



**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:	Wells Hotel Ltd. dba Wells Hotel 2341 Pooley Street PO Box 39 Wells, BC
Case:	EH14-103
For the Licensee:	Mark Norman
For the Branch:	Peter Mior
General Manager's Delegate:	Daniel M. Graham
Date of Hearing:	March 31, 2015
Date of Decision:	April 20, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Wells Hotel Ltd. (the "Licensee") operates the Wells Hotel (the "Establishment") under Liquor Primary Licence #177447 (the "Licence"). The Establishment is located at 2341 Pooley Street, Wells, BC.

The Licence specifies that the hours of operation for liquor service are Monday to Saturday from noon to 2:00 a.m., and Sunday from 11:00 a.m. to midnight. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia" (the "Guide").

Mr. Mark Norman, a principal of the corporate Licensee (the "Principal"), represented the Licensee for the purposes of this hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated August 22, 2014 (the "NOEA"). The Branch alleges that on Friday August 1, 2014 the Licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act") by selling, giving or otherwise supplying liquor to a minor.

The proposed sanction is a \$7,500 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 2, schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). 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.

The Licensee admits the contravention, but seeks to establish the defence of due diligence. With the previously granted permission of the Branch Registrar, the Principal employed an audio device to record the hearing.

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

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

33 (1) A person must not

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

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

Schedule 4

Enforcement Actions

Minors

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

ISSUES

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

EXHIBITS

Exhibit 1: The Branch's Book of Documents, tabs 1 to 15 inclusive.

Exhibit 2: Photograph and identification of the Branch's minor agent, (sealed exhibit, only to be opened by the adjudicator or court.)

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

I placed a copy of the minor agent's photo and his identification in an envelope and marked it as Exhibit 2, with a notation that it is not to be opened unless required by law. Redacted copies are at tab 7 of Exhibit 1 and the last two photos at tab 4 of Exhibit 1. Exhibit 2 has been sealed to protect the identity of the minor agent. Both before and at the hearing, the Branch provided the Licensee with an opportunity to view the photo of the minor agent and his identification with birth date.

EVIDENCE – BRANCH

The Branch called two witnesses – both liquor inspectors who attended the Establishment on the evening of August 1, 2014 (“Inspector A” and “Inspector B” respectively).

Inspector AInspection of the Establishment

Inspector A testified that he has been a liquor inspector for just under five years and that he is normally based in Surrey. He stated that he was in Prince George on August 1, 2014 to conduct inspections in town and surrounding communities under the Minors as Agents Program (“MAP”) with Inspector B and a minor agent. He viewed Exhibit 2 and confirmed that it represents the minor agent and his identification, and that the minor agent was 17 years old at the time of the alleged contravention.

Inspector A testified further that:

- The inspection team (consisting of Inspectors A and B along with the minor agent) arrived at the Establishment about 9:40 p.m. on August 1, 2014 and waited in line to be admitted. A female staff member of the Establishment (the “doorkeeper”) was working at the door to control entry to the Establishment.
- A male (later identified as the Principal) came out of the Establishment and explained to the doorkeeper that the Establishment was at capacity and that she was not to allow any more patrons in until others came out. The Principal re-entered the Establishment.

- Some patrons exited the Establishment, and the doorkeeper allowed the minor agent to enter. She did not ask the minor agent for identification.
- About 15 to 20 seconds later more patrons exited and the two inspectors entered the Establishment.
- The inspectors saw the minor agent standing near the bar and they positioned themselves so as to have a clear line of sight to the minor agent. Inspector A saw the minor agent interacting with the bartender but wasn't close enough to hear what was being said. He didn't see the subsequent transaction, but did see the minor agent with a bottle of beer in his hand.
- The minor agent approached the liquor inspectors and walked past them, while Inspector B took photos of him and the beer. The inspection team then left the Establishment and went back to their vehicle to prepare their notes. Inspector A identified the notes he prepared (tab 3, Exhibit 1) and pointed out on a floor plan of the Establishment (tab 10, Exhibit 1) where the inspectors and the minor agent had been situated.

Cross-examination of Inspector A

The Licensee, through the Principal, asked Inspector A whether he had seen signs posted at the front door stating that minors were not allowed to enter. Inspector A responded that he had not seen the signs.

The Licensee asked Inspector A whether anyone had allowed the inspection team to enter the Establishment. Inspector A responded that:

- People came out of the Establishment and the minor agent and inspectors were allowed in.
- The inspection team did not force its way in and did not sneak in. They were not being "sneaky or deceitful".
- The members of the inspection team were being "obedient" and they entered when they were allowed.

Inspector B

The MAP

Inspector B testified that the MAP was implemented in 2011, after the Act was amended in 2010 to allow the Branch to employ minors as agents for the purpose of testing compliance with the prohibition against selling liquor to minors. She explained that licensees and the public were notified of the MAP by way of a press release dated July 14, 2010 (tab 13, Exhibit 1). Under the MAP, the Branch has hired 16 to 18 year-old minor agents to carry out compliance inspections.

Inspector B also referred to a MAP update in an article in the summer 2014 edition of the Branch's newsletter Liquor Line (also at tab 13, Exhibit 1). She noted that in another article in this issue of Liquor Line (titled "Liquor Policy Review Implementation") reference was made to liquor primary licensees now being able to apply for a "family foodservice" term and condition in their licences to allow minors to be in liquor primary establishments until 10:00 p.m., provided they are accompanied by a parent or guardian. Inspector B stated that the Licence does not contain a family foodservice term and condition.

Inspection of the Establishment

Inspector B stated that at the start of the shift on August 1, 2014, the minor agent was photographed, and his identification (B.C. Driver's Licence and Care Card) was checked and photocopied to confirm that he was under 19 years of age. She examined Exhibit 2 and confirmed that it consists of the photographs and photocopies that were taken that day. She stated that the minor agent's date of birth as shown on his identification confirms that he was 17 years old at the time.

Inspector B testified further that:

- The inspection team arrived at the Establishment about 9:40 p.m. They waited in line for five to ten minutes. The doorkeeper was controlling entry to the Establishment and she had a "clicker" or counter in her hand. The doorkeeper was asking patrons to dump or get rid of any liquids they were carrying.

- There were older patrons in front of the minor agent, but the minor agent was tall and so the doorkeeper would have a clear line of sight view of the minor agent during the time he was standing in line.
- The Principal came out to check with the doorkeeper as to the head count. Patrons came out of the Establishment and the older people ahead of the inspection team went in the door, followed by the minor agent.
- The minor agent appeared to be somewhat uncertain about having been let into the Establishment ahead of Inspectors A and B, so he “hovered” in the entry way. Two more patrons came out of the Establishment and the inspectors were allowed in.
- The minor agent approached the bar and spoke to the female bartender (the “Bartender”). Inspector B could not hear the conversation, but she witnessed the transaction. A bottle of Kokanee beer was brought from the back. The minor agent paid with a \$20 dollar bill. A male staff member brought change for the \$20 bill to the Bartender who put the change on the bar.
- Inspector B took photos of the transaction as it was occurring (tab 4, Exhibit 1) and also took photos of the minor agent holding the bottle of Kokanee beer (tab 4, Exhibit 1 and Exhibit 2). In these photos Inspector B pointed out the Bartender, the male staff member, and the minor agent.
- Inspector B identified the red-lined area on a floor plan of the Establishment (tab 10, Exhibit 1) and stated that the photos had been taken inside the red-lined area.
- After the photos were taken, the minor agent put the beer on a vacant table and the inspection team exited the Establishment. They returned to their vehicle to prepare their notes. Inspector B identified her own notes (tab 2, Exhibit 1), the Minor Agent Observation Form (tab 5, Exhibit 1) and the Minor Agent Statement (tab 6, Exhibit 1).
- Inspector B prepared Contravention Notice B007457 on August 5, 2014 (tab 8, Exhibit 1) and sent it to the Licensee by registered mail.
- Inspector B referred to a copy of the Licence (tab 9, Exhibit 1) and noted that it provides that terms and conditions of the Licence are included in the Guide. She pointed out that the Guide (tab 11, Exhibit 1) provides, among other things, that a licensee “must not allow minors in your establishment, unless you have applied for and received approval from the general manager...It is against the

law to sell, serve, or supply liquor to a minor. You and your staff are expected to have effective house policies in place to meet this obligation.”

- Inspector B referred to notes of a compliance meeting (tab 15, Exhibit 1) dated August 14, 2013, indicating alleged non-compliance by the Licensee with section 12 of the Act and section 71(2)(b) of the Regulation [overcrowding beyond patron capacity], and section 43(2)(b) of the Regulation [permit intoxicated person to remain].
- She decided to pursue enforcement in this case because of the serious public safety concerns related to under-age drinking. She stated that a monetary penalty was preferred because the Licensee had previously had suspensions that appeared not to have had the desired deterrent effect.

Cross-examination of Inspector B

In response to questions from the Licensee, Inspector B stated that:

- She retracted her previous statement that the Licence has previously been suspended.
- She is short, so she did not notice any signs at the front door of the Establishment stating that it is illegal for minors to enter the Establishment. She said she thought she remembered seeing a sign prohibiting backpacks.

In response to a question from me as to when she first notified the Licensee of the alleged contravention, Inspector B referred to her file notes (tab 2, Exhibit 1) to confirm that she contacted the doorkeeper by telephone early on August 2, 2014 and advised her of the alleged contravention. The Principal was not available at that time, but Inspector B spoke to him by telephone later that day.

EVIDENCE – LICENSEE

The Licensee called two witnesses: the Principal and the Bartender.

The Bartender

The Bartender explained that a festival takes place in Wells each summer which brings in about 3,500 people, compared to the town's usual population of 200. She stated that each year she and the rest of the management team at the Establishment learn from issues that arise during the festival and make improvements in their management processes to deal with the surge of activity that it brings.

- Two years ago they put up signage throughout the Establishment with respect to minors.
- During the festival they also restrict entry to the Establishment to only one door, and have a staff person controlling entry.
- A door which leads to the women's washroom is also closed to control entry to the Establishment – during the festival female patrons are required to exit the Establishment and use a pass to access the women's washroom through another external door.
- A staff person is assigned to the patio to control access from there.

The Bartender stated that she has worked with the doorkeeper for almost five years, both at the Establishment and previously at another establishment, and knows her to be very diligent with respect to adherence to liquor legislation. She said that capacity is very strictly monitored. The Bartender confirmed that she (the Bartender) was working at the bar and served the minor agent. She said that during the festival, it is so busy that she can't check identification of patrons. She relies on the diligence of the doorkeeper to ensure that anyone who is admitted to the Establishment is of legal age to be served alcohol.

The Bartender said that the Establishment has never had a problem before with a failure to ask for identification. She stated that it is wrong for the minor agent and liquor inspectors to have entered the Establishment when the doorkeeper's "back was turned" as the posted signs make it clear that minors are not allowed in the Establishment.

Cross-examination of the Bartender

In response to questions from the Branch advocate, the Bartender stated that:

- She had assumed that the minor agent and liquor inspectors had entered the Establishment while the doorkeeper and the Principal were discussing compliance with capacity requirements, but she doesn't know for sure whether the doorkeeper's back was turned or whether she was distracted by speaking with the Principal.
- On the weekend of the festival she was relying on the doorkeeper to check for identification. The festival runs from Friday to Monday, but the Establishment only has bands in from Friday to Sunday.
- Occupancy was one of the main concerns of Establishment staff that weekend. The Principal conducts head counts constantly.
- The Establishment had six people on shift at the time of the alleged contravention: the Principal; the Bartender; the doorkeeper; and three "volunteers" looking after glassware, stationed on the patio, and controlling the door to the women's wash room.
- The person looking after the glassware was the male staff member who brought change for the minor agent's \$20 bill. Both the male staff member and the Bartender have Serving-It-Right ("SIR") certification. The Bartender was certified in 2003. She has not formally been retrained in SIR but goes over the material if she is training new staff.

When shown a photo of the minor agent and asked whether she would normally ask a person looking like him for identification, the Bartender replied "yes", but that she had been relying on the doorkeeper to check ID.

The Bartender said that staff at the Establishment have already started planning for next year's festival, and they have been meeting with the other liquor establishments in town. She stated that she was sure that no minor agent would be able to enter the Establishment in future.

The Principal

The Principal stated that he had bought the Establishment in 2008 after a long career in another field. He said that he had never run a hotel, bar or restaurant before, and that "it has been a learning experience." He knows the liquor inspectors have a job to do and he supports their efforts to educate where compliance efforts "are lacking."

The Principal said that all staff have SIR certification, and that SIR manuals are kept readily available to staff in the Establishment. He also stated that staff are trained to report any problems in an Incident Book so the Principal knows about the situation and can talk to staff about it. The Principal stated that he and his staff actively liaise with the other licensees in town to warn each other if a patron has been refused service at one establishment so the others know not to serve that person.

He explained that the Establishment is one of the venues for the festival, and that different bands rotate in and out on an hourly basis. He said that the clientele of the Establishment often changes almost entirely with each band, so there is a lot of movement of patrons in and out. Early in his ownership of the Establishment, people during the festival would often be gaining entrance by coming over the patio wall, or sneaking in through the back door. He said that experience resulted in the rigorous controls they now have in place with respect to entry to the Establishment.

The Principal said that he has had some poor experiences with liquor inspectors in the past. He said that on one occasion during the festival in 2013 the Bartender was trying to get out from behind the bar to remove an intoxicated patron, but a liquor inspector was blocking the Bartender's way and refused to let her out. The Principal said that that incident resulted in the compliance meeting of August 14, 2013. He mentioned another occasion where a liquor inspector had told the Bartender that alcohol is a drug and that the Bartender was therefore a "drug dealer" The Principal stated that the liquor inspector had been "unprofessional." When I asked the Principal if he was going to establish some link between those asserted occurrences and the current case, he said he just wanted to illustrate "the way they (liquor inspectors) conduct business."

The Principal acknowledged that the minor agent had gotten inside the Establishment, but said that the festival is an unusual weekend and that they were “overwhelmed.” He said that the Establishment is usually very quiet and that there has never been a fight during his time there. He said that during the festival, his instruction to the Bartender is to serve people and to monitor the bar. She is to rely on the doorkeeper to check ID. He said that he has been fortunate to have good, experienced staff and that he often relies on them to educate him.

The Principal acknowledged again that the minor agent “obviously...got through” the Establishment’s security and that he would make whatever changes are necessary to ensure it doesn’t happen again. He speculated that it may be necessary to employ a rope barrier at the entrance or to use a system of coloured wrist bands to bolster the doorkeeper’s ability to control access.

Cross-examination of the Principal

The Branch advocate did not cross examine the Principal.

In response to a question from me as to why the doorkeeper had not attended the hearing to testify as to how the minor agent entered the Establishment, the Principal responded that her duties for her other employer required her to be at her other job.

In response to a question as to whether he had read any previous decisions of the General Manager dealing with service of liquor to minors, the Principal replied that he hadn’t since he did not know of any other licensees who had had enforcement action taken against them for that contravention.

SUBMISSIONS – BRANCH

The Branch advocate submitted that the evidence shows that the minor agent and the liquor inspectors had gained entry to the Establishment by “normal means.” He said that the minor agent had been in full view of the doorkeeper and the Principal, and that he had been allowed in by the doorkeeper. There was no deception on the part of the minor agent or the liquor inspectors. The Branch submitted that the photos of the minor agent show that he was obviously underage, but that no one asked him for ID.

Regarding the defence of due diligence, the Branch argued that:

- The Licensee is reactive in terms of compliance, rather than proactive. There is no evidence of any training materials, or of regular staff meetings.
- Each member of a licensee's staff is responsible to ensure the liquor legislation is complied with. Due diligence does not permit staff to relinquish their duty to check for ID. The Bartender's reliance on the doorkeeper to check ID—on the instruction of the Principal—was not in keeping with due diligence.
- Due diligence is not available as a defence in any event since the Principal is a directing mind of the corporate Licensee and he was on site when the contravention occurred. The minor agent was in full view of the Principal.

With respect to penalty, the Branch submitted that the proposed \$7,500 monetary penalty is appropriate to the circumstances given the public safety concerns with liquor consumption by minors.

SUBMISSIONS – LICENSEE

The Licensee, through the Principal, admitted that the contravention occurred—that liquor was sold to a minor.

The Licensee argued, however, that the liquor inspectors and the minor agent did not have permission to enter the Establishment. He indicated that they had entered the Establishment by circumventing the security at the door, and that it was illegal for the minor agent to enter the Establishment in contravention of the signs prohibiting minors that the Licensee had posted at the door. He asserted that the minor agent and the liquor inspectors had used the opportunity of the Principal coming out to talk to the doorkeeper about capacity to gain access to the Establishment. The Principal stated that he was certain that if the doorkeeper had seen the minor agent she would have asked him for ID—she would not have simply waived him in.

The Licensee also argued that the minor agent and liquor inspectors were in contravention of fire prevention legislation when they entered the Establishment. The Licensee stated that liquor inspectors must obey the law, and that by entering the

Establishment “behind [the doorkeeper’s] back” when they knew the Establishment was already at full capacity, they put the Establishment and its patrons in jeopardy.

The Licensee argued that the evidence of the liquor inspectors was contradictory and confusing as to whether he (the Principal) had been at the door at the time the minor agent entered the Establishment or whether the Principal had already re-entered the Establishment. He also pointed out that Inspector B had incorrectly stated that the Establishment had previously had its Licence suspended for contraventions.

The Licensee also argued that there was no intent to serve a minor, as it goes against the investment interests of the owners and the employment interests of the staff. He said that in seven years staff had never had to ask a person to leave for being underage. The Licensee suggested that the contravention was simply an oversight from which he and the staff can learn and make amendments.

With respect to due diligence, the Licensee argued that it does have training (the SIR manuals) and systems (an Incident Log) in place to reduce the risk of a contravention occurring. The Licensee also argued that the doorkeeper is very diligent and that even the local police constables (who are familiar with the doorkeeper’s high standards) were surprised that the minor agent could have gained access to the Establishment. He stated that staff have called the police in the past to report drunk drivers and they have no hesitation in refusing to serve patrons who are intoxicated or in breach of other legal requirements.

Finally, regarding the proposed penalty, the Licensee asked that the proposed monetary penalty be waived. The Licensee argued that the small community relies on the money taken in by the Establishment circulating throughout the community. He suggested that further education for him and his staff would be a better remedy.

REASONS AND DECISION

Contravention

The Licensee admits that alcohol was sold to a minor. However, the Licensee went on to make a number of exculpatory arguments. I will deal with those here, except for arguments related to due diligence which are dealt with under a separate section.

Firstly, the Licensee argued that the minor agent and the liquor inspectors had entered the Establishment illegally and without the knowledge of the doorkeeper. The only evidence proffered by the Licensee on this point was indirect:

- The statement by the Bartender that the inspection team had entered “behind the doorkeeper’s back”. On cross-examination the Bartender admitted that this was an assumption on her part.
- The statement by the Principal that he knows that if the doorkeeper had seen the minor agent she would have asked him for ID and would not have waved him in. This is a statement of opinion by the Principal, and does not reflect direct observation of what actually occurred.

There was no testimony, either in the form of an oral or written statement, from the doorkeeper who could have provided direct evidence on this point.

Inspectors A and B, on the other hand, provided direct evidence to the effect that they and the minor agent entered the Establishment with the permission of the doorkeeper. Their evidence was detailed and consistent. The minor agent’s written statement (tab 6, Exhibit 1), which was written almost contemporaneously with the relevant events, notes that “...the lady...counting the occupancy allowed me to enter and seemed to put the focus of her attention on capacity.”

The Licensee sought to impugn the inspectors’ evidence by referring to asserted past “unprofessional” conduct by liquor inspectors generally; by stating that there was inconsistent evidence as to whether the Principal was at the door or inside the Establishment when the minor agent and liquor inspectors entered; and, by

highlighting the error made by Inspector B in stating that the Licensee had previously been subject to Licence suspensions.

Inspector A was not shaken on cross-examination by the Licensee, and was adamant that the inspection team had been admitted to the Establishment by the doorkeeper. Inspector B promptly retracted her erroneous evidence about previous suspensions on being questioned by the Licensee. On balance, considering the direct nature of the inspectors' evidence, the level of detail, the forthright manner in which it was given, and its consistency with the written statement of the minor agent, I find as a fact that the minor agent and the liquor inspectors were admitted to the Establishment by the doorkeeper.

This finding renders moot the Licensee's argument about the inspection team entering the premises contrary to fire regulations, as they were entering with the permission of the staff person who was charged with ensuring that capacity of the premises was not exceeded.

The Licensee argued that the minor agent entered the premises illegally in the face of the signs posted by the Licensee prohibiting entry by minors. If the Licensee's argument on this point were to be accepted, it would render the MAP completely ineffective. Section 34(5) of the Act authorizes the Branch to establish the MAP program to test compliance of a licensee with sections 33, 35, and the Regulation, and authorizes minors employed under the MAP to enter licensed establishments in the course of their employment. In my view, the authorization provided by section 34(5) must be read sufficiently broadly that a Licensee cannot thwart the legislative scheme by posting signs barring entry to minors.

I accept the Licensee's position that he and the staff did not intend to sell alcohol to a minor. However, section 33(1)(a) of the Act is a strict liability contravention, and accordingly intention is not an essential element of the contravention.

Based on the evidence of the minor agent's identification tendered in Exhibit 2, I find as a fact that the minor agent was a minor on August 1, 2014.

The evidence of Inspectors A and B, as well as the Licensee's and Bartender's admissions, demonstrate on the balance of probabilities that, with reference to section 33(1)(a) of the Act:

- a person (the Licensee, acting through its employee the Bartender)
- sold liquor (a bottle of Kokanee beer)
- to a minor (the minor agent).

Accordingly, I find that on August 1, 2014 the Licensee contravened section 33(1)(a) of the Act by selling, giving or otherwise supplying liquor to a minor.

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, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the Act.

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.

Analysis

There is no evidence before me to suggest that the Bartender who sold the bottle of beer to the minor agent had the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute her being a directing mind of the corporate Licensee, as described in *Beverly Corners*. Neither the Branch nor the Licensee made any submissions in this regard. Accordingly, I find that the Bartender who sold the liquor to the minor agent was not a directing mind of the Licensee.

The Branch suggested that since the Principal (who as an “owner” is a directing mind) was on site, and because the minor agent had been in full view of the Principal while

standing in line to enter the Establishment, the defence of due diligence is not available to the Licensee.

However, there is no evidence to suggest that the Principal had seen the minor agent outside the Establishment, or that he was involved in or aware of the sales transaction which took place between the Bartender and the minor agent. Since a directing mind did not commit the contravention I must consider the second stage of the due diligence analysis.

a. Adequate Training and Systems

Due diligence requires that a Licensee takes reasonable steps to try to ensure that a contravention does not occur. The exercise of due diligence does not guarantee that a contravention will never occur. It is intended, however, to reduce the likelihood of a contravention occurring to a reasonable and acceptable level. The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and potential consequences underlying the prohibition against selling liquor to minors:

- 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.
- Liquor is a significant factor in many crimes committed by youth.

In the circumstances of the current case, I find that the employee training system with respect to ID checks and the prohibition against selling alcohol to minors was deficient. Oral evidence was provided to the effect that the Licensee's staff all have SIR certification, and that SIR manuals are made available for staff to read if they wish. There is also evidence that the Licensee has follow-up conversations with staff regarding problems documented in the Incident Log. No documentary evidence with respect to employee training was proffered.

The Principal provided evidence to the effect that he had directed the Bartender not to ask for ID during the festival—the Bartender was to rely on the doorkeeper to check for ID. While this approach may provide for more efficient service of patrons during the busy festival weekend, it closes off a valuable safeguard against serving a minor. Each employee who serves patrons should be empowered to unhesitatingly request ID from anyone who looks underage. In this case the Bartender testified, when shown a photo of the minor agent, that she would normally have asked him for ID if she hadn't been relying on the doorkeeper to do so.

Considering the foregoing, in my view there is insufficient evidence to establish that the Licensee has an adequate employee training program in place.

b. Steps to Ensure Effectiveness

This aspect of due diligence requires the Licensee to take reasonable steps to supervise and monitor its operations sufficiently to ensure that staff are applying their skills and knowledge appropriately, and to ensure that risk-reducing systems are operating effectively.

The Licensee and the Bartender testified that after each annual festival, the Licensee and staff learn from the experience and take steps to enhance their performance the following year. This is consistent with the Licensee's evidence that the current focus on monitoring occupancy is a result of the compliance meeting held in 2013.

Due diligence requires a forward-looking approach, to address reasonably foreseeable risks. In the current case, the evidence indicates that the Licensee relies substantially on experience gained at the annual festival to retroactively put in place systems to address problems that were encountered.

It is my view that, considering the reactive approach taken by the Licensee to addressing non-compliance, as well as the limited evidence of training, systems, or monitoring, the evidence falls short of that which would be necessary to successfully establish the defence of due diligence.

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 NOEA. 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 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 risk to 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 monetary penalty of \$7,500 to \$10,000.

I have considered the Licensee's compliance history and the unproven allegations of different contraventions in 2013. I have not been influenced by Inspector B's incorrect (and subsequently withdrawn) statement that the Licensee had been subject to previous Licence suspensions.

The Branch has recommended a penalty of \$7,500, which is the minimum monetary penalty applicable in the circumstances. The Licensee asked that the monetary penalty be waived in consideration of the negative effect it will have on the local economy, and suggested that further education would be more appropriate.

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

These public safety factors, coupled with the limited evidence of due diligence being exercised by the Licensee, lead me to the conclusion that a monetary penalty levied against the Licensee is warranted. Having reached this conclusion, I am bound to apply at least the minimum penalty prescribed by the Regulation. Accordingly, I find that a monetary penalty of \$7,500 is necessary and appropriate in order to achieve the Branch's objectives of both specific and general deterrence.

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 Branch on or before Friday, May 22, 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 Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: April 20, 2015

cc: Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Rupi Gill, A/Regional Manager

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