



**DECISION OF THE
GENERAL MANAGER
LIQUOR AND CANNABIS REGULATION 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: 1150197 B.C. Ltd.,
dba Boston Pizza Restaurant & Sports Bar
300-2325 Ottawa Street
Port Coquitlam, BC V3B 8A4

Case: EH19-110

For the Licensee: Bert Hick, Licensee's Advisor
Danny MacEachern and Ryan MacEachern,
Licensee's Representatives

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: September 2, 2020

Date of Decision: October 15, 2020

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

The Licensee, 1150197 B.C. Ltd., operates a licensed establishment known as Boston Pizza Restaurant & Sports Bar (Port Coquitlam) (“the Establishment”) under Food Primary License No. 308117 (“the License”). The Establishment is located at 300-2325 Ottawa Street, Port Coquitlam. Under the Licence, the Licensee may sell liquor between the hours of 9:00 a.m. to 2:00 a.m., from Monday to Sunday.

The Licence is, as are all food primary licences issued in the Province, subject to the terms and conditions contained in the publication “Food Primary Licence Terms and Conditions Handbook” (the “Terms and Conditions Handbook”), which is available on the Liquor and Cannabis Regulation Branch's website.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated December 17, 2019 (the "NOEA").

The Branch alleges that on October 28, 2019 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 7, 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 seven to eleven-day licence suspension and/or a \$7,000-to-\$11,000 monetary penalty.

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 and claims 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 of the general manager under section 51 of the *Act* and Part 6 of the *Regulation*.

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.

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 14
Exhibit 2: Licensee's Documents, tabs 1 to 5
Exhibit 3: Licensee's Document, page 1

WITNESSES

A liquor inspector who participated in the inspection of the Establishment gave evidence on behalf of the Branch ("Inspector A").

Both of the Licensee's representatives 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, Inspector A's evidence and those facts are summarized here.

The Minors as Agents Program

Inspector A testified the Minors as Agents Program (MAP) is carried out by the Branch to verify that licensees are complying with their responsibilities not to sell liquor to persons under the age of 19 years. The minor agents are given training on the *Act*, including making and documenting observations and safety considerations.

At the start of every shift, a photo of the minor agent is taken, and their age is verified through government issued identification cards. The minor agents are directed to dress as they normally would. Minor agents do not carry any identification with them into the licensed premises and are directed to be truthful if asked for identification. No attempt is made to deceive a licensee or their employees about a minor agent's age.

A licensee simply has to ask a minor agent for identification. If identification is not requested and the minor agent is served liquor, the licensee has failed to comply with their responsibilities. The *Regulation* sets out the consequences for failing to comply.

A number of efforts are made to ensure licensees are aware of the program, including the Fall 2016 Liquor Line newsletter (Exhibit 1, tab 11). Licensees are also reminded about the MAP at routine inspections, which are typically conducted at least every two years.

On October 28, 2019, to test compliance with the *Act*, Inspector A, Inspector B and a Minor Agent conducted MAP inspections at various licensed premises in the Port Coquitlam area. The Establishment was one of those premises inspected.

At the start of the day, the Minor Agent was photographed, their identification viewed and photographed, and their age confirmed to be under 19 years (Exhibit 1, tab 6 – redacted versions).

The Inspection of the Establishment

At about 3:00 p.m. on October 28, 2019, the Minor Agent entered the Establishment and took a seat at the bar in the lounge area. Inspectors A and B then entered the Establishment and were seated at a table in the lounge area, about ten feet away from the Minor Agent. Both Inspectors had a clear line of sight of the Minor Agent. The Establishment was not busy, with possibly two other patrons.

The Minor Agent ordered the house white wine from a staff member (“the Server”).

The Inspectors observed the Server deliver a carafe of what appeared to be white wine and place the carafe and a glass in front of the Minor Agent. The Server then left. At no point was identification requested from the Minor Agent.

The Minor Agent then left the Establishment and returned to the inspection vehicle where they completed an Observation Form and Statement (Exhibit 1, tab 8). Inspector B also left the Establishment but returned shortly after.

Inspector A took possession of the carafe and glass, photographed it, determined that it smelled like wine, and advised the Server that a MAP inspection has been executed. Inspector A asked for the receipt and saw the beverage described as ‘6oz J.T. CHARD’.

Inspector A asked if a manager was present and two persons came into the lounge area and were identified as managers. Inspector A then told them about the MAP inspection and issued the Contravention Notice (Exhibit 1, tab 2). The Server’s SIR certificate was provided to the Inspector.

The Licensee’s responsibilities

Inspector A testified that the Licence is subject to the Food Primary Terms and Conditions Handbook (Exhibit 1, tab 12). A copy of the Handbook is given to licensees when the licence is issued and licensees are expected to know the contents. The Handbook sets out the prohibition against serving minors, the identification requirements, and the expectations for licensees to have systems in place to effectively prevent the sale of liquor to minors.

Enforcement Action

Inspector A gave the reasons for pursuing enforcement action. Those reasons include the impact of alcohol 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 for this Establishment (Exhibit 1, tab 5) and that the Licensee has no prior contraventions and that this is the first contravention for sale of liquor to a minor.

Inspector A had no knowledge about a June 2020 complaint shown in the Compliance History but could say from the information presented that it was a third-party complaint and not as a result of a licensed premise check by either the Branch or the police. He said third-party complaints will get entered into the system and then no action may be taken if the follow-up indicates that none is needed. He agreed that could be the case with the June 2020 complaint.

Inspector A also confirmed that while an inspector has some discretion about the enforcement action to take and in some cases a compliance meeting may be appropriate, a compliance meeting is not an appropriate enforcement action for contravening section 77(1)(a).

EVIDENCE – LICENSEE

Both of the Licensee's representatives gave evidence on behalf of the Licensee.

Ryan MacEachern

Ryan MacEachern testified he has been involved with the Licensee's businesses for over 20 years. He is now the district manager for the Licensee's five Boston Pizza locations, all of which have liquor licenses (the "District Manager"). He testified that not serving liquor to minors is a focus for the Licensee and so it is always at the front of his mind.

The Licensee's policy is to request identification from anyone who looks to be under the age of 30.

The District Manager testified the Licensee provides extensive training and orientation to staff, intended to prevent the sale of liquor to minors. Every employee is required to read the Licensee's Policies and Procedures (Exhibit 2, tab 1, pages 15 to 22). Either a general manager or the District Manager will then sit down and review the Policies and Procedures with the employee, who takes home a copy and signs off as having read, understood and agreed to follow the policies and procedures.

The District Manager acknowledged the Policies and Procedures' only reference to the service of liquor is a reference to an appendix section regarding provincial requirements, and that a copy of the appendix was not attached or provided. The District Manager believes the appendix reflects the need to request identification.

The District Manager testified that serving staff is trained to ask for two pieces of identification: one government picture identification and one other. The staff is told to look at the picture and to make sure it matches (the person and the other identification) and to ask questions if necessary.

Servers are required to sign off on a document, acknowledging they understand the correct ID practices for alcohol service (Exhibit 2, tab 1, page 2.) That document says that when a drink is ordered, two pieces of identification are to be requested. It also describes the acceptable types of identification, states the employee has their SIR certificate, and sets out the consequences for the employee for failure to require identification - termination and a fine. The consequences for the Licensee - a fine and suspension of their liquor licence - are also set out. The document also says, "Provincial regulation says you will have to ID anyone who looks under the age of 30."

The District Manager did not say when staff are asked to sign this document and a copy signed by the Server was not provided. The District Manager believes the Server would have signed off on a copy of this document.

The Licensee believes the best way to train servers is at the table, by a knowledgeable, experienced, senior server. When new servers are hired, they spend one week shadowing a senior server who is to show the new server what they are to do, and how to do it. Only long-term servers are selected as trainers, and the same senior server will train the new server for the week. The first week of shadowing is then followed by a second week where the new server serves customers and is observed by the senior server, who is to provide feedback to the new server. The senior server will also give feedback on performance to the Establishment's general manager and will recommend whether to hire the person or not. The training shifts are each five to six hours long. No checklist of matters covered during the two weeks was provided.

The District Manager said one or two days are also spent on the computer with on-line courses and quizzes. He said a quiz on responsible liquor service (U-Serve) must be completed every year, with a score of 95% required to pass. A copy of the U-Serve quiz was presented, showing a combination of 19 true/false and multiple-choice and short answer questions. Two of those questions deal with identification and both of those address what to do if fake identification is presented. (Exhibit 2, tab 1, pages 10 to 13).

Each staff member is required to take the U-Serve quiz annually. A training record is kept that shows all the staff and if the U-Serve quiz has been taken and passed in the year. A copy of the training record was presented, showing all current staff with 100% completion in their test requirement (Exhibit 2, tab 1, page 15). If the U-Serve quiz is not completed annually, the Licensee will follow up to make sure that it is taken. An employee will not be scheduled for a shift if they have not successfully passed the quiz within the year.

An individualized training record is also kept for each staff member. The three-page document entitled "Team Members" is a copy of the training record for the Server (Exhibit 2, tab 1, pages 7 to 9). It was printed in August 2020, and so it shows the information current as of the date it was printed. The Server is shown as not having completed the U-Serve course because she was fired ten months previous, so she would not have subsequently completed the course.

Prior to the Licensee opening this Establishment in November 2018, all staff went through Boston Pizza International training, delivered by specially trained trainers. The District Manager said that training session addresses the service of liquor and includes quizzes. The training follows the 103-page Front of House In-Store Trainers Guide (Exhibit 2, tab 3) and the 167-page Orientation Guide ("Front of House Managers/Trainers Facilitators Guide") (Exhibit 2, tab 4).

In reviewing those documents, the District Manger referred to page 17 as a knowledge check, where servers are taught to look at the table and to ask for identification if liquor is requested. He acknowledged the feedback portion did not include any questions on requesting identification.

The District Manager also referred to page 51 of Tab 3 refers to how to use the POSi terminal. He said the main screen asks the date of birth, so it reinforces the need to look for identification and at page 52, the knowledge check asks about that.

He referred to the role-playing exercise at page 30 of the Orientation Guide (Exhibit 2, tab 4) but did not know if it included asking for identification, but he re-iterated that servers are taught what to look for.

He also referred to pages 41, 43, 65, 92, and 165. He acknowledged that page 165 did not include requesting identification from minors, and the problem at page 167 did not include identification.

The District Manager said at least two of the corporate trainers are from British Columbia and would be knowledgeable about and would teach staff about BC liquor service requirements.

The District Manager said the Server had previously worked at another location since 2016 where she would have taken the two weeks of shadow training. In October 2018, she joined the Port Coquitlam location, where she only had to take the one-week group session and was not required to do the shadow training again.

The District Manager said five signs provided by the Branch about ID checks, moderation and not serving minors are posted in the Establishment. Some of the signs are visible only to staff, others to the patrons. Examples of the signs were provided at Exhibit 2, tab 1, page 1. Another sign, visible only to staff, says the Licensee will ID anyone under 30.

The District Manager testified that staff are told every day about the need to request identification. If a server does not ask for identification, they will be required to attend a formal meeting and disciplinary action, consisting of a warning, will be taken. If the incident is really serious, the server could be terminated.

The general manager will have daily pre-shift meetings with their staff. An August 1, 2020 pre-shift agenda was presented as an example of the template used for the Licensee's pre-shift meetings (Exhibit 2, tab 1, page 6). At the bottom of the agenda is a statement, in bolded letters "MAKE SURE YOU ARE CHECKING ID WHEN SERVING ALCOHOL". The agendas for the daily pre-shift meetings are posted on the day of the meeting but are not kept after that.

The District Manager said the Licensee uses its scheduling app to communicate any issues, concerns, and promotions to staff. No copies of how that works or details of how often it is used, or the content of messages were provided.

A December 17, 2019 email was presented as an example of the communications between managers (Exhibit 2, tab 1, page 3). It includes a reminder to remind staff to check for identification. That email was likely sent at that time because of Christmas events.

A communication tool, a JOLT tablet, is used to communicate to all staff, who can access it at the service areas. The District manager said it highlights the checklists – that is, the roles on opening. The District Manager also said he thought the sales terminal may have a prompt about whether ID has been requested.

The District Manager said a communication log is also kept but no entries were provided as examples.

Weekly one-hour meetings are held with all the Licensee's general managers to discuss major topics. The District Manager said agendas and notes are prepared, but none of those were provided.

The Licensee uses a secret shopper program. Test shoppers report on the quality of the service and the food. The program now includes whether identification is requested if the secret shopper is under 30 years old. This aspect of the program was added subsequent to October 2019. If a report is made that identification was not requested, the Licensee would contact its human resources firm for immediate follow-up and disciplinary action. No information was presented if or how often that might have happened.

The District Manger acknowledged that assessing age can be difficult, and that difficulty is communicated to staff. Because they talk about liquor service all the time, he did not think there was any need to specifically highlight things like Christmas or Halloween costumes.

After the contravention occurred, an email communication was sent to the managers of all five of the Licensee's locations to make sure they were aware and to undertake immediate action to remind all servers (Exhibit 2, tab 1, page 4). That email also refers to having staff sign a document. Each of those general managers then had a sit-down meeting with every single server.

The Licensee said the Server admitted the incident was a judgment error on her part, it was her mistake and she was very apologetic. The restaurant was not busy, as is typical at the time of day being between lunch and dinner, so no hostess was on duty. The servers are to watch for customers. The Server thinks she made the error because she did not notice the Minor come into the lounge and she was worried the Minor had been waiting, so she rushed to greet and serve her.

The Server was terminated immediately after the Contravention Notice was issued and the other employees were made aware of that very shortly afterwards.

The District Manager said the Establishment's general manager was on the premises and was in the back, doing paperwork. The general manager came out into the lounge, just after the service of the liquor was being made. He asked the Server if she had asked for identification but did not have any time to react before Inspector A took action. The District Manager also entered the service area just after that happened.

None of the Licensee's five locations have had any contravention or compliance issues while owned by the Licensee, despite some of them being located in what the District Manager described as challenging locations.

The District Manager believes that the June 2020 complaint shown in the compliance history was made by a third-party about what the third-party thought was over-service. In fact, the person complained about was a long-time customer with cerebral palsy who may have appeared to the third party to be intoxicated. The District Manager said the third party was unwilling to listen to his explanation.

As an RCMP reserve constable for 12 years, the District Manager accompanied RCMP officers on Bar Watch checks of nightclubs and bars and to car accidents, so he understands and appreciates the issues related to underage consumption of liquor. He said he tries to communicate those issues to staff, every day. He will discuss having attended at car accidents and how serious the consequences of intoxication are, and how important it is to look out for intoxication and underage consumption. He says his personal experience as a reserve constable and having seen the impacts gives him a passion to share that experience and gives him credibility in his messaging.

Danny MacEachern

Danny MacEachern testified he is a director of the Licensee, which owns a franchise for this and four other locations ("the Director"). He has 27 years as a franchisee and the Licensee has been awarded a number of recognition awards by the franchisor.

The Director served as a RCMP reserve constable in Surrey for 15 years and in that capacity, he did Bar Watch inspections and licence premise checks. He takes liquor service seriously, both in his business and in his personal life.

He says the Licensee spends a lot of money on training. He said in addition to what the District Manager described, every second year, the Licensee sends 10 to 12 senior managers to a week-long training session.

The Director says the Licensee's long, clear record is important to him. He acknowledged they are not perfect, but said they try to do all they can to educate and support staff and management. The contravention made him realize a few things they could do better, for example, the secret shopper program has been expanded to include whether ID is properly requested.

He says the Server simply made a mistake but feels servers should be held more accountable, and records kept so that they cannot simply "go down the road and get another job". He says this is the only industry where an employee's actions will go against the employer's record.

SUBMISSIONS – BRANCH

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

The Branch Advocate submitted the Licensee failed to meet the test of due diligence.

He suggested there was evidence the general manager was present at the time and so may be found to have participated in the sale. Also, the District Manager was present, so the first element of the test, that the sale was not made by a directing mind, fails.

In the alternative, he said both the evidence of the training and systems to prevent sales of liquor to minors is limited and does not meet the standards expected. No copies of the Server's acknowledgement about liquor service or quiz results were presented.

The Branch Advocate noted the recommended penalty for this first offense is payment of a monetary penalty of \$7,000 or a licence suspension for seven days.

SUBMISSIONS – LICENSEE

The Licensee admitted the contravention occurred but relied on a defence of due diligence.

The Licensee's advisor pointed to the Licensee's policies and procedure and its extensive training and testing. He said the daily meetings and annual quiz are effective, on-going means used to reinforce that training.

The Licensee's advisor says the general manager did not participate in the sale and in any event is not a directing mind of the Licensee, and the District Manager only arrived after the event happened.

The Licensee relies on the January 22, 2014 decision of the Branch's General Manager in *Vancouver Arena Limited Partnership ("Rogers Arena")* where the defence of due diligence was found to apply, saying it is similar, being a world-wide organization whose corporate training is supplemented by the licensee.

He suggests that with the Licensee's good record, a warning or a compliance meeting would be sufficient. If a penalty is to be imposed, a monetary penalty is preferred.

ANALYSIS AND REASONS

Contravention

The Licensee's representatives admitted 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 suggested that because the Establishment's general manager was present, he participated in the sale and, being a directing mind of the Licensee, the inquiry stops at the first stage and the defence fails. In the alternative, he suggested that the District Manager was also present and as clearly being a directing mind of the Licensee, the defence fails.

I find, firstly, there is no evidence that the Establishment's general manager is a directing mind of the Licensee. I also find there is no evidence that he or the District Manager participated in the sale of liquor to the Minor Agent or was even aware of the sale before the contravention occurred.

I find on the evidence before me that the sale was made by the Server, and only the Server, not at the direction or with the knowledge of the Licensee or any person who is the directing mind of the Licensee.

I turn then to the second stage of the inquiry, has the Licensee established 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.

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

- to train its staff to identify if potential purchasers are of legal age and take appropriate action, thus avoiding 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 are 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.

I have considered all of the oral and documentary evidence submitted at the hearing, the tests as set out by the Court, and whether the evidence presented meets those tests.

At the outset, I accept and acknowledge that the Licensee takes its responsibilities seriously and has sincere and good intentions to prevent the sale of liquor to minors. I also accept the Licensee's representatives' experiences as reserve constables has given them a very personal and passionate desire to avoid the harms caused by underage consumption of liquor.

However, good intentions and desires alone are not sufficient to meet the legal tests. I need to look at what was actually in place at the time of the contravention. Significant responsibility applies to the sale of liquor, including preventing the sale to minors. The sale of liquor is not like selling other items that may be on the Licensee's menu.

Adequate training to prevent the sale of liquor to minors

Licensees must provide adequate and thorough training to ensure that staff members fully understand and carry out their responsibilities in regard to liquor service and that they give training about that responsibility a high priority.

The evidence of the Licensee's training to prevent the sale of liquor to minors includes:

- written policies and procedures that are reviewed with a manager,
- a written acknowledgement by each staff member of the requirements for proper identification and that the staff member understands their responsibilities,
- one week of shadowing a senior, experienced server to observe what needs to be done and how to do it,
- one week of being observed by the senior, experienced server to see if they are doing it and doing it right, and
- the successful completion of the U-Serve quiz.

In addition, when a new location is opened, the Licensee provides two weeks of training to all staff, which training is designed and delivered by corporate trainers.

While at first blush the oral evidence on training seems to be reasonable, I am concerned about a number of aspects of that evidence, especially the lack of documentation to support the oral evidence and the lack of focus in the documents presented on the need to avoid serving minors and how to do that by requesting and assessing proper identification.

The Licensee's Policies and Procedures presented (Exhibit 2, tab 1, pages 15 to 21) include only very limited information about and no details about the responsibilities for the service of liquor or the need for identification. The pages presented into evidence do not describe what the Licensee's policy is (that is, to ask for identification if the person appears to be under 30 years of age), what identification is acceptable, how to assess the identification presented for veracity, or how to assess if a patron may be under the age of 30.

Rather, the only mention to liquor service in that document is a reference to the need to comply with the federal and provincial laws on alcohol service. It then refers to an appendix on provincial regulations for the service of liquor. The actual appendix was not submitted, so I have no ability to assess what is stated or how it is stated.

I also note that this four-line statement is only one of the many topics covered in the somewhat dense seven-page document, and it is not highlighted by bold text or given any special status or prominence.

On this basis, I find the Policies and Procedures as presented to me to be less than satisfactory in terms of documenting the extent and depth of the information about the server's responsibilities for liquor service and, in particular, about the responsibility to not serve liquor to minors and how to avoid that happening.

I am also concerned whether the management session with new servers spends a sufficient amount of time and focus on reviewing the responsibilities for liquor service, especially the responsibility to not serve liquor to minors. No detailed information about how long that session is or what is covered was provided. No checklist of topics covered was provided. There is, however, a written acknowledgement that the server understands ID practices, so I accept that that is done. And while it is unclear to me when this document is to be signed, given the email sent after the contravention referring to having staff sign a document, I am, without any evidence to the contrary, prepared to accept this is required on being hired.

However, that acknowledgement is incorrect when it states, "Provincial regulation says you will have to ID anyone who looks under the age of 30." In fact, the requirement, as set out in the Food Primary Terms and Conditions Handbook (Exhibit 1, tab 12), is simply not to serve minors liquor. To avoid this, the Licensee needs only to verify age by requesting the proper identification and assessing its authenticity. To state an incorrect version of the legal requirements may cause confusion to some servers.

While the U-Serve quiz is required on hiring and annually, and a high passing score is required without which staff will not be scheduled for a shift, I am concerned about the limited focus in that test on avoiding service of liquor to minors. Of the 19 questions in the test, only two deal with identification issues and both of those address what to do if fake identification is presented. Testing staff on their understanding of their full responsibilities, including the need to ask for identification, what is acceptable, and how to assess for authenticity, is a reasonable expectation that the quiz fails to meet.

From the evidence of the training sessions, in the ordinary course, a server is trained for two weeks by shadowing and being shadowed. In the circumstances of a new location being opened, staff will have different training, with the first week being a formal course delivered by professional trainers, then a week of being shadowed. I will address each of these separately.

Shadow training can be effective and a two-week period of ten shifts, each of five to six hours, should be sufficient. Where the Licensee's training program appears deficient is, again, in the documentation. A good shadow training system should have a checklist of matters to be covered and confirmation that those items were actually covered, especially in relation to the service of liquor. This may be especially important in a food primary establishment, where not everyone is likely to order liquor (and perhaps even more so to a family-oriented restaurant as the Establishment refers to itself in its Orientation materials, (Exhibit 2, tabs 3 and 4).

In food primary establishments, the exposure to the need to request and assess identification may be more limited than in a liquor primary establishment. And the opportunity to test a server's knowledge and ability during the final shadow sessions may also be limited. So, it is very important to document that a new server has had actual exposure to and has demonstrated the ability to properly apply the Licensee's policy to request identification and properly did request and assess that identification. The Licensee presented no evidence of any such checklist or any way to assure that the server had that exposure and ability. Another means of testing their ability would be to actually administer a test of that knowledge. Because evidence of these were lacking, I find the training program to be deficient in that aspect.

With respect to the training on opening a new location, I find the evidence of training on the need to avoid service of liquor to minors to be insufficient. The District Manager referred to various pages in the 103-page Front of House In-Store Trainers Guide (Exhibit 2, tab 3) and the 167-page Orientation Guide ("Front of House Managers/Trainers Facilitators Guide") (Exhibit 2, tab 4). I have carefully reviewed those documents and can locate only one place in those voluminous documents that mentions the need to consider the age of a customer who orders liquor.

Page 51 of Exhibit 2, tab 3, explains how to use the POSi terminal. It describes how the main screen asks the date of birth, so that it may reinforce the need to ask for identification and at page 52, the knowledge check also asks about that. But this is one of five questions asked on that page and it does not expressly say what ID is needed or ask if ID was actually asked to be presented.

I did not find any of the other pages referred to by the District Manager, or any of the other pages in those documents, to expressly address the legal prohibition on serving liquor to minors, the need to request identification to prevent that from happening, what identification is acceptable, how to assess both age and the identification presented. I note that the role-playing exercises on service specifically say non-alcoholic drinks only are to be ordered, so these would not appear to provide an opportunity to discuss and test the responsibilities for liquor service.

I find it is reasonable to expect liquor service responsibilities should be treated and tested on as a priority over other responsibilities. I find with the amount of material covered in the Front of House In Store Trainers Guide (Exhibit 2, tab 3) and the Orientation Guide ("Front of House Managers/Trainers Facilitators Guide") (Exhibit 2, tab 4), within the time allocated, and without detailed specific written mention of the legal requirements for liquor service, any oral discussion of those requirements would likely be done at a very high level and perhaps very superficially. I find this to be inadequate, especially given the serious consequences to minors and to society.

While I accept the Licensee has many years without a contravention, which may be one measure of the adequacy of its training, on the whole of the evidence presented, I find the Licensee, despite its good intentions and past clear history, did not provide its staff with adequate training to prevent the sale of liquor to minors.

With respect to the Licensee's reliance on the *Rogers Arena* decision, prior decisions are not binding on me and, in any event, are very fact specific. In that decision, the evidence and the facts were very different than those presented here, with specific findings made that the written evidence demonstrated coverage in the training materials of the responsibility to not serve liquor to minors and the steps to be taken to avoid that from happening. Here, the written evidence does not demonstrate that

information was presented or addressed, and the oral evidence does not, on its own, meet the test of reasonableness.

While this finding means the defence of due diligence fails, but I would also like to comment on the adequacy of the Licensee's on-going systems to prevent the sale of liquor to minors.

Adequate systems to prevent the sale of liquor to minors

In addition to proper training, a licensee must also ensure that it has processes in place to ensure that that training is put into practice and consistently acted on. Effective, on-going reminders, notices and monitoring are critical to ensuring that the staff apply their training, and evidence that that is being done must be available and provided if necessary.

In a food primary establishment where there may be more underage persons, servers may be more alert to the need to ask for identification. Where, as here, there might be a less frequent need to ask for identification, this may lead servers into being more complacent, something a licensee needs to be alert to and make sure that reminders are given frequently and are effective.

I accept the District Manager's evidence that servers are given frequent reminders to ask for identification, including at the daily pre-shift meeting. I agree these can be effective and on-going ways to reinforce the need to request and check identification.

I also agree and find that signs and posters can also be effective, but they may need to be changed at least on occasion to refresh their messages and bring them to the staff's attention.

I also accept that using the scheduling app may be a good way of communicating with staff but find that the evidence of using that app to actually communicate with staff about the need to check for identification was not sufficient. Records of those messages and staff responses should be kept.

I accept that, to avoid serving minors, the sales terminal has a mention on it of the acceptable age for service of liquor, but the evidence whether the sales terminal actually asks if age has been verified is unclear. A prompt, asking if age has been verified, can be helpful in reminding staff.

No entries from the communication log were provided, so I am only able to give that little weight in assessing systems to remind staff about their responsibilities.

And while I accept that weekly meetings are held with all the Licensee's general managers to discuss major topics, without any copies of agendas and notes, I am unable to assess their effectiveness in reminding staff of their responsibilities.

No evidence was submitted of regular monthly or bi-monthly staff meetings, which can be a good venue to remind staff of their responsibilities. In that regard, I recommend agendas should be set and should include the legal obligations about liquor service and the reasons why, including the harms to minors. Minutes should be taken and shared with any staff unable to attend, and signed off by them, to substantiate the oral evidence in that that is being done.

The secret shopper program only introduced questions and tests on the asking for identification after the contravention occurred, so I am unable to consider that as part of the Licensee's program in place at the time.

Again, while I accept the Licensee has many years without a contravention, which may be a measure of the adequacy of its systems, for the above reasons, I find the Licensee failed to establish, on a balance of probabilities, that it exercised all reasonable care by ensuring effective application of its training and systems in place to prevent the contravention from occurring.

For all of the above reasons, I find the Licensee has failed to show that it was duly diligent and the claim for that defence fails.

CONCLUSION

Having found that the Licensee has not established a defence of due diligence, I find the Licensee contravened section 77(1)(a) of the *Act*.

PENALTY

Licensees are obliged to comply with the legislation and the terms and conditions of their licenses. Enforcement action, and any resulting penalty, are intended to both redress the licensee's non-compliance and to encourage future compliance by way of deterrence.

Pursuant to section 51(2) of the *Act*, having found that the Licensee has contravened the *Act*, I may do one or more of the following:

- 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 range of penalties for a first contravention is set under Item 7, of Schedule 2 to the *Regulation* as monetary penalty of between \$7,000 to \$11,000 and/or a licence suspension of between seven to eleven days. In the Notice of Enforcement Action and at the hearing, the Branch proposed the payment of a \$7,000 monetary penalty or a suspension of seven days.

I am not bound to order the penalty proposed in the Notice of Enforcement Action nor am I bound by the maximums, and I may impose higher penalties when it is in the public interest to do so. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 2 of the *Regulation*. I am unable to simply recommend a warning or a compliance meeting as the Licensee's advisor has suggested.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history, a past history of warnings by the branch and/or the police, the threat to the public safety, and the well-being of the community. I have also considered the Licensee's expressed preference, if a penalty is to be imposed, for a monetary fine.

In this case, there is no record of a proven contravention by this Licensee of the same type at this establishment within the preceding 24 months of this incident. On this basis, I find this to be a first contravention for the purposes of Schedule 2 and calculating a penalty. I also note there is no evidence of a past history of warnings by the Branch or the police.

The threat to the public and the well-being of the community by the consumption of liquor by minors include those set out in the NOEA: the serious nature of the effects of liquor on the growing bodies and developing minds of minors, the effects on the minors and society of irresponsible drinking learned at an early age, a minor's lack of capacity to metabolize alcohol in the same manner as an adult which causes a more intoxicating effect, and that liquor is a significant factor in many crimes committed by youth, including significant serious offenses.

I find that a penalty is appropriate, and, in this case, the appropriate penalty is a monetary penalty of \$7,000.

ORDER

Pursuant to section 51(2)(b) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,000 to the General Manager of the Liquor and Cannabis Regulation Branch on or before November 16, 2020.

Original signed by

Dianne Flood
General Manager's Delegate

Date: October 15, 2020

cc: Liquor and Cannabis Regulation Branch, Surrey Office
Attn: Mackenzie Castle, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate