



**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:	1073409 B.C. Ltd 663 Finns Road Kelowna, BC V1X 5B7
Case:	EH20-002
For the Licensee:	Brandon Loughery and Cory Jmaeff
For the Branch:	Karol Kudyba
General Manager's Delegate:	Dianne Flood
Date of Hearing:	August 25, 2020
Date of Decision:	September 22, 2020

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

The Licensee, 1073409 B.C. Ltd., operates a licensed establishment known as the Packing House (“the Establishment”) under Liquor Primary Licence No. 036524 (“the Licence”). The Establishment is located at 663 Finns Road, Kelowna. Under the Licence, the Licensee may sell liquor between the hours of 10:00 a.m. to midnight, from Monday to Thursday, and between the hours of 11:00 a.m. to 1:00 a.m., from Friday to Saturday, and between the hours of 11:00 a.m. to midnight on Sunday.

The Licence is, as are all liquor primary licences issued in the Province, subject to the terms and conditions contained in the publication “Liquor 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 February 10, 2020 (the "NOEA").

The Branch alleges that on January 9, 2020 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

The relevant statutory provision is:

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 16

Exhibit 2: Licensee's Documents, pages 1 to 8

WITNESSES

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

One of the Licensee's representatives and the General Manager of a related establishment 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. 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 Spring 2015 Liquor Line newsletter (Exhibit 1, tab 12). Licensees are also reminded about the MAP at routine inspections, which are typically conducted at least every two years.

On January 9, 2020, to test compliance with the *Act*, Inspector A, two other Inspectors (Inspector B and Inspector C) and a Minor Agent conducted MAP inspections at various licensed premises in the Kelowna and Lake Country areas. The Establishment was one of those premises inspected.

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 6 – redacted versions). The Minor Agent had been directed to dress as she 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.

The Inspection of the Establishment

Just before 9:00 p.m. on January 9, 2020, Inspectors A and B entered the establishment and were seated at a table. The Minor Agent then entered the Establishment and was seated at a table about 8 feet away. Inspector B had a clear line of sight of the Minor Agent. The Establishment was not busy.

A staff member ("the Server") came to the Minor Agent's table and the Minor Agent ordered a beer. The Server delivered a bottle of beer to the table, put the bottle of beer in front of the Minor Agent and left. At no point was identification requested from the Minor Agent. The Minor Agent made no attempt to deceive or mislead the Server about her age.

Inspector B took a photograph of the Minor Agent with the beer in front of her. The Minor Agent then paid for the beer and left. The Minor Agent returned to the inspection vehicle where she completed an Observation Form and Statement (Exhibit 1, tab 7).

Inspectors A and B also left the premises. Shortly after, Inspector C entered the Establishment and advised the staff that a minor had just been served liquor. The Server was unable to provide a copy of her SIR certificate.

On January 10, 2020, Inspector A spoke to and subsequently issued the Contravention Notice to the Licensee (Exhibit 1, tab 2). The Server's SIR certificate was provided to the Inspector shortly after that.

The Licensee's responsibilities

Inspector A testified that the Licence is subject to the Liquor Primary Terms and Conditions Handbook (Exhibit 1, tab 13). 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 issues for this Establishment as set out in Exhibit 1, tab 5, and that the prior contravention issues shown on that document were with a prior licensee, not this Licensee. This Licensee has no prior contraventions, and this is the first contravention for sale of liquor to a minor. Inspector A confirmed he had a good working relationship with the Licensee and that the Licensee appeared to take the contravention seriously and to react proactively.

EVIDENCE – LICENSEE

Mr. Loughery, one of the Licensee's representatives, and the General Manager for a related establishment gave evidence on behalf of the Licensee.

The Licensee's Representative

The Licensee's representative and his partner are the licensees of both the Establishment and another licensed premise (the related establishment). Together they have about 50 years experience in the industry. They took over this license in October 2016. They have held the license for the related establishment since 2011. This is a first contravention for them at either establishment, with all prior inspections being positive.

The Licensee's representative and his partner are shocked and devastated that this contravention occurred as they view the sale of liquor to minors very seriously and it is against all their policies. They know about and agree on the serious impacts of the sale of liquor to minors and take their responsibilities as licensees seriously.

The Licensee's representative said they operate the Establishment as if it was a food primary, not a liquor primary, so their focus is on families and food, not liquor and loud music. The clientele is generally families and age 50 plus.

There are about 8 to 12 bartenders and servers on staff, with low staff turnover. A senior manager is always present. The senior front of house managers at both establishments support each other. The serving staff work at only one of the establishments.

The Licensee's representative admitted the Server sold liquor to the Minor Agent as set out in the NOEA. They immediately terminated the Server after learning of the contravention. The Licensee says the Server made the sale contrary to her training and all of the steps taken by the Licensee to prevent the sale of liquor to minors. Her letter admitting that is Exhibit 2, page 1. The Licensee said that its training and the steps to prevent such sales to minors establish a defense of due diligence.

The Licensee's representative said the Licensee has a thorough staff manual that all employees are required to read. He testified the manual is clear as to the law and the Licensee's expectations – there are no grey areas. Exhibit 2, page 2 is page 11 of the manual. It states in that management may terminate an employee for ten different reasons. The first reason listed is violating the liquor laws, including serving alcohol to intoxicated guests or minors. The stated reason for this (termination) is that the Licensee could lose its licence.

The Licensee representative testified they only hire servers with prior experience, "who know B.C.'s liquor laws". The Licensee's training process is to orient staff by having the new server spend a few days with a manager or senior employee. The manager or senior employee covers the service points, where things are, the manual is gone over, and any questions the new server may have are answered. The new server will be shadowed for two or three shifts before they are allowed to serve on their own. The length of training will depend on the person's experience. Training might vary between new staff members, but the content and the Licensee's expectations do not.

He said servers are trained to ask for two pieces of identification and if a person does not have it, to ask them to leave. Because this requirement is simple, the Licensee puts more focus on avoiding over-service as there are more facts and variables in that regard. No evidence of the training to avoid over-service was provided.

The new server's knowledge is not tested by a quiz or other similar process. Occasionally long-term customers will be asked to give feedback on the server's performance, which may include if identification was requested. If a new server is not considered competent and is not asking for identification appropriately, they are let go.

The Licensee's policies were developed in 2003 and were in the process of being updated by a professional consultant when the contravention occurred.

A manager is always present at the Establishment and the Licensee's representative is also typically there. They actively watch and check on staff to make sure the servers appropriately ask for identification.

Daily staff meetings about the menu and other issues will also mention asking for identification.

Management meetings are held weekly, with meetings of the whole staff about every two months. It is mandatory for all staff to attend. If they don't, they have to meet with a manager and go over the material presented at the meeting. Agendas are not made nor are minutes kept. Topics covered are both positive and negative and what needs to be changed or addressed. Reminders are given about asking for identification and avoiding over-service.

The Licensee uses an app called "Seven Shifts" to communicate with staff about shift schedules and also to remind them to check for identification. Managers and employees can post and can also comment on others' posts. Exhibit 2, page 3 is an example of three posts sent to staff about not serving minors. They date from April 2018 to September 2019.

In addition, the managers communicate directly with each other and with the Licensee's representative. Exhibit 2, page 5 provides some examples from both the Establishment and the related establishment, identifying where the manager communicated with the Licensee's representative about inspector's visits and the positive reaction from the inspector.

Posters are posted at the entrance to the Establishment as reminders to customers and staff about the need for two pieces of identification. Signs are also posted at either end of the bar. Photographs of the posters and signs were provided at Exhibit 2, page 6.

A logbook is kept at the bar back, on a shelf. All staff have access and can record any incidents. For example, if someone is asked to leave, it would be recorded. The managers review the incident logbook at their weekly meetings, and it can be used as a learning tool. The managers may then discuss the incident with staff at the daily discussions.

Events like college tours and Halloween are not promoted, so there is no need to remind staff to ask for identification at these kinds of events.

When the contravention occurred, it was a slow day, with maybe four other customers. The manager was just going off shift, and the bartender would have been in charge. He would not have been able to see the Minor Agent from the bar. The Server who served the Minor Agent had been with the Licensee for about two years, with 10–12 years' experience in the industry.

On learning of the contravention, the Licensee's representative immediately terminated the Server as their policy is clear and there is no room for error. He called a staff meeting for the very next morning and went through the policies with the whole staff again.

It has been a difficult year with the COVID 19 closures, and the Licensee has been vigilant in taking all necessary public health steps to protect its customers. This, the Licensee's representative said, shows that it is a responsible licensee and takes public safety seriously.

The General Manager

The General Manager testified she has been with the Licensee for over seven years and has worked at both of the Licensee's establishments. She is now the General Manager of the Licensee's related establishment but spends one day a week at this Establishment.

The General Manager is involved in the training of new staff. The training is the same at both establishments.

All serving staff have their Serving It Right certificates when hired.

On their first shift, a new server will be given the manual and fill out employment forms. The staff manual is about 100 pages, which includes attachments and the liquor policies. The policies include not to serve liquor to minors and not to over-serve patrons. The manual doesn't expressly discuss the dangers and impacts the sale of liquor to minors, but those matters are discussed with staff orally. The new server would go over the manual and be asked if they had any questions.

New servers are not given quizzes, but they are asked if they understand the manual and are encouraged to ask questions if they don't understand. No record is kept of any questions asked or answers that might have been given. The General Manager also goes over with them various things like their role, dress code, the menu and the need to request identification. All of this takes about half an hour. The new server will then sign off on the manual.

New servers are then given a minimum of three shadow shifts with a general manager or an assistant general manager. Notes are not kept on the topics to be covered but the general manager or senior managers know what information needs to be conveyed to the new hires. When shadowing a senior manager, the new server is shown the menus, the table numbers, how the tables work, the ordering system and the logbooks.

On day three, the new server will take service of the tables themselves and will be observed to see how well they do. Depending on how well they do, that may be the last shadow shift required. There is no written checklist that the shadowing manager checks off to ensure items have been covered with the new server. The manager will make sure that the new hire is confident and generally have experience in a variety of situations. All three shadow shifts will be conducted by the same person.

The general manager or other senior trainer will make sure that the new server is requesting identification. Generally, during each shift, at least one person looks to be under the age of 30. The server's performance is not recorded but is talked about by the managers. New hires are given a three-month probation period. She said that if new staff can't grasp the requirements, they are not hired.

Staff are verbally told about the Minors as Agents Program and the Seven Shifts app is used to communicate about that program and the need to request identification.

The Licensee's policy is to request identification from anyone who appears to be under the age of 30. The policy is that if you're not sure if that patron is of age, you ask for identification, and if no identification is produced, to ask the patron to leave. What to look for in assessing age is not discussed because, "at the end of the day, if the staff member is not 100% sure, identification should be requested".

In terms of what is acceptable identification, staff are told to look at the date and picture and to ensure that the picture matches the person. Forms of identification from other provinces or countries are not covered in the training.

In her opinion, the Licensee takes the issue of underage service seriously and all of the staff understand the liquor laws and there were no gray areas.

She said that most staff have been employed for a long time - 5 to 10 years. Sometimes, they will rehire a valued employee for the busier summer months. A re-hired employee will go through the training manual and will also be required to do one shadow shift.

She said the need to ask for identification is drilled into staff. It is mentioned at the daily staff meetings. She said there is open communication with the staff who are encouraged to ask questions. There is always a manager on staff, so servers always have someone to ask if they need to. If someone did not ask for identification, they would be pulled aside and asked if they had, but that has never happened.

The General Manager testified that management uses the Seven Shifts app to communicate with staff about their shift schedules and about other important issues like requesting identification. Staff may be asked to comment on a particular post and if they don't comment, there may be follow-up requesting them to comment, as a way to ensure that they have read the post. All employees can see each other's messages on that system.

The managers also use a system just for them to communicate with each other. She said the Licensee's documents do not include all of the posts that have been made about requesting identification. The managers also meet once a week to determine if anything needs attention

She was unclear whether the January 9, 2020 post about requesting identification (Exhibit 2, page 5) was made before or after the contravention as that post was made from the other establishment.

Management holds regular staff meetings with all employees about every two months. The Licensee decides when to call those meetings. No agendas are made but the senior managers and the Licensee cover off points and go over all of the policies and procedures, including requesting identification and over service. Minutes are not kept but the General Manager takes her own notes to cover off with staff. Attendance is not recorded because the staff is small, and the managers know if someone is not there. If a staff member is unable to attend, they are required to meet with a senior manager and go over the items that were discussed. No quizzes or other tests are required of staff with respect to the items raised at the staff meetings.

The General Manager said that the terminal used for recording sales has stickers on it regarding the dates to be checked for identification, but the terminals themselves do not have a prompt asking staff if they have checked a patron's age.

A logbook is kept behind the bar. All staff have access to it but are not required to read it. The managers will look at the entries to see how the issue was dealt with and may use it as a learning opportunity to address appropriate responses. The managers may take a photograph of an entry and circulate it on the Seven Shifts app so that all of the

staff know about the incident. The incident logbook may have a recording of someone not having identification when asked.

The General Manager did not know of any secret shopper program.

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 suggested the Licensee failed to meet the test of due diligence. He said both the oral and written evidence of the training and systems to prevent sales of liquor to minors is limited and weak and does not meet the standards expected. The manual does not cover the dangers to young people and society as a result of the sale of liquor to minors. He noted that no formal checklist was used, no written tests or quizzes were conducted to ensure staff understood the requirements. Additionally, ongoing systems were very limited. Communications about serving minors were minimal and seldom, if at all, followed up to ensure they were read. Signage and other reminders were limited.

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's representative admitted the contravention occurred but relied on a defence of due diligence.

He said that the Licensee has learned from the process and admitted their documentation is weak, but he is on the premises daily and in constant communication with and providing direct oversight of the staff. He said the lack of documentation is due in part to the small size of the organization. Unlike a large organization that has a large staff, the Licensee is able to communicate effectively with each staff member on a daily basis.

The Licensee takes its responsibilities seriously and has high expectations of staff, higher than most. As a family person, he understands and communicates to the staff the seriousness of consequences of consumption of liquor by minors, and he takes steps to prevent that from happening.

The Licensee's representative noted the Licensee's good compliance history and the lack of any previous contraventions at either establishment. This sale was a mistake and should not have happened, but it did despite the Licensee's efforts. He said the standard is not one of perfection.

The Licensee's representative submitted that due diligence has been established and a penalty is not warranted, but if a penalty is to be imposed, a fine would be preferred to a suspension.

ANALYSIS AND REASONS

Contravention

The Licensee's representative 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 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 that 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 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 good intentions to prevent the sale of liquor to minors. However, good intentions 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.

Adequate training to prevent the sale of liquor to minors

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. 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 that responsibility a high priority.

The evidence of the Licensee's training to prevent the sale of liquor to minors includes all servers being required to have their SIR certificate, prior experience serving liquor, and three training shifts.

In the initial training session, all of the Licensee's over 46 pages of policies, plus completing of forms, asking and answering any questions and signing off on the manual are covered in about one-half hour. No evidence was presented that new servers are expected to take the policy manual home and read it, or of any testing to see if they had read it or understood its contents before signing off on it.

The full content of the manual is difficult to assess as only one page was presented. From the page presented, the discussion about avoiding serving minors is very limited and consists only of a warning of termination if liquor is sold to a minor. Presumably, if the manual had addressed the issue more fully elsewhere, those pages would have been produced at the hearing.

The Licensee's representative admits that the manual does not identify or discuss the potential harms from the service of liquor to minors. Nor does the page presented 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. While the Licensee's policy is "if in doubt, request ID", how to assess for reasonable doubt is not addressed. Additionally, the manual and the in-person overview do not mention the Minors as Agents Program. I find the training manual to be deficient in terms of the extent and depth of the discussion about liquor service and, in particular, about the responsibility not to serve liquor to minors.

I am concerned about the limited time and focus spent in the initial training session on reviewing the responsibilities for liquor service, especially the responsibility to not serve liquor to minors. The amount of material covered within the time allocated could only be done at a very high level and very superficially, which I find to be inadequate, especially given the serious consequences to the minor and society if those responsibilities are not met.

I am also concerned that the servers' actual understanding of the policy and their responsibilities in that regard are not tested, orally or in writing. Not only is testing on their understanding of their full responsibilities for liquor service a reasonable expectation, it is reasonable to expect liquor service responsibilities should be treated and tested on as a priority over other responsibilities, and that the test results should be recorded. And until a clear pass is achieved, a server should not advance further in the training program.

I have additional concerns about the amount and effectiveness of liquor service training in the shadow training. A checklist of the matters to be covered in those sessions, and that they have in fact been covered, is not kept. The number of opportunities in which identification would need to be requested and verified could vary substantially on each of the training shifts, so that the opportunity and effectiveness of the training on these important items may be limited. The Licensee's representative said that they generally have few underage persons, and the General Manager's evidence is that identification may need to be requested once per training shift. This indicates to me that a server may have only very limited exposure to when and how to ask for and assess identification. This also means the opportunity to test a server's knowledge and ability during the final shadow session may be very limited.

I find that the Licensee relies too heavily on servers' past experience and in effect assumes that someone else has properly trained the server. I find that, in its training program, the Licensee does not spend enough time or detail explaining the need to prevent the sale of liquor to minors and how to do that. I find the manual to be deficient in both amount and detail of information about the sale of liquor to minors, given the serious consequences for the minors and society. I find the Licensee fails to

adequately test the new servers and fails to document the results of that testing, both at the start and at the completion of training.

On the whole of the evidence presented, I find the Licensee, despite its good intentions, did not provide its staff with adequate training to prevent the sale of liquor to minors.

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.

While I am prepared to accept that a smaller organization with a smaller staff may not have the same need to document their processes as a larger organization with a larger staff, there is still a need for at least some documentation.

Further, in an 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 Licensee's representative and the General Manager's evidence that servers are given frequent reminders to ask for identification. I accept the evidence that reminders are often given at the daily meetings and throughout the day and I agree these can be effective and on-going ways to reinforce the need to request and check identification. 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 Seven Shifts app may be a good way of communicating with staff but find that more might be done to ensure that staff are actually reading and do understand and apply any messages about proper liquor service. Consideration should also be given to changing the type and form of reminders and notices, to keep the requirements fresh in the minds of staff. And records of those messages and staff responses should be kept.

While the regular bi-monthly staff meetings can be a good venue to remind staff of their responsibilities, agendas and minutes are not kept so there is limited documentary support to the oral evidence that avoiding sales to minors is mentioned and reinforced. 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.

Other possible means to keep staff alert to their responsibilities can be occasional tests and/or secret shopper programs. Again, records of this being done should be kept and be produced, if necessary.

For these 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 licensees' 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, Regulation* and the terms and conditions of its licence, 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 license 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*.

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 October 22, 2020.

Original signed by

Dianne Flood
General Manager's Delegate

Date: September 22, 2020

cc: Liquor and Cannabis Regulation Branch, Kelowna Office
Attn: Kurt Lozinski, Regional Manager

Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Karol Kudyba, Branch Advocate