Licensee was provided by Ms. Kyncl, one of the two Owners of the licensed facility. She confirmed that the fact of the sale to the two minors was not in dispute. She introduced without objection a note from the server who was involved in the MAP incident. The server advised that she had made a mistake in judgment when she sold liquor to the Minor Agents.

Ms. Kyncl testified that she had previously worked with family and youth dealing with mental health issues and addiction. As part of her employment, she taught life skills to her clients. Her co-owner was a social worker, and in this role was well acquainted with the problems that the abuse of alcohol could cause. Both owners were very well aware of the danger of selling alcohol to minors. Liquor is provided as a convenience to accompany the food service for patrons of the restaurant. No efforts are made to promote liquor sales, and these sales amounted to less than 20% of the overall revenues for the restaurant.

The restaurant is located on water front on a lake outside of Vanderhoof. Previously the owners had operated a pizza place in town. They bought the property on the lake in 2009. Rezoning had taken some time, and the restaurant was built from scratch. The Owners have been completely involved in the operation of the restaurant since it opened in September 2015. Each has taken only a few days off work since then. Ms. Kyncl lives on the site where the restaurant is located. She works as the primary server of customers in the restaurant. There is a very small serving staff of employees as well. The server that was involved in the MAP incident had begun her employment with the Licensee in February 2016. Since that time, there had been several discussions with her about checking for identification. Included in this was discussion about asking for identification from younger patrons that attend with older family members. As well, there were discussions about avoiding over service to patrons.

Given the background of the Owners, compliance with requirements of the Act was very important. The Owners wanted to set a good example. There were ongoing discussions about issues pertaining to the sale of liquor but the staff was too small to do it on a formal basis. As well as these discussions, when Ms. Kyncl was in the back room as patrons entered the restaurant, she would ask the server if their identification had been checked when she returned to the floor.

The demographic of patrons at the restaurant was generally family-oriented. As well, the restaurant is only open until 8 p.m. during the week and 9 p.m. on weekends. It is not a place where young people come to party.

Ms. Kyncl testified that she normally sees all of the patrons who come into the restaurant. At the time of the incident, however, she was in the back room on the telephone, and so did not have a chance to manage the room at the time. During her absence, the server made a bad judgment call by not asking for identification from the minors. The Owners chose not to fire the server who was involved in the MAP incident. They did not want to be punitive.

The Licensee has not applied for a rural agency licence yet. This is Phase 2 of the business plan. In response to a question about staff training, Ms. Kyncl testified that the server was told to ID anyone who appeared to be under the age of 30. There is a sign to this effect in plain view right by the till. It shows the birth dates that are acceptable for liquor service. The server was told that she asked her to ID any patron if she felt uncomfortable doing so herself. She was also told about avoiding over service. The restaurant was heading into the busy season. This included the opening of a patio. The owners did not want the restaurant to be a place for people to come and drink. The server was told to come and get one of the owners if she ever felt uncomfortable dealing with these issues. They stressed importance of her doing so. Even when a family vouches for the age of their children, the policy is still to ask for identification.

The Licensee does not have a written policy manual or sign off procedure. As servers are hired, there is a discussion about dress codes, serving minors, and over service avoidance. The server who was hired in February had first applied for employment in January. She had been a server in a restaurant in Vanderhoof. For the first two weeks of her employment, she was with Ms. Kyncl. The restaurant facility is a small room with a capacity for 56 customers. During the first few weeks, training was hands-on. The owners did not go through a manual on service issues but instead trusted their employees must know this information since they had a Serving It Right ("SIR") Certificate.

Instead of a written policy manual, Ms. Kyncl relies on her experience. She was a server while she was in school as her parents operated a restaurant. Discussions with servers normally involved asking whether they had asked customers for ID. The server who was involved in the MAP incident has the tools but she made a mistake in judgment. The owners do not want to serve minors, and will take whatever steps are needed to avoid this from happening again. In the future, staff meetings may be conducted but because of the size of the staff these would be done on a one-to-one basis. An Incident Log might help train staff about steps that had been taken but the owners were present to discuss these as well.

When the Licence for the restaurant was first issued, the owners glanced at the Guide but it was not reviewed in depth. The discussions with the liquor inspectors were casual and not in depth. The Licensee opined that the Branch should have assisted the owners to develop a written policy manual.

The Licensee produced a note from the server involved in the MAP incident. It was admitted in evidence without objection. The Server confirmed that she has been employed by the Licensee since February 2016. She is aware that serving minors is unlawful. She made a poor judgment concerning the minors who were engaged in the MAP inspection. Ms. Kyncl was in her office when they came into the Restaurant. The server seated them and they asked for beer. The server felt uncomfortable but before she could consult Ms. Kyncl, a liquor inspector had walked to the table where the minors were seated. The server and the owners had several discussions over checking for ID. The server was told to check with the owners if she felt uncomfortable or had questions.

SUBMISSIONS:

The Branch submitted there was no issue that a contravention had occurred as set out in the NOEA. Further, the evidence concerning the events leading to the contravention did not give rise to a defence of due diligence. The Branch made no submissions on the directing mind issue.

The Licensee submitted it had taken steps to avoid serving minors and over service. There were direct discussions with staff about scenarios such as asking for identity when a family attended for meals. There had been no attempts to test staff by having a younger person come into the restaurant. Incident log books were used for the back of house, not at the front end. Since Ms. Kyncl was always there, it was not seen to be necessary.

ANALYSIS AND DECISION:

The three issues in this case are whether a contravention occurred, whether the Licensee acted with due diligence, and what if any penalty should apply. The first issue is determined because the Licensee does not dispute the fact of the contravention. On the question of 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 in question from occurring. The onus is on the Licensee to establish that it had procedures in place to identify and deal with problems relevant to the contravention, it must demonstrate 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. In summary, the Court concluded that the defence of due diligence is to be considered in two stages. First, was the employee who made the sale a directing mind of the licensee. If so, the defence of due diligence is not available and the inquiry stops there. A "directing mind" is someone who can design and supervise the policies of the Licensee instead of just carrying out those policies. If the employee who made the sale to a minor 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 both 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 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.

The evidence establishes that the server who made the sale of beer to the two minors was an employee, not a “directing mind” of the Licensee. The two owners would qualify as directing minds of the Licensee but their employee would not. The issue then is whether there was adequate supervision and training of the server such that her actions were akin to a “frolic of her own”, acting contrary to the training that she had received (see discussion in *Beverly Corners*, supra, at paragraph 33.). In deciding this question, there is a lack of written evidence to document the nature of the training that was provided. The employee was not called as a witness. Her direct evidence about her ongoing training and experience would have been extremely helpful to supplant the lack of written evidence.

Certainly, there was an unusual amount of supervision provided by the constant presence of Ms. Kyncl at the restaurant. She has barely been absent since the business opened. Of course, if the sale to the minors had taken place while she was watching the proceedings, it would be difficult for the Licensee to claim due diligence.

Appropriate supervision, however, is only one element of due diligence, the other being adequate training and other systems to avoid the contravention. It is unrealistic to expect that a manager can continue to work without time off for holidays or rest. Even without taking time away from the restaurant, proper training is required to ensure that the employee will act appropriately in the absence of a supervisor. I accept that the owners were aware more than most about the effects of alcohol on young minds due to their past training and experience.

Further, the Licensee does not promote liquor sales as part of its business, so there is no pressure on staff to make such sales as part of food service. The Licensee also has policies in place about checking for ID from anyone who appears to be under 30, and checking ID from family members even if they vouch for the age of a young person in the group.

Lacking however is any tangible evidence of a coherent process of staff training. There are occasional informal discussions with staff about liquor service issues, but the frequency and content of them is not known. An Incident Log such as described in the Branch's Serving It Right material would be a useful tool for staff and could be used as a teaching aid. It could record when staff met to discuss issues pertaining to liquor sales, and what was discussed.

One of the Licensee's owners opined during the hearing that they would not have been penalized if they had a written policy manual. A policy manual is a useful tool because it clearly articulates the Licensee's policies but it is not a panacea. Staff must still meet from time to time to refresh themselves on the nature and application of the Licensee's policies pertaining to liquor sales. All of this would clarify and augment the informal staff meetings that take place now to discuss liquor service issues.

As was earlier observed, the onus of establishing due diligence rests with the licensee. On balance, I am not able to conclude on the evidence presented by the Licensee that it has established that it acted with due diligence in the supervision and training of its staff. There is no record or other clear evidence that the Licensee has implemented adequate training and other systems to prevent a contravention such as the sale of liquor to minors, or has taken reasonable steps to ensure the effective application and the operation of those systems. I find therefore that the Licensee did not act with due diligence in respect of the contravention in issue.

PENALTY:

I turn now to consider the issue of 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 NOEA. 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 the contravention in question. 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 it did provide training

and supervision of the server who was involved in the contravention. A financial penalty would be inappropriate in the circumstances. 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 which sets out the penalties for a contravention of the Act to reduce the minimum monetary penalty. 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. The clerk who was involved in the MAP incident was not called to provide evidence and the evidence of the nature and consistency of training is insufficient. There is therefore no basis for considering waiver of penalty.

The Licensee agreed that if a penalty was found to be appropriate, a monetary penalty was preferred. The minimum monetary penalty for a first contravention under the Schedule is \$7,500.00. I conclude that in all the circumstances, a monetary penalty of \$7,500.00 is appropriate in this case.

ORDER:

Pursuant to section 20(2) of the *Act*, I order that the Licensee pay a monetary penalty of seven thousand five hundred dollars (\$7,500.00) to the General Manager of the Liquor Control and Licensing Branch on or before December 16, 2016.

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. P. Devine, Delegate

General Manager's Delegate

Date: November 15, 2016

cc: Liquor Control and Licensing Branch, Surrey Office
Attention: Rupi Gill, Regional Manager

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