



**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: 0702009 B.C. Ltd
dba Baseline Pub
100 – 8233 166 Street
Surrey, BC V4N 5R8

Case: EH14-040

For the Licensee: Craig Johnson

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: August 26, 2014

Place of Hearing: Surrey, BC

Date of Decision: September 17, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, 0702009 B.C. Ltd. operates the Baseline Pub located in Surrey BC. Craig Johnson is the principal of the corporate licensee and appeared as the licensee's representative. The licensee holds Liquor Primary Licence number 301778 for the operation of the Baseline Pub, with liquor sales from 11:00 a.m. to 1:00 a.m. Sunday through Thursday and 11:00 a.m. to 2:00 a.m. Friday and Saturday.

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").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated April 17, 2014. The branch alleges that on March 26, 2014, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act* (the "Act") by selling, giving or otherwise supplying liquor to a minor.

The proposed penalty is a \$7,500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). Item 2 provides a range of penalties for a first contravention of a licence suspension for 10 to 15 days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee does not dispute that liquor was sold to a minor but argues that it was duly diligent.

For the purposes of this hearing, and in accordance with section 3 of the *Regulation*, the General Manager has delegated to me, the undersigned Hearing Delegate, the powers, duties and functions provided to the General Manager by section 20 of the *Act* and sections 65-69 of the *Regulation*.

Minors as Agents Program (MAP)

The branch had undertaken a “Minors as Agents Program” (MAP) to monitor compliance of the *Act* prohibiting the sale of liquor to minors by licensed establishments. The project involved the hiring and training of minors by the branch to test whether individual licensed establishments are willing to sell liquor to a minor. Care was taken by the branch to ensure that the underage minors appeared to be their actual age and no attempt was made to deceive or mislead in order to make a purchase of liquor. The minors were provided with training by the branch in making observations and note taking.

To ensure that all licensees were aware of the program and of their responsibilities under the *Act*, the branch issued written notification to all licensees that minors under the supervision of a liquor inspector would be visiting licensed establishments and attempting to purchase liquor.

RELEVANT STATUTORY PROVISIONS

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

Supplying liquor to minors

- 33 (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,

ISSUES

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

EXHIBITS

Exhibit 1: Branch’s book of documents, tabs 1-15.

- Exhibit 2:** Copy of the minor agent's photograph and identification.
Note: these items were ordered to be placed in a sealed envelope, to be opened only upon an order of the Supreme Court of British Columbia or the undersigned Hearing Delegate (see below).
- Exhibit 3:** Copy of printed sign titled, "ID ID ID".
- Exhibit 4:** Copy of photograph depicting several printed bulletins and signs.
- Exhibit 5:** Copy of "Baselines Pub Employee Handbook".
- Exhibit 6:** Copy of a "Serving it Right" certificate for the subject server.
- Exhibit 7:** Copy of a sign titled, "WE I.D. 40 AND UNDER".

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

With the agreement of the parties a copy of the minor agent's photo and identification were placed in an envelope and marked as Exhibit 2, with a notation that it is not to be opened unless required by law. Exhibit 2 has been sealed to protect the identity of the minor agent. At the hearing, the branch provided the licensee with an opportunity to view the photo of the minor agent and identification with birth date. The minor agent did not appear as a witness for the branch.

EVIDENCE—BRANCH

The branch called one witness to testify at the hearing: a Liquor Inspector.

Liquor Inspector

The Liquor Inspector testified that, on March 26, 2014, he and another liquor inspector (did not appear as a witness) were working with a 16 year old minor agent of the branch visiting several licensed establishments in the Surrey and Langley areas to test whether liquor would be sold/served to the minor agent. A photograph was taken of the minor and his identification prior to the inspection (Exhibit 2).

The minor entered the Baseline Pub at approximately 3:35 p.m., shortly followed by the inspectors. The minor was observed taking a seat at the liquor service bar. The establishment was not busy with only one table occupied, a group of four or five males watching television. The minor was approached by a female server and, following a short conversation, the female server poured a beer into a glass, gave it to the minor and departed. The inspector then signalled the minor to leave the premises, which he did at approximately 3:37 p.m.

The Liquor Inspector then spoke with the server. He paid for the beer served to the minor (receipt at Exhibit 1, tab 4) and explained to the server that she had served liquor to a minor and that was a contravention of the Act. The server was astonished and upset. She said that she had worked at the Baseline Pub for 1 ½ years and that she was the acting manager.

The Liquor Inspector took a photograph of the beer served to the minor (Exhibit 1, tab 4) and issued a contravention notice to the server (Exhibit 1, tab 8). The Liquor Inspector testified that the photograph of the beer mistakenly identifies the Baseline Pub as being in Langley. It should have read Surrey.

The inspectors left the establishment at approximately 3:38 p.m., proceeded to their vehicle where the purchase of the beer was documented and notes made by the inspectors (Exhibit 1, tabs 2 (the subject Liquor Inspector) and 3). The minor completed the Minor Agent Observation Form (Exhibit 1, tab 5) and the Minor Agent Statement (Exhibit 1, tab 6). The statement describes the transaction with the server and confirms that the minor agent was not requested to produce identification.

In his evidence, the Liquor Inspector referred to further documents contained within Exhibit 1:

- Tab 9, the liquor licence in effect on March 26, 2014 for Baseline Pub
- Tab 10, approved floor plan for Baseline Pub
- Tab 11, the Guide which contains the terms and conditions for Liquor Primary licences
- Tab 12, inspection and interview document for Baseline Pub

A NOEA (Exhibit 1, tab 1) was prepared with a recommendation for a \$7,500 monetary penalty. The branch considers the contravention of selling liquor to a minor to be a serious matter which can affect the safety of the minor and have a negative impact on the community. The minimum monetary penalty is considered necessary and sufficient for future compliance.

Cross-examination

On cross-examination, the Liquor Inspector testified that, in making his recommendation for the minimum monetary penalty, he was aware that there had not been any previous contraventions by the Baseline Pub. He did not discuss the operation of the establishment with the inspector responsible for the area. It was the area inspector who made up the list of establishments to be inspected.

Asked what systems a licensee could undertake to prevent the sale of liquor to minors, he responded that they could have a doorperson checking identification. The Liquor Inspector testified that he is familiar with the Serving It Right program (SIR) which provides knowledge of the requirements involving minors and the checking of identification. The program requires that all servers in liquor primary establishments be certified.

EVIDENCE—LICENSEE

At the commencement of the hearing the licensee conceded that on March 26, 2014 liquor was sold to a minor. The licensee called three witnesses to testify at the hearing: the Kitchen Manager, the General Manager, and the Licensee Representative.

Kitchen Manager

The Kitchen Manager testified that her duties are primarily in the kitchen; however, she will help out in the front if necessary, washing glassware and cleaning up in the bar area. She is not involved in liquor service and does not hold a SIR certificate.

She was working the day shift on March 26, 2014. The lunch period was busy, continuing to be so until she left at 5:00 p.m. She was in the kitchen area and did not see the transaction between the minor and the server. The Kitchen Manager saw the server speaking to the Liquor Inspector. She then spoke with the server who told her what had transpired. The server was very upset and said that she couldn't believe that she had served a minor as she always asks for identification. The Licensee Representative had left the pub prior to the incident and spoke with the server upon his return. The server was subsequently suspended for one to two weeks.

The Kitchen Manager testified that staff meetings are held, during which proper identification is always discussed. She, not holding a SIR certificate, is not familiar with the identification requirements. There are no minutes kept of the staff meetings. The sign depicted in the photograph at Exhibit 3, stating that all persons entering the pub must be requested to produce two pieces of identification, is posted in the employee area for staff to read when starting work. The pub has had no previous contraventions or police problems.

General Manager

The General Manager testified that she has worked at Baseline Pub for the past eight years, seven years as the general manager, previously as a bartender and server. She holds a SIR certificate.

The General Manager said that they do not employ doorpersons. They once did but it was the source of fights. Now all liquor service staff are female and there are fewer problems. The area liquor inspector makes regular visits about every two weeks. There has never been a problem. She was not working March 26, 2014. She learned of the incident either that night or the next day.

As the General Manager, she is responsible for the training of liquor service staff. All new employees are in training, working with another employee for two to three weeks dependent upon previous experience, prior to working on their own. They read the Employee Handbook (Exhibit 5) and become familiar with the menu and how to deal with customers.

Cross-examination

Asked about the training regarding identification, the General Manager testified that employees are told that two pieces of identification are required: one government issued with a photograph, a passport, driver's license or a BC Identification Card; and one other. Identification requirements are a big issue at the pub with a sign posted inside for all staff and as a topic during staff meetings. She tells staff to request identification all of the time because many people look older than they are, particularly girls. She doesn't train staff to determine age because they are told to always request identification. If they have any doubt request two pieces of identification. Even if they think a person is of age, if they can't produce identification they are not to be served.

Since the incident of March 26th, they now have a sign at the entrance advising that all persons appearing to be under 40 years of age will be asked for two pieces of identification prior to purchasing liquor (Exhibit 7). This makes it easier for staff because people complain.

Asked about the Guide, the General Manager testified that she is familiar with it. It covers identification, Serving It Right requirements, over-service, the number of drinks per hour, and dealing with persons too impaired to drive. She goes over the Guide with the new employees.

The General Manager testified that the subject server was a full time employee and had been working at the pub for 1 ½ years. She had previous experience managing a restaurant and was in training for 2 ½ weeks prior to working on her own. She held a SIR certificate for about 12 years, was competent in her job, and there had never been a previous incident with her.

The General Manager said that she spoke with the server following the incident. She said that she always checks identification but was frazzled at the time, running around because they were busy. She was suspended, found another job and is no longer employed at the pub. They held a staff meeting to explain to staff what had occurred.

Licensee Representative

The Licensee Representative testified that he is the principal of the corporate licensee and is a hands-on owner. He was not present at the pub at the time of the incident on March 26, 2014. He had been in earlier in the day, then left at 2:45 p.m. attended to a family matter and picked up the liquor order for the pub. He returned at 4:30 p.m., dealt with the liquor order, then met with the subject server. She was upset and said that she was busy at the time of the incident and was flustered. He told her that was no excuse. She was immediately suspended for two weeks and it was suggested that she find another job.

The Licensee Representative said that he believed that as a licensee they are duly diligent.

- Their training period is longer than other similar establishments where a new employee only trains for one or two shifts.
- All servers at Baseline hold SIR certificates.
- New employees work with an experienced employee and then are observed to see how they handle the job on their own and are asked if they are comfortable working their areas on their own.
- Baseline Pub has an Employee Handbook (Exhibit 5) unlike other similar establishments. The Handbook deals with identification and age.

The subject server reviewed the Handbook and signed off on it (Exhibit 5). She was told to request two pieces of identification, one government issued with a photograph. She had previous experience and was familiar with the requirements. She is a server and not part of management.

The pub holds staff meetings during which identification is one of the topics dealt with. The Licensee Representative said he keeps notes of the meetings. Servers are told on every shift to check for identification and, if he sees a young person inside, he will tell the server to check their identification. They have an ATM and a cigarette machine inside the pub and ensure that all persons entering to use them are 19 years of age. They did employ a doorman for a year. It resulted in the occurrence of fights. Having a doorman was discontinued and won't be repeated.

Cross-examination

Asked about the provisions in the job description about all persons being required to produce identification, the Licensee Representative testified that employees are told which two pieces of identification are required and they are to ask all persons unless it is obvious they are of age. He believes that the legal requirement is to require identification from all persons appearing under 25 years of age. Since March 26th they use 40 years as the cut-off, all persons appearing younger are required to show identification.

SUBMISSIONS – BRANCH

The branch submitted that the licensee has admitted that liquor was sold to a minor acting for the branch under the MAP program on March 26, 2014. The minor entered the establishment, ordered and was served a beer, leaving within two minutes of his arrival. It is irrelevant whether the pub was busy or not. The onus is on the licensee that no minors are sold or served liquor. A properly trained employee would have taken the time to assess the minor to determine whether he was of legal age.

The licensee has argued that it was duly diligent. The branch submitted that the licensee's policy and training manual's only reference to minors is within the job description portion. It states that customers must show two pieces of identification but is silent on an assessment by servers and where to draw the line. The licensee has stated that the subject of identification is dealt with during staff meetings; however, he has failed to provide any minutes or notes to say what was discussed.

The branch considers that a minor being able to access liquor is a serious public safety issue, consequently enforcement must be taken and a penalty assessed. The \$7500 minimum monetary penalty is recommended.

SUBMISSIONS—LICENSEE

The licensee submitted that the Liquor Inspector did not exercise discretion in proceeding to enforcement. He did not do any due diligence on the history of the pub or ask the area inspector how the pub was being run. He was not familiar with the area and was not aware whether he was in Surrey or Langley.

The policy is that all persons must show two pieces of identification. Employees are trained how to check identification and given reminders. It is discussed at every staff meeting. It is up to each employee to implement the policy. Customers are told not to be offended in being requested to produce identification.

The Licensee Representative is a hands-on owner and manager. The pub has not had a contravention in its nine year history. It is important that liquor not be sold to a minor. The incident is taken very seriously. It is recognized that holding a liquor licence is a privilege.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and the Licensee Representative.

Contravention

I find on a balance of probabilities that the evidence supports that a 16 year old minor entered and purchased a beer (liquor) at Baseline Pub in Surrey on March 26, 2014. The minor was not requested to produce any identification nor did he produce any identification. That, on its face, is a contravention of section 33(1)(a) of the *Liquor Control and Licensing Act*.

Due Diligence

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

The Law

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

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 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 training 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 reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Findings of fact and applying the law to the facts

I find that the server who made the sale of liquor to the minor was not the directing mind of the licensee. There was no directing mind of the licensee on the premises, nor did there need to be. The defence of due diligence is not to be denied on that basis. The inquiry must continue to determine

- a. whether the licensee had adequate training and other systems in place to prevent the sale of liquor to minors, and
- b. whether the licensee took reasonable steps to ensure the effective application of that training and those systems.

Does the licensee’s evidence, once weighed and considered, meet the test of what a reasonable person would expect of procedures to prevent the sale of liquor to minors and ensuring that those procedures are consistently acted upon and problems are dealt with?

In determining what a reasonable person would expect, it is valuable to be reminded that selling liquor to minors is a significant public safety issue and it needs to be prevented because of:

- the effects of alcohol on growing bodies and developing minds
- the effects 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, so that liquor has a more intoxicating effect on minors, and
- liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft

At the time in question in this case two servers were working in the Baseline Pub. It appears that they were working independently in their respective areas, neither had any management or supervisory responsibilities. The subject server had responsibility for the bar area where the minor agent took a seat. Within the space of approximately two minutes she took his order and served him.

The licensee's written policies and procedures relating to compliance with the legal requirements surrounding the operation of a licensed establishment with the sale and service of liquor are few and brief. They consist of written instructions in the employee Handbook that every customer must show two pieces of identification upon entering and no underage guests are permitted in the pub except approved entertainment. One sign posted inside the pub reminds staff of the need to see two pieces of identification for each person entering the establishment.

The evidence of the General Manager is that she trains new employees, including the subject server, to require two pieces of identification from every person before serving them liquor. As such, new employees do not need training on assessing a person's age. However, from the evidence of the Licensee Representative, it is apparent that employees are expected to show some discretion in implementing the instructions. At the time of the contravention, it was expected that identification would not be required from those persons

appearing to be obviously of legal age. That has subsequently been changed to persons appearing to be older than 40 years of age.

I reasonably believe, and so find on a balance of probabilities, that the evidence of the Licensee Representative of allowing discretion to the servers for those persons appearing to be obviously of legal age was the practice being followed at the pub during the time of the contravention. In my experience, it would be highly unusual for a neighbourhood pub-type establishment to require every person entering the establishment to produce two pieces of identification regardless of their apparent age.

The pub's training process did not assist employees in determining the apparent age of patrons. Nor did it assist employees in determining whether the identification being shown was authentic. Unfortunately it is not uncommon for identification to be altered, fraudulent, or be that of another person. Employees should be assisted in establishing procedures to make a reasonable determination of the authenticity of the identification.

I have not had the opportunity to meet the minor agent, as he did not appear as a witness. I have seen his photograph at Exhibit 2. I find that he is obviously youthful in appearance and it would be prudent to require and carefully examine his identification prior to selling or serving him liquor.

The pub has not established a formal method of testing its employees on the requirements of the job. Once the employee has worked several shifts with another employee and the General Manager is satisfied that the employee can operate on their own and is comfortable in doing so, the training is completed. There is no formal testing or ongoing review of the employee's knowledge or performance other than general observations by the General Manager or the Licensee Representative.

Verbal reminders on their own during staff meetings and even on a daily basis can become stale if they are not followed up on a practical level. A sign posted for a period of time amongst other notices may soon be overlooked. That an employee holds a SIR certificate is not sufficient to warrant that the employee retains the required information and puts it into practice.

While this contravention deals only with the sale of liquor to a minor, I find it curious that, in examining the employees' Handbook, the only instructions related to compliance with liquor regulations are that every customer must show two pieces of identification upon entering and no underage guests are permitted in the pub except approved entertainment—two lines in an eight page document. The Handbook is silent on important issues, such as the requirements regarding intoxication, overcrowding, hours of sale, and other regulatory matters.

Giving consideration to all of the evidence I find, on a balance of probabilities, that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on March 26, 2014, the licensee contravened section 33(1)(a) of the *Act* by selling, giving or otherwise supplying liquor to a minor.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- Impose a suspension of the liquor licence for a period of time
- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

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

The branch's primary goal in bringing enforcement action and imposing penalties is achieving compliance. Among the factors that I considered in determining the appropriate penalty in this case are: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety, and the well-being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Due to a concern that minors are being permitted to purchase liquor in licensed establishments, the branch has developed a program aimed at determining whether this is occurring. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives we have in this case an obviously youthful patron being able to purchase liquor without being asked to produce any proof of age. Permitting minors access to liquor can and has resulted in very serious consequences.

It is clear that allowing consumption of liquor by minors contrary to the *Act* is a serious contravention giving rise to significant public safety concerns. Early learned behaviour with respect to abuse of alcohol and less effective metabolism of alcohol by minors cause liquor to be a factor in many crimes committed by youth, including assault and driving offences.

Reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions and the seriousness of the contravention, I find that a penalty is necessary to ensure future compliance.

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

ORDER

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

Edward W. Owsianski
General Manager's Delegate

Date: September 17, 2014

cc: Liquor Control and Licensing Branch, Surrey Office
Attention: Rupi Gill, A/Regional Manager

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