



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

IN THE MATTER OF

**A hearing pursuant to Section 51 of
*The Liquor Control and Licensing Act, S.B.C. 2015, c. 19***

Licensee: 0905677 B.C. Ltd.
dba McCracken Station Liquor Store
1626 Valleyview Drive
Kamloops, BC V2C 4B5

Case: EH17-055

For the Licensee: Paramjit S. Vinepal

For the Branch: Hugh Trenchard

General Manager's Delegate: Nerys Poole

Date of Hearing: November 22, 2017

Date of Decision: January 9, 2018

**Liquor Control and
Licensing Branch**

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INTRODUCTION

0905677 B.C. Ltd. dba McCracken Station Liquor Store (the "licensee") owns and operates a licensee retail store, with licensee retail store licence number 195316 (the "licence") at 1626 Valleyview Drive in Kamloops (the "LRS").

According to the terms of its licence, the licensee may sell liquor from 9:00 a.m. to 11:00 p.m. Monday to Sunday.

The licence is, as are all licensee retail store licenses issued in the Province, subject to the terms and conditions contained in the publication "Licensee Retail Store: Terms and Conditions" (the "Guide").

Paramjit S. Vinepal is a shareholder in the corporate entity that holds the licence. He appeared as the licensee's representatives at the hearing.

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* on July 11, 2017, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program ("MAP"). The licensee admits that its employee sold liquor to the minor agent. However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence.

For the purposes of this hearing, and in accordance with section 5 of the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act"), the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Act and Part 6 of the *Liquor Control and Licensing Regulation*.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated July 27, 2017 (the "NOEA"). (Exhibit 1, tab 1)

The branch alleges that on July 11, 2017, the licensee contravened section 77(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 3 of Schedule 2 of the *Liquor Control and Licensing Regulation*). The branch recommends either a ten day suspension or a monetary penalty of \$7,500.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Supplying liquor to minors

77 (1) Subject to the regulations, a person must not
(a) sell, give or otherwise supply liquor to a minor,

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** Branch Book of Documents, Tabs 1 to 16
Exhibit 2 Licensee's Liquor Store Policies implemented August 2017
Exhibit 3 Licensee's policies and procedures prior to contravention

WITNESSES

The Branch called one witness: the liquor inspector who wrote the NOEA and was part of the inspection team on July 11, 2017 (the "first liquor inspector").

The licensee called two witnesses:

- Mr. Vinepal, the licensee's representative at the hearing, and
- the LRS general manager

FACTS - CONTRAVENTION ON JULY 11, 2017

The Licensee accepts the facts of the alleged contravention as set out in the NOEA and in the testimony of the first liquor inspector.

On July 11, 2017, two liquor inspectors attended the LRS with a minor agent employed by the branch under the MAP. At the start of the shift, the liquor inspector reviewed and photographed the minor agent's identification and photographed the minor agent. The minor agent was 18 years old on July 11, 2017. The purpose of attending the LRS with the minor agent was to test compliance with the Act's prohibition against selling liquor to minors.

At approximately 2:35 p.m. on July 11, 2017, the second liquor inspector, followed by the minor agent, entered the LRS. The first liquor inspector remained in the vehicle in the parking lot of the LRS. The minor agent walked directly to the back of the LRS to the coolers and picked out a six pack of Hey Y'all coolers. The minor agent then walked to the cashier where he provided \$20 to the male cashier. The cashier gave him the change from the \$20 and handed him a white bag containing the six pack of Hey Y'all coolers. The minor agent exited the LRS with the white bag, followed by the second liquor inspector, and headed straight to the vehicle. The first liquor inspector photographed the minor agent with the white bag.

The second liquor inspector and the minor agent then made their respective notes and briefed the first liquor inspector on what had occurred. The first liquor inspector took possession of the liquor from the minor agent and affixed a seizure tag and photographed the cans as evidence. (Exhibit 1, tab 12) The second liquor inspector and the minor agent provided copies of their notes to the first liquor inspector who also made notes. (Exhibit 1, tabs 8, 9 and 10)

On July 12, 2017 at 11:32 a.m., the first liquor inspector returned to the LRS and asked to meet with the manager. The cashier at the LRS advised him that the general manager of the LRS was away and that he should go next door to the pub and talk with the head server there. The first liquor inspector met with the pub head server and provided the details of the previous day's sale of liquor to a minor as well as providing a photograph

of the product purchased and a photo of the minor agent exiting the LRS. The first liquor inspector issued a copy of Contravention Notice B021042. The pub head server printed her name and title on the acknowledgement of receipt portion of the contravention notice. (Exhibit 1, tab 2)

EVIDENCE – LICENSEE

The Contravention

As noted, the licensee does not dispute the facts of the contravention. The licensee submits it has a full defence to the contravention and presented evidence of its due diligence.

Licensee's Policies, Procedures and Training

Both of the licensee's witnesses gave evidence about the policies and procedures of the LRS, both before and after the contravention, and of the staff training. The general manager is the "hands on" person who is in charge of developing and updating policies and of hiring staff for the LRS.

The current licensee has owned the LRS since 2011. Mr. Vinepal said they have had no problems with the license or the liquor laws over the past six and a half years. The licensee is aware of the importance of avoiding service to minors and that minors will attempt to buy liquor. Through their staff training and their regular reminders about ID checking, Mr. Vinepal said they try very hard to avoid serving minors. The LRS general manager is in charge of the daily operations and of hiring and training staff. The LRS employs five staff.

Training

Both witnesses gave evidence about staff training. Management requires all new staff to have their Serving It Right certificates. The licensee provides new staff with ten to fourteen days of training before being allowed to serve in the LRS on their own. The general manager gives an initial orientation session to new hires. She sits down in the office with new hires and reviews the store policies with them. She stated that she emphasizes the importance of ID checking and she reviews the rules about checking for

ID to ensure minors are not served. She personally reviews all the rules with new hires, going over each page with them. Prior to starting their own shift, new hires must sign a form stating they have reviewed the house rules and policies and that they understand them. (Exhibit 3) They must provide her with a signed copy, which she places in their file, with their Serving It Right number. During the training period, new hires will shadow or work with the general manager or with the senior employee.

Prior to allowing a new hire his own shift, the trainer must be confident that the new staff person is capable of following the rules and policies of the LRS. Sometimes the new hire shadows the general manager or senior employee; at other times, one works beside the other at the two side by side tills. At all times during the training period, a senior employee supervises the new hire.

The clerk who sold the liquor to the minor agent had worked at the LRS for less than two months. The general manager hired the young man, an international student. A senior employee, who has been working at the LRS since the licensee took over the business, put him through the orientation session and checked his Serving It Right certificate. The senior employee trained the clerk for a period of ten to 14 days.

Mr. Vinepal believed the contravention was an error on the part of a new employee who deserved another chance. He explained the difficulty with keeping personnel as store clerks for any length of time. He said they felt this employee was, in other ways, a good employee and they felt he would learn from this mistake so they did not dismiss him. Since the contravention, he has been extremely diligent and cautious about checking IDs.

House Rules and Policies on the date of the contravention (Exhibit 3)

Mr. Vinepal identified exhibit 3 as the rules and policies that were in place at the time of the contravention, for both the LRS and the pub next door.

The first section of the House Rules document deals with avoiding service to minors, by asking for two pieces of ID from anyone who looks under the age of 19. It further states that management will post signs at the entrance stating that the establishment will request two pieces of ID from anyone who looks under 19 years of age. Management

provides samples of ID or an ID checking guide for staff to compare acceptable forms of ID, such as a valid driver's license, passport, or BC Identification card. Further tips for how to determine fake ID are provided. The policy adds that staff must:

“ask the patron to leave if you suspect the ID is invalid or false. Be polite but authoritative and speak to them privately or discreetly. Watch for customers buying liquor for minors.”

Other sections of the house rules deal with intoxication, refusing entry to and not serving intoxicated patrons and maintaining the occupancy limit by door monitoring and last call procedures (latter two specific to the pub) and maintaining an incident log. All staff must read and sign off on the log book at the beginning of each shift.

The final page of exhibit 3 is titled “House Rules and Policies Acknowledgement.” All new employees must complete this sheet before starting their first shift. The employee must indicate that she has received, read and clearly understood the house policies and that she must ensure that she will comply with the house policies. The employee must acknowledge that breach of these policies may result in discipline and/or termination. As noted, management places a signed copy of this sheet in the employee's file.

At the bottom of this sheet, a manager must sign saying she has reviewed the house policies with the employee and that the page is to be placed in the employee's HR file with a copy of her Serving It Right certificate.

Mr. Vinepal explained that the signed copies are kept in their files. He did not provide a sample of a signed copy. Both of the licensee's witnesses emphasized that this acknowledgement form must be signed before a new hire has a shift on his own, and that this was in place before the alleged contravention.

Reminders and Signage

The general manager described the various signs in the LRS and reminders about checking for ID.

The reminder on the top right corner of the cashier's till shows the birthdate of someone who is 19 on that day. This changes every day. The till has the branch stickers showing red, yellow and green with STOP, CAUTION and OK – which give the year in which someone is under 19, may be 19 (born that year) and the year in which someone is definitely over 19. At the entrance to the LRS are signs about ID checking and reminders to customers that they may be asked for ID and may be refused service if unable to provide it.

Mr. Vinepal stated that they have notices in the employees' room and policy manuals for employees to look at. The bulletin board in the back office has reminders to check IDs.

The general manager stated that she or the senior employee reminds staff on a regular basis about the importance of checking for ID, and what they must look for to determine the ID is legitimate. She reminds them of the instructions in the house rules about this. She encourages staff to call her if they ever have any questions. She instructs staff to refuse service to anyone who does not have the correct ID or to anyone who may appear intoxicated.

When asked in cross-examination about guidance to staff on how to determine if someone is under 19, the general manager was rather vague in her answer, saying that it is difficult to be specific about what to look for, it is best to ID everyone, and that if a customer looks "under 20 or under 25," staff should ask for ID. She added that they go over some things, but generally leave it up to the staff's judgement. Prior to the contravention, they did not test staff on this. After the contravention, they introduced mystery shoppers.

Loyalty Program

Mr. Vinepal and the general manager explained about the loyalty program in the LRS. Customers who are interested in joining the program must apply to become a member and must be over 19. Customers who are part of the loyalty program will get points for their purchases. When a customer wishes to sign up for the loyalty program, he/she must provide ID along with the membership form. A lot of their regular customers are part of the loyalty program. No one can sign up for the loyalty program unless their ID

is checked and the form filled out. Staff are trained on this program as part of their training period.

In order to get points in the program, customers who are members provide their phone number to the store clerk at the time of purchase. If the clerk has any doubt that the person presenting the phone number is the actual member or if the clerk has any doubt about the person's age, the clerk must ask for ID.

Meetings

The general manager stated she holds monthly meetings with all five staff in the LRS. She emphasizes ID checking at these meetings. Staff may discuss incidents that may have arisen when checking for ID. The general manager has one on one meetings every day, either in person or by phone, with the senior employee who is in charge when she is not on site.

Logbook

The house rules state that employees must report incidents in a logbook, a manager must sign off on the report, and that all staff must sign off on the logbook at the beginning of each shift. The house rules state that all employees must report any incident involving harassment, violence or intoxication. The house rules prior to the contravention did not specifically refer to ID checking as an incident to record in the logbook. The rules introduced after the contravention now include reporting any incidents related to minors and ID checking.

Post-Contravention Changes

The licensee submitted a document titled 'McCracken Station Liquor Store Policies Implemented August 2017'. (Exhibit 2) Mr. Vinepal explained that this document was the result of their consultations with legal counsel and other licensees after the contravention occurred. As a result of these consultations, they decided they needed to make some changes to the policies to prevent any contraventions of service to minors.

The new policy includes a signing page for each employee. At the top of the page is "I acknowledge that I must ask anyone who looks under 25 years old for 2 pieces of valid ID!!!" (bold and underlining in original). Below is a space for name, time in and out, number of hours worked, position and signature of the employee. The bottom of this page sets out the requirements for each piece of ID. The licensee's witnesses explained that all staff must now sign in at the beginning of their shift. The second page of Exhibit 2 states that "You must read and sign this sheet daily." It sets out the potential penalties that the branch may impose on a licensee and that "failure to comply will result in wage garnishes." This page adds more details on acceptable types of ID as primary and secondary ID. The employee must sign at the bottom indicating the date, name and start time of shift, and that he has read and understands the above.

Page 3 of Exhibit 2 has a daily log form with spaces for notes and action required. Page 4 of Exhibit 2 has an Incident Log form with details about a customer, why he was denied entry and the details regarding the date and time. Reasons for denying entry include: "minor/intoxicated/dress code/false ID/ no ID/ only 1 piece of ID/ previously banned/ troublesome/other." Refusal of service reasons include "intoxicated/ troublesome/minor/other." The next page of this incident log includes questions about the minor and checking of ID.

Mr. Vinepal testified about the introduction of mystery shoppers to test the ID checking of their staff. They introduced these after the contravention occurred. The staff have consistently asked for ID of these mystery shoppers.

SUBMISSIONS – BRANCH

There is no dispute that the store clerk served the minor agent. The licensee has offered evidence of due diligence as a full defence to the contravention.

The branch advocate submits that, overall, the licensee has not established a defence of due diligence. There are sufficient weaknesses in the training process and policies. A major weakness is the loyalty program. The problem with the loyalty program is that when a customer provides a phone number to demonstrate their membership in the program, it is possible the person providing the number is not the member. There is a

danger that staff may rely on the member having had ID checked at the time of signing up for the program and not request ID at the time of purchase.

The branch advocate further submits that the licensee has not been consistent in instructing staff on the age at which staff should request ID, especially at the time of the contravention.

SUBMISSIONS – LICENSEE

The licensee submits that it has demonstrated due diligence and thus it has a full defence to the contravention. If I find the defence fails, the licensee asks for a \$7500 monetary penalty rather than a ten day suspension.

In response to the branch submission about the loyalty program, the licensee emphasized that this program is not a pass for someone not to show ID. If a person looks under age, staff must ask for ID whether or not they are in the loyalty program. All staff are aware of this and how important it is to request ID if they suspect someone is under age.

REASONS AND DECISION

Contravention

The licensee has admitted that the contravention of section 77(1)(a) occurred on July 11, 2017. I find, therefore, that the licensee contravened section 77(1)(a) of the Act by selling liquor to a minor.

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, 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 *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, 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.

Directing Mind

The store clerk who made the sale was a new hire and had nothing to do with the development of the LRS policies or with staff training. The general manager testified that she was responsible for creating and updating policies and for hiring and training. The general manager was not present in the LRS at the time of the contravention.

I find that the store clerk who sold the liquor to the minor agent is not a directing mind of the licensee.

Adequate training and other systems

The licensee's witnesses testified about the training process. After an orientation session, the senior employee or the general manager will shadow or work beside a new hire for a period of ten to fourteen days. Prior to starting his first shift, a new hire must sign off on the acknowledgement form stating he has read and understood the house policies. The house policies (Exhibit 3) outline the requirements for ID checking and for ensuring ID is valid. Management encourages staff to ask questions if in doubt about anything. The general manager explained that ID checking is an important part of the training of new staff in the LRS. The store clerk who sold the liquor to the minor agent followed the training regime as described. The store clerk had been working on his own for about 3 weeks when the incident occurred.

I find that the system of reviewing the house policies with each new hire, of having them sign off on the policy and of ensuring a period of ten to fourteen days working along side or shadowing a senior employee or the general manager, provides adequate training to the LRS staff, with one qualification.

The one qualification on the adequacy of staff training is the policy that was in place at the time of the contravention. The policy in place at the time of the contravention required staff to ask for two pieces of ID "from anyone who looks under the age of 19." The policy introduced after the contravention requires staff to ask for ID of anyone who appears under the age of 25.

There is no legal requirement that staff must ask for ID of anyone who may appear under 25 or under 30. The law prohibits servers and store clerks from providing liquor to a minor, i.e. anyone under the age of 19. However, in order to prove due diligence, in the words of Mr. Justice Dickson in the *Sault Ste. Marie* case cited above, a licensee must prove it has “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.” I find that taking reasonable steps to ensure minors are not served includes instructing staff to ask for ID of anyone who appears under 25 or, even better, under 30. Instructing staff, as stated in the licensee’s pre-contravention policy (Exhibit 3), to ask for ID of anyone who looks under 19 leaves no margin for error, and may result in a contravention as occurred here. The store clerk in this case was a young man, an international student, who, given his own youth and perhaps inexperience in making judgements on age, made a mistake. I find that this mistake can be attributed to the policy of instructing staff to ask for ID of anyone who looks under 19.

I find that the pre-contravention house policy of asking anyone who looks under the age of 19 to be a fatal flaw in the licensee’s due diligence defence. I find further that the lack of instruction or guidance about what staff might look for when determining age, and leaving this to the judgement of the individual, contribute to the potential for service to a minor. The combination of setting the age at 19 in which to determine whether to ask for ID and allowing the staff to use his or her discretion on how to assess for age does not provide a sufficient safeguard for preventing service to minors.

I conclude that the licensee, on this issue of its policy of instructing staff to request ID of someone who looks under the age of 19, has not met the onus of establishing due diligence on the balance of probabilities.

Effective Application and Operation of its Systems

Having found that the policy of asking for ID of anyone who appears to be under 19 is a significant weakness in the due diligence defence, I do not need to assess the application and operations of the licensee’s systems in ensuring its policies and procedures are implemented on a daily basis. Nevertheless, given the licensee’s evidence about this and my final conclusions below on the question of penalty, I will

make findings on this step in the due diligence defence. The licensee's practices to ensure its policies are implemented include:

- all staff must sign off on its house policy document prior to starting his/her first shift
- signage around the LRS as reminders to customers
- sign on the till that changes every day, to remind its staff about the correct date of birth for someone to be 19
- the branch sign at the till, which provides the year in which someone must be born to be sure they are 19, the year in which someone is born who may be 19 that year, and the year in which someone is clearly a minor
- licensee's reminders to staff on a daily basis about the importance of checking for ID
- monthly meetings with staff in which ID checking requirements are discussed
- daily conversations or meetings between general manager and senior employee
- existence of a logbook where staff report incidents and requirement that staff review the logbook before starting a shift

A potential weakness in the licensee's operations is the loyalty program, as noted by the branch advocate. However, I accept the licensee's statement that management reminds staff to ask for ID, if there is any doubt about the customer's age, even if a customer provides a phone number to show he/she is a member of the loyalty program. Merely providing a phone number does not establish that the customer purchasing the liquor is actually the member. I recommend that the licensee continue to emphasize to staff that, if any doubt about the person's age, regardless of membership in the program, staff should be requesting ID at the time of purchase, and that this be included in their policy document.

I find that the licensee has been consistent in its application and operation of its systems. I commend the changes the licensee has made since the contravention to improve their policies and procedures which include:

- Revision of its house policy to ensure staff ask for ID of anyone who looks under 25
- Introduction of an acknowledgement page to be signed by each employee on a daily basis, setting out the new policy of asking for ID
- Daily log form and an incident log form that now include any incidents related to requests for ID, refusal of service related to ID, etc.
- Introduction of mystery shoppers to test that staff is checking for ID as required by the new policy

‘After the contravention’ changes are not evidence of due diligence at the time of the contravention. However, the branch encourages voluntary compliance from licensees. I note the speed with which the licensee acted to make these changes after the contravention occurred.

Despite finding that the licensee has met the second part of the second stage in the *Beverly Corners* analysis, i.e. “taken reasonable steps to ensure the effective application of that education and the operation of those systems,” I have found above that the written policy and verbal instructions to staff about asking for ID of anyone who appears to be under 19, that is, the system in place to prevent a contravention at the date of the contravention, falls short of meeting the threshold to establish due diligence. I find that the licensee has not met the test of proving the defence of due diligence on a balance of probabilities.

I therefore find that the licensee has contravened section 77(1)(a) of the Act. I now turn to the question of penalty.

PENALTY

Pursuant to section 51(2) of the Act, having found that the licensee has contravened the Act, the Regulations 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 NOEA. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 2 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The branch has consistently indicated that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the branch considers this a significant public safety issue:

- The effects of alcohol on growing bodies and developing minds.
- The effects on individuals and society of irresponsible drinking behaviour learned at an early age.
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult; therefore, liquor has a more intoxicating effect on minors, and
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault, and theft.

The Minors as Agents program demonstrates the branch's intention to ensure that licensees are not serving or selling liquor to minors. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities.

I have found the evidence of due diligence falls short in this case to establish a full defence to the contravention. I have noted the primary weakness in the defence is the licensee's pre-contravention policy of instructing staff to request identification of anyone who may appear to be under 19. Setting a higher age limit to check ID is a safeguard to avoid what happened here: service to a minor who was six months shy of being 19 years old.

After a finding of a contravention, as the delegate of the General Manager of the branch, I may exercise discretion as to whether or not to impose a penalty. In exercising this discretion, pursuant to section 51(3) of the Act, I am required to take into account:

- (a) the licensee's compliance history,
- (b) the matters prescribed by regulation, and
- (c) other matters that the general manager considers relevant.

This licensee has been in business for six and a half years and has no compliance history. The licensee acted immediately to improve its policies, in particular, to introduce the age of 25 for the employees to ask for ID, as well as the daily sign-off sheet to emphasize to employees the importance of this requirement. As noted, 'after the contravention' policy improvements are not relevant to the establishment of a due diligence defence. I find that they may be relevant to the question of whether or not to impose a penalty. The licensee introduced the new policy in August, less than a month after the contravention. At the hearing, both the licensee and the general manager impressed me with their awareness about the dangers of serving minors and their concerns to ensure this is not done in future.

In addition, I have considered the other steps the licensee had taken to prevent contraventions like this one. Although I have found the "under 19" policy is insufficient to support a due diligence defence, I find that the training process, as well as the other steps and processes introduced by the licensee, are relevant when considering penalty.

Based on the above considerations, I have concluded that a penalty is not warranted here. Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence. I have found that both the licensee's history, the various processes the licensee had in place prior to the contravention, and the licensee's immediate efforts to improve its policies demonstrate its desire to voluntarily comply and that a penalty here is not needed to ensure future compliance by way of deterrence for this particular licensee.

Conclusion

I have made a finding of a contravention and have found that the licensee has not proven the defence of due diligence on the balance of probabilities. I have therefore found that the licensee contravened section 77(1)(a) of the Act.

I have found a penalty is not warranted here, based on the very specific facts of this licensee's policies and actions.

I remind the licensee that this decision is a finding of a contravention and will be considered a "first contravention" for the purposes of section 4 of Schedule 2 of the Regulations. If the licensee commits a contravention of the same type within the next 12 months, that contravention will be a "second contravention" and be treated as such under the penalty schedule.

Original signed by

Nerys Poole
General Manager's Delegate

Date: January 9, 2018

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

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