



**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: The Cambie Malone's Corporation
dba Lucky's Liquor Store
3296 Island Highway North
Nanaimo, BC V9T 1W1

Case: EH12-099

For the Licensee: No Appearance

For the Branch: Cristal Scheer

General Manager's Delegate: Nerys Poole

Date of Hearing: July 3, 2013

Place of Hearing: Victoria, BC

Date of Decision: July 26, 2013

INTRODUCTION

The licensee, Cambie Malone's Corporation dba Lucky's Liquor Store, operates a licensee retail store, i.e. a private liquor store, in Nanaimo under Licensee Retail Store License No. 195503, with liquor sales from 9:00 a.m. to 11:00 p.m. seven days per week. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (the "Guide").

Sam Yehia is the principal of the corporate licensee. Kevin A. McLean is the licensee's counsel. No one appeared on the date set for the hearing. Counsel for the licensee had made an application for postponement of the hearing, pursuant to Enforcement Hearing Rule 9, which was denied by the Registrar. The Registrar invited counsel for the licensee to bring an application for adjournment with written submissions to be provided by 10:00 a.m. on July 2nd. This was not done. No one representing the licensee appeared at the hearing on July 3, 2013, to make an application for adjournment.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "branch") allegation and proposed penalty are set out in the Notice of Enforcement Action dated June 13, 2012 (the "NOEA"). The branch alleges that on May 8, 2012, the licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act") by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is a \$7,500 monetary penalty.

For a first contravention of this type, Item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"), provides a range of penalties: a licence suspension for ten to fifteen days and/or a monetary penalty of \$7,500-\$10,000.

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. Preliminary issue: should the hearing proceed in the absence of the licensee or its representative?
2. Did the contravention occur?
3. If so, has the Licensee established a defence to the contravention?
4. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: 32 pages of emails and letters, etc. with cover page addressed to the Hearing Delegate

Exhibit 2: Enforcement Hearing Rules updated February 2013

Exhibit 3: Branch's Book of Documents, tabs 1 to 15

Exhibit 4: Photograph and Identification of the Minor Agent (sealed exhibit, only to be opened by the adjudicator or court)

PRELIMINARY MATTERS

Decision to Proceed

At 9:35 a.m. on July 3, 2013, I commenced the hearing and requested submissions from the branch on the preliminary issue of whether to proceed with the hearing in the absence of the licensee. The Enforcement Hearing (EH) Rules (exhibit 2) provide the following guidance in the exercise of my discretion on this issue:

8(3) If the licensee does not attend the hearing, the hearing delegate may proceed without the licensee or adjourn the hearing to a later date.

12(2) the hearing delegate may establish his or her own practices and procedures for hearings and may:

- (d) proceed in the absence of the licensee or other party or in the absence of any submissions from the licensee or other party when the party has had notice of the proceeding;
- (i) adjourn a hearing.

15 (1) Once a hearing has commenced, the hearing delegate may adjourn a hearing on his or her own initiative or upon application.

(2) The hearing delegate will not grant an adjournment of a hearing unless there are exceptional circumstances to justify an adjournment.

(3) In determining whether to grant an adjournment the hearing delegate may consider, but is not limited to, the following factors:

- (a) the reasons for the request and any objections to the adjournment
- (b) the number of postponements or adjournments that have already been granted
- (c) whether the adjournment will needlessly delay or impede the conduct of the hearing

- (d) whether the purpose for which the adjournment is sought will contribute to the resolution of the matter
- (e) whether the adjournment is required to ensure a fair opportunity to be heard and
- (f) the degree to which the need for the adjournment arises out of intentional actions or the neglect of the applicant, and
- (g) whether the branch and the licensee agree to the adjournment.

In addition to the above, I note that section 20(2) of the Act gives the general manager (or her delegate) the power to impose enforcement action with or without a hearing. In practice, if a licensee requests a hearing, the branch will schedule one with the general manager or her delegate. Licensees also have the option of choosing a hearing by way of written submissions. This information and the option to choose a waiver is set out in the Notice of Enforcement Action provided to licensees after a contravention notice is issued.

At the commencement of the hearing, the branch advocate submitted a compilation of emails and other documents (32 pages), marked as exhibit 1, outlining some of the history of the enforcement hearing registrar's dealings with the licensee and its counsel.

After considering the documents in exhibit 1 on the morning of the hearing, I stated the following:

I have treated this as an application to adjourn, based on the July 2, 2013 email from licensee's counsel to the registrar, and thus have considered the factors and the requirement that I find exceptional circumstances to adjourn a hearing. The licensee is not present to make a submission. I have considered the branch's submission. I find that the licensee's request for an adjournment arises out of the intentional actions or the neglect of the applicant (licensee or his counsel). In addition, the adjournment of this hearing, after 14 months since the

contravention, will needlessly delay or impede the conduct of the hearing and fails to meet the branch's goal of bringing such matters to resolution in a fair and expedient manner. I do not find exceptional circumstances to justify an adjournment. I will proceed without the presence of the licensee and will provide more detailed written reasons for my ruling in my decision on the contravention.

Relevant History

At page 21 of exhibit 1 is a chronology of events outlining dates and nature of dealings between the branch and the licensee or its counsel, up to June 26, 2013.

June 13, 2012	Notice of Enforcement Action issued for May 8, 2012 contravention under section 33(1)(a) of the Act, selling liquor to a minor.
July 17, 2012	Pre-hearing conference (PHC) notice sent to licensee, setting PHC for August 28, 2012. Note: the PHC notice letter requires advance notice if the licensee is appointing a representative and indicates that failure to participate in a PHC could result in the licensee losing its opportunity for an oral hearing.
August 28, 2012	Licensee did not show up at the PHC. Registrar called licensee and left a voice mail message.
September 13, 2012	Registrar called licensee and left a message on cell phone. Licensee returned call and said that he thought his legal counsel was attending the PHC. Registrar asked licensee to provide contact information for legal counsel, which was provided September 14 th .
September 18, 2012	PHC notice sent to licensee's legal counsel, setting the PHC for October 3, 2012.
October 3, 2012	Licensee's legal counsel did not show up at the PHC. Registrar sent email to licensee advising of non-attendance at two PHCs and outlining options for proceeding with enforcement action.
October 4, 2012	Licensee's legal counsel emailed registrar asking to correspond with him via email and that the licensee was choosing "option 3" (which is the oral hearing option). Legal counsel asked the registrar to send available dates so that we can find a mutually convenient date.

October 4, 2012	Registrar emailed licensee's legal counsel asking for a list of witnesses the licensee would call to testify at the hearing and asked to clarify what issues were in dispute. There was no response.
October 15, 2012	Registrar emailed legal counsel asking for clarification regarding issues in dispute, whether minor agent needed to be called to testify at the hearing, and what witnesses the licensee intended to call to testify (or how many). There was no response.
October 26, 2012	Registrar emailed legal counsel asking again for information stated in October 15 th email and asked that legal counsel provide available dates from January to April 2013. There was no response.
November 8, 2012	Registrar emailed legal counsel advising of the witnesses the branch intends to call to the hearing, asking again about the minor agent's attendance, advising that in the absence of any information from the licensee regarding number of witnesses or issues in dispute, a 1 day hearing will be set. Email stated that registrar intended to set this matter for 1 day in either the week of January 13, 2013 or February 24, 2013. "If you do not communicate with me regarding available dates of the licensee and witnesses by November 15, 2012, I will set the hearing date unilaterally."
November 13, 2012	Licensee's legal counsel emailed registrar that he is in trial both of those times, he will have to canvass with his client how many witnesses they intend to call, and presume that one day should be fine at this stage.
November 14, 2012	Registrar emailed legal counsel asking again to provide the availability of legal counsel and the licensee/witnesses. Registrar asked for a list of what dates the licensee/witnesses are not available from January to May 2013 so that the hearing could be set. There was no response.
November 23, 2012	Registrar wrote that since legal counsel has not responded to invitation to provide availability, there are no longer any available dates in January to May 2013. "Therefore, I will book the hearing of this matter in June or July 2013. I will give you until November 30, 2012 to provide me with your preferred dates within that time frame. If you do not provide me with available dates in June or July 2013, I will proceed to set the hearing of this matter without inquiring further about your availability/preferences." There was no response.
December 7, 2012	Notice of Hearing, setting the hearing date for July 3, 2013 and the final disclosure date for June 14, 2013, was emailed to the licensee's legal counsel December 7 th , and sent via registered mail.
May 1, 2013	Legal counsel wrote to branch under a different matter asking for a hearing adjournment.

May 9, 2013	Registrar emailed legal counsel explaining that different matter does not have a hearing date and enclosing a copy of the hearing postponement Rule 9. There was no response.
June 20, 2013	Legal counsel wrote to registrar requesting an adjournment of the July 3, 2013 hearing because of a conflict with a Supreme Court matter. No documentation was enclosed.
June 24, 2013	Registrar wrote to legal counsel indicating reasons for denying hearing postponement application.
June 24, 2013	Legal counsel forwarded copy of May 1, 2013 Requisition (scheduling the continuation of a Supreme Court hearing for July 3, 2013), along with an email advising that he must obey a copy of the Order of Madam Justice Dickson.
June 24, 2013	Registrar emailed legal counsel again advising that no decision has been made re: postponement, but asking whether licensee would be available to move the hearing to next available dates (July 10 th or July 16 th)
June 26, 2013	Licensee staff member emailed registrar to advise that counsel is unavailable on July 10 th and July 16 th dates. August dates were proposed that are not available for the branch.
June 26, 2013	Legal counsel emailed registrar advising: "I appreciate your mandate [but] I am required to be in court pursuant to an Order of Madam Justice Dickson on the date that we were required to be before you. I simply cannot be in two locations contemporaneously. I look forward to receiving available dates over the next three months and I will make myself available for the hearing. We take these allegations seriously and would prefer not to appeal on a procedural error. I trust that everyone wants this matter heard on its merits as opposed to further hearings on procedural matters."

I have reviewed the above chronology as well as the additional correspondence in exhibit 1. Since the last email above, the following correspondence occurred:

June 26, 2013	Letter addressed to Kevin A. McLean, from the Enforcement Hearings Registrar, enclosing Appendix A, the chronology of events, and referring to the lack of cooperation by him and his client throughout the branch enforcement process, including poor communications and lack of attendance at two pre-hearing conferences. The registrar notes her research on BC Online, which provided her with the Requisitions regarding the B.C. Supreme Court trial matter that Mr. McLean claimed prevented him from attending the branch hearing on July 3, 2013. She states further that the hearing will proceed on July 3 and notes that the hearing delegate may adjourn the hearing or conduct the hearing without the licensee.
---------------	---

June 26, 2013 10:12 p.m.	Email from Mr. McLean to the registrar responding to her email attaching the above letter and stating that he is the only counsel for his client and if the branch chooses to proceed, he will bring this material to the attention of the court for the appeal.
June 27, 2013 9:48 a.m.	Email from the registrar reiterating the request for an explanation as to why Mr. McLean apparently double booked himself and then failed to advise the branch until 12 days before the scheduled hearing date.
June 27, 2013 9:50 a.m.	Email from Mr. McLean to licensee's staff member asking her to provide the requisition to the registrar indicating that he is "in court next week before Madam Justice Dickson."
June 27, 2013 9:52 a.m.	Email from registrar to Mr. McLean noting that a requisition is not a court order (as previously described by Mr. McLean) and asking for the order of Madam Justice Dickson, which requires him to be in court on July 3.
June 27, 2013 10:03 a.m.	Email from Mr. McLean to the registrar telling her she has misunderstood the court process and explaining that the judge informs counsel when they will be sitting as these are the dates when she is available for the continuation of the trial involving his client, and further informing the registrar that these discussions are no longer productive and that he will be appealing any decision on the basis of all correspondence to date.
June 28, 2013 1:16 p.m.	Email from the registrar to Mr. McLean noting her decision to proceed as she has not found that exceptional circumstances exist to justify a postponement, and explaining why she asked for the "court order", quoting previous emails from Mr. McLean indicating he must obey the "Order of Madam Justice Dickson" and if he does not, he will be found in contempt of court. She asks him to confirm that he had no opportunity to inform the Court, when scheduling the Supreme Court hearing, that he was scheduled to appear in another matter. She notes further that the issue of an adjournment is now in the hands of the general manager's delegate and provides him with three options, which include: 1. make a written preliminary motion to the Hearing Delegate requesting an adjournment, providing submissions and reasons in writing (with a deadline of 10:00 a.m. on Tuesday, July 2, 2013 for this application) 2. the licensee/representative can attend the hearing on July 3 rd ; or 3. the licensee/representative can attend on July 3 rd and make submissions with reasons to the Hearing Delegate for requesting an adjournment. She notes in conclusion that the Hearing Delegate will be provided with a record of the correspondence.

July 2, 2013 1:40 p.m.	Email from Mr. McLean to the registrar stating he is not wasting his client's resources and reiterating that he and his client will be in court on July 3 and stating "he is hopeful that you will consider to adjourn to a mutually convenient date for all involved."
July 2, 2013 3:20 p.m.	Email from registrar to Mr. McLean noting he failed to apply for an adjournment by the deadline of 10:00 a.m. Tuesday, July 2 nd and that the matter is now in the hands of the General Manager's delegate.

Reasons for Denial of Adjournment and Decision to Proceed

As noted, I have the discretion to decide to proceed with the hearing of this matter without the licensee present. At no time did the licensee make an adjournment application to me as the delegate of the General Manager who is tasked with holding the hearing of this matter, either in writing or in person. Nevertheless, the decision to proceed or adjourn amounts to the same as dealing with an adjournment application from the licensee, although without any input from the licensee at this stage.

In considering whether to proceed or to adjourn, I have reviewed EH Rule 15 that requires me to be satisfied that there are exceptional circumstances to justify an adjournment and I have considered the factors set out in Rule 15.

I made my ruling to proceed for a number of reasons, briefly summarized as:

- the history of the registrar's dealings with the licensee and its counsel that demonstrate an overall disregard for the branch's process in setting down an oral hearing, which was requested by the licensee
- the neglect of the licensee or its counsel throughout the process, as is evidenced by the number of times the licensee or its counsel failed to respond to requests from the registrar
- the licensee's failure to bring an application to postpone to the registrar within the time limits set by the EH Rules

- the licensee's failure to bring an application to adjourn to the hearing delegate when provided with an opportunity to do so
- the length of time since the contravention—14 months—and the branch's goal of bringing such matters to resolution in a fair and expedient manner

As set out in the chronology above, the licensee or its counsel was not responsive to the registrar's requests to cooperate in choosing the date for this hearing, nor did the licensee or its counsel respond to the registrar's request for a pre-hearing conference, nor did the licensee or its counsel respond to the registrar's specific requests for disclosure of documents and witnesses. There were two dates set for a pre-hearing conference in the late summer and fall of 2012, with notice to the licensee and its counsel, both of which were ignored by the licensee or its counsel. The notices with respect to the pre-hearing conferences indicated to the licensee that "failure to participate in a pre-hearing conference could result in the licensee losing its opportunity for an oral hearing". I note that one of the purposes of a pre-hearing conference is to schedule a hearing date, with input from the licensee.

The registrar made a number of attempts to obtain dates from the licensee for the hearing of this matter, with no response. Finally, the registrar sent out a notice of hearing on December 7, 2012, notifying the licensee that the matter was set for hearing on July 3, 2013. Despite the fact that this notice of hearing was sent on December 7, 2012, the registrar received the first indication that July 3 might not be acceptable to the licensee's counsel on May 1, 2013, when she received a letter identifying another of counsel's clients, probably erroneously, and briefly requesting a change of date from July 3. The registrar followed up with an email on May 9, suggesting he had made an error with respect to the name of his client and outlined the procedure to follow if he were requesting a postponement of the July 3 hearing date for the licensee. The registrar did not hear from the licensee or its counsel again until June 20, 2013, less than 14 days before the scheduled date of the hearing on July 3, 2013. The registrar denied the request for a postponement of the hearing, finding that the licensee had not demonstrated exceptional circumstances as set out in the EH Rules.

Licensee's counsel continued to reiterate that he was scheduled to be in Supreme Court on another matter relating to this same client on July 3, 2013. I note that the B.C. Supreme Court Requisition filed by Plaintiff's counsel on this Supreme Court matter, requesting a Trial Management Conference be set for February 25, 2013 states that "Defence counsel [Mr. McLean] has not responded to our request for his available dates". I infer from this that Mr. McLean may not have cooperated with plaintiff's counsel to reach an agreement on the trial dates or, if he was involved in setting the dates for the trial continuation, he failed to mention that he was scheduled for a branch hearing on July 3, 2013. He never responded to the registrar's request that he explain why the Supreme Court trial dates included July 3, when he was scheduled to attend the branch hearing. Certainly, it is clear from the chronology of events and the Supreme Court requisitions that the trial dates were set after the notice of hearing sent to licensee's counsel on December 7, 2012. Attendance at a Supreme Court trial may "trump" attendance at an administrative regulatory hearing, but legal counsel should be aware of the consequences when he allows such conflicts to occur.

Given the apparent awareness of the licensee's legal counsel of the conflict between the two matters, he either did not recommend to the licensee that he send another representative to the hearing or the licensee chose to rely on the possibility that the hearing might be adjourned.

In addition, I note that the registrar has gone to considerable lengths in trying to accommodate the licensee and its counsel here and has constantly been met with either non-responsiveness to her questions or complete silence. She continued to allow for an oral hearing despite having the authority to decide not to hold one, when the licensee or its counsel did not show up or respond on the dates set for the two pre-hearing conferences. She issued repeated requests for disclosure. She tried to find an alternate date in July for the hearing, despite the fact that counsel's request for a postponement was made out of time (EH Rule 9).

I note that the registrar suggested two alternate dates in July in her email of June 24, 2013, and then sent another email to an employee of the licensee at 8:12 a.m. on June 26, 2013 noting she had not heard back about her suggested dates. She finally received an email back from the licensee's employee at 1:09 p.m. on June 26 saying legal counsel and the licensee would still be in trial on those suggested dates and suggesting a date in August. This two day delay in responding to the registrar's efforts to find an alternate date, only one week before the scheduled hearing, is further evidence of the licensee's or its counsel's total disregard for the enforcement hearing process.

In her letter of June 24, 2013, the registrar denied the application for a postponement of the hearing, set out clear reasons for her refusal to postpone the hearing, and notified the licensee's legal counsel that the hearing delegate may make findings and impose enforcement action based on the evidence presented by the branch without the benefit of the licensee's evidence and argument.

One of the factors I must consider in the exercise of my discretion here is "whether the adjournment is required to ensure a fair opportunity to be heard". I have given considerable thought to this factor as a hearing without the presence of the party disputing the allegations deprives the absent party of a fair opportunity to be heard. However, I note that this is only one factor for my consideration in making a decision for an adjournment. I further note that section 20(2) provides for the imposition of penalties without a hearing. The licensee here had the opportunity to have this matter dealt with by written submissions and it was the licensee who requested an oral hearing.

In considering the evidence of the contravention from the branch, I find that the facts as set out below overwhelmingly support a finding that the licensee's employee sold liquor to the minor agent. What is missing for my consideration on this matter is any evidence of due diligence. The onus is on the licensee to present this evidence for my consideration, which could be evidence about who was the "directing mind" at the time of the contravention, and evidence of training and policies employed by the licensee to ensure such contraventions do not occur. In refusing to adjourn the hearing to another

date and thus denying the licensee the opportunity to be heard, I have considered what types of evidence the licensee might have presented to establish a defence of due diligence.

In my reasons below on due diligence, I refer to the Cambie Malone's Newsletter System (exhibit 3, tab 12, one of the documents provided to the branch in response to the branch's notice to provide records sent on May 16, 2012). Further information about the licensee's written policies or training or affidavit evidence from employees, by way of written submission, was an option for the licensee when its legal counsel agreed to (or was informed of) a trial date that conflicted with the branch's hearing date.

The licensee and its counsel made no efforts to comply with the registrar's requests for an acceptable hearing date after requesting an oral hearing, and since then, have continued to frustrate the enforcement hearing process. The history of the lack of cooperation and the neglect of the licensee in responding to the registrar tip the balance in favour of proceeding and against any argument for natural justice and providing fair opportunity to be heard. The licensee operates under an administrative regulatory regime and as such, by the terms of its licence, is required to respond to and comply with requests from the branch.

As noted, the enforcement hearing process works best when allegations of contraventions are dealt with in an expedient and timely manner. Delay results in memory loss in witnesses. Delay does not serve the branch's goal of bringing licensees into voluntary compliance through the enforcement hearing process. The contravention here occurred 14 months ago.

Having reviewed all the correspondence in exhibit 1, having considered the factors in EH Rule 15, and having heard the submissions of the branch advocate, I ordered the hearing of the contravention against the licensee to proceed.

Order to delete any reference to minor agent's name or other identifying factor

I placed a copy of the minor agent's photo and her identification in an envelope and marked it as exhibit 4, with a notation that it is not to be opened unless required by law. A redacted copy is at tab 8 of exhibit 3. Exhibit 4 has been sealed to protect the identity of the minor agent. The normal branch practice is to provide the licensee with an opportunity to view the photo of the minor agent and her identification with birth date at the hearing. As the licensee did not appear, this was not done.

The branch advocate raised a matter relating to possible identifying information about the minor agent found in the copy of the branch's book of documents that was provided to the licensee. In this case, one of the copies of exhibit 3 that was provided to me, as delegate of the general manager, included two pages at tab 13 where the minor agent's name was inadvertently left in the documents. I ordered that all reference to the minor agent's name at tab 13 of exhibit 3 (pages 1 and 12) be deleted from the branch book of documents that was provided to licensee's counsel. This is important to ensure that the identity of minors employed in these positions is protected.

EVIDENCE

The branch liquor inspector who prepared the NOEA was the only witness for the branch. On May 8, 2012, he was conducting an inspection as part of the "Minors as Agents" Program ("MAP"). The branch established this program in 2011 to monitor compliance with the provision of the Act prohibiting the sale of liquor to minors. The liquor inspector described the MAP and how it came into being.

In 2010, the Province brought in legislation to allow the branch to hire minors to test for compliance with the provision in the Act prohibiting the sale of liquor to minors. The branch initiated the MAP in 2011 and began hiring agents, young-looking people of sixteen to eighteen years of age. The minor agents enter into a contract with the branch with their parents' or guardians' permission (contract without identifying details at tab 13 of exhibit 3). The branch provides them with training that focuses on the fundamentals of observational skills and note-taking. The branch takes photos of the minor agents for evidence purposes.

The minor agent always works with a team of liquor inspectors. One liquor inspector will enter the licensed establishment while another liquor inspector waits in the vehicle with the minor agent. The first liquor inspector will perform a dynamic risk assessment of the establishment to ensure there are no concerns that might endanger the minor agent. Once assured of this, the minor agent will enter the establishment soon after the liquor inspector. The liquor inspector makes sure he maintains sight of the minor agent and can make observations of the minor agent's attempts to purchase any liquor products.

The minor agent is instructed to leave her identification in the vehicle and if asked for identification, she is instructed to say she has no identification and if the clerk refuses to sell the liquor, she is instructed to leave the premises. If the minor agent is able to purchase a liquor product, without producing any identification, she will then leave the store and return to the vehicle with the product. The liquor inspector enters the product as evidence and takes a photo of the product for future use, if needed for hearing purposes. The minor is given an opportunity to make notes about what occurred. The liquor inspector will also make notes. All MAP inspections are conducted undercover.

The liquor inspector identified tab 9 of exhibit 3 as a letter dated February 7, 2011 which was sent to all licensed retail stores to notify them of MAP and of the consequences if they were to sell liquor to a minor. In addition, at tab 9 of exhibit 3, the liquor inspector identified the enclosure with this letter which sets out the sections of the Act and Regulations regarding the sale of liquor to minors and the types of identification required, as well as ways to verify the authenticity of the identification. Also at tab 9 is a March 2011 edition of Liquor Line, which includes an article about MAP. Liquor Line is provided to licensees to give them information about any changes to legislation or branch policies. The liquor inspector noted that the MAP has now been expanded to include other licensed establishments, not only liquor stores.

The liquor inspector described the events of May 8, 2012. He and two other liquor inspectors and the minor agent were conducting MAP inspections of establishments in the north area of Nanaimo. At approximately 7:30 p.m., they went to Lucky's Liquor Store. The liquor inspector entered the store and did the dynamic risk assessment to ensure there were no issues of concern.

When he entered, he saw one customer at the cash register who was in the process of leaving. He walked to the right of the store to some rows of products. He noted there were no other patrons at that time. There was one male clerk at the cash register, and a female clerk who approached him and spoke to him for a few minutes. The minor agent entered the store several minutes later, walked through to the back of the store where there were cooler products behind doors, opened a door and withdrew a four pack of Mike's Hard Lime liquor (a cooler product). She took the four pack to the cash register. The liquor inspector was unable to hear the words but he had a clear unobstructed view of the transaction. He observed the minor agent providing a \$20 bill for her product and the clerk provided change. He did not see any gestures or anything suggesting she was looking for identification. As the minor agent was leaving, the female clerk approached the liquor inspector who said he was looking for a specific bottle of wine, which was not available in the store. He then left and went back to the vehicle. The minor agent completed her notes of her observations (tab 7, exhibit 3). The liquor inspector logged the product into evidence (tab 10, exhibit 3) and made some notes of the incident with times noted.

As the liquor inspector was going to be away from the office for the next four or five days, he asked one of the other liquor inspectors to notify the licensee of the contravention. The other liquor inspector phoned and spoke with the licensee about the incident on May 9 2012. When the liquor inspector returned to his office, he issued the contravention notice dated May 16, 2012 (tab 2, Exhibit 3,) by means of registered mail and later prepared the NOEA (tab 1, exhibit 3).

The liquor inspector identified further items in exhibit 3, including the Licensee Retail Store licence #195503 at tab 3, the floor plan of Lucky's Liquor Store at tab 4, the Guide at tab 5, the request for records at tab 11 and the information provided by the licensee at tab 12 responding to this request. He also identified the photograph of the minor agent at exhibit 4 as the minor agent who bought the liquor on May 8, 2012.

The liquor inspector reviewed the Guide at tab 5 and stated that it provides guidance to licensees on the Act and regulations, with suggestions on how to manage their business to ensure the Regulation and provisions of the Act are followed. The Guide is made available to all licensees online and licensees are strongly encouraged to read and review with staff the most recent version. It is important for licensees and their employees to understand and know the terms and conditions of their liquor licence. They will also hand out hard copies of the Guide to licensees. The liquor inspector referred to the licensee's role at page 10 and to the section about minors at page 21.

The liquor inspector stated that he recommended a monetary penalty of \$7,500 as this is the minimum for a first contravention. The directions from the branch to its liquor inspectors are to recommend a monetary penalty for all first contraventions of this nature to ensure consistency in MAP contraventions. He supports the imposition of a penalty because the branch considers the sale of liquor to minors to be a serious public safety issue, and has made this a major priority in its inspection and enforcement regime. He has firsthand experience from his previous work of the effect of alcohol on young developing minds and bodies and the dangers of irresponsible alcohol consumption at an early age that can carry on into adulthood. Criminal activity occurs as a result of alcohol consumption by minors, including theft, sexual assaults, general assaults and incidents of mischief.

In the present case, the liquor inspector pointed out that the minor agent was only sixteen and very young looking. The clerk did not request identification at all. Even with the most minimal amount of training, an employee of a licensed retail store should know the importance of requesting identification when young-looking customers attempt to purchase their products. The purpose of a penalty is to send a message to the licensee and to assure the public that the branch is monitoring and enforcing this provision of the Act, because of the seriousness of the consequences to young people. A penalty will impress on a licensee the severity of the contravention.

The licensee presented no evidence.

SUBMISSIONS

The branch submits that the contravention of section 33(1)(a) has been proven and there is no evidence of due diligence. Given the seriousness of a public safety contravention such as this, a penalty is warranted to send a message to the licensee and to ensure future voluntary compliance.

The licensee made no submissions.

REASONS AND DECISION

Based on the evidence of the liquor inspector and the branch documents, I find that:

- A 16 year old minor, acting as agent for the branch, entered Lucky's Liquor Store on May 8, 2012
- The 16 year old minor appeared young, under the age of 19, in the photos in exhibit 3 (unredacted copy at tab 8 shown to me at hearing)

- The minor agent selected a four pack of Mike's Hard Lime coolers and took it to the cash register where an employee of the licensee on duty sold her the liquor
- The employee on duty did not ask for any identification while completing the transaction
- The minor agent left the store and handed the four pack over to a liquor inspector in the vehicle

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 onus is on the licensee to prove this defence on the balance of probabilities. The licensee did not present a defence of due diligence. The documents provided by the licensee (tab 12, exhibit 3) in response to the branch's request to provide records include a newsletter that appears to be something employees are required to sign when beginning employment. There is a short section in this newsletter (page 6) telling employees that the law requires that they ask for two pieces of identification of anyone who appears to be under 25 and later, at page 5, a section points out that failure to request identification can be grounds for immediate dismissal.

I find this evidence to be insufficient to prove that the licensee has exercised due diligence to ensure such contraventions do not occur. I therefore find that the licensee contravened section 33(1)(a) of the Act by selling liquor to a minor on May 8, 2012.

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.

I note that the licensee has no compliance history and that this is a first contravention for the purpose of calculating the penalty.

I find that a penalty is warranted on the facts of this case to ensure future voluntary compliance. Selling liquor to minors is a significant public safety issue because of the following:

- The effects of alcohol on growing bodies and developing minds
- The effect on individuals and society of irresponsible drinking behaviour learned at an early age
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult; therefore, liquor has a more intoxicating effect on minor, and
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft

The Minors as Agents program demonstrates the branch's intention to ensure that licensees are not serving or selling liquor to minors. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives, a sixteen year old minor, who looked very young in her photo, was able to purchase liquor from the licensee's employee, without being asked to produce any proof of age.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a \$7,500 monetary penalty for a first contravention. I find this to be reasonable and appropriate given the importance of ensuring minors do not have easy access to liquor, to encourage future voluntary compliance from the licensee and to ensure specific and general deterrence in society at large.

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 **August 26, 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

Nerys Poole
Enforcement Hearing Adjudicator

Date: July 26, 2013

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

Liquor Control and Licensing Branch, Vancouver Office
Attn: Cristal Scheer, Branch Advocate