



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: 641486 B.C. Ltd.
dba Johnnie Fox's Irish Snug
c/o 1029 Granville Street
Vancouver, BC

Case: EH14-057

For the Licensee: William (Gus) Greer

For the Branch: Peter Mior

General Manager's Delegate: Daniel M. Graham

Date of Hearing: November 25, 2014

Date of Decision: December 19, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

641486 B.C. Ltd. (the "Licensee") operates Johnnie Fox's Irish Snug (the "Establishment") under Food Primary Licence number 301324 (the "Licence"). The Establishment is located at 1033 Granville Street, Vancouver, BC.

The Licence specifies that the hours of operation for liquor service are Sunday to Thursday from 9:00 to 1:00 a.m., and Friday and Saturday from 9:00 a.m. to 2:00 a.m. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia" (the "Guide").

Mr. William (Gus) Greer, principal of the corporate Licensee, represented the Licensee for the purposes of this hearing (the "Principal").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated June 4, 2014 (the "NOEA"). The Branch alleges that, on Saturday, May 10, 2014, 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 sanction is a \$7,500 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

The Licensee did not dispute that the contravention occurred, and did not seek to establish the defence of due diligence. He did, however, make submissions with respect to the inspection process, due diligence and the proposed penalty.

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

RELEVANT STATUTORY PROVISIONS

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

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

Schedule 4 Enforcement Actions

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
2	A breach of section 33 of the Act (<i>Selling liquor to minors</i>)	10-15	20-30	30-60	\$7,500-\$10,000

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: The Branch's Book of Documents, tabs 1 to 14 inclusive.
- Exhibit 2: Photograph and identification of the Branch's minor agent (the "Minor Agent"), a sealed Exhibit only to be opened by the Hearing Delegate or Court.

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 his identification in an envelope and marked it as Exhibit 2, with a notation that it is not to be opened unless required by law. A redacted copy is at tab 7 of Exhibit 1. 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 his identification with birth date. The Minor Agent also appeared as a witness for the Branch.

EVIDENCE – BRANCH

The Branch called two witnesses: the Minor Agent and a liquor inspector who attended the Establishment on the evening of May 10, 2014 ("Inspector A").

The Minor Agent

The Minor Agent testified as to his birthdate, and confirmed that he was 16 years old at the time of the alleged contravention. He said that on the evening of May 10, 2014 he was engaged in Minors as Agents Program ("MAP") inspections with two liquor inspectors, including Inspector A. Prior to commencing the inspections, the inspectors photographed the Minor Agent and photocopied his identification. The Branch submitted the photographs and copies of his identification as Exhibit 2. Redacted copies appear at tab 7 of Exhibit 1.

The Minor Agent said that he entered the Establishment at 6:21 p.m. on the date of the alleged contravention after leaving his identification in the inspection team's vehicle. He said that he walked to the end of the bar and ordered a pint of Canadian beer from the male bartender. The bartender put the beer on the bar in front of the Minor Agent who paid for the beer and received change. He reported that the bartender did not request identification from him. The Minor Agent stated that the liquor inspectors approached him to take control of the beer. He then left the Establishment at 6:23 p.m. and returned to the vehicle to prepare the Minor Agent Observation Form (tab 5, Exhibit 1) and the Minor Agent Statement (tab 6, Exhibit 1).

In response to a question from the Licensee, the Minor Agent stated that the inspection team had inspected three licensed premises on that day.

Inspector A

The MAP

Inspector A testified that the MAP was implemented in 2011, after the Act was amended to allow the Branch to employ minors as agents for the purpose of testing compliance with the prohibition against selling liquor to minors. He explained that licensees were directly notified of the MAP by way of a letter sent to all food-primary licensees from the General Manager in October, 2012 (tab 13, Exhibit 1). Under the MAP, the Branch has hired 16 to 18 year old minor agents to carry out compliance inspections.

Inspector A stated that he and his colleague had trained the Minor Agent to leave his identification in the inspection vehicle so that if he was asked for ID by licensee staff he would not be able to produce it. He was also trained to answer truthfully if he was asked his age.

Inspection of the Establishment

Inspector A testified that on Saturday, May 10, 2014 he was conducting MAP compliance inspections with a second liquor inspector and the Minor Agent. He stated that, at the start of the shift, the Minor Agent was photographed, and two pieces of identification with his birth date were photocopied to confirm that the Minor Agent was under 19 years of age.

Inspector A stated that, at about 6:21 p.m., the Minor Agent entered the Establishment followed 15 to 20 seconds later by the liquor inspectors. He said that he stopped about six or seven feet from the Minor Agent, and observed the male bartender serve the Minor Agent a glass of beer. Inspector A stated that he then sent the Minor Agent back to the vehicle.

Inspector A testified further that:

- He identified himself to a female server and asked to speak to the manager. The manager arrived from the kitchen and was advised of the contravention.
- While Inspector A was speaking to the manager, the Licensee's Director of Operations came and joined the discussion.
- Inspector A completed a Contravention Notice (tab 8, Exhibit 1) and served it on the manager.
- The inspectors left the Establishment at approximately 6:47 p.m.
- After the inspection, Inspector A prepared his notes (tab 2, Exhibit 1).

Cross-examination of Inspector A

In response to questions from the Licensee, Inspector A stated that:

- He had never met the Principal at the time of the alleged contravention.
- He was not personally aware of whether anyone had ever called the Branch to complain that the Establishment was serving minors.
- He was unable to speculate as to whether or not any minors other than the Minor Agent had ever been served at the Establishment.
- He never gives a "warning" for alleged contraventions arising from MAP inspections; he always pursues an enforcement action.

EVIDENCE – LICENSEE

The Principal provided evidence on behalf of the Licensee.

The Principal

The Principal testified that:

- He had never met Inspector A prior to the hearing, and that Inspector A had never called the Principal. He said it was offensive that the first time Inspector A ever contacted the Licensee was when his staff was served with the contravention notice.

- The bartender who served the Minor Agent had only been employed by the Licensee for two days and was perhaps a little overwhelmed on his second day. He had been trained to ask for two pieces of ID and was being closely supervised by the manager and the Director of Operations. The bartender was fired as a result of the contravention.
- None of the employees involved – the manager, the Director of Operations, or the bartender – are still employed by the Licensee and so are not available to be called as witnesses.

SUBMISSIONS – BRANCH

The Branch advocate submitted that the Licensee did not dispute that the contravention occurred, and that the elements of the contravention had been established.

The Branch argued that the Licensee had not provided any evidence of due diligence and that the proposed \$7,500 monetary penalty is appropriate to the circumstances.

SUBMISSIONS – LICENSEE

The Licensee, through the Principal, made the following submissions with respect to the contravention:

- The MAP may be a necessary program, but it is unrealistic in the circumstances of this case. The bartender was new on the job, but was being closely supervised by the manager. There were in fact two managers (the manager and the Director of Operations) on site at the time of the contravention.
- The Establishment is not a teen hangout, and caters to a distinctly older crowd. The Minor Agent obviously looked young, and if the liquor inspectors had just waited at most 10 minutes instead of whisking the Minor Agent out within literally two minutes, one of the managers would have spotted the Minor Agent and taken the beer away from him before he got half way through it. There was no risk that the negative social consequences of underage drinking would have arisen in the circumstances.
- There is no evidence that any minor other than the Minor Agent has ever been served in the Establishment.

- He had never previously received notification from the Branch (tab 13, Exhibit 1) with respect to the MAP.

With respect to due diligence, the Licensee submitted that:

- The Principal has read the previous Branch decisions on due diligence.
- The Licensee trains its employees to ask for two pieces of ID.
- The Licensee has produced an employee manual, but the Principal was too busy working so didn't bring a copy to the hearing.
- It is very inconvenient that the Licensee can't call any witnesses as they are no longer employed by him and are unwilling to testify. He questioned the legitimacy that can be accorded to paid testimony.

Regarding the proposed monetary penalty the Licensee submitted that:

- It is an unreasonable cash grab by the Branch to levy a \$7,500 monetary penalty simply because a new employee made a mistake that would have been corrected by one of the managers within moments.
- Smaller licensees should not be subject to the same minimum penalty as large operations with multiple locations and more resources.
- The Licensee's only previous contravention is irrelevant because it was for overcrowding and should not influence the potential penalty in the current case.
- Previous compliance meetings regarding the sales mix (alcohol versus food) should not be admissible since it is difficult for a licensee to control and no contravention was proved.

REASONS AND DECISION

Contravention

The Licensee does not dispute that alcohol was sold to a minor. The Licensee's submissions with respect to there being no evidence of other incidents or complaints of service to a minor aren't relevant to the issue that I must decide—that is whether the contravention that is the subject of this hearing occurred. The Licensee's submissions

with respect to the two managers being on site will be addressed below in the analysis of due diligence.

Regarding the Licensee's assertion that he did not receive notification of the MAP, section 33 of the Act prohibits the sale or supply of liquor to a minor, and section 34(5) was added in 2010 to allow the Branch to establish the MAP program. I'm satisfied on the evidence that the Branch took steps to notify food primary licensees of the MAP by way of the October 2012 letter (tab 13, Exhibit 1).

Even if the Branch had taken no steps to notify licensees about the MAP, the principle that "ignorance of the law is no excuse" applies. This is spelled out to licensees in the Guide (which is incorporated by reference into the terms and conditions of the Licence) where on page 8 under the heading Your Role as Licensee it states "You are legally responsible for understanding how the Act, its Regulations, and the specific terms and conditions of your licence affect the operation of your establishment...You are also responsible for making sure your employees follow B.C.'s liquor laws and the terms and conditions of your licence, even when you are not on site."

Based on the evidence of the Minor Agent's identification tendered in Exhibit 2, I find as a fact that he was a minor on May 10, 2014.

The evidence and the submissions filed in these proceedings demonstrate on the balance of probabilities that, with reference to section 33(1)(a) of the Act:

- a person (the Licensee, acting through its employee the bartender)
- sold liquor (a glass of beer)
- to a minor (the Minor Agent)

Accordingly, I find that on May 10, 2014 the Licensee contravened section 33(1)(a) of the Act by selling, giving or otherwise supplying liquor to a minor.

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

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 Act.

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.

Analysis

There is no evidence before me to suggest that the bartender had the degree of express or implied authority to "design and supervise the implementation of corporate policy" to constitute him being a directing mind, as described in *Beverly Corners*. Neither the Branch nor the Licensee made any submissions in this regard. Accordingly, I find that the bartender was not a directing mind of the Licensee.

Since a directing mind did not commit the contravention I must consider the second stage of the due diligence analysis.

a. Adequate Training and Systems

Due diligence requires that a Licensee takes reasonable steps to try to ensure that a contravention does not occur. The exercise of due diligence does not guarantee that a contravention will never occur. It is intended, however, to reduce the likelihood of a contravention occurring to a reasonable and acceptable level. The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and potential consequences underlying the prohibition against selling liquor to minors, including:

- 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, and
- Liquor is a significant factor in many crimes committed by youth

In the circumstances of the current case, I find that the employee training system with respect to ID checks and the prohibition against selling alcohol to minors was deficient. There is limited evidence of adequate training being provided to prevent contraventions of this nature from occurring.

The Licensee says it does have an employee training program and an employee manual. However, the employee manual was not entered in evidence, and there is little evidence of the content or extent of the training, other than that the bartender was trained to ask for two pieces of ID, and he was being "closely supervised" by the manager and the Director of Operations. This limited degree of training is clearly inadequate given the potential social risks.

b. Steps to Ensure Effectiveness

This aspect of due diligence requires the Licensee to take reasonable steps to supervise and monitor its operations sufficiently to ensure that staff are applying their skills and knowledge appropriately, and to ensure that risk-reducing systems are operating effectively.

In the current case, the evidence indicates that the Licensee relies substantially on observation of the staff by management. That system was not effective in this case where the Minor Agent, who the Principal acknowledged looked obviously young, was sold and served a glass of beer. The Licensee argues that his managers would have spotted the Minor Agent and taken the beer away within minutes, but I can't give significant weight to speculation as to what might have been the outcome in this case. Supervision by managers is only one element of an effective system for reducing the societal risk that section 33 is meant to address. Other than the fact that the bartender was fired as a result of this contravention, the Licensee provided no other evidence as to systems or supervision for monitoring its operations.

It is my view that, considering the limited information on training, systems, or monitoring, the evidence falls far short of that which would be necessary to successfully 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 NOEA. 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 general and specific deterrence.

There is no record of a proven contravention of the same type for this Licensee at this Establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a monetary penalty of \$7,500 to \$10,000.

The Branch has recommended a penalty of \$7,500, which is the minimum monetary penalty applicable in the circumstances.

The compliance history listed in the NOEA and at tabs 14, 15, and 16 of Exhibit 1 includes a finding of contravention of section 6(4) of the Regulation for overcrowding in July 2013, for which a \$5,000 monetary penalty was levied. There were also compliance meetings held with the Licensee in September 2006 and April 2009, to discuss potential breaches of section 20 of the Regulation with respect to operating contrary to primary purpose of the Licence. This compliance history does not significantly influence my conclusion with respect to the present case.

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.

These public safety factors, coupled with the fact that a 16 year old was served alcohol without being asked for ID and the limited evidence of due diligence, lead me to the conclusion that a monetary penalty levied against the Licensee is warranted. Having reached this conclusion, I am bound to apply at least the minimum penalty prescribed by the Regulation. Accordingly, I find that a monetary penalty of \$7,500 is necessary and appropriate to achieve the Branch's objectives of both specific and general deterrence.

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 Branch on or before January 23, 2015.

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 Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: December 19, 2014

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

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