



**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:	Central City Brewing Company Ltd. dba Central City Liquor Store 190-13450 102 nd Avenue Surrey, BC V3T 5X
Case Number:	EH07-152
For the Licensee:	Murray Lott
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	K. McIsaac
Date of Hearing:	February 12, 2008
Place of Hearing:	Surrey, BC
Date of Decision:	April 23, 2008

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Central City Brewing Company Ltd., operates Central City Liquor Store (liquor store) under Licensee Retail Store Licence No. 195237. It also is licensed to operate a liquor primary establishment and a brewery. The store is located in Surrey, BC, and is licensed to sell packaged liquor from 9:00 a.m. to 11:00 p.m., seven days a week. The licence is subject to terms and conditions that include the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia" and contained in the licensee retail store agreement between the licensee and the province.

ALLEGED CONTRAVENTION

By Notice of Enforcement Action dated November 5, 2007, the Liquor Control and Licensing Branch (branch) alleged that on September 4, 2007, at 12:45 p.m., the licensee contravened the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act), section 33, by supplying liquor to a minor.

The branch recommends a monetary penalty of \$7,500.00. This is the minimum penalty for a first contravention of this type as set out in Schedule 4, Item 2, of the *Liquor Control and Licensing Regulation, B.C. Reg. 244/2002* (Regulation).

RELEVANT STATUTORY PROVISIONS

Section 33 (1) of the *Act* reads:

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 admits that liquor was sold to a minor on September 4, 2007, contrary to section 33 of the *Act*. However, the licensee relies on the defence of due diligence to exonerate it from a finding of a contravention under the *Act*.

Therefore, the issues in this case are:

1. Did the licensee exercise due diligence in preventing the sale of liquor to a minor? and, if not,
2. What penalty, if any, is appropriate in the circumstances?

EXHIBITS

- | | |
|----------------|---|
| Exhibit No. 1: | Branch's book of documents |
| Exhibit No. 2: | Violation ticket issued to the minor, Sept. 4, 2007 |
| Exhibit No. 3: | Violation ticket issued to minor #2, Sept. 4, 2007 |
| Exhibit No. 4: | Violation ticket issued to minor #3, Sept. 4, 2007 |
| Exhibit No. 5: | Empty can of Molson Canadian 6.0 Cold Shots |
| Exhibit No. 6: | Licensee's package of documents |

EVIDENCE

I heard evidence from the following witnesses: the R.C.M.P. Constable, Safe School Liaison, minor, minor #2, liquor inspector, operating partner of the licensee and a sales clerk and manager of the Central City Liquor Store.

There is no dispute regarding the basic events of September 4, 2007, the day the contravention took place.

On September 4, 2007, the students were dismissed at 12 noon, as it was the first day of school after the summer holiday. It was also the minor's seventeenth birthday. To celebrate, the minor, minor #2 and minor #3, the driver, went to the liquor store to purchase beer. The minor entered the store alone and purchased two packs (16 cans) of Molson Canadian 6.0 Cold Shots. He was in the store for only a few minutes and was not asked for identification. The youths returned to the school parking lot where other students in two vehicles joined them.

At that time, the Safe School Liaison was just leaving the school. She operates as a liaison between staff, parents and students on matters of safety. The school liaison looked over at the parking lot and observed a student throwing a silver can into the bushes. As she went over to tell the student to retrieve the can, one car attempted to leave and she signalled it to stop. There were two female students in the front and two male students in the back seat. When the school liaison saw two opened beer cans, one at the feet of each male student, she immediately called the school administrators for assistance.

An R.C.M.P. constable also happened to be at the school that day to introduce herself to the staff as the R.C.M.P. school liaison officer. The constable joined the group to offer her assistance. The students were interviewed, their cars searched, and the school liaison administered a breathalyser test to each of the youths. It was determined that the minor and minor #2 were the only youths consuming liquor. The constable issued tickets to both students for consuming alcohol in a public place. The school also reprimanded and suspended the two youths from school for three days. The driver of the vehicle, minor #3, also received a ticket from the constable for having open liquor in her vehicle and was reprimanded and suspended from school.

The constable advised the licensee of Central City Liquor Store that a minor had purchased liquor and issued a warning.

The liquor inspector became involved on September 17, 2007, after a parent of a student at the school complained to the branch that Central City Liquor Store sold liquor to a minor who later shared it with her son. The liquor inspector contacted the operating partner (partner) of the licensee who admitted that a minor had been permitted to purchase liquor on September 4, 2007. However, after viewing the surveillance tapes, the partner and managers estimated that the youth looked older than his age and older than 25 years old. The inspector advised the partner that he would be issuing a contravention notice for supplying liquor to a minor and that he would be proceeding with a recommendation of enforcement action.

At the hearing the operating partner (partner) of the licensee presented evidence in support of the defence of due diligence.

The partner testified that although the security systems in place are primarily to prevent theft, usually by minors, they also serve to discourage minors from entering the store. Security tags on the liquor containers and metal detectors at the door make it difficult for a person to leave the store without paying for the liquor. Machines at the checkouts scan drivers' licences for their validity and the information is shared with other liquor establishments and the RCMP.

The partner testified there are seven security video cameras around the store that he and the managers monitor frequently. There are video monitors on his desk at the office and at his home allowing him to view the store at any hour of the day. He said he wants the staff to know he may be watching at any time. From his glassed office he can also observe half the store.

The partner testified that they hired two managers, one with 22 years experience in the liquor distribution branch, to ensure there would not be a wide learning curve for staff. The managers hire and train employees and are on the floor at all times to supervise and monitor the clerks and to inform them of changes in policies and procedure. The clerks have taken the Serving it Right course. He said there is no policy manual for the store but there are many small meetings and constant attention to detail.

The operating partner expressed regret that the clerk, a typical bright, conscientious employee, made a mistake. After viewing the video, he agreed with the clerk's assessment that the minor appeared over 25. He said the clerk only had a few minutes to observe him and make a judgment call and the minor was over 6 feet and sported a full beard. Having seen the minor, the partner said he was not sure there was a procedure that could capture this situation. He said the licensee had done all they could do to filter out such a person and this minor still got through. The partner said, "We are constantly trying to change the mousetrap regarding minors and theft."

The store manager with 22 years experience as manager of a liquor distribution branch testified. He said he is in charge of hiring and training and, as manager; he is responsible for the actions of the staff. On the day of the incident he and the general manager were in the store along with three sales clerks. The clerk who sold the liquor to the minor was well trained and experienced and one of the most diligent employees. She had taken the Serving it Right course and had been placed in a supervisory role. He said the clerk is no longer employed at the liquor store.

The manager testified that staff met together every month to six weeks to review basic policies and clerks are informed of any new developments and proposed plans. He said there is no individual store policy manual; however, the employees are constantly reminded about safety, shoplifters and minors. One or both of the managers are available at all times to assist clerks with questions or problems regarding the validity of a customer's ID. He recently wrote a code of conduct setting out the rules that is read and signed by all staff.

The manager said the video surveillance system is elaborate and cameras can zoom in to watch staff or anyone stealing liquor, and videos are monitored frequently. Videos are on a 2-week cycle and then re-recorded. The video on the day of the incident was also recorded over as it was thought the contravention notice was only a warning.

After the incident, the managers had discussions with the staff and they were required to sign a letter stating that if they sold to a minor they would be terminated.

The clerk who testified was not the clerk who was involved in the incident and is a relatively new employee. She testified that at least one of the two managers or supervisors are on the floor at all times. They are available to assist with problems of security or identification. Although she was not required to write a written test after her training, the managers regularly quiz her on proper identification.

The clerk said she understands that although the age requirement for identification has changed, she must ask for identification from anyone that looks under the age of 25. She signed a letter recently stating that failure to do so will result in her immediate dismissal.

The clerk testified that if a group of people come into the store they are all asked for identification and if one is a minor, no person in the group is sold liquor. This is to ensure that liquor is not given to the minor in the group. She said ID signs are posted at each till and in front of the door that are visible to everyone and the new code of conduct is posted on bulletin board.

SUBMISSIONS

Counsel for the licensee submits that at the time of the incident, the licensee had done all it could do to prevent the clerk's error of judgment and there were no further steps they could reasonably have taken to prevent this contravention. The mistake was personal to the clerk and no other person had a direct opportunity to prevent it. Counsel said that unless every person is asked for identification, errors such as this are inevitable and this was a reasonable mistake given that the minor looked older.

ANALYSIS AND DECISION

The defence of due diligence, if successful, will completely exonerate the licensee from having contravened the *Act*. The licensee must demonstrate, on a balance of probabilities, that it took all reasonable steps to prevent the contravention.

In the leading case of *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 p. 1325, Dickson J sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence, see *Tesco Supermarkets v. Nattras* [[1972] A.C. 153].

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC (para 25), set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*.

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.

The court in Plaza clarified that the directing mind need not be an officer or 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 of 'directing mind and will' of the licensee.
(para 27)

Therefore, the licensee must establish on a balance of probabilities that the clerk was not the directing mind at the time of the incident and, that it

- a) implemented adequate training and other systems to prevent the contravention, and
- b) took reasonable steps to ensure the effective operation of the system.

I find the clerk was not the directing mind of the licensee. Clearly, the directing mind of the licensee at the time of the incident, were the two managers who were present that day and who supervised the clerks. The managers were in charge of the day-to-day operation of the store and responsible for the actions of the clerks.

The branch considers several factors in assessing whether the licensee took reasonable measures to prevent the contravention. These include the training of employees, whether there are written tests, ongoing testing or spot checks of staff, regular meetings, written policies and procedures and posted notices. The branch may also consider whether there were further steps the licensee could have taken to prevent the contravention.

I found the evidence of the operating partner and manager consistent and straightforward and accept their testimony regarding the steps taken by the licensee to prevent the contravention. Their evidence was not challenged.

The clerk, in her testimony, indicated to me that she was well trained and understood her responsibility with respect to minors, although I am mindful that she is a new employee and was not employed by the licensee at the time of the incident.

Although the clerk involved in the incident did not testify, I am satisfied she was adequately trained to identify and deal with underage customers. The clerk had taken the Serving it Right course and received her initial training from experienced managers who also provided ongoing supervision and were available to assist with questions regarding identification. I accept that she was an experienced employee and being placed in a supervisory position speaks to her level of competence. Although the clerk was not administered a written test

at the end of her initial training, I find the ongoing testing and supervision by the managers was sufficient to ensure that she knew and understood and continued to understand what she had learned.

While a policy manual is an important indicator of whether a licensee's systems in place are reasonably adequate to prevent a contravention, I find the role of the managers in this particular case, provided a reliable and adequate resource for the clerks. The evidence satisfies me they are knowledgeable and experienced regarding policy and procedure and, as well as having regular meetings with staff, one or both managers are always present to advise and supervise the clerks and monitor their performance. On the day of the contravention both managers were on duty along with three clerks.

I find the driver's licence scanning machines and policy to require ID from anyone who appears under 25 years of age, also reasonable steps taken by the licensee to prevent this type of contravention. Although licensees are no longer required to ask for identification from any person who appears to be under the age of 25, they have a legal obligation not to sell liquor to minors and must establish the policies and procedures necessary to prevent the sale of liquor to minors in its establishment.

The licensee's security systems also serve to indirectly prevent the sale of liquor to minors. The security tags on liquor containers, extensive video surveillance and monitoring system serve as a general deterrent to those persons who are intent on stealing liquor and presumably this will include some minors.

Given the totality of the evidence in these particular circumstances I find, on a balance of probabilities, the licensee's systems in place at the time of the incident, were adequate and reasonably effective to prevent this type of contravention and ensure the effective operation of the system.

While the appearance of a minor is not, in itself, a defence to this type of contravention, I find the clerk's assessment that the minor appeared to be much older than his age, was reasonable. The R.C.M.P. constable agreed that the minor looked older than his age. The operating partner and managers, after reviewing the video of the incident, agreed with the clerk's assessment that he looked older than 25. When the minor testified I also had an opportunity to observe him and concluded he could reasonably be mistaken as being much older than his age.

Accordingly, I find the licensee has succeeded in establishing the defence of due diligence and did not contravene section 33 of the *Act* on September 4, 2007.

The facts of this case underline the seriousness of selling liquor to minors who may not have the maturity to make responsible decisions regarding alcohol. The minor in this case purchased liquor, not just for his own use, but also to share with other minors. If not for the intervention of authorities, there may have been a more serious outcome.

Original signed by

K. McIsaac
Enforcement Hearing Adjudicator

Date: April 23, 2008

cc: Surrey RCMP Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Olubode Fagbamiye, Branch Advocate