



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: 0445539 B. C. Ltd.
dba Off the Rail Brewing
1605 Kamloops Street
Vancouver, BC V5K 3W3

Case: EH16-076

For the Licensee: Steve Forsyth & Sharrol Segal

For the Branch: Hugh Trenchard

General Manager's Delegate: A. Paul Devine

Date of Hearing: January 18, 2017

Date of Decision: February 21, 2017

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC

<http://www2.gov.bc.ca/gov/content/employment-business/business/liquor-regulation-licensing>

INTRODUCTION

The Licensee operates a brewery with an on-site store endorsement under Brewery Licence No. #306266. Under the terms of the licence, the Licensee operates a tasting room at the site of its brewery located at 1351 Adanac Street in Vancouver. The licence for the business was issued on December 17, 2014.

As with all similar licences, the Licensee is subject to the terms and conditions set out in the branch's "Brewer, Distiller and Agent Licences Terms and Conditions Guide" (the "Guide".) The Licensee was represented by Steve Forsyth and Sharrol Segal, owners in the brewery business.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The details of the alleged contravention and proposed penalty action are set out in the Notice of Enforcement Action ("NOEA") dated July 27, 2016. It is alleged that on July 8, 2016, the branch conducted minors as agents program ("MAP") inspections in the East Vancouver area to test compliance of several licensed establishments. The MAP allows the branch to use minor persons to test the compliance of licensees with the obligation not to sell liquor to underage persons.

The Licensee was the subject of a MAP inspection at 8:53 p.m. The minor agent, described as Minor Agent #86, entered the establishment of the Licensee followed by two liquor inspectors. He proceeded up a flight of stairs and entered into the facilities' tasting room. There, he proceeded to a refrigerated cooler and selected a six pack of beer. A male bartender asked how he was doing, and the minor agent replied "good". The male bartender then scanned the product, and provided change for the \$20 bill that had been tendered by the minor agent. At no time was the minor agent asked to produce identification.

Afterwards, the inspectors exited the premises and prepared a contravention notice ("CN"). The minor agent prepared an observation form outlining what had taken place inside the tasting room. On returning to the establishment, the inspectors spoke to the male bartender who had been involved in the transaction with the minor agent in a private room across from the tasting room. He advised that the manager of the facility

was not working on site at the time. The liquor inspectors explained the particulars of the contravention to the bartender, and gave him the CN to pass on to management. He acknowledged that he was aware of the MAP program.

In view of the seriousness of selling liquor to a minor, a monetary penalty of \$7500.00 was proposed. This is the minimum monetary penalty for a first contravention set out in Schedule 4 of the *Liquor Control and Licensing Regulation* ("Regulation").

LEGISLATION

Liquor Control and Licensing Act ("Act")

s. 33(1) A person must not

(a) sell, give or otherwise supply liquor to a minor...

EXHIBITS

EXHIBIT 1	Book of Documents (Branch)
EXHIBIT 2	Guide Page 35 regarding ID requirements (Branch)
EXHIBIT 3 a-b	Pictures of posters in Tasting Room (Licensee)
EXHIBIT 4 a-c	Pictures of posters near cash registers (Licensee)
EXHIBIT 5	Agenda for Staff meeting October 16, 2016 (Licensee)

EVIDENCE OF THE BRANCH:

In view of the concession by the licensee that it was not disputing the contravention of selling liquor to a minor, the branch called only one of the liquor inspectors involved in the MAP inspection on July 8, 2016. East Vancouver, where the business of the licensee is located, is part of the area

serviced by the liquor inspector. The licensed facilities in this area include liquor manufacturing, and U Brew businesses.

The Inspector identified the Guide applicable to breweries, and noted that its contents would be familiar to the Licensee. The Guide reminds licensees about their responsibilities when selling liquor, including not to sell liquor to minors. As well, the use of the MAP to inspect licensed facilities had been explained in publications distributed by the branch to licensees in the province on several occasions.

On July 8, MAP inspections were conducted with a minor agent who was then 17 years of age. The minor agent entered the premises of the licensee followed by two inspectors. Once inside, the minor agent observed purchasing six beer that he had ordered from a bartender. He paid for the beer with cash, and was not asked for ID at any point. Afterwards, the inspectors and the minor agent prepared paperwork to confirm the beer sale incident. The Inspector prepared a CN and returned to the bar, where he spoke to the bartender involved in the sale to the minor agent. The bartender advised there was no manager working on site at the time. The Inspector explained that a liquor sale had been made to a minor. The bartender acknowledged receipt of the CN. The bartender acknowledged that he was aware of the MAP. He was told to advise management to retain any video evidence of the incident.

The Inspector had only recently begun to work in the East Vancouver area. He had therefore not conducted any inspections of the facilities of the Licensee previously. The Licensee had first been licensed for business in December 2014. The Inspector confirmed that there was no prior history of contraventions by the Licensee.

EVIDENCE OF THE LICENSEE

S.S. is one of the owners in the corporate business of the Licensee. She brought 30 years of experience in the liquor industry into the business. She managed other well-known businesses in Vancouver, including the Lotus for 15 years, and the Railway Club for 10 years. She also had her own café business for several years, and obtained the liquor licence for it. Her system with staff has been to be

present as much as possible, a hands-on approach. During her time as a manager and an owner, she had not experienced any other contraventions of the provisions of the *Act*.

S.S. is involved in the daily management of the tasting room operated by the Licensee on its brewing premises. She is present on site almost every day that the tasting room is open. When she is on site, she personally asks customers for identification. She also gives daily reminders to the staff on issues relating to the sale of liquor, including asking for identification, and avoiding overcapacity. As well, she sends text messages to her staff at least weekly about these issues. There are posters concerning the age for asking for identification in the tasting room, as well as cards on the bar containing the same information. Altogether eight employees work in the tasting room on shifts. Some of these are part time.

The tasting room is part of the manufacturing facility for the brewery but is in a separate room. There is a regular flow of customers during the week, and lineups on the weekend when the facility reaches capacity. There is no table service. Customers come to the bar to order beverages. One employee normally works until 4 p.m., and then two are on-site until closing. S.S. is normally present until 2:30 PM each day, as well as going in regularly during other times to check up on the activities of the business. In summary, she personally speaks to staff when she is present, and sends them text messages when she is away about issues pertaining to the sale of liquor. When she is on site, she makes a point of asking staff if certain customers were asked for identification.

In her experience, the bartender that was involved in the MAP incident is reliable. She was surprised that he was involved in selling to a minor. Normally, he is responsible for closing down the tasting room, and setting the alarm when he leaves. He made a mistake in this instance, and feels terrible for it.

There is a clip board near the cash register that contains check lists for staff concerning matters pertaining to the business. The practice, however, is to meet staff personally face-to-face. There is no written policy manual for staff. There are, however, formal meetings held monthly with an agenda. As well, there is a

training manual that is discussed with new staff. There is a checklist that she uses for new staff. As well, new staff are shadowed until S.S. is satisfied they can work alone.

Exhibit 5 was produced as an example of a monthly agenda. One discussion point on the agenda is "systems to prevent violations." The discussion includes issues around asking for identification. The policy of the Licensee is to ask for ID from anyone who appears to be the age of 30 or under.

The bartender was working alone on the night of the MAP incident. He testified that he felt terrible for making a mistake by serving a minor. He was appreciative that he was not fired because it is a firing offence. He felt badly because he let down other staff working for the Licensee, and failed to have adequate regard for public safety concerns about selling liquor to minors. He recalled that he was distracted talking to another person, and made a stupid mistake. He testified that the Licensee has constant reminders in place regarding issues involving the sale of liquor, including asking for ID, avoiding over service, and overcrowding. There was always communication between the servers behind the bar, and patrons are always asked for ID when it appears appropriate. As well, S.S. sends weekly text messages about these issues, and reminds staff daily when she is on site. She uses verbal check lists on multiple occasions during the day, and gives reminders when she leaves. There are posters, tent cards, and stickers on the till to remind staff about asking for ID. There is also a clipboard by the cash register. It is used to record incidents that occur during a shift. It is also used to record events such as brewery tours where more care about service issues is needed. The clipboard also contains reminders to staff about the policy to ID anyone that appears to be under 30, and to be vigilant about over service. Despite all of these reminders, he made a mistake.

The bartender testified that he has had his SIR certificate for five years. He enjoys working in the craft beer industry. He began work with the Licensee in April 2015. Before he was hired, he was asked about his prior experience. He was taken through the policies of the Licensee after he was hired, including its mission statement, service processes, and employee responsibilities. Next, he

was shadowed for a few shifts. Normally he assesses age by looking for signs of aging in customers, how they are dressed, how they behave. Some of this he learned from taking his SIR certificate, and some was learned from experience. At work, there are discussions with fellow staff member on issues such as asking if customers or their friends look young. There are also discussions about over service issues, and about inappropriate behaviour by customers. Staff discuss asking for ID, and if there is any shadow of a doubt, ID is requested. Asking for ID is not an issue for anyone working for the Licensee.

S.F. is also an owner in the business of the Licensee. He testified that he is not as hands on with staff as is S.S. because his areas of responsibility are production and management. He attends management meetings where they discuss all aspects of the business, including service issues. He follows up to make sure that S.S.'s text messaging goes out. He also attends staff meetings to talk about company policies, new products, how to create social media buzz, or anything that is on the agenda. Service issues are always on the agenda. The bartender like all other employees follows company policies. He does not set those policies. The incident with the minor agent was a slip and a mistake.

Staff in the tasting room are very personable with customers. This is part of the culture of the Licensee. New staff are initially shadowed to observe their adherence to company standards. As well, they can ask other employees if they have questions as staff will help to train them. There has been no turnover of staff at the brewery tasting room since it opened.

When management is not present, some of the staff are trusted to run the business. The bartender for example was entrusted with closing the business at night.

ARGUMENT OF THE BRANCH

In a brief closing, the position of branch is that the contravention was not in dispute, and on the balance of probabilities, the Licensee was not due diligent. The shadowing of staff without clear training guidelines comprises a deficiency.

How staff are trained in those circumstances is unclear. While it is a family business with low turnover, any new staff would suffer without written training steps as to how to implement the Licensee's policies on a consistent basis. Therefore, a penalty was warranted in the circumstances.

ARGUMENT OF THE LICENSEE

As business owners, the Licensee never wants to stop learning. As such, the Licensee is open to consider the recommendations of the branch concerning new staff. The Licensee believes, however, that it has established diligence regarding existing staff. New staff are shadowed by watching them the whole time. Since opening, there has been no staff turnover, and staff run the business in accordance with the policies of the Licensee. The Licensee expects them to follow its guidelines.

The Licensee has chosen to argue due diligence because the size of the fine for a contravention is large for a small business. As well, its reputation with 60 years of unblemished experience is important. The Licensee takes improper service to minors very seriously. It does not just sell beer. There is a love for craft beer and the service industry. The Licensee wants a culture of understanding and responsibility. The business is not large, and management is present daily to speak and engage with staff. All employees have SIR certification. They are all aware of their responsibilities.

The Licensee is extremely diligent in training and follow up. It is very important as minors can come into the tasting room when accompanied by an adult. With youngsters present, a safe environment is necessary. New staff are trained and shadowed. The MAP incident was not due to a lack of diligence. Instead, it was due to a lapse of judgment. The Licensee submits that it meets the criteria for due diligence.

ANALYSIS AND DECISION

The first question normally addressed in a hearing such as this is whether the evidence demonstrates that a contravention occurred such that there is a basis for taking penalty action. The onus is on the branch to produce evidence to establish the occurrence of a contravention. In view of the concession by the Licensee that an employee served the minor agent without asking for identification, the contravention as alleged by the branch is established.

The second question then is whether the evidence establishes that the Licensee acted with due diligence notwithstanding the contravention. The onus is on the Licensee to demonstrate due diligence. 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 minor agent was an employee of the Licensee, not a person who would be considered a directing mind. There was no management presence on site in the tasting room when the sale to a minor occurred. Since there was no “directing mind” involved in the impugned sale, I am not precluded from considering whether the Licensee acted with due diligence notwithstanding the occurrence of a contravention. The second stage inquiry focuses on the training and systems of the Licensee directed towards prevention of a contravention.

The issue then is whether there was adequate supervision and training of the Licensee’s staff including the server such that he acted contrary to the training that he had received (see discussion in *Beverly Corners, supra*, at paragraph 33.) In assessing this, I begin by considering the culture of the Licensee as created by its management. The two principals have years of experience in retail liquor sales. I accept that there is a corporate culture that emphasizes responsibility and safety as minors may be on the premises with their parents. There is no suggestion in the evidence that beer sales are unduly promoted by staff. In fact, sales are customer driven as the wait staff consists of bartenders standing behind a counter.

Initial training consists primarily of shadowing new employees for a few days. There is a training manual that is reviewed with new staff but no evidence they are examined on its contents. I agree with the branch that this could be regarded as a weakness in the training systems of the Licensee. It is important, however, to look at the practices of the Licensee as a whole to determine if there were systems in place with reasonable steps taken to ensure their effective operation.

The systems utilized by the Licensee include regular formal meetings with staff based on a written agenda. Liquor compliance issues are a routine feature of these meetings. Signage is posted in several places to remind staff about issues including asking for ID. A clipboard is kept at the bar for recording unusual incidents with patrons. It also has information on compliance issues including requesting ID. In addition, and most importantly, there are regular daily verbal reminders to staff about issues including ID, overcrowding, and excess service. Management is not at all reluctant to confirm that ID has been checked. Staff people communicate with each other on these issues. As well, management frequently enforces these reminders with text messages to all staff. This is the modern equivalent to giving paper reminders to staff, and is probably more effective as it will reach staff both at work and away.

If the contravention had been caused by a new staff member one might blame weakness in initial training systems. There has, however, been no turnover in staff since the Licensee opened its business almost two years ago. The staff therefore have all been exposed to the ongoing system of meetings and daily reminders. The bartender is a long service employee who has been exposed to this system over the course of almost two years of employment with the Licensee. He gave a cogent explanation about how he normally assesses age in customers, albeit he claimed to be distracted when the minor agent attended the premises. This of course is not an excuse, but it reflects an awareness and training in responsible systems including the application of the Licensee's policy to check ID for anyone appearing to be under 30.

The evidence shows that regular staff are well trained, and they understand their responsibility concerning the avoidance of service to minors. While a policy manual may be one indicator of an appropriate training system, the role of the manager of the tasting room in supervising staff was a reliable and adequate alternative system.

In the result, I accept that the Licensee has in place systems and procedures to monitor and reinforce with staff their responsibilities under the *Act* regarding the sale of liquor to the public. I would prefer to see a more fulsome training of new staff on the manual of policies and procedures of the Licensee. It is clear, however, there is a culture of compliance and understanding in place for regular staff. The daily verbal and text message reminders as well as the regular meetings with staff consistently drive home the requirements for compliance. I find therefore with respect to the contravention that occurred on July 8, 2016, the Licensee had systems and procedures in place to avoid the contravention. On the facts here, I find that the licensee has taken sufficient steps to establish the defence of due diligence on a balance of probabilities.

CONCLUSION

I therefore find that the licensee has established the defence of due diligence and thus has a complete defence to the contravention of section 33(1)(a) of the *Act*.

As there is no finding of a contravention, I do not need to consider the issue of penalty.

Original signed by

A. Paul Devine
General Manager's Delegate

Date: February 21, 2017

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager

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