



**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:	Tirso Holdings Ltd. dba Ma Miller's Licensed Liquor Store 2903 Sooke Lake Road Victoria, BC V9B 4R4
Case:	EH12-090
For the Licensee:	Tony and Cindy Piga
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	November 14, 2012
Place of Hearing:	Victoria, BC
Date of Decision:	January 4, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee owns and operates Ma Miller's Licensed Liquor Store, a retail liquor store (LRS) which is located near the Goldstream Provincial Park in Sooke. The LRS services a primarily residential clientele. The Licensee operates under Licensee Retail Licence Number 195171.

The LRS, like all licensed retail stores in the province, is governed by the terms and conditions contained in a guide entitled "Licensee Retail Store Licence-Terms and Conditions Guide" (the "Guide"). Included in the Guide is the stipulation that the Licensee must not sell liquor to minors, or allow minors on site unless accompanied by an adult. It also makes the Licensee responsible for the actions of its employees.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch (the "Branch") alleges that on April 23, 2012 the Licensee sold liquor to a minor contrary to section 33 (1)(a) of the *Liquor Control and Licensing Act* (the "Act"). The proposed enforcement action is a \$7,500 monetary penalty, which falls within the penalty range set out in item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (Regulation) for a first contravention of this type.

In 2011, the Branch began a program known as "Minors as Agents" or MAP. Amendments to the *Act* allowed the Branch to employ minors as agents to test the compliance of its licensed LRS's with the requirements of the *Act* which prohibit the sale of alcohol to minors.

On April 23, 2012 two liquor inspectors and a minor hired to work in the MAP attended the store operated by the Licensee. The minor agent was identified as "Agent 05" during the hearing. On the day in question Agent 05 entered the store and purchased liquor from the clerk inside. She was not asked for identification during this transaction.

The Licensee does not dispute the contravention. It submits, however, that it acted at all times with due diligence.

RELEVANT STATUTORY PROVISIONS

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

- s. 33(a)** A person must not, (a) sell, give or otherwise supply liquor to a minor;
- s. 33(5)** It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant
 - (a) required that the person produce identification, and
 - (b) examined and acted on the authenticity of the identification.

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

1. Book of Documents of the Branch
2. Copy of Video from CCTV of the Licensee
3. Documents of the Licensee provided to the Branch

EVIDENCE – THE BRANCH

Liquor Inspector A:

Liquor Inspector A testified that he was one of two inspectors engaged in the MAP in the Victoria area on April 23, 2012. He worked in concert with another liquor inspector, and the female minor identified as Agent 05. The three were working as a team to check compliance of LRS's in the Victoria region with respect to the sale of liquor to minors. Prior to setting out on their rounds, the Drivers Licence and Care Card identification of Agent 05 were photographed to confirm that she is under the age of 19. As well, full length pictures of Agent 05 were taken to show her general appearance on the day in question.

Liquor Inspector A testified that the team arrived by car at the Licensee's store, Ma Miller's Licensed Liquor Store (Ma Miller's LRS), at about 7 pm. Liquor Inspector A went into the store first and Agent 05 followed him soon afterwards. The store was nearly empty, and the line of sight to the area where a single clerk was working was unobstructed. Agent 05 went to the cooler and selected four cans of Strongbow cider. She took these to the clerk and paid for them with a \$20 bill. There was no exchange other than the price of the merchandise, and the clerk did not ask Agent 05 for identification.

Liquor Inspector A testified that he spoke to the clerk briefly about available liquor products, and left the store afterwards. He completed his notes about the incident when he returned to the car with the rest of the team. Agent 05 also completed an Observation Form confirming the details of the events inside the store.

Liquor Inspector A telephoned the Licensee on the next business day. He testified that the Licensee was very concerned, and provided the documents that were requested by Liquor Inspector A. There was no prior history of selling to minors, so a monetary penalty for a first contravention of \$7500 was recommended.

Liquor Inspector A testified that the Branch is very concerned about the sale of liquor to minors. There are public safety concerns about the effect of liquor on the physiology of minors, and the impact that it may have in causing them to engage in inappropriate or criminal behavior.

EVIDENCE – THE LICENSEE

Tony Piga is one of the principals of Ma Miller's LRS. He testified that Ma Miller's LRS is a small family-oriented business. There are four employees and the two owners who run the store. Mr. Piga testified about the clerk who was responsible for selling liquor to Agent 05. She was greatly embarrassed about having made the sale to a minor without asking for identification. The clerk was suspended for one month as a result of her actions in failing to ask for identification. He testified that the Licensee does not dispute that the contravention occurred.

Mr. Piga acknowledged that the Licensee was aware of MAP as a liquor inspector had been around a few months before to remind them that it was being used to confirm compliance. He testified that there are signs in the store advising that minors cannot be present unless in the company of an adult. Staff are reminded frequently to ask for identification. All staff have "Serving it Right" training. There are regular discussions about the need to ask for identification. New staff are supervised closely for a lengthy period to ascertain that they understand the rules. Local clients who are over 19 but look youthful are used as a test to determine if new staff members ask for identification.

They are told that even customers who are known to them must be asked for identification if they look to be underage.

Mr. Piga testified that staff meetings are normally conducted on Thursdays. This is the time when inventory arrives, and all staff are present. Issues such as checking for identification are discussed. There are written training procedures which are posted near the cash register. As well, there is a communications book for employees to look at when they come on shift. The staff all were warned in writing about MAP, and initialed the warning to make sure that they understood it.

In cross-examination, Mr. Piga acknowledged they do not have follow-up training of staff after initial training is completed, nor does the Licensee test to ensure staff compliance with asking for identification of young customers. For example, the licensee has not employed a secret shopper to check compliance. Mr. Piga explained that his daughter had full authority while working in the store on the night in question, including the authority to sell or refuse to sell liquor to customers. He reviewed video surveillance footage and confirmed that she did not ask for identification when Agent 05 was in the store. The Licensee provided the CCTV recording to the Branch, and as well produced an undated Store policy setting out the requirements for requesting identification from minors. The Policy did not, however, give any information or advice on how to identify underage patrons such as asking identification from anyone that looked under 25 or 30.

SUBMISSIONS - THE BRANCH

The Branch submits that the contravention of selling to a minor contrary to section 33(1)(a) of the *Act* is not disputed. Further, the question of due diligence is assessed based on facts available prior to the contravention occurring, not afterwards. In this case, the clerk was the directing mind of the Licensee on the evening in question. While the Licensee has provided training for its staff, it was not effective. The staff members were not following the written policies of the Licensee by requesting identification from young looking patrons. There was no evidence that the Licensee had follow-up training or testing of its staff to ensure that they complied with the legislation.

SUBMISSIONS - THE LICENSEE

The Licensee does not dispute that the contravention occurred as alleged. It submits that there was nothing further that could have been done to prevent the contravention from occurring unless the principles of the store made all of its sales instead of using employees.

ANALYSIS AND DECISION

The evidence presented by the Branch establishes on the balance of probabilities that the Licensee sold liquor to a minor on April 23, 2012, contrary to section 33 (1)(a) of the *Act*. In any event, the Licensee does not dispute that the contravention occurred as alleged. The question then is whether the Licensee exercised due diligence, the proof of which can afford the Licensee a complete defence to the contravention. The onus, however, is on the Licensee to produce evidence which establishes, on the balance of probabilities, that it took reasonable steps to avoid the contravention. This means the Licensee must demonstrate both that it had effective systems in place to prevent the contravention, and that it took reasonable steps to ensure these systems operated

effectively. It is therefore up to the Licensee to establish on the evidence that it acted with due diligence. The test is one of reasonableness, not perfection.

The principle of due diligence is discussed in the off-quoted case of *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299. In this decision, the Supreme Court of Canada established that where an individual or corporation was found to be guilty of what are described as strict liability offences (that is, offences where state of mind is not a necessary component to establish liability), there was a defence available if the accused party could show that it took all reasonable steps in the circumstances to prevent the occurrence of the offence. At page 1331, the Court described the defence as follows:

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 that employment, the question will be whether the act took place without the accused direction or approval, thus negating willful 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 were the directing mind and will of the Corporation, whose acts are therefore in law the acts of the corporation itself.

The actions of the party that causes the breach of the legislation cannot be the "directing mind" of the Licensee. This requirement is described in more detail in the decision of *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch General Manager)*, 2004 BCSC 248. The British Columbia Supreme Court stated that the Licensee must show on the balance of probabilities that the employee involved in the offence was not the directing mind in respect of the operations of the business, and those who were in fact responsible were duly diligent in attempting to prevent the

unlawful conduct from occurring. The "directing mind" is an individual who in the circumstances of the offending conduct was effectively in charge, someone who is a directing force in the Company. This individual need not be an officer or director of the

Licensee but should be someone who controls the practices and procedures of the Licensee to effect compliance with its statutory responsibilities. The directing mind is not merely an employee who carries out these practices and procedures. The determination of whether a party is a directing mind of a business is a mixed question of fact and law.

I am satisfied that the clerk who sold the liquor was not a directing mind of the Licensee. While the clerk is the daughter of the owners of the LRS, and has worked for the business for several years, there was no direct evidence that she had a management or supervisory role in the business. She did not play a role in developing the policies and procedures of the Licensee in respect of complying with the terms and conditions of its licence. Instead, it is clear the directing mind of the Licensee would be either or both of the two owners, Tony or Cindy Piga.

In order to establish that it acted with due diligence, the Licensee must satisfy a two-part test. It must first demonstrate that it has put systems in place to prevent the commission of the contravention for which it is charged. In respect of this, the Licensee gave a detailed account of the systems that it uses to train its employees, and to communicate with employees about issues such as the MAP. The Licensee testified that there is store signage about minors not being in the store without an adult. Staff are reminded to ask for identification, and all staff have Serving it Right training. The Licensee says it holds discussions with staff about the need to ask for identification, and careful supervision of new staff for a lengthy period to ascertain that they understand the rules for the sale of liquor to the public. The Licensee did not, however, produce photographs or other evidence about its signage. As well, as earlier observed, the undated Store policy which was produced by the Licensee has scant information to assist staff in when

they should ask patrons for identification. The evidence falls short of establishing that the Licensee has effective systems in place to prevent the sale of liquor to minors.

As to the second test, the Licensee must also demonstrate that it took reasonable steps to ensure the effective operation of the systems it had in place to prevent a contravention from occurring. In regard to this aspect of the defence of due diligence, I also find that the evidence falls short. The Licensee did not produce any documents with regard to ongoing supervision and training of staff with respect to their responsibilities under the legislation. No employees were called to testify about their training and supervision. While there was evidence of informal discussions with staff on an ongoing basis, there were no records or other evidence of concrete steps taken to supervise or examine staff about compliance matters after they received their initial training. While the Licensee testified that it posted procedures in the LRS for the purpose of ongoing staff training, it did not produce these documents as part of its case. Nor was there evidence that employees received ongoing training on these procedures. I am therefore unable to assess the efficacy of the procedures that were described by the Licensee. Without the production of such documents, and without the evidence of employees about their training and supervision, I cannot find that the Licensee had effective procedures in place to prevent the occurrence of the contravention for which it was charged. I am left with undisputed evidence of a contravention, and insufficient evidence to demonstrate that it occurred despite the diligent efforts of the Licensee. In the result, I must reject the defense of due diligence on the facts here.

PENALTY

I turn now to consider penalty. Pursuant to section 20(2) of the Act, having found that the licensee has contravened the *Act*, the *Regulation*, 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. The primary goal of the Branch in bringing enforcement action and imposing penalties is to achieve voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven history of compliance, a past history of warnings by the branch and/or police, the seriousness of the contravention, the threat to the public safety, and the well being of the community.

There is no record of a proven contravention of the same type for the Licensee at this establishment within the preceding 12 months of this incident. I conclude that the minimum monetary penalty is appropriate given this is a first contravention for the Licensee. The amount of the penalty for a first contravention in the Schedule reflects the seriousness of the concern the Legislature has over the sale of liquor to minors.

ORDER

Pursuant to section 20(2) of the *Act*, and Schedule 4 of the Regulation, I find that the Licensee is required to pay a monetary penalty of the sum of Seven Thousand Five Hundred Dollars (\$7500) to the General Manager of the Liquor Control and Licensing Branch on or before February 8, 2013.

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

A. Paul Devine
Enforcement Hearing Adjudicator

Date: January 4, 2013

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