



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING 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:	Lansdowne Lumber Marketing Ltd. dba Malone's Garden City Liquor Store 400-9100 Blundell Road Richmond, BC V6Y 3X9
Case:	EH11-166
For the Licensee:	Richard Fernyhough Sugden, McFee & Roos LLP
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	April 3, 2012
Place of Hearing:	Vancouver, BC
Date of Decision:	April 18, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Lansdowne Lumber Marketing Ltd, operates Malone's Garden City Liquor Store located in Richmond, BC. The licensee holds Licensee Retail Store Licence No. 193145 for the operation of a licensee retail store, i.e., a private liquor store, with liquor sales permitted from 9:00 a.m. to 11:00 p.m. seven days per week. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated November 28, 2011. The branch alleges that on November 17, 2011, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is a \$7,500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

For a first contravention of this type, Item 2 provides a range of penalties: a licence suspension for ten to fifteen days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS

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

Supplying liquor to minors

33 (1) A person must not

(a) sell, give or otherwise supply liquor to a minor,

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

1. Branch's book of documents, tabs 1 – 13.
2. Licensee's book of exhibits.

At the commencement of the hearing the licensee conceded that on November 17, 2011, liquor was sold to a minor as alleged.

EVIDENCE – The Branch

The branch presented two liquor inspectors as witnesses, **A** and **B**. The inspectors testified that on November 17, 2011, they were part of a team conducting inspections of liquor stores under the "Minors as Agents Program" (MAP). In 2011 the branch undertook MAP to monitor compliance with the provisions of the Act prohibiting the sale of liquor to minors by licensed establishments. The program involves hiring minors to test whether individual licensed establishments are willing to sell liquor to a minor. To ensure that all licensees are aware of the program and of their responsibilities under the Act the branch notified all licensees that minors under the supervision of a liquor inspector would be visiting government and private liquor stores and attempting to purchase liquor.

Inspector A

On August November 17, 2011 at approximately 7:50 p.m. the team arrived at Malone's Garden City Liquor Store and parked nearby. The minor agent entered the liquor store at approximately 7:56 p.m. followed shortly by Inspector A. Inspector A testified that the liquor store was well lit and he could see throughout the store. There were two employees present; one working at the front cash till, the other was seated behind a counter at the back of the store. He did not identify himself as a liquor inspector to the staff on duty. There were no other customers in the store at the time.

Inspector A observed the minor agent proceed to the cooler, take out a six-pack of beer and proceed to the cashier. The cashier made eye contact with the minor agent, engaged him in conversation about the weather and completed the sale of the beer to the agent. The agent left the store with the beer, followed shortly by the inspector. They returned to their vehicle and documented the sale/purchase transaction. The inspector made his notes (exhibit 1, tab 8b) and the minor completed the Minor Agent Observation Form and Statement (exhibit 1, tab 8c and d).

The inspector testified that he did not recall seeing any signage regarding the checking of identification in the liquor store. He identified the signage depicted at exhibit 2, tabs 1, 4 and 5 as being that produced by the branch for licensees. It is the branch expectation that licensees or their staff will check two pieces of identification to verify age. This is a term and condition in the Guide to Licensees issued by the branch (exhibit 1, tab 6, p.21). He agreed that if the signs were posted at the cash tills they would be visible to store staff and to customers. He agreed that it would be a good policy for the licensee to require two pieces of identification from persons appearing under 25 years of age as depicted in the signage at exhibit 2, tab 10.

He testified that he was not familiar with the documents at exhibit 2, tabs 3, 7 and 8 regarding suspensions and monetary penalties for selling liquor to minors. He agreed that if these documents were read by staff they would understand the consequences of selling liquor to a minor. He testified that the branch does not require a licensee to be present during all hours of operation. The licensee is however responsible for the operation of the establishment and is responsible for training staff. He testified that liquor inspectors work with licensees to ensure they are aware of their responsibilities. Liquor inspectors are not business advisors for licensees. It is up to a licensee to determine how to ensure compliance. The Serving It Right Program Guide provides examples of policies that a licensee might incorporate into its operation (exhibit 1, tab 7). Signs are useful tools for licensees but must be acted on to be effective. He agreed that a licensee cannot guarantee the behaviour of its employees. It is possible that an employee could do the opposite of what he/she was told.

Inspector B

Inspector B testified that after the minor agent and Inspector A returned to the vehicle, he and the regional manager [who did not appear as a witness] entered the liquor store. It was then approximately 8:20 p.m. He advised the cashier that he had sold liquor to a minor, and he issued a contravention notice (CN) to him. The cashier was noticeably upset. The principal of the corporate licensee (witness C) telephoned the inspector the following day. He was upset that liquor had been sold to a minor. He told the inspector that he had learned about the incident later that night and had immediately fired the cashier.

The inspector prepared a NOEA with a recommendation for a \$7,500 monetary penalty (exhibit 1, tab 1). The inspector was concerned that selling liquor to a minor is a serious public safety issue. The inspector considered that the minimum monetary penalty was sufficient in these circumstances to ensure future voluntary compliance.

The inspector testified that the licensee has operated a licensed establishment in Richmond for over 30 years. He has been the inspector responsible for the Richmond area for over 10 years and knows the licensee as a good operator with no enforcement action taken by the branch during that time. The licensee is co-operative and will contact the inspector if there are any matters upon which he is unclear.

EVIDENCE – THE LICENSEE

Witness C

Witness C, testified that he is the principal of the corporate licensee. He has been the licensee for the liquor store for approximately 11 years and for a pub located across the street since 1978. There have been no previous enforcement actions for the liquor store. He has always maintained a good working relationship with the area liquor inspectors. The liquor store has eight employees. It is managed by himself, family members and a long term employee. They also have other senior and junior employees. They follow all the guidelines required by government.

New employees are scheduled to work with senior staff for at least their first 10 days. If they perform satisfactorily during that time, they are able to work the cash till on their own. They are told to look for proper identification, intoxication and provide customer service. The focus is mostly on checking identification. Senior staff always makes sure that new employees are checking identification. He referred to the document at exhibit 2, tab 10 which advises customers and staff of the need to check for proper identification for persons appearing to be under 25 years of age. This forms part of staff training and is posted at the cash tills and at the store entrance. Staff members are told not to be shy about checking identification that they should check anyone appearing to be under 25 and if in doubt to check even if the person seems to be older than that.

The signs depicted in exhibit 2, tabs 1, 4 and 5, reading "2 pieces of ID required" are posted at the entrance and at the cash tills for staff and customers to see. They form part of the training program. Signs reading, "Suspension and Monetary Penalty Signs", as depicted in exhibit 2, tabs 2, 3, 6 and 7, were received from the branch as part of the MAP program. They were required to be read by staff and staff signed off that they understood (exhibit 2, tab 3). They have been posted by the cash tills for staff to see.

Staff is told to focus on identification and to check the identification of all persons appearing to be under 25 years of age. Young staff are told to ask senior staff to check identification if necessary. They are told to check the customer's signature and to ask for their date of birth. If in doubt, they do not serve the customer. Fake identification is confiscated, and the person told to bring in proper identification in order to have it returned. Examples of seized identification are found at exhibit 2, tab 8. Sales are voided where the identification is fake (exhibit 2, tab 9). Staff meetings are held every two to three months. Staff is reminded about minors, what to look for and how to deal with them. It is a priority at every meeting.

Junior staff is scheduled primarily during day shifts when a manager is present. There is always a senior staff person on night shift to oversee the operation, to ensure that customers are asked for identification and to keep watch on the cash till. Security staff is scheduled for Fridays, Saturdays, long weekends and holidays. They will watch to see if employees are checking identification or may do it themselves.

He testified that he is aware of the MAP program, had informed his employees about it and told them to be certain to check identification. He will sometimes observe the store operations at home using the in-store security video system and will call the store if he sees a young person in the store.

The night of November 17, 2011, was a slow business night. The employee on duty at the time of the incident was a junior employee with about three month's experience. He had been trained by the senior manager and there was no doubt that he knew what to do. He had signed off on the notice regarding suspension and monetary penalty signs (exhibit 2, tab 3). There was a senior employee working that night as well who would have been stocking shelves at the time of the incident. He testified that he learned about the incident when he and the senior manager went to the liquor store after attending an event. He was furious when he learned what had occurred. The junior employee was immediately fired because he did not follow the rules and could not be trusted in the future. Staff is reminded every day to check identification.

He testified that he had obtained a "Serving It Right" (SIR) certificate many years previously and his staff had obtained SIR certificates. Questioned whether the junior employee making the sale to the minor agent had a SIR certificate, he responded that the employee had been given two to three weeks to obtain the certificate when he was hired. He thought that he might have been in the process of obtaining the certificate at the time of the incident. The employee had not as yet attended a staff meeting but would have been scheduled to attend the January 2012 staff meeting if he was still on the job.

Directed to the photo of the minor agent at exhibit 1, tab 9c, he agreed that he looked young and he would have requested that he produce identification.

He agreed that the training program is primarily on-the-job training and does not use a training manual. Written materials used are the aforementioned signs regarding the checking of identification and the notice regarding suspension and monetary penalty signs. There are no written tests for employees upon completing their training.

Witness D

Witness D testified that he has been employed by the licensee for approximately 10 years and is currently the liquor store manager. He checks the identification of young appearing patrons and about seven or eight years ago he received a letter from the branch commending him for checking the identification of a young patron. He holds a SIR certificate.

The policy of the liquor store is not to sell liquor to minors and to check the identification of patrons appearing to be under 25 years of age. Signs to that effect are posted at the store entrance and the cash tills to be viewed by customers and staff. The signs are used in staff training. Staff is reminded daily about checking identification. Identification is examined to ensure that it is authentic. Fake identification is confiscated if it is possible to do so. Junior employees work with a senior employee who watches over what they are doing. Senior staff is reminded not to leave junior staff on their own. Staff meetings are held, but there is no written agenda nor are minutes recorded.

He hired the junior employee, who is the subject of the hearing. He told him to obtain a SIR certificate but is not certain whether he had done so prior to the November 17th incident. He trained the subject employee. The training lasted three to four days. The employee was told to make sure that customers were 19 years of age and to check the identification of all who appeared to be under 25. In the first few days of his training, a senior staff person worked with him at the till to ensure that he was checking identification. If a customer could not produce the two pieces of identification the customer was told that they could not sell him liquor. He was trained to look at the photograph on the identification to see that it matched the customer and to ask the customer for his postal code. He was told that if he was uncertain about the person, he was not to make the sale.

The employee understood the policy. He observed the employee once he had completed his training. On one occasion he saw him serve a person who appeared to be underage. He told the employee to check the individual's identification. He did and it was determined that the person was of age. He testified that before the November 17th incident, he had no reason to believe that the employee was not following what he had been told to do.

That night after the incident he talked to the senior employee and asked him why he let it occur. He said that he was stocking the beer coolers at the time.

SUBMISSIONS – the Branch

The branch advocate's submission is summarized as follows:

Section 33(1)(a) of the Act prohibits the sale of liquor to a minor. The elements constituting the contravention have been proven.

For the licensee to be duly diligent, the licensee must do all that is reasonable to prevent the occurrence of the contravention. The licensee must provide adequate training for staff and have a system in place to prevent the contravention. The licensee must take reasonable steps to ensure that the system is effective. Here the licensee failed to implement adequate training and an adequate system to ensure that its policies were acted upon. Having signs is not sufficient if they are not acted upon. No written tests were administered to the employee at the completion of his training. The employee did not hold a SIR certificate which is required for persons selling liquor.

The licensee failed to provide adequate supervision for an employee with only three months experience. The licensee failed to provide the employee with adequate guidance for when to check identification. The licensee's defense of due diligence must fail.

Selling liquor to a minor is a public safety contravention. The recommended \$7,500 monetary penalty is necessary to reinforce the need for voluntary compliance.

SUBMISSIONS – the Licensee

Counsel's submission is summarized as follows:

The alleged contravention is not one of absolute liability but of strict liability. The licensee is entitled to a defense of due diligence if it took all reasonable steps to prevent the contravention. If it did so, then it doesn't matter if liquor was sold to a minor. The test is not one of perfection.

Here, the licensee took all reasonable steps to ensure there were no sales to minors. The licensee had policy, both written and verbal, that staff must request two pieces of identification from all persons appearing to be under 25 years of age. Signage to that effect was used for training staff and to reinforce the policy. Staff was reminded on a daily basis. New employees had senior staff standing beside them to train them how to identify persons appearing to be under 25 years of age and how to request identification.

There is no question that the subject employee knew the policy. There is no evidence that giving the employee a written test would have been more effective, nor is there a requirement to do so. What more could the licensee have done? The branch has not suggested what else the licensee could be doing to prevent the sale to a minor. It is not unreasonable for a licensee to hire an employee without a SIR certificate and have him obtain it later. The alleged contravention is not for having an employee without SIR.

A licensee cannot have 100 percent total supervision of an employee. Here the employee was unsupervised for only the 10 to 15 minute period that the minor agent was in the store and the supervisor was in the back area doing other duties. It is not unreasonable that the subject employee, after being trained, was left to serve customers on his own.

Here is a licensee with over 30 years experience and a good relationship with the liquor inspector. The licensee is trying to do the right thing. A young employee disregarded the policy and training and sold liquor to a minor despite all the licensee's efforts. Firing the employee reinforced the licensee's policy. There were no previous incidents or problems.

Due diligence has been made out on the evidence presented.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and counsel for the licensee.

There is no dispute about the age of the minor agent or that he was sold liquor.

I find on a balance of probabilities that the evidence in this case is that an 18 year old minor entered and purchased beer (liquor) at Malone's Garden City Liquor Store on November 17, 2011. That on its face is a contravention of section 33(1)(a) of the *Liquor Control and Licensing Act*.

Due Diligence

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, 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.

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 248, sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 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 are, in fact, responsible for that part of the licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in *Plaza Cabaret* clarified that the directing mind need not be an officer or director of the licensee:

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. *If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person 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 'directing mind and will' of the licensee.*

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely *whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons.* That inquiry requires, of course, consideration of *who, on the*

premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.

(My emphasis in italics)

There is evidence that the licensee has a training process in place for new employees. New employees receive training in when to request identification from customers wishing to purchase liquor and some means of testing whether the identification is authentic by examining the photo, asking the customer for a date of birth or postal code. There is some evidence that employees received training from senior employees on how to determine which customers should be requested to produce identification. However there is no evidence presented on what a new employee is to look for in making an assessment that a customer was under 25 years of age. There is also some training about intoxication and customer service. Written materials are limited to signage provided by the branch regarding requesting two pieces of identification and signage related suspensions and monetary penalties. There is no evidence of a training or procedures manual which an employee could refer to, nor is there evidence of the use of other materials such as the Guide to Licensees published by the branch or the Serving It Right Program Manual provided to persons taking the SIR program. On the whole the training appears to be somewhat rudimentary in nature. Signage and reminders are a useful part of a licensee's program to promote compliance but cannot stand alone.

The licensee was aware that the subject employee did not have a SIR certificate when hired and failed to ensure that he obtained a certificate prior to commencing employment. The SIR program was developed by the hospitality industry to provide a consistent level of knowledge and training for people employed in licensed establishments. Section 13(4) of the Act and section 43 of the Regulations require that all employees selling or serving liquor require a SIR certificate. It is also a term and condition of the LRS licence pursuant to the Guide to Licensees.

At the time in question, two employees were working in the licensee's liquor store. The subject employee was the junior employee and was tasked with completing the sale of liquor to customers. The other, a senior employee was tasked with supervising the junior employee to ensure that he followed the licensee's policies. He was also tasked with other duties which included restocking the beer coolers. He, in the circumstances of this case, would be considered the directing mind of the licensee.

I have not had occasion to see the minor agent. He was not called as a witness. I have seen the photograph at exhibit 1, tab 9c. It is in colour and depicts a young man. What is obvious is that he is youthful in appearance, obviously well under 25 years old, and it would be prudent to require him to produce identification in order to make a purchase of liquor. Despite the youthful appearance of the minor, the subject employee completed the sale of liquor to him. He did not request identification nor otherwise satisfy himself that he was of legal age. The senior employee neither checked the identification of the minor agent nor ensured that the junior employee did so.

Giving consideration to the evidence as a whole, I find that the licensee's system of training and supervision was not sufficient to reasonably ensure compliance with the law relating to the prohibition against the sale of liquor to a minor.

In conclusion, I find that the licensee is not entitled to the benefit of the defence of due diligence.

In conclusion, I find on a balance of probabilities that on November 17, 2011, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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 for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Here, the branch, with a concern that minors are being permitted to purchase liquor in licensed establishments has developed a program aimed at determining whether this is occurring and has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives we have in this case an obviously youthful patron being able to purchase liquor without being asked to produce any proof of age. Permitting minors access to liquor can result in very serious consequences. All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions, and the seriousness of the contravention, I find that a penalty is necessary to ensure future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulations provides a range of penalties for a first contravention of this type. The branch has proposed the minimum monetary penalty suspension for a first contravention of this type. In the circumstances here I find that the minimum monetary penalty of \$7,500 is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the General Manager of the Liquor Control and Licensing Branch on or before May 22, 2012.

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

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: April 18, 2012

cc: Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate