



**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: Y.P.V.Z. Enterprises Ltd.
dba IL Greco
2900 Tillicum Road
Victoria, BC V9A 2A5

Case: EH16-023

For the Licensee: Angelo and Anna Joyce Skrivanos
(The "Licensee's Representatives")

For the Branch: Hugh Trenchard

General Manager's Delegate: R. John Rogers

Date of Hearing: June 29, 2016

Date of Decision: August 3, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Y.P.V.Z. Enterprises Ltd. (the "Licensee") holds Food Primary Licence number 175366 (the "Licence"), pursuant to which it operates the IL Greco Restaurant at 2900 Tillicum Road, Victoria, B.C., V9A 2A5 (the "Establishment").

According to the terms of the Licence, the Licensee may sell liquor from 11:00 a.m. to 1:00 a.m. Monday through Saturday and from 11:00 a.m. to Midnight on Sunday.

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 Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated March 22, 2016 (the "NOEA") (Exhibit 1 tab 1).

The Branch alleges that on March 16, 2016, 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 female minor ("Agent #78"). Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out the range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty. The Branch proposes a penalty of a 10 day licence suspension.

The Licensee has admitted that its employee sold liquor to Agent #78 and to the facts as set out in the NOEA. However, the Licensee disputes the finding of a contravention based upon a due diligence defence.

For the purposes of this hearing and in accordance with Section 6.1 of the Act, 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***Supplying liquor to minors**

33 (1) A person must not

(a) sell, give or otherwise supply liquor to a minor.

*Liquor Control and Licensing Regulation, B.C. Reg. 244/2002***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: Branch book of documents, tabs 1 to 20, save and except for the documents behind tabs 9 and 20 which documents are excluded from the record.

Exhibit 2: The Licensee's Written Submission on Due Diligence

WITNESSES

The Branch called two witnesses:

1. Liquor Inspector A who accompanied Inspector B and Agent #78 at the Establishment on March 16, 2016 ("Inspector A"); and
2. Liquor Inspector B who together with Agent #78 entered the Establishment on March 16, 2016 ("Inspector B").

The Licensee called no witnesses.

EVIDENCE—BRANCH

The Licensee confirmed that it accepted the facts as they are set out in the NOEA as to what occurred in the Establishment on March 16, 2016 with respect to the alleged contravention.

The NOEA

The facts in the NOEA might be summarized as follows:

- On March 16, 2016, Inspector A, Inspector B, Inspector C and Agent #78 constituted an inspection team pursuant to the Branch's Minors as Agents Program (MAP) to test compliance with the Act and the Regulation at several licensed establishments in the Capital Regional District;
- At the start of the shift on this date, Agent #78 was photographed (a redacted copy of which is Exhibit 1 tab 14), her identification viewed and photocopied (a redacted copy of which is Exhibit 1 tab 14) and her age confirmed to be 16 years old;
- At 8:06 pm on March 16, 2016, Agent #78, together with Inspector B entered the Establishment and were met by an employee of the Licensee who directed them to a booth located near the main front entrance;
- Once Agent #78 and Inspector B were seated, another employee of the Licensee (the "Staff Member") asked them what they would like to drink and Agent #78 ordered a "Bud Light";

- The Staff Member advised that Bud Light was not available, but that Budweiser beer was available, and Agent #78 and Inspector B each ordered a Budweiser beer;
- The Staff Member brought two bottles of Budweiser beer to the table and placed one in front of Agent #78 and one in front of Inspector B;
- After the Staff Member had departed, Inspector B took a picture of Agent #78 in possession of the bottle of Budweiser beer placed in front of her by the Staff Member (Exhibit 1 tab 10);
- The Staff Member returned to the table to take the food order for Agent #78 and Inspector B at which point they advised the Staff Member that they had to leave and asked for the bill;
- When the Staff Member returned with the bill (Exhibit 1 tab 13), Agent #78 gave the Staff Member a 20 dollar bill in payment and received back seven dollars and thirty-five cents in change;
- Agent #78 and Inspector B then left the Establishment and returned to their vehicle where Agent #78 completed her Minor Agent Observation Form (Exhibit 1 tab 11) and her Minor Agent Statement (Exhibit 1 tab 12);
- Following the departure of Agent #78 and Inspector B, Inspectors A and C (collectively the "Inspectors") entered the Establishment and advised the Staff Member that they wished to speak to the manager of the Establishment or its owners;
- The Staff Member advised the Inspectors that she was the manager of the Establishment and that the owners were not present;
- The Staff Member was told by the Inspectors that a MAP inspection had been conducted at the Establishment and that as she had sold liquor to a minor, the Establishment had failed the MAP inspection;
- When asked by the Inspectors for a copy of her Serving It Right certificate (the "Staff Member's SIR"), the Staff Member stated that she had it stored in another location and walked off to the rear of the Establishment;
- After approximately 10 minutes, one of the Licensee's Representatives ("Representative A") approached the Inspectors, advised them that she was the wife of one of the owners of the Licensee;
- The Inspectors advised her that they were seeking to examine the Staff Member's SIR;
- The Staff Member subsequently returned, identified herself, and unsuccessfully attempted to locate the Staff Member's SIR in her wallet;

- Inspector C went online to locate a copy of the Staff Member's SIR but was unable to do so with the identification provided by the Staff Member; and
- The Inspectors advised Representative A that a contravention notice (Exhibit 1 tab 2) would be issued.

Inspector A

In his testimony, Inspector A:

- Stated that as a liquor inspector working for the Branch his responsibility was for the geographic area surrounding the City of Victoria and that the Establishment is within his area of responsibility;
- Testified that on March 8, 2016 the Branch had received an anonymous complaint that several employees of the Establishment, including management, were not qualified under the Serving It Right program and that that was one of the reasons why the Establishment was selected for a MAP inspection on March 16, 2016;
- Identified:
 - a copy of a letter dated February 7, 2011 from the General Manager to all licensees licensed under the Act; and
 - subsequent communication from the General Manager to all such licensees;
 - advising these licensees of:
 - the passing of the provisions of the Act permitting the foundation and operation of MAP (Exhibit 1 tab 15); and
 - of the results of MAP in achieving the desired goal of securing compliance with the prohibition against the serving of liquor to minors;
- Stated that based upon this communication between the Branch and licensees under the Act, he was of the opinion that these licensees should be well aware of MAP;
- Identified the copy of the contravention notice B016101 (the "Contravention Notice") (Exhibit 1 tab 2) as being the contravention notice he prepared and forwarded to the Licensee following his visit to the Establishment on March 16, 2016;

- Noted that the Contravention Notice included a contravention relating to the fact that the Staff Member was not able to produce the Staff Member's SIR on March 16, 2016, but that as the Staff Member's SIR was subsequently produced by the Licensee, notwithstanding its reference in the Contravention Notice, this contravention is not before the hearing;
- Identified a copy of a document entitled "Serving It Right *Inspectors Console*" (Exhibit 1 tab 19) and testified that this document evidenced the fact that the manager of the Licensee at the time of the MAP inspection on March 16, 2016 did not have her Serving It Right qualification;
- Identified the Licence (Exhibit 1 tab 3) and noted that one of the terms and conditions of the Licence was that the Licensee comply with the terms of the Guide;
- Identified a copy of the Guide (Exhibit 1 tab 16) and testified that as a current copy of the Guide is online and available for easy reference to licensees that when he does inspections of licensees' premises he will often recommend that their staff review this online version of the Guide on a monthly basis to ensure that they are aware of any rule changes that might have come into effect since the last time they reviewed the Guide;
- Noted that pages 33 and 34 of the Guide dealt with the prohibition against serving liquor to minors and the requirement to ask for two pieces of identification to verify a patron's age prior to serving liquor to that patron;
- Identified the NOEA (Exhibit 1 tab 1) and confirmed that he was its author; and
- Testified that as the Licensee had no record of previous enforcement actions being taken against it similar to the matter at hand, he believed that a 10 day suspension of the Licence preventing the Licensee from serving liquor during that period of suspension would not impose as great a financial penalty on the Licensee as would a monetary fine of \$7,500, but that it would still act as a deterrent and encourage the Licensee to ensure future compliance with the prohibition against serving liquor to minors.

Inspector B

In her testimony, Inspector B testified that:

- She had been a liquor inspector for 6 years and that her geographic area of responsibility is the City of Victoria;

- At 8:06 pm on March 16, 2016 she went into the Establishment with Agent #78, found the Establishment to be relatively busy, together with Agent #78 was instructed to find their own seating, and were served by the Staff Member;
- When Inspector B and Agent #78 were seated the Staff Member placed food menus in front of them and a liquor menu in front of Agent #78 and asked them what they would like to drink;
- When told by Agent #78 that she would like a “Bud Lite”, the Staff Member went to the bar area, confirmed that the Establishment did not have Bud Lite, advised Agent #78 of that fact, and took Agent #78’s alternative order of a Budweiser beer;
- The Staff Member then asked Inspector B what she would like and Inspector B ordered the same, with both Inspector B and Agent #78 declining the offer from the Staff Member of a glass for the beer;
- When the Staff Member returned to the table with two bottles of Budweiser beer, she placed one bottle in front of Agent #78 and one in front of Inspector B, and Inspector B took a picture of Agent #78 in possession of the bottle of Budweiser beer, a copy of which is at Exhibit 1 tab 10;
- When the Staff Member returned to ask for a food order, Agent #78 asked for the bill, which Agent #78 paid;
- Apart from the female who met Agent #78 and Inspector B at the door upon them entering the Establishment, the Staff Member was the only employee of the Licensee she encountered;
- At no time did the Staff Member ask Agent #78 for her identification;
- The document at Exhibit 1 tab 4 was a copy of the floor plan of the Establishment;
- The document at Exhibit 1 tab 7 was a copy of her notes made on the evening of March 16, 2016; and
- The document at Exhibit 1 tab 13 was a copy of the receipt for the Budweiser beer served to her and Agent #78.

EVIDENCE—LICENSEE

The Licensee elected not to call any witnesses.

SUBMISSIONS – BRANCH

The Branch submitted that it had established that on March 16, 2016 liquor was sold by the Staff Member, an employee of the Licensee, to Agent #78 who at the time of the sale was a minor.

Due Diligence

The Branch further submitted that the Licensee had not made out the essential elements of the due diligence defence in that:

- The Licensee's manager did not have her qualified Serving It Right certificate at the time of the MAP inspection of the Licensee on March 16, 2016;
- If the Licensee's manager did not have her proper qualification, this suggested a regime lax on the rules and an absence of due diligence across the board together with a strong suggestion that other employees of the Licensee might not have their qualifications;
- The Licensee submits that it has an employee handbook which is constantly being updated, but there is no evidence before the hearing of these updates or when they were made;
- There is evidence that the Licensee changed its compliance practices, but this change occurred after the MAP inspection;
- There was no formal training or monitoring of employees to prevent the sale of liquor to minors;
- There were no written policies on the subject of the prohibition of the sale of liquor to minors;
- There were no efforts taken to assist employees, such as role playing sessions, or written or oral quizzes, to help them in enforcing the rules; and;
- There were reminders given about the prohibition of the sale of liquor to minors, but not in a formal, concrete manner.

Therefore, the Branch submitted, the Licensee had not made out the defence of due diligence.

As the alleged sale of liquor had been proven and as the Licensee had demonstrated no defence to this contravention, the Branch submitted that the Licensee should be found liable for breach of section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor.

As to the matter of penalty, the Branch submitted that as this was the Licensee's first contravention, the minimum recommended penalty of a 10 day suspension of the Licence was reasonable and appropriate.

SUBMISSIONS – LICENSEE

The Licensee acknowledged that on March 16, 2016, the Staff Member sold liquor to Agent #78 as alleged in the NOEA.

However, the Licensee submitted that the defence of due diligence applies. The basis for this defence is contained in Exhibit 2 which provides in part:

- The Licensee has been in the restaurant business for over 36 years, has always complied with the liquor laws, and has never before had an infraction of this nature suggesting strongly a culture of compliance;
- The Licensee has an employee handbook which is given to each new employee, which has been in place for many years, and which is constantly being updated with all new information;
- The Licensee holds regular staff meeting with compulsory attendance at which times the information in the employee handbook is reviewed and reinforced;
- Following the incident on March 16, 2016, the Licensee has reinforced the rules by having each employee sign an Employee Liquor Serving Compliance Agreement;
- As well, following the incident on March 16, 2016 there are several notices and notes posted on Facebook and in the restaurant regarding this incident along with the consequences;
- The Staff Member, a single mother of two young boys who worked another job to support them, had just been through a bout of flu at the time of the incident, she was exhausted, and she wasn't thinking clearly;

- The Staff Member, a longtime employee of the Licensee, is extremely remorseful for making the mistake she did in serving Agent #78;
- The Licensee has second and third level fail safe systems in place to prevent incidents such as this happening. But it happened and the Licensee is at the mercy of the employee who breaks the prohibition against serving liquor to a minor. The Licensee's only recourse is to fire the employee who did not follow the rules and following the firing, this employee is able to move on without censure to his or her employment with another licensee and;
- The Staff Member is no longer an employee of the Licensee.

REASONS AND DECISION

Contravention

The Licensee has admitted that on March 16, 2016 as alleged in the NOEA, the Staff Member sold liquor to Agent #78.

To address the Licensee's submissions on the defence of due diligence.

Due Diligence

As the Staff Member sold liquor to a minor in contravention of section 33(1)(a) of the Act, the Licensee is liable unless it can demonstrate 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 prevent from happening activities that might lead to this contravention of the Act, it must ensure that such procedures are consistently in operation and acted upon by its employees.

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, 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 (see paragraphs 41 to 44).

The Court states that the defence of due diligence is to be considered in two stages:

1. Whether the employee who sold liquor to the minor 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 took such action or failed to take such action was not a directing mind of the Licensee (and there is no requirement that a “directing mind” must be on the premises when the contravention occurs), 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 upon the evidence presented. The onus is on the 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.

Directing Mind

Although the evidence of Inspector A suggested that the Staff Member attempted to pass herself off as the manager of the Licensee, the evidence before suggests that the Staff Member was not the directing mind of the Licensee and I so find.

I move to the second part of the analysis as set out in *Beverly Corners*.

Implementation of Adequate Training and Systems and Effective Application and Operation of these Systems

I accept the Licensee's submissions that it strives to create and maintain a culture of compliance at the Establishment. It was obvious from the submissions made that the Licensee feels very strongly about ensuring that the rules are followed. The staff of the Establishment is comprised of a group of people who have worked together for a long time and who work together well.

However, even though Exhibit 2 speaks of an employee handbook, there was not one placed in evidence before me, nor was there evidence of the procedure or timing for completing updates to this handbook. Although it was submitted that there were regular staff meetings to deal with compliance, there was no evidence of minutes from such meetings or of Facebook postings. Nor was there evidence of ongoing procedures, such as staff testing, to ensure that the Licensee's staff fully understand what is expected of them when it came to the prohibition against the sale of liquor to minors.

With respect to the training of employees, I find that there was little evidence before me concerning the training given to new employees nor was there evidence with respect to updated training for existing employees.

As well, no matter how strong the professed culture of compliance might have been among the staff of the Licensee, there was little evidence before me which spoke to ongoing structure or monitoring of staff to ensure such compliance prior to the incident on March 16, 2016. Indeed, the introduction of the Employee Liquor Serving Compliance Agreement did not come about until after March 16, 2016.

As well, what is most telling is that the fact that the manager of the Establishment did not appear to have her Serving It Right qualification on the date of the incident. Surely if the culture was one of compliance as professed by the Licensee, the manager of the Establishment would have set an example and would have ensured that she was acting in compliance with the Act, the Regulation and the Guide.

The evidence before me of the Licensee's staff compliance training and ongoing monitoring prior to the incident on March 16, 2016 does not meet the test in *Beverly Corners*.

The test for due diligence is not perfection. The test is whether a Licensee has implemented adequate training and other systems and has taken reasonable steps to ensure the application of this training and the operation of its systems in a consistent and effective manner.

I have no doubt from the evidence before me that since the event of March 16, 2016 the Licensee and all members of its staff are continuing their efforts to ensure compliance with the Licence, the Act, the Regulation, and the Guide. It is the goal of the Branch to achieve such compliance.

However, unfortunately for the Licensee, good intentions are not sufficient to meet the test for due diligence. The onus is on the Licensee to prove that it has met this test and on the evidence before me, I find that the Licensee has not met this test and proven the defence of due diligence on a balance of probabilities.

I therefore find that on March 16, 2016 the Licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a female 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 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; the seriousness of the contraventions; the threat to the public safety; and the well-being of the community.

As the matter involves the sale of liquor to a minor, the most important of these factors is the public safety issue because of:

- The effects of alcohol on growing bodies and developing minds;
- The effects on individuals and society of irresponsible drinking behavior learned at an early age;
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult with the result being 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.

I find that a penalty is warranted here.

There is no record of a proven contravention of the same type as dealt with here for the Licensee 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 of contravention to be a 10 to 15 day suspension of the Licence and/or a \$7,500 to \$10,000 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum for a first contravention, which is either a \$7,500 monetary penalty or a 10 day suspension of the Licence. The Licensee has requested that if I find that a penalty is warranted, that I impose a suspension rather than a fine and Inspector A in both the NOEA and his testimony recommends a suspension rather than a fine.

I find that an appropriate penalty is a 10 day suspension of the Licence.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence Number 175366 for a period of ten (10) days to commence at the close of business on Tuesday, September 6, 2016 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the Victoria Police Department from the close of business on Tuesday, September 6, 2016 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the Establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

R. John Rogers
General Manager's Delegate

Date: August 3, 2016

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Stephen Hitchcock, Regional Manager

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