



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: Big White Mountain Mart Ltd.
dba Big White Market Deli
c/o Mark Mustacich
5375 Big White Rd
Big White , BC V1X 4K5

Case: EH16-041

For the Licensee: Mark Mustacich

For the Branch: Hugh Trenchard

General Manager's Delegate: Daniel M. Graham

Date of Hearing: December 7, 2016

Date of Decision: January 24, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Big White Mountain Mart Ltd. (the "Licensee") operates a licenced deli doing business as Big White Market Deli (the "Establishment") under Food Primary Licence #302299 (the "Licence"). The Establishment is located at 5375 Big White Road, Big White, B.C.

The Licence specifies hours of liquor sales from 9:00 a.m. to midnight seven days a week. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication A Guide for Liquor Licensees in British Columbia (the "Guide").

Mr. Mark Mustacich, a principal of the corporate Licensee, represented the Licensee for the purposes of this hearing. Throughout these reasons for decision, Mr. Mustacich and the corporate Licensee - individually or collectively - may be referred to as "the Licensee" as the context requires.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated May 13, 2016 (the "NOEA"). The Branch alleges that on Saturday April 9, 2016 the Licensee contravened section 42(2) of the Liquor Control and Licensing Regulation (the "Regulation") by permitting liquor not purchased from or served by the Licensee to be consumed in the Establishment.

The proposed penalty is a \$5,000 monetary penalty, which falls within the penalty range set out in item 28, schedule 4 of the Regulation. The range of penalties for a first contravention of this type is a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

The Licensee admits that the contravention occurred as outlined in the NOEA. However, the Licensee disputes the finding of a contravention on the basis that the evidence establishes a defence of due diligence.

For the purposes of this hearing, and in accordance with section 6.1 of the *Liquor Control and Licensing Act* (the "Act"), the general manager has delegated to me the powers, duties and functions provided to the general manager by section 20 of the Act and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

42 (2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Schedule 4

Enforcement Actions

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
28	A breach of section 42(2) of this regulation by permitting liquor not purchased from the licensee to be consumed in the licensed establishment.	4-7	10-14	18-20	\$5,000-\$7,000

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, Tabs 1 to 10 inclusive.

WITNESSES

A liquor inspector (the "Inspector") provided evidence on behalf of the Branch.

Mr. Mustacich provided evidence on behalf of the Licensee.

EVIDENCE - BRANCH

The Licensee accepts the facts of the contravention as set out in the NOEA (Exhibit 1, tab 1).

On April 9, 2016 at approximately 7:15 p.m. the Inspector conducted a compliance inspection of the Establishment. At a table in the middle of the seating area the Inspector noticed a group of six people. On the table was a 24-pack of Molson Canadian Beer, with a bright orange sticker attached reading "do not freeze." The box had been opened and two male patrons had open cans of Molson Canadian Beer directly in front of them. A server who attended the table made no attempt to have the patrons remove the beer.

The Inspector took photos (Exhibit 1, tab 7) and completed some notes (Exhibit 1, tab 6), and then at about 7:25 p.m. he asked the cashier if there was a manager on duty. After having the circumstances explained to him by the Inspector, the manager asked the patrons to remove the beer from the Establishment. The manager stated to the Inspector that this is a common problem that happens about every five days, since there is a Rural Agency Store (the "RAS") selling liquor in the grocery store next door. Before he left the Establishment, the Inspector offered to meet with the manager and the Licensee to go over new legislation.

Cross Examination of the Inspector

In response to questions from the Licensee, the Inspector responded that:

- He was not aware that the Establishment does not offer table service, but he did observe the server bringing food to the table where the open case of beer was located.
- He was not aware of any previous contraventions by the Licensee.
- The manager had apparently been working in the kitchen at the time of the alleged contravention.

EVIDENCE – LICENSEE

The Licensee stated that he did not dispute the allegation of contravention and that he was not disagreeing with the Inspector's account of what he had seen in the Establishment. He said that the staff are not servers – they are mainly busy taking take-out orders and bussing the tables. Patrons normally order food and drinks at the counter and subsequently pick up the items themselves at the counter. If the staff were serving, it must have been because orders were backed up and getting in the way.

The Licensee explained that the Establishment is open during the ski season on Big White Mountain each year. Accordingly about 30 of the 35 staff are newly hired each year for the duration of the 5-month ski season. The manager of the Establishment has more than 15 years' experience in the hospitality industry.

With respect to training of staff, the Licensee stated that he uses a 26-page workbook provided by a tobacco inspector. The workbook deals extensively with the principles of checking the identification of patrons, and the Licensee uses the same workbook in training staff with respect to selling liquor since many of the principles are similar. Employees take a test at the end of their training and each individual signs a statement acknowledging that they have taken and understood the training.

The Licensee explained that there is little police presence on the hill, and that there is a relaxed culture with respect to the consumption of alcohol. He stated that "People see

Big White as a resort with no laws. It is like the wild, wild west.” The Licensee said that it is commonplace to see people walking outside in the streets pouring and drinking beer. The Licensee operates the grocery store (with the included RAS) adjacent to the Establishment, and said that it is common for even older patrons to walk into the store off the streets with a glass of wine in hand to peruse the grocery aisles. The expectation of many patrons is that it is acceptable to do so. He said that his grocery store employees are trained to direct such patrons back outside with their drinks, but that police have told them they have no authority to take the alcohol away from patrons or to prevent people from drinking outside. He stated that the Establishment’s due diligence is better than most other licensees’ on the hill, and that while the relaxed atmosphere on the hill raises expectations in patrons that make it more difficult to strictly enforce the rules, his staff are very good at doing so. The Licensee stated that the alleged contravention occurred on the second-last day of the season, so the server “probably just didn’t care.”

Cross Examination of the Licensee

In response to questions from the Branch, the Licensee responded that:

- It is an ongoing issue at the Establishment (probably about every 5 days) that patrons will bring food in from the grocery store and expect to eat it in the Establishment. It is a much less common issue with alcohol. It is the Licensee’s policy that no outside food or beverage is to be consumed in the Establishment and he has a sign posted in the Establishment to that effect. His staff are trained to ask patrons to leave in those circumstances.
- Employees are required to have Serving-it-Right certification at the time of hiring.
- The Licensee provides two hours of orientation training to staff. The focus is alcohol and tobacco.
- New employees are initially supervised one-on-one for 8 hours.
- The manager has 15 years’ experience and has been with the Licensee for 5 years. The manager usually participates in the orientation with staff, but does not get ongoing training himself.

- No alcohol leaves the RAS without being paid for. An orange sticker is put on alcohol containers to indicate that it has been purchased.
- A section in the employee manual states that no open consumables of any kind are allowed to be brought into the Establishment. This message is reinforced to staff almost daily by the manager and the Licensee.
- The written training materials don't include anything specific about outside alcohol being brought into the premises. The Licensee maintained that having such policies written in a manual is not efficient, particularly with seasonal employees that don't care about getting a good recommendation from their employer. It is more effective to drive the message home verbally with staff on a daily basis to "put the fear of God in them."
- There is no signage in the Establishment to indicate that consumption of alcohol from the RAS is prohibited in the Establishment. The Licensee expressed a willingness to put up such signage and would like to work with the Inspector to develop appropriate wording. The manager had not informed the Licensee of the Inspector's previous offer of a meeting to review new legislation.
- The Licensee does not maintain an incident log book. There are regular staff meetings at which incidents are discussed. There was no staff meeting after the alleged contravention as there was only one day left in the season.

In response to questions from me, the Licensee stated that:

- He was downstairs in his office at the time of the alleged contravention, and did not find out about it until after the Inspector had left.
- His current employees are fully aware of what he is doing today and of the potential \$5,000 penalty. The manager has emphasized with staff that ignoring consumption of outside alcohol will not be tolerated.
- Another licensed establishment had been unexpectedly shut down on the day of the alleged contravention. The Establishment was understaffed to deal with the unanticipated overflow business. That was why the manager was working in the kitchen - he usually circulates around the Establishment checking on staff to ensure operations are going smoothly.

SUBMISSIONS – BRANCH

The Branch advocate submitted that the Licensee had admitted that the contravention occurred, and that the elements of the contravention had been established.

Regarding the defence of due diligence, the Branch stated that there was more that the Licensee could have done; for example, signs warning patrons not to consume liquor purchased at the RAS might have gone a long way to preventing the contravention. The Branch argued that in circumstances where there is high staff turnover greater efforts at due diligence are required.

The Branch advocate deferred to the NOEA with respect to the recommended penalty.

SUBMISSIONS – LICENSEE

The Licensee admitted that the contravention occurred. He argued that his training and supervisory processes should be sufficient in that it is just common sense that no restaurant allows outside food and drink to be consumed. However, he acknowledged that due diligence had not been met, and stated that signage prohibiting the consumption of liquor from the RAS may have been helpful. The Licensee stated that he makes more of an issue of non-consumption of outside food and drink with his staff than do other restaurants. He said it is against his financial interest to allow such consumption.

With respect to penalty, the Licensee stated that the Establishment is a seasonal business, and that the proposed \$5,000 monetary penalty represents an “exorbitant” proportion – almost half - of its annual liquor sales. He stated that a 4-day suspension would be preferred, though even that would be unreasonable. The Licensee noted that he has had a completely clean record for 15 years, and suggested that he would like to meet with the Inspector to determine better ways to deal with similar situations in the future.

REASONS AND DECISION

Contravention

The Licensee admits that the contravention occurred.

The evidence and the submissions filed in these proceedings demonstrate on the balance of probabilities that, with reference to section 42(2) of the Regulation:

- the Licensee (through its employee the server)
- allowed consumption of liquor (Molson Canadian beer) in the licensed Establishment
- and that the subject liquor had not been purchased from or served by the Licensee for on-site consumption as contemplated by the legislative scheme.

Accordingly, I find that on April 9, 2016 the Licensee contravened section 42(2) of the Regulation.

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 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 is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

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 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 the 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 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. These principles apply to the contravention in the current case.

Analysis

a. *Directing Mind*

The evidence indicates that the server did not have the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute her being a directing mind, as described in *Beverly Corners*. The Branch made no submissions in this regard. Accordingly, I find that the server was not a directing

mind of the Licensee. There is no evidence before me to indicate that a directing mind of the Licensee had a direct role in the contravention.

Since a directing mind did not commit the contravention I must consider the second stage of the due diligence analysis.

b. Adequate Training and Systems

Due diligence requires that a licensee takes 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. It is intended, however, to reduce the likelihood of a contravention occurring to a reasonable and acceptable level. The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and potential consequences of the consumption of liquor in a licensed establishment that was not purchased or served by the licensee. These include an increased risk of over-consumption, and diminishment of a licensee's ability to manage and control the establishment.

The due diligence standard is not one of perfection, but of adequate training and systems. There isn't a rote list of steps or elements that will constitute due diligence in all cases. The unique circumstances of each case have to be considered in determining whether the due diligence threshold has been achieved.

On the evidence, I find that the Licensee's training regime falls short of demonstrating due diligence. The written materials were not provided to me for review, but on the Licensee's evidence the materials are based on training for tobacco sales rather than being specific to sales and service of liquor. Use of the Guide during training would also be of benefit to highlight the legal responsibilities of the Licensee and his employees. The Licensee argued that extensive use of a written training manual was inefficient. However, appropriate written materials provide a clear indication to employees and regulators of the seriousness with which the Licensee views its and its employees' responsibilities.

The Licensee stated that employees are tested at the end of the training period and are required to sign a written statement with respect to the training. No test materials were provided to demonstrate their suitability or adequacy.

While oral one on one discussion of new issues with individual staff is a valuable tool, it is no replacement for periodic, mandatory staff meetings where the key messages and best practices can be reinforced and a culture of compliance can be emphasized in a team setting. It is important that adequate documentation be maintained for such meetings.

On balance, for the foregoing reasons, I find that the Licensee's training and systems regarding contraventions of section 42(2) of the Regulation fall short of the standard required for due diligence.

c. Steps to Ensure Effectiveness

This aspect of due diligence requires the Licensee to take reasonable steps to supervise and monitor its operations sufficiently to ensure that staff are applying their skills and knowledge appropriately, and to ensure that risk-reducing systems are operating effectively.

In the current case, the evidence indicates that there is an RAS immediately adjacent to the Establishment, and that the Licensee regularly has to deal with the situation where outside food and (less frequently) liquor are brought into the Establishment for consumption. The Licensee described a "wild west" atmosphere in the resort area. These circumstances, and the high proportion of seasonal staff, indicate a heightened risk level for non-compliance. A heightened risk level requires proportionately greater efforts in diligence.

In the circumstances of this case, due diligence would warrant maintenance of a written incident log. Documentation of ongoing processes to test staff performance is essential in demonstrating due diligence. There is a lack of such documentation in the current case, and the Licensee tended to dismiss the value of such documentation.

For the foregoing reasons, I find that the Licensee's supervisory and monitoring processes fall short of the standard required for due diligence.

The Licensee expressed an interest in learning how its training and systems could be improved. I would suggest that every licensee would do well to be familiar with current decisions by the General Manager as posted on the Branch website at <http://www.pssg.gov.bc.ca/lclb/enforcements/index.htm> These decisions are not binding on future decision makers, and do not set precedent, but they do provide valuable information to licensees about current standards and practices. They provide a broad menu of tactics that Licensees may use for designing training, testing and monitoring regimes appropriate to their circumstances. I note that in the current case both the Licensee and the Inspector have indicated their willingness to meet to discuss improvements.

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

In this case the facts are that patrons were able to bring a case of beer into the Establishment, leave it open on the table in plain sight, and openly consume the beer without any response from the server, even though it was a frequent occurrence for patrons to attempt to bring outside consumables into the Establishment. The Licensee is sincere in his wish to maintain compliance, but for the reasons detailed above has

fallen short of proving due diligence. In these circumstances, I find that a penalty is warranted.

The factors that I considered in this case in determining the appropriate penalty include: consideration of whether there is a proven compliance history, 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 a proven contravention of the same type for the Licensee at the Establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

There is no evidence before me to indicate any previous enforcement history against the Licensee or any compliance history.

The lack of due diligence indicates a need for specific deterrence. There is also a demonstrable need for general deterrence, given the "wild west" atmosphere described by the Licensee.

In consideration of:

- The serious public safety concerns related to the consumption of outside liquor;
- The insufficiency of evidence of due diligence;
- As mitigated by the Licensee's otherwise good compliance record; and
- The disproportionate impact of the minimum monetary penalty

I find a six-day License suspension to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific deterrence.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Licence for a period of six (6) days to commence at the close of business on Friday, February 10, 2017 and to continue 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 close of business on Friday, February 10, 2017 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

Daniel M. Graham
General Manager's Delegate

Date: January 24, 2017

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