



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: Jimmy's Liquor Store Inc.
dba Jimmy's Liquor Store
490 Paul Lake Road
Kamloops, BC V2H 1J8

Case: EH16-105

For the Licensee: Dennis Coates, Barrister and Solicitor

For the Branch: Hugh Trenchard

General Manager's Delegate: A. Paul Devine

Date of Hearing: April 27, 2017

Date of Decision: June 2, 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
www.gov.bc.ca/liquorregulationandlicensing

INTRODUCTION

Jimmy's Liquor Store Inc. (the "Licensee") operates a Licensee Retail Store ("LRS") under Licence Number 195462. The LRS is located at 490 Paul Lake Road in Kamloops, B.C. It is licensed to sell all kinds of liquor from 9 a.m. to 11 p.m. Monday to Sunday.

The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication for licensee retail stores titled "A Guide for Liquor Licensees in British Columbia" (described below as the "Guide").

On January 23, 2017, the *Liquor Control and Licensing Act* R.S.B.C. 1996, c. 267 (the "Former Act") was replaced with the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Current Act") which came into force on that date. Therefore, although this hearing was held under the provisions of the Current Act, as the contravention occurred prior to January 23, 2017, this decision is in accordance with the provisions of the Former Act and the Former Regulation.

For the purposes of this hearing, and in accordance with section 5 of the Current Act, the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Current Act and Part 6 of the current *Liquor Control and Licensing Regulation*.

Mr. Dennis Coates represented the Licensee as counsel during this hearing.

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 September 7, 2016. It is alleged that on July 19, 2016, the branch conducted minors as agents program ("MAP") inspections in the Kamloops area to test compliance of several licensed establishments in selling packaged liquor for offsite consumption. 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 4:32 p.m. The minor agent, described as Minor Agent #94, entered the establishment of the Licensee after one of the

liquor inspectors went into the store. The Minor Agent proceeded to a refrigerated cooler and selected a six pack of beer. The Minor Agent proceeded to the cashier and provided a \$20 bill. The female cashier provided change for the \$20 bill and a receipt. At no time was the Minor Agent asked to produce identification.

As a result of the contravention, a monetary penalty of \$7500.00 was proposed.

LEGISLATION (IN FORCE AT THE TIME OF THE INCIDENT)

Liquor Control and Licensing Act ("Act") R.S.B.C. 1996, c. 267

s. 33(1)(a) A person must not 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	Book of Documents (Branch)
EXHIBIT 2	Guide Page 35 regarding ID requirements (Branch)
EXHIBIT 3	Pictures of posters in Tasting Room (Licensee) Agenda for Staff meeting October 16, 2016 (Licensee)

WITNESSES

A liquor inspector testified for the branch.

The licensee called two witnesses:

- the manager and part owner of the licensed retail store (the "manager") and
- a retail clerk of the LRS, "RM").

PRELIMINARY ISSUES:

The licensee made a preliminary objection over the fact the NOEA asserted that the employee who was involved in the MAP incident did not have her Serving it Right ("SIR") certificate. The branch agreed it was not maintaining the position that the employee lacked SIR certification. The branch noted, however, that it received documents from the Licensee as late as the day before the hearing notwithstanding prehearing discussions that they were to be delivered in a timely manner. This was noted for the record but no other procedural objection was maintained. In particular, the branch did not object proceeding with the hearing including the admission of the documents in question.

EVIDENCE OF THE BRANCH:

At the outset of the proceeding, the Licensee acknowledged it was not disputing the occurrence of the contravention as alleged in the NOEA. Instead, it was advancing a defence of due diligence. In view of this, the branch called only one witness to testify about the events in question. The witness was Liquor Inspector B, who was inside the store of the Licensee when the MAP inspection was conducted.

The inspector testified that she normally works in the Vancouver Island region. She was, however, involved with another liquor inspector in the MAP inspection which took place in Kamloops on July 19, 2016. The minor agent who was identified as Minor Agent #94 had previously been trained about the process for making liquor inspections, and about making notes about those inspections when required. The inspectors checked the ID of Minor Agent #94 prior to setting out on the MAP inspections and photographed it for the record. On each inspection that took place that day, the floor plan of the licensed establishment was reviewed before the minor agent went into it.

The Liquor Inspector testified that she went into the Licensee's store first and waited near the cooler area. She watched as the Minor Agent came into the store and selected a 6 pack of beer from a cooler. He then went to cashier and paid for the beer with a \$20 bill. The Minor Agent was not asked for ID. He was given a receipt, after which he exited the store. The liquor inspector waited behind until the Minor Agent left the store. After this, she followed, and made notes about what she had observed concerning

the sale of liquor to the Minor Agent. The Minor Agent also prepared an observation form and statement setting out the details of the sale of liquor which took place during the inspection.

The Inspector identified material that was sent to licensees in the Province by the Branch from time to time concerning the implementation of MAP in order to test compliance with the requirement not to sell liquor to minors. As well, she noted that licensees such as the Licensee in this case were obliged to be familiar with the material in the Guide which also discusses the prohibition against the sale of liquor to minors. Such sales are considered a public safety issue because minors are physically unable to metabolize liquor well at a young age. As a result, while under the influence of liquor, the probability is higher that they could become involved in motor vehicle accidents, and engage in inappropriate behaviour such as committing sexual assaults. All of this constitutes a danger to public safety and wellbeing. In view of the public safety implications of selling liquor to a minor, a monetary penalty was proposed by the branch. The \$7500 proposed penalty was the minimum available under the Schedule of penalties proscribed in the legislation that was in effect at the time of the contravention.

The liquor inspector noted that there had been an inspection in 2012 during which the licensee had sold liquor to a minor. Other inspections taken afterwards found the Licensee to be compliant.

In cross examination, the Liquor Inspector agreed that liquor inspectors do not look into whether or not a licensee involved in a contravention otherwise acted with due diligence. She said the branch had records of other inspections which had taken place at the licensed premises. In 2014, a MAP inspection was conducted, and the licensee was found at that time to be compliant.

The Liquor Inspector was questioned about the NOEA at page 4 which stipulated that the cashier who sold to the Minor Agent did not have a SIR certificate. It was suggested that this was incorrect. The Liquor Inspector did not dispute the suggestion, and the inspector who authored the NOEA was not called by the branch to testify. Therefore, this assertion in the NOEA is disregarded.

EVIDENCE OF THE LICENSEE:

The Manager and part owner of the Licensee's store which is located in the Tranquille area of Kamloops. He has been involved as the manager for 10 years and has 30 years in the retail liquor business altogether. In all of these, service to minors has been an issue.

There are 5 to 6 employees working at the LRS. It is a small store. The cashier for the store is located near the two doors in the store. One is meant for entering the store, one for exiting. Because of the small size of the store, the cashiers see all customers who enter and leave. There are normally two employees on staff. At night, there are always two employees for security reasons.

The standard for the store is that any customer who appears to be under the age of 25 must be asked for ID. Each staff member, however, has his or her own standard which is usually higher. For example, one of the two night clerks asks for ID from anyone who looks younger than she is. The clerk is 35 years of age.

There are discussions every day with staff about the need to ask for ID. The store is located in a rural area. There are frequent occurrences where minors attempt to buy liquor. The remote location of the store may encourage them to try to buy without presenting ID. The store, however, has a reputation in the community for being strict about the requirement to produce ID.

When the liquor inspector identified the clerk who was involved in the MAP incident, he was dumbfounded. He checked to make sure that she was in fact working at that time. The clerk in question had a reputation for being especially aggressive about checking for ID. Some customers had complained about her conduct in this regard. For example, a customer complained that she would not allow him to buy liquor for his 19-year-old son who had forgotten to bring his ID. The clerk told them it was bootlegging and she would not allow it.

The Manager reviewed the video of the incident involving the sale to the Minor Agent. There was nothing unremarkable to see. It looked like there had been some interchange between the cashier and the Minor Agent at the time but nothing else. He understood

from another clerk that the cashier might have been distracted as she was dealing with some medical issues. These services of the clerk who was involved in the contravention were terminated in accordance with the policy of the store in such cases.

The Manager noted that the LRS is frequently inspected by local liquor inspectors. It is located in a tough area. There have been no infractions prior to this one going back to 2012.

The Licensee produced as Exhibit 2 a document a "Reminder to Staff" which must be signed by employees each day acknowledging they are to ask for ID. This document was implemented after the MAP inspection. The policies of the store were not otherwise changed, and this document was only recently required of staff at the store.

In cross-examination, the Manager stated that the cashier in question did not provide an explanation as to why she failed to ask for ID from the Minor Agent. In respect to posters in the store, there is a poster on the door informing customers they will be asked for ID if they appear to be under age 25. There is no similar poster at the cash register. There is a point of sale reminder to staff to ask for ID. It has been in place for 10 years.

New staff are trained by being shadowed by a dayshift worker for a few days. One relatively new employee had previously been a bartender for 30 years. She was told about her pay, hours of work, and was asked to produce her SIR certificate to be photocopied for the record. She worked with the dayshift employee for 2 to 3 days, and then worked at night where there is always another employee. The dayshift employee would advise her about the policy to ask for ID from anyone who appeared to be under 25. The training consisted of taking her through the daily procedures in the store and how to do the work there.

There is also a bookkeeper who works at this store as well as at the other store operated by the Licensee. She is considered to be a member of management. She occasionally conducts meetings with staff.

The Manager testified that he discusses ID issues with staff on an as-needed basis if he sees there is an issue. He also leaves notes on the cashier stand as a reminder to ask for ID. There is no process of formal meetings with staff. He is in the store every day. No

spot quizzes or other meetings are used, and there is no policy manual or incident log book. There have been no discussions with staff about having regard to facial characteristics when assessing the age of customers. The staff work this out between themselves.

The Licensee called RM as a witness, a retail clerk who has been employed in the LRS for about nine years. The store is located on First Nation land in North Kamloops. She described her duties as retail sales, which involves stocking shelves, cashier duties, and other related tasks. She now works mainly at night from 3:30 PM to 11 PM. She finds that this shift works better because she has a young baby at home.

RM was present when the MAP incident took place. She was at the store waiting for her shift to begin. The employee who was involved in the incident worked on dayshift. The staff considered the clerk who was involved in the incident to be extremely aggressive in checking for ID. She was known to ask just about everyone for ID. There was also a concern in the store about customers bootlegging for underage individuals. The clerks made a practice of asking for triple ID if someone was buying in small lots, and there were young people in the store. This was almost a daily occurrence. RM says that she asks for ID 10 – 20 times a day. Usually two – four customers won't have ID and will be sent away. The store is in a tough neighbourhood, and staff need to be wary.

RM said that staff have developed their own practices about asking for ID. Hers is to ask anyone that looks younger than her. She is 35 years old. Staff will not necessarily ID regulars but since the season is changing, there are always new customers in the store. These are regularly checked for ID. Staff also leave notes for each other about issues pertaining to liquor sales because they all know that a failure to comply means they will lose their jobs.

On the day of the MAP incident she was waiting to take over the cashier position. Normally the dayshift cashier stocks shelves before leaving. She saw the Minor Agent, and said that she would have asked him for ID. She did not know why the other clerk failed to do so on this occasion. She understood that the clerk had a medical problem, and perhaps was distracted in her duties on the day in question.

In cross-examination, she acknowledged she had worked for the Manager at another property previously. She was given information by him and by other employees at the start of her employment. It was not really a checklist but there were questions asked about dealing with intoxication in customers. She was also given a booklet that explained some of these issues. She now tells new staff to read the booklet after they are hired. She also trains new staff when she is asked to do so.

RM testified that there are posters in the store and on the cashier stand concerning checking ID for anyone that appears to be under 25. The staff, however, develop their own preferences. A young clerk uses 40 and under as her standard because it is difficult for her to assess how old anyone is who is closer to her age. Employees talk about these issues at staff meetings which take place every few months. These are done at random times, usually when there are seasonal changes. The meetings are normally arranged by the bookkeeper.

As for staff training is concerned, there are no set standards. When she is involved in training, she just tries to tell new employees everything that she knows. There is also a pop up on the point-of-sale system advising employees about checking for ID. Staff leave notes for each other. There is a logbook for entering issues about stealing from the store and when there are ID issues with clients.

ARGUMENT:

The branch advances two broad general positions. On the defence of due diligence, it submitted there is a disconnect between the policies of the Licensee and what actually occurs in the establishment. In other words, staff in the store operate fairly efficiently in spite of a lack of clear policies. There are no clear policies to guide staff as to what happens inside the store in practice. Staff are asking customers for ID but the Licensee has not established a set of policies to guide the employees in their duties. The Licensee needs to establish these in order to meet the test of due diligence on the balance of probabilities.

The branch also raised a concern about establishing due diligence when there are no documents that go to the issue of the policies and practices set by the licensee. How is the standard to be applied or determination made that such oral evidence is credible?

If there are no documents, what evidence is to be relied on to establish that the licensee acted with due diligence?

In its submission, the Licensee stated there is no issue about the facts pertaining to the contravention. On due diligence, the branch as a matter of practice does not investigate due diligence when it issues a NOEA. As such, there is a waste of both time and money. As well, it would be useful if the branch tracked and provided statistics about when the Licensee was previously inspected and found to be compliant.

The Licensee submitted that there is a culture of compliance at the LRS that it operates. It is a small store with only six employees. Management is there every day. It is not necessary to depend on manuals to establish the fact of due diligence. Messages are left for staff and there is a bulletin board that sets out the requirements for acceptable ID. As well, the employee that was involved in the contravention was normally extremely aggressive about asking for ID. It is therefore speculated she must have been distracted by personal issues or she would not have made this mistake.

The evidence of RM goes to the number of customers who are asked for ID each day, and the number that are rejected as well. The store is a place where staff must be diligent.

The evidence of the Manager goes to the culture of compliance. Management is hands on in his business and in the compliance aspects of that business. There was no management present when the contravention occurred, and so there is no issue of a directing mind being involved. While larger operations need a more formal structure, smaller businesses such as the one in question do not.

The focus is not on what could have been done to prevent the contravention in question. The focus is on the systems and operations in place to prevent the occurrence of such contravention: see *Central City Brewing v. British Columbia (Liquor Control and Licensing Branch)* 2013 BCSC 2301 per Goepel, J. On the evidence, there are systems in place and the employee in question was almost fanatical about asking for ID. On this basis, due diligence is made out.

In reply, the branch notes that it is the licensee that must develop policies. In this case, there were no policies evident by the Licensee, notwithstanding that staff had themselves put in place individual practices to ask for ID.

DECISION

The first issue normally addressed in a hearing such as this is whether on the evidence a contravention of the *Act* or the *Liquor Control and Licensing Regulation* occurred such that there is a basis for taking penalty action. The onus is on the branch to establish the occurrence of a contravention. In view of the concession by the Licensee that an employee sold liquor to the minor agent without asking for identification, the contravention as alleged by the branch is established.

The issue which follows then is whether the Licensee otherwise acted with due diligence. At the outset, it is common ground that the onus to establish due diligence falls on the Licensee. 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 willful 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.

There is no evidence that the sale to the Minor Agent was made with the concurrence of management. The issue then is whether the Licensee had "a proper system to prevent commission of the offence" and took "reasonable steps to ensure the effective operation of the system" in the words of Dickson, J. quoted above. The evidence that is advanced for the purpose of establishing a "proper system to prevent commission of the offence" is often written, including policy manuals, written guidelines, agendas, records of meetings with staff, incident logs, and the like. These can serve to support oral evidence concerning the systems and procedures utilized by the Licensee. Smaller

businesses such as the LRS operated by the Licensee in this case may not have the degree of written systems and procedures as may be required in larger operations. In some cases, oral evidence alone given under oath may be sufficient if accepted to establish the requisite policies and procedures, but the task of discerning their existence and nature of these is made more difficult without written records.

I agree with the submission of the Licensee that the focus of whether it acted with due diligence is on the policies and procedures that it had in place, not on the contravention itself. In *Central City Brewing, supra*, at paragraph 11, the licensee led evidence on these that included a policy and procedures manual which included:

- a) a policy and procedures manual that includes information on the importance of identity checks and a requirement the staff sign for a receipt and reading of the manual;
- b) the requirement that all staff have been trained and possess a "Serving It Right Responsible Beverage Service" ("SIR") certificate;
- (c) posting of signs notifying customers of ID checks at all points of entry and exit;
- (d) posting of signs notifying customers of ID checks at all points of sale;
- (e) frequent staff meetings where the need to check ID is reinforced and questions are answered and new issues discussed;
- (f) ready availability to staff of the ID guide to acceptable identification;
- (g) production and distribution to staff of a company "standard of conduct" protocol signed by all employees;
- (h) circulation to managers and staff of bulletins regarding ID policy and the Minors as Agents program from the alliance of beverage licensees and the Branch, with the requirement that the staff sign for receipt and reading;
- (i) close supervision and support by middle and senior managers and easy access to them for questions by staff;

- (j) employment of a manager with 25 years' experience in government and private liquor sales to train and oversee staff;
- (k) a policy of management always supporting a decision of a sales clerk to refuse service for insufficient or questionable ID;
- (l) tagging of all merchandise to prevent theft by minors;
- (m) store policy of ID-ing persons apparently under the age of 25 (as opposed to the government mandate of 19);
- (n) store policy of identifying and excluding underage customers - alone or in the company of enabling adults - upon entry and before they attempt to make a purchase;
- (o) store policy of excluding adults who attempt to purchase liquor for minors;
- (p) store policy of refusing to service adults who appear to be buying liquor for minors off the premises;
- (q) store policy of capture and detention of grab and run thieves - the majority of whom are minors - and recovering stolen alcohol;
- (r) constant live zoom-able video monitoring of all customers or staff within the store;
- (s) store policy of dismissing employees for a first offence of service to a minor; and
- (t) approximately 100 ID checks recorded each day.

All of the above were found to comprise evidence of effective policies and procedures.

Some of these procedures are utilized by the Licensee. All staff have SIR certification. Signs are posted at the entrance to the store concerning the need for identification. Experienced management is in the store daily, and discusses ID issues with staff when

necessary. Staff are supported in their decisions concerning questioning ID. There is a policy of asking for ID from anyone that appears to be under age 25, although staff have developed their own policies. There is a point of sale system in use which reminds employees about ID requirements. There is a policy of terminating staff that do not request ID or commit other offences under the *Act*. There are also a very high number of ID requests required daily.

There is, however, distinct lack of evidence of policies that were developed and applied by the Licensee in other areas. There is no evidence that the Licensee utilizes a manual or guidelines or other policies for staff that are recently hired. New staff are assigned to work with experienced staff for a few days in order to learn the administrative practices and procedures of the store. There is, however, no formal involvement of management in training new staff about the legal requirements and obligations when they are selling liquor. The Licensee has no explicit policies on excluding underage minors entering the store or on excluding sales to adults who appear to be buying for minors. Individual staff are left to work these issues out for themselves.

There was some evidence that the bookkeeper has meetings with staff from time to time, but no direct evidence was led concerning the nature of these meetings. I therefore can draw no conclusions as to whether management was involved in leading staff discussions pertaining to liquor sales matters at these meetings.

In result, I find that the procedures that are in place at the LRS have primarily been developed by staff, not by the Licensee. The requirement to establish due diligence is to demonstrate effective policies and procedures that the Licensee has developed and utilized. While there is evidence of some procedures such as management support for checking ID and the like, there is almost no evidence of procedures in place when new staff are hired about their responsibilities pertaining to the sale of liquor. Nor is there evidence of store policies or procedures on liquor sales issues to guide staff on a daily basis. All information about these procedures are left for existing staff to convey to new staff during their period of on-the-job training. As well, there is also no evidence of ongoing guidance of staff by management on these issues.

As a result, I find that the Licensee did not meet the test of establishing that it has appropriate policies and procedures in place to avoid a contravention such as occurred on July 19, 2016. Therefore, the Licensee has not met the obligation on it to establish due diligence. I find also that the proposed minimum monetary penalty of \$7500.00 is

appropriate to encourage the Licensee to meet its obligations under the *Act* going forward.

ORDER:

Pursuant to section 20(2) of the *Former Act* which was in force when the contravention occurred, I order that the Licensee pay a monetary penalty of seven thousand five hundred dollars (\$7500.00) to the General Manager of the Liquor Control and Licensing Branch on or before July 2, 2017.

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: June 2, 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