



**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: Pacific Liquor Merchants Corp.
dba Metro Liquor, Brentwood Bay
100 – 7143 West Saanich Road
Central Saanich, BC V8M 1P7

Case: EH12-125

For the Licensee: Andrew D. Gay
Gudmundseth Mickelson LLP

For the Branch: Cristal Scheer

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: June 12 and August 22, 2013

Place of Hearing: Victoria, BC

Date of Decision: October 23, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Pacific Liquor Merchants Corp., operates Metro liquor, Brentwood Bay located in Central Saanich B.C. Marc Gaucher is a principal of the corporate licensee and appeared as the licensee's representative. The licensee holds Licensee Retail Store Licence number 195264 for the operation of a licensee retail store (LRS), 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 licences issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated June 18, 2012. The branch alleges that on May 28, 2012, 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 \$7,500 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 licence suspension for ten to fifteen days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee does not dispute that liquor was sold to a minor but argues that it was duly diligent.

For the purposes of this hearing, and in accordance with section 3 of the *Regulation*, the General Manager has delegated to me, the undersigned adjudicator, the powers, duties and functions provided to the General Manager by section 20 of the *Act* and sections 65-69 of the *Regulation*.

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?
- 4.

EXHIBITS

- Exhibit No. 1:** Branch's book of documents, tabs 1-15.
- Exhibit No. 2:** Copy of the minor's (agent #5 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:** Excerpts from the LCLB Compliance and Enforcement Policy and Procedures Manual, Desk Reference.
- Exhibit No. 4:** LCLB Policy Directive No: 07-02 dated February 16, 2007.
- Exhibit No. 5:** Licensee's book of documents, tabs 1-16.
- Exhibit No. 6:** Resume of the subject cashier, an employee of the licensee.
- Exhibit No. 7:** Resume of a consultant within the liquor hospitality industry.
- Exhibit No. 8:** One page document titled, "Basic Industry Standards for ID Requirements in a Licensee Retail Liquor Store".
- Exhibit No. 9:** One page document titled, "Brentwood Bay, Daily Transactions".
- Exhibit No. 10:** Written argument of the licensee.

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 her identification were placed in an envelope and marked as Exhibit 2, with a notation that it is not to be opened unless required by law. Exhibit 2 has been sealed to protect the identity of the minor agent. At the hearing, the branch provided the licensee with an opportunity to view the photo of the minor agent and her identification with birth date. The minor agent did not appear as a witness for the branch.

EVIDENCE – THE BRANCH

The branch called one witness to testify at the hearing: the liquor inspector.

Liquor Inspector A

Liquor Inspector A testified that on May 28, 2012 he was employed as a liquor inspector by the branch. The branch had undertaken a "Minors as Agents Project" (MAP) to monitor compliance of the *Act* prohibiting the sale of liquor to minors by licensed establishments. The project 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 and note taking. To ensure that all licensees were aware of the program and of their responsibilities under the *Act*, the branch issued 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 28, 2012, Liquor Inspector A testified that he was working with another liquor inspector and two minor agents visiting licensed establishments to test whether they were willing to sell liquor to a minor. He entered Metro Liquor, Brentwood Bay ("Metro Liquor") at approximately 5:05 p.m. followed by minor agent #5. There were two staff working, a male and a female. There were two other patrons in the store.

Liquor Inspector A observed the minor agent pick up four cans of Strongbow Cider and take them to the cash till operated by the female employee. The minor agent paid for the cider with a \$20 bill and received her change. She did not produce any identification to the female employee. He followed the minor agent from the store to their vehicle where the purchase of the liquor was documented and notes made.

Liquor Inspector A said that he and the other liquor inspector went into Metro Liquor and spoke with the two employees. He requested their Serving It Right (SIR) certificates. The employees were unable to produce the certificates but said that they had both obtained them. This was later confirmed. Liquor Inspector A observed that the copy of the liquor licence posted on display had expired. He confirmed that a current licence had been issued (Exhibit 1, tab 3).

Liquor Inspector A testified that he advised the two employees of the sale of liquor to the minor agent. The male employee had been employed at Metro Liquor for approximately four months whereas the female was working only her third shift. Both said that they were aware of the MAP. A Contravention Notice (Exhibit 1, tab 2) for supplying liquor to a minor was served to the male employee. The employee told Liquor Inspector A that he recognized the minor agent from having checked her identification on a previous occasion.

In his evidence, Liquor Inspector A referred to further documents contained within Exhibit 1:

- Tab 6, the Guide which contains the terms and conditions for LRS licences
- Tab 4, approved floor plan for Metro Liquor
- Tab 5, inspection and interview document for Metro Liquor

A NOEA (Exhibit 1, tab 1) was prepared with a recommendation for a \$7,500 monetary penalty. The branch considers the contravention of selling liquor to a minor to be a serious matter which can affect the safety of the minor and have a negative impact on the community. The minimum monetary penalty is considered necessary and sufficient for future voluntary compliance.

Liquor Inspector A testified that, in his experience and observations as a liquor inspector, other LRS licensees have taken measures for voluntary compliance consisting of:

- Frequently scheduled meetings with staff and recording the minutes of the meetings
- Having staff sign off on codes of conduct
- Having staff sign off on training packages provided by the licensee
- Providing detailed policy and procedures for staff direction
- Some licensees use secret shoppers using young appearing persons
- Have liquor inspectors attend and speak with staff

Cross-examination

On cross-examination, Liquor Inspector A testified that he was instructed by his regional manager to proceed to enforcement proceedings in this case. Although there have not been any formal instructions to the liquor inspectors, the contraventions of selling liquor to a minor agent observed during the MAP invariably go to enforcement proceedings. The policies outlined in the branch's Compliance & Enforcement Manual providing the

liquor inspector discretion whether to proceed to enforcement or to a compliance meeting are not adhered to. Although the policy in the manual is for the inspector to consider whether there was due diligence on the part of the licensee he did not carry out any investigation on that point.

Liquor Inspector A testified that the requirements for identification have changed within the branch. It was previously required to check identification of persons appearing to be under 25 years of age; however, the current requirement is for identification to verify that a person is 19 years or older. He agreed that it is a judgment call and is subject to human error. He agreed that the Serving it Right (SIR) Program Manual at page 82 (Exhibit 1, tab 7) provides a sample policy for licensees with procedures for checking identification of persons appearing to be under 19 years of age.

Liquor Inspector A testified that he is unaware of the number of cases where MAP inspections have found the sale of liquor to a minor but that it would number in the hundreds. He testified that he was not aware of any publication by the branch other than the Guide which outlines procedures for persons checking identification. He testified that he is not aware of the branch having a standard for due diligence.

When questioned regarding his evidence that the male employee told him that he had checked the minor agent's identification on a previous occasion, Liquor Inspector A agreed that he did not point out the minor agent to the employee or provide him with a photograph. He agreed that there were other patrons in the liquor store at the time. He assumed that the male employee knew which patron was the minor agent as he seemed to have a clear recollection of her having purchased the Strongbow cider.

EVIDENCE – THE LICENSEE

At the commencement of the hearing the licensee conceded that on May 28, 2012 liquor was sold to a minor. The licensee called four witnesses to testify at the hearing: the Licensee Representative, Consultant, Cashier 2, and the Store Manager.

Licensee Representative

Marc Gaucher testified that he is a principal of the corporate licensee which owns and operates four Licensee Retail Stores (LRS) located within the province. They specialize in high end wines with each store having a trained sommelier on staff. Each store has a store manager who reports to a corporate general manager who reports to himself. Management meetings are held monthly by telephone and by personal attendance quarterly. As a corporation they are involved within their communities supporting local charities, sports teams as well as organizations such as MADD and dry grad events. They know the value of and work toward maintaining a good reputation within their communities and with their suppliers. The key to their operation is their due diligence to ensure that all liquor products are legally sold and purchased. It is discussed at each management meeting. They practice social responsibility with a philosophy that it is unacceptable to sell liquor to minors.

Mr. Gaucher testified that store policies are set by himself and the general manager, and implemented by each store manager. Cashiers have no role in developing policy nor have any delegated executive function. It is corporate policy to require two pieces of identification from all persons who appear to be under 30 years of age. Prior to the branch's implementation of the MAP program in 2011, the policy was to ID all persons appearing to be under 25 years of age. Staff are trained and sign off acknowledging this policy. They are reminded of the policy during staff meetings and on a day to day basis by their managers. Mr. Gaucher believes that there is no better technique to build a culture around the need to require identification of young appearing persons. Each store maintains a log book and serious incidents are referred to the general manager and himself. There has not been any previous compliance history with the branch with any of the stores.

Mr. Gaucher testified that the store managers are responsible for maintaining product levels for their store. They implement the due diligence policy, hire and train cashiers, and conduct staff meetings. Every employee must have obtained a Serving It Right certificate, a copy of which is kept at the store. They were kept in the store manager's office, but they are now kept at the cash tills. Training manuals are maintained in each store and are signed off by each employee. Signage regarding the identification requirements is posted in each store.

The managers open the store and work with the cashiers during the day. Mr. Gaucher testified that it is not economically feasible to have two managers for each store to cover both day and evening shifts. There are two cashiers on evening shifts for safety and security. They have a cell phone and can contact the store manager if necessary. They do not employ secret shoppers. There has never been a previous contravention and the policy of checking identification of persons under 30 gave certainty that it could not occur.

Mr. Gaucher testified that he makes a surprise visit to a store once a week and advises the store manager of his observations. If he observes a problem during his visit, he will deal with it. On one occasion at the Brentwood Bay store he observed a cashier serve a patron who appeared to be in mid to late 20's without requesting ID. He spoke to the cashier who believed the patron to be over 30.

He was extremely upset when made aware that a cashier had sold liquor to a minor. Mr. Gaucher testified that he discussed the incident with the store manager and was satisfied that the manager had implemented the due diligence policies. He spoke with the cashier, who was contrite and apologetic. She knew the policy of requiring identification of persons under 30 but couldn't explain why she didn't require the minor's ID. She knew that she could be fired and assured him that it wouldn't happen again. He discussed the matter with the general manager. They considered that the cashier was a mature person in her thirties who knew the policies. She had made a mistake that was not likely to reoccur and consequently she would not be fired. The cashier is no longer

employed with the licensee. Mr. Gaucher said that she quit on her own accord after finding another job several months after the incident.

Mr. Gaucher referred to the Licensee's Book of Documents at Exhibit 5, which contains the following:

1. Their policy of requiring all persons appearing to be under 30 years old is reiterated in several of the documents (tabs 1, 2, and 4). It is easier to determine if a person is under 30 than if a person is 19 thus it eliminates judgment calls by staff.
2. SIR certificates for current staff are found at tab 3.
3. The staff training manual is found at tab 4. All staff are required to sign off the manual.
4. A policy statement regarding providing safe and responsible service is found at tab 5. It is signed off by all staff.
5. Copies of Refusal of Service Reports are found at tab 6.
6. Excerpts from the Log Book at tab 7. Staff are required to read through them at the beginning of each shift and they are discussed at staff meetings.
7. Excerpts from the Guide for staff awareness are at tab 8.
8. Staff meeting agendas at tab 9.
9. Photos of store signage and the scanner used to authenticate identification at tab 10.
10. Out of Province Identification guides at tab 11.
11. Tab 12 is an email sent to all store managers regarding the MAP program. New branch policies are sent to store managers for discussion with staff during staff meetings.
12. Tab 13 is a letter to an irate customer refused service because of a concern that she may have been purchasing liquor for a minor.
13. Tab 14 illustrates the screen display on every till showing the date of birth for the legal age of 19 years. It updates each day and appears for every sale.

14. Tab 15 signage posted in the store.

15. Tab 16 is a CBC report regarding the MAP program. It is posted behind the till to share with staff.

Cross-examination

In cross-examination, Mr. Gaucher was asked about the sign off sheets for the training manual at Exhibit 5, tab 4 and for the policy statement "Providing Safe and Responsible Service" at tab 5. He agreed that these sign off sheets were not for the female cashier making the sale to the minor but were for the other cashier on duty that night (Cashier 2). He testified that since the cashier making the sale had quit her employment, her file had been cleared, thus the sign off sheets were no longer available.

Mr. Gaucher testified that, at the time of the incident, the subject cashier was working her third shift since being hired. The first two shifts were training shifts during which she worked with the store manager. At the time of the incident she was working with another cashier (Cashier 2). They worked their tills independently. He was not responsible for her supervision, but as a longer term employee with five months experience could answer any questions that she might have. If the cashier had further questions she could phone the store manager.

He agreed that the log book entries at Exhibit 5, tab 7 do not refer to this incident of May 28, 2012. He testified that there was an entire file on the issue and it was brought up at staff meetings.

Consultant

The Consultant 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 for approximately

25 years. He is familiar with branch compliance requirements and has worked with licensees to take corrective action where problems have occurred.

The Consultant testified that he has had approximately 40 LRS as clients and is familiar with others through his practice of dropping into licensed establishments as he travels throughout the province. This licensee has not been one of his clients but he is familiar with its operations.

The Consultant testified that there are basic standards within the LRS industry. Some stores operate above the standards, some below the standards. Basic standards include:

- Staff has SIR certification which is required by the *Act* and *Regulations*. Certification training includes identification requirements
- Written policy for staff outlining acceptable identification and policy requirements for checking identification
- Staff trained on identification requirements
- Signage inside the store includes branch signs regarding identification requirements
- Ongoing communication between management and staff on the need to request identification
- Surveillance cameras allowing management to review staff performance and provide video for authorities if necessary

He testified that the Refusal of Service Reports in Exhibit 5, tab 6 are not normally found in private liquor stores and are beyond what is typical for the industry. The Consultant testified that it is becoming typical within the industry for the cash tills to illustrate the date of birth for a person turning 19 years, the legal drinking age in the province.

On cross-examination, the Consultant testified that there are approximately 670 private liquor stores and that he is familiar with only a small proportion of them. Asked whether the completion of a six hour training program with a store manager prior to working unsupervised was within the industry standards, he responded that it would depend upon the previous experience of the employee. If the employee indicated that he/she was knowledgeable six hours may be sufficient.

Cashier 2

The cashier who allegedly sold the alcohol to the minor on May 28, 2012 was not called to testify at this hearing. The other cashier who was on duty on the night in question (Cashier 2) testified that he has been employed at Metro Liquor Brentwood as a cashier since January 2012. He has held a SIR certificate since beginning his employment.

Cashier 2 explained that his responsibilities include: assisting and serving customers, stocking shelves, store cleanliness, and cashing out at the end of his shift. He was provided the training manual on his first shift and given time to read it following which the store manager reviewed it with him. He signed off on the training manual at Exhibit 5, tab 4. He knew the legal drinking age to be 19 and understood the company policy of requiring identification from all persons appearing to be under 30 years of age. He signed off on the store policy statement of providing safe and responsible service at Exhibit 5, tab 5.

Cashier 2 testified that his second, third and fourth shifts were spent with the store manager observing the techniques of serving customers and learning what to watch out for. He was advised not to be misled by facial hair or dress and to require identification if there was any doubt that a person was under 30. The store manager observed him dealing with customers and requesting ID.

He is familiar with the store Refusal of Service Reports and the log book (Exhibit 5, tabs 6 & 7). They are required to be read each day when coming on shift. Cashier 2 testified that the store manager keeps an eye on him when he is in the store and reminds him of the requirement of checking identification each day that their shifts overlap. He is familiar with the black light scanner (Exhibit 5, tab 10) used to check the authenticity of currency and identification.

Staff meetings are held two to three times a year with all employees required to attend. Cashier 2 said the identification policy is always a topic covered, as well as any new policies or practices. The signs depicted in photos at Exhibit 5, tab 10 are placed throughout the store and are useful as reminders of identification requirements and to refer customers to who question being asked for identification. The out of province identification samples depicted at Exhibit 5, tab 11 are useful references when needed. The date of legal age (Exhibit 5, tab 14) at each till is helpful particularly when they are busy. He is familiar with CBC article (Exhibit 5, tab 16). It was posted in the store by the manager to show the serious consequences of selling to a minor.

Cashier 2 testified that he was working the evening shift on May 28, 2012. He was covering one of the cash tills; the subject female cashier was covering the other. She had previous experience working in bars and seemed quite confident. The store manager was not working that night. It was quite busy. The liquor inspector came in and told him that they had sold liquor to a minor earlier. He did not describe the minor but said that she had purchased Strongbow cider. The inspector required him to sign a notice form. The liquor inspector did not say which employee had made the sale. After the inspector left he discussed it with the other cashier. They knew it was a serious matter for which they could lose their jobs. He assumed that it was him as he had sold some Strongbow cider earlier in his shift. He did not learn until months later that it was the other cashier who had made the sale.

He phoned the store manager and told him what had occurred. Cashier 2 said he later met with the store manager, who went over the identification policies with him and the possible consequences to the store. The manager suggested that he review the Serving It Right manual again, which he later did.

Cashier 2 testified on cross-examination that he was not tested for knowledge of the policies by the manager although he will ask him from time to time: "Would you ID that customer?" He testified that the refusal reports at Exhibit 5, tab 6 are not always completed as it is not practical when the store is busy. He agreed that most of the employee initials on the entries are of one person. He believed that this may have been done for other staff. He could not identify any of the entries as being that of the other (subject) cashier but does recall seeing her request identification during the shift.

Viewing the photo of the minor agent he testified that he would require her to produce identification and would not serve her without proper ID.

Store Manager

The Store Manager testified that he has been employed with Metro Liquor for eight years, two years as a clerk and assistant manager, six years as a manager. He has been the store manager at the Brentwood Bay store for the past two years. As a store manager his responsibilities are the daily operation of the store including the hiring, training and managing of staff. New staff are hired following an interview to ensure that they have the maturity to meet the requirements of the job. All must have a SIR certificate. He does not have a role in creating store policies, that is done by the general manager and the corporate licensee representative.

The operating philosophy of the company is that each store will operate in accordance with the law. The Store Manager testified that persons under 30 years of age will be required to produce two pieces of identification. Intoxicated persons will not be served and if they proceed to drive a vehicle the police will be notified. It is his responsibility to ensure that the store operates in compliance with the requirements. Management and staff meetings are held to ensure that staff are aware of the policies.

The Store Manager said that he hired the cashier responsible for making the sale to the minor agent. She was hired near the end of May 2012 shortly before the incident. She had a SIR certificate and provided a resume and covering letter (Exhibit 6). He interviewed the cashier about her approach to requesting identification and assessing signs of intoxication. She is a mature person in her mid thirties and understood her obligations towards compliance.

He conducted one-on-one training with her. The Store Manager testified that the first day they spent approximately six hours with a focus on service and compliance. It included requesting identification and how to confirm its authenticity with scenarios about identification and intoxication. The training manual at Exhibit 5, tab 4 and the policy statement at tab 5 were used during the course of her training. They went through the training manual and discussed how to determine legal age by examining facial features, dress, demeanour and the type of product purchased. They discussed how to distinguish signs of intoxication from observable physical challenges that a person may have.

The Store Manager was certain that the cashier signed off on the training manual and policy statement; however, he has been unable to locate the documents or explain how they were missing from her store file. They discussed checking identification for authenticity using the black light scanner and the out of province identification booklet. They discussed the point of sale screen image showing the date of legal age for liquor purchases.

The second day was spent familiarizing the cashier with the point of sale system and reinforcing the compliance policies. The Store Manager testified that the cashier worked the evening shift during which he observed her for about two to three hours, and for about one and a half to two hours on the third day at the beginning of her shift.

Altogether he observed her serving about 100 customers without issue. She performed well during her training. He observed her working at the till as she checked identification and engaged customers. She had no problem checking identification or denying service where no identification was produced.

He had no concerns with her working the evening shift with another cashier. The other employee (Cashier 2) had been employed for four to five months and was a mature, able person who never failed to request identification when necessary. Evening shift employees are told to contact the manager by phone if necessary. They are to fill out the Refusal of Service Report as much as possible (Exhibit 5, tab 6). The Report serves to provide the store with statistics, can indicate if they are refusing the same customers, and serves as a reminder and means of communication between staff.

The Store Manager testified that he learned about the incident regarding the sale to the minor agent through a phone call from Cashier 2 who thought that it was he who had served the minor. Cashier 2 took the matter very seriously and was upset about it. They later received the NOEA (Exhibit 1, tab 1) and determined that it was the new cashier who had served the minor. The manager spoke with the employee advising her that she had served the minor. She was upset, contrite, and said that it wouldn't happen again. He spoke to her about their compliance policies and their expectations and advised her if it occurred again she would be fired. He was satisfied that she would carry out her duties as required. The manager discussed the matter with the general manager and the licensee representative. They were satisfied that the incident occurred due to a lack of judgment on the part of the employee and, in the circumstances, she would not be fired. She left her employment at the store on her own accord; her last shift was August 12th.

The Store Manager testified that he holds staff meetings twice a year with compulsory attendance by all employees. The agenda always includes reminders to check the identification of all persons appearing to be under 30 years of age and what documents constitute acceptable ID. He also deals with how to determine age and whether a person is intoxicated. They discuss any concerns that staff may be having.

Informal staff meetings are held every six weeks and staff are again reminded about checking ID. The Store Manager said he regularly observes staff either from his office or via their video surveillance system. He speaks with staff members at the beginning of their shifts to pass along any new information and to remind them of the need to check the identification of persons appearing to be under 30 years of age.

The communications log (Exhibit 5, tab 7) is kept at the till. He uses it to remind staff to check identification. Examples are the entries for Jan 10 and May 29, 2013. The Refusal of Service Report (tab 6) is also kept at the front till. The log and the report serve as reminders to staff and a means of passing along information. Staff are told to review each at the beginning of every shift. Signs as depicted in the photos at Exhibit 5, tab 10 are posted at the tills and throughout the store.

He was not working on the date of the incident so he didn't speak with the cashiers working that night. However, the manager was informed by the senior dayshift employee that he had reminded them about checking identification at the beginning of their shift.

The Store Manager testified that he tried without success to contact the subject cashier, leaving messages at her workplace. She was recently a customer at the liquor store. He spoke with her about the benefit to the licensee of having her attend the hearing as a witness. She became upset and refused.

Cross-examination

The Store Manager testified on cross-examination that the standard of training provided depends upon each new employee. When training the subject cashier he took into account that she had previous experience within the industry requesting identification from patrons. She was mature, in her mid-thirties, and more able to determine if a person was under 30. She had a SIR certificate. He was uncertain when she had obtained it, probably in 2002 when she previously worked in the industry. He had her review the SIR manual and believed that she had adequate knowledge and would have no issue regarding checking identification, age determination or refusing service. An excerpt from the SIR manual (Exhibit 5, tab 8) is kept in the store.

He testified that at the time of the liquor inspector's attendance copies of the cashiers' SIR were in his office in their employee files. The subject employee had her SIR certificate in her purse in her vehicle. The male cashier (Cashier 2) may have forgotten his.

The Store Manager agreed that, during training, employees were told to enter refusal of service incidents into the Refusal Report; however, this was not always done or may occasionally be done by another employee. Refusals of sale are made by staff on a daily basis, upwards to 12 times on busy Saturdays and Sundays, an average of four times a shift on other days. He testified that there was no entry in the communications log (Exhibit 5, tab 7) regarding the May 28th incident as he spoke with each employee personally to advise what had occurred.

He testified that during their training sessions he would quiz the employee orally rather than in writing. The Store Manager believed that with written questions an employee has time to think about the answer, whereas in oral quizzes they respond instantly. When a customer is present before them they don't have time to think, thus a verbal test is more realistic.

He agreed that they don't have a secret shopper program. The licensee representative or his wife will occasionally be in the store and speak to regular customers. That is a kind of secret shopper program.

SUBMISSIONS – THE BRANCH

The branch advocate's submission is summarized as follows:

The licensee has admitted that liquor was sold to a minor acting for the branch under the MAP project. The licensee has argued that it was duly diligent. The branch submits that the licensee has not met the threshold for a due diligence defense. The MAP project was well known within the licensee community. Holding a liquor licence is a privilege with the responsibility for compliance on the licensee. Licensees must educate themselves and provide training, monitoring and supervision of their staff. The sale of liquor is regulated for public policy reasons. The consumption of liquor can lead to potential public safety issues including impaired driving, assaults and alcohol dependency. The minimum monetary penalty is necessary for specific and general deterrence.

The evidence has established that at the time of the sale of liquor to the minor agent the licensee did not have the SIR certificates of its employees or the current liquor licence available for inspection as required. The cashier making the sale was a new hire working her third shift and was working apart from the other cashier who was busy operating his own cash till. The licensee considered that the cashier made a bad choice, was apologetic and consequently was not fired. Following the incident it was business as usual with no consequences to the employee.

The licensee's video system was designed for the purpose of theft protection and not for surveillance and identification. The other cashier, shown a photo of the minor agent, said that he would have requested her identification. The industry consultant has knowledge of only a small portion of the private liquor store industry. He was unable to say that the six hour training provided by the licensee was sufficient. The store manager relied on the maturity and the dated previous experience of the subject cashier to tailor her training. He didn't provide specifics of how to determine the age of a person or how to determine fake identification by asking questions related to astrology signs or high schools. He did not provide written tests for trainees. He was unable to explain what happened to the subject cashier sign off documents. There was no disciplinary action for the subject cashier. The licensee did not deduce what went wrong and try to fix it.

The branch submitted that, based on the evidence it can only be concluded that the subject cashier, a new hire, was not properly trained that persons under 19 years of age could not be sold liquor. The administrative errors of not having the SIR certificates and current liquor licence available for inspection carried over to the training provided. The training was not adequate and the systems to monitor staff performance were not effective. The licensee training manual does not provide a rationale in writing of preventing the sale of liquor to minors through requiring identification. If staff know why they are doing so, the direction may be better followed. If the licensee is serious about educating its staff the repercussions of selling liquor to a minor would be spelled out in writing. No action was taken following the incident and the subject cashier remained employed for three months.

The branch advocate referred to previous decisions of the branch. In cases where it was found that training was deficient due diligence was not established. Where the licensee did significantly more than has been established here to prevent the contravention it was found that the licensee had taken reasonable measures and due diligence was established.

SUBMISSIONS – THE LICENSEE

Counsel made a written submission (Exhibit 10) and an oral presentation. Counsel's submission is summarized as follows:

The licensee concedes that liquor was sold to a minor by an employee that did not ask for identification. The issue is one of due diligence.

Counsel argued that the branch has a misconception of due diligence. What other licensees have done is not relevant to whether this licensee was duly diligent. Other decisions do not form the standard against which this licensee is measured. The issue of not having the SIR certificates or the current liquor licence available at the time of the inspection is not connected to the contravention of the sale of liquor to a minor and is thus irrelevant. Policy is a concept, a rule that may be expressed orally or in writing. Steps taken by the licensee post contravention are not relevant to due diligence.

Counsel argued that the branch's submission misrepresents the evidence presented during the hearing. The branch's argument that the security cameras are not used for surveillance of staff is clearly wrong on the evidence of the Store Manager. The evidence of the Consultant was that six hours of training may be sufficient depending upon the experience of the person. The Store Manager did not provide evidence that he used the maturity and previous experience of the subject cashier to tailor her training. The evidence of Liquor Inspector A that there was more that the licensee could do was opinion evidence and on objection he was not qualified as an expert witness. The evidence of the Consultant was that he is knowledgeable of industry practices, was never employed by this licensee, thus he is independent and his evidence should be given weight.

Metro Liquor is not a typical LRS. Its focus is on high end wines. Social responsibility, ethical management and community involvement are key to the licensee's operation. This is irreconcilable with the sale of liquor to minors and the licensee goes to great lengths to ensure that it does not occur.

The test for due diligence is that of a reasonable person, i.e. what a reasonable LRS licensee would do in similar circumstances. It does not require a standard of perfection. The licensee must demonstrate that it had in place a reasonable system to prevent the contravention and took reasonable steps to ensure the operation of its system. Here the licensee had no prior non-compliance issues thus it cannot be said that it had a systemic problem with its operation. That an employee acted negligently or without diligence is not evidence that the licensee was not duly diligent.

Neither the Act, the Regulation nor the branch policy contain standards of what a reasonable licensee should do to prevent the sale of liquor to a minor. An industry consultant provided evidence of what is typical within the LRS industry.

Here the licensee established reasonable policies and procedures in place to prevent the sale of liquor to minors. All employees had SIR certificates, completed in-house training with the Store Manager utilizing the written training manual and were required to sign off on the written policy statement that all persons appearing under 30 must be asked for ID. Employees were told to check the ID for authenticity and the date for legal age to purchase liquor.

Counsel submitted that the licensee took all reasonable steps to ensure the consistent operation and enforcement of its identification policy and to prevent the sale of liquor to minors. Employees were constantly reminded by management of the need to check identification. Management made observations whether employees were checking identification of young appearing persons. Staff and management meetings were regularly held during which the identification policy was always discussed. The store maintained a communications log book and a Refusal of Service Report which staff

were required to read at the start of each shift. Signage was placed throughout the store. The Store Manager was on call every evening for staff if necessary. Security cameras were placed throughout the store recording staff performance.

The industry consultant testified that the licensee met or exceeded what is typical within the LRS industry thus it can be said that the licensee did what a reasonable person would have done to prevent the contravention. The branch has not provided any rationale for any additional measures that could be taken by the licensee.

There is no evidence that the contravention by the subject cashier was foreseeable. She was mature, had previous experience, was fully trained, knew the policy and the law, and had been observed properly carrying out her duties. Other branch decisions have found due diligence despite there being noted shortcomings in the licensee's system. This is consistent with the test of reasonable steps not all conceivable steps. The liquor inspector's evidence that other licensees had taken additional measures should not be given any weight.

The subject cashier was 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. The licensee is entitled to and has made out the defence of due diligence.

REASONS AND DECISION

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

Contravention

I find on a balance of probabilities that the evidence in this case is that an 18 year old minor, entered and purchased Strongbow Cider (liquor) at Metro Liquor, Brentwood Bay on May 28, 2012. The minor was not requested to produce any identification nor did she produce any identification. That on its face is a contravention of Section 33(1)(a) of the *Liquor Control and Licensing Act*.

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 Law

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.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently 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 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 training 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 reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Findings of fact and applying the law to the facts

I find that the cashier who made the sale of liquor to the minor was not the directing mind of the Licensee. There was no directing mind of the licensee on the premises, nor did there need to be. The defence of due diligence is not to be denied on that basis.

The inquiry must continue to determine

- a. whether the licensee had adequate training and other systems in place to prevent the sale of liquor to minors, and
- b. whether the licensee took reasonable steps to ensure the effective application of that training and those systems.

Does the licensee's evidence, once weighed and considered, meet the test of what a reasonable person would expect of procedures to prevent the sale of liquor to minors and ensuring that those procedures are consistently acted upon and problems are dealt with? In determining what a reasonable person would expect, it is valuable to be reminded that selling liquor to minors is a significant public safety issue and it needs to be prevented because of:

- the effects of alcohol 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 alcohol in the same manner as an adult, so that liquor has a more intoxicating effect on minors, and
- liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft

At the time in question in this case two employees were working in the licensee's liquor store. They were working independently on their cash tills, neither had any management or supervisory responsibilities. The cashier making the sale of liquor to the minor was a new hire just having completed a six hour training session with the Store Manager and two work sessions at the cash till during which she was observed for a portion of her shifts by the Store Manager.

On this occasion she was working an eight hour evening shift unsupervised. 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. She was required to follow the licensee's policy of requesting identification from any person appearing to be under the age of 30 years. If any questions arose she could ask the other more experienced clerk or telephone the Store Manager.

I have not had the opportunity of observing the minor agent. Her photographs and identification are found at Exhibit 2. She was 18 years old at the time of the alleged contravention. I find that she was youthful in appearance and a reasonable person would have asked her to produce identification in order to purchase liquor. I find that she could not reasonably be considered to be 30 years or older. It was also the evidence of Cashier 2 on viewing the photograph that he would have required proper identification from her prior to making the sale. Despite the youthful appearance of the minor the subject cashier completed the sale of liquor to her. The subject cashier did not request identification nor otherwise satisfy herself that she was of legal age. The licensee has argued that this was an error in judgement by the cashier.

To reasonably protect itself from an employee's error in judgement a licensee would need to either provide full time supervision of each employee or ensure that the employee received proper training and incorporated the training in carrying out his/her duties. The evidence is that full time supervision of each employee through having a manager on all shifts is not economically viable thus is not a reasonable option.

Here the Store Manager acting on behalf of the licensee hired the subject cashier on the basis of her previous experience, her SIR certification, her age and her maturity. He was responsible for her training and carried this out during a six hour training session followed by observing her on the job performance during part of her first two work shifts. She then proceeded to work independently and it was during her first shift that the contravention occurred.

Training included having her read the training manual (Exhibit 5, tab 4) and the licensee's policy statement (tab 5). The Store Manager went through the material with her, dealing particularly with issues related to identification requirements and intoxication. The cashier was required to sign off on the documents. The evidence of the Store Manager was that the signed copies of the documents have disappeared however he was certain that she had signed them. [I pause to note that this evidence is problematic to me for reasons which I will later discuss.] The Store Manager also had her read over the SIR manual to refresh her memory.

The Store Manager orally quizzed the cashier on various scenarios related to the training materials. He did not have her undertake any written tests as he was of the opinion that oral quizzes required spontaneous answers which provided a more realistic test to the job requirements. Written tests gave the employee too much time to think. I cannot agree with the Store Manager on this point. The training should put the emphasis on a thoughtful analysis of the issue, i.e. does this patron appear to be under 30 years of age. The employee would give consideration to her training of what indicia she might use to judge the person's age, reach a considered determination and proceed from there. Implicit within the Store Manager's position (that quick spontaneous answers were more realistic to the job requirements) is that cashiers cannot spend too much time determining whether to ask for identification, there are other patrons to be served. Further, written tests which have been reviewed with the employee allow the employee a means of review from time to time, particularly so where the original answer was wrong or incomplete.

The training conducted by the Store Manager of the subject cashier differed from that of the training for Cashier 2 hired approximately five months previous to the subject cashier. Cashier 2 worked under supervision for three shifts following the initial training period, whereas the subject cashier worked under supervision for only two. No evidence was provided for the difference.

Cashier 2 appeared at the hearing. He is a mature individual, with previous work experience although not related to liquor service. The subject cashier had previous experience in licensed establishments, albeit 10 years previous. It is probable and I find it so, that it was this previous experience that resulted in the different training provided.

Cashier 2 had obtained his SIR just prior to his employment at Metro Liquor, thus the knowledge obtained on which he had been recently tested was fresh in his mind. It was believed by the Store Manager that the subject cashier had obtained her SIR certificate at the time of her previous experience, 10 years previous. He had her read over the SIR manual. The oral quizzes may have covered some of the SIR training but there is no evidence that it was as complete a test as was conducted through the SIR program. I find that the Store Manager erred in reducing the training regime for the subject cashier.

The Store Manager, as a key part of the training process, was responsible for having the trainees sign off on the training manual and the policy statement. The signed documents pertaining to the subject cashier were not tendered as evidence. The documents in Exhibit 5, tabs 4 and 5 were those of Cashier 2. The evidence of the Store Manager was certain that they had been signed but they are now missing. The Licensee Representative gave evidence that they would have been removed from the employee's file once she left their employment. The Store Manager could not offer an explanation but agreed that it was possible that the signed off documents could have been forwarded to the

office of Licensee Representative when that was suggested to him by the licensee's counsel.

I have much difficulty with this explanation. The sale to the minor occurred on May 28, 2012. The branch issued a Notice of Enforcement Action on June 18, 2012. The subject cashier left her job at the store on August 12, 2012. Thus it was known that enforcement action was being pursued by the branch well before the date that the subject cashier left. It would be contrary to the licensee's interest to dispose of such a document in light of the impending enforcement process. The Licensee Representative is, on the evidence, a sophisticated and experienced businessman. If the documents were forwarded to the Licensee Representative's office it would have been done by the Store Manager. He could not recall doing so. Further, the licensee did produce other documents that would have formed part of the employee's file, namely her SIR certificate at Exhibit 5, tab 3 and her resume and covering letter bearing dates in April, 2012 at Exhibit 6. Giving consideration to the evidence on this point I find that it is probable that, for some reason (perhaps oversight, perhaps negligence), the Store Manager did not require the documents to be signed off by the subject cashier.

The licensee had a system of reminders for staff about their responsibilities regarding the need to require identification of all persons appearing to be under 30 years of age prior to making a sale. Employees were verbally reminded on a daily basis, it was an agenda topic during staff meetings, signage was placed throughout the store including the cash tills, it was entered into a communications log required to be read at the beginning of each shift. A Refusal of Service Report was to be completed by cashiers and was kept at the cash tills for this purpose and as a means to remind cashiers of the need to check identification. To assist an employee in determining the authenticity of identification a black light scanner was located at the cash tills as was a publication illustrating out of province identification. The Store Manager, and on occasion the Licensee

Representative, would make observations of the employees to ensure that they were carrying out their responsibilities properly.

The verbal reminders to staff to check identification of persons appearing to be under 30, the discussions during staff meetings, signage, and periodic entries in the communication log were part of the licensee's system to ensure that liquor was not sold to a minor. As were the periodic observations of the employees to ensure that they were carrying out their responsibilities. I find on the evidence that these were adequately carried out. They formed only part of the licensee's system to prevent the sale of liquor to minors.

The licensee also had a Refusal of Service Report for staff to complete. The Store Manager stated that the purpose of this Report was: to provide statistics, indicate if they are refusing the same customers, and to serve as a reminder and means of communication between staff. The evidence is that the Report was not always completed. The evidence is that typically there were multiple refusals on a daily basis, particularly so during busy times. A brief review of the Report at Exhibit 5, tab 6 reveals that days and weeks went by without an entry.

Although it was the Store Manager's responsibility to have employees complete the Report he accepted that it was not always practical for them to do so. I take it from this that if there were customers in line staff should not take the time to complete the report. [I pause to note that it is reasonable to assume that the individual entries in the report at Exhibit 5, tab 6 could be made in less than a minute.] Therefore, I find that the Report cannot serve any of its purposes, which is unfortunate. Properly completed the Report would serve to indicate and to reinforce to staff (and to any customers observing it being completed) the importance to the licensee of ensuring that liquor is only being sold where it is legal to do so.

The black light scanner, descriptions and illustrations of proper identification and the illustrated date of birth for the legal purchase of liquor are only useful tools if identification is requested and presented. That did not occur here.

The person responsible for the training of staff and the daily operation of the Metro Liquor store is the Store Manager. He does not set the licensee's policies but is responsible to carry them out. He would receive supervision from the general manager (did not appear as a witness) and the Licensee Representative, Mr. Gaucher. There is little evidence of how that supervision is carried out other than through management meetings and periodic visits to the store by the Licensee Representative and presumably the general manager.

The responsibility for the daily operation of the store would include all requirements of the liquor licence, both the important and the mundane. The evidence of Liquor Inspector A was that, at the time of the MAP inspection, the employees on duty could not produce their SIR certificates nor could they produce the current liquor licence. While it was later determined that the employees had SIR certification and the store had a valid and current liquor licence they were nonetheless unavailable at the time of the inspection as required. While not going directly to the alleged contravention of the sale of liquor to a minor I find that it is a relevant consideration in determining the issue of due diligence. I find that it provides evidence of a lack of attention to the requirements of holding a liquor licence by this licensee.

For the aforementioned reasons, I find on a balance of probabilities that the licensee's training and other systems to prevent the contravention of the sale of liquor to a minor were not adequate to meet the test of the reasonable licensee. Thus the defence of due diligence must fail.

In conclusion, I find on a balance of probabilities that on May 28, 2012, the licensee contravened section 33(1)(a) of the *Liquor Control & Licensing 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 compliance. Among the factors that I considered in determining the appropriate penalty in this case are: 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 licence 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.

Due to a concern that minors are being permitted to purchase liquor in licensed establishments, the branch has developed a project aimed at determining whether this is occurring. The branch 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.

It is clear that allowing consumption of liquor by minors contrary to the *Act* is a serious contravention giving rise to significant public safety concerns. Early learned behaviour with respect to abuse of alcohol, and less effective metabolism of alcohol by minors cause liquor to be a factor in many crimes committed by youth, including assault and driving offences.

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 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 to the General Manager of the Liquor Control and Licensing Branch on or before Monday, December 2, 2013.

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: October 23, 2013

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Cristal Scheer, Branch Advocate