



**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

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|----------------------------------|---------------------------------------------------------------------------------|
| Licensee: | 0905184 B.C. Ltd. dba Shack Vernon 2933 B 30 Avenue Vernon, BC V1T 5A7 |
| Case: | EH12-001 |
| For the Licensee: | H. Michael Hofbauer |
| For the Branch: | Olubode Fagbamiye |
| Enforcement Hearing Adjudicator: | Edward Owsianski |
| Date of Hearing: | Written Submissions |
| Date of Decision: | June 22, 2012 |

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, 0905184 B.C. Ltd. operates Shack Vernon, a restaurant located in Vernon, BC (the licensed establishment). The licensee holds Food Primary Licence No. 304507 for liquor sales at the licensed establishment from 9 a.m. to Midnight seven days per week. The licensed establishment has a maximum capacity of 125 persons. As a restaurant it may have minors on the premises. Minors are not however, permitted to be served nor to consume liquor. 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 March 14, 2012. The branch alleges that on December 30, 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)*).

Item 2 provides a range of penalties for a first contravention of a licence suspension for 10-15 days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee does not dispute that the contravention took place, just the penalty proposed. It was agreed that this hearing would take place by way of written submissions.

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 written submission dated May 17, 2012 with covering email of May 24, 2012.

EVIDENCE & SUBMISSIONS

The branch's evidence and submissions are summarized as follows:

On December 30, 2011, at approximately 9:00 p.m. three liquor inspectors and a police officer entered the Shack Vernon food primary establishment. They observed two female patrons seated at a table, one (the subject patron) appeared to be very young. There were two glasses in front of each patron. One glass appeared to contain water, the other a bluish liquid which upon subsequent analysis was determined to contain beverage alcohol.

One of the liquor inspectors identified himself as a liquor inspector to the two patrons and requested their identification. One produced valid identification showing that she was of legal drinking age, the other, the subject patron, said that she had recently lost her identification but that she was 19 years old. She said that she was drinking vodka. At this point an employee of the establishment interceded and told the inspector, "It's okay. I know them. She lost her ID."

The inspector asked the subject patron for her name. She provided her name and admitted that she was only 18 years of age and provided her correct birth date as being July 31, 1993. The inspector then spoke with the employee present who advised that she was the person in charge of the establishment at that time. She stated that the other female patron had ordered two drinks, she drank one then ordered another and that the underage patron must have taken the other drink.

A NOEA was prepared with a recommendation for a \$7,500 monetary penalty. The inspector provided several reasons for his recommendation. He was concerned that selling liquor to a minor is a serious public safety issue. The employee in charge of the establishment was less than cooperative, attempting to deflect the inspector's attempt to obtain the subject patron's age and was not accepting responsibility by stating that the female adult patron had ordered both drinks. The inspector was concerned that the employee was not well versed on her responsibilities as a server or as the person in charge of the establishment at the time of the incident. He recommended the minimum monetary penalty for a first contravention of this type to achieve future voluntary compliance.

The licensee's evidence and submissions were made by the authorized representative of the corporate licensee and are summarized as follows:

None of the principals of the corporate licensee were present at the time of the incident nor did the inspector witness it. The contravention is admitted on the basis of probability.

The evidence of the inspector does not show the placement of the glasses, two containing water, two containing alcohol, nor does the evidence show when the alcoholic beverages were served. The server in her statement said that both alcoholic beverages were served separately to the adult patron. There is no evidence that alcohol was served to the minor patron. The inspector did not ask the minor patron whether she had ordered an alcoholic drink. The underage patron was not observed to consume the alcoholic beverage by the inspector or the server. The inspector should have taken time to observe whether the underage patron was consuming the alcohol beverage. There is no direct evidence of the age of the minor patron, only inadmissible hearsay that she was 18 years old. The inspector did not ticket the minor.

The inspector pursued enforcement and recommended a penalty because the server was uncooperative and attempted to cover up the incident. There is no evidence that the server was uncooperative or attempting to cover up anything. She knew the subject patron and believed that she was of legal age.

The inspector failed to consider the defence of due diligence. The establishment is a restaurant, not a drinking establishment and is not interested in catering to underage patrons. Serving staff are experienced and competent; they do not have discretion to deviate from the rules or to make a judgement call. The matter of underage drinking is part of the hiring process for every employee and is followed up formally at least once per year. The bartender and manager are to oversee any situation where it is not clear that a patron ordering alcoholic beverages is of age. Servers are to ask for two pieces of identification if there is any question of age.

There is no evidence that the licensee "permitted" the contravention by "not observing as high a degree of diligence as it should have or shut its eyes to the obvious".

The recommended penalty is inappropriate in the circumstances of the case and not in keeping with similar cases. There is no previous enforcement history for this establishment. The worst case scenario here is that a patron six months from legal drinking age took a sip from her friend's alcoholic beverage. This is not a threat to public safety such as to warrant such a severe penalty. The establishment is currently closed and a licence transfer is pending the conclusion of this case. An appropriate penalty would be a written warning and a commitment by the licensee which would form part of the terms and conditions of the licence. In the circumstances the proposed penalty would be punitive.

REASONS AND DECISION

The licensee has admitted the contravention. Having carefully considered all of the evidence and the submissions, I find on a balance of probabilities that on December 30, 2011, the subject patron was 18 years of age, and was in possession of liquor that had been supplied by the licensee. That on its face is a contravention of section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)*.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contravention, 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 (CANL II), 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)

Here, there is some evidence that the licensee has a process in place to advise and remind employees that underage patrons must not be served alcoholic beverages and that where there is a question of age two pieces of identification must be obtained. There is no evidence of how that program was implemented in this instance nor that the server received sufficient training to allow her to assess a customer's age and then to require proper identification if necessary.

At the time in question in this case the server was the person in charge of the establishment and was in the strict legal sense the directing mind of the licensee. She was required by law to take reasonable steps to ensure that underage persons did not have access to liquor served in the establishment. She did not properly satisfy herself that the subject patron was of age, nor did she take any measures to reasonably ensure that the subject patron did not have access to liquor whilst in the establishment.

Taking a look at the evidence as a whole, I find that the licensee's program was not sufficient to reasonably ensure compliance with the law relating to the prohibition against selling, giving or otherwise supplying liquor to a minor.

In conclusion, I find that the licensee is not entitled to the benefit of the defence of due diligence and that the licensee may be said to have "permitted" the contravention.

In conclusion, I find on a balance of probabilities that on December 30, 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 have discretion to order one or more of the following enforcement actions:

- 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

Imposing any penalty is discretionary. However, if I find that either a licence suspension or 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, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

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 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.

Each case is considered individually on the circumstances of the case. In the circumstances of this case, I am satisfied that the licensee has not successfully or sufficiently stressed upon its employee responsible for the operation of the establishment at the time of the contravention the need to fully and conscientiously carry out her duties. Permitting minors access to liquor can and has resulted in very serious consequences. All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. While the licensee has expressed an intention to sell the establishment and transfer the licence, that decision is subject to change. Additionally the licensee may wish to obtain further licenses. 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 July 30, 2012.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: June 22, 2012

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

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