



**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: Golden Sound Holdings Ltd.,
dba Ivanhoe Hotel
1038 Main Street
Vancouver, BC, V6A 2W1

Case: EH15-012

For the Licensee:
Counsel: Nasser Nabahat
Colin Edstrom, Barrister & Solicitor
Harris & Company LLP, Barristers &
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For the Branch: Hugh Trenchard

General Manager's Delegate: R. John Rogers

Date of Hearing: December 1, 2015

Date of Decision: January 25, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Golden Sound Holdings Ltd. holds Liquor Primary Licence number 003148 (the "Licence"), pursuant to which Launhardt Hotel/Pub Ltd., as third party operator, operates the Ivanhoe Hotel at 1038 Main Street, Vancouver, BC (the "Establishment"). For ease of reference, the licensee and the operator are collectively referred to as the "Licensee".

According to the terms of the Licence, the Licensee may sell liquor from 11:00 a.m. to 1:00 a.m. Monday through Saturday and from 11:00 a.m. to Midnight on Sunday.

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

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated February 26, 2015 (the "NOEA") (Exhibit 1 tab 1).

The Branch alleges that on January 17, 2015, 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 male minor ("Agent #57"). 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.

The Licensee has admitted that its employee sold liquor to Agent #57 as set out in the NOEA. However, the Licensee disputes the finding of a contravention. The Licensee's submission was initially based upon two positions:

1. The defence of due diligence; and
2. That the MAP inspection on January 17, 2015 was carried out unfairly and therefore constituted an abuse of process resulting in a dismissal of the contravention. This position was based upon two grounds:
 - a. that Agent #57 acted contrary to Branch policy in that he altered his appearance over his normal attire to make himself look older; and
 - b. that Agent #57 appeared older than his age contrary to the Branch's policy with MAP.

In its written submissions following the hearing, the Licensee abandoned its allegation that Agent #57 had altered his appearance.

For the purposes of this hearing, and in accordance with section 6.1 of the Act, 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

Supplying liquor to minors

33 (1) A person must not

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

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002**Schedule 4
Enforcement Actions****Minors**

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

ISSUES

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

EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 17.
- Exhibit 2: A coloured photocopy of a picture of Agent #57 (to be sealed at the conclusion of the hearing).
- Exhibit 3: Un-redacted photocopies of Agent #57's Firearm's License and his British Columbia Driver's Licence (to be sealed at the conclusion of the hearing).
- Exhibit 4: A photocopy of the Minor Agent Observation Form completed by Agent #57 on January 17, 2015.
- Exhibit 5: A photocopy of the Minor Agent Statement prepared by Agent #57 on January 17, 2015.
- Exhibit 6: A photocopy of the 2013/2014 Annual Report of the Branch on the Minors as Agents Program.
- Exhibit 7: A copy of the CCTV camera footage recorded by the CCTV camera system operated by the Licensee in the Establishment on January 17, 2015.

WITNESSES

The Branch called three witnesses:

1. Liquor Inspector A who together with Agent #57 attended at the Establishment on January 17, 2015 (“Inspector A”);
2. Liquor Inspector B who accompanied Inspector A and Agent #57 at the Establishment on January 17, 2015 (“Inspector B”) ; and
3. Agent #57

The Licensee called two witnesses:

1. The female clerk who sold liquor to Agent #57 on January 17, 2015 (the “Server”); and
2. The Manager of the Establishment (the “Manager”).

PROTECTING THE IDENTITY OF THE MINOR AGENT

To protect the identity of Agent #57, and with the agreement of the parties, at the conclusion of the hearing the colour photocopy of Agent #57’s photograph and the photocopy of his identification as contained in Exhibit 2 and Exhibit 3 were placed in an envelope, marked as Exhibit 2 and Exhibit 3, and sealed with a notation on the envelope that it was not to be unsealed or its contents disclosed without a court order.

EVIDENCE – BRANCH

The Licensee confirmed that it accepted the facts as they are set out in the NOEA as to what occurred in the Establishment on January 17, 2015 with respect to the alleged contravention.

The NOEA

The facts in the NOEA might be summarized as follows:

- On January 17, 2015 Inspector A, Inspector B and Agent #57 constituted an inspection team pursuant to the Branch's Minors as Agents Program (MAP) to test compliance with the Act and the Regulation at several licensed establishments in Vancouver;
- At the start of the shift on this date, Agent #57 was photographed (a copy of which is Exhibit #2), his identification viewed and photocopied (Exhibit #3) and his age confirmed his age to be 17 years old;
- The Licence includes an off-premises sales endorsement which allows during the hours of sale permitted by the Licence for the sale of packaged coolers, beer, cider and wine for off-premises consumption;
- At approximately 6:25 pm on January 17, 2015, Agent #57, with Inspectors A and B following, entered the Establishment and proceeded to the service counter;
- At the service counter Agent #57 was asked by the Server "What can I get you?";
- Agent #57 replied "Can I get a half sack of Molson Canadian?";
- The Server replied "Yup, that will be \$14.50", whereupon Agent #57 handed the Server \$15.00, and received back a white plastic bag containing 6 cans of Molson Canadian and change of \$.50;
- Agent #57 replied "Thanks" and at 6:25 left the Establishment with the liquor, returning to the vehicle used by the inspection team during its shift;
- At no time during the transaction between Agent #57 and the Server did the Server ask Agent #57 for identification to verify his age;
- The entire transaction between Agent #57 and the Server was observed by Inspectors A and B;
- Inspector A contacted the Manager advising him that the Server had just sold liquor to a minor and issued Contravention Notice B 005664 (Exhibit 1 tab 2) (the "Contravention Notice"); and
- Inspectors A and B together with the Manager reviewed the recorded CCTV footage of the transaction between the Server and Agent #57 (a copy of which is Exhibit 7).

Inspector A

In his testimony, Inspector A:

- Stated that he has been a liquor inspector with the Branch for 9 years and that the area of Vancouver in which the Establishment is located is part of his area of responsibility;
- Identified Exhibit 2 as a photocopy of a coloured photograph that he had taken of Agent #57 on January 17, 2015 at the start of his shift and testified that the clothing that Agent #57 was shown as wearing in Exhibit 2 was exactly the same clothing as Agent #57 was wearing when he purchased liquor from the Server later on that day. Inspector A confirmed that he was in the presence of Agent #57 from the time the photograph in Exhibit 2 was taken until the time of the alleged contravention and that during that time, Agent #57 did not change his clothing or his appearance in any respect;
- When asked what criteria he used personally to judge whether or not a person was over the age of 19 he testified that it would depend upon the individual, but that some of the features he looks at are the person's height, hair colour, facial characteristics and muscle tone;
- Testified that business in the Establishment at the time of the alleged contravention was "steady", that there was a line up at the service counter, and that the lighting was a "bit on the dark side";
- Identified the NOEA and confirmed that he had prepared this document;
- Testified that on January 17, 2015, the inspection team conducted 4 to 5 inspections and, including the alleged contravention, Agent #57 on two occasions was not asked for identification prior to the sale to him of liquor;
- Identified Exhibit 1 tab 11 as a picture of the beer purchased by Agent #57 in the alleged contravention, which picture included the white plastic bag in which the 6 cans of beer were sold;
- Stated that he has visited the Establishment approximately once a month over the last four years and that the Licensee is one of his best licensees in the area in that it has had no prior contraventions or issues and has always been receptive to full communication and open dialogue with the Branch with attention to compliance detail;

- Testified that the Establishment is a “hub” in the area of the city employing a lot of people and that he had recommended as a penalty a fine rather than a suspension as a suspension would adversely affect the area residents who use the Establishment as a hub.

On Cross-examination, Inspector A:

- Confirmed that the Branch instructs the minors participating in MAP not to alter their appearance or normal attire in any way;
- Identified a copy of the document entitled “2013/14 Annual Report” of the Liquor Control and Licensing Branch Minor as Agents Program (MAP) (Exhibit 6) and testified that he advises the licensees for whom he is responsible to read a copy of this document posted on the Branch’s website. He confirmed that this document notes (Pg. 4) that the MAP program is a “risk-based inspection program”, but that some establishments are sometimes checked on an *ad hoc* basis based on geography. Inspector A confirmed that the reason for the inspection of the Establishment on January 17, 2015 was not “risk” based, but rather “geography” based resulting from the fact that the inspection team was on that day working in the area of the Establishment;
- Was directed to the NOEA (Exhibit 1 tab 1) which he confirmed he had drafted. He was referred to the following sentences (Pg. 2):

MAP inspections are used to test compliance with the Liquor Control and Licensing Act’s prohibition against selling or supplying liquor to persons under the age of 19 years (minors). LCLB has hired 16 to 18 year old minors who appear young, as agents to carry out these compliance inspections. The minor agents are provided training with the Liquor Control and Licensing Act, making and documenting observations and safety considerations

and the following sentences (Pg. 4) under the heading “REASONS FOR PURSUING ENFORCEMENT”):

In this case, the agent who completed the purchase of liquor is 17 years of age which is below the legal drinking age of 19 years. In addition, the minor agent also physically appeared to be their actual age by making no attempt to deceive or mislead in their physical appearance.

and asked if, to his knowledge, these sentences reflected the policy of the Branch. Inspector A testified that although he was not responsible for establishing this policy, it was his understanding that these sentences correctly stated the Branch's policy;

- Testified that it was his understanding that the intent of the MAP was not to trick licensees into selling liquor to minors. He confirmed that fairness together with transparency were "essential" components of everything the Branch carries out. When pressed, Inspector A confirmed that in his opinion if the Branch employed minors who appeared to be older than their actual age, that that would be unfair in that it wouldn't test compliance and it would be contrary to the MAP program;
- Was asked to compare what Agent #57 was wearing in his picture in Exhibit 2 with the images of him purchasing liquor included in the CCTV footage (Exhibit 7) and, specifically, as to the jacket Agent #57 was wearing. Inspector A was asked to comment on what appeared to be differences in:
 - The colour of the jacket with the jacket in Exhibit 2 appearing black while the jacket in Exhibit 7 appearing light grey;
 - The jacket in Exhibit 2 appearing to be a much heavier jacket and to extend significantly longer than that in Exhibit 7;
 - The jacket in Exhibit 2 appearing to have epaulets on its shoulder which appear missing on the jacket in Exhibit 7;
 - The jacket in Exhibit 7 appearing to have a black collar while the collar on the jacket in Exhibit 2 appears to be the same colour as the jacket;
 - The jacket in Exhibit 7 appearing to have a breast pocket containing a white handkerchief or scarf, while the jacket in Ex 2 appears to have no such feature; and
 - The jacket in Ex 7 appearing to have black buttons unlike the buttons in the jacket in Exhibit 2.

Inspector A testified that Agent #57 was wearing the same jacket in the picture in Exhibit 2 as in the images of him in Exhibit 7 and that Agent #57 did not alter his appearance in any manner between the time that the picture in Exhibit 2 was taken and the video footing in Exhibit 7 was recorded; and

- Was referred to the copy of Agent #57's driver's license in Exhibit 3 and confirmed that the license issued on September 27, 2014 stated that Agent #57 was 188 cm. tall and confirmed that height together with weight and muscle tone is one of the core components in determining whether or not someone is a minor.

Inspector B

In his testimony, Inspector B:

- Testified that he has been a liquor inspector for 8 years and is currently the Regional Inspector for the Vancouver Regional Office of the Branch, being second in command for the Vancouver Region;
- Stated that he is responsible for running MAP and confines his inspections of licensees to inspections under this program;
- Confirmed that MAP has been in operation for over 4 years and since its inception the Branch has actively advised licensees of its operation;
- Testified that during the shift on January 17, 2015, he was with Agent #57 during the entire shift and that Agent #57 did nothing to alter his appearance from what appeared in the picture in Exhibit 2;
- Stated that he is quite familiar with the Establishment knowing that it has a liquor primary license including a term and condition for off-sales liquor; and
- Stated that the reason that the Establishment was inspected was that the inspection team was working in the geographical area in which the Establishment is located.

On Cross-examination, Inspector B:

- Confirmed that he was one of three Regional Inspectors involved in the implementation of MAP once the Branch had created the policy around it;
- Stated that when MAP was developed there was no intention to trick licensees into selling liquor to minors. The reasoning behind the inspections was to test the licensee's compliance. To ensure that the inspections were conducted fairly, safeguards were established, such as the requirement that minor agents not alter their appearance during their work on MAP inspections.

- Testified that he was responsible for hiring the minors who worked for the Branch in connection with MAP and that he was concerned only that these minors were between the ages of 16 and 18. In his decision on hiring, he did not require the prospective MAP agent to “look young”;
- When directed to the following paragraph in the NOEA (Exhibit 1, Tab2)(Pg. 2):
MAP inspections are used to test compliance with the Liquor Control and Licensing Act’s prohibition against selling or supplying liquor to persons under the age of 19 years (minors). LCLB has hired 16 to 18 year old minors who appear young, as agents to carry out these compliance inspections. The minor agents are provided training with the Liquor Control and Licensing Act, making and documenting observations and safety considerations.

Inspector B testified that:

- This language is introductory language originally drafted by the Branch’s Deputy General Manager;
 - The NOEA was approved by the Vancouver Branch Manager prior to it being delivered to the Licensee and he was not involved in this approval process;
 - When this paragraph was originally written in 2011, he would not have hired a male minor who had a beard as the direction was to only hire clean shaven males, but this policy was changed in 2012 and today males with beards are permitted;
 - Under the current policy, he would hire a minor who had grey hair, or a minor who was balding. The criteria is whether or not the person is between the ages of 16 and 18. The current policy is that due to the subjectivity and interchangeability of characteristics among youths under 19, the minor’s appearance is now considered irrelevant;
- Identified Agent #57 in his picture (Exhibit 2) and confirmed that Agent #57 did not change his clothing at any time during his shift on January 17, 2015;
 - When shown the CCTV footage (Exhibit 7) confirmed that although he had not seen this footage on January 17, 2015, that he had seen it before and that from the images in the CCTV footage, Agent #57 appears to be wearing the same clothing when he was purchasing liquor as he was when his picture was taken (Exhibit 2).

Agent #57

In his testimony, Agent #57 testified:

- That on January 17, 2015, he was 17 years old and attending high school. He is currently in the motion picture arts program at university;
- He was hired by the Branch at the age of 16 to work in MAP, having spent the previous year doing inspections in connection with lottery enforcement;
- He has performed between 30 and 40 MAP inspections;
- That during his shift on January 17, 2015, he was wearing jeans and a black pea coat with a T-shirt underneath as shown in his picture in Exhibit 2 and that he wore this clothing all during his shift without changing. He noted that the black pea coat had a zipper pocket over the left breast, and that there was nothing in this pocket during his shift on January 17, 2015;
- That Exhibit 3 contained true copies of his driver's license and his firearms license and Exhibit 4 and Exhibit 5 were true copies of reports he had completed following the transaction in the Establishment on January 17, 2015;
- That during his shift on January 17, 2015, he carried out 5 inspections, and that although he didn't remember how many of these inspections he had been asked for identification, he stated that from his experience in conducting over 30 MAP inspections he had been asked for identification 50% of the time.

On Cross-examination, Agent #57 testified:

- That the high school which he attended was a fantastic sports school and had an enrollment of about 1,300 students, of which his graduating class numbered 250;
- That in his senior year he was on the cross country team, volleyball team, track and field team, and swam with and coached the swimming team, all activities leading him to be named athlete of the year for his high school;
- That at 6 feet two inches in height and weighing 170 pounds, he was stronger, taller, more muscular, more coordinated, and more mature than the rest of his classmates;
- That what he wears for inspections is dependent upon what he is wearing that day and is a function of the season and the weather;
- That a "half sack" is half a case of beer which is usually sold in a grocery bag;
- That prior to entering the Establishment on January 17, 2015 when he was given the money for the intended transaction, he was instructed by Inspector A and

Inspector B to ask for a “half a sack of Molson Canadian” when he entered the Establishment and sought to purchase liquor;

- He had not before seen the CCTV video footage in Exhibit 7;
- The pea coat that he was wearing in the picture in Exhibit 2 was the same as the one shown in the CCTV video footage in Exhibit 7, being an all black jacket with black buttons, black hemming on the bottom of the wrist, black sleeves, and there was nothing in the breast pocket of the jacket, but a zipper which was closed;
- That he is certain that he did not change his jacket during his shift from the one that he had on when the picture in Exhibit 2 was taken, as the Branch stresses that an agent is not to change his or her appearance during a shift.

EVIDENCE—LICENSEE

The Manager

In his testimony, the Manager testified that:

- He is the manager of the Establishment, that he has been a manager in the hospitality industry for over 25 years, and that he has held this position with the Establishment since about 2008;
- His responsibilities as manager include staff scheduling, staff hiring and discipline, overseeing the operations, organizing promotions, and ordering;
- The Establishment has 14-15 employees serving as bartenders, waitresses, bar backs and floor staff;
- He is responsible for implementing the Licensee’s policy with respect to the sale of alcohol on a day to day basis, including enforcing policies preventing the sale of liquor to minors;
- The Server has no managerial responsibilities and is not involved in the development of policies to prevent the sale of liquor to minors;
- When he found out that the Server had sold liquor to Agent #57 without asking for identification, he was shocked as the Server was one of the best employees of the Establishment for asking for identification from patrons;

- After he had been advised of the sale of liquor to Agent #57, he, together with Inspector A and Inspector B, viewed the CCTV video footage in Exhibit 7. He testified that he had asked the liquor inspectors how tall Agent #57 was as when he viewed Agent #57 on the CCTV footage, Agent #57 didn't appear to be a minor as he hadn't seen 17 year olds that tall before;
- The Licensee has the following policies in place to prevent the sale of liquor to minors:
 - Constant attention to ensuring that patrons appearing to be 25 years old or under the are asked for identification and communication among the staff to that effect (following the incident on January 17, 2015, this age has been increased to 30);
 - Ensuring that all serving staff have Serving it Right certification;
 - That most new employees who serve alcohol in the Establishment must either have a great deal of experience, or must spend months learning the Licensee's policies, and in any event, he works with them until they have experience; and
 - There is one government issued identification notice located at the serving station in the Establishment;
- He checks with employees 30-40 times each day to ensure that they have asked patrons for identification;
- When a group of patrons come into the Establishment if there is a member of the group who appears to be underage, that person is asked for identification and if that person is not able to produce identification proving the person to be over the age of 19, either that person has to leave, or if that person will not leave, the entire group is required to leave the Establishment;
- The Establishment's CCTV camera system consists of 16 cameras, of which 13 are directly in the licensed area. This system is used to show staff underage patrons who are attempting to gain access to the Establishment to purchase liquor. Images from this system can be viewed on the Manager's cell phone so that he can access these images when he is not present in the Establishment;
- The Establishment keeps an incident log in its office together with a list of patrons who are no longer welcome in the Establishment. A copy of this latter list is kept at the serving desk;

- If an employee knowingly serves a minor, the employee will be fired. The Server has not been fired as from viewing the CCTV camera footage, Agent #57 clearly looked to be over 19 years old. The Manager testified that he does not believe that he would have asked Agent #57 for identification;
- During a week day there could be up to 600 people coming and going in and out of the Establishment, with that number up to more than double over the weekend;
- During a week day, there could be 50 to 60 incidents of checking patrons for identification;
- He constantly meets with employees to discuss the requirement to check for identification;
- The CCTV footage showed that on two separate occasions after Agent #57 entered the Establishment on January 17, 2015, floor security staff of the Establishment whose responsibility it was to look for underage patrons and ask them for identification passed by Agent #57 and didn't ask him for his identification. He noted that the video footage appeared to show these staff members were being fairly vigilant in their duties;
- The Establishment pre-bags the beer it sells as it makes it more efficient in carrying on its business;
- The Establishment has zero tolerance when it comes to the sale of liquor to minors, and, following the incident on January 17, 2015, the staff are more vigilant than they were before, including the Server who has always been extremely vigilant; and
- The term "half sack" is not a common term in off-sales in the industry, and the use of this term is slang and suggests that a person using it is used to ordering beer in this manner.

On Cross-examination, the Manager testified that:

- When there was a change in operation policy for the Establishment, sometimes the Manager would write out this change and leave the message for the staff either on the bulletin board outside the Establishment's office or by way of delivering a document to each member of the staff, but this is not done as a matter of course, with the preferred method being oral communication;
- There was no written policy with respect to selling liquor to minors;

- There are no training manuals employed by the Licensee;
- There are no staff meetings where policies and operational issues are discussed collectively, such as what criteria might be used in attempting to determine whether or not a patron is a minor. The Manager confirmed that there was not a staff meeting when the policy was increased from 25 to 30 as the cutoff age for asking for identification. Rather he spoke directly to the staff;
- The Establishment's staff is not tested on its operating policies or with respect to the requirements of requiring the production of identification;
- The incident log is with respect to employee performance and is kept on his computer in a file where he keeps notes on staff and his communication with his staff;
- The Server didn't write up notes on the sale to Agent #57 on January 17, 2015;
- There are 5 entrances to the Establishment and rather than have a staff member at each door, there are two security staff whose responsibilities include bussing;
- He was familiar with the Guide (Exhibit 1 tab 15), a copy of which he keeps at his office for members of his staff and other members of management to view;
- The Licensee has never used a secret shopper program to test staff compliance;
- The Licensee has never done any role playing exercises with staff to deal with occasions when younger patrons come into the Establishment and a staff member is required to make a decision on whether or not the patron is a minor; and
- There is no employee orientation manual for new employees.

The Server

In her testimony, the Server testified that:

- She has had about eleven and a half years bar tending experience, six of which have been working in the Establishment;
- She started at the Establishment bagging beer in the basement and was promoted upstairs to bar back and waitressing for about a year and a half once she had obtained her Serving it Right certificate;
- She is not responsible for formulating or enforcing policies and procedures dealing with the sale of liquor to minors in the Establishment;
- She has seen the video in Exhibit 7 and that she is the person behind the counter serving Agent #57 liquor;

- Agent #57:
 - Was very tall, confident, and dressed nicely,
 - Appeared to be in his mid to late twenties and his face didn't appear youthful,
 - Was dressed very professionally,
 - Used the slang "half sack" asking for beer, it appeared that he was used to purchasing beer this way, and that he had done it many times;
- She was very shocked to discover that Agent #57 was a minor and that she did not complete her shift that night as she was too upset to work;
- She is sufficiently trained to prevent the sale of liquor to minors as it is a constant focus as staff in the Establishment are constantly speaking of it; and
- On a week night she will check 15 to 20 patrons for identification and on weekends that number increases to 25-50.

On Cross-examination, the Server testified that:

- She received her Serving it Right certificate in 2009;
- Most of her training was on the job training and that she did not get any special training involving the service of liquor to minors;
- Often the floor staff will ask people for their identification prior to them coming to the service desk for off-sales purchases;
- There are signs about serving underage in the bar area and stickers at the waitress station;
- There are no quizzes on procedures for asking patrons for identification;
- There are no written reminders, only verbal reminders about asking patrons for identification;
- Following the incident on January 17, 2015, the Establishment's staff are much more vigilant;
- There was not a general meeting of staff of the Establishment following the incident on January 17, 2015, but staff members talked about it afterwards after work;
- She was the staff member who before was the most vigilant in asking for identification and after this incident, she is even more vigilant; and
- She was not before aware of MAP.

SUBMISSIONS

Both the Branch and the Licensee made oral submissions at the hearing and, following the hearing, were given the opportunity to provide subsequent written submissions. Both the Branch and the Licensee took advantage of this opportunity to provide subsequent written submissions. The two sets of submissions are consolidated below.

SUBMISSIONS – BRANCH

The Branch submitted that it had established that on January 17, 2015 liquor was sold by the Server, an employee of the Licensee, to Agent #57 who at the time of the sale was a minor.

Alteration of Appearance

With respect to the claim that Agent #57 altered his appearance, the evidence of Inspector A, Inspector B and Agent #57 himself was that Agent #57 did not alter his appearance and that he was wearing the same clothing for his picture (Exhibit 2) as when he purchased the liquor from the Server.

Agent #57's Performance

Regarding the claim that Agent #57's appearance led the Server to make a mistake in fact and not to ask Agent #57 for identification, the reasonable approach would have been to ask Agent #57 for identification.

The Branch submitted that Agent #57 is simply an example of a normal, athletic, taller than average youth under 19 and the Server should have been trained to ask such customers for identification.

Similarly with respect to the fact that Agent #57 was instructed by Inspector A and Inspector B to ask for "a half sack of Molson Canadian". The Branch submitted that this phrase was not uncommon in the context in which it was used, that is to purchase pre-bagged off-sales beer. Indeed, the evidence clearly demonstrated that when Agent #57 made his request, the Server knew exactly for what he was asking. Therefore, in instructing Agent #57 to speak as he did, the Branch's inspectors were not attempting to

deceive the Server into serving liquor to a minor, but rather to instruct Agent #57 in the common parlance of customers purchasing pre-bagged off-sales beer.

The Branch submitted that the sale of liquor to Agent #57 by the Server was not due to any bad faith by the Branch leading to an abuse of process, but rather to weaknesses in the Server's understanding and training in relation to how a person's physical characteristics and phrasing may be interchangeable across a wide range of ages from those under 19 to those over 19 years of age. The test to be applied is not whether or not the person before the Server appears as though he or she is a minor, but rather whether or not that person *could* be a minor

Due Diligence

And finally concerning the Licensee's claim that that defence of due diligence applies, the essential elements of this defence have not been made out in that:

- There was no formal training or monitoring of employees with respect to procedures or a defined system to prevent the sale of liquor to minors;
- There were no written policies on that subject;
- There were no efforts taken to assist employees in this area such as role playing sessions, or written or oral quizzes;
- There were reminders given, but not in a formal, concrete manner;

Therefore, the Branch submitted, the Licensee has not made out the defence of due diligence.

As the alleged sale of liquor has been proven and as the Licensee has demonstrated no defence to this contravention, the Branch submitted that the Licensee should be found liable for breach of section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor.

As to the matter of penalty, the Branch submitted that as this was the Licensee's first contravention, the minimum recommended penalty of \$7,500 was reasonable and appropriate.

SUBMISSIONS – LICENSEE

The Licensee acknowledged that on January 17, 2015 the Server sold liquor to Agent #57 as alleged in the NOEA. However, the Licensee submitted that the defence of due diligence applies.

Due Diligence

The Licensee submitted that the evidence clearly shows that the Server was not a directing mind of the Licensee and that adequate systems were in place and enforced prior to January 17, 2015 to prevent the sale of liquor by the Server to Agent #57, such systems including:

- Constant communication among the Licensee's employees within a culture of compliance to ensure that all patrons who should have been challenged were asked for their identification;
- An experienced manager who implemented proper policies as evidenced by the Licensee's compliance history;
- The requirement for all employees serving liquor to have their Serving it Right certificates;
- The positioning of stickers next to the service desk reminding servers to ask patrons for two sets of identification; and
- The use of a 24 hour CCTV camera system to monitor activities, with access to this system available to the Manager on his cell phone.

Evidence that this approach by the Licensee was working was the evidence of Inspector A that the Licensee was one of the best licensees for which Inspector A was responsible, indicating that the Licensee knew well how to operate its business.

The Licensee further submitted that its policy was that if an employee serves liquor to a minor, that that employee is immediately fired. However, as the Server clearly thought that Agent #57 was over 25 years old and as the Manager, after having reviewed the CCTV video agreed, the Server's employment was not terminated.

The Licensee noted the evidence of both the Server and the Manager that since the incident on January 17, 2015, the Licensee had increased the age threshold from 25 to 30 for the purpose of asking for identification and had made the culture of compliance it enforced even more diligent than it was previously.

Alteration of Appearance

The Licensee submitted that it was clear from the differences in appearance in what Agent #57 was wearing in the picture in Exhibit 2 and the CCTV Camera footage in Exhibit 7 that, contrary to Branch policy, Agent #57 had changed his clothing between the time he was photographed and the time he purchased liquor from the Server. This alteration constituted an abuse of process and should lead to a staying of the contravention.

Agent #57's Performance

In his outward appearance and his approach to the Server, the Licensee submitted that Agent #57 had clearly come across as being over the age of 25. The Server testified that she had made a conscious decision prior to serving Agent #57 that he was over the age of 25 based upon his appearance and his approach. This was not a case of her inattention to the age of customers she was serving, the Licensee submitted.

The Licensee noted that in his testimony, Inspector A confirmed that the intention of performing inspections under MAP was not to trick an employee of a licensee into breaking the law, but it was rather to monitor a Licensee's compliance with the terms of its license. The Licensee further noted that the NOEA clearly stated that it was the Branch's policy to employ a young looking minor to monitor this compliance. Notwithstanding the testimony of Inspector B that this policy had changed, there appeared to be no written notification of this change in policy to licensees. Agent #57 certainly did not meet this "young looking" test, the Licensee submitted, and, therefore in carrying out this inspection, the Branch's policy was clearly not followed.

The Licensee further submitted that the evidence was that:

- Both the Server and the Manager, persons well experienced in the hospitality industry, were shocked to find that Agent #57 was indeed 17 years old;
- Two security employees of the Licensee's whose duties included checking patrons for identification were seen in the CCTV video (Exhibit 7) as looking at and walking by Agent #57 as he approached the service desk to purchase liquor;
- Agent #57 is an outlier for his age group in that:
 - He is a confident and physically mature young man who acknowledged in his testimony that he was stronger, taller, and more muscular than his classmates;
 - He was athlete of the year in his graduating year at what he described as a fantastic sports high school.

The Branch has a duty in law, the Licensee submitted, to conduct its inspections of licensees fairly and in a manner which monitors a licensee's compliance with the prohibition against selling liquor to minors. Inspections should not be conducted in a manner which deceive a licensee into breaking the law. In instructing Agent #57 to use local slang to ask for a "half sack of Molson Canadian" in ordering off-sales pre-bagged tins of beer, this duty of fairness was not met and constituted an unfair process rather than a bona fide monitoring of the Licensee's compliance regimen.

What occurred here was not a test of compliance, but rather a ruse to see if Agent #57 based upon his appearance, parlance and demeanor could deceive an employee of the Licensee to sell him liquor.

In conclusion, the Licensee submitted that there should not be a finding of liability against the Licensee either on the basis of the defence of due diligence or on the basis of an abuse of process due to the fact that the Branch acted unfairly in using a minor who looked much older than his age and coached him to use a parlance which suggested he was other than a minor.

REASONS AND DECISION

Contravention

The Licensee has admitted that on January 17, 2015 as alleged in the NOEA, the Server sold liquor to Agent #57, and I so find

I address the question of due diligence below.

Due Diligence

As the Server sold liquor to a minor in contravention of section 33(1)(a) of the Act, the Licensee is liable unless it can demonstrate 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 prevent from happening activities that might lead to this contravention of the Act, it must ensure that such procedures are consistently in operation and acted upon by its employees.

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).

The Court states that the defence of due diligence is to be considered in two stages:

1. Whether the employee who sold liquor to the minor 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 took such action or failed to take such action was not a directing mind of the Licensee (and there is no requirement that a “directing mind” must be on the premises when the contravention occurs), 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 upon the evidence presented. The onus is on the 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

The evidence before me is quite clear that the Server was not the directing mind of the Licensee.

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

Adequate Training and Other Systems

As noted above, the Licensee and its witnesses provided considerable evidence about the training to new staff, and ongoing training and other systems in place, with respect to ensuring minors are prevented from purchasing liquor. This included:

- Constant communication among the Licensee's employees within a culture of compliance to ensure that all patrons who should have been challenged were asked for their identification;
- An experienced manager who implemented proper policies as evidenced by the Licensee's compliance history;
- The requirement for all employees serving liquor to have their Serving it Right certificates;
- The positioning of stickers next to the service desk reminding servers to ask patrons for two sets of identification; and
- The use of a 24 hour CCTV camera system to monitor activities, with access to this system available to the Manager on his cell phone.

I find that the licensee has policies and implemented training on these policies to guide staff to ask for ID of anyone under 25. Through this policy, the licensee has created a buffer for staff to help ensure anyone under 19 is asked for ID. I further find that this policy has served the licensee well, as evidenced by the fact that many are turned away on a regular basis.

It is clear from the testimony of Inspector A that, in his opinion, the Establishment is one of the best run operations within his area of responsibility. It is also clear from the testimony of both the Manager and the Server that as the Licensee operates in an environment which has many challenges it takes very seriously its compliance obligations and attempts to comply with the terms of its Licence, the Act, the Regulation, and the Guide.

I accept the Manager's testimony that the Licensee has operating policies and procedures for the Establishment to carry out these compliance obligations. I was impressed by the passion with which both the Manager and the Server spoke of the culture of compliance at the Establishment. It was obvious from their testimony that

they feel very strongly about it. Their testimony was to the effect that staff of the Establishment is comprised of a group of people who had been together for a while and who work together well.

Effective Application and Operation of the Systems

The Licensee has taken reasonable steps to ensure the application and operation of its systems.

The steps taken to ensure the ID policies are followed include:

- The presence of two floor security to monitor guests
- Regular reminders to all staff of the ID policy
- Requirement for all staff to have their Serving It Right certificates
- Evidence that customers may be turned away on any given night because of failure to produce the required ID
- Evidence of a good compliance history with respect to ensuring minors are not permitted in the Establishment.

The Branch raised the absence of any formal testing or role playing sessions. I consider this as one practice a licensee may adopt to help ensure its employees are implementing its ID policy. However, I note the evidence of the Manager that he will often observe staff to ensure they are checking for ID. Although there is no formal testing, staff are constantly being reminded, through verbal reminders, of the ID policy. Therefore, I find that the absence of any formal testing or role playing is not fatal to establishing the defence of due diligence.

The test for due diligence is not perfection. The test is whether a Licensee has implemented adequate training and other systems and has taken reasonable steps to ensure the application of this training and the operation of its systems in a consistent and effective manner.

I have no doubt on the evidence before me that since the event of January 17, 2015 that the Licensee and all members of its staff are continuing their efforts to ensure

compliance with the Licence, the Act, the Regulation, and the Guide. It is the goal of the Branch to achieve such compliance.

As noted in *Central City Brewing Company Ltd. v. British Columbia (Liquor Control and Licensing Branch)* 2013 BCSC 2301, at para. 39, the fact that a sale was made to a minor does not mean that the due diligence defence is unavailable. I find that the Licensee had good ID policies, training and practices in place, and effective application of those policies at the time of the incident in requiring ID from patrons who appear under the age of 25.

While the appearance of Agent #57 is not, in itself, a defence to this type of contravention, I find the Server's assessment that the minor appeared to be much older than his age, was reasonable. The Manager, after viewing the video of the incident, agreed with the Server's assessment that Agent #57 looked older than 25. When the minor testified I also had an opportunity to observe him and concluded he could reasonably be mistaken as being much older than his age.

CONCLUSION

I find that the contravention of section 33(1)(a) has been proven on a balance of probabilities.

I find that the Licensee has met the onus of establishing a defence of due diligence and thus has a complete defence to the contravention.

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

Original signed by

R. John Rogers
General Manager's Delegate

Date: January 25, 2016

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

Liquor Control and Licensing Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate