



**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:	Island Apple Inc. dba Chad's West Coast Grill & Bar 2910 Kilpatrick Avenue Courtenay, BC V9N 8P1
Case:	EH13-130
For the Licensee:	Dave Vosper
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Daniel M. Graham
Date of Hearing:	February 5, 2014
Date of Decision:	March 14, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Island Apple Inc. (the "Licensee") operates Chad's West Coast Grill & Bar (the "Establishment") under Food Primary Licence number 304253 (the "Licence"). The Establishment is located at 2910 Kilpatrick Avenue, Courtenay, BC.

The Licence specifies hours of liquor service daily, seven days a week, from 11:00 a.m. to midnight. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the "Guide").

Mr. Dave Vosper (the "Consultant") represented the Licensee for the purposes of this hearing.

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 September 12, 2013 (the "NOEA"). The Branch alleges that on Thursday, May 30, 2013 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 disputes the alleged contravention, and also seeks to establish the defence of due diligence.

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 <i>Act (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 13 inclusive.

Exhibit 2: Photograph and identification of the Branch's minor agent (the "Minor Agent"). This is a sealed exhibit, only to be opened by the Hearing Delegate or Court.

Exhibit 3: Responsible Beverage Policy for all Serving Staff, submitted by Licensee.

EVIDENCE – BRANCH

The Branch called one witness: the regional liquor inspector (“Inspector A”).

Inspector A

Inspector A testified that he had been an inspector since July 2009, and that during that time he had conducted approximately 1,500 inspections. He stated that the main purposes of liquor inspections are to enhance public safety and to assist licensees to achieve compliance with licence conditions and regulatory requirements.

The Minors as Agents Program (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 notified of the MAP by way of a letter from the General Manager in February 2011. Under the MAP, the Branch has hired 16 to 18 year-old minor agents to carry out compliance inspections.

Inspection of the Establishment

Inspector A testified that on Thursday, May 30, 2013 he and another inspector (“Inspector B”) were conducting MAP compliance inspections with minor agent 40 (“Agent 40”). He stated that at the start of the shift, Agent 40 was photographed, and his identification was checked and photocopied to confirm that Agent 40 was under 19 years of age.

The Branch submitted a copy of Agent 40’s photo and identification. I placed these items in an envelope and marked it as Exhibit 2, with a notation that it is not to be opened unless required by law. Redacted copies are located at tabs 9 and 10 of Exhibit 1. Exhibit 2 has been sealed to protect the identity of Agent 40. At the hearing, the Branch provided the Licensee with an opportunity to view the photo of Agent 40 and his identification with birth date.

Inspector A testified that at 1:55 p.m. he, Inspector B, and Agent 40 drove into the parking lot of the Establishment. He said that he and Agent 40 entered the Establishment at 2:00 p.m. He referred to a floor plan of the Establishment (tab 4, Exhibit 1) to indicate where they had entered and the location of the table at which they were seated. Inspector A said that with respect to other patrons he could only see one other couple in the Establishment, but noted that there could have been others behind a nearby partition.

Inspector A testified that a female server (the "Server") asked him and Agent 40 for their drink orders. Inspector A ordered water, Agent 40 ordered a Budweiser beer. Inspector A stated that the Server did not ask for any identification, and that the drink order was the only conversation that took place between Agent 40 and the Server. He said that at 2:02 p.m. the Server returned and placed a bottle of Budweiser beer immediately in front of Agent 40. Agent 40 then left the Establishment and returned to the inspection team vehicle to complete the Minor Agent Observation Form (tab 7, Exhibit 1) and the Minor Agent Statement (tab 8, Exhibit 1).

Inspector A testified that he photographed the bottle of Budweiser with his iPhone, and then approached the bar where he spoke with the Server to inform her of the MAP inspection. The Server identified herself as the onsite manager, acknowledged that she had been aware of the MAP, and asked whether she would be personally fined for serving a minor. At that time, Inspector B came into the Establishment and handed a contravention notice to the Server (tab 2, Exhibit 1). Inspector A then paid for the beer and received a receipt (tab 11, Exhibit 1).

Inspector A testified that he then returned to the inspection team vehicle where he completed notes on his iPhone. He subsequently sent these notes in the form of an e-mail to the Branch for purposes of disclosure (tab 6, Exhibit 1).

Inspector A testified that he subsequently prepared the NOEA (tab 1, Exhibit 1). He stated that he decided to take enforcement action because serving alcohol to minors is a serious public safety issue. He said that minors can't metabolize alcohol in the same way as adults, which leads to crimes and serious offences. He explained that the proposed penalty falls within the range set out in Schedule 4 of the Regulation, and that it is appropriate to ensure the Licensee's compliance in the future.

Cross-examination of Inspector A

In response to a question from the Consultant about whether it is Branch policy to use minor agents who appear young, Inspector A stated that there is a small window of time within which minor agents can be utilized. They can't be any younger than 16, and then they are "retired" at 18 to 18 ½ years old. He said that boys in particular can mature drastically during that time. He acknowledged that Agent 40 is a large individual.

Inspector A testified that minor agents are instructed not to seek to deceive licensee staff. Male minor agents are not permitted to wear beards, and as a guideline minor agents are advised to dress and act as they would when they are at school.

Inspector A acknowledged that he was not aware of any other compliance history for the Establishment, and that he was not aware of internal policies developed by the Licensee.

EVIDENCE – LICENSEE

The Consultant was the only witness for the Licensee.

The Consultant

The Consultant explained that he is a former creditor of the Licensee who has become involved in the business to help out during the current economy. He said that he is thoroughly familiar with the Licensee's operations, and that the Licensee asked him to attend this hearing as its representative.

The Consultant testified that the Server was not employed by the Licensee as a manager—she was a server with a reasonable amount of experience. She was expected to provide a degree of oversight during periods when there was not high demand. There is usually a slow period between 2:00 to 5:00 in the afternoon, but at the time of the alleged contravention it was unexpectedly busy.

The Consultant testified that he had managed to speak to the Server just two days before this hearing. She told him that she was aware that it was the company policy to ask for identification from anyone who appeared to be under 35 years old, and that she thought that Agent 40 was at least 25 years old, and maybe 30. She herself was only 23 years old. She used her own discretion not to follow company policy and didn't ask for identification. She said that she was busy and the Establishment was short-handed so she was feeling flustered.

The Consultant said that the Server explained that she is involved in a school program with her niece and that she frequently deals with 17-19 year-olds. In her experience, Agent 40 looked significantly older than his age. The Server told the Consultant that Agent 40 didn't look any younger than she is, and that she would probably serve him again. The Server acknowledged to the Consultant that she has Serving It Right certification, that staff were given frequent reminders about checking for identification, and that there was signage with respect to identification checks and a warning regarding the MAP posted in the Establishment.

The Consultant testified that the Licensee now requires all new employees to sign a copy of the Licensee's Responsible Beverage Policy which he submitted as Exhibit 3. The Responsible Beverage Policy provides, among other things, that:

- Every server is required by law to have a Serving it Right certificate.
- It is the Licensee's company policy that any guest who appears to be under the age of 35 must be properly identified or carded.
- It is the servers' responsibility to ensure that all guests consuming alcoholic beverages are over the age of 19 years.
- There are absolutely no conditions that will ever counteract these rules.

- Any server who does not follow these rules will be immediately terminated from their employment.

Cross-examination of the Consultant

In response to questions from the Branch advocate, the Consultant testified that:

- The Server was not appointed to be a manager.
- There was no manager on shift at the time of the alleged contravention.
- The Server did not have signing authority to receive goods.
- The Server did not work with management to develop corporate policy.
- The Server did not prepare staff schedules.
- The Server did not have authority over any other staff members.

The Consultant testified that he had not found the Server's personnel file, and he didn't know whether she'd ever signed a copy of the Responsible Beverage Policy. He said that the Responsible Beverage Policy had been in place since opening day. With respect to any other documentation for servers, the Consultant said that a handbook is issued to new hires containing every aspect of policy regarding being a server. The Consultant did not bring a copy of the handbook to the hearing, but said that it is required reading for servers. He said that he did not know if new hires were required to sign that they had received or read the handbook. He also said he did not know how the Server had been trained.

In response to another question from the Branch advocate, the Consultant said that employees were required to write a written test with respect to customer service. He said he is not directly involved in that process and did not know what marks the Server may have received. He stated that the test would have been administered by the Licensee's general manager, who had approximately 36 years of experience in the restaurant business. The Consultant also said that there was written policy in the employee handbook with respect to identifying minors, and that while he had not brought a copy to the hearing he could provide a copy if required.

The Consultant testified that he had heard reference being made to incident reports, but that he had not seen any and did not know if an incident report had been prepared regarding the alleged contravention. He stated that each individual staff member had been spoken to about the incident in both of the Licensee's restaurants. He said that no record would be kept of incidents where minors had been discovered in the Establishment as the result of a request for identification.

The Consultant said that management visually monitors the performance of staff with respect to how they deal with customers and whether they are asking for identification, but the monitoring is not structured or systematic. He said that there are regular staff meetings where staff are reminded about the importance of asking for identification. Staff sign attendance sheets for the meetings, but no minutes are kept.

The Consultant said that the Server was not fired as a result of the alleged contravention. He said that she'd already given her notice and that she only worked for another month or two after May 30, 2013 so the issue of terminating her employment was moot.

SUBMISSIONS – BRANCH

The Branch advocate submitted that there is sufficient evidence on the elements to prove the contravention of section 33(1)(a) on the balance of probabilities. He said that liquor (the Budweiser beer) had been sold to a minor (Agent 40).

Regarding the defence of due diligence, the Branch advocate acknowledged that the Server was not a directing mind of the corporate Licensee. However, he said that the Licensee has offered only one unsigned and undated document in support of its claim of due diligence. He noted that the Server did not attend to testify as to any training that she received, there is no documentary evidence of any training or monitoring. There is no incident log, no minutes of staff meetings, and no copies of signed policy documents from other employees. The Branch suggested I should draw an adverse inference from the lack of documentation.

The Branch submitted that there is no evidence of a system in place to monitor employees regarding whatever standards there may have been, and no system to correct errors as they arose.

SUBMISSIONS – LICENSEE

The Consultant submitted that the MAP is not the best way to test compliance. He said that it meets the definition of entrapment, and that in this case a vulnerable young staff member had been deceived by an individual who she thought was older than she was.

The Consultant also submitted that the level of documentation to make due diligence a “slam dunk” is simply not possible resource-wise in an operation the size of the Establishment – people are run off their feet and that level of documentation is insurmountable.

The Consultant submitted that Exhibit 3 (the Licensee’s Responsible Beverage Policy) is the only relevant document regarding the Licensee’s policy about asking for identification. He said that personal observation of staff by management is important to the very existence of the business. He stated that there is signage in the Establishment noting that they ask for identification under age 35, and that it is a policy that has been in place for a long time and which is made clear to everyone. He questioned the relevance or efficacy of anything going beyond that.

The Consultant stated that the Licensee’s position on asking for identification under the age of 35 is made clear to everyone, and that no deviation is allowed. He described the Licensee’s training of staff as being “concise, but clear,” and suggested that its efficacy is demonstrated by the fact that the Server still recalls the Licensee’s corporate policy. He said that management can’t watch staff 100% of the time, and that at some point they have to be trusted to do their job. He maintained that it is unreasonable to hold the Licensee responsible for a staff member who blatantly chooses to ignore company policy which she knows very well.

Regarding the proposed penalty, the Consultant submitted that a stiff penalty is a negative incentive and that a warning would be more appropriate. He also submitted that penalties should be levied against staff personally as it would be a more credible threat for them to comply. He said that the Licensee wants to comply – alcohol is a small but important part of the business and the Licensee doesn't want anything to go wrong. The Consultant submitted that there is no other evidence of non-compliance by the Licensee and that a warning would serve the purposes of the Branch more than a crippling financial penalty.

REASONS AND DECISION

Contravention

The Licensee does not dispute that alcohol was served to a minor. It does, however, say that its staff member was entrapped and deceived by use of the MAP.

The Licensee is engaged in a regulated business activity – the sale of alcohol. As a consequence of being granted the Licence, the Licensee is subject to compliance inspections by the Branch. The MAP is authorized by law. The Act was specifically amended to authorize the Branch to use minor agents in its inspection program. All Licensees were advised of the MAP. The Licensee says it had signage in the Establishment warning staff about the MAP.

The Branch generally tries to employ minor agents that are youthful in appearance. In this case, Agent 40 was a large individual who was perceived by the Server as being of legal age. This does not constitute entrapment or deceit. It reflects reality in that there are underage individuals who may look older than their age and who may try to purchase alcohol. The Branch's minor agents are instructed to be truthful when asked for their age or for identification, and there is no evidence that Agent 40 mislead or otherwise sought to deceive the Server.

The Licence incorporates by reference the terms and conditions contained in the Guide. The Guide makes it clear that the Licensee is responsible to ensure that its staff ask for identification and refuse service to patrons under the age of 19.

Based on the evidence of Agent 40's identification tendered in Exhibit 2, I find as a fact that Agent 40 was a minor on May 30, 2013.

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 Server)
- sold liquor (a bottle of Budweiser beer)
- to a minor (Agent 40)

Accordingly, I find that on May 30, 2013 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:

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 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

The evidence indicates that the Server did not have the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute her being a directing mind, as described in *Beverly Corners*. The Branch acknowledged this in its submissions. Accordingly, I find that the Server who sold the liquor to Agent 40 was not a directing mind of the Licensee.

Since there was no directing mind on site at the time of the contravention I must consider the second stage of the due diligence analysis.

Training and Systems

Due diligence requires that a Licensee take all 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 does, however, 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, such as:

- 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.
- That 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 training or systems being in place to prevent contraventions of this nature from occurring. The Licensee, through the Consultant, said that it does have an employee training program and an employee handbook. However, no supporting documentation was submitted as evidence of the content of the training and there is no indication of the extent or efficacy of the training other than the Consultant's description of it as being "concise, but clear".

There is nothing to indicate that the employee training contained any detail with respect to the public policy concerns of selling alcohol to minors, the types of acceptable ID, how to verify ID, or how to assess a patron's age. There is no evidence that the training provides employees any familiarity with respect to the terms and conditions of the Licence. There is no evidence before me to show that the Server had ever seen or signed the Licensee's Responsible Beverage Policy.

The ongoing oral reminders from management are an important element in staff training; but, having a written policy or training material with respect to identification of minors would serve as a useful resource for employees. Similarly, regular staff meetings with documented discussion about identification of minors would provide an opportunity to keep training fresh and front of mind.

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 entirely on observation of the staff by management, but that such observation is not structured or systematic. The Licensee argued that staff can't be monitored 100% of the time and that at some point they have to be trusted to do their job. It is because staff can't be monitored 100% of the time that sufficient training and systems must be in place to minimize the risk of staff committing a contravention. Keeping track of and communicating the number of incidents where minors have been caught on the premises ordering alcohol would be a good method for management and staff to be aware of the risks they are facing. Written communication of incidents, such as this contravention, would reinforce the message that checking identification should be second nature for staff.

The Licensee argued that it is unreasonable to expect a small business to have the resources to maintain the level of documentation and processes to constitute due diligence. The analysis of due diligence is, however, context-specific. Large operations with greater resources can reasonably be expected to make greater efforts in order to demonstrate due diligence. In the Licensee's case, the evidence indicates that, even considering the Licensee's case-specific circumstances, very minimal and wholly inadequate steps have been taken with respect to due diligence.

It is my view that, considering the limited evidence of 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 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 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 Licensee has requested a warning rather than a monetary penalty. The Licensee has also suggested that it would be a more effective enforcement option to sanction the employees rather than the Licensee. The Branch may issue a violation ticket to any person who contravenes section 33. However, section 20 of the Act (under which this process is taking place) authorizes the General Manager to take action against a licensee, and it is a licensee's responsibility to promote a culture and environment of compliance for its staff. It is also the Licensee's role as employer to discipline its employees.

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 very limited evidence of due diligence being exercised by the Licensee, 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 warranted for the Licensee to bring itself into compliance.

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 April 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 Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: March 14, 2014

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Hugh Trenchard, Branch Advocate