



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF**
A hearing pursuant to Section 51 of
The Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Licensee: After Glo Europub Grill Ltd.
dba Glo Restaurant + Lounge
104-2940 Jutland Rd.
Victoria, BC V8T 5K6

Case: EH17-009

For the Licensee: Paul Simpson, Representative of the Licensee

For the Branch: Hugh Trenchard, Branch Advocate

General Manager's Delegate: Dianne Flood

Date of Hearing: June 6, 2017

Date of Decision: July 11, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, After Glo Europub Grill Ltd., operates a licensed establishment known as Glo Restaurant + Lounge (“the establishment”) under Liquor Primary License #300963 (“the License”). The establishment is located at 104-2940 Jutland, Victoria, BC. Under the Licence, the Licensee may sell liquor between the hours of 11:00 a.m. to midnight Sunday to Thursday and between the hours of 11:00 a.m. to 1:00 a.m. on Friday and Saturday.

The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Terms and Conditions Handbook* (the “Handbook”). Under the licence, the Family Foodservice term and condition permits minors accompanied by a parent or guardian in all licensed areas until 10:00 p.m. when meal service is available.

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 2, 2017 (the "NOEA").

The Branch alleges that on February 4, 2017 the Licensee contravened section 77(1)(a) of the Liquor Control and Licensing Act, S.B.C. 2015 c. 19 (the “Act”) by selling, giving or otherwise supplying liquor to a minor (the “Minor Agent”).

Item 3, Schedule 2 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 241/2016, (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 monetary penalty of \$7,500, noting that under a 10-day suspension of its Liquor Primary licence the establishment would have to close, so that not even food could be served during that time.

The Licensee admits that its employee sold liquor to the Minor Agent and to the facts as set out in the NOEA. However, the Licensee disputes the finding of a contravention, claiming a defence of due diligence.

For the purposes of this hearing, and in accordance with section 5 of the Act, the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Act and Part 6 of the Regulation.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

Liquor Control and Licensing Act, S.B.C. 2015, c.19

Supplying liquor to minors

77 (1) subject to the Regulations, a person must not

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

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016, Schedule 2

Monetary Penalties and Licence Suspensions

Table

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
Minors					
3	Contravention of section 77 of the Act [<i>supplying 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's Book of Documents, tabs 1 to 16

Exhibit 2: Photographs of the Minor Agent and her identification (sealed)

Exhibit 3: A copy of the Liquor Line, Issue 11, Fall 2016

Exhibit 4: A copy of the Liquor Line, Issue 12, Spring 2017

Exhibit 5: Glo Orientation + Policy Guide

Exhibit 6: Orientation + Policy Guide Test 2017 Answer Key

Exhibit 7: Excerpts from the Licensee's electronic Manager Log Book (three pages)

WITNESSES

Two liquor inspectors ("Inspector A" and "Inspector B"), who attended at the establishment with the Minor Agent on February 4, 2017, gave evidence on behalf of the Branch.

The Licensee's representative and two staff members (the "Floor Manager" and the "Server") gave evidence on behalf of the Licensee.

EVIDENCE—BRANCH

Inspectors A and B gave evidence about the Minors as Agents Program, the facts set out in the NOEA and licensees' responsibilities. As the Licensee accepts the facts as alleged in the NOEA to have occurred in the establishment on February 4, 2017, the Inspectors' evidence and those facts are summarized here.

The Minors as Agents Program

Inspector A testified that the Minors as Agents Program (MAP) was authorized by legislation to enable the Branch to verify licensees are complying with their responsibilities not to sell liquor to persons under the age of 19 years (minors), with consequences to follow if they do. He said a number of efforts were made to ensure licensees were aware of the program, including the Liquor Line newsletters and the LCLB MAP 2013/14 Annual Report (Exhibit 1, tab 14).

On February 4, 2017, pursuant to the MAP, Inspectors A and B, together with a third inspector and the Minor Agent, conducted a series of inspections in the Capital Region District to test compliance with the prohibition under the Act against selling liquor to minors.

At the start of the day, the Minor Agent was photographed, her identification viewed and photographed, and her age confirmed to be under 19 years (Exhibit 1, tab 12 – redacted versions). The Minor Agent carries no identification and if asked for identification she will say she has none.

The Inspection of the Establishment

At about 6:10 p.m. on February 4, 2017, the Minor Agent and Inspector B entered the establishment to conduct a routine inspection under the MAP. They were greeted by a hostess who, at the Minor Agent's request, seated them in the service area of the Liquor Primary License. The hostess gave them menus. A staff member (the Server) came to the table, lit a candle and explained the drink specials. Inspector B was busy on her cell phone. The Minor Agent asked for two bottles of beer.

Inspector B said the premises were so dimly lit she could not read the menu. Inspector B said even with the candle lit, it was hard to see across the table. She said the lighting from the adjacent areas was also dim and did not illuminate their table. She referred to the photograph at Exhibit 1, tab 13 as showing the poor lighting.

The Server delivered the two bottles of beer to the table, put one bottle in front of the Minor Agent and one in front of Inspector B and left. About two minutes later, the Minor Agent flagged down the Server, told her that they needed to leave. The Minor Agent paid for the two beers with cash and the Minor Agent and Inspector B left the establishment. No identification was requested from the Minor Agent at the time of the purchase or at any time before the Minor Agent exited the establishment.

The Minor Agent then left the establishment and returned to the inspection vehicle where she completed the observation form and her statement (Exhibit 1, tab 11). Inspector B also exited the establishment and made her notes. An extract of her notes for that day is at Exhibit 1, tab 10.

The Contravention Notice

Inspector A completed the Contravention Notice (Exhibit 1, tab 2) and together with the third inspector entered the establishment at about 6:37 p.m. He spoke to the Floor Manager, advised her that liquor had been sold to a minor, and gave her the Contravention Notice. The Floor Manager confirmed that the Server was the person who served the Minor Agent and provided a copy of her SIR certificate.

The Licensee's responsibilities

Inspector A testified that the Licence is subject to the Terms and Conditions of the Handbook (Exhibit 1, tab 15). Inspector A said he expected licensees to be aware of all of the contents of the Handbook, including the prohibition against sales to minors and the identification requirements. At page 5, the Handbook sets out the prohibition against serving minors and the expectations for a house policy to prevent that. Identification requirements are set out at page 6 of the Handbook.

He said the signed interview sheet (Exhibit 1, tab 8) indicates the Licensee knows these responsibilities. Further, the License is sent to the Licensee every year so the Licensee is expected to know its terms and conditions and to comply with them.

Enforcement Action

In the NOEA, Inspector A said that the reasons for pursuing enforcement action include the impacts of liquor on growing bodies and developing minds, the effects on individuals and society of irresponsible drinking behavior learned at an early age, the inability of minors to metabolize alcohol in the same manner as adults such that it has a more intoxicating effect, and that liquor is a significant factor in many crimes committed by youth.

Inspector A confirmed the compliance history issues for this establishment under this Licensee was set out in Exhibit 1, tab 6. The Licensee has two proven contraventions for overcrowding but this is the first contravention for sale to a minor.

The range of penalties on a first contravention of this nature is a 10-to-15 day suspension or a monetary penalty of \$7,500 to \$10,000. In this case, the Branch is seeking a monetary penalty of \$7,500.

MAP Inspection protocols

The Map inspections are conducted either randomly or targeted, based on a complaint. Here, the Licensee was selected on a random basis. No complaints had been made about it.

Both inspectors testified that in their region of responsibility the protocol for MAP inspections of Food and Liquor Primary Licences typically calls for the “handling” inspector to sit at the same table with the minor agent. They said this is, firstly, for the minor agents’ safety and, secondly, so that the inspector can hear what goes on and can testify to it if necessary. They said if they allow a hostess to seat the minor agent and the handling inspector separately, they can end up being seated too far apart for the handling inspector to hear the conversation between the minor agent and the server.

Inspector B testified that she did not speak to or engage with the Server, as that is not the inspection protocol. She said the protocol is for only the minor agent to engage with the server, so the server has an opportunity to assess the minor agent. Inspector B said she was on her cell phone when the Server was at the table, either texting or calling the other inspectors to let them know she had entered the establishment.

Inspector B testified that she hired and trained the minor agents. She said the minor agents are instructed to dress and keep their appearance as they normally would for school. They are trained not to try and deceive licensees and to give their real age if asked.

Inspector B was asked whether she thought sitting with the Minor Agent and being on her cellphone gave the Server the impression of a mother-daughter outing. It was suggested the Server would rely on a mother not acquiescing in her under-age daughter drinking, and so this could lead the Server to make the assumption the “daughter” was of legal age. Inspector B re-iterated that sitting with the Minor Agent is for the agent’s

safety and for later testimony purposes and letting the Minor Agent order is to test for compliance.

Inspector B testified that on February 4, 2017 the team carried out 23 inspections with four contraventions occurring. She said this means that in the other 19 inspections the Licensee was compliant and the Minor Agent was asked for identification. Inspector B said the inspectors had no quota of non-compliance that they had to meet or were under any pressure to obtain any “fails” in the MAP. She said the inspectors were happiest when all licensees complied, which is the goal of the MAP.

The Licensee asked both inspectors how a licensee could absolutely prevent any sale to a minor. Inspector A said that the Branch policy is that it is the Licensee’s responsibility to make sure they don’t serve minors, and the Branch does not tell licensees what age to set to ask for identification. On being asked further, he said if a licensee wants to be 100% sure they don’t sell liquor to a minor they may request identification from all customers. He said it is up to the Licensee to set their own guidelines to make sure they comply with the law. He noted that minors’ appearances can vary in terms of looks, features, maturity and nationality.

Inspector A said that sales to minors can be more of a heightened concern in areas that experience a high degree of tourism, either from Alberta where the legal drinking age is 18 years or from Europe or other places around the world, which may vary significantly in terms of legal drinking ages. He said that some parents from these places may not be aware that their child who is of legal drinking age at home is not of legal drinking age in B.C. Checking for identification even when the customer is or may be with a parent is required to prevent sales to minors.

Inspector B said that with her experience she would recommend to licensees who want to avoid serving minors to check the identification if the person appears to be under 30 or 35 years old. She said other licensees who request identification if the person looks under 30 or 35 years old don’t seem to have a problem with that, but it is the licensee’s responsibility to set their own guidelines. She said some places, like nightclubs, special events, or where they get a lot of university students, request identification from

everyone. Inspector B also referred to the need to be more vigilant about checking identification in areas with high tourism.

EVIDENCE – LICENSEE

The Licensee's representative and two staff members ("the Floor Manager" and "the Server") gave evidence on behalf of the Licensee.

The Floor Manager

The Floor Manager has been employed by the Licensee since March, 2014, when she was initially hired as a hostess. She was the floor manager on duty the night of February 4, 2017. As floor manager she is responsible for staffing levels, customer issues, and ensuring the food and drinks are "top notch". She also has some responsibility for training new staff, but that is mostly done by one of two senior managers.

Training

She testified that training of all new staff starts with a one and one-half to two hour orientation that involves reading the Licensee's Orientation and Policy Guide (Exhibit 5). She noted that page 11 deals with Serving Minors and page 10 with Over Service. She also noted that Disciplinary Actions listed at page 15 of the Policy Guide includes serving alcohol to minors. The Floor Manager had input into the Policy Guide, but two other senior managers prepared it. She said the Guide has changed over time but the prohibition on serving minors was always there. The Guide is now available to staff electronically and a paper copy is also kept in the office.

She said employees are given a test on their knowledge of the orientation material and referred to Exhibit 6, a copy of a test administered in May, 2017, as an example of that test. Question 10 deals with service to minors and over-service. She had personally administered the test to new hires. New employees must get at least 80% to be considered a passing mark. She said as far as she knew the test had not changed since February 4, 2017.

The Floor Manager said all front of house employees have the orientation and are tested on it. This includes bartenders, servers and support persons such as hostesses, food expeditors, runners and bus persons. She said no one is allowed on the floor unless they understand the responsibility for service, even though not all will be serving liquor. This is because some of the support persons may later be promoted to servers or bartenders.

The Floor Manager said that to be hired directly as a server [as opposed to being promoted from within] the person must have a minimum of two years experience as a server. To be promoted from within, a person will usually have gained experience as a “bar back”, be trained by the bartender and also have their SIR certificate. At that point the person is not re-tested on the orientation material or the requirements for checking identification.

The Floor Manager said after the initial orientation staff are then given training shifts as support staff. Servers then get an additional five days training alongside a senior server. The Floor Manager said that the Licensee has a lot of senior servers, some of who have been with the Licensee for eight years or longer, and they take a personal pride in the operations of the establishment.

She said on Day 1 the new hire shadows the more experienced server, then on days 2, 3 and 4 the new hire assumes more responsibility as the days go on. On Day 5, the experienced server shadows the new hire. After the five days, the servers are then tested on their knowledge, but she did not give any information about how they are tested. The new hires, she said, then take on responsibility for a small number of tables, which increases as they get more experienced.

The Floor Manager said that during training the experienced server is asked to illustrate how to ask for identification in accordance with the Licensee’s policy to ask for identification if the person looks to be under 25 years old. She said the process to ask for identification is not written down but all the senior servers and the new hires have their SIR certificates, so she believed they would apply the same standards.

The Floor Manager testified that senior servers will also be involved in testing new hires using the Orientation and Policy Guide Test (Exhibit 6), about one or two times a month.

She said she has worked at other establishments and in her opinion their training and policies are not as thorough as those of the Licensee.

Systems

The Floor Manager said that asking for identification happens frequently and especially in the summer when the demographic of the clientele becomes younger, because of their patio. She said servers are told to be overly cautious and to ask for identification on the patio because of things like sunglasses and hats.

She said the managers all sit down and meet with Mr. Simpson on Sunday mornings. Regular meetings are not held for servers. Communications with servers is by memo or one-on-one with a manager.

She said the Licensee sends memos and objectives sent to the staff. She said these are now sent out over the electronic system that all staff can access using an app or email. That system is primarily used for scheduling and was implemented in March, 2017. She said the memos address things like reservations, appropriate footwear, changes to hours, over-service and also checking identification properly. She said three or four things might be included in one memo.

The Floor Manager said that memos are also printed out and posted on the features board in the kitchen that all staff are to check at the start, during and end of their shifts. The Floor Manager testified that the on duty manager will question staff on the contents of the memos when the staff start their shifts. She said a note is made if the staff person cannot repeat the contents of the memo.

She said a memo about checking for identification is on the feature board and that recently increased the age for checking to 30 years.

Also, she said, the managers have a Manager Log Book where they record incidents. The Manager Log Book is now kept as part of the Licensee's electronic record and messaging system. Previously the incidents were recorded on paper and kept in a paper binder in the management office that all managers had to sign off on.

She said she had used the Manager Log Book both before and after the incident. She presented three pages printed from the electronic Manager Log Book (Exhibit 7), showing recent recordings made by her. She said these were a small sampling of from when she was the on-duty manager.

The Floor Manager said there was no signage about checking for identification but to her knowledge that was not expected in a restaurant, only in retail liquor stores.

She said she did not know of any secret shopper programs or other spot checks on staff.

She also said that staff are not rewarded for checking identification as that would be unrealistic considering the number of times that is done. She said the establishment has a high volume of traffic, so it would be hard to track when those requests are made. The Floor Manager said the year of birth for the legal age for service is not in the POS system, but is in the Orientation and Policy Guide (Exhibit 5).

She said that the Licensee has no different expectations or standards for tourists than for other customers, and that expectation and standard is that all persons who appear to be under the age of 25 will be asked for identification.

She said that staff is not penalized for any wasted product or disciplined if a person is subsequently denied service for lack of identification or for over-service. The servers know it is ok if this happens.

She said she requests identification from customers if in doubt [about their age]. She said she has followed up with staff about them asking and has never had an issue with their decisions. She said friends of hers have been requested [by other servers at the establishment] to produce identification even though they are over 25 years of age. She said she has seen servers [in the establishment] request a second piece of identification.

She described a recent situation where a person who was with his parents did not have identification and even though the parents vouched for him being of legal age, the person was denied service.

The Incident

On the night in question, the Floor Manager never saw Inspector B and the Minor Agent. She did meet with Inspector A, who gave her the Contravention Notice.

The Floor Manager said as manager on duty she was responsible for the lighting of the establishment on the evening of February 4, 2017. She testified that the lighting was dim so there was no glare, describing it as a romantic glow. She said in addition to the candle on the table, there was lighting on the adjacent pillars, in the nearby booths, on a picture between the booths and at the bar. The Floor Manager did not think the picture at Exhibit 1, tab 13 was a very good representation of the lighting that night. She said in February it is generally an older clientele, so the lights are brighter. In any event, she said the Licensee's expectations for servers to check for identification are the same regardless of the lighting levels.

The Floor Manager said she thinks that the Minor Agent was served liquor at least in part due to the nature of who she was with and that the situation presented as a mother-daughter outing.

The Server

The Server testified she had about 12 to 13 years experience serving alcohol. She said she started as a server in Alberta at age 18 and had worked at restaurants and pubs. She had her certificate in the Alberta equivalent of the SIR program. She was hired by the Licensee in July, 2016.

She testified that the Licensee's policy was to check for identification if the person appears to be under 25 years of age. Since February, 2017, the policy was changed to check for identification if the person appears to be under 30 years of age.

Training

The Server testified that she had been given two hours of verbal orientation, one-on-one by a manager, where they talked about responsible beverage service, not just reading about it. The Server recalled getting a big binder with lots of information in it, including about the service of liquor. She said she still had her binder.

The orientation, she said, was followed by nine or ten days of training. She said the first day was training on hostessing, serving, bartending, serving minors, and on the restaurant. She recalled getting about six verbal tests, one each day. She said one test included questions about asking for identification. She said the training she got elsewhere was not as intense as the training she got at the Licensee.

The Systems in Place

The Server said daily, pre-shift meetings are conducted by the on-duty manager and attended by all servers. She said there is no set agenda for the meetings but include topics like the daily features and if anything is going on, and include tests, which are very structured, unlike most other restaurants. She said the daily meetings and tests included reminders about asking for identification every couple of shifts – probably one in every three shifts she works. She testified that these daily tests had been conducted prior to February 4, 2017, the date of the incident.

The Server also said the daily feature board included a reminder to check identification. She was not sure if the reminder had been there prior to February, 2017.

With the new electronic scheduling system [introduced in March, 2017], weekly on-line messages were sent to staff by management, including reminders to ask for identification.

The Server said the servers don't remind each other to check for identification because that [checking for identification] is something the servers do every day. She also said the servers do not regularly discuss how to check for identification or to identify someone's age, as that is also something they do every day. The Server testified that the servers will talk about it every once in awhile. Their consensus is that if there is any doubt, to request identification. The Server testified that if she thinks someone is under the age of 25 years, she will ask them for identification.

The Incident

The Server testified that she recalled serving Inspector B and the Minor Agent. She said they looked like a mother-daughter and nothing seemed unusual to her.

The Server said the lighting did not cause her any difficulty in assessing the Minor Agent's age. She said the lighting was the same as at other restaurants and described it as a romantic setting. She said that although the photograph at Exhibit 1, tab 13 made it appear dark, she thought she could see well enough at the time.

The Server said she had thought the Minor Age was 26 or 27 years old and over the age of 25 years [which is the age the Licensee's policy called for checks for identification]. She said she based that assessment on the Minor Agent's appearance – she was wearing make up - and how the Minor Agent presented herself, and the situation of what appeared to be a mother-daughter outing. She did not think a mother would allow her underage daughter to order liquor. While she thought the Minor Agent was older than 19 years of age, she thought that if the Minor Agent had been with someone younger than the Inspector - who appeared to be her mother - she would have asked for identification. She said she has asked for identification even if the person is with their parent, if they look 19 years of age.

The Server said she works about three shifts a week. She testified that she probably serves 400 customers a month. She said she requests identification every day. She reiterated the Licensee's policy is to check for identification if the person appears to be under 25 years of age. She said she never hesitates to request identification if she thinks the person is under 25 years old, referring to her years experience in the industry. She said she would ask for two pieces of identification, and if only one piece was presented, she would tell the person she could not serve them. She testified that she has refused service many times.

The Server testified that the Licensee has a high degree of awareness of the need to check for identification and not to over-serve. She placed that at above industry average. She also said the Licensee's managers provide lots of support to serving staff with respect to these issues.

The Server said she had not been disciplined for the incident. She believed that the lack of any disciplinary action was because it [the incident] could have happened to anyone, and it just happened to be her. She said she was upset by the incident, and she agreed that because it was her job to check for identification, she should have been dismissed. She was grateful that had not happened.

The Licensee's Representative

Mr. Simpson testified that he has been a part-owner of the establishment since 2005. He has also been involved in another licensed restaurant for over 20 years. Prior to that, he was the regional manager for a major food and beverage chain for nine years.

Mr. Simpson testified that the Licensee served over 150,000 customers annually, with 65% of the revenue derived from food. Mr. Simpson said there are about 83 employees, with about 33 servers, 5 bartenders, 19 support staff and 5 managers. He said about 50 new employees had been hired since February, in anticipation of the busier summer season.

He said the establishment was previously a pub and has two licenses. He said the owners are moving to make it more of a restaurant.

In the 20 years of his involvement in this establishment and the other restaurant, they have never had a contravention for serving a minor or for over-service. He attributed that to the level of training provided, saying that in his opinion it was above the industry average.

Training

Mr. Simpson said the training program was developed with years of work. He said their manual was not just a document, it was a constant communication. He said the new hires vary from very experienced to no experience, with all of the new hires commenting on how good the training is.

He testified that senior servers are designated as trainers for new hires, using a “train the trainer” program. He said this means that the trainers have lots of experience on what to do and how to do it, so they are competent to train others. He said in late January, 2017, a one day program was delivered to all the Licensee’s trainers, to go over the whole program. He said the Licensee has also been holding on-going meetings to update the training manual.

Mr. Simpson said their policy is for servers to ask the older person [at a table] for their order first, then the younger person. He said that did not happen here because Inspector B was on her phone at the time.

Systems in Place

Mr. Simpson said that the Licensee does not have regularly scheduled management meetings but he is always meeting with the managers on various issues. He said the managers’ daily routine was to check the Log Book and the features board, which has other information, to meet with kitchen staff, and then to meet with the other staff [on duty that shift] to go over the information.

He said that on holidays like St. Patrick’s Day, Canada Day, Halloween, and Christmas, or on special reservations for company parties, the floor manager will meet with the staff and remind them about checking for identification.

He testified that despite the name of “Europub” they do not target their marketing to tourists. He said most of the clientele is local. He said even if the clients are tourists from Alberta or Europe, the Licensee would expect staff to treat them all the same with respect to asking for identification if they look under 25 [now 30] years old. He said the policy applies regardless of whom the person is with, so that it applies even the person is with their parent, if the person looks under 25 [now 30].

Respecting the lighting, Mr. Simpson said the lighting is adjusted for the time of the year. He said it is never so low that the menu could not be read. He said the Licensee has a lot of older clientele and the menu is printed with a large font on good paper so it’s easy to read. He said candles are used to give a romantic ambience.

SUBMISSIONS – BRANCH

The Branch Advocate submitted the evidence and the Licensee's admissions supported a conclusion that liquor was sold to a minor and the contravention was proven.

He submitted that it is the Licensee's responsibility to establish a policy that prevents the sale of liquor to minors. He said the Licensee may need to do more training with staff on how to identify minors.

He suggested that the poor lighting may have been a factor in the Server making the decision to sell liquor to the Minor Agent.

The Branch Advocate said that the assumption of a mother-daughter relationship should not be an influencing factor. Tourists who come from another jurisdiction that allows minors to purchase liquor may make an assumption that it is ok to do that here, when it is not, and it is the Licensee's responsibility to make sure that does not happen.

SUBMISSIONS – LICENSEE

The Licensee's representative admitted the contravention occurred but relied on a defence of due diligence. He said that the Licensee takes its responsibilities seriously and understands the public safety concerns about the sale of liquor to minors. He says the Licensee has taken considerable efforts through its training program to prevent a contravention from happening.

He said the problem is that the determination of age is a subjective thing, and mistakes can be made. He said the age to check for identification constitutes a grey area. He noted the Inspectors differed in their opinions as to what age would be prudent to check for identification in order to avoid a contravention. He suggested the Branch needs to do more to help licensees and should require licensees to check everyone's identification, no matter what their age.

The Licensee's representative says despite its best efforts, with 150,000 customers annually, things can happen even with an experienced server, as it did here. While as a licensee he was willing to take full responsibility for the contravention, he also noted the lack of any legal consequence for a server for serving a minor. He thought that servers should also have a consequence, perhaps a short suspension of their SIR certificate.

The Licensee's representative submitted that due diligence has been established and a penalty is not warranted. He said that if a penalty was to be assessed against the Licensee, it would prefer a monetary penalty.

ANALYSIS AND REASONS

Contravention

The Licensee admits that a staff person sold liquor to a minor. Based on that admission, the evidence and the submissions I find that the Licensee contravened section 77(1)(a) of the Act by selling, giving or otherwise supplying liquor to a minor.

Due Diligence

A licensee is entitled to a defence if it can show that it was duly diligent in taking reasonable steps to prevent the contravention from occurring.

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

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 then *Liquor Control and Licensing Act* (see paragraphs 41 to 44 of that decision).

In these circumstances, the court said, 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, 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 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.

I will address the elements of the test for due diligence below, but want to first address the inferences raised by the Branch of the alleged poor lighting and by the Licensee of the Server's perception of a mother-daughter outing. The Licensee, having admitted the contravention, is confined to the defence of due diligence. Once having "passed" the directing mind element of the test, the focus is then on whether the Licensee acted with due diligence in its training, policies and procedures and not on the circumstances surrounding the contravention itself, which has been admitted and, in my view, has been proven. As such, I find that whether the alleged poor lighting impaired the Server's ability to properly assess the Minor Agent's age is immaterial to and is not a

factor in assessing the due diligence defence. For that reason, I do not need to make any finding about the lighting. I do find, however, that the perception of a mother-daughter relationship and its role in not asking for identification does have some implications when assessing the adequacy of training and systems and I address that more fully below.

Directing mind

The Branch did not allege nor is there any evidence to suggest that the Server who made the sale was a “directing mind” of the Licensee. On this basis, I find she was not and I move on to consider the second step in the due diligence analysis.

Steps to avoid the sale

The Licensee must establish two things - it has taken reasonable steps

- to train its staff in procedures to identify if potential purchasers are of legal age and thus avoid the potential for a contravention, and
- to ensure those procedures are consistently acted upon and any potential issues are properly dealt with.

The analysis of the standard to be met - that is, what is reasonable - must be undertaken in consideration of the public policies and potential consequences that underlie the prohibition against selling liquor to minors, which include:

- the effects of liquor 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 liquor in the same manner as an adult;
- that poor choices are made by minors when consuming liquor and liquor is a significant factor in many crimes committed by youth.

The standard is not one of perfection – that is, that a contravention will never occur. Rather, it is what is adequate training, systems, and monitoring within this public policy context. The circumstances of each case have to be considered in determining whether the due diligence threshold has been achieved.

Adequate training to prevent the sale of liquor to minors

Strict legal limits are in place to prevent minors from buying liquor and significant training efforts must be undertaken by licensees to ensure that staff members fully understand their responsibilities in that regard.

In this case, the Licensee's evidence of training regarding the prevention of the sale of liquor to minors included:

- a one and one-half to two hour orientation session delivered by a senior manager, one-to-one, with every new hire. That session involves reviewing the Licensee's Orientation and Policy Guide (Exhibit 5). Page 11 deals with Serving Minors, page 10 with Over Service and page 15 with Disciplinary Actions for serving alcohol to minors listed. The stated policy is to take extra care not to serve minors and to ask for identification if a customer appears to be under the age of 25 [now 30] years. The acceptable forms of identification are described. The year of birth for the legal age for service is set out in the Orientation Guide.
- New hires are tested on their understanding of the Orientation Guide, with one of 21 questions asked being directed to the serving of minors and over-service. A score of at least 80% is required. Re-testing is offered until a pass rate is achieved.
- Servers are required to have their SIR certification.
- After the initial orientation, in addition to the training given to support staff, servers get an additional five days training alongside an experienced senior server.
- New servers shadow the more experienced server for one day, then gradually assume more responsibility. On Day 5, the experienced server shadows the new server.
- During training the experienced server is to illustrate how to ask for identification in accordance with the Licensee's policy to ask for identification if the person looks to be under 25 [now 30] years old. The Licensee relies on the SIR certificate program and the experienced server's experience in how to do that and does not have any set program to describe or review the steps.
- The new servers are tested by the senior server on their knowledge and gradually take on responsibility for an increasing number of tables.

- Senior servers are also involved in testing new hires using the Orientation and Policy Guide Test (Exhibit 6), about one or two times a month.
- In late January, 2017, a one day program was delivered to all the Licensee's trainers, to go over the whole program.

The evidence is also that Licensee's policies apply no differently to tourists than to other customers and the expectation and standard is that all persons who appear to be under the age of 25 [now 30] will be asked for identification. The general approach is when in doubt, to check for identification.

In assessing the adequacy of the training program, I have considered that the establishment is a large operation, with a high volume of sales and a mix of both new and more experienced staff. A number of trainers are involved.

Based on the evidence, I find that in its training program the Licensee pays some limited time and attention in its orientation on explaining the need to prevent the sale of liquor to minors. However, that is only one of the many other topics relating to the Licensee's operations included in the Guide, which other topics are presumably also covered in the orientation session.

Also, while the Licensee tests its new employees on requesting identification as part of the initial, larger and more encompassing orientation test, I note that this question is only one of a large number of questions and a pass at 80% could mean that the new hire failed that question but passed the test. I find that in a licensed establishment, testing the knowledge of the responsible service of liquor should be a priority over other operational matters. I find that it is a reasonable expectation is that a correct answer to questions on that topic should be a prerequisite to a passing grade.

I find that the Licensee's program where an experienced employee mentors and coaches the new employee over a period of five or more days can be a good approach to training new employees about their responsibilities for liquor service. However, no documents were provided to me, or presumably to the senior employees, listing or otherwise identifying the matters that must be covered in the training. I also note that no evidence was provided to me about the matters covered in the one-day training

program held in January. I find the lack of documentation as to what the hands on mentors must cover in their training of the new hires to be a gap in the training program. I find that where a number of different employees do the hands on training, a written standardized protocol and stated expectations is important to ensure that all aspects of responsible liquor service are covered comprehensively by each trainer. Whether each of the senior trainers covers not just to ask for identification, but how to assess age in order to know when to ask and also what to look for when assessing the identification presented for its veracity is not absolutely clear from the evidence before me.

While even without that documentation, I am prepared to accept that in this establishment the mentor/trainers do review with the new employees their responsibilities to prevent the sale of liquor to minors. However, I have concerns about the testing of the new employees after or during the hands on training.

No documents were provided to me about the testing done as part of the mentoring/coaching training process and the nature and extent of that testing in relation to legal service of liquor, which is a concern for me. Again, with several different trainers, the tests could be different in their content and expectations. Without any documentation I cannot assess the adequacy of that testing. I am also concerned that with respect to the testing that is done, it is by the person who trained the new employee. A more independent test may be desirable to ensure that the person truly does understand their responsibilities.

I find that the lack of solid evidence about the testing of those new hires on their actual personal knowledge and understanding of their responsibilities to prevent the sale of liquor to minors that to be a significant gap in the Licensee's training program.

Adequate systems to prevent the sale of liquor to minors

No only must a license have proper training, it must ensure that it implements on-going processes to ensure that the training is put into practice and consistently acted on. In that regard, I find that the Licensee has put in place a number of measures:

- It regularly communicates with servers by an electronic messaging system that all staff can access using an app or email (since March 2017 and by written memos prior to that).
- Memos are also printed out and posted on the features board that all staff are to check when they come on shift.
- Staff are tested on the contents of the memos, with it being noted if a staff person does not know the contents of the memo.
- Incidents are recorded in a Manager's Log Book. Prior to March, 2017, incidents were recorded and kept in a binder in the management office and all managers had to sign off on them. The Manager's Log Book is now kept as part of the Licensee's electronic record and messaging system.
- Recent incidents have been recorded in the Manager's Log Book where a person was refused service for not having any or sufficient identification.
- The policy is that staff is not penalized for any wasted product or disciplined if a person is denied service for lack of identification or for over-service.
- On holidays or for special events, the floor manager will meet with the staff and remind them about checking for identification.

However, I also find that:

- While one-on-one meetings may be held by a manager with a staff person, no evidence was presented on when or why that may happen or how frequently.
- The new electronic messaging system is used primarily for scheduling and the memos sent to staff may address a variety of things, with three or four things included in one memo. No copies of any memos were provided. [And in any event the electronic system was implemented after the incident and I need to assess the systems as they were on the date of the incident.]
- No copies of the types of memos sent to staff at or before the time of the incident were submitted into evidence. The content of messaging [in the memos] of when and how to check for identification and any stated expectations for staff was not made available to me. Without copies of the memos it is hard to have a good sense of how the issue of checking for identification was addressed or a real sense of how frequently.
- While staff is tested orally on the memos and a note apparently made if a staff person does not know the contents of the memo, where that note was made and

what was done as a result of it was not in evidence. Further, the memos typically included a number of items. How the oral tests included how and when to check for identification and how frequently that testing might occur was not in evidence.

- While at least one floor manager followed up with staff about asking for identification, little or no evidence was presented that this was done consistently or how frequently by her or that there is any expectation that it be done by other managers.
- No secret shopper tests were conducted to independently verify that the staff is properly checking for identification in accordance with the Licensee's policies.
- No signage is posted about checking for identification. (I note the Branch did not cite this as a failure by the Licensee to meet its responsibilities.)
- The POS system does not include a reminder about the effective birth date for legal age. That information is included in the orientation guide and I note that it only refers to a year, naming a year for the whole of 2017.
- Servers don't, as a practice, remind each other to check for identification or regularly discuss with each other how to check for identification or to identify someone's age.

I find the evidence about staff meetings was unclear and therefore inconclusive. The Floor Manager said that the managers met with Mr. Simpson on Sunday mornings. He did not mention any regular meetings. In any event, no agendas or minutes were produced nor was it suggested that effective ways to ensure staff is properly checking for identification was a topic discussed at these meetings.

I find that the Licensee did not adequately document the steps it has taken and without that documentation the effectiveness of the processes in place is difficult to assess. As a sizable operation, with many servers and many managers, documentation becomes more important to ensure a consistent message is given, that it is given on a regular basis, that effective means are used to deliver it and that any issues in following the policies are identified and are appropriately followed up. Without adequate documentation, the assessment of the effectiveness is more difficult. On the basis of the evidence before me, I find that the Licensee's on-going programs are not adequate.

Further, while the particular circumstances of a contravention are not, in and of themselves, evidence that due diligence has not been met, they can go to assessing the adequacy on-going processes to ensure the initial training is still effective. The evidence here is that the Server relied on the mother-daughter appearance of the situation as a reason to support her decision not to request identification. The Server also relied on the Minor Agent's make-up and presentation as reasons for not checking identification. These are clearly not appropriate reasons to not request identification. In my view these go to show that the Licensee needs to do more on an on-going basis to remind its staff when and to effectively assess the need to ask for identification.

For this reason I find that the Licensee's systems and procedures do not meet the standard of what is reasonable to expect from it to prevent the sale of liquor to minors.

Based on the foregoing, I find that the Licensee has failed to establish a defence of due diligence with respect to the contravention.

PENALTY

Pursuant to section 51(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 minor 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.

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.

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 2 and calculating a penalty. The Establishment's compliance history record shows no previous compliance or enforcement history against the Licensee for a similar type of offence.

In consideration of the serious public safety concerns related to selling alcohol to minors, but noting the Licensee's good compliance record, I find the minimum monetary penalty of \$7,500 to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific deterrence.

ORDER

Pursuant to section 51(2) of the Former 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 (insert Date).

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

Dianne Flood
General Manager's Delegate

Date: July 11, 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