



**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:	WITF Restaurants Inc. dba Wolf in the Fog PO Box 1222 Tofino, B.C. V0R 2Z0
Case:	EH16-096
For the Licensee:	Jorge Barandiaran and Hailey Pasemko
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Daniel M. Graham
Date of Hearing:	February 23, 2017
Date of Decision:	March 24, 2017

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
www.gov.bc.ca/liquorregulationandlicensing

INTRODUCTION

WITF Restaurants Inc. (the "Licensee") operates a licensed restaurant doing business as Wolf in the Fog (the "Establishment") under Food Primary Licence #305962 (the "Licence"). The Establishment is located at 150 Fourth Street, Tofino, B.C.

The Licence specifies hours of liquor sales from 9:00 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. Jorge Barandiaran, a principal of the corporate Licensee, and Ms. Hailey Pasemko, a manager of the Establishment (the "Manager"), represented the Licensee for the purposes of this hearing. Throughout these reasons for decision, Mr. Barandiaran 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 August 3, 2016 (the "NOEA"). The Branch alleges that on July 6, 2016 the Licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* [RSBC 1996] c. 267 (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*, B.C. Reg. 244/2002 (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 5 of the *Liquor Control and Licensing Act* [SBC 2015] c. 19 (“the Current Act”), the General Manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Current Act and Part 6 of the current *Liquor Control and Licensing 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 17 inclusive.
- Exhibit 2: Printout of an e-mail from the Manager dated April 9, 2016, submitted by the Licensee.
- Exhibit 3: Printout of an e-mail from the Licensee dated April 11, 2016, submitted by the Licensee.
- Exhibit 4: Printout of an e-mail from the Manager dated February 2, 2017, submitted by the Licensee. (The Licensee had torn a strip of his personal notes off the bottom of the page prior to submitting it into evidence.)
- Exhibit 5: A document titled Responsible Service of Alcohol, submitted by the Licensee.
- Exhibit 6: A document titled Verification of Terms of Employment, submitted by the Licensee.

WITNESSES

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

The Licensee and the Manager provided evidence on behalf of the Licensee.

EVIDENCE - BRANCH

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

On July 6, 2016 a liquor inspector ("Inspector 2"), along with another liquor inspector and a minor agent were conducting MAP inspections in the Tofino area to test compliance. At the start of the shift the inspectors photographed the minor agent and reviewed her identification to confirm the minor agent was 16 years of age (Exhibit 1, tab 12).

At about 4:01 p.m. Inspector 2 and the minor agent entered the Establishment and seated themselves on the patio. The minor agent ordered a Lonetree apple cider from a

server who waited on them at the table (the "Server"). Inspector 2 ordered nothing as he was still looking at the menu. Moments later the Server returned to the table and placed a can of Lonetree apple cider and a glass with lime in front of the minor agent. After the server left Inspector 2 took photos of the minor agent with the cider (Exhibit 1, tab 13). The minor agent paid for the cider and left the Establishment with Inspector 2 at about 4:25 p.m.

Inspector 1 subsequently called the Licensee to advise him of the alleged contravention and to inform him of the issuance of a contravention notice (Exhibit 1, tab 2). Inspector 1 served the Licensee with the contravention notice on July 8, 2016.

On direct examination Inspector 1 – referring to his notes (Exhibit 1, tab 10) - stated that he had conducted an inspection of the Establishment on April 9, 2016. He became concerned because he observed a number of young patrons being served alcohol without being asked for identification. Inspector 1 expressed his concerns to the Manager, who advised him that the servers know most of the patrons. Inspector 1 specifically discussed MAP inspections with the Manager.

Cross-examination of Inspector 1

In response to a question from the Licensee, Inspector 1 acknowledged that it was possible that the servers did indeed know all the patrons that were being served on April 9, 2016.

EVIDENCE – LICENSEE

The Licensee and the Manager

The Licensee testified that the Establishment is "not a dive bar, diner, or casual family restaurant" – it is a well-regarded restaurant of which its clientele have high expectations. He stated that the Establishment won an award as the best new restaurant in Canada in 2014, and that last year it was ranked 38th in the country. The Licensee explained that he was not disputing that the contravention occurred but that he had taken all necessary steps he possibly could to prevent the contravention.

Firstly, he said, all new hires are required to have Serving-It-Right ("SIR") training. All the identification requirements are set out in that training.

Secondly, the Licensee stated that the employee manual contains information dealing with the need to identify minors. He submitted as evidence a sheet of paper titled Responsible Service of Alcohol (Exhibit 5) which he said was a page from the version of the employee manual which had been in use at the time of the alleged contravention. This sheet includes information stating, among other things, that:

- No employee is to serve an alcoholic beverage to any person under 19 years of age;
- Any guest who appears to be under 30 years old is required to present documentation to show they are 19 years or older. Acceptable identification is a driver's licence with photo, or photo identification, showing date of birth issued by a government body;
- The employee will check the identification to confirm its authenticity, and any appearance of forgery or tampering is to be reported to a manager.
- In the absence of authentic identification or in case of doubt, service of alcohol will be refused.

New hires are required to sign a form titled Verification of Terms of Employment (the "Verification form") (Exhibit 6) by which the employee agrees that he or she has "thoroughly read and understand the contents" of the employee manual. The Licensee stated that a new employee manual developed approximately two weeks prior to this hearing contains more specifics about identification of minors.

Thirdly, the day after the April 9, 2016 inspection and warning by Inspector 1, the Licensee implemented a process whereby the birthdate required to evidence the age of 19 years is posted daily on the chef's whiteboard where the day's specials are displayed. The Licensee stated that he holds a daily briefing with staff at 4:45 p.m. to go over the specials, to point out the "19 year" birthdate, and to remind staff about asking for 2 pieces of ID.

Fourthly, the Licensee testified that on April 9, 2016, after the inspection by Inspector 1, the Manager had sent an e-mail to all staff (Exhibit 2) stating that “[He] gave us a heads up that they will actively be sending in minors that will try and order alcohol. They must be able to produce 2 valid pieces of ID in order for us to serve them. The inspector even said that they will send people with just 1 piece of ID so make sure we are checking for both.” In her e-mail the Manager included an excerpt from the SIR website detailing identification requirements. On April 11, 2016, the Licensee sent an e-mail to staff (Exhibit 3) urging staff to review the identification requirements set out in Exhibit 2 and to act on them.

The fifth step that the Licensee described as part of its efforts at due diligence is that each shift two to four managers are, among other duties, watching the servers to ensure that they are asking for ID. He stated that almost every day they have to send patrons back to their hotel for a second piece of ID and that it is very disruptive of service. The Licensee said that he is well aware of the legislation and that it is his job to pass his knowledge along to staff.

The Manager stressed the deep disappointment the management team felt that even though they had known a MAP inspection was coming, and had made best efforts to avoid a contravention, they still “failed” the inspection.

Cross-examination of the Licensee and the Manager

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

- New hires are interviewed to ensure they are right for the business. They work a trial shift for a few hours and if they work out are officially hired. The hire form includes a space for the employee’s SIR certification number. Employees without SIR certification cannot serve alcohol – they have to act as hosts. The management team knows who has or does not have SIR certification.
- The Verification form signed by the Server is back at the Establishment.
- The employee manual is about 20 pages and is e-mailed to each employee. The Licensee does not go through it with them – they just sign the Verification form to indicate that they have read it. He stated that “If they don’t read it, it’s their fault, not ours. We trust them. They are grown people.” The Licensee refers to

the manual daily. That carries more weight than sitting down with them for an hour to go over the manual at hiring. They have 70 employees during the summer (though half of them work in the kitchen) and – given the tight margins in the restaurant business - it would be too expensive to sit down for an hour with each of them. He does not see how that would be better than what the Licensee is doing now.

- The Licensee doesn't hire inexperienced staff.
- New hires undertake a trial shift for four to eight hours and are present for the daily briefing meetings. They then spend four to five days working with an experienced server. Three staff are entrusted with training new hires. This training period includes experience with identifying patrons who appear to be under 30 and asking for ID.
- The subjectivity of judging age is discussed at the daily briefings. They don't talk about physical features as the Licensee doesn't think it's relevant. They do stress that it's hard to know age.
- They spend time training staff in damage control...international guests are often infuriated at having to provide ID. The Establishment never bends the rules and sends patrons home for IDs every week.
- The Licensee does not rely on scheduled all-staff meetings as there are always some staff that are away from home. The daily briefings are preferred. He does hold all-staff meeting two or three times a year to discuss, among other things, what could have been done better. The Licensee always prepares an agenda for the managers but not for staff.
- Weekly management team meetings are held each Sunday. Servers are told that the management team is there to support them with respect to asking for ID.
- Since April 10, 2016 the Licensee has maintained an incident log book for major incidents.
- There are no testing protocols or written policies with respect to testing staff knowledge. Pop quizzes are used to test employees' product knowledge and SIR knowledge.
- There are no signs in the Establishment regarding identification requirements. They have an aesthetic in the restaurant - you won't see such signs in any fine dining establishment.

In response to questions from me the Licensee responded that:

- When the Licensee interviewed the Server after the alleged contravention he was unable to explain how he had failed to ask the minor agent for ID. The Server was very upset as the staff have a strong team ethic and he felt he had let the team down. The Server is one of their best employees so he was suspended for three or four days rather than being fired.
- The Licensee has reviewed previous decisions of the General Manager on the Branch website. He is proud of the Establishment's clean compliance record.

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 as Tofino and the Establishment are international destinations, the Licensee should do more to prepare guests for the potential to be asked for ID. This would reduce the numbers of irate reactions and would assist servers to be more comfortable asking for ID.

The Branch also argued that the Licensee should provide more structured training regarding identification of minors, including a testing protocol with group testing sessions.

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.

The Licensee stated that he had done all he could to meet the standard of due diligence. He referenced the e-mails to staff, the daily briefings, and the updated employee

manual. He stated that the e-mails to staff highlighted the seriousness with which they viewed the upcoming MAP inspection. The Licensee argued that anyone can recommend what the business could do better, but they are running a business and that group training sessions are not realistic or necessary. He stated that their training is already thorough and that they are very supportive of the staff.

The Licensee also argued that at the end of the day it is always up to the individual server as to whether or not they will comply with ID requirements. He suggested that if the Branch is serious about reducing the risk of serving alcohol to minors it should ensure individual servers are subject to penalties for non-compliance rather than leaving a licensee to bear the full liability.

Regarding a penalty, the Licensee submitted 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 (Lonetree apple cider)
- to a minor (the minor agent).

Accordingly, I find that on July 6, 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. A Licensee who successfully establishes the defence of due diligence will avoid liability for a penalty.

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.

In this case the Licensee provided evidence about training and other systems in place regarding identification of minors and prevention of alcohol service to minors. These included:

- New employees are required to have SIR certification.
- The employee manual includes information about checking for identification.
- New employees are subject to several shifts of job shadowing with a more senior employee.

While the Licensee has some elements of a training regime in place, I find that it falls short of being adequate. Testing and documentation are key components of any training system. In this case, the Licensee acknowledged that he leaves it up to new staff to review the employee manual, including the provisions about responsible service and identification requirements, with no system of subsequent independent verification. Having the employee sign the Verification form on his or her own recognizance is not adequate verification. The Licensee referred to subsequent pop quizzes, but there is no evidence of any record being kept of the results of this process. The Licensee acknowledged that there are no written policies regarding training standards or processes.

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 to me with respect to the two or three annual staff meetings and whether they included discussions of compliance issues, and there is no consistent policy with respect to documentation.

Overall, the evidence conveyed a sense of the Licensee's training regime being largely developed *ad hoc*. The Licensee questioned the need for, and the effectiveness of, a more rigorous and better-documented training regime. While these things may

legitimately be the subject of some debate, it is clear that well-organized, documented training processes are key elements of a defensible regime of due diligence. The evidence in this case does not demonstrate that the Licensee's training system meets that standard.

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 two to four managers are available on each shift to support staff. The Licensee also utilizes a reminder system on its Specials Board and holds a daily briefing session with staff where identification of minors is emphasized. The Licensee stated that he has implemented an incident log to document significant events. The Licensee also acted promptly after the contravention to implement a discipline process for the Server.

Based on the foregoing, I find that the Licensee's supervisory and monitoring systems are appropriate. However, given my conclusions with respect to the inadequacy of the Licensee's training regime, I find that the Licensee has not established the defence of due diligence on the balance of probabilities.

Regarding the Licensee's contention that the responsibility for a contravention on any given day always falls on the individual server, the essence of a strict liability regulatory regime is that the licensee is exempt from penalty if he can demonstrate due diligence, regardless of whether the individual server had an "off day" or even deliberately contravened the legislation.

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.

In this case the facts are that the Licensee's employee sold liquor to a 16 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 6) 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 April 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: March 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