



**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: Paul Esposito's Restaurant (Abbotsford) Ltd.
dba Mt. Lehman Liquor Store by Liquor for
less.com

Case: EH16-154

For the Licensee: Paul Esposito

For the Branch: Maria Caduhada

General Manager's Delegate: A. Paul Devine

Date of Hearing: June 6, 2017

Date of Decision: July 14, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION:

Paul Esposito's Restaurant (Abbotsford) Ltd. (the "Licensee") operates a Licensee Retail Store ("LRS") known as Mt. Lehman Liquor Store by Liquor for less.com under Licence Number 195258. The LRS is located at M115 - 3122 Mt. Lehman Road, Abbotsford, B.C. It is licensed to sell all kinds of liquor from 9 AM to 11 PM Monday to Sunday inclusive.

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. 26 (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. Paul Esposito Jr. is an owner of the Licensee, and represented it 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 December 28, 2016. It is alleged that on July 27, 2016 and July 30, 2016 the Licensee sold liquor to a holder of a Special Occasion Licence ("SOL"). In doing so, the Licensee was in contravention of the terms and conditions of its Licence, and contravened section 12 of the Former Act. The sales on each occasion were made to the holder of a SOL for the Merritt Rockin' River Festival ("Festival".)

It was considered that the sales resulted in a loss of revenue to the government, and constituted unfair competition to the liquor industry. As a consequence of the contravention, a monetary penalty of \$3000 was proposed.

LEGISLATION

Former Act:

Licences

- 12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).

Former Regulation:

Schedule 4 of the Former Regulation Enforcement Actions
Item 46:

General					
46	Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specifically referred to in this Schedule	1-3	3-6	6-9	\$1 000 - \$3 000

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 Book of Documents (Branch)
EXHIBIT 2 Witness Statement (Licensee)

WITNESSES

A liquor inspector testified for the branch. A witness who was involved in the purchase of the liquor which was described in the NOEA testified for the Licensee.

EVIDENCE

Branch

Liquor Inspector A testified that the Licensee falls within the area that she normally inspects. She noted that the LRS licence issued to the Licensee expressly incorporates the terms of the Guide. One of the terms of the Guide at page 17 explicitly states that the Licensee is restricted to selling liquor to retail customers. Further, the Licensee may not sell liquor for events held under a SOL. As well, the terms of the Licence state that packaged liquor may only be sold within the blue lined area to which licence is applicable. The Licensee is also required to understand the liquor legislation that is relevant to its business. The Liquor Inspector noted that a copy of the Guide was sent to the Licensee in 2015.

In January 2016, a complaint was received in the branch that the Licensee was advertising for liquor sales inappropriately. The Liquor Inspector spoke to one of the principals of the Licensee, and explained that sales of liquor to the types of events that were being solicited in their advertisements normally involved holders of SOLs. Entities that are involved in SOL events must purchase their liquor through the Liquor Distribution Branch ("LDB"). The Licensee advised the Liquor Inspector that this portion of the advertisement would be removed.

The Liquor Inspector testified that she learned about the alleged contravention from another liquor inspector who covered the municipality of Merritt. She learned that all of the liquor that was purchased by the Festival had been returned to the local LDB. In discussion with people involved with the Festival, the Liquor Inspector was informed that the liquor had been purchased from the Licensee. The Liquor Inspector conducted an investigation, and she requested and received documents from the Licensee. The daily transaction records provided by the Licensee for August 2016 referred to invoices for two large purchases. These invoices were requested, and on review, showed that sales to the Festival occurred on August 4 and 5. Each sale to the Festival was for beer in the amount of \$7,158.65. The records indicated that one half of the product purchased was subsequently returned to the Licensee for a refund. Each invoice showed that the liquor was shipped to "Chris" and in parentheses there was reference to the Festival. After reviewing the invoices, the Liquor Inspector called the Licensee and advised that a Contravention Notice would be issued for selling liquor to the holder of a SOL.

The Liquor Inspector noted that the Festival had also been penalized for purchasing liquor from a vendor other than the LDB, and agreed to pay a \$3,000 monetary

penalty. She also noted that the Licensee had been a sponsor in a talent search event for the Festival.

The Inspector stated that a monetary penalty was proposed first because purchasing liquor by SOL holders outside of the LDB resulted in a loss of revenue for the provincial government. Second, permitting the Licensee to sell to a SOL holder was unfair to other retail stores. The policy of the Branch is to maintain a level playing field. A penalty that was higher than the minimum was proposed because the action constituted a conscious decision by the Licensee. There had been discussions on this issue previously, and so the Licensee was made aware of the restrictions in the sale of liquor to a SOL holder.

In cross-examination, the Liquor Inspector acknowledged that she did not know Chris, the person that was identified as the purchaser in the invoices.

Licensee

The Licensee called C K as a witness. He testified that he operates a trucking business in the municipality of Abbotsford. C K said he was the individual that purchased the beer on behalf of the Festival. He reviewed a written statement he made on February 6, 2017 (filed as Exhibit 2) and confirmed that it was accurate. In it, he stipulated that his company had supplied trailers and general set up assistance to the Festival for the past several years both in Mission and in Merritt. Because of a busy Thursday night at the Festival, and because of the weather forecast at the time, the organizers of the Festival felt there going to run short of beer for the event on Saturday and Sunday. C K therefore volunteered to arrange to purchase additional beer on July 29, 2016. Since he had access to a truck and trailer, he contacted the LRS operated by the Licensee. He knew the Licensee had a large store, and so should have the stock required on short notice. As well, since the Licensee had supported the talent search for the Festival, and so he felt obliged to support its business. He advised the person who took his order that his company was assisting the Festival, and needed to purchase a large beer order. He was asked if he had a SOL, and he said he did not. Arrangements were made for one of his employees to pick up the beer on July 30, and he told the person who took his order that he would come into the store during the following week to pay for it. He told the order taker to clear this arrangement with Paul Esposito Jr. who he had known for several years. He came into the store on August 4 and 5 to pay for the beer, and requested then that the name of the Festival be put on the invoices in order for him to be reimbursed. After completion of the Festival, he returned 135 36 packs of beer, so the net amount

purchased was 135 36 packs of Budweiser cans. He apologized for the trouble he caused in purchasing liquor in this fashion.

C K confirmed that he used his own money to purchase the beer. He told the order taker he did not have a SOL.

In cross-examination, C K acknowledged that he knew Paul Esposito Jr. and his father, Paul Esposito Sr. Both his company and that of the Licensee are involved in putting on events in the Abbotsford community. Normally, his company does not hold the type of events that require a SOL. He has, however, purchased large amounts of liquor from the Licensee in the past for personal use in events such as birthday parties.

C K stated that one of the organizers of the Festival told him that they needed more beer. He was trying to help. He did not speak to Paul Esposito Jr. directly but needed to make arrangements to defer payment for the beer until the following week. He assumed that his request was approved after he placed the order. He testified that he did not say he was purchasing beer for the Festival when he originally placed the order but mentioned this only later when he asked for it to be put on the invoices.

ARGUMENT

Branch

The Branch argued that the Licensee violated the terms and conditions of its Licence when it sold liquor to C K for the Festival. The Licensee is restricted to selling on a retail basis. Both the invoices issued to C K refer to the purchase being used for the Festival. The purchase was referred to Paul Esposito Jr. for approval. He is a directing mind of the Licensee. The Branch witness affirmed that Paul Esposito Jr. makes decisions about the operations of the Licensee. The evidence is that C K referred the sale of beer to Paul Esposito Jr. Paul Esposito Jr. knew about the Festival, and the Licensee had been a sponsor of the Festival's talent show. In the absence of evidence to the contrary, a contravention was made out.

There is no evidence the Licensee operated with due diligence. The Licensee's argument is that it had no intention to sell to an SOL holder. The Act is a strict liability statute, and so negating a contravention requires more than an honest belief that the action was innocent. The Licensee could not reasonably believe the sale was not for a SOL. C K has known Paul Esposito Jr. for a long time, and knows the

business of the Licensee. If C K said his purchase was not for the SOL, the circumstances of the sale raises issues necessitating further inquiries. The Licensee did not do so, and has not provided evidence of policies and procedures to avoid this type of contravention. Therefore a contravention is made out.

Licensee

The Licensee argued that the playing field for retail liquor stores is not level. Instead, the stores operated by the LDB are entitled to more than a level field. The Licensee acknowledges that only an LDB can sell to holders of a SOL. This is unfair to all other licensees. As for the Guide, there is reference there to ID requirements in order to give more certainty to licenced operators. There is, however, no detail on due diligence requirements regarding sale to SOL. Instead, the Licensee is left to figure it out itself. Here the liquor was sold to C K, who is a third party, not an SOL holder. The store manager asked C K whether he had a SOL. She did not have to ask the question but she did. The main issue then is what should Licensees know or ask of its customers? An answer to this may clarify the issue for private sector stores.

ANALYSIS AND DECISION

Contravention

The first issue to be determined is whether the Licensee committed a contravention as alleged. Technically, the sale of the beer in question (on two occasions) was made to a business operated by C K, and he did not have a SOL at the time the purchase was made. On the evidence, however, C K was clearly buying the beer on behalf of the Festival, and the Festival was conducting an event under the auspices of a SOL.

In these circumstances, the Licensee's awareness of the purpose for which the purchase was made is a crucial factor in determining whether it committed a contravention. Otherwise, it would be a simple matter to sidestep the constraints of the legislation by selling liquor to a third party who purchases it on behalf of the holder of a SOL.

The Licensee argues there is no obligation or onus on it to question its customers about the purpose for which its liquor purchases are made. It is true that the statute makes no express requirement in this regard. A failure to make such inquiries will not, however, provide a defence since the legislation is a strict liability statute. Intent is not normally an issue. Evidence of an act contrary to the requirements of the legislation (in this case selling to a party with a SOL) is enough to establish a

contravention. It therefore makes sense for the Licensee to make reasonable inquiries when a customer places a large purchase order. Otherwise, the Licensee would be hard pressed to demonstrate that it acted with due diligence.

C K testified that he purchased beer from the Licensee on two occasions, and on both of these occasions did not specify the purchase was for the holder of a SOL. He testified that it was only after he purchased the beer and returned several days later for an invoice that he requested reference be made to the Festival so that he could be reimbursed. On this evidence, it is arguable that the Licensee did not know that C K was buying the beer for the Festival. This is, however, contrary to the written statement of C K which was introduced by the Licensee as Exhibit 2. C K testified that the contents of the written statement are true. In this document, C K stipulates that he told the manager of the Licensee that he was assisting the Festival in the purchase of the beer. While he was asked if he had a SOL, it was apparent that the beer he was purchasing was for the Festival which was the holder of a SOL. As well, the manager was directed to speak with Paul Esposito Jr. in order to authorize the sale without immediate payment. It is a reasonable inference that Mr. Esposito was aware that the product was being purchased for the Festival which was an event which had a SOL. Mr. Esposito had an opportunity to give evidence about his involvement in the sale to C K's company but chose not to testify.

I conclude therefore that C K's company purchased the beer as agent on behalf of the holder of a SOL. Further, the Licensee was aware of this at the time the purchase was effected. Therefore, a contravention of the Former Act is made out as alleged.

Due Diligence

The onus to establish that it acted with due diligence is on the Licensee. The owner of an LRS may be in a position to argue that it acted with due diligence if it sold liquor to a customer if it was misled about whether the customer had a SOL. While the fact of the contravention remains, there are grounds for determining that the licensee should be relieved of responsibility if it made due inquiries. In this case, however, the inquiries made by the Licensee lead to a conclusion that the customer was purchasing for or on behalf of the holder of a SOL. It is a reasonable inference the manager of the Licensee was aware of the real party for whom the beer was being purchased. As well, it is a reasonable inference that Mr. Esposito was also aware of the purpose for which the purchase was made. On these facts, due diligence is not established.

Penalty

Once a finding of a contravention is made, followed by a finding that the Licensee did not act with due diligence, the question remains to determine what penalty if any is appropriate. While I may increase a penalty or a waiver of penalty altogether, I am not authorized to depart from the range of penalties set out in the Schedule to the Former Regulation.

The primary goal of the branch in bringing enforcement action and imposing penalties is to achieve voluntary compliance. The factors that are considered in determining the appropriate penalty may include a proven history of compliance, a past history of warnings by the branch and/or police, the seriousness of the contravention, the threat to the public safety, and the well-being of the community.

The range of monetary penalties available under the Schedule is from \$1,000-\$3,000 for a first contravention. The Liquor Inspector chose a penalty of \$3,000.00 because there had been previous discussions with the Licensee about its obligations in respect of sales of liquor to a party holding a SOL. I agree that in these circumstances a higher penalty is appropriate. Past conduct is a relevant factor in the determination of the appropriate penalty applicable to a contravention. As well, the chosen penalty is the same as the one that was applied to the Festival for purchasing liquor outside the terms of its SOL. It is appropriate that the monetary penalties be the same in these circumstances.

I therefore direct that the Licensee pay the amount of the monetary penalty that was proposed in the NOEA in the amount of \$3,000.00 on the terms set out below.

ORDER

Pursuant to section 51(2)(b) of the Current Act, I order that the Licensee pay a monetary penalty of three thousand dollars (\$3,000.00) to the General Manager of the Liquor Control and Licensing Branch on or before August 15, 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.

Dated the 14th day of July, 2017.

Original signed by

A. P. Devine, Delegate

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Rupi Gill, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attn: Maria Caduhada, Branch Advocate