**DECISION OF THE**

**GENERAL MANAGER**

**LIQUOR AND CANNABIS REGULATION BRANCH**

IN THE MATTER OF AN APPLICATION FOR RECONSIDERATION

A reconsideration pursuant to Section 53.1 of
**The *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19 *("Act")***

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| Licensee: | Paul Esposito's Restaurant (Abbotsford) Ltd.<br>dba Liquor for Less.com<br>1-34252 Marshall Road<br>Abbotsford, BC V2S 1L9 |
| Case: | REH19-080 |
| For the Licensee: | Paul Esposito |
| For the Branch: | Karol Kudyba |
| General Manager's Delegate: | Nerys Poole |
| Date of Decision: | September 3, 2020 |

## INTRODUCTION

Paul Esposito's Restaurant (Abbotsford) Ltd., dba Liquor for Less.com (the "Licensee") has applied to the general manager for a reconsideration of the decision of the general manager, dated March 6, 2020 (the "section 51 order"). The Licensee filed the application for reconsideration on July 24, 2020 which was more than three months after the deadline set out in section 53.1(5) of the *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19 ("the *Act")*.

## NOTICE OF ACCEPTANCE OF APPLICATION AND STAY OF ORDER

On August 4, 2020, the registrar of enforcement hearings in the Branch notified the Licensee that she was accepting the application for reconsideration, despite the delay in requesting it. In this letter, the registrar cited the relevant sections of the *Act*, including the following subsections of 53.1:

> (5) The general manager must not accept an application for a reconsideration of a section 51 order unless the following requirements are met:
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> > (d)subject to subsection (6), the general manager receives the application within 30 days after the date on which the applicant receives the section 51 order.
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> (6) The general manager may extend the deadline in subsection (5)(d) if the general manager is satisfied that
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> > (a)special circumstances existed that prevented the applicant from meeting the deadline, and
> > (b)an injustice would result if no extension were granted.

The registrar reviewed the Licensee's submission which explained why there were special circumstances that prevented the timely filing of the application. The Licensee stated that the additional workload and stress caused by COVID-19 were the cause of the delay. The Licensee further submitted that the Licensee wished to submit new evidence for the reconsideration and that an injustice would result if this new evidence were not considered. The registrar, acting as the delegate of the general manager, concluded that COVID-19 was a special circumstance that prevented the Licensee from

meeting the deadline and that "the only avenue for the licensee's alleged new evidence to be considered is through an application for reconsideration." She therefore accepted the application for reconsideration and referred the matter to me as the general manager's hearing delegate for a decision on its merits.

On August 4, 2020, the A/Deputy Manager of Compliance and Enforcement Division of the Branch issued a stay order of the penalty in the section 51 order:

> The Order to pay a monetary penalty is stayed until December 24, 2020 or until a decision on the application for reconsideration is rendered, whichever comes first.

The Branch's registrar then referred the section 51 order to me, as a delegate of the general manager, to reconsider pursuant to section 53.1 of the *Act*.

**RECONSIDERATIONS UNDER THE *ACT***

Section 53.1 of the *Act* governs reconsiderations of section 51 orders. Amongst other things, section 53.1 provides that a reconsideration is a review on the record and may only be based on one or more of the prescribed grounds. Section 152 of the *Regulation* sets the prescribed grounds. The grounds are a failure to observe the rules of procedural fairness, an error of law and, subject to section 53.1(4) of the *Act*, new evidence.

Subsection 53.1(4) allows the general manager to consider new evidence only if satisfied that the new evidence is substantial and material to the reconsideration and did not exist when the section 51 order was given or did exist at that time but was not discovered and could not, through the exercise of reasonable diligence, have been discovered.

In a reconsideration order, the general manager may confirm, vary or rescind the section 51 order that is under reconsideration. In combination, sections 53.1(10) and 51(3) direct that on a reconsideration the general manager is to take into account the licensee's compliance history, the matters prescribed by regulation, and other matters that the general manager considers relevant.

When making a reconsideration order, the general manager must set out the reasons for that order. If a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid are to be set out. The date for payment must be within 30-days after the applicant receives the order, or the general manager may specify a longer period in the order. If a licence suspension is imposed, the period of the suspension and the dates on which the suspension must be served must be set out.

**THE SECTION 51 ORDER**

The decision that I am to reconsider is that of the general manager dated March 6, 2020. The hearing delegate conducted the hearing on February 25, 2020.

**The Contravention**

The Branch alleged a contravention of section 77(1)(a) of the *Act*, service to a minor. Prior to the commencement of the hearing, the Licensee admitted that the contravention occurred and that a sales clerk served a minor in its licensed retail store ("the LRS") on August 23, 2019. The minor who was served was a minor agent employed by the Branch, pursuant to the Minors as Agents program. The Licensee stated at the pre-hearing conference that it would be raising the defence of due diligence. The hearing delegate found a contravention and then considered the evidence of due diligence.

**Due Diligence**

The Licensee presented its evidence of due diligence. The hearing delegate found that the sales clerk was not a directing mind and then moved to the second stage of the test of due diligence as enunciated in the decision of the B.C. Supreme Court in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851. Under the second stage of the test there are two questions to answer:

a. Whether the licensee implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
b. Whether the licensee had taken reasonable steps to ensure the effective application of that education and the operation of those systems.

The hearing delegate answered the first question in the affirmative. He found that the Licensee had taken reasonable steps to train and supervise employees in the application of its policies when first employed.

He then turned to the second question and considered the Licensee's evidence with respect to the effective application of the education and operation of its systems.

The hearing delegate answered this second question in the negative and based his conclusion on the following:

- Verbal evidence only of warning given to employees – although licensee stated he sends memos to employees, no memos were entered into evidence;
- Lack of connection between the store clerks and management over the daily application of the licensee's policies respecting the sale of liquor to minors and other related matters;
- No vehicle for employees to communicate with management about issues that may occur in the course of their employment, e.g. no logbooks or incident records in the LRS;
- Verbal evidence only of written memoranda to staff about policy issues – no evidence submitted of these materials;
- No formal meetings or similar opportunities for staff to provide input.

The hearing delegate pointed out that logbooks or incident reports can serve as useful tools for discussion between management and staff when incidents occur. The hearing delegate acknowledged the use of video camera footage as a basis for speaking to employees who may be deficient in their obligations.

The hearing delegate commented on the "Employee Declaration" which new employees must sign following their review of the document. He noted that the Declaration deals extensively with the prohibition against selling liquor to minors – including requesting identification from any customer who appears to be under the age of 30.

The hearing delegate, in discussing the question of the application of the training and the operation of its systems, noted one of the policies in this Declaration. The policy provides that where a customer fails to provide appropriate ID but where the on-duty

manager knows one thousand percent that the customer is not a minor and will not acquire liquor for a minor, the on-duty manager in his or her sole discretion can approve the sale. In the contravention here, the sales clerk stated she believed (mistakenly) that the minor agent had bought liquor in the store before. However, she failed to involve the on-duty manager when making her decision not to request identification. The hearing delegate noted that there was "no evidence about any training or discussion concerning the application of this policy" and that "use of a logbook could be used to record instances of the application of this policy and would be beneficial for review by management with its employees when necessary."

Based on the above, the hearing delegate concluded that the Licensee "has failed in its onus to establish that it acted with due diligence in the continued application of its training and the operation of its systems beyond initial training in order to prevent a contravention under the *Act*."

The hearing delegate therefore found a contravention and imposed the minimum penalty for a first contravention of section 77(1)(a) – a $7000 monetary penalty.

**APPLICATION FOR RECONSIDERATION**

Under 'Prescribed Grounds for Reconsideration' on the application form, the Licensee checked the box: "There is substantial and material evidence that is new or was not discovered or discoverable at the time of the original hearing."

The Licensee stated that it did not hire a lawyer or consultant to assist at the hearing because the costs of a lawyer or consultant would have been within the range of the $7000 for the proposed penalty. The Licensee elected therefore to represent himself. The Licensee pointed out that this was the first time in the Licensee's history that he had attended a hearing relating to service of a minor.

The Licensee argued that the Branch had an unfair advantage at the hearing as the Branch was represented by an in house well experienced branch advocate who specializes in representing the Branch in enforcement hearings.

After reviewing the March 6, 2020 decision, the Licensee "realized the additional information and items it should have presented at the hearing."

**New Evidence**

The Licensee requests that the following new evidence that was not provided at the time of the original hearing be considered:

> Appendix A of its submission showing the licensee communicates to its employees regarding job performance issues. Appendix A shows emails from Mr. Esposito Jr. to its employees at the LRS, dated May 8, 2018, May 5, 2018, and Performance Adjustment Notices dated August 2, 2018, August 27, 2018, May 6, 2019, June 28, 2019, July 23, 2019, October 1, 2019, December 6, 2019, December 18, 2019.
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> Addition to Appendix A sent to branch registrar on July 30, 2020 asking that the attached email from an employee and his response be included (dated July 29, 2020 and July 30, 2020 respectively)

The Licensee disagrees strongly with the statement in the March 6, 2020 decision that "there is no vehicle for the employees to communicate with management about issues that may occur in the course of their employment." The Licensee submits that "now more than ever" employees have "vehicles of communication" to bring issues that may occur in the course of their employment to the attention of the store manager. The Licensee first points out that the owner, senior management and store managers are physically working with their members on a daily basis and therefore are available to answer any questions a member may have in person. The Licensee asks the Branch to advise if it requires any evidence to substantiate this, and if so, what type of evidence is required.

The Licensee states further that a contact information list of the owner, senior management, store managers and other emergency contacts are located at their customer service desk and available for their members to use 24 hours a day/365 days a year including all statutory holidays. These "vehicles of communication" would be via phone calls, text messages and emails. The Licensee attaches a picture of this contact

information list to its submission. The Licensee also attaches photos of "electronic sticky notes that are used on our manager's desktop computer located at our customer service for members to communicate between each other."

The Licensee concludes his submission with the statement that "this incident has caused anxiety to us as we are being wrongfully penalized while the clerk who sold to the minor agent receives no penalty." The Licensee submits that fines or suspensions should be given to clerks and servers who fail to meet the terms of their serving it right obligations. The Licensee comments on the absence on the Branch website of best practices a licensee should follow to provide a due diligence defence for serving a minor. He suggests the Branch should consider providing this to licensees.

**REASONS AND DECISION**

The grounds for reconsideration of a decision are the only reasons that a decision may be reconsidered. Reconsideration is not an opportunity to re-argue the case.

The Licensee has identified "new evidence" as outlined above in the Licensee's application. As noted in section 53.1(4) of the *Act*, as the delegate of the general manager, I may consider new evidence only if I am satisfied that the new evidence:

> (a) is substantial and material to the reconsideration, and
> (b) did not exist when the section 51 order was given or did exist at that time but was not discovered and could not, through the exercise of reasonable diligence, have been discovered.

I find that the Licensee's new evidence as submitted in Appendix A and B of its application is mostly evidence that existed at the time of the hearing which resulted in the section 51 order – the two emails and the performance adjustment notices in Appendix A, other than the three notices dated after the hearing and the email forwarded to branch registrar on July 30, 2020. The evidence of actions taken by a Licensee and its staff after a contravention demonstrate the licensee's efforts to ensure such contraventions do not happen again but is not evidence to support a defence of due diligence. With respect to the evidence of emails, performance reviews and notes, dated prior to the contravention, I find that this evidence existed at the time of the

hearing and could have been discovered, through the exercise of reasonable diligence. The copies of sticky notes in Appendix B are undated.

By the Licensee's own admission, the Licensee realized the importance of providing some of this evidence only when he read the March 6, 2020 decision and discovered there were gaps in his evidence – and this is what he is now producing.
The Licensee admits that he was unaware of the types of evidence he needed to provide to the hearing delegate to make a finding of due diligence. The Licensee submits that the Branch should have a list of best practices on its website to assist licensees as to what they need to provide to establish this defence. I find that the branch registrar provided the Licensee with information as to where to find branch decisions on its website, as well as advice about the importance of disclosing all information that may assist the licensee's defence.

The prehearing conference summary letter dated November 8, 2019 sets out the requirements re. deadlines for disclosure of evidence and cites the website for the branch enforcement hearing decisions.

The Notice of Hearing letter dated November 25, 2019 and sent to the Licensee has a paragraph on disclosure:

> **Disclosure and Witnesses**
> By the above-noted final date of disclosure, the branch advocate and licensee are required to provide each other with final disclosure of any documents on which they will be relying or producing to the Hearing Delegate at the hearing of this matter. Failure to disclose documents within the timeframe set may result in the evidence being ruled inadmissible by the Hearing Delegate. Please bring an extra copy of all of your documents to the hearing for the Hearing Delegate to use as an official exhibit copy.
>
> By the above-noted final date of disclosure, the branch advocate and licensee must provide each other with their final list of witness names. Failure to identify witnesses within the timeframe set may result in the evidence being ruled inadmissible by the Hearing Delegate.

> Where supporting documents and evidence are available, it is the branch's expectation that this will be provided during disclosure and presented at the hearing. **If this information is not produced, this could affect the weight or admissibility of the evidence. (bold added)**

A reconsideration is not intended to provide licensees with an opportunity to submit further evidence that existed or was discoverable at the time of the hearing. The branch registrar provided the Licensee with warnings about the importance of providing all documentation to support its defence. The branch registrar noted the consequences of not providing all available evidence – i.e. that it could affect the weight given to the evidence. In this case, the hearing delegate concluded that the verbal testimony about written memos was insufficient and that the Licensee should have provided copies of these.

The Licensee notes in its reconsideration submission "it was the first time in the licensee's history it has attended a hearing relating to service of a minor." Although the Licensee did not attend a hearing relating to service of a minor, the Licensee did attend a hearing that resulted in a decision dated July 14, 2017, dealing with the sale of liquor from its LRS to a special occasion licence holder. The importance of presenting all available evidence of due diligence would have applied in that hearing which dealt with the sale of liquor from its LRS to a special occasion licence and received a penalty of $3000. (*Paul Esposito's Restaurant (Abbottsford) Ltd. dba Mt. Lehman Liquor Store by Liquor for less.com* Case: EH16-154, decision dated July 14, 2017)

The hearing delegate concluded, when making the section 51 order, that the licensee "failed in its onus to establish that it acted with due diligence in the continued application of its training and the operation of its systems beyond initial training in order to prevent a contravention under the *Act*."

I have found that the "new evidence" does not meet the definition of new evidence under the *Act* and that it was discoverable prior to the hearing, or was evidence of actions taken post-contravention or post-hearing. My role as the reconsideration hearing delegate is not to rehear the evidence nor to hear for the first-time evidence that was available to the licensee. A licensee is required to present all available evidence to establish a defence of due diligence. The decisions on the website provide ample

guidance to licensees to consider what types of evidence is important to disclose. The "best practices" to demonstrate due diligence may vary depending on the size of an operation and the type of licence.

It is incumbent on licensees to provide written documentation, if available, to support any verbal testimony. The Licensee asks in its submission what evidence the Branch may require to substantiate the regular daily communication contacts that occur between owner, management and staff. If nothing is written down, then verbal testimony about these contacts would suffice. However, if there are written memos, as was stated in verbal testimony and noted by the hearing delegate as "written memoranda to staff about policy issues in addition to direct discussions", the Licensee is expected to provide such materials. The Licensee realized after reading the decision of March 6, 2020 what the gaps were in its evidence of due diligence.

The conclusions of the hearing delegate, when assessing the evidence, were not only about the deficiencies in the Licensee's practices (no logbooks or incident reports, no meetings with staff, etc.), but also about the Licensee's failure to produce the written documentation referred to in its verbal testimony.

The hearing delegate concluded that the Licensee had not met the onus of establishing due diligence on the second question of the due diligence test. I find that the hearing delegate, as the person hearing the evidence, was fully exercising his powers to draw the conclusions he did. I further find that the "new evidence" submitted in the reconsideration application, was discoverable prior to the hearing, through the exercise of reasonable diligence. Other "new evidence" submitted was undated or post-dated the contravention and thus was not evidence to support a defence of due diligence at the time of the contravention.

The Licensee states he finds the $7000 penalty to be excessive for a first contravention and objects to the fact that the clerk who served the minor does not receive a penalty. The option to fine servers is in the *Act* but this does not relieve the Licensee of its obligations as a licensee to provide ongoing training and supervision of its staff.

With respect to the imposition of the monetary penalty of $7000, once a hearing delegate has concluded the licensee has contravened the *Act*, the hearing delegate must follow Schedule 2 in the Regulation when imposing a penalty. A first contravention of serving a minor is subject to a minimum monetary penalty of $7000 or a suspension of seven days. The Licensee indicated at the hearing that it preferred the monetary penalty over a suspension.

**ORDER**

For the reasons set out above, the decision of March 6, 2020 and the section 51 order is confirmed.

When an original decision is confirmed, section 53.1(11)(b) of the *Act* requires that the details of a penalty, if any, are to be set out. The contravention of serving a minor was a first contravention for the licensee. The hearing delegate imposed the minimum penalty for a first contravention – a monetary penalty of $7000.

Pursuant to section 53.1(11)(b) of the *Act*, I order that the Licensee pay a monetary penalty in the sum of $7,000 to the general manager of the Liquor and Cannabis Regulation Branch on or before **October 9, 2020**.

*Original signed by*

Nerys Poole
General Manager's Delegate

Date: September 3, 2020

cc: Liquor and Cannabis Regulation Branch, Surrey Office
Attn: McKenzie Castle, Regional Manager