



**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: Albertson Enterprises Inc.
dba Original Joe's Restaurant & Bar
c/o Matt Albertson
2728 Pandosy Street
Kelowna, B.C. V1Y 1V7

Case: EH16-087

For the Licensee: Matt Albertson and Dan Targonsky

For the Branch: Hugh Trenchard

General Manager's Delegate: Daniel M. Graham

Date of Hearing: December 8, 2016

Date of Decision: January 24, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Albertson Enterprises Inc. (the "Licensee") operates a licensed restaurant doing business as Original Joe's Restaurant & Bar (the "Establishment") under Food Primary Licence #304487 (the "Licence"). The Establishment is located at 2728 Pandosy Street, Kelowna, B.C.

The Licence specifies hours of liquor sales from 11:00 a.m. to midnight seven days a week. 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. Matt Albertson, principal of the corporate Licensee, and Mr. Dan Targonsky, manager of the Establishment, represented the Licensee for the purposes of this hearing. Throughout these reasons for decision, Mr. Albertson and the corporate Licensee - individually or collectively - may be referred to as "the Licensee" as the context requires.

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 8, 2016 (the "NOEA"). The Branch alleges that on July 20, 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 minor who was acting as an agent of the Branch under the Minors as Agents Program ("MAP").

The proposed penalty is a \$7,500 monetary penalty, which 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 admits that its employee sold liquor to the minor agent, and accepts the facts as outlined in the NOEA. However, the Licensee disputes the finding of a

contravention on the basis that its policies, practices, procedures and training establish a defence of due diligence.

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

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 16 inclusive.

Exhibit 2: A folder of documents (identified individually in the following reasons for decision.)

WITNESSES

A liquor inspector ("Inspector 1") provided evidence on behalf of the Branch.

The Licensee testified, and also called the Establishment's manager and one of its bartenders as witnesses.

EVIDENCE - BRANCH

The Licensee accepts the facts of the contravention as set out in the NOEA (Exhibit 1, tab 1).

On July 20, 2016 a liquor inspector ("Inspector 2"), along with another liquor inspector and a minor agent were conducting MAP inspections in the Kelowna area to test compliance. At the start of the shift the inspectors photographed the minor agent and reviewed his identification to confirm the minor agent was 17 years of age (Exhibit 1, tab 11).

At about 4:48 p.m. Inspector 2 and the minor agent entered the Establishment and took two seats at a high table directly in front of the bar. The minor agent ordered a bottle of Budweiser beer from a server who waited on them at the table (the "server"). Inspector 2 told the server he would need another minute to decide on his order. At 4:55 p.m. the server returned to the table and placed a bottle of Budweiser beer in front of the minor agent. After she left Inspector 2 took a photo of the minor agent with the beer (Exhibit 1, tab 12). Inspector 2 advised the server that they had to leave. The minor agent paid for the beer and received a receipt (photo at Exhibit 1, tab 12).

On July 21, 2016 Inspector 1 called the Licensee to advise him of the alleged contravention from the previous day, and to inform him of the issuance of a contravention notice (Exhibit 1, tab 2).

Cross-examination of Inspector 1

In response to a question from the Licensee, Inspector 1 confirmed that over time the Licensee has consulted with him to proactively discuss compliance management. Inspector 1 stated that the Licensee has no previous compliance or enforcement history other than "a very minor education issue."

EVIDENCE – LICENSEE

In his opening statement, the Licensee stated that the Original Joe's franchise group provides training materials to its franchisees. He stated that the bartender was not involved in the alleged contravention, but that he would testify as to the training he received, which was similar to the training given to the server.

The bartender

The bartender testified that he was hired on June 21, 2016 and went through the Licensee's orientation process. As part of the orientation he was taken through the Responsible Alcohol Service document (the "RASD" - included in Exhibit 2).

In seven pages the RASD covers a number of topics with respect to alcohol service, including identification requirements, policies and best practices. Included in the section on identification is the statement that "...we ask for identification from anyone who appears to be under the age of 30 who enters or orders an alcoholic beverage."

The bartender stated that after his orientation he signed a Responsible Service Corporate Policy document (included in Exhibit 2) thereby acknowledging that he understood the policies and procedures outlined in the RASD, that he would follow all provincial regulations regarding responsible service of alcohol, and that failure to do so would result in termination of employment.

Cross-examination of the bartender

In response to questions from the Branch advocate, the bartender responded that:

- The orientation process took an hour to an hour and a half. As well as the RASD, the process included a number of other topics (such as information about corporate culture) as detailed in a document titled FOH Training Printing Checklist ("the Checklist" – included in Exhibit 2.) The training material is all online, so the bartender subsequently re-read the material.
- His personal philosophy is to ID anyone who looks under 35.
- The bartender generally asks for ID about twice a shift.
- The Licensee maintains an incident log book. Instances of individuals being refused service for inadequate identification are not required to be included.
- The bartender has been trained to consult with his immediate supervisor (the manager) or the assistance general manager if he has any questions about customer service or compliance issues.
- The bartender took an online test on the RASD.
- The servers and bartender often have informal discussions about whether to ID a particular table. The manager has advised staff that an easy policy to follow is that "if there is any question as to whether to ask for ID, just ask for it."
- The bartender completed Serving-It-Right ("SIR") training in October 2014. The Licensee required the bartender to provide his SIR certificate as a condition of hiring.

Re-direct of the bartender

The bartender stated that everyone gets shadow shifts with more experienced employees when starting out. He said that he never has any difficulty getting help from the management team when he needs it.

The bartender testified that the day after the alleged contravention, the manager held two mandatory staff meetings to talk to staff about the incident and to go over the RASD. These sessions were about one hour long.

The bartender also stated that the Licensee has a Specials Board that employees are required to review each day at the beginning of their shift. On the Specials Board is a reminder that "All guests who appear under 30 yrs old must be carded + have I.D. – ask everyone, every day!" (A photo of the Specials Board is included in Exhibit 2.)

Re-cross of the bartender

In response to a question from the Branch advocate the bartender stated that the reminder about IDing was incorporated into the Specials Board after the alleged contravention.

The Licensee and the manager

The Licensee stated that the server was hired in 2014. He said that her resume (included in Exhibit 2) demonstrated that she was experienced in a similar licensed franchise restaurant operation in another province prior to working for the Licensee. The server had the equivalent to SIR training from the other province in 2011 (certificate included in Exhibit 2). The server signed documents acknowledging receipt of training in August and September, 2014, and again in September, 2015 (included in Exhibit 2).

The Licensee stated that he called the server in within 24 hours of being informed of the alleged contravention by Inspector 1. The server was mortified at having served the minor agent. She stated that she believed the minor agent to be of legal age and admitted that she had not asked him for ID. The Licensee terminated the server's employment immediately.

Cross-examination of the Licensee and the manager

In response to questions from the Branch advocate the Licensee stated that:

- A previous manager had hired the server. The current manager was hired in September, 2015.
- The training materials were updated and went online early in 2015.

- Regular staff meetings are held two or three times a year, generally dealing with menu changes and other topics that everyone should be aware of. Most managers prepare an agenda in their notebooks so there is no formal recording of meeting agendas or minutes.
- The Specials Board is the easiest way to communicate issues to staff daily. Other methods were used prior to the alleged contravention.
- He was not aware whether the server ever took the SIR training – he prefers SIR even if the employee has an equivalent certification from another jurisdiction.
- The Licensee communicates frequently with the franchisor regarding updated policies as they are always evolving.
- Neither the Licensee nor the manager was present on the day of the alleged contravention. The assistant general manager was in the kitchen at the time.

In response to questions from me the Licensee responded that:

- The employee's name was deleted from the Licensee's computer system after she was terminated, so there is no record to confirm whether the server actually took the online test or what her performance was on it.
- There is no firm policy to check whether or not an employee actually takes the online test. It is up to the employees' manager to determine this. Policy is evolving. Most of the online material is probably just supplemental to what was covered during orientation.
- The incident log is kept in the office shared by the management team. It is used for communicating among staff, for example: food or beverages that may be running short or key metrics and targets. There aren't typically a lot of incidents per se. Nothing recently required emergency attention. The incident log is a tool to ensure engaging as a team.
- The Licensee had 3 months of training from the franchisor. He has not seen any previous decisions by the General Manager.
- There is always a manager on site for every shift, so there is always a go-to person if staff has any problems. There is a community feel to each shift – the employees have each other's backs.

SUBMISSIONS – BRANCH

The Branch advocate submitted that the Licensee had admitted that the contravention occurred, and that the elements of the contravention had been established.

The Branch argued that the defence of due diligence had not been established by the Licensee on the balance of probabilities. He argued that partly as a result of the management team being in transition, there were gaps in the style and consistency of training given to the server.

The Branch advocate deferred to the NOEA with respect to the recommended penalty.

SUBMISSIONS – LICENSEE

The Licensee admitted that the contravention occurred and that alcohol had been sold to the minor agent.

With respect to due diligence, the Licensee submitted that the evidence of the Licensee's policies, procedures, training, and implementation establish a defence of due diligence. He stated that the server had 3 separate sets of training with the Licensee alone, as well as previous experience and the equivalent of SIR training. The Licensee argued the server had been provided with all the tools she needed to avoid the alleged non-compliance, but that she had failed to use them appropriately.

With respect to penalty, the Licensee said that the proposed monetary penalty would be more appropriate than a ten day suspension.

REASONS AND DECISION

Contravention

The Licensee admits that alcohol was sold to a minor.

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 (the minor agent).

Accordingly, I find that on July 20, 2016 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, 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

a. *Directing Mind*

There is no evidence before me to indicate that a directing mind of the Licensee had a direct role in the sale of the alcohol to the minor agent.

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

b. *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 justifiable 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:

- 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.

The due diligence standard is not one of perfection, but of adequate training, systems, and monitoring. There isn't a rote list of steps or elements that will constitute due diligence in all cases. The unique circumstances of each case have to be considered in determining whether the due diligence threshold has been achieved.

The Licensee's witnesses provided evidence about the training provided to new staff, ongoing training and other systems in place with respect to identification of minors and preventing the service of alcohol to minors. These included:

- New employees are subject to a training program conducted by the manager, including shadowing with a more senior employee.
- New employees are required to have SIR certification.
- The training includes information about checking for identification.
- A process for testing employees' knowledge.

While the Licensee's training regime has many elements that one would expect, I find that it falls short of being adequate. Testing is a key component of any training system. In this case, the testing process appears to be largely left up to the employees to complete. There is no formal system in place to determine whether an employee actually completed a test or what his or her performance was. The Licensee did not appear to have a comprehensive knowledge of the online content when he commented that the material was "probably mostly supplementary" to the orientation materials.

While oral discussion of new issues with staff is a valuable component, it is no replacement for periodic, mandatory staff meetings where the key messages and best

practices can be reinforced and a culture of compliance can be emphasized in a team setting. It is important that adequate documentation be maintained for such meetings. In the current case, no documentation was provided with respect to staff meetings and whether they included discussions of compliance issues, and there is no consistent policy with respect to documentation.

For the foregoing reasons, I find that the Licensee's training and systems regarding contraventions of section 33(1)(a) of the Act fall short of the standard required for due diligence.

c. 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.

The Licensee has indicated that it uses a job shadowing system for new employees, and that a manager is always available on each shift to support staff. It also took prompt action in disciplining the server, and in communicating the contravention to its employees. These are important elements of a supervisory system. However, an incident log is also a useful risk management tool for tracking compliance risks and communicating them to staff. In the current case it is not clear to me that the "incident log" referred to by the Licensee and bartender is used to its potential for management of compliance risks – it appears to exist primarily to record and communicate operational issues such as the need to order supplies.

I note that while the evidence indicates the Licensee has implemented a reminder system on its Specials Board about asking for identification, it did so only after the contravention had occurred. The Licensee stated that other processes had been in use prior to the Specials Board but there is no information before me about the nature or effectiveness of those prior processes.

Based on the foregoing, I find that the Licensee's supervisory and monitoring systems fall short of the standard required for due diligence.

I believe that the Licensee is genuinely interested in maintaining an effective compliance management regime. The evidence indicates to me, however, that it may be placing too much reliance on the franchisor's training materials and systems without fully understanding how to use them most effectively.

The Licensee should reference additional sources to develop a functional understanding of due diligence. For example, the Licensee would benefit by becoming familiar with current decisions by the General Manager as posted on the Branch website at <http://www.pssg.gov.bc.ca/lclb/enforcements/index.htm> These decisions are not binding on future decision makers, and do not set precedent, but they do provide valuable information to licensees about current standards and practices. They provide a broad menu of tactics that licensees may use for designing training, testing and monitoring regimes appropriate to their circumstances.

Given my conclusions with respect to the inadequacy of the Licensee's training, supervision and monitoring, I find that the Licensee has not established the defence of due diligence on the balance of probabilities.

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

The Branch has consistently maintained that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the Branch considers this a significant public safety issue:

- 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; therefore, liquor has a more intoxicating effect on minors, and
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault, and theft

In this case the facts are that the Licensee's employee sold liquor to a 17 year old individual without any request for identification. For the reasons detailed above the Licensee has fallen short of proving due diligence. In these circumstances, I find that a penalty is warranted.

The factors that I considered in this case in determining the appropriate penalty include: consideration of 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.

There is no record of a proven contravention of the same type for the Licensee at the 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.

The Establishment's compliance history record (Exhibit 1, tab 7) shows no previous compliance or enforcement history against the Licensee.

In consideration of:

- The serious public safety concerns related to selling alcohol to minors
- The insufficiency of evidence of due diligence
- As mitigated by the Licensee's good compliance record

I find the minimum \$7,500 monetary penalty to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific 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 February 23, 2017.

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: January 24, 2017

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