



**DECISION OF THE  
GENERAL MANAGER  
LIQUOR CONTROL AND LICENCING BRANCH  
IN THE MATTER OF**

A hearing pursuant to Section 20 of

*The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267*

|                                  |  |
|----------------------------------|--|
| Licensee:                        | Palomino Holdings Ltd.<br>Buffy's Licensed Liquor Store<br>6858 West Coast Road<br>Sooke, BC V0S 1N0 |
| Case:                            | EH07-029   |
| For the Licensee:                | Peter K. Jones   |
| For the Branch:                  | Shahid Noorani   |
| Enforcement Hearing Adjudicator: | K. McIsaac   |
| Date of Hearing:                 | April 25, 2007   |
| Place of Hearing:                | Victoria, BC   |
| Date of Decision:                | June 15, 2007  |

## **INTRODUCTION**

Palomino Holdings Ltd. ("licensee") operates Buffy's Licensed Liquor Store ("store") under Licensee Retail Store Licence No. 195173. The hours of sale are from 9:00 a.m. to 11:00 p.m., seven days a week.

## **ALLEGED CONTRAVENTION**

By Notice of Enforcement Action ("NOEA"), dated February 19, 2007, the Liquor Control and Licensing Branch ("branch") alleges that on November 17, 2006, the licensee contravened section 33 of the *Liquor Control and Licensing Act* ("Act") by selling liquor to a minor.

## **RELEVANT STATUTORY PROVISION**

Section 33 of the *Act* reads:

33 (1) A person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) have liquor in his or her possession for the purposes of selling, giving or otherwise supplying it to a minor, or
- (c) in or at a place under his or her control, permit a minor to consume liquor.

## **ISSUES**

The licensee does not dispute that liquor was sold to a minor on November 17, 2007, contrary to section 33 of the *Act*. However, it raises the defence of due diligence as excusing it from a finding of a contravention under the *Act*.

Therefore, the issues in this case are:

1. Did the licensee exercise due diligence and, if not,
2. What penalty, if any, is appropriate?

## **EXHIBITS**

- Exhibit No. 1: Branch's Book of Documents  
Exhibit No. 2: Handwritten notes of RCMP Constable  
Exhibit No. 3: Licensee's Documents numbered 1 to 12  
Exhibit No. 4: Handwritten notes of liquor inspector (4 pages)

## **PRELIMINARY MATTERS**

The licensees' advocate requested that the date of the contravention on the NOEA be changed from November 18, 2006, to November 17, 2006. The branch advocate agreed that November 17, 2006, was the correct date and it was so amended.

The advocate submitted that the NOEA was sent incorrectly, to Palomino Holdings Ltd. c/o the previous company owner. I am satisfied the notice was sent correctly to the address on record, that the licensees received the notice, and they were not prejudiced by the previous owner's name being on the record.

The advocate submitted that the licensees did not receive the second page of the liquor inspector's Summary of Evidence attached to the NOEA (Exhibit No. 1, Tab 1). The branch advocate submitted the licensees did not raise this at the pre-hearing conference, and this is the first time it has been brought to his attention.

On the first page of the Summary of Evidence, the last sentence continues on the second page. The licensees have read the second page and as there is no suggestion this omission has been an impediment to their presentation, I am satisfied there has been no prejudice to the licensees.

The advocate also objected to the Contravention Notice included in the branch's Book of Documents (Tab 6), being included as evidence. The Contravention Notice, dated December 2, 2004, involves a contravention of section 45(2) of the *Regulation*, failing to request ID. The advocate submits the Contravention Notice should not have been issued as it involved the liquor inspector asking for ID from a regular patron, who the server confirmed was of proper age. He says it should not be included as it clouds the issues being dealt with today.

The branch advocate clarified the matter by saying that the Contravention Notice in Tab 6 was relating to a separate incident than the one referred to by the licensees' advocate. The incident in Tab 6 involved an agent of the branch whose job it was to test compliance and when he entered the liquor store he was not asked for ID.

## **EVIDENCE**

These are the relevant facts as I determine them:

The licensees, JR and FR, took ownership of Buffy's Licensed Liquor Store ("store") and the adjacent pub in May 2004. They are involved in the day to day operation of both establishments, seven days a week. JR is mainly responsible for the pub and his wife, FR, is responsible for the store.

The store is located in the downtown area of Sooke, also referred to as the "up Sooke" area. As it is the closest and most convenient liquor outlet to the downtown area, youths frequent this area, and according to the R.C.M.P. Constable ("constable"), do their best to obtain liquor from Buffy's.

The clerk on duty in the store on the evening of November 17, 2006, had just completed her training. She had been trained by the licensee FR who had worked along side of the clerk for ten or eleven shifts. This evening was the clerk's twelfth shift. After staying with her during the busy time (8:30-9:00 p.m.), FR went home for supper leaving the clerk on her own for the first time.

The clerk testified she was trained to assess the look and demeanour of younger looking customers and to ask them for two pieces of ID. She said that younger customers appear to have no confidence, shuffle their feet and look down. The clerk said she does not serve impaired customers and is trained to look for slurred speech and fumbling. She had recently completed the "Serving it Right" course. FR testified she considered the clerk well trained and would not have left her alone otherwise. She said the clerk was an excellent and reliable employee.

Approximately one hour after licensee FR left, several young males entered the store. The clerk determined they were intoxicated and refused to serve them. She testified they were behaving badly and swearing but did not threaten her. A customer waiting in line told the youths they were not going to be served. After they left, one or two returned and looked like they were going to take a case and leave without paying. The incident lasted approximately 20 minutes. The clerk did not call the licensees or the R.C.M.P.

When the youth RB entered the store, the clerk asked him for ID. The youth informed her he had lost his wallet and commented that she seemed new and he had been in the store many times before – that everyone knew him. At the hearing, the youth admitted this was not true, but said this to persuade the clerk to sell him liquor. The clerk, making no further inquiries, sold him two cases of beer and two bottles of rum.

The youth left the store and was confronted by an R.C.M.P. Constable ("constable") who recognized him as a person who knew how to present himself as not being under age. I found the constable to be a credible witness. She is an objective third party and her testimony was consistent and straightforward. The constable was returning to the pub to speak with the licensee after resolving an earlier incident. It was approximately 10:30 to 11:00 p.m., when the constable arrived and there were no other youths or R.C.M.P. officers outside.

The constable called to the youth and he attempted to leave. She caught up with him, and placing her hand on his shoulder, took the youth back into the store. The constable instructed the youth to place the liquor on the table at the back of the store. When she asked him his name, the youth gave her three false IDs. He said he gave false names until he figured out that lying was not working out, and then gave her his proper name. The youth also told the constable that the liquor did not belong to him. The constable confirmed with the clerk that the youth had indeed purchased the liquor.

Although the youth seemed restrained and answered briefly to the questions asked of him, I found his testimony straightforward and consistent with that of the clerk and the constable, in that he acknowledged lying to the clerk and giving false information to the constable. The youth also testified he was intoxicated when he entered the store. He said he had consumed approximately 7-8 beers earlier in the evening.

The constable testified that the youth's demeanour was similar to her encounters with him on previous occasions in that he was intoxicated, argumentative and uncooperative. She observed him swaying and she smelled liquor on his breath. Notwithstanding the clerk's evidence that the youth was not intoxicated, I find, on a balance of probabilities, the youth was intoxicated when he entered the store. The constable is an experienced and objective third party and her observations were corroborated by the youth himself.

The constable arrested the youth for obstruction, and by the time she left the liquor store with the youth, there were other officers outside the store. The youth was handcuffed and searched by the constable's male partner. The youth's brother who was outside informed the constable of the youth's full name and date of birth.

While transporting the youth home the constable heard calls on the radio regarding other youths at Buffy's, and deciding she was needed at Buffy's as backup, released the youth without charge. The constable said that underage drinking is a huge problem and she was concerned that an underage youth was able to purchase \$70 worth of liquor.

At the end of her shift, the clerk informed FR of the incident and the licensee informed her husband later that evening.

Licensee JR testified that when he and his wife first took over the establishment, he met with a local R.C.M.P. officer. He said he wanted to have a good working relationship with the R.C.M.P. and considered that he and his wife get along well with them. The licensee said that his management skills as a communications officer in the air force, in charge of a large group of personnel, were applicable to managing Buffy's. His responsibility was to providing a safe and harassment free environment and if someone made a mistake, he was obliged to make sure it did not happen again.

JR also testified he had no discussions with the liquor inspector or was aware there would be enforcement action before receiving the Contravention Notice in January 2007. He said if he had been advised sooner, he could have provided a video of the incident as there are three cameras in the store.

FR confirmed that she was involved in all aspects of the clerk's training. She also confirmed that she left between 8:30 and 9:00 p.m., that evening and when she returned (by 10:45 p.m.), the constable had left. When the clerk informed her about the incident at the end of her shift, she did not think there was an issue and did not call the R.C.M.P constable.

After meeting with the liquor inspector in January 2007, the licensees met with the staff. They instructed the staff to read the Liquor Primary Licence Terms and Conditions and made the "Serving it Right" course and manual available to them.

The licensees have an operator's manual that has been read in part by the licensees and manager, but not staff. Information is shared with staff verbally on an ongoing basis. There has been no Policy and Procedure Manual for staff members and policies have been communicated to staff verbally by the licensees. In the licensee's book of documents (Exhibit No. 3) are agendas for four staff meetings held in 2004 and 2005 (notes 2-5). Two meetings in January and August 2005, deal with the issue of checking ID. Four policy letters are also included (notes, 7-10). Three letters are dated after the incident in the store. While the policy letters mainly focus on pub issues, the policy letter dated January 26, 2007, addresses ID checking and the letter dated February 1, 2007, addresses incident reporting. Four staff signed the January 15, 2007, letter and five staff signed the January 26, 2007, letter. Nine staff also signed a page of the Liquor-Primary Licence Terms and Conditions outlining the penalties for contraventions (note 6). Recently the licensees' advocate prepared and provided a Policy and Procedure Manual for Buffy's. The bar has always kept a log to record discussions and incidents and the licensees have now implemented an incident log in the store. Two digital radios have also recently been added to improve communication. Also included in Exhibit No. 3 are branch posters setting out ID requirements, mounted on the outside door and counter of the store.



The liquor inspector who was involved in the case and prepared the documents is no longer an inspector with the branch and has moved away. The liquor inspector who gave evidence at the hearing testified that he had been involved in a previous incident at Buffy's on December 2, 2004 regarding staff requesting only one piece of ID. He issued a Contravention Notice on January 6, 2005 (Exhibit No. 1, Tab 6). The inspector was also involved in a Compliance meeting with the licensees on November 24, 2004 (Exhibit 1, Tab 7).

## **SUBMISSIONS**

The licensees' advocate submits there were mitigating circumstances that can explain the clerk's actions. He says she made a mistake. She was new, her first shift alone and was intimidated by the youths.

He also submits the due diligence exercised by the licensees is sufficient to excuse them from any enforcement action as a result of the action of their employee. The advocate says the licensees are good corporate citizens and care about the community and, although the pub and store are inspected on a routine basis, there are few problems. The advocate submits that the licensees have a desire and willingness to comply with the *Act*.

The advocate directed me to portions of two Supreme Court of BC cases that address the defence of due diligence in liquor cases. In *Palomino's v. British Columbia (Liquor control and Licensing Branch)*, 2007 BCSC 17, the court found the licensee continued to stress the importance of complying with the laws relating to minors by written instructions to its employees, accountability agreements, and ongoing meetings with staff. In *Small House Ventures Inc. d.b.a. Lucky Bar v. The General Manager, Liquor Control and Licensing Branch*, 2006 BCSC 1792, the court emphasized the licensee's policies and training must be taken into account in an inquiry into the defence of due diligence.

The advocate submits that if due diligence does not apply to this case there is sufficient evidence to show that the licensee's voluntary compliance is more than sufficient. He says the licensees have learned from the incident and acknowledge that additional work is required. They have a desire and willingness to comply with the *Act* and have acted on all advice given to them.

The advocate referred me to the December 20, 2005, decision of the General Manager in *Irish Times Pub Co. Ltd. dba Irish Times Pub & Oyster Bar* (EH05-112). In that case, although a contravention was proven and the defence of due diligence failed, the adjudicator found that no penalty was required to ensure voluntary compliance. The licensee responded immediately to the recommendations by the branch and implemented timely changes to address any likelihood of further contraventions. The adjudicator also found that but for an irregularity; enforcement action might not have been pursued.

### **Branch**

The branch advocate submits the clerk was the directing mind of the licensee at the time of the contravention, as she was the person in charge and the contravention was within her sphere of influence. He says that although the licensees submit there are mitigating circumstances such as the clerk being intimidated, the evidence makes this position untenable. The evidence shows that the youths left a full hour before the youth entered the store, so the clerk could not have still been flustered or under duress. He says when she asked the youth for ID and he talked her up, she sold him the liquor.

The branch advocate submits the licensees have taken the defence of due diligence too far. It is the due diligence up to the time of the incident that is relevant and what took place after goes to penalty. With respect to due diligence, there was no staff manual in place, the clerk was not tested for her knowledge, the operational guide was foreign to staff and staff meetings were not common until

August 2005. The advocate referred me to the July 28, 2004, decision of the General Manager in *Haney Hospitality Ltd. dba Haney Motor Hotel*, (EH03-170) for a discussion of the factors that would support a finding of due diligence. The advocate submits that the licensees have not claimed what factors can be reasonably expected or should have been done. He submits that voluntary compliance would mean that the licensees had reviewed policies, retrained staff and especially retrained the clerk. He says the licensees have taken the position, "it happened."

In recommending a penalty of \$5,000, the branch advocate suggests that policies may not have been sufficiently communicated to staff and that a special degree of vigilance is required. He submits the licensees' practise fell short of this and a strong message is needed to ensure voluntary compliance.

## **ANALYSIS AND DECISION**

Due diligence is a complete defence to contraventions under the *Act*.

The *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC 248, has set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

Regarding the first criteria, the court in Plaza clarified that the directing mind need not be an officer or director of the licensee:

[27] ... Such person need not be an officer or the director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee

I find the clerk involved in the incident was the directing mind of the licensee in relation to that part of the operation in connection with the contravention. She had completed her training and this was her first shift alone. Licensee FR assisted until the end of the busy time and had left before the incident occurred. The clerk acknowledged she was the person in charge of the store and the one to check ID that evening and this was not challenged.

The second criteria involves a two part analysis first articulated by Dickson J. in *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 QL 21. Essentially two questions must be asked:

1. Did the licensee implement adequate training and other systems to prevent the contravention, and
2. Did the licensee take reasonable steps to ensure the effective operation of the system?

While there may have been circumstances that impacted the clerk that evening, I am not persuaded they sufficiently account for her actions. She may have been new but her training was complete and she felt comfortable being left alone for the first time. FR considered the clerk well trained and said she would not have left her alone otherwise.

I find the clerk's feelings of upset and intimidation because of the youths coming into the store was likely not a significant factor in her decision to sell liquor to the youth RB. She may have felt upset by the youths, but was not so upset that she felt it necessary to call the licensees who were close by, or the R.C.M.P. for assistance. Although feeling intimidated by them the clerk was able to remain firm in her decision not to sell liquor to them.

I also find the clerk's evidence unreliable with respect to the timing of events. She testified that one of the reasons she felt intimidated when RB entered the store was that he talked to the other youths and she thought they were all together. However, the constable did not observe any other youths when she arrived at the establishment as RB exited the store. When the clerk was asked in cross examination if the group left one hour before the police came in with the youth, she said she wasn't sure. After considering the evidence, I conclude the youths may not have left an hour before RB arrived, but they had left well before he entered the store.

The licensees' advocate referred me to the General Manager's August 31, 2006, decision in *671643 B.C. Ltd. dba Sauce Restaurant* (EH06-009). In that case, the licensees were found not to be liable for the actions of their server who failed to check for proper ID. The server, new and fully trained, got flustered and forgot to ask the underage patrons for a second piece of ID. The server's mistake was not attributed to the licensee, who had exercised due diligence. The General Manager found that the server, who was not the directing mind of the licensee, also took full responsibility for her mistake and her evidence was consistent with other witnesses. The present case is different in that the clerk is the directing mind of the licensees at the time of the contravention, and I find she did not take full responsibility for her actions.

I find the clerk chose to accept the youth's story and sell him liquor rather than diligently follow through in her duty to make sure he was not underage, thus indicating that at least in this instance, a lack of understanding of the importance of not selling liquor to an underage youth.

While I accept that the licensees are hardworking and genuine in their desire to operate a well-run establishment, I find they have not demonstrated on a balance of probabilities that they took all reasonable steps to prevent the contravention.

What steps might be reasonable depends on the particular circumstances of each establishment. The licensees have not suggested what might be reasonable for their establishment. However, a review of previous decisions indicate reasonable steps may include the implementation of systems such as proper training and ongoing process to ensure staff know and understand the legislation and policies, an up-to-date Policy and Procedure Manual for staff reference, regular staff meetings, incident logs and a system for review of important issues.

In this case, I acknowledge that the presence of the licensees at the establishment everyday is an advantage, both as a resource to staff and maintaining order. The clerk was trained by the licensee and completed the SIR course. However, there was no evidence of what systems, if any, were in place to test her knowledge of the legislation and policies, and how well she understood their importance. I find the clerk's actions indicate that the system in place at the time of the contravention was likely inadequate. On her first shift alone the clerk sold liquor to a customer who she assessed as possibly being underage. She determined the youth was not impaired when in fact he was, and did not contact the licensees right away after the contravention, indicating to me she did not fully understand the seriousness of selling liquor to an underage youth.

There were other systems I consider reasonable for this establishment that were not implemented. There was no Policy and Procedure Manual in place for staff to review on their own initiative. Although the licensees purchased an operations manual, they acknowledged this was too technical for staff and they and the manager communicated information to the staff verbally. Except for reading flyers, the clerk relied on the licensees for information essential to her duties. There was also no incident logbook in the store, an important tool for communication and review to help prevent similar contraventions. The evidence indicates that staff meetings are infrequent and relate mostly to pub matters. No minutes or record of attendance are kept. Most of the policy letters in evidence were dated after the contravention, only one was written prior to the contravention and this was for pub staff.

I therefore find the licensees have not established, on a balance of probabilities, the defence of due diligence and that they have contravened section 33 of the *Act*.

## **PENALTY**

Pursuant to section. 20(2) of the *Act*, having found that the licensee has contravened section 33 of the *Act*, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound by the minimums set out in Schedule 4 of the *Liquor Control and Licensing Regulation* ("Regulation").

However, I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents. The range of penalties for a first contravention of section 33 of the *Act* pursuant to the *Regulation*, Schedule 4, section 2(2), is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

I acknowledge that given the location of the establishment and its convenience to underage youths who are looking to purchase liquor, there have been few problems and that the licensees are cooperative with the R.C.M.P. I also acknowledge the licensees have acted on advice given to them. After meeting with the liquor inspector in January 2007, the licensees held a staff meeting and made the SIR course available to all staff. They have recently implemented a Policy Manual for staff and an incident log in the store. The licensees also have added two digital radios to improve communication.

However, voluntary compliance requires more than a response to enforcement action and there is no evidence the licensees took steps on their own initiative after the contravention to review the clerk's knowledge and understanding of her responsibilities or review the effectiveness of their systems to reduce the likelihood of this happening again. Indeed, the evidence indicates the incident produced no response from the licensees who did not think there was an issue. This was an



opportunity to review training methods, incident reporting and communication and the video could have provided an important tool to review what happened, both for the licensees and the clerk.

I find a penalty is warranted to ensure voluntary compliance in the future and that the minimum monetary penalty of five thousand dollars (\$5,000) is appropriate in the circumstances.

## **ORDER**

Pursuant to section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of five thousand dollars (\$5,000) relating to Licensee Retail Store Licence No. 195173. The monetary penalty must be paid no later than the close of business July 6, 2007.

[ORIGINAL SIGNED]

"Kathleen McIsaac"  
Enforcement Hearing Adjudicator

Date: June 15, 2007

cc: Sooke R.C.M.P

Liquor Control and Licensing Branch, Victoria Headquarters  
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional office  
Attn: Shahid Noorani, Branch Advocate