



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF**

A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licensee: 352382 British Columbia Ltd.
dba Boston Pizza (New Westminster)
1045 Columbia Street
New Westminster, BC

Case: EH14-128

For the Licensee: Thomas Nevison

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: May 14, 2015

Date of Decision: July 8, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

352382 British Columbia Ltd. dba Boston Pizza (New Westminster) (the “licensee”) holds Food Primary licence number 159501 (the “licence”). Boston Pizza (New Westminster) (the “Restaurant”) is located at 1045 Columbia Street in New Westminster. The licence specifies hours of liquor service daily, from 11:00 a.m. to 2:00 a.m.

Thomas Nevison is a principal of the corporate licensee and appeared at the hearing as the licensee’s representative (the “Owner”).

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”).

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the “Act”) on September 18, 2014, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program (“MAP”). The licensee admits that its employee sold liquor to the minor agent and accepts the facts as outlined in the Notice of Enforcement Action dated October 6, 2014 (the “NOEA”). However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch’s (the “branch”) allegations and proposed penalties are set out in the NOEA.

The proposed enforcement action for the contravention of section 33(1)(a) of the Act is a \$7,500 monetary penalty. Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the “Regulation”) sets out a 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.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267*****Supplying liquor to minors**

33 (1) 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 book of documents, tabs 1 to 15.

Exhibit 2: Sealed envelope with photo of minor agent and photocopy of the identification of minor agent.

Exhibit 3: Licensee's package of documents, tabs A to G.

Order to delete any reference to minor agent's name or other identifying factors

With the agreement of the parties, a copy of the minor agent's photo and identification were placed in an envelope and marked as Exhibit 2, with a notation that it is not to be unsealed or disclosed without a court order. Exhibit 2 has been sealed to protect the identity of the minor agent. At the hearing, the branch provided the licensee and its witnesses with an opportunity to view the photo of the minor agent and identification with birth date. The minor agent did not appear as a witness for the branch.

WITNESSES

The branch called two witnesses: the two liquor inspectors who attended the Restaurant with the minor agent on September 18, 2014 ("Inspector 1" and "Inspector 2").

The licensee called two witnesses: the liquor inspector who was responsible for the supervision of the licensee's establishment with respect to compliance with the liquor laws ("Inspector 3") and the manager of the Pub (the "Manager").

FACTS

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

On September 18, 2014, Inspectors 1 and 2, with the minor agent, were conducting MAP inspections in New Westminster. Prior to beginning the inspections, Inspector 2 took a photo of the minor agent and photocopied his identification, which showed him to be 17 years old on September 18, 2014 (Exhibit 2).

The minor agent entered the Restaurant at approximately 4:00 p.m., followed by the two inspectors. The minor agent seated himself at the bar in clear view of the two inspectors who sat at a table approximately 10 feet away. A male bartender (the "Bartender") approached the minor agent and took his drink order. A few minutes later, the Bartender returned with a glass and an unopened can of Guinness and placed it in front of the minor agent. At no time did the Bartender or any other staff request identification from the minor agent.

Once the minor agent was served, Inspector 2 approached the bar and took possession of the Guinness while Inspector 1 escorted the minor agent back to the vehicle. The minor agent remained in the vehicle to complete his observation form and his statement (Exhibit 1, tabs 6 and 7).

Inspector 2 spoke to the Bartender and asked to speak to the Manager, who appeared and spoke with Inspector 2. Inspector 1 re-entered the Restaurant and joined Inspector 2 in the back area near the kitchen where he was briefly introduced to the Owner. The inspectors informed the Manager about the liquor sale to the minor agent. The inspectors then spoke with the Bartender and advised him that he had served the minor agent without requesting any identification. Inspector 2 completed the Contravention Notice (Exhibit 1, tab 8) and handed it to the Manager. Inspector 1 explained the

contravention, the enforcement process and the recommended penalty for this contravention. The inspectors paid for the Guinness and received a receipt (Exhibit 1, tab 4). The two inspectors left the Restaurant at 4:30 p.m.

In his testimony, Inspector 1 noted that when he first spoke with the Manager about the incident, she indicated she was aware of the MAP and expressed her dismay that the sale had occurred. He also noted that, in his conversation with the Bartender, the Bartender took full responsibility for the sale and stated how badly he felt that it occurred.

LICENSEE'S HISTORY AND ITS POLICIES, PROCEDURES AND TRAINING

The licensee called Inspector 3 as a witness. Since 2009, when the current licensee took over the operation of the Restaurant, Inspector 3 has been the licensee's contact person in the branch with respect to any questions about the licence and compliance with the liquor laws. During this time, Inspector 3 has found the licensee to be fully compliant and always willing to ask him questions prior to embarking on any action that might affect liquor regulations. He referred to many instances when the licensee has discussed certain activities with him to obtain his opinion. The licensee has always complied with the requirements of the liquor regulations and with suggestions made by Inspector 3. The NOEA shows no record of compliance meetings and no record of enforcement action with this licensee.

The Manager gave evidence about the management of the Restaurant, its policies and procedures, the training given to employees, and the implementation of its policies.

Hiring, Training and Testing of Employees

The Manager is responsible for the hiring and training of employees and for the development of the policies and systems that the licensee has in place, including implementation of the Boston Pizza policies for franchisees.

The Manager referred to the employee information for the Bartender to illustrate the hiring and initial training period used by the licensee for all its employees (Exhibit 3, tab A). The Manager hired the Bartender on August 15, 2014, just a month before the incident with the minor agent. The resume of the Bartender indicates that he had serving and bartending experience for seven years prior to beginning his employment with the licensee. He had also worked at two other Boston Pizza restaurants.

The Bartender was required to serve a three month probationary period that would have ended on November 15, 2014. He left the Restaurant of his own accord on October 12, 2014, almost a month after the incident. The Manager explained that they do not have a policy of automatic termination if an employee infringes the liquor laws. She stated that she prefers to use an incident such as this one as a learning tool for all the staff. She said that, in the month after the incident, the Bartender became their best advocate for selling liquor responsibly.

Most employees must complete four shifts of training. An outline of this training schedule is included in Exhibit 3, tab A. The Manager testified that, because of the Bartender's previous experience both as a bartender/server and his work with Boston Pizza elsewhere, he was able to complete the training in two shifts.

The training schedule of four shifts includes the BP (Boston Pizza) learning and the U-Serve course for Boston Pizza. The job description for bartenders includes the following under Duties and Responsibilities: "the bartender will practise the responsible selling and serving of alcohol at all times." The bottom of the job description has a signature space for the employee to indicate that he/she has read and understood the document (Exhibit 3, tab B).

The licensee requires all its employees involved in the service of alcohol to take the U-Serve course before starting a solo shift (Exhibit 3, tab D). U-Serve is Boston Pizza's self-study course on responsible alcohol service. The course educates franchisees, managers, bartenders and servers about the legal responsibilities when serving alcohol, and provides effective techniques to prevent problems related to over-service. The training is mandatory for all managers and employees that are in regular contact with alcoholic beverages and guests. The licensee's servers and bartenders have all taken the

U-Serve program (Exhibit 3, tab F). On July 31, 2014, Boston Pizza introduced version three of the U-Serve program. All employees must now take this version as a yearly refresher course.

The Bartender took version two of this course, which usually takes between 45 minutes and an hour to complete. The Bartender checked off on BP learning, indicating that he completed the whole course on BP policies, including the U-Serve, on August 19, 2014 (Exhibit 3, tab A). On August 15, 2014, the Bartender signed a form to state that he had read the Boston Pizza New West Policies and Procedures and that he agreed to the terms and conditions. The Bartender had a valid Serving It Right certificate (copy in Exhibit 3, tab A).

The Bartender completed the quiz at the end of the U-serve course. His test results show that he took the quiz twice on August 19, 2014, one showing a mark of 12 out of 20 and the second showing a result of 20 out of 20. The Manager stated that employees must receive 100% on the test. The questions are different with the different attempts.

Policies and Practices re: Preventing Service to Minors

The Manager testified that, as a franchisee, they follow the policies of Boston Pizza with respect to service to minors as set out in the U-Serve course. They also adapt policies and use what works best for them in their circumstances.

At the time the Bartender was hired, the licensee was still using version two of the U-Serve course (Exhibit 3, tab D). Since then, they have started using the new version three of the course (Exhibit 3, tab G). The Manager testified that the policy of requesting ID of anyone who appears to be under the age of 25 and of requesting two pieces of ID was in place prior to the incident. The new version has introduced some additional language and changed the wording in some areas but the policy with respect to ID requirements is essentially the same in both versions.

Both versions of the U-Serve course have a section on minors, which states that you may not sell or give liquor to minors and adds that “generally, provinces require two pieces of ID for anyone who appears to be a minor.” Another section refers to Identification and says:

Primary identification must: [sic]

- Issued by a government agency (Canadian or other), and include the person’s name, signature, birth date, expiry date and picture
- Driver’s license, Canadian Passport, Canadian Armed Forces ID, Canadian Citizenship Card, First Nationals status card, National Defence ID.

Secondary identification must:

- Include an imprint of the person’s name
- Include the person’s signature and/or picture
- Credit cards, bank cards, university or college student ID cards, Canadian Blood Services donor cards, credit cards or other ID that contains both a name and signature under picture.

In red and bolded at the bottom of this section is the statement: “If a person cannot produce two pieces of acceptable identification, you must refuse service.”

Another section deals with fake ID and gives the following pointers:

- Check if the ID is counterfeit
- Compare the person to the photo
- Look for signs of tampering
- Check the date of birth and expiration date
- Make sure that ID is authentic
- Check the second piece of ID
- Ask the person to verify the signature
- Watch body language and behaviour
- Talk to the person

The legal drinking ages in Canada, including British Columbia, are in table form. Under factors affecting intoxication, age is noted, with a note about a minor's lack of capacity to metabolize alcohol in the same manner as an adult.

Further emphasis re: service to minors is under Duty of Care: "Only serve or sell to guests legally old enough to drink."

There is an additional reminder re: identifying and managing Underage Guests or Minors, with a large red circle which has the wording "Underage Drinking It's Not OK" A warning re: possible fake IDs states:

1. Falsely using valid ID, hoping the resemblance is plausible
2. Using completely manufactured or counterfeit ID
3. Using authentic ID that has been manipulated or altered to misstate the holder's name, date of birth, photo or other information.

Signage

Exhibit 3, tab C contains photos of the signs in the Restaurant. The Manager testified about the location of these signs. The first sign is a branch-issued sign about the requirement for 2 pieces of ID and the types of acceptable ID, which includes the reminder "if there are any doubts about your ID, you will not be served liquor." This sign is located behind the bar. Other signs in the Restaurant are reminders to staff and customers about the requirement to show "two pieces of ID if you look 25 or under." These are posted in three different places around the Restaurant (Exhibit 3, tab C).

Reminders to Staff

In 2010, the licensee implemented a policy of requiring all employees to punch in at the beginning of their shift. When employees punch in, they receive a reminder message about asking for ID of all guests under 25 and to ask for two pieces of ID (Exhibit 3, tab C). Employees must enter OK before they are able to enter their start time on the machine. The operating system for entering sales has a popup message that changes every day as it shows the birthdate that is valid for a 19 year old (Exhibit 3, tab C).

Management regularly holds pre-shift meetings with staff. Prior to the start of a shift, employees are notified if there are any changes to the policies and are given reminders about existing policies. The management will remind staff about IDing anyone who appears to be under 25, they will review what acceptable ID is, and they will often do different role plays with staff to help them to diffuse situations when people are refused service.

The items discussed at these pre-shift meetings will depend on what issues may have arisen during the month. Exhibit 3, tab E shows a calendar for November of 2014 with various items identified for discussion at pre-shifts. There are five mentions of "ID under 25" during the month of November. The Manager testified that this practice of noting items on a calendar for discussion at pre-shift meetings was in place prior to the incident. Management discusses specific appearance indicators to help staff assess age. They regularly remind staff to ask for ID if in doubt and, if no ID, to refuse service.

Management often has discussions with staff after their shift, when they do on-the-spot coaching if an issue has arisen during a staff member's shift.

Exhibit 3, tab E includes an email dated July 16, 2014, from the regional business manager for Boston Pizza reminding BP franchisees that liquor inspectors have been entering the restaurants with underage people to try and order drinks. The email refers to the potential for a \$7500 fine and a reminder to all to be extra diligent that their servers are following ID procedures (2 pieces of ID with one being government issued). The writer of the email states this is a good time to reinforce these requirements through pre-shifts and individual discussions. Another email dated August 12, reminds franchisees about the potential for a MAP agent to enter the restaurants and to tell their staff to check and approve proper ID before taking any drink orders. The Manager testified that, after receiving these emails, they discussed the MAP with their employees and that they reinforced the importance of requesting identification of anyone who appears to be under 25.

Meetings and Minutes

Exhibit 3, tab F includes some notes from management meetings prior to the incident, with discussion items. The management meetings typically occur once a week. They have agendas for the meetings and keep a record of the meeting (copies of meeting notes from August 2014 in Exhibit 3, tab F).

Since the incident, management has been keeping the minutes online, accessible to all staff. In their management meetings, they will discuss changes to liquor laws, any information from Liquor Line, etc.

Recording Incidents

The U-Serve course under Duty of Care, includes a section on “Record Incidents and Share Information,” with three steps to record incidents and share information noted:

- Establish a system of recording incidents
- Make a record of both the employee’s recollections of the events as well as an account of the incident from any witnesses
- Seek contact information from any other witnesses to the incident and if possible obtain detailed statements from them about the incident

Prior to the incident, the licensee had a system of recording any incidents in a logbook (examples from August and September 2014 at Exhibit 3, tab F). Since the incident, management has implemented a new policy, using a program called ‘schedulefly’, an online communication with management and the employees. Management also introduced a new format for incident reports, which sets out specific questions to be answered about incidents. Included are questions about minors on premises, types of ID asked for etc., with a space for comments to provide a detailed description of an incident. At the end of every shift, the manager has to submit a fly note, which is mailed out to every management team. The Manager stated that this new system has proven more effective than the logbook as not everyone was reading the logbook. With this program, staff can review the information/reports online as soon as they are issued. This works better for staff who are not working every day.

SUBMISSIONS – BRANCH

The branch has provided notice to the industry about the MAP. The branch has also provided copies of the Guide to all licensees. The Guide emphasizes that the best way to check if anyone is underage is to ask for identification. The branch submitted the Supreme Court decision, *Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch* 2006 BCSC 417, for my consideration. The judge in this case emphasized the need to be cautious in order to avoid selling liquor to minors. The only way to determine someone's age is to ask for ID.

The branch submits that the sale of liquor to minors is a serious public safety issue. The recommended penalty is the minimum for a first contravention of this type. In the circumstances of this case, it is reasonable and appropriate.

SUBMISSIONS – LICENSEE

The licensee admits that its employee sold the liquor to the minor agent. However, the licensee says that the evidence of its training, policies, practices and procedures demonstrates that it has met the test of due diligence and thus I should not find a contravention in the circumstances of this case.

The licensee adds that it is very committed to ensuring its staff follow all the liquor laws and that their history of compliance demonstrates this commitment. The licensee has also stated that they are willing to make any changes necessary to ensure such an incident does not occur again.

REASONS AND DECISION

Contravention

The licensee admits the contravention occurred. I, therefore, find that the licensee has contravened section 33(1)(a) of the Act.

Due Diligence

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

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

The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, has 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 *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,

- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The directing mind

I find that the Owner and the Manager are both directing minds of the licensee. The Bartender who sold the liquor to the minor agent was not responsible for the development of the licensee's policies or procedures. Both the Owner and the Manager were nearby at the time the liquor was sold but were not actually in the restaurant area as they were in a management meeting in the back. I find that, for the purpose of the due diligence analysis, the directing minds were not involved in the sale to the minor agent. I turn to the second stage of the *Beverly Corners* analysis.

Adequate training and other systems

As noted above, the Manager has provided considerable evidence about the hiring and training procedures for the Restaurant staff. She also described the specific training on the Boston Pizza U-Serve policies and the testing of new hires. She reviewed the documents with the policies about requesting ID of anyone who appears to be under 25. The policies include:

- The Boston Pizza U-Serve course, which is a responsible alcohol service training program and specifically details requesting ID, what ID is acceptable, dealing with fake ID, age as a factor influencing intoxication, etc.
- Requirement for all employees to take the U-Serve course which includes 45 minutes on how to avoid service to minors
- Testing of all new employees on the U-Serve policies
- Requirement for all employees to have Serving It Right certificates as well as the Boston Pizza training

- Training of most new employees over a period of four shifts before they are allowed to work a solo shift
- Requirement for staff to sign a sheet indicating they have reviewed the policies

I find that the licensee has incorporated policies on responsible alcohol service and has implemented training on these policies to guide staff to ask for ID of anyone who appears to be under 25.

Effective Application and Operation of the Systems

The Manager testified about the steps taken to ensure staff are applying and following the ID policies:

- Requirement for all employees to punch in at the beginning of their shift, with the reminder message about asking for ID of all guests under 25 and to ask for two pieces of ID
- the popup message on the operating system for sales, which shows the valid birthdate that day for a 19 year old
- The presence of branch signs around the store, setting out the importance of ID and the requirement that two pieces be provided
- Regular reminders to staff at pre-shift meetings about the importance of requesting ID
- After shift on-the-spot coaching when issues arise
- Management meetings to discuss issues, including agendas and minutes to record the discussions
- The incident log book that is kept to record any incidents

There are many practices and procedures that a licensee may follow to ensure its staff are adequately trained to follow the liquor regulations and are monitored to ensure staff are applying its policies. Even with the most extensive training program and regular reminders from management, staff may still make mistakes. I find that this is what happened here. The Bartender failed to ask an obviously underage customer for ID.

Licensees have a defence if they can prove that they have implemented adequate training and other systems and taken reasonable steps to ensure the application and operation of its systems. The fact that the Bartender failed to request ID of the minor agent and thus contravened section 33(1)(a) does not determine the issue. The licensee is entitled to present a defence of due diligence to support its argument that it has taken all reasonable steps to try to prevent such contraventions.

I find that the licensee here had adequate ID policies, training, and practices in place in the Restaurant. I find further that the licensee has taken reasonable steps to ensure the application and operation of its systems. In addition, I find that the licensee's history of compliance and cooperation with the branch indicate the efforts it has made to ensure it follows the liquor laws.

Since the incident, the licensee has made some changes to its policies and practices to strengthen them and to help ensure such an incident does not occur again. The licensee has expressly stated its willingness to make further changes if they will help prevent such incidents. One suggestion I have for the licensee is to implement a policy of requesting ID of anyone who appears to be 30 or under, instead of under 25. I note that the licensee's current policy refers to requesting ID of anyone under 25 while the signs in the Restaurant indicate ID will be requested of anyone who appears to be 25 or under. It is helpful to staff to be consistent in the messaging. A policy of requesting ID of anyone who appears to be 30 or under would give staff an additional margin of error when assessing a person's age, and will warn customers that ID will be requested of this age group.

Another recommendation I would suggest is that all new hires, regardless of their previous experience and training, be required to fulfil the four shift course requirement. The Bartender here had some years of bartender/server experience and had also worked at two other Boston Pizza restaurants. As a result of this experience, the Manager made the decision to allow him to complete the training with only two shifts. The fact that the Bartender's first try on completing the quiz from the U-Serve course was very weak was an indicator that perhaps he would have benefitted from a full four shift training period. The decision to train the Bartender for only two shifts was understandable given his previous experience in the industry and with Boston Pizza restaurants. My comment

is made with the benefit of hindsight and does not affect my conclusions on the licensee's defence of due diligence.

CONCLUSION

I find that the licensee contravened section 33(1)(a) on September 18, 2014. I find that the licensee has met the onus of establishing a defence of due diligence and has a complete defence to the contravention.

Original signed by

Nerys Poole
General Manager's Delegate

Date: July 8, 2015

cc: Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Rupi Gill, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Peter Mior, Branch Advocate