



**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: Beverly Corners Liquor Store Ltd.
dba Beverly Corners Liquor Store
2755 Beverly Street
North Cowichan, BC V9L 6X2

Case: EH11-077

For the Licensee: Andrew D. Gay
Gudmundseth Mickelson LLP

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: January 18 & 19, 2012

Place of Hearing: Victoria, BC

Date of Decision: February 27, 2012

**Ministry of Energy
and Mines**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Beverly Corners Liquor Store Ltd, operates Beverly Corners Liquor Store located in North Cowichan, BC. The licensee holds Licensee Retail Store License No. 195428 for the operation of a licensee retail store, i.e. a private liquor store, with liquor sales from 9:00 a.m. to 11:00 p.m. seven days per week. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated July 6, 2011. The branch alleges that on May 11, 2011, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is a \$7500 monetary penalty (item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

Item 2 provides a range of penalties for a first contravention of a license suspension for ten to fifteen days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee disputes the contravention.

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,

Prohibitions with respect to minors

34 (1) A minor who purchases or consumes liquor on a licensed establishment, except as provided under this Act or by the *Liquor Distribution Act*, commits an offence and is liable on conviction to a fine of not less than \$100.

(2) A minor who, without lawful reason or excuse, enters or is found in a liquor store, or in that part of a licensed establishment where the minor is not permitted by the regulations, commits an offence and is liable on conviction to a fine of not less than \$100.

(3) A minor who, without lawful reason or excuse, has liquor in his or her possession commits an offence.

(4) A minor commits an offence who, for the purpose of purchasing or attempting to purchase liquor or of gaining or attempting to gain access to a licensed establishment, presents identification, proof of age or any other record to establish his or her age or identity if that identification, proof of age or other record

(a) has been altered or defaced to misrepresent the age or identity of the minor,

(b) was not issued by the issuing agency to the minor,

(c) was issued by the issuing agency to another person,
or

(d) is otherwise forged or fraudulently made.

(5) This section, except as subsection (1) applies to the consumption of liquor, does not apply to a minor

(a) who is employed or contracted by a municipal police board, the provincial police force or the general manager to test the compliance of a licensee with section 33 or 35 or the regulations, and

(b) while the minor is engaged in that employment or under that contract and accompanied or supervised by a peace officer or an employee.

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

- Exhibit No. 1:** Branch's book of documents, tabs 1 - 13.
- Exhibit No. 2:** Copy of minor's (agent #6 contracted by the branch) photograph and identification. [Note: these items were ordered to be placed in a sealed envelope, to be opened only upon an order of the Supreme Court of British Columbia or the undersigned adjudicator.]
- Exhibit No. 3:** Licensee's book of documents, tabs 1 – 31.
- Exhibit No. 4:** Excerpts from the branch Compliance and Enforcement Policy and Procedures Manual, Desk Reference.
- Exhibit No. 5A:** Licensee's two page document listing and recording "ID rejected/not provided" transactions for the period 1/8/2012 to 1/16/2012.
- Exhibit No. 5B:** Licensee's two page document listing and recording "no service" transactions for the period 1/8/2012 to 1/16/2012.
- Exhibit No. 6:** DVD "Beverly Corners Security Footage".
- Exhibit No. 7:** Argument of the Licensee.

EVIDENCE – THE BRANCH

At the commencement of the hearing the licensee conceded that on May 11, 2011, liquor was sold to a minor and no identification was requested from the minor.

Witness A testified that in 2011 he was employed as a regional liquor inspector by the branch when the branch undertook a “Minors as Agents Program” to monitor compliance of the Act prohibiting the sale of liquor to minors by licensed establishments. The program involved the hiring of minors by the branch to test whether individual licensed establishments are willing to sell liquor to a minor. Care was taken by the branch to ensure that the underage minors appeared to be their actual age and no attempt was made to deceive or mislead in order to make a purchase of liquor. The minors were provided with training by the branch in making observations, writing notes and reports and dealing with hostile people. To ensure that all licensees were aware of the program and of their responsibilities under the Act the branch issued a general press release followed by written notification to all licensees that minors under the supervision of a liquor inspector would be visiting government and private liquor stores and attempting to purchase liquor.

On May 11, 2011, a 17 year old male employed as an agent by the branch was working with inspector A and another liquor inspector visiting private and government liquor stores to test whether the subject stores were willing to sell liquor to a minor. The minor entered the Beverley Corners Liquor Store (BCLS) at approximately 8:10 p.m. The liquor inspectors, concerned that they may be known by the staff, remained outside, observing the minor through the front windows. The minor was observed to proceed to the rear of the store, pick up a six pack of beer and proceed to the front of the store where three employees were engaged in conversation. The beer was purchased by the minor from one of the employees, a female cashier. He left the store with the beer and proceeded to the inspector’s vehicle where the transaction was documented. The inspectors made their notes (exhibit 1, tabs 2 & 3) and the minor

completed the Minor Agent Observation Form (exhibit 1, tab 4). The inspector determined that the minor was not requested to produce identification.

The principal of the corporate licensee was later advised of the alleged contravention and a contravention notice was issued. A copy of the closed circuit television recording (CCTV) and other documents were requested and obtained.

A NOEA was prepared with a recommendation for a \$7,500 monetary penalty. The inspector was concerned that selling liquor to a minor is a serious public safety issue. None of the employees made an effort to check the identification of the underage agent despite his youthful appearance. The inspector considered that the minimum monetary penalty was appropriate to reinforce the seriousness of selling liquor to minors and would encourage the licensee to enhance existing policies and procedures to ensure future voluntary compliance.

EVIDENCE – the Licensee

Witness B testified that he is an experienced businessman and has been a shareholder in the corporate licensee since BCLS was opened in December 2006. He is also involved in the ownership of another private liquor store and was previously involved in the ownership of a licensed pub which has since been sold. There have never been any compliance issues at any of the licensed businesses. They are aware of the importance of the liquor licence, realize that it is a privilege and not a right, and operate in compliance with all the licence requirements. They keep current with license requirements through notices received from the branch, membership in an industry association and checking the branch website. Their business philosophy is to operate in a manner that encourages customers and suppliers to do business with them.

He is the general manager of BCLS and as such is responsible for the day to day operations. There is a store manager who reports to him and other management staff who report to the store manager. He does not interfere with the managers'

responsibility to manage staff. Managers are told that leadership flows from the top and employees will do what you do. Their policy regarding the checking of identification is to take the high road and err on the side of being cautious and checking rather than not checking. He referred to exhibit 3 tabs 8 – 13, 19 and 20 whereby staff and management are frequently reminded of their obligations through staff meetings, emails, sign-off sheets, labels posted on shelves, notices posted on the tills and in offices, and reminders on their name tags and in their pay envelopes.

He referred to the “Employee Policy Manual” created for BCLS (at exhibit 3, tabs 5, 16 and 17). It is updated as necessary and is required to be read by all employees. It includes the ID checking requirements for employees. He referred to the “Training and Procedure Manual” at exhibit 3, tabs 6 and 18 which is used by managers to train employees. Employees are required to read the manuals prior to their first shift. The manuals include sections on the ID checking requirements and using the “cancel sale” button where a customer is refused service because of insufficient identification or intoxication. The “cancel sale” button can be correlated with photos from the security cameras (exhibit 3, tab 26) to allow a review of the transaction for the purposes of staff training and to ensure staff are checking identification and refusing service where insufficient identification is presented. They have developed a system of hand (raised index finger) and voice signals (code word) to alert staff to the presence of suspected minors in the store.

He referred to emails (exhibit 3, tab 23) sent to the store manager regarding the branch program involving the use of minors to check compliance and a follow up email after the incident of May 11, 2011. He decided not to tell staff the identity of the employee involved in the incident, thus-causing all employees to consider their own actions and responsibility. Following the May 11th incident he worked with the company information technician to develop a software program for the cash tills requiring the cashier to consider the need to check identification for every transaction and punch a button on the till which would generate a report.

He testified that the employee on duty at the time of the incident of May 11, 2011 (witness D) was hired in August, 2010. She had previous retail experience selling tobacco to age restricted customers, 18 years or older. She received training from senior staff and was required to read and sign-off on the training and policy manuals. She regularly checked identification and used the "no sale" button when a sale was refused (exhibit 3, tab 29). The evening of May 11th was her last shift as she was relocating out of the province. She was the supervisor on that shift. Supervisors are not part of management and do not have authority over other staff. The job functions of a supervisor are to ensure that the store is cleaned at the end of the night and ready for business the following day. They put the money into the safe and ensure that the store is locked upon leaving. If they have a problem with staff or other issues arise they are to call one of the managers. She was a satisfactory employee and was subsequently rehired in October 2011 when she returned to the area. She was informed of the May 11th incident at that time and was required to go through the training program again and to read and sign-off the training and policy manuals. She has recently ceased employment as she once again moved out of province.

He referred to exhibit 3, photos 1 & 2 depicting the store windows. He testified that the inspector standing outside of the store looking through the window on the right would be unable to see over the top of the liquor shelving.

The witness viewed an excerpt from a security video recording (exhibit 6) which depicted the subject sale of beer to the minor agent by the employee (witness D) at 8:10 p.m. May 11, 2011. No identification was checked by the employee. The excerpted video recording also records the sale made immediately prior at 8:06 p.m. A male cashier is observed checking two pieces of identification from a female customer.

Witness C testified that she has been employed at the BCLS for approximately five years and is currently the senior cashier at the store. She is familiar with liquor compliance requirements and holds a Serving It Right: Responsible Beverage Service Program (SIR) certificate. She previously owned or was employed in licensed restaurants for approximately 17 years. Management of the store have stressed since the time the store opened that they wanted to become the toughest liquor store on identification in the area. All staff are constantly reminded of the importance of checking for identification through posted notices and staff meetings. All staff members wear a button on their uniforms, "Make it a habit, show two pieces of identification".

As the head cashier she is responsible for training cashier staff. She uses the store's checklists found at exhibit 3, tabs 3 and 28. Training cashiers on checking for identification is her first priority. All cashiers have a two day training period. On the first day the trainee spends the whole shift with her while they go through the training check lists. On the second day the trainee operates the cash till while she observes them from an adjacent till. Cashiers are trained to make eye contact with each customer and to check the identification of all persons appearing to be under 30 years old. They are trained to check for two pieces of identification, one primary and one secondary and to look for fake identification. If a cashier is not satisfied with the identification produced they are told to refuse service. The store uses several aids to assist cashiers; the year of birth for persons 19 year of age is shown at the till, a poster illustrates acceptable types of identification, a book containing copies of out of province driver's licenses is posted at the till.

She was responsible for the training of the cashier (witness D) who sold the beer to the minor agent. The cashier was a satisfactory employee who had no qualms about asking customers for identification where she felt the customer to be of questionable age. She always followed the rules. As head cashier she knew that the employee would check any young customer coming to her till. It is inexplicable that she failed to check the identification of the minor agent on May 11th.

Witness D testified via long distance teleconference that she was hired as a cashier at BCLS in August 2010. She was required to read the store's policy and training manuals and spent two days in training for the job with the senior cashier (witness C). The first day was spent working with the senior cashier, the second day she worked as a cashier with the senior cashier observing from the neighbouring till. Requesting identification was stressed during training and during staff meetings and notices were posted in the staff room. She was told to request two pieces of identification from all customers who appeared to be under 25 years old. If the customer could not produce the identification she was required to refuse service. If the customer was upset she told them that she was required by law not to serve them. She did not find this difficult as she had had a previous job which involved selling cigarettes and was required not to sell to any persons under 18 years old. BCLS provided resources to assist cashiers: the year of birth for persons 19 years old was posted at the till as was a poster illustrating acceptable identification and a book with examples of identification from other provinces and states. When identification was presented she would compare the photo with the person and ask the person their address, and their Zodiac sign to confirm that the identification was for the customer. If proper identification was not produced she punched a "no sale" key on the till and wrote on the sales slip the reason for the no sale.

She testified that she was working afternoon shift on Wednesday, May 11, 2011, commencing around 5:30 p.m. There were three staff on duty; she was the supervisor that night which required her to lock-up at closing. Supervisors do not manage staff. It was her last shift at the store, she had given her notice to the store manager (witness E) as she was going to another job in Alberta and then to Oklahoma and was planning to catch a 5:00 a.m. ferry the following morning. Wednesday evenings are busy as liquor deliveries are made that day and the shelves and coolers must be restocked. One employee will move stock from the back storage area while the other two will restock shelves and serve customers.

She testified that her mind was elsewhere that night as she still had to pack her belongings and prepare to leave in time to catch the 5:00 a.m. ferry. She left work early, sometime between 8:30 and 9:00 p.m. One of the other cashiers (the male cashier on duty, who did not testify) was also a supervisor, had a key and agreed to act as supervisor and lock-up at closing. She had not returned her store key upon leaving, doing so at a later date when she returned to the area. She is aware of the ramifications of selling liquor to a minor and tried to act responsibly and uphold the requirements of the law. She believes that this was the only lapse she had during her employment at BCLS.

She testified that she was made aware of the sale to the minor by the manager (witness E) when she paid a visit to the store in August 2011. She re-commenced her employment at BCLS in October 2011 and discussed it with the manager again at that time. At that time she was required to read the updated policy and training manuals. She no longer works at the store as she resides out of the province.

Witness E testified that she has been employed at BCLS since 2009, starting as a cashier and currently as store manager reporting to the general manager. She has considerable prior business experience. The business philosophy at BCLS is to uphold the laws and to operate in a manner which best serves the community and customers. They are serious about checking identification and refusing service to intoxicated persons. There is a zero tolerance policy about checking identification of persons considered to be under 25 years of age and refusing service if the identification is not sufficient. When working she ensures that staff check identification. Staff is regularly reminded of the requirements through notices and staff meetings. They are reminded to pay particular attention when a community event is taking place.

She testified that she hired the subject employee (witness D) in August 2010. New employees are told of the importance of checking identification of all persons believed to be under 25 years of age. She ensures that all new staff are willing and able to carry out their responsibilities before they are hired. All new employees must read and sign-off training and policy manuals prior to their first shift.

She completed performance reviews for this employee after three and six months of employment. She was a good employee and was given pay raises and made a supervisor performing closing up duties on evening shifts (exhibit 3, tab 3). She had given notice that she was moving out of the province and May 11, 2011, was her last shift. The witness testified that she was unaware until very recently that the employee had left early that night.

The employee returned in October 2011 and because she had been a good employee was rehired. She advised the employee of the May 11th incident, and she did not recall not checking the identification of a customer. She was upset that it had occurred, it was her last night and she had made an error in judgment. Prior to commencing work the employee was required to re-read the training and policy manuals and complete the new employee documentation.

Witness F testified that she commenced employment at BCLS as a cashier at the time that the business was preparing to open. She is currently an assistant manager. She has considerable previous experience working in licensed establishments as a server, bartender and as a manager. She was working as a cashier at BCLS the night of May 11, 2011. Because it was liquor delivery day there were three staff on duty, herself, the subject employee and a male cashier. They were busy restocking shelves and coolers, organizing bottle returns and cleaning up the store for the following day. If she had seen the subject employee not checking identification she would have intervened to have her check the identification or would have done it herself. It was the subject employee's last shift and she left early.

Witness G testified that he is knowledgeable about the hospitality industry having spent two years as the general manager of the branch and having been a consultant working within the industry for liquor licence applicants and licensees since 1988. He is familiar with branch compliance requirements and has worked with licensees to take corrective actions where problems have occurred. He has had 30 – 40 private liquor stores as clients and has assisted this corporate licensee obtain a pub license as well as the BCLS license. He is not currently working with the corporate licensee.

He testified that there is a wide range of licensee operations to prevent sales of liquor to minors. Licensees with multiple private liquor store licenses generally have higher standards. Basic level requirements would include:

- Staff have SIR certification
- Policy and training manuals for staff outlining acceptable identification and policy requirements for checking identification
- Staff trained in identifying acceptable identification
- Signage inside the store
- Ongoing communication between management and staff regarding identification requirements
- Surveillance cameras allowing management to review staff performance.

He testified that he has reviewed BCLS documents found within exhibit 3 and found their program to be above that of most private liquor store operators. He specifically described the following practices as going beyond that of most other operators:

- Having staff read and sign-off branch directives (tab 4)
- Photos taken from store surveillance system matched to cancelled sales transactions (tab 26)
- Changes made to the training and procedures manuals requiring cashier to identify “no Sale” transactions, the use of a system of hand (raised index finger) and voice signals (code word) to alert staff to the presence of suspected minors in the store (tab 18)

- Staff name tags with “2 pieces of ID required” (tab 19)
- Staff pay envelopes with wording “remember to ask for 2 pieces of ID” (tab 20)
- Software system for the cash tills requiring cashiers to make a determination whether to require identification (tab 24).
- Collecting data on the number of times a cashier cancels a sale due to insufficient ID
- Use of role playing techniques in training staff regarding identification.

He testified that it is not standard in the industry for licensees to use “secret shoppers” to test staff compliance nor to provide written tests for staff or review surveillance tapes on a daily basis unless an incident had occurred. It is not usual for a manager to always be working night shifts unless a particularly busy night is anticipated. A manager would be available on an on-call basis. A manager would not normally be working on an ordinary Wednesday night.

SUBMISSIONS – the Branch

The branch advocate’s submission is summarized as follows:

Section 33(1)(a) of the Act prohibits the sale of liquor to a minor. The branch developed a “Minors as Agents Program” to test licensees’ compliance with the Act. On May 11, 2011, a 17 year old minor agent of the branch entered and purchased liquor from BCLS. The minor agent was youthful in appearance and there was no attempt to deceive the licensee as to the minor’s age. The licensee has policy and training manuals but does not have a system in place to monitor and test staff compliance. Selling liquor to a minor is a serious public safety issue and can have serious consequences to the minor and to the community. In the circumstances, the minimum monetary penalty of \$7,500 is warranted.

SUBMISSIONS – the Licensee

Counsel made a written submission (exhibit 7) and an oral presentation. Counsel's submission is summarized as follows:

There are three issues present in this case:

1. Branch non-compliance with section 34 of the Act.

Section 34 creates an offence for a minor to enter a liquor store and purchase liquor unless the minor is employed or contracted by a police agency or the branch and is accompanied or supervised by a peace officer or employee. Here there is insufficient evidence that the minor was contracted or employed by the branch. Further the minor was not accompanied or supervised by a peace officer or inspector. The inspectors remained outside the liquor store while the minor went inside and purchased the liquor. The inspector, witness A, at best had a limited view of the minor due to the height of the store shelves. This could have put the safety of the minor at risk. The branch's failure to comply with the requirements of s. 34(5) should result in this enforcement action being dismissed on public policy grounds.

2. Due Diligence

The test for due diligence is that of a reasonable person in similar circumstances. Here the evidence is that the licensee has established reasonable policies and procedures to deal with potential problems prior to the alleged contravention and has strengthened those policies and procedures following the incident. The licensee's policies and procedures are consistent with or exceed the industry norms. The evidence does not suggest a systemic problem with the licensee's policies and procedures. The evidence is of a momentary lapse on the part of an otherwise well trained and satisfactory employee. No additional policies or training on the part of the licensee could have prevented that momentary lapse. The employee was a cashier, not a manager and did not have decision-making authority on matters of the licensee's policies. She was not the directing mind of the corporate licensee. To hold the licensee responsible for the actions of the employee in the circumstances of this case would move the due diligence test dangerously close to

that of absolute liability. The licensee did all that a reasonable licensee would do and as such was duly diligent.

3. Penalty

If a contravention is found, it is within the general manager's discretion whether or not to assess a penalty. Here there is no compliance history and the evidence is of a diligent licensee going to great lengths to achieve compliance. Assessing a penalty will not further voluntary compliance with this licensee. Assessing a penalty will send the wrong message to licensees that no matter how hard you strive to operate within the requirements you will be nonetheless be penalized.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and counsel for the licensee.

I find on a balance of probabilities that the evidence in this case is that a 17 year old minor, youthful in appearance, entered and purchased beer (liquor) at the Beverley Corners Liquor Store at approximately 8:10 p.m. on May 11, 2011. The minor was not requested to produce any identification nor did he produce any identification. That on its face is a contravention of Section 33(1)(a) of the *Liquor Control and Licensing Act*.

I find on a balance of probabilities that the evidence is that the minor was working with two liquor inspectors and was an agent acting on behalf of the Liquor Control and Licensing Branch. Neither of the inspectors entered the liquor store at the time that the minor was inside but remained outside where they made observations through the store windows. While their view may have been somewhat obstructed by shelves of liquor, I am satisfied that the minor's safety was not jeopardized and he was at the time under the supervision of the inspectors. In conclusion, I find on a balance of probabilities, that the provisions of Section 34(5) were complied with.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention, 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:

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 respondent 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.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch* (2004) BCSC 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 36(2)(b), it must prove, on a balance of probabilities each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who are, in fact, responsible for that part of the licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in *Plaza Cabaret* clarified that the directing mind need not be an officer or director of the licensee:

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. *If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.*

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely *whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons.* That inquiry requires, of course, consideration of *who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.*

(My emphasis in italics)

At the time in question in this case three employees were working in the licensee's liquor store. One of the employees was designated as the supervisor and it was she who served the patron. As supervisor she was not designated to be part of management, did not set store policies, nor was she in charge of other employees. Her responsibilities were to ensure that the store was properly prepared for the next day's business and the cash receipts and the store itself secured at the end of the night. She was also a cashier and as such was authorized to sell liquor to customers. She was required to ensure herself that a sale was made only to a person of legal age and not in a state of intoxication or under the influence of liquor. While she had telephone access to management staff if necessary, I do not accept that she would reasonably be expected to contact a manager in order to determine if each customer was of age. She had the authority to make a determination whether the customer was of legal age and if not satisfied in that regard to refuse the sale. I find that when the contravention occurred she was the directing mind of the licensee. Despite the youthful appearance of the minor she completed the sale of liquor to him. She did not request identification nor otherwise satisfy herself that he was of legal age. Consequently, the licensee, notwithstanding its well intentioned efforts to attain compliance by, amongst other

things, publishing comprehensive employee manuals, providing training, providing reminders and conducting staff meetings, is not entitled to the benefit of the defence of due diligence.

In conclusion, I find on a balance of probabilities that on May 11, 2011, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing Act (the Act)* by selling, giving or otherwise supplying liquor to a minor.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this license within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Here, the branch with a concern that minors are being permitted to purchase liquor in licensed establishments has developed a program aimed at determining whether this is occurring and has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives we have in this case an obviously youthful patron being able to purchase liquor without being asked to produce any proof of age. Permitting minors access to liquor can and has resulted in very serious consequences. All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions and the seriousness of the contravention, I find that a penalty is necessary to ensure future voluntary compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the Regulations provides a range of penalties for a first contravention of this type. The branch has proposed the minimum monetary penalty suspension for a first contravention of this type. In the circumstances here, I find that the minimum monetary penalty of \$7,500 is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 (Seven Thousand Five Hundred Dollars) to the general manager of the Liquor Control and Licensing Branch on or before March 27, 2012. Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: February 27, 2012

cc: RCMP Duncan Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

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