



BRITISH
COLUMBIA

**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: North Shore Liquor Shop Ltd.
dba North Shore Liquor Shop
1887 Marine Drive
North Vancouver, BC V7P 1Z8

Case: EH12-199

For the Licensee: Mr. Dennis Coates

For the Branch: Mr. Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: October 10, 2013

Date of Decision: January 10, 2014

Liquor Control and
Licensing Branch

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INTRODUCTION

The Corporate Licensee, North Shore Liquor Shop Ltd., (the "Licensee") owns and operates the North Shore Liquor Shop located at 1887 Marine Drive in North Vancouver, B.C. The Licensee operates under Licensee Retail Store ("LRS") Licence #195292 (the "Licence"). Hours of operation under the Licence are from 9 a.m. to 11 p.m. Monday to Sunday inclusive.

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 (the "Guide").

The Licensee was represented in this matter by Dennis P. Coates, Barrister and Solicitor.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The allegations and proposed penalty of the Liquor Control and Licensing Branch (the "Branch") are contained in a Notice of Enforcement Action ("NOEA") dated September 13, 2012. The Branch alleges that on August 31, 2012 the Licensee sold liquor to a minor contrary to section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act").

The Branch proposes a monetary penalty of \$7,500 in accordance with Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). Item 2 of Schedule 4 of the Regulation provides that, for a first contravention of section 33 the Act of selling liquor to a minor (no prior contravention in the preceding 12 months), the range of penalties consists of a 10–15 day licence suspension and/or a \$7,500 -- \$10,000 monetary penalty.

The Licensee acknowledges that one of its sales clerks sold liquor to a minor on the day in question. It raises the defence of due diligence.

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,

*Liquor Control and Licensing Regulation, B.C. Reg. 244/2002***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**Exhibit 1:** Book of Documents of the Branch**Exhibit 2:** Picture of Minor Agent #14 (sealed)**Exhibit 3:** Book of Documents of the Licensee**Exhibit 4:** Document "Training Program about Responsible Liquor Service for New Employees" (Licensee)**EVIDENCE – BRANCH**

Liquor Inspector 1 provided evidence for the Branch in this matter. He testified first about the initiation of the minors as agents program or "MAP" in British Columbia. Changes to the Act in 2010 allowed the Branch to use individuals under the age of 19 to test the compliance of licensees with their obligation not to sell liquor to minors. The Branch advised LRS licensees about the MAP in a letter dated February 7, 2011, and in a publication of the "Liquor Line" in March 2011.

Liquor Inspector 1 testified that he and another regional inspector train minors for the MAP in the Lower Mainland. On August 31, 2012, an inspection was conducted of licensees in the North Vancouver region where the LRS of the Licensee is located. A minor agent identified in these proceedings as "Minor Agent #14" was used for this inspection. Prior to setting out on the inspection, the identification of Minor Agent #14 was examined and photographed. She was 18 years of age at the time.

The premises of the Licensee were inspected at about 10 p.m. on August 31st. Minor Agent #14 was given money to make a purchase. She went into the LRS without identification. Liquor Inspector 1 followed her inside the store. The store was not busy, and was well lit. The Minor Agent was seen picking an alcoholic product from the cooler. She took this to the clerk at the counter. The Minor Agent paid for the product, and was not asked for ID. She exited the store, and Liquor Inspector 1 followed her outside of the store.

Afterwards, paperwork was prepared by Minor Agent #14 about the incident inside the store. Liquor Inspector 1 completed his notes about the incident, and also prepared a Contravention Notice ("CN"). He then returned to the LRS accompanied by the other liquor inspector who was working on the licensee retail store inspections that evening. The CN was served on the clerk inside the store.

Liquor Inspector 1 also identified the licence applicable to the LRS, and the Licensee Retail Store Licence Terms and Conditions Guide (the "Guide") which is binding on the Licensee. The Guide sets out in lay terms the obligations of the Licensee when selling liquor, including the obligation not to sell liquor to minors.

EVIDENCE – LICENSEE

Customer Service Clerk:

A Customer Service Clerk ("Clerk") who is presently employed by the Licensee at the LRS testified about the training process he went through when he began employment. The Clerk had no prior experience in the retail sale of liquor business. He was trained

on the terms and conditions in the Guide, and on the Licensee's Employee Manual. The Manual contains policies and procedures for asking customers for ID.

On the issue of age assessment, the Clerk testified that he was trained that there are a number of indicators which tend to identify the age of a customer. Included in the addition to the physical appearance of a customer are whether the customer shops alone or in a group, the type of products that are selected, the way the individual dresses and speaks, and his or her mannerisms. Initial training took place over the course of the first few weeks of his employment, with supervision declining as he gained experience. The Clerk testified that he has observed that staff will intervene if there appears to be a circumstance where a new employee should be asking for ID.

The Clerk testified that there are five to seven employees working at the LRS. Some are full-time, some are part-time. The employees have frequent sessions with management to discuss issues pertaining to the store.

The Clerk identified pictures of the store and confirmed that there are a number of signs stipulating that minors are not allowed to purchase alcohol or to be in the store. Often customers who appear to be underage are approached before a purchase is made to ask about their age. If a customer cannot be definitively identified as being over 30 years of age, identification is required.

The Clerk testified that there is also a logbook kept behind the till. This is for the purpose of recording information about any customer who is not served because of being underage or because of intoxication. As well, every employee sign-in sheet and schedule contains a reminder to always ask for two pieces of ID.

Staff bulletins are posted every few months concerning matters relating to the LRS. Included is a comment about the ID policy of the store. The May 2012 bulletin to employees attached a news item about a newspaper's use of an underage teen to buy liquor from private vendors on the North Shore where the LRS is located. Employees must sign off to confirm reading these bulletins.

The Clerk was working in the store on the evening that the Minor Agent purchased liquor. He was preparing to close up at the time, and did not see her enter. He only saw the Minor Agent as she left the store.

In cross-examination, the Clerk acknowledged that the policy to ask for ID from anyone appearing to be under the age of 30 came into effect after the MAP incident. Previously, it was under 25. He testified there was no testing of staff on the contents of the staff bulletins but they are reminded about the information contained in them. Staff reviewed the video of the incident involving the Minor Agent as a reminder of what can happen. The Clerk testified that he would not have sold liquor to this individual without ID. Further, the log book which is kept at the till is only reviewed with the Store Manager when there is an unusual incident.

Store Manager

The Store Manager of the LRS began employment as a bartender, and advanced from there to manage a brew pub in Victoria. He became the manager of the Licensee's store in June 2011. The store serves about 130,000 customers each year.

When he was first employed, the Store Manager was advised by the Owner and Operations Manager of the importance of compliance with liquor licensing requirements. He was required to read the Guide for the Licensee and initial each page. He has his Serving It Right certification. He was told a core part of his job is to ensure compliance with liquor laws prohibiting service to minors and service to intoxicated patrons.

The Store Manager testified that normal hours of work for him are 9 a.m. to 5 p.m., although he may come into the store during the evening or on weekends. As well, the Operations Manager is in the store at least once per week.

The Store Manager testified that he is responsible for hiring and training staff. He looks for people who have the confidence and maturity to ask for ID as it is one of the hardest parts of their jobs. When new staff are hired, he reviews with them the written policies of the LRS, including the policy on checking for ID, and advises new employees that the

core policy of the Company is not to sell to minors or intoxicated patrons, and money is not a consideration.

Employees are shown the Guide, and its role in the operation of the business is discussed. Employees read the Guide and initial each page. They acknowledge at the end by their signature that they are bound by its terms. As well, new employees are warned they will be terminated if they sell to minors, and are told that management will back them up for denying service to customers.

The Store Manager testified that the LRS uses an ID guide to assist employees, and there is a sign at the till advising them the current minimum birth date for service. The policy of the store is to confiscate fake ID. A number of signs are displayed around the store advising of ID policies. Staff receive a memorandum every few months which remind them about the ID policies of the LRS. Staff members sign to acknowledge they have reviewed these memoranda.

Employees must sign in and out on a sheet that states "Always Ask May I please see two pieces of ID?" There is a log book kept at the till for employees to record incidents when ID is not provided or when service is refused for intoxication. The Store Manager testified that he reviews the log book to see if there are any gaps in reporting by staff.

After the incident involving the sale of liquor to the Minor Agent, the employee who sold liquor to the Minor Agent was terminated in accordance with store policies. The Store Manager met with each employee of the LRS to discuss the seriousness of the problem of selling liquor to minors. Employees were shown the video footage from the camera in the store which captured the sale to the Minor Agent. The policy of checking for ID was changed from checking anyone who appeared to be under 25 to checking everyone that appeared to be under 30. The Store Manager testified that all staff were required to re-take the Serving It Right examination, and their results were graded.

Cross-examination

In cross-examination, the Store Manager was asked how employees are trained to assess age. He testified that it is a subjective exercise, so employees are urged to err on the side of caution. Whenever there is a doubt, they should ask for ID. Staff are monitored when he is in the store, and he will question them on their decisions about asking for ID. The Store Manager testified that he had no concerns in his observations of the clerk who sold the liquor to the Minor Agent.

He acknowledged there were no entries in the log book of the clerk refusing service because of an ID issue. The Store Manager was asked about the secret shopper program which is mentioned in the employee manual. He testified that it is used primarily to assess customer service, not to confirm compliance with checking for ID. Compliance is monitored by watching employees and advising them on the penalties for failing to ask for ID.

The Store Manager was asked if there were systems in place to monitor employees working at night. He stated that he will go into the store on occasion himself to observe employees at work. As well, employees rotate their shifts to work on day shifts, during which time he can observe their performance. He also receives feedback from employees on the job performance of their peers.

Operations Manager

The Operations Manager testified that she oversees the three LRS's owned by the Licensee presently. Her duties include the hiring of managers for each of the stores, and for ensuring that they maintain the standards expected by ownership. In this capacity, she visits the store in North Vancouver at least once a week. The offices of the ownership are located over one of the other stores, so she is there almost daily.

The Operations Manager reviewed the notes of an earlier Compliance Meeting which took place in April 2012. She testified that a police officer spoke to a customer leaving the LRS, and thought he was intoxicated. Information from the clerk involved indicated the person was a regular customer, and did not seem to be intoxicated as far as the clerk was concerned. The LRS reviewed its policies with the liquor inspector who conducted the meeting to discuss the incident, and committed to ongoing training and in-store messaging reminders.

The Operations Manager testified that in 2011 the LRS served over 130,000 customers, while the LRS in Vancouver serving over 237,000 customers. There were no other problems with sales to minors. She testified that she created the current Employee Manual in concert with another manager. The Operations Manager testified that she makes minor updates to the Manual on a regular basis, and these are then conveyed to the three store managers.

The Operations Manager testified that all of the stores have a log book. She does not review it herself unless there are issues raised by a store manager. The sign-out sheets with reminders about asking for ID are common at all stores. She testified that she performs an audit on each store every few months. Staff memos are reviewed by her at that time. In her opinion, the stores adhere to the culture of vigilance in not selling to minors. All stores have till reminders about the minimum age for the sale of alcohol, and all stores have at least 10 signs advising customers about ID requirements.

Cross-examination

In cross-examination, the Operations Manager testified that their LRS stores have been tested for compliance by the Branch previously and were found to be compliant. She was not sure if the store in North Vancouver was included in these visits.

The Operations Manager was asked about how staff are instructed to determine when to ask for ID. She said it is the policy to ask for ID whenever a staff member is unsure about the age of the customer.

SUBMISSIONS – BRANCH

The Branch submitted that the prohibition under section 33(1)(a) of the Act is not to sell liquor to minors. Previously, the requirement in the Act was to ask for ID from anyone who appeared to be under 25. This was changed in 2007 because it was considered to be too subjective. The test now is to ask in all cases when there is any doubt. As noted in the BC Supreme Court decision *Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch*, 2006 BCSC 417 at paragraph 30, assessing age is a purely subjective exercise which is impossible to determine with a consistent degree of success. It is an insufficient exercise of due diligence to ask if a person appears to be under or over the age of 25. In the absence of anything approaching certainty as to a person's age, identification should be obtained in every single case.

The Minor Agent in this case appeared to be her age; there was no attempt by the Branch to fool the Licensee. There was no evidence about how the Licensee trained its employees to assess the age of its customers. Nor was there evidence of monitoring compliance, or testing its staff's understanding of its policies. Exposing minors to liquor consumption is a serious public safety concern. A \$7,500 monetary penalty is justified in the circumstances.

SUBMISSIONS – LICENSEE

The Licensee confirmed that there was no issue about the clerk who sold to the Minor Agent being a directing mind of the Licensee. The Licensee submits that while it may not meet the standard of perfection, its policies and practices meet the reasonableness standard of due diligence.

The philosophy of the store is one of compliance. The staff all sign off on their review of store policies, which include discussion about asking for ID. There is a log book which is reviewed daily by the Store Manager. The store has several signs regarding the prohibition for selling to minors, and the requirement for proper ID. Employees are trained on the policies of the LRS when hired, and are shadowed during the performance of their duties.

The Licensee submits that employees are trained to observe the age of customers based on facial characteristics, clothing, and the manner in which they conduct themselves. There is no one characteristic—all are clues. The Branch did change the legislation but the policy to check for ID from anyone that appeared to be under 25 had its roots in government policy.

The test for due diligence is what a reasonable person would do in similar circumstances. It is not a test of perfection. The Licensee had reasonable policies and procedures in place prior to the contravention. People, no matter how well trained, will make mistakes. The owner of the LRS has had 10 million customers in its stores since it has been in business, and this is the first time it has been charged under the legislation.

The Licensee submits that the steps it takes to train and supervise its employees is evidence of a culture of vigilance and compliance with the liquor laws concerning service to minors. There is no guidance in the publications such as the Serving It Right program as to how one is to assess the age of customers. Despite the wording in *Sandman Hotel Langley Inc. supra*, the test is ultimately subjective, and depends on the circumstances of each case.

REASONS AND DECISION

Contravention

Section 33(1)(a) of the Act provides that a person must not sell, give or otherwise supply liquor to a minor. The Licensee does not dispute that the contravention of selling liquor to a minor occurred as reported in the NOEA. I, therefore, find that the Licensee contravened section 33(1)(a) of the Act by selling liquor to a minor on August 31, 2012.

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 to which address the principles of due diligence is the Supreme Court of Canada decision in *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... 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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the Licensee – if so, the defence of due diligence is not available, and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the Licensee (and there is no requirement that a "directing mind" must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The sale of liquor to the Minor Agent was made by an employee of the Licensee. There is no suggestion that the employee had any management or ownership interest in the business of the Licensee. The Branch does not take issue with the position of the Licensee that the clerk in question was not acting as a directing mind of the business when the sale took place. I, therefore, find that the clerk was not acting in the capacity of "directing mind" of the Licensee during the sale of liquor to the minor agent. The question then is whether the Licensee otherwise satisfies the two part test of due diligence.

(i) Adequate Training and Systems:

I agree with the Licensee that the test of due diligence is one of reasonableness, not perfection. The first part of the two-part test is whether the Licensee implemented adequate training and other systems to prevent the contravention, which in this case is the sale of liquor to minors.

The evidence of the Clerk and the Store Manager both confirm that new employees are trained by reviewing the Guide. Employees must review and initial each page. They are also trained on the Licensee's Employee Manual (Exhibit 4). This includes material on the policies of the Licensee for checking the ID of anyone that appears to be under the age of 25, and includes instructions on ensuring that minors are not using other people to buy liquor for them. Employees receive training in identifying facial features for purposes of assessing the age of customers. They are told the core values of the Licensee includes checking for ID and not selling to intoxicated patrons. As well, they are told they will be terminated if they are caught selling liquor to minors.

Subsequently, new employees are shadowed by management over the first weeks of their employment. They sign in on a sheet that reminds them to ask for two pieces of ID. The Licensee distributes newsletters every two months that contains relevant information about the business of the LRS, including reminders of the ID policy of the Licensee.

Beginning in May 2012, the Licensee introduced a log book to record refusing to serve patrons because of age, lack of ID, intoxication, or for any other reason. There are signs posted around the store advising patrons of the ID policies of the Licensee, including a large sign at the entrance to the store. There is a reminder posted on the tills about asking for ID and this also advises (on a daily basis) as to the current minimum birth date necessary for a patron to purchase liquor.

I am satisfied that the initial training of new employees and the systems in place after they are hired are sufficient to meet the first test of due diligence. There are adequate initial training and follow up systems in place to make it clear to employees that one of the core values of the Licensee is not to sell liquor to minors. The question remains as to whether there are reasonable steps in place to ensure the effective operation of these systems.

(ii) Effective Application and Operation of these Systems

On an ongoing basis, the Licensee supervises the staff of the LRs by the presence of an on-site manager. The Operations Manager also visits the LRS regularly to review operations in each store. Management instils a culture of compliance among its staff, and receives feedback from employees on issues that affect the performance of their duties. Employees are reminded about checking for ID when they sign in before they begin work. Staff memoranda are sent out bi-monthly which contain reminders about checking for ID. Staff must confirm they have read these by signing the last page of the memorandum. There is, however, no practice of face to face meetings with staff to discuss these issues directly. Management, as a result, misses the opportunity to ensure that their training and systems are being understood and applied by their employees.

One of the challenges that licensees may face in operating an LRS is the management and supervision of staff who work at night. The Licensee has no regular supervision of its staff during the evenings. The Store Manager visits the store occasionally but there is no regular management presence. Rotating shifts are used so that employees work directly under management on day shifts, and this provides some oversight of staff to ensure that they are complying with the legal requirements of their jobs. There is also a video system in the store that could be used as a management tool. It was used, for

example, to show employees the sale which was made to the Minor Agent after the contravention as an object lesson. There was no evidence, however, that it is reviewed regularly to observe the performance of employees who are working without supervision.

The logbook is a useful tool to review performance, but it requires careful analysis. For example, the clerk who sold liquor to the Minor Agent had never placed an entry in the logbook for having refused service for failure to produce ID. He was never questioned about this omission in the five months that the logbook was in use prior to the contravention.

Some licensees use a secret shopper to monitor the performance of their employees. The secret shopper used by the Licensee was for the purpose of evaluating customer service, not for reviewing compliance.

In sum, the Licensee has a culture of compliance and structures in place that have the potential to meet the standard of due diligence. The Licensee, however, falls short of meeting that standard in failing to provide a reasonable application of these systems in order to provide ongoing training and supervision of staff. There is an insufficient application of the systems because of the failure to meet with staff directly to train them on an ongoing basis. The entries in the logbook are examined by management on a regular basis but the logbook was not used critically to question staff performance. There is also a failure to use the available video system as a tool for the supervision of staff who work alone to ensure that they are continuing to be compliant with the obligations for liquor service that are set out in the Act.

For these reasons, I cannot find that the Licensee has satisfied the tests necessary to establish the defence of due diligence.

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 factors that I have considered in determining the appropriate penalty in this case 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4, and for the calculation of a penalty. Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type consisting of 10-15 day licence suspension and/or a \$7,500- \$10,000 monetary penalty.

I am satisfied that there is no relevant history of non-compliance that bears on the assessment of a penalty in this case. I am also satisfied that the minimum monetary penalty of \$7,500 as set out in the Schedule is sufficient to encourage compliance in the future.

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 February 14, 2014.

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
General Manager's Delegate

Date: January 10, 2014

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate