



**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: Chilliwack Holdings Limited
dba Plaza Liquor Store
46298 Yale Road
Chilliwack, BC V2P 2P6

Case: EH14-109

For the Licensee: Clinton S. Marks

For the Branch: Hugh Trenchard

General Manager's Delegate: A. Paul Devine

Date of Hearing: June 10 & August 26, 2015

Date of Decision: February 15, 2016

Liquor Control and
Licensing Branch

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INTRODUCTION

Chilliwack Holdings Limited (the "licensee") owns and operates the Plaza Liquor Store at 46298 Old Yale Road, Chilliwack, BC. The licensee holds Licensee Retail Store Licence number 195251 (the "licence"). Mr. Marks is a principal of the licensee, and appeared as the licensee's representative at the hearing.

According to the terms of its licence, the hours of operation for the retail liquor store operated by the licensee may sell liquor from 9:00 a.m. to 11:00 p.m. from 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 is alleged to have contravened the *Liquor Control and Licensing Act* (the "Act") on September 12, 2014, by selling liquor to a minor who was acting as an agent for the branch under the Minors as Agents Program or "MAP." Legislative changes allow the branch to engage minors for the purpose of testing licensee compliance with the provisions of the liquor legislation that prohibit the sale of liquor to minors.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated September 30, 2014 (the "NOEA") (Exhibit 1, Tab 1).

The branch alleges that on September 12, 2014 the licensee contravened section 33(1)(a) of the Act by selling liquor to a minor. The range of penalties for a first contravention of this type is a 10-15 day licence suspension and/or a \$7500 - \$10,000 monetary penalty (*Liquor Control and Licensing Regulation*, Schedule 4, item 2). The branch proposes a monetary penalty of \$7500.00.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 s. 33(1)(a)

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 Book of Documents
- Exhibit 2: Picture of Minor Agent (to be sealed)
- Exhibit 3: Copy of Shipping Receipt
- Exhibit 4: December 17, 2014 letter from Registrar to Licensee
- Exhibit 5: Bundle of letters from the Licensee
- Exhibit 6: Bundle of pictures taken at Plaza liquor store
- Exhibit 7: copies of seven cell phone photos of signage inside the store

EVIDENCE

Evidence for the branch was given by the two liquor inspectors who attended at the premises of the licensee on September 12, 2014.

Liquor Inspector A testified that he has worked for the branch in the Surrey Regional office for 14 years. His main responsibility is for liquor licensing and inspections to ensure licensees' compliance with their obligations under relevant liquor legislation. The Chilliwack region was not normally his area. On the day in question, he was working for another inspector.

Liquor Inspector A identified the licence applicable to the licensee's establishment, and the terms and conditions applicable to a retail store license as contained in the Guide. The provisions of the Guide set out the role of the licensee, which includes being familiar with applicable liquor legislation. Among these requirements is familiarity with the prohibition against selling liquor to minors.

On September 12, 2014 the inspector was involved with Liquor Inspector B to test compliance by government and private retail stores in the Chilliwack area. A minor agent was used in the inspections in accordance with the MAP. Inspector A identified a press release and letter which was sent to licensees in the province in February 2011 advising about the implementation of MAP inspections. The MAP was also discussed by the then-General Manager of the branch in the "Liquor Line" published in March 2011.

Liquor Inspector A testified that before proceeding on the compliance testing exercise, he took a picture of the minor agent, and copied her identification. Redacted copies of these are in tab 6 of Exhibit One. He identified the original photographs which are contained in Exhibit 2. These pictures were sealed after the licensee stipulated that the age of the minor agent was not in dispute.

The Liquor Inspector identified the floor plan of the Plaza Liquor Store at tab 10 of Exhibit One. During the inspection, it was his turn to go into a retail store, so he entered the Plaza Liquor Store at about 3:26 p.m. The minor agent followed him into the store and selected a six pack of Palm Bay, a beverage containing liquor. At the time the only others observed in the store were a woman at the till and a second employee. The Liquor Inspector testified that he had clear view of the minor agent as she proceeded to the till. He heard the employee at the till ask the minor agent if she knew which sports team was identified on her hat. The minor agent said no; and her purchase was rung up. There was no request for ID from the minor agent, and she left with her purchase of the Palm Bay. The Liquor Inspector identified a copy of a receipt for the purchase and a picture of the product at tab 7 of Exhibit One.

The Liquor Inspector testified that he left the store and returned with Liquor Inspector B five minutes later. The practice of the branch is to notify the retail store of a breach. He prepared and delivered a Contravention Notice which was received by Mr. Marks (Exhibit One tab 8). The minor agent completed her observation form and statement form in the Inspector's car (Exhibit One, tabs 4 and 5). The Liquor Inspector testified that he completed his notes in the car as well (Exhibit One Tab 2.)

Later, the Inspector prepared the NOEA dated September 30, 2014. He testified that the sale of liquor to minors is considered a public safety issue because of the affect of liquor on young minds. As the compliance history of the licensee was clean, he chose the lowest monetary penalty available for the breach under Schedule 4 of the *Liquor Control and Licensing Regulation* ("Regulation.") He noted there was a record with the branch of a compliance meeting with the Licensee in 2007. He was not involved in the meeting and had no idea what it was about.

Liquor Inspector B testified that she has worked as a liquor inspector for the branch for five years. Her areas of responsibility now are Surrey, Burnaby and Port Moody. Inspections by the branch generally look for compliance in areas involving public safety and administrative matters concerning the licenses issued to licensees. The Plaza Liquor Store is the responsibility of the Surrey Regional office but is not one she would normally inspect. On September 12, 2014, she was working with Liquor Inspector A doing MAP compliance inspections in the Chilliwack area. After the minor agent returned from the Plaza Liquor Store with a purchase of Palm Bay, she tagged it for identification. She also accompanied Liquor Inspector A when he returned to the store to deliver the Compliance Notice. They spoke to Mr. Marks, and discussed the non-compliance issue. Marks asked about the timing of the incident, and reviewed the store's surveillance video camera footage. She testified that she saw Liquor Inspector A deliver the Contravention Notice to Mr. Marks.

The Liquor Inspector did not recall specifically signage in the store regarding sale of liquor to minors. She recalled there were signs indicating staff could be dismissed for making such sales.

At this point, the branch closed its case. The hearing adjourned to seek documents which the Licensee had forwarded to the branch prior to the hearing. The shipping receipt entered as Exhibit 3 confirmed their delivery to the branch. The Licensee did not have copies of all of the documents that had been forwarded to the branch. While it is normally the licensee's responsibility to bring relevant documents to the hearing, in the circumstances an adjournment was granted.

On resumption of the hearing the branch advocate admitted the documents had been delivered to the branch but no one was able to locate them. The Licensee reproduced all of the documents that had been sent to the branch, and some but not all of the original photographs. The newer photographs were admitted in evidence. As the hearing unfolded, the absence of the photographs did not raise issues that could not be addressed in the evidence.

Mr. Marks for the Licensee opened by submitting the focus of his business is to keep liquor out of hands of minors. The biggest issue his business faces where it is located is bootleggers. The core of the Licensee's defence is how it keeps liquor out of hands of minors.

S.Y. is the manager for the Licensee. She testified that she has worked 30 years in the service industry, 10 years of which were in the liquor sales business. She typically works 9-5 Monday to Friday, and pops into the store from time to time outside of these hours. There is surveillance camera on the premises of the store which is reviewed as part of her regular duties. It stores three months of footage. Problems experienced during a shift can be reviewed by other staff. During evenings there are two staff persons on duty. One of these is very experienced, and the business relies on him to deal with problems.

S.Y. testified the store policy is for 2 ID's even from customers who say they have been served before. The practice is to try to catch minors at door when they enter the store. Otherwise, some will grab and dash. Pictures are circulated among staff of minors who have been in the store before. Also circulated are pictures of customers who were buying for minors waiting outside the store.

S.Y. advised that the main problem for the store is dealing with thieves and bootleggers. Minors are not a major problem because the policy is to try to spot them before they are allowed inside the store. All staff members are trained to do this, it is not just left to management. If young people attend in groups of three to four, they are asked for ID before they are allowed to shop. The main tool for assessing age is to greet people at the door, and to check to see if they appear nervous. The store policy is to ask for ID if customers appear to be under 25 years of age.

S.Y. testified that new staff members are trained initially by shadowing senior employees. They are trained to ask for ID and to look for phony ID. The store conducts staff meetings before big seasonal events such as Christmas. There are no written policies but the store uses a communication book to note problems and communicate among staff. The book is accessible to all staff. In it there are records concerning problem customers, slips or falls, broken products, and other minor issues. S.Y. testified that she reviews it with staff from time to time. The book was not produced in evidence during the hearing.

S.Y. testified there are no guidelines for employees other than those found in the Serving It Right manual. The store considered preparing a staff manual but hasn't done one yet. Staff meetings are conducted 2 – 3 times a year, and are mainly informal. The staff meetings discuss new products or problems encountered in the store. Notes are not taken or kept because the meetings are informal. There are no written tests of employees except for those required for the Serving It Right certification. There are no written guidelines for staff and managers do not meet together on a regular basis. The Licensee produced a letter from A. W., who also works as a manager in the Plaza liquor store. A. W. wrote that the staff members are reminded to ask for ID from persons who appear under 25 by both verbal and written communications. There are reminders on the staff bulletin board, and next to the cash registers in the store. The policy is to ask for ID even if a person has been served previously.

Mr. Marks testified that there are seven employees in the retail store. The Licensee does not rely on written policies for staff because they don't work. Instead, the practice is to watch employees, to remind them if they make mistakes, and to discipline them if they don't comply with store policies. Consistency is obtained by management observing their staff. The video system is a key component in this exercise.

There is no training manual for staff in the store. Instead, there is a training process that he developed including the use of the video camera system. There is a manager in the store every day, and so problems are dealt with as they arise.

ARGUMENT:

THE BRANCH

The branch notes that the offence of selling to a minor is admitted. The required elements of a breach of section 33(1)(a) of the Act are present. The issue then is whether the Licensee acted with due diligence. The branch submits there is an absence of written policies and guidelines which would allow for consistent application of those guidelines. A verbal reminder to staff even daily can become stale without a system of follow up. Reliance on staff having their Serving It Right certification is not enough. The Licensee did not produce its communications book, so the information contained therein is not known. The proposed penalty is the minimum monetary penalty available under Schedule 4 in the Regulation, and is more appropriate than a suspension.

The Licensee submits that it lives in the real world where written communications and guidelines are not effective. In 20 years the store has only experienced one incident involving a contravention, which was for over service. Written procedures would not make any difference. While boot legging is not the issue in this hearing, the store's approach on the issue reflects its concern for compliance with the Act. The store carries on business with diligence, and pieces of paper would not make a difference.

REASONS AND DECISION

Contravention

The Licensee does not dispute the fact that on September 12, 2014 a minor was sold alcohol inside its store as alleged. I find on a balance of probabilities the evidence establishes that on September 12, 2014, a 16 year old minor was sold liquor by the licensee in contravention of section 33(1)(a) of the Act.

Due Diligence

The licensee is entitled to a defence to the allegations set out in the NOEA if it can show that it was duly diligent by taking reasonable steps to prevent the contravention from occurring. The licensee must show that it had established procedures in place to identify and deal with the type of problems for which the contravention was issued. It must also demonstrate that those procedures are consistently acted upon in order to deal with problems as they occur.

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

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.

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

The Directing Mind

I find that Mr. Marks as the owner and S.Y. as the Manager are both directing minds of the licensee. The clerk who sold the liquor to the minor agent, however, was not responsible to develop or apply the licensee’s policies or procedures. There is no evidence from the Liquor Inspectors that either the owner or the manager were present or nearby when liquor was sold to the minor agent. I find that, for the purpose of the due diligence analysis, these directing minds were not involved in the sale of liquor to the minor agent. I therefore turn to the second stage of the *Beverly Corners* analysis.

Adequate Training and Reasonable Steps

At the outset, I accept that the primary issue that faces the licensee in its market place is bootlegging and theft by minors. I accept that the licensee takes extraordinary measures to deal with these problems, exceeding those taken by its immediate competition. The responsibilities of a licensee under the Act, however, are multifaceted. They include over service of liquor and significantly in this case, the sale of liquor to minors.

What then are the training and administrative steps taken by the licensee to prevent this type of contravention? Training for the licensee rests primarily with the obtaining of a Serving It Right certificate by its employees, and the initial shadowing of a senior employee when a new employee is hired. Meetings with employees afterwards are infrequent and unrecorded. There is a communications book to record incidents in the store but the extent to which it is used by employees is unclear as it was not produced in evidence.

S.Y. acknowledged that the development of a training manual would be useful but to date none has been developed. The initial training of employees should not rely solely on the possession of a Serving It Right Certificate. The licensee lacks records to demonstrate that it has taken adequate steps to train employees on its systems, including the identification and prevention of minors who may be attempting to purchase liquor.

Compounding the lack of initial training, there is no evidence of ongoing training of employees by the licensee. It relies on verbal warnings, and use of its video system to review employee compliance in dealing with the public. Circulating pictures of problem customers and challenging minors as they come into the store are useful tools. There is, however, no record of when and how often staff is trained to use these systems. There appears to be a strong reliance on management oversight without formal training to ensure self-reliance by employees. A lack of formal records makes it very difficult for the licensee to demonstrate the efficacy of its methodology. Further, the sale of liquor to the minor agent without challenge when she entered the store or afterwards at a time when the store was not busy speaks to the fallibility of this approach.

As noted earlier, the onus to establish due diligence rests with the licensee. I find that the licensee has not established that it acted with due diligence within the meaning of the authorities referred to previously.

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 or both of 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 NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties is to achieve compliance. Among the factors that are considered in determining the appropriate penalty 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 within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 of the Regulation, and for the calculation of a penalty.

Due to a concern that minors are being allowed to purchase liquor in licensed facilities, the branch developed the minors as agents program to test licensee compliance. The branch took measures to advise licensees about the minors as agents program, and to remind them of their responsibilities under the Act. Despite these steps, the evidence in this case establishes that a youthful customer purchased liquor from the licensee without being asked for proof of age.

Allowing minors access to liquor in this manner is a public safety issue as it can lead to very serious consequences. The branch accepts that consumption of liquor by minors can lead to early learned behaviour with respect to abuse of alcohol. As well, due to their less effective metabolism of alcohol, liquor becomes a factor in many of the crimes committed by youth, including assault and driving offences.

On consideration to all of the evidence, and in view of the seriousness of the contravention, I find that a penalty is necessary to ensure future compliance. Both the lack of formal training of employees when they are hired, and lack of a demonstrable program of ongoing training of employees to meet their obligations under the Act are factors impelling the implementation of a penalty.

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 for a first contravention, and I find in the circumstances here that the minimum monetary penalty of \$7,500 is 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 **March 15, 2016**.

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