



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: Cactus Café Park Royal Ltd.  
dba *Cactus Club Café*  
855 Main Street  
West Vancouver, BC V7T 2Z3

Case: EH12-211

For the Licensee: Randall Olafson

For the Branch: Peter Mior

General Manager's Delegate: R. John Rogers

Date of Hearing: June 27 & 28, 3013

Date of Decision: November 27, 2013

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

The corporate licensee, Cactus Café Park Royal Ltd., (the "Licensee"), owns and operates the *Cactus Club Café* at 855 Main Street, West Vancouver, B.C. (the "*Cactus Club Park Royal*") under Food Primary Licence number 301153 (the "Licence"). The authorized representative of the Licensee is Randall Olafson.

Under the Licence, liquor sales are permitted from 11:00 a.m. until Midnight on Sunday, 11:00 a.m. to 1:00 a.m. on Monday and Tuesday, and 11:00 a.m. until 1:30 a.m. on Wednesday through Saturday. The permitted capacity under the Licence for *Cactus Club Park Royal* is 240 persons allocated among a restaurant area, an interior lounge area, and a patio area. The interior lounge area has a capacity of 19 people.

The Licence is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the "Guide").

## ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated October 3, 2012.

The Branch alleges that on Saturday, September 15, 2012, the Licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act") by selling, giving or otherwise supplying liquor to a minor. The proposed enforcement action outlined in the NOEA is a monetary penalty of \$7,500 as provided for in item 2, Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "Regulation"). Item 2, Schedule 4 of the Regulation stipulates a penalty range for a first contravention of a 10-15 day licence suspension and/or a monetary penalty of \$7,500-\$10,000.

The Licensee acknowledges that liquor was served to a minor as alleged in the NOEA, but claims a defence of due diligence and disputes the penalty proposed by the Branch in the NOEA.

Pursuant to section 3 of the Regulation the General Manager of the Branch has delegated to the undersigned the powers, duties and functions imposed upon the General Manager by, and referred to in, Section 20 of the Act and section 65-69 of the Regulation for the purpose of this enforcement hearing.

## 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,

### *Liquor Control and Licensing Regulation, B.C. Reg. 244/2002*

Schedule 4

Enforcement Actions

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
2	A breach of section 33 of the Act ( <i>Selling liquor to minors</i> )	10-15	20-30	30-60	\$7,500-\$10,000

## ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

## EXHIBITS

- Exhibit 1:** The Branch's Book of Documents, tabs 1 to 14 inclusive.
- Exhibit 2:** A sealed envelope with a notation that it is to be opened only upon an order of the Supreme Court of British Columbia or the undersigned adjudicator and containing copies of two photographs of the Branch's minor agent identified below as "Agent #34", together with a copy of a photograph of her British Columbia Driver's License and her Identity Card.
- Exhibit 3:** The Licensee's Book of Documents, tabs 1 to 9 inclusive.

### **Agreement of the Parties Protecting the Identity of the Minor Agent**

The Licensee's representative agreed that the identity of Agent #34 was to be kept confidential and that he would maintain this confidentiality outside the confines of this hearing. Redacted copies of the documents contained in Exhibit 2 are included in tab 7 of Exhibit 1.

At the hearing, the Licensee's representative was given an opportunity to view the photographs in Exhibit 2 prior to them being placed in the sealed envelope. Agent #34 appeared as a witness at the Hearing.

### **Preliminary Matter**

As a preliminary matter at the commencement of the hearing, the branch advocate referred to the NOEA dated October 3, 2012 (tab 1 of Exhibit 1), and the Contravention Notice B005376 (the "Contravention Notice") a copy of which is at tab 8 of Exhibit 1. The NOEA is addressed to "Cactus Café Park Royal Ltd.", the proper name of the Licensee. However, the Contravention Notice sets out the Licensee's name as "Cactus Club Park Royal Ltd.". This discrepancy was noted and the Licensee's representative was given leave to reference this discrepancy in his submissions should he chose to do so.

The Branch made an application to have the Licensee's name on the Contravention Notice amended to reflect the Licensee's correct name. I deferred consideration of this application until the Licensee had made its position known and had made submissions as to what prejudice, if any, the Licensee had suffered due to this error. However, I gave the Branch leave to reapply to have this amendment to the Contravention Notice made, if it thought fit to do so, following the Licensee's submissions.

## **EVIDENCE – BRANCH**

The Branch called three witnesses to testify at this hearing: Agent #34, Inspector A, and Inspector B. Inspectors A and B are Branch liquor inspectors who were present at *Cactus Club Park Royal* when the alleged contravention occurred on September 15, 2012.

### **Agent #34**

Agent #34 testified that she is presently a high school student having just completed Grade 12 and that on September 15, 2012 she was 17 years old. She identified the copies of the pictures of herself taken on that date at the Branch's Vancouver office as well as the copies of pictures of her BC Driver's License and Identity Card included in Exhibit 2.

On September 15, 2012, she testified, having left her personal identification in the car, she entered the *Cactus Club Park Royal* to assess the establishment for compliance with the prohibition against serving liquor to minors. Inspectors A and B followed closely behind her.

Upon entering the establishment, Agent #34 testified that she was greeted by a hostess who she asked if she could wait for her friends in the lounge. The hostess told her to sit where she wished. Agent #34 testified that she went into the lounge area which was quite busy at the time, sat down on a bar stool at the bar, and a few minutes later she was approached by a blond female bartender (the "Bartender"). When the Bartender asked Agent #34 if she wished anything to drink, Agent #34 testified that she ordered a bottle of Smirnoff Ice Vodka, which liquor the Bartender brought to her.

After she had been served the liquor, Agent #34 testified that she left the untouched liquor on the bar, exited the *Cactus Club Park Royal*, and returned to the car in the parking lot. Agent #34 identified tabs 5 and 6 of Exhibit 1 as copies of the report she completed upon her return to the car.

Agent #34 identified tab 10 of Exhibit 1 as being a floor plan of *Cactus Club Park Royal*. On this floor plan, Agent #34 confirmed where she had entered the establishment and where she had sat herself.

Agent #34 testified that at no time while she was in the *Cactus Club Park Royal* was she asked for identification to verify her age, either by the hostess at the door of the establishment upon entry, or by the Bartender in the lounge.

#### Cross-examination of Agent #34

Agent #34 confirmed that she was aware that in order to sit in the lounge area of the *Cactus Club Park Royal* by herself that she had to be 19 or older.

Agent #34 testified that she spoke to the Bartender for about five seconds, and that it was a noisy, fairly dark environment. She confirmed that the Bartender had asked her if she wished to see a menu and Agent #34 had replied that she did not wish to see one.

Agent #34 testified that prior to entering the *Cactus Club Park Royal* on September 15, 2013, she had been in four or five other establishments and that for each of these establishments her pattern had been pretty much the same, in that she had seated herself in the establishment and had asked for a Smirnoff Ice Vodka.

#### **Inspector A**

##### The Minors as Agents Program

Inspector A testified as to the following with respect to the Minors as Agents Program ("MAP").

In June 2010 the Act was amended to permit the Branch to employ minors as agents to test compliance with the Act's prohibition against selling, giving or otherwise supplying liquor to minors. Pursuant to this authority, the Branch established MAP.

Under this program, the Branch hires as agents 17 and 18 year old minors, who clearly appear to be under the age of 19, for the purpose of carrying out inspections to determine compliance with the Act with respect to supplying liquor to minors. In the delivery of MAP, no attempt is made to hide the minor's age or to otherwise deceive a licensee in order to make it appear that the agent is older than 19 years of age.

MAP includes training for the newly hired MAP agents on the relevant provisions of the Act, how to make and document observations made during an inspection, and important safety considerations in carrying out their duties. A MAP agent is specifically instructed that if asked for identification during an inspection, the minor agent is to advise the questioner that the minor agent is not carrying any identification and is to be truthful if responding to questions about age.

Commencing in 2011, the General Manager has communicated with all parties licensed under the Act to advise them of MAP and of the fact that MAP inspections are being conducted whereby minors under the supervision of a liquor inspector would be visiting government and private liquor stores and food primary licensees in an attempt to purchase liquor. In this communication, the General Manager identified the penalties for licensees found to be non-compliant.

Inspectors A identified the document in tabs 13 of Exhibit 1 as a news release dated July 14, 2010 issued by the Branch and relating to the establishment of MAP.

#### Inspection of the *Cactus Club Park Royal*

Inspector A testified that on Saturday, September 15, 2012 she, Inspector B, and Agent #34 arrived at the *Cactus Club Park Royal* at 7:38 in the evening. Her evidence was that Agent #34 preceded her and Inspector B into the entrance of the establishment; that they followed Agent #34 into the lounge; and that she observed Agent #34 seat herself at one of the stools at the service bar in the lounge area.

Inspector A testified that neither she nor Inspector B overheard the conversation between the Agent #34 and the hostess at the entrance to *Cactus Club Park Royal* when Agent #34 entered the establishment, but the general instructions to the MAP agents were to ask to sit in an area where the accompanying liquor inspector(s) had the ability to directly observe the minor agent. Using the floor plan of *Cactus Club Park Royal* (tab 10 Exhibit 1), Inspector A demonstrated where she and Inspector B had seated themselves in relation to where Agent #34 was seated at the service bar in the lounge area.

Inspector A testified that she saw the Bartender approach Agent #34, then walk away, and subsequently return bringing her a bottle of Smirnoff Ice Vodka. As soon as the liquor arrived, Inspector A confirmed that she and Inspector B walked over to where Agent #34 was sitting. She then accompanied Agent #34 back to the car in the parking lot. Inspector B remained at the seat that Agent #34 had occupied and took control of the liquor.

Leaving Agent #34 at the car to complete her report, Inspector A testified that she returned to join Inspector B, who in turn went to find a manager of the *Cactus Club Park Royal* (the "Manager"). When Inspector B returned with the Manager, Inspector A testified that they advised the Manager that Agent #34, a minor agent and part of MAP, had been served liquor.

After confirming with the Bartender that she was the person who had served Agent #34, Inspector A testified that she and Inspector B accompanied the Manager to his onsite office carrying with them the bottle of Smirnoff Ice Vodka and glass of ice. In the Manager's office, the bottle of liquor and glass of ice were photographed, and Inspector A identified a copy of this photograph to be the document in tab 4 of Exhibit 1.

While in the Manager's office, Inspector A testified that the Contravention Notice was issued to and signed for by the Manager. Inspector A noted that at that time the Manager had stated that he was very disappointed with the situation and that he took it very seriously.



After leaving the Manager's office, Inspector A testified that she spoke further with the Bartender who was quite adamant in stating that in her opinion Agent #34 did not appear to be under the age of 25.

Inspector A identified tab 3 in Exhibit 1 as the notes she had made after she had left the *Cactus Club Park Royal* on September 15, 2012.

### Cross-examination of Inspector A

Inspector A testified that she believed that the discussion with the Manager in his office was approximately 15 minutes and that the Bartender was not with them at that time.

Inspector A confirmed that the Bartender approached her and Inspector B in the hallway outside the Manager's office following this meeting with the Manager. The conversation that followed was primarily between the Bartender and Inspector B, and the tone of this conversation was aggressive.

### **Inspector B**

#### The Contravention Notice

Inspector B identified tab 9 of Exhibit 1 as a copy of the Food Primary Licence issued to the Licensee. Inspector B further identified tab 8 of Exhibit 1 and confirmed that it was a copy of the Contravention Notice, the original of which he completed in the Manager's office on September 15, 2012. Inspector B testified that he had explained the contents of the Contravention Notice to the Manager, and then had the Manager sign a copy of the Contravention Notice to acknowledge its receipt.

Inspector B was then directed to tab 2 of Exhibit 1 which he identified as a copy of his notes made on September 15, 2012.

After comparing the Contravention Notice which he had completed on September 15, 2012 with the contents of the Licence, Inspector B testified that he had made an error in setting out the name of the Licensee when completing the Contravention Notice.

Inspection of the *Cactus Club Park Royal*

Inspector B confirmed that he was part of the team which inspected the *Cactus Club Park Royal* on September 15, 2012 for compliance with the rules against serving liquor to a minor. The choice for inspection of the *Cactus Club Park Royal*, he testified, was done purely on a random basis, being the first licensee that they came to after parking their car in the Park Royal Shopping Centre parking lot.

Inspector B confirmed that Agent #34 preceded him and Inspector A into the *Cactus Club Park Royal*, following her in approximately 20 seconds later. He and Inspector A walked past the hostess at the entrance and observed Agent #34 sitting in the lounge section of the establishment. Inspector B testified that he had previously been in the *Cactus Club Park Royal* and was, therefore, familiar with its layout. He confirmed that the lounge area was licensed for 19 patrons and minors were allowed into this area provided that they were accompanied by a parent or guardian.

Inspector B testified that he saw the Bartender approach Agent #34, saw that there was a brief conversation between the two of them, and then shortly after the Bartender return and placed a bottle of Smirnoff Ice Vodka and a glass in front of Agent #34. At that point, Inspector B confirmed that he and Inspector A walked over to Agent #34 and, while Inspector A accompanied Agent #34 out of the establishment, he remained at the seat previously occupied by Agent #34 to maintain the evidence of the liquor.

When Inspector A returned, Inspector B testified that he located the Manager, identified himself as a liquor inspector, and advised the Manager of the alleged contravention. Inspector B stated that he and Inspector A then accompanied the Manager to his office to continue the discussion, during which time Inspector B testified that the Manager had confirmed that he was aware of MAP but that he couldn't believe that liquor had been sold to a minor in the *Cactus Club Park Royal*.

### The receipt

Inspector B was directed to tab 4 of Exhibit 1 which he identified as a copy of the receipt for the liquor served to Agent #34 by the Bartender. Inspector B testified that while in the Manager's office, he had paid for the liquor served to Agent #34. He was issued the receipt for this payment and had this receipt initialed by the Manager for identification.

### Conversation with the Bartender

Inspector B testified that after he and Inspector A left the Manager's office, he had a brief discussion with the Bartender who was quite agitated and was adamant that she thought that she had been "set up" and that Agent #34 looked at least 25 years old. Inspector B testified that the Bartender had attributed the dim lighting in the lounge area and her inability to see Agent #34 clearly as the reason why she did not ask Agent #34 for her identification.

### The provisions in the Guide

Inspector B confirmed that one of the terms and conditions of the Licence was that the Licensee was subject to the provisions contained in the Guide. Inspector B was then directed to tab 11 of Exhibit 1 which he identified as a copy of the Guide referred to in the Licence. He agreed that the Guide was a condensation in layman's terms of the provisions of the Act and the Regulation.

On page 11 of the Guide, Inspector B confirmed that under the heading "Your Role as a Licensee", the document made it clear that the Licensee was legally responsible for understanding how the Act, the Regulation, and the specific terms and conditions of the Licence affected the operation of the *Cactus Club Park Royal*. The Guide went on to provide that the Licensee was legally responsible for ensuring that its employees followed B.C.'s liquor laws and the terms and conditions of the Licence, even when the owner of the Licensee was not on site at the *Cactus Club Park Royal*. Similarly, on page 16, the Guide provides that if a licensee has a restaurant lounge endorsement on its licence that there must be a sign visible to all lounge patrons, located either at the entry to or within the lounge, explaining that adults must accompany minors.

Inspector B was then directed to page 24 of the Guide which, he observed, states that minors are allowed in an establishment such as the *Cactus Club Park Royal* unaccompanied by a parent or guardian, but that it is against the law for the Licensee or its employees to sell, serve or supply liquor to a minor and that the Licensee and its staff are expected to put in place effective systems to meet this obligation. Inspector B further testified that the Guide goes on to state that part of this obligation includes that the Licensee demonstrates that it and its staff are preventing minors from obtaining liquor by verifying a customer's age and asking for two pieces of identification prior to serving them liquor. The Guide notes that if the customer is not able to produce such identification, then liquor service must be refused.

Inspector B was then referred to tab 12 of Exhibit 1, which he identified as a copy of the Food Primary Inspection Interview sheet for the *Cactus Club Park Royal* completed in October 2004. Inspector B confirmed that although at that time MAP was not in existence, as part of the final inspection process for the Licence leading to the issuance of this document, a copy of the Guide would have been made available to the Licensee. Included in this final inspection process would have been an educational component dealing with the Guide and the importance of compliance by the Licensee and its staff with the Act and Regulation.

#### Reasons for enforcement action

Inspector B confirmed that he was the author of the NOEA, and he identified a copy attached as tab 1 to Exhibit 1. He was asked for his reasons for pursuing enforcement action based upon the alleged contravention. He affirmed that the Branch's mandate is public safety. The prevention of the selling and serving of liquor to a minor is probably one of the highest priorities in this mandate.

In his 28 years as a police officer dealing with minors, Inspector B testified that he has seen the tragic effect of alcohol on minors. Inspector B asserted that, under the influence of liquor minors make poor choices and make them quickly, with horrendous consequences in the form of assaults, mischief, and property damage. This causes a ripple effect down through society, he testified, with hospitals being affected, police being affected, and licensees being affected. Inspector B asserted that the Branch hasn't

stopped liquor getting into the hands of youth, but it is making it more difficult for them to access it. Clearly public safety becomes compromised, he maintained, when a youthful person becomes intoxicated.

In this case, as there is no previous history of the Licensee serving liquor to a minor, Inspector B testified that he believes that a fine of \$7,500 is appropriate as being the lowest fine prescribed. He testified that he is hoping that such a penalty will serve as a notice to the Licensee that it must improve the training of its employees to ensure that it meets its obligation to society so that the sale of liquor to minors is prevented.

#### Cross-examination of Inspector B

Inspector B confirmed that, when he spoke with the Manager in his office following the alleged contravention, the Manager was shocked and amazed that the Bartender had served liquor to Agent #34 without asking for identification.

The Licensee's representative asked Inspector B if, during his 28 years as a police officer and his four years with the Branch, Inspector B had asked a person for identification (assuming the person to be a minor) and, upon the identification being produced, found that he had been incorrect in his assumption that the person was a minor. Inspector B acknowledged that this had happened to him on a number of occasions. Inspector B was then asked if, based upon his acknowledged difficulty in determining a person's age, it was not reasonable that the Bartender failed to ask Agent #34 for identification. Inspector B would not agree and maintained that the Bartender should have asked Agent #34 for identification.

Inspector B confirmed that prior to entering the *Cactus Club Park Royal*, Inspector B had instructed Agent #34 to sit in the lounge area of the establishment.

When asked whether it was a common practice for all food primary licensees to identify all persons entering the premises to ensure that they were over 19 years of age, Inspector B responded that he was not aware of a common practice among food primary licensees, but he confirmed that the obligation still lay with a server prior to

serving alcohol to a customer to not assume but to verify the age of this customer, so that the server could be assured that he or she was not serving liquor to a minor.

Inspector B confirmed that it is common practice to have an owner offsite and to give directions to his staff.

## **EVIDENCE – LICENSEE**

The Licensee called the Bartender and the Director of Corporate Operations and Human Resources (the “Director”) for the group of licensees operating food primary licensees under the name “Cactus Club Café” (the “Corporate Group”), of which group the Licensee was a member.

### **The Director**

The Director testified that at the Corporate Group, she is one of eight executives responsible for the management of the 23 licensees and the management company which comprise the Corporate Group. Her responsibilities are focused on the legal, regulatory, and human resources needs of the Corporate Group. As the person in the Corporate Group responsible for legal matters, any contravention notices issued by the Branch eventually come to her attention.

One of her specific responsibilities, she noted, is the operations manual used by the licensees of the Corporate Group (the “Operations Manual”), copies of some of the sections of which constitutes Exhibit 3, together with the syllabus for the training program based upon the Operations Manual undertaken by all operations staff of the Corporate Group.

### The Corporate Group policy on liquor service

The Corporate Group is a good corporate citizen, the Director testified, and does everything in its power to ensure that its corporate policy and philosophy is followed and to ensure that the laws and regulation are observed. They take the proper serving of liquor very seriously, she affirmed, and realize that it is a privilege to have a liquor licence.

The Director testified that serving liquor is not the Corporate Group's major goal, but rather serving liquor is a part of their business which completes the guest's enjoyment of a great dining experience. She believes that having the ability to serve liquor is a complement to this dining experience. The Director testified that the Corporate Group and the restaurants they run have built a reputation based upon serving good quality food products, and as such, their marketing approach is not to advertise alcohol in a prominent manner.

### The Operations Manual and training program

The Director testified that there are eight sections of the Operations Manual which comprise the training syllabus for staff members. Each new staff member of the Corporate Group, whether he or she is starting as a server or as a manager, must go through training on each of the sections of the Operations Manual and must write and pass the tests located at the end of each section.

A staff member cannot leapfrog a particular section, she testified, as the training program is a linear process whereby the staff member being trained must successfully proceed through each section before commencing the next section. Only when a staff member involved in the training is ready to move to the next section does he or she move to it. The reason for this approach is that it ensures that each member of staff is trained in the same way ensuring a consistency of approach, knowledge and performance across the Corporate Group.

### References in the Operations Manual to serving liquor

The Director noted that throughout the eight sections of the Operations Manual there are several hundred references to the requirements that each staff member of the Corporate Group is to be aware of and to comply with the liquor laws under which they operate. The Director testified that she believes that through the constant reference in the Operations Manual, and the requirement that every employee of the Corporate Group pass the tests included within the Operations Manual, the “directing mind” of the Corporate Group has done everything reasonably possible to prevent minors from being served alcohol. As the Corporate Group is in the service industry which employs mainly young people, she noted, the best way for them to learn and to retain the knowledge is to ensure that the message is constantly repeated consistently throughout their training.

The Director then identified the document in tab 3 Exhibit 3 as a copy of the section of the Operations Manual labeled “Service”. Page 13 of this document, she noted, is headed “liquor laws + alcohol awareness”. The wording on this page, she testified, outlines the corporate responsibility that the Corporate Group has and the responsibility that each staff member has to be aware of the liquor laws under which they operate. This wording is a clear message to each staff member that the consequence of breaching these laws can be immediate dismissal.

Page 14 of the copy of the Service section of the Operations Manual in tab 3 Exhibit 3, the Director testified, is headed “i.d. policy”. She stated that the reason that the contents of this page is in the service section of the Operations Manual is to ensure that employees of the Corporate Group are well aware of the corporate policy on asking for identification, what is expected from each employee, and what the consequences would be should they not follow this policy. She noted that there is specific reference in the paragraphs on this page headed “serving minors” relating to the severity of penalties resulting from serving liquor to minors, and to the fact that liquor inspectors undertake spot checks to ensure compliance with this prohibition.



The Director next identified the document in tab 4 Exhibit 3 as a copy of the section of the Operations Manual entitled "Promises". She noted that this section outlines all of the policies and expectations of the Corporate Group of a new staff member.

Paragraph 22 on page 7 (tab 4 Exhibit 3), the Director observed, states that if a guest is under the age of 25, two pieces of identification are required. It goes on to state that there are no exceptions to this rule and, if the employee serves liquor to a minor, he or she is subject to termination without notice.

The Director confirmed that every staff member is made aware of this paragraph and, to reinforce this knowledge, every time a staff member is paid the staff member signs off that he or she is aware there are no exceptions to the prohibition against serving liquor to a minor and that the staff member will be subject to immediate termination if he or she knowingly serves liquor to a minor.

### Signage

The Director identified tab 7 of Exhibit 3 as consisting of two documents:

1. A copy of a notice from the Branch specifying that two pieces of identification are required prior to serving alcohol to a person possibly under the age of 19; and,
2. A copy of a sign prepared by the Corporate Group management stating that it is not only the responsibility of the Corporate Group as the employer but also the responsibility of each staff member to follow the rules against serving liquor to minors, and that if these rules are breached both the staff member and the Corporate Group could be fined.

The Director testified that, as constant reminders to staff, copies of these documents are posted in all of the restaurants of the Corporate Group in the service areas and other areas accessible by staff but where customers can't see the notice, such as the pass through area or the bar. Depending upon the size of the restaurant, she testified, there are about six of these signs posted in each restaurant.

### The CBC report

The Director identified tab 8 Exhibit 3 as an excerpt from a November 16, 2012 CBC hidden camera report on underage drinking. The CBC reported that four teenagers under the age of 19 were served alcohol at various food primary licensed establishments in the Lower Mainland of British Columbia. This report states that the teenagers were refused service at the Cactus Club Café Restaurant on the Lougheed Highway in Burnaby.

### The Director's reaction to the alleged contravention

The Director testified that the restaurants of the Corporate Group get about 18 million customer visits each year, but that before this alleged contravention, the Corporate Group has not been before charged with a contravention similar to the one at hand.

The Corporate Group, she testified, does a lot to support their local communities and they are a good corporate citizen. The Director was adamant that for the Branch to have a 17 year old get dressed up in order to trap one of the Licensee's more senior people who is a great employee, does a great job, and takes a lot of care and attention in what she does, is wrong. The Bartender, the Director stated, was in fear for her job because of what happened.

The Director believes that the Corporate Group has probably the most extensive training program in the hospitality industry and that its people are very, very well trained. The alleged contravention, she believes, is nothing other than a young girl coming into the establishment and trying to trick someone. The Director testified that she doesn't understand the philosophy behind MAP

### Cross-examination of the Director

The Director confirmed that, although the Operations Manual contains a requirement for a staff member to request identification from a guest who looks to be under the age of 25, there is no guidance anywhere in the Operations Manual as to how a staff member might determine whether or not a guest is under the age of 25. Although there

were “signs” of what a bartender should look for to determine whether or not a guest was intoxicated, the Director agreed that the Operations Manual did not list such criteria to assist a staff member to determine whether or not a guest might be under the age of 25.

When asked how the Corporate Group teaches its staff what to look for in determining whether or not a person is a minor, the Director testified that a person working in the restaurant industry learns from experience rather than working to defined criteria.

The Director confirmed that the Corporate Group corporate policy was to the effect that an employee is subject to termination if he or she knowingly serves alcohol to a minor. She agreed that the only foolproof method of ensuring that a person was not a minor, unless the server knew the guest personally, was to ask the guest for identification.

The Director also confirmed that the Bartender was not fired by the Corporate Group following the alleged serving of alcohol to Agent #34 as she believed that there were special circumstances in this matter. When asked if this non-action did not send the wrong message to the other employees of the Corporate Group, the Director testified that the entire situation was carefully reviewed by the management of the Corporate Group. This review included a thorough examination of the video recordings of the matter, copies of which she identified as being included under tab 13 of Exhibit 3. The determination was made, in this case, to make an exception.

The Director testified that she was surprised to discover that Agent #34 was 17 years old. She stated that she felt it was quite uncharacteristic for a 17 year old girl to walk up to a bar in one of the restaurants of the Corporate Group and to sit down by herself and order a drink. The Director disagreed with the proposition that it might be more unusual for a 17 year old girl to be seated at the bar by a hostess, although confirmed that the rule in the establishment was that a minor should not be in the lounge if not accompanied by a parent or legal guardian.

The Director testified that there were regular staff meetings (usually every two weeks) involving the general manager, the regional manager and the chef. She wasn't sure if there were minutes kept of these meetings. A variety of matters are discussed at these meetings, including new policies and procedures, with an opportunity to get feedback from the managers. At these meetings, she stated, policies such as the prohibition against serving liquor to minors could be discussed.

When asked how the Corporate Group tests staff with regards to its policy respecting minors, she replied that there is a list of questions they have to answer and they get graded on these answers. These questions change. She didn't have the test results for the Bartender, but as she was qualified as a bartender, the Director testified, the Bartender would have passed the test. The Director testified that they have never tested staff compliance by using undercover minors.

The Director testified that the only training provided to a new staff member by the Corporate Group with respect to the prohibition against serving liquor to minors is that if a guest is under 25, the employee has to ask for identification. In this training program, she stated, a new staff member shadows a more senior person. The more senior person is given a training schedule to be followed. When the new person is trained the new person is signed off by the senior person and by the manager before proceeding.

### **The Bartender**

The Bartender testified that she: is 24 years old; has a "Serving it Right" certificate; has worked for the Corporate Group for five years as both a server and a bartender; and, is presently head bartender at the *Cactus Club Park Royal*.

She confirmed that she was not part of the Corporate Group management team and that she did not set policy for either the Corporate Group or the Licensee, nor was she a policy advisor to the Corporate Group or the Licensee.

### Corporate Group's policy on prevention of service of liquor to minors

The Bartender confirmed that over the course of her employment with the Corporate Group, as part of the training program, there were more discussions than she could count with her manager and other bartenders and staff members about false identification—what it looked like, how to identify minors, and what characteristics to look for to distinguish a minor. She testified that there is a continuous communication between the management of the Corporate Group and staff members about the alcohol laws of British Columbia, the Act and Regulation, and that all of the staff are updated on a regular basis about serving alcohol to minors.

The Bartender testified that approximately two years ago, management of the Corporate Group instituted a program to prevent the serving of alcohol to minors in order to protect the members of the staff and the Corporate Group against this prohibition. This program focused on the corporate policy that their restaurants were not the kind of establishment where minors could come and be served.

### The Bartender's training

During her time of employment with the Corporate Group, the Bartender testified, she has been trained about the liquor laws of British Columbia throughout each of the five levels of training which she has completed to achieve her present position. Each one of these training levels involves an examination which she successfully wrote and passed.

The Bartender specifically identified:

1. The Service section of the Operations Manual, a copy of which is in tab 3 Exhibit 3;
2. The Promises section of the Operations Manual, a copy of which is in tab 4 Exhibit 3;
3. The Liquids section of the Operations Manual, a copy of which is in tab 5 of Exhibit 3; and
4. The Bartender section of the Operations Manual, a copy of which is in tab 6 of Exhibit 3.

She confirmed that she had trained on and passed the written exam for each of these sections of the Operations Manual. In each of these sections there is reference to the liquor laws, alcohol awareness, and the prohibition against serving liquor to minors, including the requirement to ask for identification from any guest who appeared to be under the age of 25.

The Bartender testified that, at the *Cactus Club Park Royal*, there are at least two staff meetings a day at which issues involving the establishment are discussed among staff members. Usually at these meetings compliance with the liquor laws, including the prohibition against serving liquor to minors, is discussed. She stated that she is well aware that under these laws she could face a fine of \$575 if she were to sell liquor to a minor and she has never knowingly sold liquor to a minor.

During her five years of working for the Corporate Group, the Bartender testified, she has served many customers and she has refused service to a minor between 50 and 100 times. She determines who she asks for identification by looking at the following indices of age:

- appearance
- style of dress
- maturity
- self-confidence
- manner of speaking
- attitude
- whether or not alone or with friends, and
- where the guest chooses to sit

She stated that she believes that she is good at determining a person's age.

#### The alleged contravention

The Bartender identified tab 1 of Exhibit 3 as a copy of the statement of the Manager, and a copy of her statement relating to the events leading to the issuance of the Contravention Notice.

On the night of the alleged contravention, the Bartender testified, she and another bartender were working at the bar in the lounge area of the *Cactus Club Park Royal*. She confirmed that she asked Agent #34 for her drink order approximately 10 seconds after Agent #34 had seated herself at the bar in the lounge area. She testified that she then brought the Smirnoff Ice Vodka and a glass of ice in response to Agent #34's order.

The Bartender stated that this was the total contact that she had with Agent #34. She testified that, during this brief interaction, she did not get a good look at Agent #34, as the lighting in the lounge area was not bright and Agent #34 was looking down at her cellphone and texting. The Bartender stated that she had no inkling that Agent #34 was a minor and did not expect a minor to be sitting at the bar unaccompanied by a parent or guardian. To her, Agent #34 looked mature, exactly like the Bartender's roommate who is 27 years old. She stated that Agent #34 spoke in a confident adult manner, not like someone who was 17 years old. The Bartender testified that, in the brief encounter that she had with Agent #34; she had absolutely no doubt that Agent #34 was over the age of 25.

The Bartender confirmed that the copies of photographs in tab 2 of Exhibit 3 were photographs secured from the video taken by CCTV cameras in the *Cactus Club Park Royal* on September 15, 2012 and consisted of:

1. A picture of Agent #34 entering the establishment taken by the entrance camera;
2. A picture of the Bartender greeting Agent #34 and asking for her order taken by the camera in the lounge; and,
3. A picture showing the Bartender serving Agent #34 a bottle of Smirnoff Ice Vodka and an empty glass with ice in it while Agent #34 is busy with her head down and texting on her cellphone taken by the camera in the lounge.

### The CBC report

The Bartender was asked if she found it unusual in the CBC Report (tab 8 Exhibit #3), that the Cactus Club on the Lougheed Highway had turned away the teenagers seeking to be served liquor. The Bartender testified that she did not find this unusual as she believed that the staff of the Corporate Group were good at asking guests for identification and that this would be a perfectly normal occurrence if a guest did not

have identification with him or her. She confirmed that it would have to be two pieces of identification, one would not be sufficient.

### Cross-examination of the Bartender

#### *Identification of a Minor*

The Bartender confirmed that the only true way of knowing whether or not a guest is a minor is to ask for his or her identification. She agreed that the question of whether or not a person looks to be over or under 25 years of age is a very subjective determination, and it can be difficult to tell the difference between someone who is under 19 and someone who is 25.

When asked if she could make a proper assessment of a guest's age in the 48 seconds that lapsed between when Agent #34 sat down and the Bartender served the drink to Agent #34, the Bartender testified that she made such rapid assessments on a daily basis, but that she did ask Agent #34 if she was eating and if she wished a menu.

The Bartender testified that her job is to greet someone who sits down within 10 seconds of the guest being seated and to serve this guest within three minutes. This means quick, fast service and also means that in a busy bar the Bartender has to move quickly. If not, she wouldn't be doing her job properly. With her experience, the Bartender believes that she has, within a 48 second window, the ability to judge someone's age properly.

#### *New Policy at the Cactus Club Park Royal*

Following the alleged contravention, the Bartender confirmed that among the staff of the Licensee there was a great deal of discussion as to how to ensure that a minor was not being served alcohol. As a result of these discussions, the new policy at the *Cactus Club Park Royal* is that the age limit has been increased from 25 to 30 so that now anyone who looks under 30 years old is asked for identification prior to being served liquor. She noted that the Corporate Group policy largely leaves it to the staff member to



determine whom to ask for identification, but the general rule is that when in doubt ask for identification and don't worry about offending people.

When asked if as a result of the alleged contravention the staff at the *Cactus Club Park Royal* have become more vigilant in asking for identification, the Bartender testified that she believed that the staff have been vigilant all along and that she didn't believe that her experience had made them more so. She testified that she slipped up, that it wasn't fair as Agent #34 looked older than 25, and that the Bartender would not now act differently as she felt that she was "set up". This incident has made her very aware of the possibility of this occurring.

## **SUBMISSIONS – BRANCH**

### **Failure to Ask for Identification at the Entrance**

The Branch submits that, based upon the evidence, the Licensee is in breach of the Licence in two respects. Firstly, Agent #34 was able to enter the lounge area of the *Cactus Club Park Royal* unaccompanied by an adult without any member of the Licensee's staff asking her how old she was. The Operations Manual is deficient in this area in that nowhere in this document is there reference to this prohibition. This deficiency in the Operating Manual sets up the staff of the Licensee for failure.

### **Failure to Ask for Identification Prior to Serving Liquor**

Secondly, the Bartender failed to take the time to make a proper assessment of Agent #34's age prior to serving liquor to Agent #34. One of the causes of this failure might be attributed to the Licensee's policy of ensuring that customers upon their arrival at their seat in short order have their drink order taken and are offered a menu. The Bartender's focus, as demonstrated by the video in tab 9 of Exhibit 3, was upon complying with this policy and in ensuring that Agent #34 did not have to wait, rather than taking the time and focusing on assessing the age of Agent #34.

The Branch submits that Agent #34 looks 17 years of age and, as a person clearly under the age of 19, she should have been asked for identification. This request should have come both from the hostess at the entrance to the *Cactus Club Park Royal* prior to permitting Agent #34 to sit in the lounge area and from the Bartender prior to serving Agent #34 liquor.

### **Governing Policy Should be to Ask for Identification**

The law is very clear, the Branch submits, namely anyone under the age of 19 must not be served liquor by the Licensee. Rather than attempting to determine a guest's age by appearance, manner, or some other criterion, the Licensee's staff should be instructed to ask for identification. If Agent #34 had been asked for identification, she would not have been served alcohol. The Operations Manual makes numerous references to the requirement of the Licensee's staff to ask for identification, the Branch notes; however what this manual does not do is to establish that the Licensee has a system in place to monitor the compliance of the Licensee's staff in asking for identification in accordance with this policy.

### **Staff Member Was Not Terminated**

In addition, the Branch submits, the policy of the Licensee is to terminate a staff member if he or she serves alcohol to a minor without first asking the minor for identification. In the matter at hand, the Bartender has not been terminated. The Branch observes that this lack of action is in breach of the Licensee's own corporate policy.

### **Clear Breach of Section 33(1)(a)**

The Branch submits that the evidence is clear that on September 15, 2012, 17 year old Agent #34 entered the *Cactus Club Park Royal* and was able to purchase alcohol from the Licensee's staff without the Licensee's staff taking any action to prevent this sale from occurring.

The Branch submits that the evidence clearly demonstrates that the contravention has been proven and, therefore, the recommended penalty of \$7,500 is appropriate

## **SUBMISSIONS – LICENSEE**

### **Written Submissions**

The Licensee's representative asked that he have the ability to make his submissions in writing. With the agreement of the Branch, the Licensee's representative was given until the close of business on Friday, July 5, 2013 to file written submissions.

It was also agreed that the Branch would have until the close of business on Friday, July 12, 2013 to make a reply to the Licensee's representative's written submissions, if the Branch wished to do so. The Licensee's representative made his written submissions by the agreed upon date and the Branch chose not to file a reply to these written submissions.

In his written submissions, the Licensee's representative makes reference to the noted discrepancy in the Contravention Notice and leaves it to me to determine the effect, if any, that this discrepancy might have to this enforcement process.

### **Acknowledgement that the Bartender Served Liquor to Agent #34**

The Licensee's representative's submissions acknowledge that Agent #34 on September 15, 2012 was served liquor by the Bartender, an employee of the Licensee. However, the Licensee's representative submits, the defence of due diligence applies to this matter and, as a result, the Licensee should not be found liable for a contravention of section 33(1)(a) of the Act.

### **The Bartender is Not the Directing Mind**

In his submissions, the Licensee's representative notes that the evidence clearly shows that the Bartender is not a "directing mind" of the Corporate Group nor of the Licensee. He further submits that the evidence clearly demonstrates that the Corporate Group and the Licensee have taken reasonable steps to ensure that, within both the operations of the Corporate Group and the Licensee, liquor is not served to minors in contravention of 33(1)(a) of the Act.

## The Corporate Group's Training Program

The Licensee's representative in his submissions points to the Director's testimony as to the following established training programs and implementation systems the Corporate Group has in place to prevent the sale of liquor to minors by the employees of its licensees, including the Licensee, summarized as follows:

1. A very complete and comprehensive staff training syllabus which clearly instructs the employee to ask guests who appear to be minors for identification prior to serving them liquor;
2. A broad based step by step personal development program for employees, which program also references the requirement to ask guests who appear to be minors for identification prior to serving them liquor;
3. A graduated training program that requires a minimum of five exams that must be written and passed to reach a senior bartender position, similar to that which the Bartender occupies, and which training program includes training on asking guests who appear to be minors for identification prior to serving them liquor;
4. Verbal coaching from fellow staff members on operational issues within the Corporate Group, which coaching includes references to the requirement to ask guests who appear to be minors for identification prior to serving them liquor;
5. The acquisition of signs issued by the Branch dealing with the requirement to ask guests who appear to be minors for identification prior to serving them liquor and the installation of these signs within the licensees of the Corporate Group; and,
6. The creation by the Corporate Group of their own signs for mounting within the restaurants of the licensees of the Corporate Group, which signs deal clearly with the requirement of the employee to ask guests who appear to be minors for identification prior to serving them liquor and the consequence to the employee if he or she does not do so.

In his submissions, the Licensee's representative points to the Director's testimony regarding how the management of the Corporate Group works with regional managers and general managers of the Corporate Group to improve liquor awareness and staff training. These meetings are usually done on at least a monthly basis and deal with items such as the effects of alcohol on guests and how to spot signs of over-

consumption, forms of false identification, updates on rule changes issued by the Branch, and reinforcing existing policies.

The Licensee's representative noted the Director's testimony that as a follow up initiative to the training programs offered to all employees, the policy of the Corporate Group and (the Licensee) include the following:

1. Monthly staff meetings, which include liquor related identification requirements;
2. Shift change staff meetings, which include liquor related identification requirements;
3. Bartender meetings, which include liquor related identification requirements;
4. Established disciplinary procedures for serving liquor to a minor, which procedures are updated monthly; and,
5. Copies of the current version of the Guide at each of the licensed locations of the Corporate Group.

#### **The Bartender's Action in Serving Liquor to Agent #34**

The Licensee's representative refers to the evidence of the Bartender that she is fully aware of the policy of the Corporate Group prohibiting the sale of liquor to a minor. She confirmed that if she knowingly serves liquor to a minor that she would be fired. The Bartender testified that, in compliance with this policy, she has refused service to many guests when either they were not able to produce identification demonstrating that they were not minors or when she had doubts as to the quality of the identification produced.

He submits that it is completely understandable why the Bartender served Agent #34 without first asking her for identification. He points to the evidence of the Bartender that:

- the lounge was busy on the night of the alleged contravention
- the lighting was poor and therefore difficult to make out faces
- Agent #34 entered the lounge and ordered an alcoholic beverage popular with guests who are in their 30's, and

- the appearance and demeanor of Agent #34 resembled a woman in her mid-twenties, similar to the Bartender's roommate who is 27 years old, rather than a 17 year old high school student

### **The Bartender Was Not Terminated**

In his submissions, the Licensee's representative notes that when asked on cross-examination why the Bartender was not immediately fired for selling liquor to a minor in contravention of the Corporate Group's explicit policy, the Director testified that the Bartender was not reprimanded nor was her employment terminated following the alleged contravention because the Bartender was a valuable and conscientious employee.

After reviewing the video contained in tab 9 of Exhibit 3 and the statements from the Manager, the Bartender herself, and other members of the staff of the Licensee about what had transpired on that night, the senior management of the Corporate Group came to a unanimous decision that the Bartender had acted in a responsible manner consistent with her experience and that therefore her employment was not terminated.

However, the Licensee's representative submits, the Director testified that within 24 hours of the alleged contravention occurring, all licensees of the Corporate Group were given instructions to increase the age limit for asking for identification from guests from 25 to 30 years old.

### **The Bartender's Training**

The Licensee's representative submits that the Bartender's evidence clearly shows that, from her perspective, both the Corporate Group and the Licensee have had a significant and continuous focus on the education of staff dealing with the prohibition against serving liquor to minors. The Bartender's evidence was that, upon joining the Corporate Group, she attended an in depth two day workshop that completely described:

- the philosophy of the Corporate Group
- the Operations Manual and all the training programs inherent therein, and

- the expectation of the Corporate Group that the Bartender as an employee would at all times act in the best interests of the Corporate Group

Following this initial training, the Bartender then testified to her hands-on training at the Licensee's location. This part of her training required her to watch the work done by a co-worker, and then to perform this work under the direction of this co-worker. She testified that this hands-on training approach is used by the Corporate Group in all of the sections of the Operations Manual.

The Licensee's representative further points to the Bartender's testimony that, for her to achieve her current level of employment, she has written and passed five specific exams and attended countless management and staff changeover meetings that discussed many operational issues. Specifically included among these issues was a continual reference to the mandatory policy that if a guest appears to be 25 years of age or younger that she must, without exception, ask for two pieces of identification before serving alcohol to that guest, and that a failure to make this request could lead to immediate dismissal.

The Licensee's representative points to the Bartender's testimony, when asked if any more direction from the Corporate Group in the form of additional training, meetings, or signage might have changed her decision and caused her to ask Agent #34 for identification, the Bartender responded that such additional effort would not have changed her actions as (in her opinion) Agent #34 clearly fit the profile of a 27 year old female guest.

### **Recommended Prevention Measures**

The Licensee's representative notes in his submissions that the Branch does not provide any "hard and fast rules" for what preventative measures a licensee must implement. He suggests that what is reasonable for such measures may vary substantially from location to location, type of establishment, physical plant, the existence of the owner on site, and may other factors.

He notes that neither Inspector A nor Inspector B were able to advise as to what information, instructions or written procedures are provided by the Branch to enable an employee of a licensee to determine whether or not to ask for identification prior to serving or selling liquor to a person in the event that this person might be a minor. Their only response, he submits, was that if such a person appears to be 25 years of age or less that person should be asked for identification. He also notes that over the years that these Inspectors acknowledge to having made many errors regarding the age of an individual and the only true way to learn of a person's age was to ask for identification.

### **The Defence of Due Diligence Established**

The Licensee's representative submits that the evidence shows clearly that the Licensee had and has taken all steps necessary to convey the importance to all staff members of the Corporate Group of all liquor laws and identification requirements on behalf of the directing mind of the Corporate Group. The evidence discloses that the Corporate Group does and always has taken above normal steps to provide reasonable care and continuing instruction, materials, signs, and notifications to staff to give clear and unwavering direction as to the identification requirements for minors in all of their restaurants prior to the service of alcohol. The evidence discloses, he submits, that the Corporate Group's educational syllabus program is one of the best in the industry for continually upgrading staff training.

The Licensee's representative submits that the Corporate Group's ongoing training and the Operations Manual exceed industry standards and that in light of the overwhelming evidence of the appropriate due diligence applied by the directing mind of the Corporate Group, the Licensee has met the test of due diligence which is a complete defence to the alleged contravention.



## REASONS AND DECISION

### Contravention

#### The discrepancy in the Contravention Notice

As was referred to above and as was acknowledged by Inspector B, the Contravention Notice contained the incorrect name of the Licensee. The Branch made an application during the hearing to amend the Contravention Notice, but consideration of this application was deferred pending submissions by the Licensee's representative. The Licensee's representative in his written submissions left it to me to determine the effect, if any, this discrepancy had on this enforcement process.

The evidence before me is that immediately following the alleged contravention, Inspector B accompanied the Manager to the Manager's office where Inspector B wrote the Contravention Notice and handed a copy of it to the Manager. The Manager acknowledged receipt of a copy of the Contravention Notice by signing Inspector B's copy of it. There is no doubt whatsoever that both the Manager and the Bartender were aware of the contravention alleged in the Contravention Notice.

In addition, when the NOEA was issued to the Licensee it was issued in the Licensee's proper name and the NOEA was forwarded to the Licensee's representative. The Director as the member of the Corporate Group's management team responsible for legal matters confirmed that she was made aware of the NOEA by the Licensee's representative. Therefore, there is no doubt that the Licensee was made aware of the contravention alleged in the Contravention Notice within a reasonable time following the alleged contravention.

Finally, this discrepancy was not at any time raised by the Licensee or the Licensee's representative prior to the hearing.

I therefore find that the discrepancy in the Contravention Notice caused by incorrectly stating the Licensee's proper legal name did not cause the Licensee any prejudice with respect to this matter, and I grant the Branch's motion to amend the Contravention Notice to include the Licensee's proper legal name.

Did the contravention occur?

I find the evidence of Agent #34, Inspector A and Inspector B credible and not in any manner controverted by the evidence of the Licensee.

I, therefore, find that the Branch has clearly established that on September 15, 2012 Agent #34 was a minor. I also find that, as acknowledged by the Bartender and the Licensee's representative, on September 15, 2012 at the *Cactus Club Park Royal*, without previously asking for identification, the Bartender served Agent #34 the Smirnoff Vodka Ice liquor.

*The Bartender's intention*

The Bartender's testimony was credible and to the point. I sympathize with the Bartender in that the video evidence before me clearly shows that the lounge area at the *Cactus Club Park Royal* where Agent #34 sat was quite dark, the bartenders at the bar were busy, and Agent #34 for most of the time while she sat at the bar had her head down and appeared to be looking at her cell phone. Therefore, I accept the Bartender's testimony that she did not intentionally sell liquor to a minor. As well, I accept her testimony that at the time of the transaction, the Bartender viewed Agent #34 in the same light as the Bartender viewed her roommate at that time, namely a 27 year old woman, not as a 17 year old high school student.

However, section 33(1)(a) of the Act is what is known as a "strict liability offence". This means that to establish liability under this section, the Branch does not need to demonstrate that the person serving the minor intended to serve liquor to a minor. It is sufficient merely that the Branch prove that the person, the subject of the alleged contravention, did indeed serve liquor to a minor.

Therefore, even though I accept the fact that the Bartender did not *knowingly* serve liquor to Agent #34, I find that the evidence before me clearly shows that the Bartender did in fact serve liquor to Agent #34 on September 15, 2012 as alleged in the Contravention Notice. Therefore, I find that the Branch has proven that the contravention as alleged in the Contravention Notice did occur.

*The Licensee's liability*

The Licence by its terms and conditions incorporates the provisions of the Guide. As provided for in the Guide and as described in more detail in the testimony of Inspector B above, the Licensee is liable for the actions of one of its employees if that employee is found to have served liquor to a minor. I therefore find that the Licensee is liable for the contravention as alleged in the Contravention Notice.

*The lack of established criteria*

In his submissions, the Licensee's representative suggests that the Licensee should not be held responsible for its employee serving liquor to a minor because the Branch has not set out criteria by which a server can identify a minor. I don't accept this submission.

It is the Licensee which bears the responsibility for ensuring that minors are not served liquor in its establishment. The Licensee has a statutory obligation included as a term and condition of the Licence to ensure that a minor is not served alcohol in its restaurant. This requires the Licensee to ascertain that it and its employees have the ability to tell the difference between a minor and an adult. Where there is any doubt, the appropriate and required response is to require the guest to produce identification.

*Use of minors as “entrapment”*

I found the Director’s evidence credible. I also found that her testimony clearly established her commitment to the Corporate Group and reflected the Corporate Group’s commitment to the community in which its licensees operate and to the customers they serve.

However, the Director in her evidence commented on the MAP program using words such as “trap” and “trick”, comments to which I believe a response is required.

Licensees wishing to sell liquor in British Columbia choose to participate in a regulated activity and, by doing so, place themselves in a relationship which bears a responsibility to the general public. As part of this choice to participate, a licensee agrees to bear the consequences of being in breach of this responsibility.

This responsibility to the general public is enshrined in the provisions of the Act, the Regulation, the terms and conditions in the Guide, and in any terms and conditions attached to their licence. Licensees agree, as one of the conditions attached to their licence, to ensure that they and their staff understand and follow all of these provisions.

The Branch has a legislated duty to enforce the Act and the Regulation and to ensure that licensees and their employees in the course of their affairs conduct their operations in accordance with the provisions of the Act, the Regulation, and the terms and conditions of their licences. As an integral part of this duty, the Branch is responsible for monitoring the activities of licensees to ensure their compliance with these provisions.

In June 2010, to support the enforcement of the prohibition in the Act against selling liquor to minors, the Act was amended to specifically permit the Branch to employ minors as agents to test the compliance of licensees and their employees with this prohibition. In response to this legislative change, the Branch introduced MAP. As noted above, with the introduction of MAP the Branch gave written notice of MAP to all licensees, including notice to food primary licensees, about the details and purpose of and the Branch’s expectations from MAP.

Therefore, I strongly disagree with the Director. MAP is not a form of trickery or entrapment. Rather it is a tool used by the Branch in a regulatory regime in order to uphold its legislated duty to monitor the activities of licensees to ensure their compliance with the prohibition against serving liquor to minors.

By engaging in the sale of liquor at their restaurants, the Corporate Group and each of its employees have undertaken the obligation to exercise reasonable care to ensure that the harm identified in the Act, and encompassed in the prohibition against selling liquor to minors, does not occur. A concomitant aspect of this right to sell liquor at its restaurants is the acceptance by the Corporate Group and its employees that they will be subject to monitoring by the Branch in order to carry out its responsibility of ensuring that the Corporate Group and its employees are, in fact, meeting this obligation to exercise reasonable care.

The monitoring program undertaken by the Branch in the form of MAP is to encourage compliance by the Corporate Group with its obligations. Where this monitoring program has detected a breach of these obligations by one of the licensees or employees of the Corporate Group, it is the Branch's right to institute enforcement proceedings to both encourage ongoing compliance by that licensee or employee and to act as a deterrent to other licensees and employees to encourage them to undertake such compliance.

### **Due Diligence**

Even though I have found that the Branch has proven on a balance of probabilities that the contravention alleged in the Contravention Notice did in fact occur, the Licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent this contravention from occurring. To successfully establish such a due diligence defence, the Licensee must not only demonstrate to my satisfaction that it has established procedures to identify and deal with ensuring that liquor is not sold to minors, it must also demonstrate that those procedures are consistently acted upon and that any problems arising are dealt with.

## Case 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 respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, 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 the licensee had:
  - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
  - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

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

### Directing mind

On the evidence before me, it is clear that the Licensee is a member of the Corporate Group. The Corporate Group is run by a management committee which sets policy and establishes training protocols and programs for all the licensees in the Corporate Group. One of the basic operating principles across the Corporate Group is to ensure a consistency of delivery of product by each of the restaurants in the Corporate Group. Based upon this evidence, I find that the “directing mind” of the Licensee for the purpose of the analysis as defined by the *Beverly Corners* case is the Corporate Group.

In her evidence, the Bartender who provided the liquor to Agent #34 on September 15, 2012 testified that she is not part of the management committee of the Corporate Group nor of the Licensee and, therefore, does not participate in policy making. In other words, the Bartender confirmed that she had neither the express or implied authority which permitted her to design or supervise the implementation of the Licensee’s policy enforcing the prohibition against the serving of liquor to minors.

Therefore, I find that, on the evidence before me, the directing mind of the Licensee was not involved in the sale of liquor to Agent #34 on September 15, 2012.

### Adequate training and other systems to prevent the sale of liquor to minors

As noted above, the second stage of the due diligence defence as outlined in the *Beverly Corners* case involves two parts. The first part is the onus on the Licensee to demonstrate on a balance of probabilities the existence of adequate training and other systems to enable the Licensee to prevent the proven contravention from occurring.

### *The Operations Manual and training program*

In the evidence before me are copies of the relevant portions of the Operations Manual produced by the Corporate Group which refer to the serving of liquor at restaurants managed by the Corporate Group, including the *Cactus Club Park Royal*. Each of these portions has specific reference to the prohibition against serving liquor to minors. I find these portions of the manual to be complete and comprehensible to a member of the staff of the Licensee. These portions of the Operations Manual deal in detail with the serving of liquor to restaurant guests, and with the prohibition against serving liquor to minors.

These specific references to the prohibition against serving liquor to minors and the consequences to both the Licensee and the employee if this prohibition is breached clearly show that the corporate policy of the Corporate Group treats this prohibition as a priority. It cautions the staff member of the Licensee that if he or she is knowingly in breach of this prohibition the staff member will face immediate termination of employment.

The evidence of the Director was that each new staff member of the Corporate Group, whether starting as a server or as a manager, must go through training on each of the sections of the Operations Manual and must write and pass the tests located at the end of each section. She noted that a staff member cannot leapfrog a particular section as the training program is a linear process whereby the staff member being trained must successfully proceed through each section before commencing the next section. The reason she gave for this linear approach is that it ensures that each staff member at all levels is trained in the same way providing a consistency of approach, knowledge and performance across the Corporate Group.

### *The Bartender*

I was impressed with the testimony of the Bartender. There is no doubt from the Bartender's testimony that she was quite upset with the fact that she had served liquor to a minor. This distress was not caused by the fact that she had been caught; rather, it was caused by the fact that she felt that she had been deceived into acting in a manner



in which she had been trained not to act. In other words, through Agent #34's looks, manner, and approach, the Bartender truly believed that Agent #34 was over 25 years of age when she served her liquor.

I comment on the Bartender's testimony in this regard in that to me it is ample testament to the affect the Corporate Group's training program has had on its employees. The Bartender impresses me not as a person who has gone through the motions, completed the relevant sections in the training syllabus, and passed the requisite tests to become a bartender. The Bartender comes across as a person who is a professional, proud of what she does, and is absolutely mortified that she sold liquor to Agent #34. To me this speaks very favourably to the effectiveness of the training and systems of the Corporate Group to prevent the sale of liquor to minors. The Bartender impresses me as someone who exemplifies how a person who has taken the "Serving It Right" program should act.

#### *Deficiency in the Operations Manual*

I note that in the sections of the Operations Manual placed in evidence before me there is no reference to the fact that minors are not permitted to enter the Licensee's lounge area unaccompanied by an adult. As well, I note that the evidence before me shows that the hostess on duty at the entrance to the *Cactus Club Park Royal* on September 15, 2012 permitted Agent #34 to enter and sit at the bar in the lounge without asking her for identification.

Such an oversight might be considered to constitute a deficiency on the part of the Corporate Group's policies and training regimen. However the matter before me is not about the admission of unaccompanied minors into the *Cactus Club Park Royal's* lounge area on September 15, 2012. Rather the matter before me and the Contravention Notice deals with the service of liquor to minors and to section 33(1)(a) of the Act.

In any event, I do not find that this oversight detracts from the effectiveness of the Operations Manual and the training syllabus based upon it with respect to the prohibition against serving liquor to minors.

*The Licensee's quick service policy*

The Bartender's testimony clearly stated that the policy of the Corporate Group, as followed by the Licensee, is that customers should not have to wait for service. Indeed, the Bartender testified that within 10 seconds of Agent #34 seating herself at the bar, the Bartender asked her if she would like something to drink and if she would like a menu. Overall, it appears that it was 48 seconds between the time that Agent #34 sat down at the bar and was served liquor.

It might be seen that this quick serve policy could make it more difficult for the Licensee's staff to properly assess the guest they were serving and to make a decision as to whether or not this guest was a minor. However, when this suggestion was put to the Bartender on cross-examination, the Bartender denied that this policy had any effect on her ability to properly assess a guest's age. The Bartender was adamant that she could deliver quick service and still properly assess a guest's age. She stated that it was her belief that the reason she failed to properly assess the age of Agent #34 was because she was deliberately deceived by Agent #34.

I accept the Licensee's position, as forcefully maintained by the Bartender, that its policy on quick service does not detract from its staff's ability to determine whether or not a guest is a minor.

*Failure to assist staff with factors indicating age*

The evidence before me shows that the sections of the Operations Manual submitted in evidence do not attempt to assist the Licensee's staff in making a determination as to whether or not a guest is a minor by presenting staff members with characteristics or indices to which a staff member might look to make this determination. This omission might be considered a critical deficiency in the training program of the Corporate Group and, therefore, the Licensee.

During the hearing, Inspectors A and B, the Director and the Bartender were all asked how they determined whether or not a person was a minor and under the age of 19. Although a number of factors were submitted by the witnesses, it appears that the general consensus both from the Inspectors and the Licensee's witnesses is that to make such an age determination is a very difficult undertaking and dependent upon a number of factors related to both the person and his or her surroundings. It appears to be the consensus view of all of these witnesses that the only sure method of making a proper determination of age is to ask the guest for identification.

The evidence before me is that the training program of the Corporate Group/Licensee emphasizes that anyone under the age of 25 must be asked for two pieces of identification. The further evidence before me is that as a result of the serving of liquor to Agent #34 on September 15, 2012, the policy of the Corporate Group/ Licensee is now to ask for identification from anyone who appears to be under the age of 30.

I find that, as the determination of age is such a difficult and subjective issue, the lack of stated criteria in the Operations Manual is not a deficiency in the training program and systems of the Corporate Group/Licensee and, therefore, fatal to the effectiveness of this training program.

### *Conclusion*

I find that on the evidence before me the Licensee has satisfied the onus of establishing the first part of the second stage of the *Beverly Corners* test by demonstrating that at the time of the contravention it had in place adequate training and other systems to prevent the sale of liquor to minors.

### Reasonable steps to ensure the effective application of the training and systems

The next part of the second stage of the *Beverly Corners* test is whether or not the Licensee took reasonable steps to ensure that its training programs and systems were being effectively applied.

Both the Director and the Bartender in their evidence spoke of the regular meetings both at the Corporate Group management level and at the Licensee employee level at which operational matters were discussed. Both of these witnesses testified that regularly included in these discussions was the serving of alcohol and specifically the prohibition against serving alcohol to minors.

Both of these witnesses spoke to the posting of signs in the staff areas of all of the licensees in the Corporate Group, including the Licensee, which signs deal with the prohibition against the sale of liquor to minors and the requirement to ask for two pieces of identification from any person who appeared to be under the age of 25.

In addition, both the Director and the Bartender made no apologies for the stated policy of the Corporate Group that any employee knowingly serving liquor to a minor would be subject to immediate dismissal.

#### *Failure to enforce policy on termination*

It is noted that the Licensee failed to terminate the Bartender in accordance with its “no exceptions” policy after the Bartender admittedly served liquor to Agent #34. This lack of action suggests very strongly that the Licensee failed to enforce its own policy.

The sections of the Operations Manual in evidence before me clearly state that an employee who *knowingly* serves liquor to a minor will face immediate dismissal. The Director’s evidence is that following the incident on September 15, 2012, the entire matter was reviewed by the management of the Corporate Group and the Licensee. Following this review, she stated, the conclusion of these management groups was that, although it was clear from the video footage that the Bartender served liquor to Agent #34, it was equally clear that the Bartender clearly thought that Agent #34 was a 27 year old woman rather than a 17 year old high school student. Therefore, they decided that, as she did not *knowingly* serve liquor to a minor, her employment should not be terminated.

I find that the failure by the Licensee to terminate the Bartender following the incident on September 15, 2012 did not demonstrate a failure by the Licensee to enforce its own policy against serving liquor to a minor.

### *Conclusion*

The most important element of a training program is the results. As above set out, the Bartender in her testimony clearly demonstrates the results of proper and effective training and an ongoing commitment to ensuring that the policies of the Corporate Group/Licensee are delivered in practice. By her actions and her attitude to her job, she demonstrated to me that the training programs and systems of the Corporate Group/Licensee are effective and are delivered on an ongoing basis resulting in the delivery at the restaurant level by the restaurant staff of the overall corporate policies of the Corporate Group/Licensee.

I find that on the evidence before me the Licensee has satisfied the onus of establishing the second part of the second stage of the *Beverly Corners* test by demonstrating that the Corporate Group, and therefore the Licensee, took reasonable steps to ensure the effective application of their policy against the sale of liquor to minors.

### **Summary**

In summary, I find that the person who sold liquor to Agent #34 on September 15, 2012 at the *Cactus Club Park Royal* (the Bartender) was not the directing mind of the Licensee. I also find that the Licensee has satisfied the evidentiary burden on it and has clearly demonstrated on a balance of probabilities that, on the date of the contravention (September 15, 2012), it had in place adequate training and other systems to prevent the sale of liquor to minors and that it had taken reasonable steps to ensure the effective application of that training and the operation of those systems.

I, therefore, find that the defence of due diligence applies and that the Licensee is not liable under the provisions of section 33(1)(a) of the Act with respect to the contravention set out in the Contravention Notice and described in the NOEA.

*Original signed by*

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R. John Rogers  
General Manager's Delegate

Date: November 27, 2013

cc: Liquor Control and Licensing Branch, Vancouver Office  
Attention: Donna Lister, Regional Manager

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