



**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: 19812506 BC 2006 Ltd.,
dba Cow Cafe West Coast Grill
1681 Cowichan Bay Road
Cowichan Bay, BC

Case: EH17-105

For the Licensee: Matthew Heyne

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: March 13, 2018,
with subsequent written submissions

Date of Decision: April 12, 2018

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Cow Cafe West Cost Grill, operates a licensed establishment known as the Cow Cafe West Coast Grill (“the establishment”) under Liquor Primary Licence #060033 (“the License”). The establishment is located at 1681 Cowichan Bay Road, Cowichan Bay, BC. Under the Licence, the Licensee may sell liquor between the hours of 9:00 a.m. to 1:00 a.m. from Monday to Saturday and between the hours of 9:00 a.m. to midnight on Sundays.

The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (the “Guide”). Under the licence, the Family Foodservice term and condition permits minors accompanied by a parent or guardian in all service 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 November 16, 2017 (the "NOEA").

The Branch alleges that on November 10, 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.

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.

The Licensee, by its representative, 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 and claims a defence of due diligence.

Subsequent to the March 13, 2018 in-person hearing, the Licensee's representative requested and was permitted to make submissions with respect to the Branch's disclosure of evidence.

I will deal with both those matters in this decision.

RELEVANT STATUTORY PROVISIONS

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

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
3	Contravention of section 77 of the Act [<i>supplying liquor to minors</i>]	10-15	20-30	30-60	10 day suspension or \$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?

The Licensee's representative also raised an issue of the Branch's alleged failure to disclose its documents in advance of the hearing, as required and requests the hearing be re-opened to deal with that issue.

EXHIBITS

- Exhibit 1: Branch's Book of Documents, tabs 1 to 16
- Exhibit 2: Licensee's FOH Manual and Training Guide
- Exhibit 3: Licensee's Responsible Alcohol Service Bible
- Exhibit 4: Photographs of the Notice posted on the Establishment's beer cooler door
- Exhibit 5: Copy of a text message from the Licensee's representative's wife to the staff, sent on October 16, 2017
- Exhibit 6: A written statement from the Server

WITNESSES

A liquor inspector ("Inspector A"), who participated in the inspection of the establishment on November 10, 2017 and had conducted an earlier administrative inspection of the establishment on October 12, 2017, gave evidence on behalf of the Branch.

The Licensee's representative and the General Manager gave evidence on behalf of the Licensee.

EVIDENCE—BRANCH

Inspector A 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 November 10, 2017, the Inspector's 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 notices, news releases, the Liquor Line newsletters and the LCLB MAP 2013/14 Annual Report (Exhibit 1, tab 13).

On November 10, 2017, pursuant to the MAP, Inspector A, together with two other inspectors and the Minor Agent, conducted multiple MAP inspections in Duncan and the Cowichan Valley Regional District to test compliance with the Act.

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 11 – redacted versions).

The Inspection of the Establishment

At about 6:00 p.m. on November 10, 2017, the Minor Agent and another liquor inspector ("Inspector B") entered the establishment to conduct a routine inspection under the MAP. A hostess greeted them and they were seated at a table in front of the bar. A staff member ("the Server") came to the table and asked the Minor Agent and Inspector B what they would like to drink. The Minor Agent asked for two bottles of beer.

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 three minutes later, the Minor Agent told the Server that they needed to leave and paid for the two beers with cash. 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 10). Inspector B also exited the establishment and made his notes. An extract of his notes for that day is at Exhibit 1, tab 8.

The Contravention Notice

Inspector A completed the Contravention Notice (Exhibit 1, tab 2) and entered the establishment at about 6:20 p.m. He spoke to the Licensee's representative, advised him that liquor had been sold to a minor, and gave him the Contravention Notice. The Licensee's representative identified the Server as 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 Guide (Exhibit 1, tab 14). Inspector A said he expected licensees to be aware of all of the contents of the Guide, including the prohibition against sales to minors and the identification requirements. At page 5, the Guide 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 Guide.

He said he had met with the Licensee's representative's wife and the General Manager in an administrative inspection conducted on October 12, 2017 and one of the things they discussed was the MAP. His inspection notes (Exhibit 1, tab 9) confirm that meeting and the matters reviewed and discussed.

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 as set out in Exhibit 1, tab 6. This Licensee has no prior contraventions and this is the first contravention for sale to a minor. 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.

The range of penalties on a first contravention of this nature is a 10-to-15 day suspension and/or a monetary penalty of \$7,500 to \$10,000.

EVIDENCE – LICENSEE

The Licensee's representative and one staff member, the General Manager gave evidence on behalf of the Licensee.

The Licensee

The Licensee's representative is the owner and he admitted the sale of liquor to the Minor Agent occurred as set out in the NOEA. He claimed a defense of due diligence, based on the Licensee's training processes, systems and steps taken to ensure the sale of liquor to minors did not happen.

The Licensee's representative has operated and had a liquor license since May, 2007, and moved to this location in June, 2017. The Licensee's representative testified that he recognized that this location, being larger and located in a hotel, would require additional staff and more formalized training for the staff, so a training program and the FOH Employee Manual and Training Guide (Exhibit 2) ("the FOH Guide") and the Responsible Alcohol Service Bible (Exhibit 3) ("the RAS Bible") were developed and put

in place. Also at that time, the General Manager was promoted to that new position. She was largely responsible for the training program and the FOH Guide was developed by looking at what some bigger establishments did in that regard.

In June, 2017, when the Licensee moved to the larger premises all serving staff were required to sit down with the General Manager and go over the FOH Guide and the RAS Bible with her.

The Licensee's representative said the training program for new hires consists of five days. On Day 1 approximately 4 to 6 hours are spent with the General Manager going over the FOH Guide and the RAS Bible with the new hire. The new hire is expected to know these documents "front to back", including the sections on the policy to request identification of persons under 30 years of age and the type of identification to be produced.

Day 2 is spent going over the menu and the POS system.

On Day 3 and 4 the new hire will shadow a senior server, who will ask from all customers who request to purchase liquor for identification, regardless of age. The senior server will go over the pieces of identification produced with the new hire, to show them what to look for, what questions might be raised about the identification, and the questions to ask about it. The intent is that by doing this, the new hire will get comfortable with asking all kinds of people for identification, they will be exposed to various circumstances such as when people do not have any identification, and they will get to view a variety of kinds of identification and know what is acceptable. He said the new hires and the senior server will discuss how some people don't always look their age, and the sheer spectrum of how looks can be different from the actual age, so that is why it is important to ask if the person appears to be 30 years or younger.

The Licensee's representative said that is especially important because being in a hotel environment, they get customers from various other places who may be used to different liquor laws and requirements and may have different forms of identification. He wanted staff to be comfortable in asking for and assessing that identification.

On Day 5, the new hire is shadowed by the General Manager, who is there to review, assist and evaluate the new hire's performance, including asking for identification. The new hire is to ask all customers who request liquor for identification, regardless of age, and then to review and discuss it with the General Manager, before serving the customer any liquor.

In reviewing the FOH Guide, the Licensee's representative pointed to pages 6, 7 and 8 as setting out its serious approach to the service of liquor. He highlighted the statements on patron safety and the responsibility for patrons on and off premises.

In reviewing the RAS Bible, the Licensee's representative described it as a plain language version of the SIR manual. At page 3, the policy is stated as to check the identification of anyone who looks under 30 years of age. What constitutes acceptable identification and the procedures for checking validity of the identification are also set out - to feel it and ask questions about the documents presented, and how to deal with possible fake identification. Also, a notation is made that the legal age limit is posted on the walk-in beer fridge. He said that poster (as shown in Exhibit 4) is updated as required. He said copies of the RAS Bible are kept behind the bar, in the staff break room, and given to new hires, so it is always readily available to staff.

The RAS Bible also addresses how to identify and avoid over-service, what to do if over-service is observed, and re-iterates from the FOH Guide the importance of patron safety, which the Licensee said they "drill into staff". Also included is a table to calculate consumption in order to avoid over-service.

The Licensee's representative said a sign about the legal age is posted on the walk-in beer cooler where it is highly visible to serving staff who would all use the cooler every day (Exhibit 4). He said nothing is posted at the POS system and it is not set up with any prompts about age or checking for identification. No other signs or notices are posted for staff.

The Licensee's representative thought that notices were posted on the communication board in the staff break room but did not give any particulars of what those notices might have addressed or said.

The Licensee's representative testified that the MAP was in the Licensee's front-of-mind because Inspector A drew attention to the MAP when conducting the October 12, 2017 inspection with the Licensee's representative's wife. The Licensee's representative said after that meeting his wife sent out the October 16, 2017 text message to all staff, highlighting the need to check for identification (Exhibit 5). He said they subsequently had a meeting and a lot of discussion with staff about the need to ask for identification. Prior to the October inspection, group staff meetings were not typically held.

The Licensee's representative said the staff member who served the Minor Agent ("the Server") was away and so was unable to attend the hearing. He said the Server had been a full-time server at five days a week for about five years but in the fall, 2017 she cut back on her hours to one or two days a week due to other commitments. In her letter (Exhibit 6), the Server acknowledges receiving the text message and having group discussions about the importance of checking for identification. She says she had proper training and was well aware of the notice posted on the beer fridge about the legal age but exercised poor judgment when serving the Minor Agent.

The Licensee's representative said on November 10, 2017, due to a staff member calling in late to say that she could not come into work as scheduled, the General Manager took over responsibility for one of the service areas, which was not usual. For this reason, there was "one less set of eyes on the floor". Also, the Server had asked to be switched from her assigned area as it had a big group reservation and she wanted to leave early.

He also said that after Inspector A gave him the Contravention Notice, he called the Server into his office and gave her a one-week suspension. She also had to come in and re-do the Day 1 training, reviewing the FOH Guide and the RAS Bible.

He said that with the new training in June and the new FOH Guide there had been a lot of discussion "on any given day" about the need to request identification. Since the contravention, the Licensee has taken further steps to make sure underage service does not happen, including pre-shift meetings re-iterating the legal birthdate, the need to ask for identification and to not over-serve. Also an incident logbook has been created.

The Licensee's representative was not aware of any circumstances of staff not requesting identification when they should have or needing to be reminded to request identification.

The Licensee's representative said his staff is generally well-educated, with many having university degrees. There are five full-time serving staff with five shifts a week, three part-time with three shifts a week, and two part-time with one or two shifts a week

The General Manager:

The General Manager has been employed by the Licensee for a number of years, first as a server and then working her way up to the general manager position when the Licensee took over the new premises in the hotel in June, 2017. The General Manager testified that on the move to the new premises, she and the Licensee's representative recognized that the servers would have a lot of responsibility for patron safety on and off the premises and also there was a need for a more professional approach to the work environment. She developed the training program and worked on fine-tuning the FOH Guide and RAS Bible to address those needs.

Her description of the training program, the FOH Guide and RAS Bible was essentially the same as that of the Licensee's representative. She said staff are taught to ask for two pieces of identification, to look at it, assess it for validity and to ask questions if any doubt.

She recognized that being located in a hotel with tourists could present some different scenarios (regarding identification) and she wanted staff to be prepared and able to deal with them. She thought the requirement during training to request identification from everyone (who requested liquor) was an effective way to learn what to do and how to address the various scenarios as they may arise. In this way, she said, staff get used to asking for identification, know what is acceptable and how to assess various types of identification for validity. Once the training is completed, the staff are directed to ask for identification from everyone who appears to be under 30 years old.

In training, she said she discusses with staff how to assess if someone might be under 30 years old, and they are told to ask if in any doubt. The age of 30 years was chosen as that gave some "room", as some people look older and others younger than their actual age.

The General Manager was present for part of the administrative inspection conducted by Inspector A on October 12, 2017. She said he let them know about the MAP and as a result, they were more than ever alert to the need to request identification. She said the text message (Exhibit 5) was sent to all serving staff to remind them. In addition, she said numerous discussions were held with the staff about the MAP and the need to request identification. She said the staff started quizzing each other on various matters related to asking for identification. No records were kept of the discussions or the informal quizzes but she said the Server participated in at least some of them. The General Manager said it was really discouraging for the sale to the Minor Agent to have occurred, given the recent (June) training, the text message and those discussions.

The General Manager was the floor manager on duty the night of November 10, 2017. She arrived around 2:00 p.m. and her responsibilities did not normally include table service for customers. However, later in the afternoon a staff member called in, unable to come to work because her basement had flooded, so the GM took over responsibility for that staff person's section. In the ordinary case, she would have had more of an opportunity to have oversight of the servers.

The General Manager testified that she saw the Minor Agent and Inspector B as they were leaving and she recalled saying good evening to them. She said the Minor Agent was obviously underage and "it blew her mind" that the Server had not asked for identification. She said despite the Server having been trained and given all the tools, she still failed to ask.

The General Manager also stated that they take their responsibility for the service of liquor and for patron safety very seriously. She described the staff as responsible, professional people, for whom the work was "not just a summer job".

In her oversight role, she has asked staff if they had requested identification from a patron and the answer was always yes. She could not recall a situation where she needed to intervene where liquor was being served without asking for identification.

She said that since June, 2017, staff meetings are held every couple of months. No agenda is made or minutes kept, but identification requirements would be covered. With new hires and the new location, the topic (of identification requirements) was really pushed. A staff communications board is also used and after the October 2017 inspection a notice was posted on it, to remind staff to ask for identification.

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 suggested that by asking all persons for identification during training, a new hire is perhaps not being adequately trained to assess ages so that they may not be equipped to determine if a patron is a minor or not. He also speculated that staff may rely too much on oversight by the General Manager so that being short staffed the night in question may have meant that that oversight was not provided.

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. The Licensee's representative said despite its best efforts, things can happen even with an experienced server, as it did here.

The Licensee's representative submitted that due diligence has been established and a penalty is not warranted.

PROCEDURAL ISSUE:

Subsequent to the March 13, 2018 in-person hearing, the Licensee's representative requested and was permitted to make submissions with respect to the Branch's disclosure of evidence. The Branch responded to those submissions and the Licensee's representative filed a reply.

The Licensee's representative says that the Branch failed to disclose its evidence to him in advance of the hearing, as required by the Registrar's pre-hearing order. The Licensee's representative says that as a result he had not seen or reviewed most of the Branch's documents prior to the hearing. He says this was unfair, as he had no time to adequately prepare for the evidence submitted at the hearing. He acknowledges that he should have raised the issue at the hearing but says due to inexperience and also thinking that the Branch would have been diligent in meeting its obligations, he did not do so.

The Licensee's representative asks that the case be re-opened to consider the Branch's failure to disclose, to address the admissibility of the Branch's documents, and the effect of the Branch's failure on his ability to make an effective response at the hearing.

The Branch advocate says he did send the documents by email, one day before the deadline for production. He also says that in any event the Licensee's representative should have been familiar with most of those documents, being the License and the terms and conditions of the License, its own corporate records, the NOEA, and the legislation. As such, the Licensee's representative would not have been taken by surprise by these documents, given it had prior knowledge of them. The Branch advocate says other of the documents relate to the occurrence of the contravention, to which the Licensee had already admitted and continues to admit occurred. He says the only document the Licensee's representative might not have been aware of is the Compliance History Report, Tab 6 of the Branch's book of Documents (Exhibit 1).

In reply, the Licensee's representative says it did not get the email and re-iterates that he was unable to prepare properly for the hearing.

In light of my findings below on the defence of due diligence, I will deal with this issue briefly.

Pre-hearing conferences and the requirement for advance disclosure of documents are intended to promote fair and effective hearings. The requirement to disclose documents in advance reflects the parties' right to know the case against them and is intended to avoid surprises on the day of the hearing. By advance disclosure, all parties are able to prepare for the hearing. If unable to prepare adequately, a party's rights to a fair hearing may be prejudiced.

Advance disclosure also limits any need for adjournments so hearings proceed in a timely way. By conducting timely hearings, any necessary actions for non-compliance may be taken promptly, in order to minimize public safety risks, protect community standards, and deter further incidences of non-compliance.

Despite a registrar's orders in a pre-hearing conference, at the hearing, a delegate of the General Manager always has the discretion whether to admit evidence that was not part of the advance disclosure. In considering whether and how to exercise that discretion, the delegate will typically consider whether and to what extent the parties (both the party seeking admission and the party opposing) may be prejudiced if the evidence is allowed or not, and the impact on a timely hearing. A consideration may be the importance of the document on a matter at issue in the hearing.

Given my findings below on the issue of due diligence, I do not need to address the issue of whether the documents were in fact sent as the Branch advocate says and which the Licensee's representative disputes.

Here, the sale of liquor to the Minor Age as alleged in the NOEA has been admitted by the Licensee. The only matter at issue is the Licensee's claim of a defence of due diligence. The onus, or obligation, to prove that defence is on the Licensee, not the Branch. I will deal with the extent to which the Licensee either knew or ought to have known about the various documents and the extent which he was prejudiced in his defence by the documents of which he may not have been aware.

In this case, the Licensee's representative says he was unaware of most of the Branch's documents. The Branch says the Licensee's representative should have been aware of the documents, except perhaps some of those establishing the sale to the Minor Agent, and the Licensee's Compliance history.

I find that the Licensee's representative should have been aware of the License, the terms and conditions of the License, and its own corporate records. It also should be aware of the legislation governing its License. I also find that because the Licensee has admitted that liquor was sold to the Minor Agent, it was aware of the NOEA, and the other documents related to the sale to the Minor Agent ought not to have taken him by surprise. In any event, the issue here is a defence of due diligence and the onus is on the Licensee to establish that defence. The only Branch document that relates to that defence is the Compliance history (showing no prior issues for this Licensee) and Inspector A's October 12, 2017 inspection notes. I find that rather than prejudicing the Licensee in its claim of due diligence, both of these documents go instead to support its claim of due diligence. For these reasons, and given my finding on the defence of due diligence, I have accepted those documents into evidence and decline to re-open the hearing to address this issue.

ANALYSIS AND REASONS

Contravention

The Licensee's representative 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.

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 behavior 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.

In my analysis, I have considered the smaller size of the establishment and the smaller size of the staff (despite the recent growth), which allowed for more direct, on-going communication with staff.

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:

- All servers are required to have their SIR certification.
- New hire training is undertaken over five shifts.
 - Day one includes training on the Licensee's policies about and the employee's responsibilities to request identification and the joint responsibility for patron safety. (Day two is directed to the menu and the POS system, so do not relate to the issue of preventing a sale to minors.)
 - On day three and four, new hires work directly with a senior server, observing the senior server who will request and assess the identification of all patrons who order liquor, regardless of age.
 - On day five new hires work under the direct supervision of the GM who observes and reviews the new hire, including the requesting and assessing of identification from all patrons who order liquor regardless of age, to ensure the new hire knows what to do and is comfortable with their responsibilities.

Based on the evidence, I find that in its training program the Licensee pays time and attention on explaining the need and how to prevent the sale of liquor to minors, including the responsibility for patron safety, both on and off the premises.

I find that the Licensee's training program, which on days three and four requires the senior server to request identification from all patrons who order liquor, ensures that the new hire is fully exposed to the responsibility to request and assess identification that meets the legal requirements, and to consider whether that identification belongs to the person presenting it.

However, simple observation by the employee without more is not enough. I also find that an important element in determining the adequacy of a training program is to have an effective test of the employees, to ensure that they actually understand their responsibilities.

In that regard, I find that day five of the training program, where the server is required to request and assess identification from all who order liquor under the direct and constant supervision of the General Manager, is an adequate test of the employees on the need for, when to request and how to properly assess the identification that is offered.

I do note that the Server who served the Minor Agent did not go through the above-described training process. She was an experienced server, with five years' service with the Licensee. The Licensee used to be a smaller operation and its training process when she was hired was less formal. However, on moving to the new premises and enlarging its operations, the Licensee did recognize the need for a more fulsome training process and did implement the one described above. The Licensee also required the Server and other long-serving staff to review the FOH Guide and the RAS Bible in June, 2017.

In this case, I find that at the time of the contravention the Licensee had implemented adequate training to prevent the sale of liquor to minors and I find the Licensee met the standard for reasonable training regarding the prevention of the sale of liquor to minors.

I do note that the FOH Guide and the RAS Bible could be more specific about the legal harms of the sale of liquor to minors and the reasons why staff should be alert to prevent such sales. I also recommend that the Licensee keep a good record of the staff having received, reviewed and understands both of those documents and signed off on that.

Adequate systems to prevent the sale of liquor to minors

Not only must a licensee 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 this regard, I find that I must evaluate what was in place at the time the contravention occurred.

Here, an administrative inspection was conducted about one month prior to the contravention. As a result of Inspector A drawing attention to the MAP, the Licensee took a number of steps, including sending out a text to remind staff and various discussions with staff. In addition, staff started conducting informal quizzes about the legal requirements. I find that these to be indicators that at the time of the contravention, adequate steps were being taken to ensure the effective application of the employees' training to prevent the sale of liquor to minors.

Had the administrative inspection not occurred and these steps not been taken at that time, I would have been inclined to find that the second part of the test had not been met. Effective, on-going reminders and notices are critical to ensuring that the trained staff continuously and effectively use the tools they have been given.

In that regard, I recommend that the Licensee should take and document more fulsome and on-going steps to ensure that its training remains at the forefront of its staff. Staff meetings should be more regular and minutes taken and shared with any staff unable to attend, and signed off by those staff members as having been read. And those meetings should include the legal obligations about liquor service and the reasons why, including the harms to minors. And more frequent and varied reminders should be given (including what needs to be done and why), and the reminders should be recorded to prove that is being done, if necessary. Notices about the need for and various identification requirements should be posted in various locations in the establishment,

and should be changed on a reasonable basis, to keep the requirements fresh in the minds of staff. And, for example, on holidays or for special events, the General Manager should specifically remind staff about the need for and how to check for proper identification.

CONCLUSION

The due diligence standard is not one of perfection, but of adequate training and systems. As with most training programs and systems, there are improvements that the Licensee can make. I have noted a few suggested improvements.

On balance, however, I am satisfied that the evidence demonstrates that the Licensee has adequate training and systems in place with respect to the contravention of section 77(1)(a) of the Act.

Based on the foregoing, I find that the Licensee has met the onus of establishing a defence of due diligence with respect to this contravention. As such, I need not discuss any penalty.

Original signed by

Dianne Flood
General Manager's Delegate

Date: April 12, 2018

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