



**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: Yang-Myung Hotel Management Limited
dba Astoria Hotel LRS
769 East Hastings Street
Vancouver, BC

Case: EH13-191

For the Licensee: George Metrakos

For the Branch: Cristal Scheer

General Manager's Delegate: Nerys Poole

Date of Hearing: September 24 & 25, 2014

Date of Decision: November 6, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Yang-Myung Hotel Management Limited (the "licensee") owns and operates the Astoria Hotel Licensed Retail Store at 769 East Hastings Street in Vancouver, BC (the "LRS"). The licensee holds Licensee Retail Store licence number 191222 (the "licence"). According to the terms of its licence, the licensee may sell liquor from 9:00 am to 11:00 pm, Monday through Sunday.

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

The licensee appointed Mr. George Metrakos, an employee of the licensee, to be its representative at the hearing.

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the "Act") on November 22, 2013, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program ("MAP"). The licensee admits that its employee sold liquor to the minor agent. However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated December 9, 2013 (the "NOEA") (Exhibit 1, tab 1).

The Branch alleges that on November 22, 2013, the licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 2, Schedule 4, *Liquor Control and Licensing Regulation*). The branch proposes a monetary penalty of \$7,500.

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

33(1) A person must not

(a) sell, give or otherwise supply liquor to a minor.

ISSUES

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

EXHIBITS

- Exhibit 1: Branch Book of Documents, tabs 1 to 12.
- Exhibit 2: Minor's photo with identification (sealed).
- Exhibit 3: Astoria Service Refusal Sheets, dated April 28, 2014, April 14, 2014, September 30, 2013 and June 17, 2013.
- Exhibit 4: Astoria employee knowledge testing questionnaire dated December 8, 2013, noting employee ID 10 (LRS clerk's ID).
- Exhibit 5: Mystery shopper program record sheets, dated January 22, 2014, July 13, 2013, May 11, 2013, November 28, 2012, April 14, 2012, December 4, 2011, and March 16, 2011.
- Exhibit 6: Duties and Obligations sheet House Policy dated January 28, 2014.
- Exhibit 7: Clerk's SIR card, photocopied.
- Exhibit 8: Samples of logbook entries.
- Exhibit 9: Liquor Serving Guidelines, dated January 9, 2011, February 4, 2012, January 1, 2013, and January 8, 2014.
- Exhibit 10: Astoria Hotel LRS – Pre-hiring Training and Orientation.
- Exhibit 11: Handwritten letter from clerk, dated December 14, 2013.
- Exhibit 12: Astoria – A history in spin; Serving you Better.
- Exhibit 13: Summary of Service Refusals (from April 28, 2013 to December 6, 2013), compiled from logbook entries.
- Exhibit 14: Astoria Management Inquiry, dated December 4, 2013.

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

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

WITNESSES

The branch called two witnesses: the two liquor inspectors who attended the LRS with the minor agent on November 22, 2013.

The licensee called two witnesses:

- The LRS Clerk who sold the liquor to the minor agent on November 22, 2013.
- The controller/manager of the licensee who is responsible for the management of the LRS (the "Controller") and has been employed at the Astoria for 15 years.

FACTS**November 22, 2013 incident**

The following facts are undisputed.

On November 22, 2013, two liquor inspectors attended the LRS with a minor agent employed by the branch under the MAP. The purpose of attending the LRS with the minor agent was to test compliance with the Act's prohibition against selling liquor to minors. The branch implemented the MAP in 2011, after the Act was amended to allow the branch to employ minors as agents for this purpose.

According to Exhibit 2 and the testimony of the liquor inspectors, the minor agent was 18 years old on November 22, 2013.

The minor agent walked ahead of the two liquor inspectors and entered the LRS at approximately 8:41 p.m. The LRS Clerk advised the minor agent to wait outside as he had to obtain some change from the adjacent office. The LRS Clerk then locked the front door. The two liquor inspectors, the minor agent and another customer waited outside for the LRS Clerk to return, which he did at 8:45 p.m. The two liquor inspectors, the minor agent and the other customer then walked into the LRS.

The minor agent walked directly to the cooler and selected a six pack of Pabst beer (photo at tab 6, Exhibit 1). He walked directly to the sales counter with the product and presented it to the LRS Clerk for purchase. The LRS Clerk apologized for the delay in serving him. He then took the twenty dollar bill from the minor agent and proceeded to complete the sale of liquor to him. The LRS Clerk returned the change from the sale and deposited the beer into a plastic bag. The LRS Clerk did not provide the minor agent with a receipt. At no time did the LRS Clerk request identification from the minor agent. At the time of the sale of the product to the minor agent, the two liquor inspectors were standing approximately five feet from the sales counter. They had a clear and unobstructed view of the sales transaction between the minor agent and the LRS clerk.

The minor agent then exited the LRS with the product at approximately 8:45 p.m. The two liquor inspectors followed him out the door. The minor agent returned to the vehicle where he gave the beer to one of the liquor inspectors, who tagged the product as evidence. The minor agent then completed the observation form and a written narrative detailing his involvement concerning the sale of the liquor to himself (Exhibit 1, tab 5).

At approximately 9:03 p.m., the two liquor inspectors returned to the LRS and talked to the LRS Clerk. They advised him of the contravention and served him with a contravention notice for a violation of section 33(1)(a) of the Act (Exhibit 1, tab 2). The LRS Clerk stated to them that he had worked at the LRS for two years and he provided no reason as to why he sold the liquor to the minor agent without requesting identification. The LRS Clerk signed the contravention notice, acknowledging service of the notice. Both liquor inspectors exited the LRS at approximately 9:21 p.m.

On November 25, 2013, the branch sent a cover letter with the copy of the contravention notice to the licensee. On November 26, 2013, one of the liquor inspectors phoned the contact number for the licensee and advised the corporate licensee's representative to contact the liquor inspector. On November 28, 2013, the licensee's representative and a relative of hers attended at the Vancouver branch office where they discussed the contravention. The liquor inspector explained the procedure regarding enforcement action.

LRS Clerk's recollections

The LRS Clerk testified that he works at the LRS part-time, on Fridays, Saturdays and Sundays. He has worked there since 2011. Prior to 2011, he had worked there for a period of about five years and then left in 2009 to go overseas.

On the evening of November 22, 2013, he was working on his own in the LRS when three potential customers wanted to enter the store. He told them he had to lock the door to go to the hotel desk area to obtain change. He then returned and unlocked the door. The three entered, along with another customer. At the time, there was no assistant working in or around the LRS as he had left at 8:00 p.m. because of a family emergency.

The LRS Clerk remembered the two men who walked in with the minor agent. He recalled them looking around for a while within the LRS and one of them making a request for something the LRS did not carry. While the two men were standing nearby, the LRS Clerk made the sale to the minor agent without requesting identification.

When the two liquor inspectors returned and gave the LRS Clerk the contravention notice and asked him if there was any reason why he would sell liquor to a minor, his only answer at the time was that it had been a busy day. He later told management about an earlier incident that had rattled him somewhat. A young man had entered the LRS with a large bag. The LRS clerk thought he was putting single coolers into the bag. He looked at the man who looked back at him and asked the LRS Clerk if he wanted to know what was in the bag. The young man proceeded to open the bag and to show him a large knife/cutlass about 18 inches long.

Management noted the comments of the LRS Clerk with respect to the knife incident in the Management Inquiry Sheet dated December 4, 2013 (Exhibit 14). The LRS Clerk responded to management's inquiry as to why he sold liquor to a minor: "that it was an overwhelming night – a busy day (a welfare Friday), with one native showing a cutlass when making eye contact with a possible shoplifter, rude customers and certain individuals constantly trying to steal."

The LRS Clerk testified that he regularly asks anyone who appears to be under the age of 25 for ID but did not do so with the minor agent. He stated he would ask for ID about 25 times on a shift. He also said the person who stood at the door (the assistant who left early) would also ask for ID or tell young-looking customers to have their ID ready. His normal practice is to ask anyone who appears to be under 25 for two pieces of ID: a government issued ID with a photo and another type of ID. To help verify the ID presented, he usually asks for the address and the postal code. If he has any doubts about the ID, he explains that his boss is watching the camera and he would apologize and say he could not serve the person. He said this happens a lot with photocopied ID.

Staffing in the LRS

The LRS clerk and the Controller testified that two employees, other than the clerks, are usually available to assist with LRS functions. One is an employee who comes on a frequent basis to fill up the cooler and to take recycling downstairs. Another is an employee of the hotel who helps to control the flow of traffic into the LRS on busy nights. He might deny entry to an undesirable before they enter the LRS and/or request identification of anyone appearing under the age of 25, or in some cases, to alert an individual to have their identification ready to show.

On the evening of November 22, 2013, the assistant who helps with stocking and recycling had to leave for a family emergency around 8:00 p.m., so the LRS Clerk was on his own in the store. The hotel desk manager was at the hotel desk, not less than 10 feet away from the LRS door. The desk clerk in the hotel was available to help if needed, but was not in the LRS at the time of the incident. If there were a rush of customers, which was not the case that night, the desk manager would leave the hotel desk and come to the LRS.

Nature of the neighbourhood

The Controller described the culture and neighbourhood of the downtown eastside. He stated that the area houses the people who are most difficult to house in Vancouver; many have different kinds of mental issues and disabilities. Because of some of the difficulties that the LRS has had with customers, there is a fair turnover of staff. Some of the incidents can be very challenging for staff. The LRS will refuse service to individuals who have been deemed unfit or unstable because of previous encounters with LRS staff.

The LRS Clerk testified about how he deals with the constant threat of theft or robbery in the LRS. He stated that he is not intimidated or frightened by petty theft or undesirables. If necessary, he calls the police. As the LRS is a small store, staff will generally limit the numbers who enter at a given time to five customers. The staff member, who had left early on the evening of November 22, 2013, usually assists with controlling the number of customers entering the LRS at any one time.

The LRS Clerk had an unsettling experience with a customer the week before November 22, 2013. A clearly intoxicated customer wanted to buy a strong beer. The LRS Clerk refused to serve him, politely stating he could not because of his condition. The customer became upset, grabbed the LRS Clerk and assaulted him. The LRS Clerk was able to defend himself but the customer then broke the window in the LRS as he left. The management's report of the incident on November 22, 2013 refers to this assault on the LRS Clerk (Exhibit 14).

The LRS Clerk described some of the tricks employed by people who enter with intent to steal. He said these generally occur when there is more than one customer in the LRS, in the hope that the LRS Clerk will be distracted. The LRS Clerk stated that sometimes two to three people will enter and ask him questions, while a friend is slipping coolers into their bag. Other times, friends will distract him with questions at the point of sale machine while an accomplice is running off with product. People are often high on drugs, sometimes operating in gangs, sometimes as single individuals.

The logbook samples (Exhibit 8) provide a vivid picture of the nature of the downtown eastside activities that the LRS and its staff encounter in this location. There are many references to people stealing or attempting to steal, people high on drugs, assaults, and refusal of service to intoxicated individuals.

Disciplinary action taken

After the incident of November 22, 2013, management suspended the LRS Clerk for one day and instructed him to use the day to educate himself with respect to performance of his job duties and responsibilities, particularly around the service of alcohol to minors. Management asked him to write down his recollections of the incident and to write an essay on negative effects of underage alcohol consumption (Exhibit 11). Management also advised him to redo his Serving It Right certificate, which he did (Exhibit 7). In its management inquiry dated December 14, 2013 (Exhibit 14), management notes the "impeccable record" of the LRS Clerk in his employment with the LRS and that the LRS Clerk "sincerely and genuinely regrets" the incident.

The LRS Clerk testified that he deeply regretted his actions on November 22, 2013. He has done further reading on the topic of underage drinking. He feels he is fully aware of the gravity of the contravention and the negative social and community effects caused by underage drinking.

LICENSEE'S POLICIES, PROCEDURES AND TRAINING

The licensee's two witnesses gave evidence about the management of the liquor store, its policies and procedures, the training given to employees, and how the policies are implemented in the LRS.

Policies and procedures

The LRS Clerk explained about the store policies with respect to refusal of service. Because of the type of clientele at the LRS, the licensee has specific policies and directions to employees about how to refuse service and the types of individuals who should be refused service. These include individuals who may have caused problems at

previous times, that management has deemed unfit or unstable because of their behaviour, who appear intoxicated or high on drugs, who appear to be under the age of 25 and do not produce the required forms of identification, and who are without shoes or shirts. LRS staff must record any service refusals in the logbook. In addition, they document the number of service refusals during a week and the reasons for the refusals on a separate sheet (Exhibit 3).

The LRS has a Duties and Obligations House Policy sheet. The licensee submitted a sample sheet dated January 28, 2014 (Exhibit 6), signed by several of the staff, including the LRS Clerk. Management requires each employee to sign as having read the information. The 25 points on the sheet relate to general duties in the LRS including:

- All anecdotes must be entered in the logbook. (no.5)
- I.D. will be checked at all times for people who look under 25 years. (no.6)
- No one will serve people who are drunk or high on drugs. (no.7)
- Will read the Serving It Right book and govern accordingly. (no.8)

Management reviews and updates this document on a yearly basis. The Controller stated that they have used documents similar to this one for about five or six years. He did not have a copy from the earlier years. The LRS Clerk testified that he and his co-workers follow these policies.

The licensee submitted a document (Exhibit 12) titled "Astoria, a history in spin, serving you better" and on the second page: "Operation – Training and Reference Manual: a hotel, a restaurant, a liquor store and an urban farm." A section on Age Identification explains the importance of checking for ID and sets out the policy of checking for ID of anyone who looks younger than 25 years of age, as follows:

Why check ID?

- As a server it's up to you to determine whether your guests are 19 years of age or older.
- It is illegal for licensed establishments to serve alcohol to anyone under 19 years.
- You and your establishment can be sued and/or fined. Your employer's Liquor Licence can also be suspended or revoked.

When to check ID?

- When a person looks younger than 25 years of age.
- Body language or behaviour is unusual, for example avoiding eye contact or trying to rush the process.

Acceptable ID:

- Valid provincial driver's licence or out-of-province photo driver's licence
- Provincial identification card
- Valid passport
- Armed forces identification card
- Certificate of Indian status
- Canadian citizenship card/permanent resident card
- Always ask for one or more pieces of government-issued photo ID
- NEVER accept student cards or expired ID

How to check ID:

- Examine in a well-lit area
- Tilt the ID under light to see all of the reflective seals and holograms flash
- Check the overall condition of the card – minors often use the expired license of a family member or friend
- Visually and manually confirm that the ID's size, weight and shape are normal and that the photo, lettering and lamination haven't been switched, altered or tampered with
- Check for uneven surfaces and edges as well as cuts or bubbles in the laminate

What to check:

- Does the person actually look old enough to be the person on the ID?
- Does the ID verify that the person is over the legal drinking age?
- If the colours are dull-faded or if the birth or expiry dates look scratched, or appear to have been tampered with – do not accept the ID
- Are the letters in the same font and same size of font?
- Beware of misspelled words or disclaimers
- Compare ID photo and description – height, weight, eye and hair colour are the most likely and easiest to change, pay attention to the shape and size of the facial features

- Consider checking other features such as: shape of face, cheek bone structure

What to do when the Person and ID aren't a real match:

As a server, it is your right and responsibility to ask for additional ID if you have any concerns about the identification that has been presented to you. If you still have doubts about the validity of the ID you might want to consider asking the following questions:

- What is your birthday?
- How do you spell your middle name?
- What is your postal code? Your street address?
- Ask the person to sign a blank sheet of paper and compare the signature to the one on the ID
- Again, pay attention to body language and behaviour.

This document also includes considerable information about intoxication and the signs of intoxication.

Training

During his first few days of employment, the LRS Clerk worked with a senior employee in a buddy system. As a new hire, he watched the senior employee for a few hours and then was given the opportunity to perform while the senior employee observed him. He then reviewed the Guide with the Controller who encouraged him to ask questions. The LRS Clerk stated that this training process/buddy system takes place over three or four days, depending on the individual's knowledge or level of experience, and that other new hires follow the same process.

The LRS Clerk testified that occasionally other individuals involved in the management of the Astoria Hotel will come by and ask him questions to check on his knowledge of various aspects of his job in the LRS. He receives advice regularly about issues relating to service to intoxicated persons and minors and dealing with counterfeit money, all common problems in the area.

The LRS has a “pre-hiring training and orientation” sheet (Exhibit 10), to be completed by a senior manager only about prospective applicants and whether they have been informed about specific aspects of the duties in the LRS. The orientation sheet deals with: 14 questions on health, safety and emergency procedures; 10 questions on moral and legal obligations; 11 questions on daily operations and maintenance; 6 questions on storage, rooms and supplies.

Under the “moral and legal obligations” section, the questions relating to identification of minors are:

- Has the applicant been informed of proper and polite service refusal policy?
- Has the applicant been informed dealing with underage customers?
- Has the applicant been informed on ID checking policy?
 - Has the applicant been informed of the ID verification policy?
 - Ask for postal code
 - Ask for the sign (Libra, Leo, etc.)
- Has the applicant been informed of the types of ID, condition of ID and the amount of ID required to produce by a young looking person?
 - two pieces of state issued ID (one with the picture e.g. D/L – the other (health/SIN card)
 - non effaced – non-doctored ID
- Has the applicant been reminded of age of majority date of the cash register monitor?

At the end, there are several questions relating to communication and information:

- Has the logbook been shown to the applicant?
- Has the purpose of the logbook been explained to the applicant?
- Has the service refusal sheet been shown and explained to the applicant?
- Has the memo policy been explained to the applicant?
- Was the applicant given an opportunity to ask questions?

Management must check off yes/no indicating that the subject matter has been covered with applicants. The LRS Clerk stated that he reviewed this with the Controller when he was hired in 2011. Exhibit 10 shows the LRS Clerk's name with the date of March 29, 2011 and the Controller's signature indicating he conducted the training and information session.

Ongoing training programs include an annual skills audit that checks staff's knowledge of various issues. The Astoria Employee Knowledge Testing Questionnaire (Exhibit 4) tests the knowledge of employees on a number of issues relating to service of alcohol and store policies. The Astoria also conducts a few informal training programs. Exhibit 4 is a copy of the test taken by the LRS Clerk on December 8, 2013. The LRS Clerk received 100% on the test. He testified that staff take these tests every year.

The last question on this questionnaire deals with an employee's understanding of the importance of the Guide. The multiple choice answers include (4) as the correct answer: "Read and signed once; thoroughly understood and referred to whenever necessary, read during free times." The LRS Clerk testified that the Guide is kept in the lower shelf just under the cash desk for easy review.

When he was hired in 2011, the LRS Clerk had his Serving It Right certificate. After the November 22, 2013 incident, management asked him to retake the Serving It Right test, which he did (copy of his new SIR certificate at Exhibit 7). A copy of the Serving It Right manual is kept in the LRS and management encourages staff to review it.

Implementation of policies

The LRS management implements its policies on identification of minors through:

- Its initial training programs.
- The ongoing reminders from management in either one-on-one meetings or monthly staff meetings.
- Reminders to staff to review the Guide, the Serving It Right Manual, the Liquor Serving Guidelines that are signed off annually.
- The mystery shopper program.

Other reminders about ID policy include the signs around the store and at the cash register. Staff are encouraged to read the binders that contain newspaper clippings about liquor service issues.

Reminders to staff of policies

The management requires all LRS staff to be familiar with the Guide, as a condition of employment. In addition, management requires all staff to sign a sheet that summarizes the Astoria Hotel's policy with respect to the service of liquor. The LRS Clerk explained about the importance of these liquor serving guidelines. He stated that these set out the store rules about responsible beverage service and that everybody who works behind the till must follow these rules. With respect to the checking of identification, he testified that staff check anyone who appears to be under 25 and that they ask for two pieces of ID. The photo ID is the primary ID, while the second ID can be without a picture.

The Liquor Serving guidelines (Exhibit 9) state:

We reserve the right to [not] serve anyone who is deemed intoxicated, slurred speech, bloodshot eyes, fumbling etc. (in accordance with BCLDB guidelines) – unstable, persons who do the Hastings shuffle (dance) or high on drugs. Undesirables who loiter in the vicinity, engaged in begging or harassing Astoria customers, or anyone seen drinking consuming alcohol products outside.

Any individual who appears to a responsible person to be under 25 years of age, must require any such individual to produce, before being served alcohol, identification bearing their photograph (as primary ID), date of birth and a holographic mark. The only forms of identification to be accepted is a photo card driving licence, passport or a proof of age card with the picture and the date of birth where all entries are clearly visible, unaltered and un-doctored and clearly visible. A second ID with the bearers name and signature is required to verify the authenticity of the primary ID.

In addition to the above no one who does not have any shoes or a shirt must be served. All service refusals must be marked in the logbook or service refusals sheets provided. Anyone who has a prior negative contact with the premises should not be served (stealing, assault, violent aggressive and intimidating behaviour). Once a weekly refusal sheet is filled it must be filed in the "Service Refusal Binder." LRS – Terms and conditions book [the Guide] must be retained at the store and referred to as necessary.

A final note is followed by the signature of two of the licensee's representatives: "The following person(s) have been trained on this policy and are therefore duly authorised to act in accordance with it."

The employee names and signatures on these sheets show that the LRS Clerk (and others) signed on January 12, 2014, January 19, 2013, and February 3, 2012. The fourth sheet, dated January 9, 2011, is signed by three employees but not the LRS Clerk who was not working at the LRS at that time.

There are a number of signs in and around the LRS that emphasize the requirement for checking identification. A clearly visible sign at the entrance states that the LRS reserves the right to check ID, and what type of ID must be produced. The sign also notes that production of ID does not guarantee service. There are two signs at the door and a sign at eye level on the immediate left of the counter. There is also a sign on the counter by the cash register and a reminder to staff indicating the age of majority on the cash register monitor (as noted in question 8 on Exhibit 10).

The LRS management maintains a binder of newspaper articles of interest to the LRS. This binder is kept under the sales counter and is made available to the LRS staff to inform them of articles of relevance, such as "buying kids booze comes with price." The LRS Clerk regularly reviews the articles. After the event of November 22, 2013, management suggested he read a newspaper article with regards to a young man's experience with alcohol and its negative effects on his life. This young man is now working to educate youth regarding the negative effects of alcohol consumption. The dates of the articles in this binder range from 2007 to 2013.

Management encourages staff to read this binder and the logbook during their preparation time. LRS Clerks are employed for eight hours, although their shift in the store is only seven hours. This allows them one hour of preparation and review time.

Staff meetings and interaction with management

The Controller testified about his role in the LRS. He has an office behind the LRS with a camera that allows him to see the sales counter and parts of LRS. He described himself as a hands-on manager who is there every day. He was not there when the LRS Clerk sold the liquor to the minor agent. He arrived later that evening.

Whenever he walks into the LRS, he talks to staff about the importance of requesting ID from young persons who appear under the age of 25.

The LRS Clerk and the Controller testified about the types of informal staff meetings held in the LRS. These are often one-on-one discussions between the Controller and the staff person. The Controller or another management person may talk to staff two to three times a day to share information about things around the LRS, including incidents with intoxicated individuals outside the LRS.

There are also monthly staff meetings, generally on a Saturday evening. At these meetings, management will discuss issues of concern that may include: rooming houses, the immediate area outside the LRS (e.g. drinking outside), school kids coming into LRS, no service without shirt or shoes, the weekly service refusal forms, etc. The main office will issue occasional memos about issues to the staff. The licensee did not submit any agendas or minutes of these meetings. These staff meetings are for both hotel and LRS staff. The Controller said they try to hold staff meetings on the last Saturday of each month.

Logbook and reporting out

The LRS has a logbook that is kept under the sales counter (samples of the entries submitted as Exhibit 8). The LRS staff use this logbook to record any incidents that are deemed to be of importance. The clerk on duty at the time records the time, date and briefly recounts what happened. Staff usually record incidents immediately or as soon after the incident as possible.

Some examples of incidents in the logbook are:

- Record of a verbal assault of store clerk and desk clerk, police called (entered by the principal of the corporate licensee on May 9, 2014).
- Service refusal on May 23, 2013 because customer attempts to walk out with a sixpack before transaction is completed with his friend.
- Service refusal on May 24, 2013 due to intoxication.
- Service refusal on August 18, 2012 to someone without I.D.
- Service refusal on August 26, 2012 to unstable elderly gentleman.
- Service refusal on July 22, 2012 to two very drunk men, one of whom smashed the window as he left, called police.
- Service refusal on July 27, 2012 to intoxicated youth.
- July 31, 2012 - caught a guy stealing 2 buds, photo taken.
- Service refusal on August 30, 2012 to intoxicated man.
- July 31, 2012 - note from controller not to sell liquor to the gang of people who sit by the bicycle rack as requested by police.
- Service refusal on August 9, 2012 to young girl who seemed high.
- Service refusal on November 19, 2008 due to intoxication.
- Service refusal on October 20, 2012 to underage girl who did not have ID.
- Service refusal on March 24, 2013 to intoxicated man.
- Service refusal on March 28, 2013 to girl without ID.

The logbook entry for the date of the incident is very brief, just noting the presence of the liquor inspectors on that day. The LRS Clerk explained that the management inquiry sheet (Exhibit 14), documenting the events of November 22, 2013, would be included on the blank page of the logbook.

The Weekly Service Refusal log sheet (Exhibit 3) provides a list of reasons for refusal of service and a space for a tick mark to check under each day of the week. The reasons for refusal include: no ID, improper or invalid ID, intoxication, prior barring, undesirable, unstable, other (with an opportunity to explain "other" below the graph). Exhibit 3 includes four samples of these sheets, for weeks starting April 28, 2014, April 14, 2014, September 30, 2013 and June 17, 2013. As an example, the weeks of June 17, 2013 and September 30, 2013 (both prior to the incident) show six ticks for refusing service for "lack of valid ID."

The licensee submitted a summary sheet of these service refusals, prepared specifically for this hearing from the weekly service refusal sheets, (Exhibit 13). The summary covers the period from July 13, 2012 to December 6, 2013 and documents 56 refusals of service for reasons which include "no valid ID", intoxication, public drinking, disorderly conduct, unstable customer, personal hygiene. "No valid ID" is the reason for service refusal on 19 different dates during this period.

Mystery shopper program

The Controller explained that management introduced this about four years ago on the advice of a liquor consultant. They try to bring in the mystery shoppers about twice a year. The Controller explained this program and said they use young relatives of the owners as the mystery shoppers (over the age of 19 but under 25).

The forms submitted as Exhibit 5 indicate the following dates for the mystery shoppers: January 22, 2014, July 13, 2013, May 11, 2013, November 28, 2012, April 14, 2012, December 4, 2011, and March 16, 2011.

The forms filled out by the shoppers include the question: "Were you asked for identification during entrance to the premises at the time of purchase?" Although relatives of the owner, the Controller testified that they have a more critical eye than outsiders and are harder on their review of the hotel and the LRS.

Post-incident policy changes

As a result of the November 22, 2013 incident, the LRS management made some changes to ensure such an incident will not happen again. They told the LRS Clerk to take another Serving It Right exam and asked him to write out his views of the incident. Management has hired a consultant to review their current policies, to make any recommendations and to provide the LRS with guidelines specifically for identification issues. The consultant has described this as a due diligence package for the licensee.

SUBMISSIONS – BRANCH

The branch notes that the licensee has admitted that one of its employees sold liquor to the minor agent on November 22, 2013.

The branch submits that there was a breakdown in the system on the evening of November 22, 2013. The branch says that it was a failure in the implementation of the licensee's policies and practices and not just the case of a single employee failing to follow the established policies. Given the particular circumstances of this LRS, i.e. its location and the demands placed on its staff, a contravention such as the service of liquor to a minor was foreseeable on November 22, 2013.

Because of the seriousness of the section 33(1)(a) contravention (i.e. the effect of alcohol on young people), the branch submits that a penalty of \$7,500 is warranted.

SUBMISSIONS – LICENSEE

As noted, the licensee agrees that the LRS Clerk sold liquor to a minor agent on November 22, 2013. The licensee submits that it has established a defence of due diligence to the contravention. In a written submission, the licensee reviewed the evidence of its two witnesses and the documents presented in the hearing.

The licensee highlights the key documents that demonstrate the hiring and training systems in place, the policies relating to liquor service in the LRS, the recording of incidents in the logbook and in the weekly service refusal sheets.

The licensee describes the events of November 22, 2013 and submits that, at the time of the entry of the minor agent, the LRS Clerk was distracted and somewhat intimidated by the presence of the two liquor inspectors, who were not purchasing a product but merely standing close by the sales counter observing him. The licensee refers to the event that occurred earlier that day that had rattled the LRS Clerk, with respect to a male showing what appeared to the clerk as a cutlass and his belief that this person was trying to steal product from the LRS.

The licensee describes the neighbourhood where the LRS is located. It is in the downtown eastside of Vancouver and attracts a clientele quite different from other parts of Vancouver. The LRS Clerk testified that he confronts people on a daily basis who are trying to steal liquor products from the LRS. The licensee says that the threat of robbery is a constant concern to all employees and that the incident prior to the entry of the liquor inspectors, with the man with the cutlass, may help to explain the mindset and nervousness of the LRS Clerk that night.

The licensee reviewed the testimony of the Controller who has been an employee of the licensee for 15 years. The Controller described the mystery shopper program that has been in place for a number of years. The Controller also explained about the post-contravention measures he has taken, including the hiring of a consultant to further refine the LRS policies and provide advice on best practices to help prevent any further contraventions.

The Controller testified about the training programs for LRS staff, at the time of hiring and during their employment. He explained about the use of a staff person who is generally available to assist the LRS clerks with processing recycling, standing outside to monitor numbers going into the LRS, and alerting potential customers to ID checks if they appear under age. On the night of November 22, 2013, this person had left at 8:00 p.m. due to a family emergency.

The licensee points out that it has never, since taking over the LRS licence in 1988, received a contravention for service to a minor. The licensee takes the matter of responsible service, particularly avoiding service to minors, very seriously. The licensee submits that it has been diligent and has taken reasonable steps to prevent this sort of contravention and that the licensee actively ensures that its procedures are consistently acted upon and challenges are dealt with. The licensee states further that the sale to the minor agent was not done by the directing mind of the licensee.

The licensee has implemented significant training practices, promoted its liquor service guidelines to its employees and actively reminds them of the ID checks for anyone who may appear under the age of 25. The licensee concludes by saying that it has met the test of establishing a defence of due diligence as set out in the *R. v. Sault Ste. Marie* (1979) 2 SCR 1299 decision.

REASONS AND DECISION

Contravention

The licensee has admitted that the contravention of section 33(1)(a) occurred on November 22, 2013. I find therefore that the licensee contravened section 33(1)(a) of the Act by selling liquor to a minor.

I turn now to the defence of due diligence.

Due Diligence

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

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

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

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

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

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

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

The directing mind

I find that the LRS Clerk is not the directing mind of the LRS. The LRS Clerk had nothing to do with the development of the policies. The Controller drafted or introduced many of the policies. Other representatives of the corporate licensee reviewed and approved the policies. Neither the Controller nor any other representatives of the corporate licensee were present in the LRS at the time of the incident on November 22, 2013.

I therefore turn to the second stage of the *Beverly Corners* analysis.

Adequate training and other systems

As noted above, the licensee introduced evidence about the steps it takes when hiring and training new staff. The licensee also described the policies and procedures in place in order to ensure its employees are aware of the law and specifically on how to prevent the sale of liquor to minors. These include:

- Three day training program using buddy system.
- Pre-hiring training and Orientation Program, reminding management of policies to review with new hires (Exhibit 10).
- Serving It Right certificate required for all employees.
- Serving It Right Manual and the Guide, kept below sales counter for employee reference and review.
- Liquor Serving Guidelines with employees' and management signatures indicating annual review (Exhibit 9).
- LRS' Employee Knowledge Testing Questionnaire as a training tool with annual updates (Exhibit 4).
- The Duties and Obligations House Policy sheet signed off by employees, with testimony from licensee that these policies have been in place and followed for five or six years (Exhibit 6).
- Astoria Operations Plan, setting out explicit policies on checking for ID and what is acceptable ID (Exhibit 12).

I find that the licensee has drafted policies and procedures and has implemented training on these policies to guide staff to ask for two pieces of ID, one with photo, of anyone who appears to be under the age of 25.

Effective application and operation of the systems

The licensee presented evidence of the steps it has taken to ensure staff are applying and following the ID policies:

- Presence of an assistant on busy nights to monitor the flow of people into the LRS, and to either check for ID before customers enter or to alert a customer to have ID ready.
- Signs in the LRS advising of ID requirements, including one at the point of sale register with age of majority noted (referred to in Exhibit 10).
- Controller's testimony that he regularly checks with staff about the importance of requesting ID and verification of ID.
- The Controller's ability to monitor what occurs in the LRS through the camera in his office.
- Annual reviews and testing of employees, through the Knowledge Testing Questionnaire (Exhibit 4) and requirement for annual staff sign off of the staff Duties and Obligations sheet (Exhibit 6) and the Liquor Serving Guidelines (Exhibit 9).
- Record-keeping of incidents in the logbook (samples at Exhibit 8) and the use of weekly service refusal sheets (Exhibit 3), as reminders to staff of the importance of the policies on service refusal.
- Binder of news clippings used to educate staff on the negative effects of alcohol on young minds.
- Mystery shopper program to test staff's adherence to the policies.
- Staff meetings once a month and informal one-on-one meetings between the Controller and LRS staff on a regular basis to remind and discuss any issues of concern, including discussion of service to minors and reminders re: ID checks.

The test for due diligence is not perfection. The test is whether a licensee has implemented adequate training and other systems and taken reasonable steps to ensure its application and operation of its systems.

I agree with the branch submission that the failure on the evening of November 22, 2013 was not only that of the LRS Clerk (who did not request ID of the minor agent) but was also the failure in the backup system when the assistant normally on duty had to leave unexpectedly at 8:00 p.m.

I find that the failure in the backup system probably contributed to the contravention here. Given the emergency that arose with this employee, this situation was not necessarily foreseeable by management, as this employee left only a short time before the incident with the minor agent. I therefore find that this failure in the backup system does not preclude a finding of due diligence.

The licensee presented considerable evidence of its policies, training and systems within the LRS, and the implementation of those systems with the staff. I find that the licensee has taken reasonable care to establish a proper system to prevent contraventions like the one on November 22, 2013, and has taken reasonable steps to ensure the application and operation of its systems.

With respect to the licensee's submission that the LRS Clerk was somewhat intimidated by the presence of the two liquor inspectors, and from the incident earlier in the day, I find that the LRS is located in a neighbourhood where such incidents occur on a regular basis. The licensee has an obligation to ensure its employees have the necessary backup so that they are not disturbed by the presence of other customers to the point where they are unable to perform their duties. The LRS Clerk testified that he is usually able to perform his duties despite the regular occurrence of threats of robbery etc. in the neighbourhood. Despite the training and regular reminders, the LRS Clerk in this case failed in his duty to request identification of a minor.

I note the licensee's evidence about obtaining the services of a liquor consultant to review their existing policies, particularly with respect to ID checks, and commend the licensee for its efforts to make improvements. Although I have concluded the licensee has met the test of due diligence, I remind the licensee that it is responsible for ensuring the safety of its clerks and for ensuring they are able to perform their duties despite the often difficult clientele they may encounter. The licensee must be cognizant of the nature of the neighbourhood in which it operates its business and to ensure that its staff are properly supported at all times. This is the only way to ensure they are able to perform their duties and follow the licensee's policies.

CONCLUSION

I find that the licensee contravened section 33(1)(a) of the Act on November 22, 2013. I find that the licensee has met the onus of establishing a defence of due diligence and thus has a complete defence to the contravention.

Thus, I do not need to consider the issue of penalty.

Original signed by

Nerys Poole
General Manager's Delegate

Date: November 6, 2014

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

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