



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: Lansdowne Central Liquor Store Inc.,
dba Specialty Liquor Store
225 – 450 Lansdowne Street
Kamloops, BC

Case: EH14-065

For the Licensee: Dennis Coates

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: November 5, 2014

Date of Decision: December 4, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Lansdowne Central Liquor Store Inc., dba Specialty Liquor Store (the "licensee") owns and operates the Specialty Liquor Store at 225 – 450 Lansdowne Street in Kamloops, BC (the "LRS"). The licensee holds Licensee Retail Store licence number 195395 (the "licence"). According to the terms of its licence, the licensee may sell liquor from 9 a.m. to 11 p.m., 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").

Mr. Dennis Coates appeared at the hearing as the licensee's legal counsel and as a shareholder of the corporate licensee. A second principal of the corporate licensee appeared as the representative of the licensee (the "Licensee's Representative") and gave evidence of the licensee's policies and procedures.

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the "Act") on May 24, 2014 by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program ("MAP"). The licensee admits that its employee sold liquor to the minor agent. 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 July 31, 2014 (the "NOEA") (Exhibit 1, tab 1).

The branch alleges that on May 24, 2014, the licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out the range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty. 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 15.
- Exhibit 2: Copy of minor agent's photograph and identification – to be sealed at close of hearing.
- Exhibit 3: DVD copy of closed circuit camera system in LRS showing transaction with minor agent on May 24, 2014.
- Exhibit 4: Package of licensee's due diligence materials, with first page marked as Time Sheet.
- Exhibit 5: Six photos of parts of the establishment.
- Exhibit 6: Statement of LRS Manager.

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.

The parties also agreed to destroy any copies of the DVD (Exhibit 3), which shows the minor agent completing the transaction in the LRS. I have placed Exhibit 3 in an envelope, with a notation that it is not to be unsealed or disclosed without a Court Order.

WITNESSES

The Branch called two witnesses:

- The liquor inspector who attended the liquor store with the minor agent on May 24, 2014 (the "First Liquor Inspector")
- The liquor inspector who waited in the vehicle outside the liquor store on May 24, 2014 and who was the author of the NOEA (the "Second Liquor Inspector")

The licensee called two witnesses:

- The manager of the LRS (the "LRS Manager")
- The Licensee's Representative

FACTS

May 24, 2014 incident

The licensee accepts the facts as set out in the NOEA. I have made further findings of fact based on the CCTV footage of the transaction on May 24, 2014 (Exhibit 3).

On May 24, 2014, 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 17 years old at the time of the inspection on May 24, 2014.

At 4:15 p.m., the inspection team arrived at the LRS. The First Liquor Inspector entered ahead of the minor agent who followed shortly after. The minor agent went to the cooler in the rear of the LRS and took out a four pack of Bacardi Real Jus coolers (the "product"). The minor agent proceeded to the male cashier at the counter (the "LRS cashier") who asked how she was and whether she had any identification. The minor agent stated that she had left her identification in the car. Exhibit 3 shows the minor agent making a move towards the door when the LRS cashier then stated: "shh, it's OK, just don't tell my partner."

The LRS cashier then scanned the coolers and advised that the cost was \$9.00. The minor agent gave the LRS cashier \$20.00 and received \$11.00 in change. The LRS cashier placed the product in a bag. The minor agent took the bag and exited the store at approximately 4:17 p.m.

While the minor agent was purchasing the product, the First Liquor Inspector was standing approximately seven to ten feet away from the cashier area and was able to observe the transaction and hear the conversation.

Upon returning to the vehicle, the minor agent turned the bag with the product over to the Second Liquor Inspector who tagged the product and placed an exhibit sticker on it. The minor agent completed her notes of the transaction. (Exhibit 1, tab 5)

At 10:36 p.m., the two liquor inspectors returned to the LRS where they identified themselves to the in-store manager at the time. The LRS cashier was also present. He recalled serving the minor agent. The Second Liquor Inspector explained what the circumstances were with respect to the contravention notice and advised the in-store manager to have the LRS manager contact him to obtain further details. The in-store manager signed the contravention notice, acknowledging receipt of the notice. (Exhibit 1, tab 8)

On May 27, 2014, the Second Liquor Inspector contacted the Licensee's Representative and advised her of the incident on May 24, 2014. He requested a copy of the CCTV surveillance tape of the time of the incident and the Licensee's Representative offered to provide it. The Second Liquor Inspector advised the Licensee's Representative that the branch would be taking enforcement action and would send notice of this action to the licensee. The Second Liquor Inspector later received a copy of the CCTV surveillance tape. (Exhibit 3)

Observations of the CCTV Footage (Exhibit 3)

At the hearing, the licensee played a copy of the CCTV footage showing the LRS cashier at the counter and the minor agent making the purchase. The licensee's witnesses identified the other figures that were visible at different times during the three to five minute period on the tape. The tape erroneously shows a time of 15:15. The licensee's witnesses agreed that this was probably because of the time change and the machine had not been updated to show the correct time of 16:15.

As noted above, the CCTV footage shows the minor agent taking a step towards the door and then returning to the till to complete the transaction. There is no audio on the CCTV footage. The CCTV footage shows three other employees in the LRS and around the till area at the time of the transaction. One woman is bending down to do some work below the counter.

Evidence of the LRS Manager about the incident on May 24, 2014

By agreement of the parties, the LRS Manager testified by phone. She was able to watch the CCTV tape while testifying and to answer questions about it. The LRS Manager identified the women bending down behind the counter and stated she was the in-store manager who was doing inventory at the time. The LRS Manager identified another woman walking by the top of the video frame. This woman was the former assistant manager. There is a brief glimpse of a second employee behind the counter. Although initially unsure, the LRS Manager eventually identified him as another LRS clerk. The LRS Manager explained that some employees were completing their shift at 4:30 p.m. while others had started a shift at 4:00 p.m. The LRS Manager completed her shift at 4:30 p.m. The LRS cashier started his shift at 4:00 p.m.

When asked about the time of the incident in the hearing, the LRS Manager initially responded that she thought it occurred around 10 or 10:30 p.m. This was the time she was notified of the delivery of the contravention notice.

The LRS Manager was vague about where she was at the time of the incident. She acknowledged that her shift would have ended at 4:30 p.m. that day and that she would have probably left around 4:30 or 5:00 p.m. She responded that she could have been in the back office or she could have been out doing some banking. She was also vague about who was working with her that day and thought it was probably the former assistant manager. When asked again about whether she was actually in the LRS at the time of the incident, she responded that she could not remember that far back.

When asked who else might have been on duty, she responded that she could not think of anyone else. When she was asked to observe the people in the CCTV footage, she was able to identify the in-store manager on shift, the former assistant manager who could be seen walking by at the top of the frame and also the other male cashier. She thought the other male cashier worked on Tuesdays, Thursdays and Fridays. May 24, 2014 was a Saturday.

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.

Testimony of the LRS Manager

The LRS Manager is responsible for the hiring and firing of the staff and the supervision of the staff. She orders the product for the LRS. She stated that she writes and implements the policies. She has been in this position for over three years and reports directly to the Licensee's Representative. She is responsible for human resources issues and for management of the staff. She is always informed of everything that is going on.

The LRS Manager stated that the LRS cashier had worked in the store for approximately three and a half months prior to the incident. He had worked in the LRS at a previous time for about four months. The LRS Manager interviewed the LRS cashier when he was hired. The former assistant manager trained him. The LRS Manager explained that she terminated the LRS cashier on the day after the incident because of the sale to the minor agent.

The LRS Manager gave evidence about the signs around the LRS with respect to ID checking and the reminders that she gives to the staff. She referred to the photos (Exhibit 5) and explained that the "legal age" pops up on the till as a reminder to staff that anyone presenting ID must be born before the date shown on the till. The first photo in Exhibit 5 shows the legal age as November 3, 1995, as it was taken just prior to the hearing. This indicates to staff at the till that anyone wanting to make a purchase on November 3, 2014 must be 19 years old on or before that date. The second photo in Exhibit 5 shows the whole of the till screen with a button indicating "ID check". The LRS Manager did not refer to this button on the till.

The third photo is a laminated sign that is kept on the counter at the till. The sign states:

19+ 2 PIECES OF ID REQUIRED

YOU MUST BE 19 YEARS OF AGE OR OLDER TO ENTER THIS ESTABLISHMENT

FIRST ID

MUST BE GOVERNMENT ISSUED

MUST INCLUDE

- NAME
- PHOTO
- BIRTH DATE
- SIGNATURE

FOR EXAMPLE:

DRIVER'S LICENCE OR PASSPORT

SECOND ID

NAME MUST BE IMPRINTED ON CARD

MUST INCLUDE:

- NAME IMPRINTED ON CARD
- PHOTO OR SIGNATURE

FOR EXAMPLE:

CARE CARD OR CREDIT CARD

VALID ID DOES NOT GUARANTEE ENTRY

The fourth photo shows a framed notice on the counter at the till area. The LRS Manager testified that this is a regular reminder to staff of the possible consequences of selling to a minor: "Staff may be fined \$575 for selling liquor to a minor."

The fifth photo shows the 19+ laminated notice on the counter beside the pad for entering credit or debit cards. The LRS Manager explained that this is not taped to the counter to allow them to clean the counter.

The sixth photo shows a sign, issued by the branch, on the bulletin board in the staff room. The LRS Manager testified that this sign is kept on the bulletin board:

\$230 Liquor Fines

PATRONS AND STAFF MAY BE FINED FOR THE FOLLOWING:

- Minors possessing, purchasing or consuming liquor
- Minors presenting false ID
- Minors on licensed premises (unaccompanied by parent)
- Selling or serving liquor to someone who is intoxicated
- Permitting intoxicated person on premises

The LRS Manager explained that she gives daily reminders to the staff about the importance of checking for ID. She also said that the time sheets (part of Exhibit 4) are signed at every shift and include the following reminder:

I acknowledge that it is the law, and my job, to ask anyone who appear as though they may be under 30 years of age for 2 pieces of valid ID!!!!!!

First ID must be government issued and must include: Name, Photo, Birthdate, Signature. i.e. Drivers licence or passport.

Second ID must include: Name imprinted on card photo or signature i.e.: care card of credit card. Always make it a habit to ask for 2 pieces of valid ID!!!!

Selling liquor to a minor can result in a fine to yourself and the stores, and you will be terminated.

The Sales Associate Job Description includes a reference to the requirement for Serving It Right certification and the importance of ID checking:

A Sales Associate must be certified by the Serving It Right program. You must have your SIR card on your person at all times while on shift. ID MUST be checked if the person looks under 30 years of age. You must be knowledgeable on the types of ID accepted in British Columbia. If it is a regular customer and you know the person is of age, ask them if they have their ID on them. It is the law that persons purchasing alcohol or cigarettes are of age. Status cards are not acceptable forms of ID.

The LRS Manager explained that new hires sign this job description after a review of the ID procedures. She also stated that, when she holds the regular three month reviews with staff, they review this sheet and she asks staff to sign again.

When asked under cross-examination if she had a copy of these forms (the time sheets, Sales Associate job description, staff reminders - part of Exhibit 4) with the signature of the LRS cashier, she responded that she did not have anything in front of her but probably had one in the files.

The LRS Manager reviewed the Meeting Organizer printouts, with dates of October 19, 2014, July 2, 2014, May 15, 2014, April 1, 2014 and February 15, 2014 (Exhibit 4). The notes on these printouts show that "reinforced ID check" is mentioned at every meeting. The February 15, 2014 printout points out the "right age is on the upper right

hand corner of the till screen." There is no mention of the swiping of drivers' licences, using the technology on the back of the till.

The LRS Manager testified that she prepared and wrote down the Company Policy (part of Exhibit 4) which states:

In our store everyone is reminded daily about the importance of checking for ID. [name of new Assistant Manager] and myself talk to staff regularly about this. They also sign a document about this when they are hired and periodically throughout there [sic] employment. Just to make sure everyone is in compliance with our rule.

The LRS Manager and the new assistant manager have signed at the bottom. As the new assistant manager was hired in July of 2014, her signature indicates that they prepared and signed this after the incident. Under cross-examination, the LRS Manager explained that the licensee has always had this policy, just not written down. When asked about recording any incidents or keeping a logbook, the LRS Manager responded that there is no requirement for staff to record anything. The only thing they have is the CCTV footage. Sometimes they will review this with staff if there has been an incident.

In response to a question on cross-examination, the LRS manager said that they do not discuss the negative effects of minors consuming alcohol in their staff meetings or otherwise with the staff. With respect to any instructions to staff on how to determine if someone looks under 30, she said this is all part of the Serving It Right course, and that if a person looks as if he/she is under 30, the staff must request ID. She said most of her staff are under 30 so they know what 'under 30' looks like. Management does not provide any further guidance on how to determine if someone is under 30.

In response to a question about the Guide, the LRS Manager said the Guide is kept in a file in the office. She was unsure as to whether staff ever looked at the Guide. She could not remember when she last reviewed the Guide.

She emphasized the Serving It Right course as the primary source for staff and that staff must produce their certificate before they are hired. She does not do any testing of the staff and relies on the fact that they have their Serving It Right certificate

The LRS Manager indicated she was aware of the MAP through letters that came through the licensee's office, but she could not remember exactly what those would have been.

Testimony of the Licensee's Representative

The Licensee's Representative explained her position with the LRS and the licensee. She is a shareholder of the corporate licensee. She is also the regional manager for the corporate licensee and is responsible for nine other stores she described as "the Heartland group." She attends the LRS about four to five times a month. She monitors the LRS by camera every day and is on the phone or email with the LRS Manager almost every day.

The Licensee's Representative described the LRS Manager's job as managing the day to day running of the store. Her duties include the banking, ordering the product, administering, training and supervising the clerks, and overseeing the safety of building. She stated that the LRS Manager is not responsible for creating or changing policies. The Licensee's Representative stated that she is the directing mind for the LRS and that she sets the policy.

The Licensee's Representative first heard about the incident on the morning after. She received a call from the LRS Manager who was extremely distressed and upset. She reviewed the CCTV footage with the LRS Manager and, at that point, they decided to terminate the LRS cashier. On May 27, 2014, the second Liquor Inspector called her and explained what had happened.

The Licensee's Representative described the driver's licence authentication swipe located on the back of the till. The clerks can use this technology to swipe a driver's licence. The screen will then show whether or not the driver's licence is valid and whether the owner of the licence is over 19 years old. She said that management has instructed staff to swipe the licence of anyone who looks under 30. In response to a question in cross-examination, she said she thought the LRS had the technology to implement a policy to ensure the swiping of a driver's licence prior to completion of a transaction.

The Licensee's Representative said that when she receives a new directive from the government, she has every staff person read it, sign it, and then display it on the bulletin board.

The LRS has a high turnover rate with its clerks. She said this is why training is continuous and never stops.

The Licensee's Representative explained about the camera system in the LRS. She said they consolidated the system for all the stores that she oversees. This makes it easy for her to go online and check the camera footage at any store at any time. If she sees something that concerns her, whether inadequate ID checking or anything else, she will phone the LRS Manager and bring it to her attention. There are 13 cameras in the LRS: one on each till, several at different spots in the store, and one overlooking the till, which allows her to see transactions and the purchasers in real time.

The Licensee's Representative said she does not use secret shopper programs as she thought she would not be allowed to hire underage teens. In cross-examination, she agreed she had not hired any secret shoppers who appeared to be under the age of 30, but over 19, to check compliance with their ID policy.

The Licensee reviewed the policies and practices as outlined in *Central City Brewing Company Ltd. v. British Columbia (Liquor Control and Licensing Branch)* 2013 BCSC 2301 ("*Central City*") (pages 3 to 5) and asked the Licensee's Representative to respond as to whether or not the LRS had a similar policy or practice.

Following is a list of the policies and practices mentioned in *Central City*, with the responses of the Licensee's Representative':

- a) A policy and procedures manual that includes information on the importance of identity checks and a requirement the staff sign for a receipt and reading of the manual.

Response: We don't have an actual manual but we do have policy and procedures that you saw earlier. I am in the process of developing a manual, e.g. of licences from Alberta and other areas.

- b) The requirement that all staff have been trained and possess a "Serving It Right Responsible Beverage Service ("SIR") certificate.

Response: Yes, copy kept in their file.

- c) Posting of signs notifying customers of ID checks at all points of entry and exit.

Response: Yes.

- d) Posting of signs notifying customers of ID checks at all points of sale.

Response: Yes.

- e) Frequent staff meetings where the need to check ID is reinforced and questions are answered and new issues discussed.

Response: Not just staff meetings, but constantly at the till, ongoing every day.

- f) Ready availability to staff of the ID guide to acceptable identification.

Response: Yes.

- g) Production and distribution to staff of a company "standard of conduct" protocol signed by all employees.

Response: Yes, in job description of sales clerks.

- h) Circulation to managers and staff of bulletins regarding ID policy and the Minors as Agents program from the alliance of beverage licensees and the Branch, with the requirement that the staff sign for receipt and reading.

Response: Yes, definitely done and signed by everyone – "I can prove if you would like".

- i) Close supervision and support by middle and senior managers and easy access to them for questions by staff.

Response: LRS was without an assistant manager briefly at the LRS; the new assistant manager is available and constantly ID checking.

- j) Employment of a manager with 25 years' experience in government and private liquor sales to train and oversee staff.

Response: I have over 25 and LRS Manager has 20 to 25.

- k) A policy of management always supporting a decision of a sales clerk to refuse service for insufficient or questionable ID.

Response: We always support a sales clerk.

- l) Tagging of all merchandise to prevent theft by minors.

Response: No, not terribly effective, will run out the door anyway; latest trick is to run in, grab and run out the wheelchair access area.

- m) Store policy of ID-ing persons apparently under the age of 25.

Response: Yes, ID under 30 – even if they look 25, still ask for ID.

- n) Store policy of identifying and excluding underage customers – alone or in the company of enabling adults – upon entry and before they attempt to make a purchase.

Response: Yes.

- o) Store policy of excluding adults who attempt to purchase liquor for minors.

Response: Yes.

- p) Store policy of refusing to service adults who appear to be buying liquor for minors off the premises.

Response: Yes.

- q) Store policy of capture and detention of grab and run thieves – the majority of whom are minors – and recovering stolen alcohol.

Response: We do not run after them as don't want to risk staff's safety, we have one person on the cell, we might follow the person to see which direction; in meantime, we have a video to show police.

- r) Constant live zoom-able video monitoring of all customers or staff within the store.

Response: Not zoom-able, but we have monitoring.

- s) Store policy of dismissing employees for a first offence of service to a minor.

Response: In this case, because it was so unbelievable, he was fired immediately.

- t) Approximately 100 ID checks recorded each day.

Response: No, no idea of how many checks in a day; do not record in any of the stores.

When asked about the Company Policy (included in Exhibit 4), the Licensee's Representative said that the LRS Manager did not create the policy as there is something similar on other sheets that have been used for a number of years. The LRS Manager just wrote it out for the new assistant manager to sign. With respect to the policy of checking for under 30s, she said this has been in place for some time.

The Licensee's Representative created the Sales Associate Job Description (part of Exhibit 4) and stated that the licensee requires each new hire to sign this document. When asked if the LRS cashier signed, she stated she did not look for that document and relied on the LRS Manager saying that he had signed it. The Licensee's Representative was not involved in training the LRS cashier.

The Licensee's Representative referred to an incident record book where staff will record abusive customers, description of the person, any theft and time of theft to find a photo of that person. They do not record ID checks in this book.

SUBMISSIONS – BRANCH

The branch notes the information from the branch about the MAP and that these minor agents would be visiting all LRSs. (Exhibit 1, tab 14)

The branch notes that the licensee has admitted to the facts of the contravention.

The branch points out that initially the LRS cashier asked the minor agent for her ID and then sold to her anyway. This raises a question about the extent of training on this issue and whether the LRS cashier was unsure of the store's policy as to what to do when someone did not present ID when asked.

The branch notes that there were other employees in the LRS at the time. No one paid any attention to this underage minor entering the store, taking out a product and proceeding to the till. This raises a question about the training of all staff in their duties to monitor and prevent sales to minors.

The branch submits that the systems in place to train and monitor staff are minimal. There is no training given to staff on how to make an assessment of a person's age. Staff are left to their own devices on how to go about assessing age. Assessing age is a purely subjective exercise.

The branch refers to the *Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch* 2006 BCSC 417 (page 9) for the fallibility in assessing age and the subjective nature of the exercise.

The evidence of the licensee's policies and procedures demonstrate that the licensee does not have a firm system for monitoring and recording of ID checks and sales in order to ensure that staff are compliant with the policy of requesting ID of anyone appearing under 30. A reasonable licensee would have such a system.

Finally, the branch submits that the minimum recommended penalty here of \$7500 is reasonable and appropriate.

SUBMISSIONS – LICENSEE

The licensee agrees that the LRS cashier sold liquor to the minor agent on May 24, 2014. The licensee says it has a full defence to the contravention as shown by its policies and procedures that were in place at the time of the contravention.

The licensee says that the directing mind was not on site at the time of the contravention, and submits that the Licensee's Representative, as the creator of the policies for the licensee, is the directing mind of the corporate licensee.

The licensee muses as to the reason for the LRS cashier's failure to follow through on his request for ID. The licensee submits that perhaps he was trying to impress a young female and his thought processes got confused. The licensee submits that the fact that he initially requested ID demonstrates that he had good training on the importance of requesting ID of anyone who appears under 30.

The licensee points out that it has many of the similar policies and practices noted in the *Central City* decision and refers to paragraph 25 that "no one could have anticipated that the employee would depart from years of consistent best practice by selling to a minor on the day in question."

The licensee submits that the question to answer here is whether or not the licensee has established a proper system to prevent commission of the offence and to take reasonable steps to ensure the effective operation of the system. The licensee refers to the statements of the court at paragraphs 38 and 39 of the *Central City* decision.

The licensee reviewed the evidence of both the Licensee's Representative and the LRS Manager and says that this evidence demonstrates that there are effective tools in place that meet the test of due diligence.

The licensee refers to an earlier decision of the General Manager: the *Irish Times Pub Co. Ltd.*, dated April 16, 2014, EH13-086 ("*Irish Times Pub*") and the principles noted in that case, which include those noted in the *Beverly Corners* Supreme Court decision. The licensee emphasizes the comments in the *Irish Times Pub* case that the test for due diligence is not perfection (p.22).

The licensee refers to another decision of the General Manager (*Rayman Investments & Management Inc., dba Coal Harbour Liquor Store*, dated January 23, 2013, EH11-139 ("*Coal Harbour*") and submits that the "culture of vigilance" referenced in that decision applies equally to the policies and procedures in place in the LRS here.

The licensee requests that the contravention be dismissed on the basis that the licensee has met the test of due diligence and therefore has a full defence to the contravention.

REASONS AND DECISION

Contravention

The licensee has admitted that the contravention of section 33(1)(a) occurred on May 24, 2014. 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:

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, 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 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.

Directing Mind

I find that the directing mind was not present during the incident on the evening of May 24, 2014. At the hearing, the Licensee’s Representative stated she was the directing mind. The determination as to who may be the directing mind is a matter of mixed fact and law and not simply a factual issue for a witness to state. In making a determination as to who may be the directing mind, I have considered the evidence about who makes the policy decisions, who drafts the policies, and who is responsible for implementing those policies with staff. There is no requirement for the directing mind to be on site at the time of an incident.

The two witnesses for the licensee gave evidence about who creates the policies for the LRS. The LRS Manager stated that she wrote some of the policies. The Licensee's Representative said only she created the policies and that the LRS Manager may have written them down and implemented them, but that she did not create them. The LRS Manager testified that she was responsible for the supervision of the LRS employees, the hiring and training of the employees and ongoing monitoring of the employees. I find that her role in the LRS goes beyond simply performing tasks in the LRS and that she has a managerial or supervisory function. Given the extent of her role as a manager and supervisor, I am not prepared to exclude her as the directing mind. Nevertheless, as the LRS Manager was unsure as to where she was when the transaction occurred, I find that it is not necessary for me to determine whether or not she or the Licensee's Representative or both operate as directing minds of the licensee. I conclude that the LRS cashier who made the sale to the minor was not the directing mind of the licensee.

I move to the second part of the analysis as set out in *Beverly Corners*.

Implementation of Adequate Training and Other Systems

I find that the licensee had a number of systems and policies in place at the time of the incident, with respect to checking for identification of minors. These include:

- A policy of requiring its employees to check identification of anyone who appears to be under the age of 30
- Requirement for all staff to have the Serving It Right certificate
- Pop-up message on the till indicating the correct date of birth of the age of majority for that day
- Laminated sign on the counter indicating that customers must be over 19 and have two pieces of ID, with specifics about the type of ID necessary
- Notice to staff of the possible fine for selling liquor to a minor
- Notice on the staff bulletin board of possible fines
- Daily time sheets with reminder at the top that staff must ask anyone who looks as though they may be under 30 years of age for two pieces of valid ID
- Sales Associate Job Description with a reminder about checking for ID for persons who look under 30 years of age

- Printouts of meeting organizer notes indicating reminders given to staff about importance of checking for ID of anyone under 30
- Daily verbal reminders from the LRS Manager about the importance of checking ID

With respect to the training of new employees, and in particular with respect to the training of the LRS cashier, I find that there is no evidence about the length of the training given to new employees and very little evidence about the nature of the training. The Licensee's Representative stated that the LRS Manager was responsible for training employees and that training was ongoing. The LRS Manager said that the former assistant manager, who did not testify, trained the LRS cashier. The LRS Manager was clear in her testimony that she relied on the Serving It Right certificate of her employees to ensure they were properly trained.

I find that the absence of evidence about on-site training of new hires to be a critical oversight in the licensee's efforts to establish due diligence. I find that the incident itself demonstrates a deficiency in the staff training generally, not just that of the LRS cashier. At the time there were a number of employees in the LRS, as a result of overlapping shifts. These employees, including the on-site manager and the then assistant manager, either were unaware of the minor agent in the LRS and the transaction, or chose to ignore a transaction that they were not directly involved with. Adequate staff training means that all employees are aware of the importance of checking for minors in the LRS, even if it is not their transaction. There was no evidence to show this incident was later used to emphasize to staff the importance of being on the lookout for minors in the LRS.

The licensee has no written instructions for its staff, similar to the information about verification of identification as set out in the information sheet from the branch (Exhibit 1, tab 14) or the Guide (tab 1, tab 11, page 20). I find that the absence of any guidance from management, on what to look for when assessing age and what kinds of tools staff might employ to catch false ID, is a deficiency in the licensee's training of its employees. The LRS Manager stated that most of their employees are "under 30" and thus know what "under 30" looks like. This may be true for some people but does not replace giving staff specific tips on how to assess age and how to verify ID.

The Licensee's Representative stated, because of the high turnover, training was ongoing. Given this high turnover, I would have expected to see evidence about the nature of this ongoing training. I heard evidence about daily reminders to staff about checking for ID and that ID checking is reinforced at staff meetings. These reminders are an important element of any system to ensure staff are aware of the licensee's ID policy; however, they are only one aspect of an effective system.

The licensee does not record ID checks in a logbook to use as a training tool in making any new employees aware of the importance of these ID checks. The LRS Manager stated they look at the CCTV footage when there is an incident but the evidence of this is sparse. In fact, the LRS Manager did not appear to have examined the CCTV footage of the May 24, 2014 incident in any detail, as she was not aware of the actual time of the incident when initially giving evidence, nor was she aware of the number of employees who were present in the LRS at the time of the incident. She was vague about the actual day of the incident, which was a Saturday, as she eventually identified the second LRS cashier in the CCTV footage, stating that she thought he worked on Tuesdays, Thursdays and Fridays.

I find that the licensee has policies with respect to identification of anyone who appears under 30. However, I find that the evidence of the staff training falls short of establishing that the training was adequate to prevent the contravention of selling liquor to minors.

I turn now to the question as to whether the licensee has taken reasonable steps to ensure the effective application of its education and the operation of its systems.

Effective Application and Operation of the Systems

As noted above, the licensee has a stated policy of requiring staff to ask for ID of anyone who appears to be under 30. I find that, in addition to the lack of evidence about the initial training of new hires, the licensee has not proven on a balance of probabilities that these systems are effectively applied in the operation of the LRS.

The licensee submits that the fact that the LRS cashier initially asked for identification from the minor agent indicates that he was aware of the policy and thus had been trained on the policy of asking for ID. My response to this submission is that his failure to follow through on his request for ID indicates a weakness in the system, and suggests that the LRS cashier believed he could get away with making the transaction, despite his obvious awareness that she appeared to be under 30, and despite the fact that there were a number of other employees in the immediate vicinity at the time.

The employees, who were present in the LRS at the time of the sale and visible in the CCTV footage, including the then assistant manager, did not question the sale to the minor agent. With respect to the verification of ID, the evidence from the Licensee's Representative was that the till at the cashier has a swipe function to authenticate driver's licences. The LRS Manager in charge of the supervision of employees did not refer to this swipe function in her evidence. She only referred to the legal age "popup" on the till. Other than the fact that this swiping option is available, there was no evidence to show that staff were using it.

The licensee has presented some documentary evidence to show that staff receive information at the time of their hiring and that they are regularly reminded of the licensee's ID policy. Exhibit 4 includes:

- Sales Associate Job Description
- Daily time sheets, with reminder about ID checking
- Staff Members/Reminder sheet

The licensee did not provide any documentary evidence that the LRS cashier had signed any of the above forms. The time sheets provided in Exhibit 4 are blank sample time sheets, with a notation in writing from the new assistant manager (initial "K"): "Note all staff signs sheet every day they work." The new assistant manager started in July of 2014, after the May 24, 2014 sale of the liquor to the minor. The Sales Associate Job Description has no signatures. The sheet titled 'Staff Members' has the signature of the LRS Manager but the date is left blank and the staff member signature line is left blank. It has a notation at the bottom in writing that "These forms are part of employee package when hired. They are given again for reinforcement after 3 months."

The Licensee's Representative stated that she relied on the LRS Manager who told her that the LRS cashier had signed these sheets. The LRS Manager, when questioned about any sheets with the LRS cashier's signature stated that "they were probably in her files, and she could get if needed."

The LRS Manager stated she kept the Guide in her office and that she had never asked staff to read the Guide. She believed that their Serving It Right certificate was sufficient proof that they would be able to perform their jobs. She never tested her staff on the policies, believing it was sufficient that they had their Serving It Right certificate.

Finally, I am disturbed by the fact that the LRS Manager was unable to remember where she was at the time of the incident. She stated in her evidence that she may have been in the back office or she may have been out doing the banking. She knew that she did not normally leave until 4:30 or 5:00 p.m. She indicated that she was dismayed and distressed by what happened and spoke with the LRS cashier the very next day. The Licensee's Representative said she reviewed the CCTV footage with the LRS Manager the day after the incident. If the LRS Manager had reviewed it, she would have known the exact time of the sale to the minor agent and presumably would have been able to say where she was at that time, and would also have been aware of the other employees who were on site at the time. In her testimony, she initially stated that she thought the sale occurred around 10:00 p.m., which was the time she was notified of the contravention notice. As the licensee's employee responsible for the supervision and management of the LRS staff, I find this failure on the part of the LRS Manager to adequately review the CCTV footage and establish who was present and where she was demonstrates that the system of "checks and balances" i.e. the CCTV footage, was not being used effectively to assess what went wrong on May 24, 2014.

As noted in the *Central City* case, at paragraph 32, the onus is on the petitioner (i.e. the licensee) to demonstrate that it had established a proper system to prevent the sale of liquor to minors and that it had taken all reasonable steps to ensure the effective operation of that system. The petitioner must also show that the system was being meaningfully enforced at the time of the contravention.

I find that the absence of any documentary evidence to show that the LRS cashier signed the documents, as suggested by senior staff, demonstrates the system was not being meaningfully enforced. Further evidence suggesting there was no meaningful enforcement of the policy of ensuring staff were aware of the need to check ID is the fact that the Company Policy (part of Exhibit 4) was written down and signed after the incident. The fact that it was not written down until July of 2014 raises questions about the effective application of the policy and its reinforcement to staff.

The licensee has provided an undated document signed by the LRS Manager (Exhibit 6), with the name of the LRS cashier at the top followed by "May 24th Afternoon Shift." The one page document refers to the facts of the transaction with the minor agent and then outlines the ID Procedure stating at first bullet: "At your interview for a position here one of things that is gone over is to ID everyone who doesn't look at least 30." It is not clear if the interview referred to here is meant to be the interview with the LRS cashier. What is clear is the final bullet point referring to staff being reminded all the time that they must ID customers on a daily basis" and that this rule "is strictly enforced by myself and [name of new assistant manager] all the time."

I find the LRS Manager created this document after the incident as the new assistant manager was hired in July 2014, after the LRS cashier was terminated in May. I, therefore, do not rely on the statements under ID Procedure to establish what occurred during the hiring of the LRS cashier.

I find that the follow up actions of the LRS Manager, and her failure to accurately record and document what happened and where she was on the afternoon of the incident, indicate that the system to ensure staff are fully aware of the importance of identification checks was not being meaningfully enforced at the time of the incident, nor immediately after.

Due Diligence Decisions

The licensee submitted a number of decisions to support its defence of due diligence. Branch decisions on contraventions and due diligence are fact specific and do not set precedents. However, the branch endeavours to ensure consistency and fairness in its decisions.

Central City

The B.C Supreme Court judicial reviews of branch decisions provide guidance to the General Manager in reaching his decisions. The licensee placed great reliance on the B.C. Supreme Court decision in *Central City*, as a direct comparison to the policies and procedures of the licensee here. The Supreme Court in that decision found that the General Manager erred in focusing on what the licensee could have done to prevent the particular sale. In *Central City*, the General Manager did not identify any problems with the system or its enforcement; the system did not fail. That is not the case here.

In direct examination, the Licensee's Representative reviewed the itemized list of *Central City's* policies, at pages 3 to 5, and stated which were applicable to the LRS here. I find that there are some significant differences between the policies and procedures that established a defence of due diligence in the *Central City* case and the policies and procedures of the licensee here:

- The licensee here does not have a policy and procedures manual.
- The licensee does not have a guide on what identification is acceptable and how to verify false ID, other than the book on international identification.
- The LRS Manager could not remember if she had posted information about the MAP on the staff bulletin board.
- The LRS Manager could not remember the last time she looked at the Guide or if staff were ever encouraged to look at the Guide, which was kept in the office, not at the till.

Irish Times Pub

The licensee relied on the *Irish Times Pub* decision of the General Manager, dated April 16, 2014, EH13-086. There are some distinguishing factors from the present case. In *Irish Times Pub*, no employee was identified as the server who served the two 18 year old minors. There was evidence about the details of the training of new hires. New hires were required to sign off on a Statement of Understanding which was included in the employees' file. The licensee, the Pub manager and several staff witnesses confirmed that this was done. Here, the Licensee's Representative relied on the LRS Manager telling her that employees signed off on the Sales Associate Job Description when hired. The document with the LRS cashier's signature was not provided as evidence.

In *Irish Times Pub*, the Guide was available in the Pub for staff to review and the Assistant manager testified that he had reviewed it a number of times. Here, as noted above, there was no such evidence about the Guide. The *Irish Times Pub* had an employee manual, with the ID policies, which was reviewed by management with all new hires and again with all staff every six months. The licensee here does not have an employee manual and is planning on creating one. The licensee here has stated that they review the ID policy on a daily basis and that new hires sign a document. However, this policy of daily reminders and having new hires sign a document was only written down after the incident (included in Exhibit 4).

Coal Harbour

The licensee referred to the decision of the General Manager in *Rayman Investments & Management Inc. dba Coal Harbour Liquor Store*, dated January 23, 2013, EH11-139. Again, there are some key differences in the policies and procedures of the two licensees. In *the Coal Harbour* decision, there was a four-step training program for new hires. In addition, staff were provided with information about the MAP and signed a document acknowledging that they were advised about the program. There was evidence about staff using the swiping of drivers' licences on the till, technology that was available to the licensee here but no evidence that it was being used by staff.

Coal Harbour staff received training specifically on how to assess the age of their customers; staff here did not receive any training on this. In *Coal Harbour*, the cashier who sold liquor to a minor testified about her training and that she had signed off on the licensee's policies several years earlier. Here, other than a statement that it was probably in the files, there was no evidence to prove that the LRS Cashier had signed the documents as suggested by the LRS Manager. If a licensee wishes to succeed in making a due diligence defence, the licensee is responsible for providing such key documents as part of its defence.

Finally, I find that the licensee here does not have a "culture of vigilance" as noted in the *Coal Harbour* case. The evidence of the LRS Manager, who was responsible for the day to day operations of the LRS, did not persuade me that such a culture of vigilance exists in the management of this LRS.

Conclusion on Due Diligence

I agree with the licensee that 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. The fact that the LRS cashier contravened section 33(1)(a) by selling liquor to the minor agent does not determine the issue.

I find that the licensee has not proven the defence of due diligence on a balance of probabilities. I have found that the licensee has a policy of requiring staff to ask for ID of anyone who appears to be under the 30. I have also found that the evidence of staff training is minimal and raises questions about the effective application of the licensee's ID policy. The licensee did not provide me with sufficient documentary detail to supports its assertions about the training of the LRS cashier. I have been unable to conclude that the key documents with the signature of the LRS cashier actually exist.

The two witnesses for the licensee have provided inconsistent evidence on some matters, e.g. the awareness of employees about the MAP program, the use of the swipe function on the till. As the LRS Manager is responsible for the day to day operations, I have relied on her evidence when it comes to the matters relating to the actual implementation of the policies in the LRS. The LRS Manager was vague in her testimony about the actual incident and follow up and seemed to be unaware about the importance of the Guide as a tool for informing employees about the terms and conditions of the LRS licence and the requirements of the law.

I have placed little reliance on the documents that were created after the incident to support the testimony about daily reminders to staff. I find that the LRS Manager relies primarily on the Serving It Right training that all servers are required to have for employment in the LRS. This training is not a substitute for on-site training and monitoring of new employees. The failure to document incidents in a logbook is another weakness in a system which has too many deficiencies to support a defence of due diligence.

Having concluded that the defence of due diligence fails, I find the licensee has contravened section 33(1)(a) of the Act and I turn now to the issue of penalty.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

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

The branch has consistently indicated that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the branch considers this a significant public safety issue:

- The effects of alcohol on growing bodies and developing minds
- The effects on individuals and society of irresponsible drinking behaviour learned at an early age
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult; therefore, liquor has a more intoxicating effect on minors, and
- Liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault, and theft

The Minors as Agents program demonstrates the branch's intention to ensure that licensees are not serving or selling liquor to minors. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives, a seventeen year old minor was able to purchase liquor from the LRS cashier, without being asked to produce any proof of age.

I find that a penalty is warranted here.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a \$7,500 monetary penalty for a first contravention. I find this to be reasonable and appropriate given the importance of ensuring minors do not have easy access to liquor, to encourage future voluntary compliance from the licensee and to ensure specific and general deterrence in society at large.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before **January 9, 2015**.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Nerys Poole
General Manager's Delegate

Date: December 4, 2014

cc: Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Jay Blackwell, A/Regional Manager

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