



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 51 of

The Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Licensee:	Craic Holdings No. 2 Ltd. dba Clayton Liquor Store 1-18710 Fraser Highway Surrey, BC V3S 7Y4
Case:	EH16-126
For the Licensee:	Randy Nohr, Head of Business Operations Gregory Yorke, Regional Manager
For the Branch:	Maria Caduhada
General Manager's Delegate:	Dianne Flood
Date of Hearing:	April 26, 2017
Date of Decision:	May 15, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Craic Holdings No. 2 Ltd., operates a licensed establishment known as Clayton Liquor Store (“the establishment”) under Retail Store License #191719 (“the License”). The establishment is located at 1 – 18710 Fraser Highway, Surrey, BC. Under the Licence, the Licensee may sell liquor Monday to Sunday between the hours of 9:00 a.m. to 11:00 p.m.

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”).

Randy Nohr, Head of Business Operations, and Gregory Yorke, Regional Manager, attended the hearing as the Licensee’s representatives.

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 September 30, 2016 (the "NOEA").

The Branch alleges that on September 11, 2016, the Licensee contravened section 33(1)(a) of the Liquor Control and Licensing Act R.S.B.C. 1996, c. 267 (the “Former Act”) by selling, giving or otherwise supplying liquor to a minor (“the Minor Agent”). Item 2, Schedule 4 of the Liquor Control and Licensing Regulation BC Reg. 244/2002 (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 admits that its employee sold liquor to the Minor Agent and to the facts as set out in the NOEA. However, the Licensee disputes the finding of a contravention, claiming a defence of due diligence.

On January 23, 2017, the Liquor Control and Licensing Act S.B.C. 2015 c. 19 (the “Current Act”) replaced the Former Act and this hearing was held under the Current

Act. However, as the contravention set out in the NOEA is alleged to have occurred prior to January 23, 2017, this decision is made pursuant to and in accordance with the provisions of the Former Act and its Regulation.

For the purposes of this hearing, and in accordance with section 5 of the Current Act, the general manager has delegated to me the powers, duties and functions provided to the general manager by section 51 of the Current Act and Part 6 of the current Liquor Control and Licensing Regulation.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

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 [selling liquor to minors].	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's Book of Documents, tabs 1 to 15

Exhibit 2: Copy of the Minor Agent's photograph and identification - sealed

Exhibit 3: Copy of Licensee's shift schedule for September 11, 2017

Exhibit 4: Copy of Licensee's POS Daily transactions

Exhibit 5: Licensee's Book of Documents

Exhibit 6: Two stickers for checking identification, valid from Jan. 1 to Dec. 31, 2017

WITNESSES

The Branch called the liquor inspector ("Inspector A") who attended at the premises with the Minor Agent on September 11, 2016 and who later issued the NOEA (Exhibit 1, tab 1).

The Licensee's representative called the store's general manager (the "General Manager"), a staff member ("the Night Supervisor"), and the Regional Manager as witnesses on behalf of the Licensee.

PROTECTING THE IDENTITY OF THE MINOR AGENT

With the parties' agreement, to protect the identity of the Minor Agent, the photocopies of the Minor Agent's photograph and identification (Exhibit 2)) were sealed in an envelope that I have ordered may only be unsealed or its contents disclosed pursuant to a court order.

EVIDENCE—BRANCH

Inspector A reviewed the facts set out in the NOEA. As the Licensee accepts the facts as alleged in the NOEA to have occurred in the establishment on September 11, 2016, Inspector A's evidence and those facts are summarized here.

The Minors as Agents Program

Inspector A testified that the Minors as Agents Program (MAP) was authorized by legislation to enable the Branch to verify licensees are complying with their responsibilities not to sell liquor to persons under the age of 19 years (minors), with consequences to follow if they do. She said a number of efforts were made to ensure licensees were aware of the program, referring to Exhibit 1, tab 14. Inspector A said that while some MAP inspections are complaint driven, others are simply a matter of routine, random inspections.

On September 11, 2016, pursuant to the MAP, Inspector A, another liquor inspector (Inspector B) and the Minor Agent conducted a series of inspections in the City of Surrey, to test compliance with the prohibition under the Act against selling liquor to minors.

At the start of the day, the Minor Agent was photographed, her identification viewed and photographed, and her age confirmed to be 17 years old. The Minor Agent is not told what products to buy or what to say. The Minor Agent carries no identification and if asked for identification will say they have none.

The Inspection of the Establishment

At about 5:00 p.m. on September 11, 2016, on a routine random inspection, the Minor Agent entered the establishment, followed by Inspector A. Liquor retail stores are only allowed to have minors inside when accompanied by a parent or guardian who is shopping.

The Minor Agent went to the cooler, selected a liquor product (a large can of beer), and took her selection to the cash register where a male staff member (the "Staff Member") advised he would assist her. The Minor Agent handed the Staff Member the liquor product, he scanned the product and asked the Minor Agent for money. The Minor Agent provided cash and received change from the Staff Member. The Staff Member asked if the Minor Agent wanted a bag, which she refused. No identification was requested at the time of the purchase or before the Minor Agent exited the establishment with the liquor product.

The Minor Agent then left the establishment with the purchased liquor product and returned to the inspection vehicle where she completed the observation form and her statement (Exhibit 1, tabs 3 and 4). Inspector A also exited the establishment and returned to the inspection vehicle where she prepared her notes (Exhibit 1, tab 2). Inspector B wrote out the Contravention Notice (Exhibit 1, tab 7).

Inspector A and Inspector B then re-entered the establishment at 5:10 p.m. The Staff Member was not at the cash register. When asked, another staff member advised that no manager was working at that time. Inspector A identified herself as a liquor inspector, advised the staff member that liquor had been sold to a minor and gave her the Contravention Notice, asking her to notify the manager or owner.

The next day the General Manager contacted Inspector A and confirmed the identity of the Staff Member who had sold the liquor product to the Minor Agent. He also confirmed that the Staff Member had been employed for a month and a half and had his SIR certificate.

The Licensee's responsibilities

Inspector A testified that the License is subject to the Terms and Conditions of the Guide (Exhibit 1, tab 10). At page 9, the Guide sets out the Licensee's responsibilities, including the responsibility to understand and comply with the Act and Regulations and to ensure its employees follow the law. She noted that at page 22, the Guide sets out the prohibition against sales to minors and specifically requires that if there is any doubt age must be verified by requesting two pieces of identification, which is to be carefully examined for authenticity. The Guide goes on to say that if the licensee cannot demonstrate this was done, it can be held responsible for serving a minor, if the person is under 19 years old.

Inspector A said the interview sheet (Exhibit 1, tab 11) shows that the Licensee was aware of these responsibilities.

Enforcement Action

Inspector A said that the reasons for pursuing enforcement action include the impacts of liquor on growing bodies and developing minds, the inability of minors to

metabolize alcohol in the same manner as adults such that it has a more intoxicating effect, and the irresponsible choices that can be made by youths when drinking.

Inspector A confirmed she had expressed to the Licensee's representative surprise at the contravention. She said that was because the Licensee has several licensed establishments and when she assisted the Licensee with a different food primary license, she thought the Licensee seemed to have a strict protocol that staff are expected to adhere to. Inspector A confirmed she had not conducted any inspections of those other licensed establishments.

Inspector A confirmed the Licensee had no compliance history issues for this or any of its other establishments.

EVIDENCE – LICENSEE

The Licensee's representative called the store's general manager (the "General Manager"), a staff member ("the Night Supervisor"), and the Regional Manager as witnesses on behalf of the Licensee.

The General Manager:

The General Manager testified that he has been employed by the Licensee since September, 2010. He was appointed as the General Manager in December, 2015. The General Manager said he was devastated by the sale. He wants a safe community.

The September 11 2016 incident

The General Manager was not working on September 11, 2016, which was a Sunday.

The General Manager said he learned about the incident when the Staff Member who sold the liquor to the Minor Agent called him that day. He said the Staff Member was freaking out and at first did not want to tell him what happened, just that he had done something terribly wrong and he had made a huge mistake. When he told the General Manager that he had sold liquor to a minor and a contravention notice had been given,

the General Manager told him he was suspended from the till and to go into the back and wait further instructions.

In the General Manager's opinion the Staff Member had otherwise been a good employee but he was terminated for this action. At first the Staff Member was given a one-week suspension during which senior staff confirmed the incident has occurred and his failure to follow the required protocol to check for two pieces of identification. The Staff Member did not work any further shifts after the incident.

The General Manager said there are four floor supervisors, three at night and one during the day, in addition to the General Manager himself who is there during the day. He testified that ordinarily there is always a floor supervisor on duty, but on September 11, 2016 the day supervisor left at about 3:30 p.m. and the Night Supervisor did not come on duty until about 5:15 p.m. so that at the time of the incident, there was no floor or other supervisor on duty. He said that since then a floor supervisor is always on duty.

Staff training

The General Manager testified that he is responsible for training staff. He said he has created a two-day training manual, but had not provided that document to the Branch in advance of the hearing, as required. On day 1, the new hire shadows the General Manager or another experienced staff person on the till, where they are taught everything to do with the till. He said the protocol is to ask for two pieces of identification when the product is brought to the till. Also on day 1, new staff are taught how to count stock and cigarettes.

He said the new hires are taught the importance of requesting identification from anyone who appears to be under the age of 30, which, since the incident, has been changed to request identification from anyone who looks to be under the age of 40. He said staff members are told the importance of requesting identification and they are told if they don't request identification, they will be terminated.

The General Manager said visual cues located at the till for the testing for identification are pointed out to the new hire. According to the General Manager, new staff do not undertake any transactions on day 1.

On Day 2, new hires are taught how to put away orders, stock shelves and where things are. New hires are only allowed on their own at the till on Day 3. The new employees sign off on the Employee Handbook and that is how the General Manager is assured they are ready to work on their own. The General Manager confirmed that testing for legal age by role-playing or otherwise is not done.

The General Manager testified that new hires are given the Employee Handbook prior to their first day of work and are given an hour to review it. After some initial confusion on the witness's part about what comprised the most current version of the Employee Handbook, the General Manager identified a document as the most current version and it was included as part of Exhibit 5.

Item # 6 of the Employee Handbook expressly states two pieces of identification are required if the "guest" appears to be under 30. The General Manager said this was revised in September, 2016 to read "under 40", as a result of the incident.

The Employee Handbook also describes the acceptable primary and secondary identification. It notes the requirement to check for fake identification and gives examples of how to do that. Staff are directed to raise any concerns regarding the identification with a supervisor. The penalties for not doing this are listed in this part of the Handbook but do not, in this section, refer to termination of the employee.

The General Manager testified he revised the Employee Handbook in August, 2016. He said he added, under "Disciplinary Guidelines", a provision that an employee who serves an underage patron will be terminated. The General Manager said this was the only change made at that time. He also testified that a copy of the Handbook, as revised in August, was distributed to the staff but staff was not required to sign the revised copy to indicate they had read it. He said the Staff Member who sold the liquor to the Minor Agent had been hired shortly before the Handbook was revised and that Staff Member signed the old version, not the revised version.

The General Manager said he teaches new staff how to tell if someone is over 19 by looking at their overall appearance and demeanor and for things like wrinkles in the forehead. He said facial hair can be deceiving. He testified that new staff is constantly assessed to ensure they are asking for identification but gave no particulars of how that is done, other than by supervisors or himself being on the floor.

The General Manager said in August 2016 he instituted a Responsible Service Program and produced a copy of it. The Branch Advocate did not object to that document being entered into evidence as part of Exhibit 5. The General Manager acknowledged that that Program deals primarily with over-service, and only one line in the seven-page document addresses asking for identification.

On-going supports to staff

Referring to photographs in Exhibit 5, the General Manager identified the following visual cues he said support staff to request identification,

- a sign on the inside of the till area that says you must be 19 years old, which he acknowledged refers to the sale of tobacco, not liquor.
- a prompt on the cash register has to be pressed for the transaction to proceed – either that identification has been asked for (“Checked ID”) or the person appears over 30 – after September 11, 2016, this button was changed to over 40.
- the top right hand side of the cash register shows the birthdate by which it is legal to purchase liquor (ie the date 19 years ago), against which identification can be checked. This is automatically changed daily.
- the printer at the till for receipts has a sticker reminding staff to check age, with prompts as to acceptable birth years to purchase tobacco. He acknowledged that the sticker is from 2014, and so is out of date.

The General Manager identified the photographs in Exhibit 5 of the three signs in the establishment that highlight the age requirement to customers and tell them that identification will be asked for if they look under 30, which has now been changed to age 40. He acknowledged that some of the signs refer to the sale of tobacco, not liquor.

The General Manager said he no longer works on the till very much, but says every day someone gets refused for not having identification, even if they look well over 19. He

said that if a group comes in, everyone in the group must have identification or no liquor will be sold to anyone in the group.

The General Manager testified that the Licensee's POS system shows which transactions identification has been asked for and which ones the person looked over 30 (now 40), but it does not show the transactions where identification was asked for and not produced. In those cases, no sale is made, so the system does not record any transaction.

He said about once a week a staff member is reminded to ask for identification and a verbal warning is given. If it happens again, he said, it is written up in the employee's file. If an employee is written up three times, he said they are terminated. Supervisors are required to advise the General Manager if they are writing up an employee, but not if a verbal warning has been given. The General Manager acknowledged this meant that it was possible for verbal warnings to be given without his knowledge.

The General Manager could only recall about two instances of where an employee was written up for failure to request identification. He said one employee had been terminated for her failure to ask for identification, with that termination communicated to other employees at a staff meeting.

With respect to staff checking for identification, the General Manager said you have to trust staff. He acknowledged that staff could fail to check identification and still click on the "checked ID" prompt on the till.

He said asking for identification is talked about at staff meetings, which he said are held every four months. He acknowledged that meeting agendas and meeting minutes are not made and distributed to staff.

The General Manager said an incident logbook is kept, but is used principally for things like staff being hurt or something being stolen.

The Regional Manager

The Regional Manager testified that the confusion over the correct version of the Employee Handbook was likely due to the failure to save the revised document under a new name. He said there were three versions:

- one prior to August 2016 that required the checking for identification if under 30 and no mention of termination for failure to do so,
- a revised version August 2016 to add the termination for failure to check for identification, and
- a revised version September 2016 to change the age for checking identification to under 40.

He also clarified that the Exhibit 5 photographs of the cash register screen prompts were taken after September, but showed age 30, not 40. He said this was done to accurately show what the screen looked like on September 11, 2016. He said the screen prompt now says age 40, in accordance with the Licensee's revised policy.

The Night Supervisor

The Night Supervisor testified that he has worked at the establishment since June, 2015. He said he had his SIR certificate when hired, but had no prior experience working at a liquor store or serving liquor.

He testified that he was the night supervisor and that usually there is at least one supervisor on duty, sometimes more. As night supervisor he watches to make sure staff are asking for identification, and he is there as back up if a person cannot be served.

He said he learned of the September 11 incident when he came into work that evening. His shift that day was originally from 9 a.m. to 5 p.m., but he had to get it changed to 5:15 to 9:15 p.m.

Checking for Identification

He testified that he was taught the importance of checking for identification, having been told to always ask for identification if a person looked to be under the age of 30. That age was changed to 40, after the September 11, 2016 incident. He was taught and told that if he sold liquor to someone under 19 years old, he would be terminated.

The Night Supervisor described the process of a transaction as follows:

- greeting the customer
- taking a good look at the customer's face and determining if their identification needed to be checked
- if yes, asking for two pieces of identification – one government issued and one secondary
- looking at both pieces of identification to see if they matched
- asking if the customer had points (that is, enrolled in a loyalty program)
- ringing the transaction through.

He said the computerized cash till asked if the transaction was cash or card and then a prompt asked if identification had been checked or if the person was over 40. He acknowledged that the prompt does not ask what form of identification was produced. He said that if one of those two buttons was not selected, the transaction could not be processed and no record of it shows up in the POS system, even if he scans an item before checking for identification.

If the Night Supervisor was unsure if the person who presented identification was of legal age, he would use the prompt on the top right hand corner of the till. That prompt showed the date of birth for a person of legal age as of that date, so anyone born on that date or earlier was old enough to purchase liquor.

On assessing age, the Night Supervisor said that he thought it was mainly a personal assessment, looking at things like crow's feet, wrinkles and facial marks, and considering voice changes, noting how the person says hello. These things were discussed informally by staff but not at a staff meeting.

He said on any given weekend, he might refuse service to about five or six people. On weeknights, he said he didn't have to refuse as many as there didn't seem to be the same demand those nights. If one person in a group does not have identification, he said all those in the group will be refused service.

Training

The Night Supervisor testified that he had read, understood and signed the Employee Handbook and he understood that if he sold liquor to someone under age, he would lose his job. He said he had been given the Handbook to read before his first shift. He said he took it home and read it. After that, he was asked by the Licensee if he had any questions about the Employee Handbook. He said he found the Handbook fairly straightforward. He testified that no tests or quizzes were given on the contents of the Employee Handbook.

The Night Supervisor testified that he was trained by an employee who no longer works for the Licensee. On his first day, he said, he was taught how to ring sales through, to ask for identification, and how the point system worked. He watched that other employee on the till for the day and how if someone looked under 40 to go through the procedures. He said the person who trained him was experienced, having worked there for about one and a half years. He described the first day as "hands on", saying that he was allowed to work the till, with the other staff member guiding him through transactions and then watching him from a distance. He was also trained in stocking. He had two days training. After that, he said he was "good to go, to a degree". On the third day, he worked the till on his own.

The Night Supervisor said he had no formal training from the Licensee on how to spot fake identification and that he had learned that from the SIR Program.

He said he had no further training or re-assessment since first trained, but did get the revised Employee Handbook and the Responsible Beverage Program in August 2016 and read and signed off on those. He said he recalled that the Responsible Beverage Program addressed not serving a person if they appeared drunk, for example, slurring words and also to "ID" anyone who appeared under 40. He said it basically reiterated the Employee Handbook. He also said that while he had been working for the Licensee,

the Employee Handbook had been updated to change the age for checking for identification from 30 to 40. This happened after the September 11 incident.

Staff meetings, warnings and memos

The Night Supervisor testified that staff meetings are held quarterly, every three months. He said meetings were held so that all staff can attend and if not all can attend, then a secondary meeting was held for those staff members who could not attend the main meeting. He said the General Manager usually held the meetings, with sometimes the Head of Business Operations attending.

The Night Supervisor said agendas or discussion topics were not distributed ahead of time, with generally the same things discussed – due diligence in identification and not serving if unfit, for example, if drunk or under 19. He said that other issues might be how to be more efficient in things, like taking breaks. He said minutes of the meetings were not distributed to the staff.

Respecting the secondary meetings, he had never been to one, having always attended the first meeting so while he had heard about them, he couldn't say what was discussed.

The Night Supervisor said that because a high school was located close by, they often have a lot of young people in the store. The General Manager gave staff warnings about upcoming things like spring break and holidays and to be more vigilant about checking identification as there might be more under-age persons trying to purchase liquor. Memos were posted in the staff room about times of the year, and things like the time change, to pay more attention. Other memos discussed shift hours and how things were being done.

The Incident Logbook

The Night Supervisor said an incident logbook is kept in the staff room. He had made entries in it, for example, if there was an incident like having to call security or someone was loud or vulgar. He was trained in how to use it on his first or second day. The information entered was the person's name, a description of the event and any witnesses. He said incidents to be entered were anything potentially threatening to

safety or “underage obviously”. He couldn’t recall if he had entered in the incident log things like asking teenagers to leave the premises, but he did tell the General Manager if that happened.

The Staff Member wrote a letter in support of the Licensee. The letter was included in the Licensee’s documents. When writing the letter, he had read another letter and paraphrased it as he agreed with that first letter.

SUBMISSIONS – BRANCH

The Branch Advocate summarized the evidence of the contravention of selling liquor to a minor and submitted that the contravention was proven.

She also reviewed the evidence of due diligence and suggested it fell short of what was required to claim that defence. She noted that while there is an Employee Handbook, the evidence was that it was not gone over in detail with the employees, nor were any tests conducted to ensure an understanding of its contents. She submitted that the training was more focused on store operations like stocking merchandise and using the cash register than the requirements for identification.

She suggested that the Licensee did not keep an organized record of the training and the materials or that the most current version of the Employee Handbook was distributed and read. The Responsible Service Policy, she said, refers principally to over-service with only one brief reference to identification requirements.

The Branch Advocate noted a lack of ongoing or reinforcement of employee training and a lack of on-going testing of employees about their identification duties.

She submitted the Licensee relied heavily on the prompts on the till, and on signs that were directed to the sale of tobacco not liquor, and in some cases were out of date. She said the Licensee did not ensure the employees were actually checking identification before using the prompt that said they did. She noted the lack of any supervisor on duty at the time of the contravention.

The Branch Advocate drew attention to the lack of minutes or agendas for staff meetings, suggesting that these would have helped reinforce the importance of requesting identification.

She said for the reasons set out in the NOEA, a monetary penalty of \$7500 was warranted.

SUBMISSIONS – LICENSEE

The Licensee's representative admitted the contravention occurred but relied on a defence of due diligence. He said that the Licensee has taken substantial efforts to prevent a contravention from happening but says despite those best efforts, human error can happen, which is outside of the Licensee's control.

The Licensee's representative submitted the Licensee's training program works well as evidenced by a lack of any other contraventions in any of its various licensed establishments over the last seven years. He said they have training materials on asking for identification and do conduct staff meetings where this issue is raised.

The Licensee's representative said the employee admitted it was his fault and also said the incident was a bad mistake by a young man, who was fired for it. Since the incident, the Licensee has raised the age for which employees are directed to request identification from 30 years to 40 years, in order to avoid any future contraventions.

The Licensee's representative said the Licensee cannot do anything more than it does, except "stand behind every employee", for every transaction. The Licensee's plan moving forward is to conduct internal audits (of employees) and to send out secret shoppers to test employees.

The Licensee's representative submitted that due diligence has been established and a penalty is not warranted.

ANALYSIS AND REASONS

Contravention

The Licensee admits that a staff member sold liquor to a minor. Based on that admission, the evidence and the submissions I find that the Licensee contravened section 33(1)(a) of the Former Act by selling, giving or otherwise supplying liquor to a minor.

Due Diligence

A licensee is entitled to a defence if it can show that it was duly diligent in taking reasonable steps to prevent the contravention from occurring.

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

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 *Liquor Control and Licensing Act* (see paragraphs 41 to 44 of that decision).

In these circumstances, the court said, 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, 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 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 Branch did not allege nor is there any evidence to suggest that the Staff Member who made the sale was a “directing mind” of the Licensee. On this basis, I find he was not and I need to move on to consider the second step in the due diligence analysis.

Steps to avoid the sale

The Licensee must establish two things - it has taken reasonable steps

- to train its staff in procedures to identify if potential purchasers are of legal age and thus avoid the potential for a contravention, and
- to ensure those procedures are consistently acted upon and any potential issues are properly dealt with.

The analysis of the standard to be met - that is, what is reasonable - must be undertaken in consideration of the public policies and potential consequences that underlie the prohibition against selling liquor to minors, which include:

- the effects of liquor 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 liquor in the same manner as an adult; and
- that poor choices are made by minors when consuming liquor and liquor is a significant factor in many crimes committed by youth.

The standard is not one of perfection – that is, that a contravention will never occur. Rather, it is what is adequate training, systems, and monitoring within this public policy context. The circumstances of each case have to be considered in determining whether the due diligence threshold has been achieved.

Adequate training to prevent the sale of liquor to minors

In this case the Licensee's evidence of training regarding the prevention of the sale of liquor to minors included:

- new employees are required to have SIR certification;
- the Employee Handbook, distributed to employees when hired, includes information about the need for and what to check for in identification;
- new employees are required to sign that they understand the contents of the Handbook;
- new employees are trained on two shifts of job shadowing a more senior employee and are then allowed to complete transactions on their own, without anything more; and
- a Responsible Service Program, dealing principally with over-service, was distributed in August, 2016.

A two-page written outline of training process was referred to, but had not been produced to the Branch in advance of the hearings and was not entered into evidence.

Based on the evidence, I find that while the Licensee has a training program in place, that training program falls short of being adequate to prevent the sale of liquor to minors.

The sale of liquor is not like the sale of milk or coffee. Strict legal limits are in place to prevent minors from buying liquor and significant effort must be undertaken to ensure that staff members fully understand their responsibilities in that regard. Given the

number of things that identified as part of the two-day training, without better evidence, I find that it is reasonable to assume that prevention of the sale to minors by requesting and assessing appropriate identification may not have been given the prominence or the detail that it requires. As an example, the Night Supervisor testified that he learned how to verify identification from the SIR program, not by any efforts of the Licensee. I find a licensee needs to know that all employees have learned the need to ask for and verify identification and how to do that, and also needs to be able to demonstrate that has been done. I do not have adequate evidence of that before me.

Further, I find that to establish that adequate training has in fact been given, licensees need to not only test employees but also to document that testing – what was tested, how it was done and how the employee did.

In this case, the Licensee acknowledged that it is left up to new staff to review the Employee Handbook, including the provisions about identification requirements, with no system of subsequent independent verification of their understanding and ability to put that understanding into practice, (other than the undocumented two day, all-encompassing training). I find that simply having the employee sign they have read the Handbook is not adequate verification of their understanding of the very important need to request and check for valid identification and their ability to put that understanding into practice.

On this aspect I find the Licensee has failed to meet the standard for reasonable training regarding the prevention of the sale of liquor to minors.

Adequate systems to prevent the sale of liquor to minors

With respect to ensuring its policies on identification were put into practice, the Licensee put in place a number of measures:

- prompts on the cash register so that on each sale transaction staff were to turn their minds to the issue of legal age (“ID checked” or “over 30” – since changed to 40);
 - an automatic notice on the cash register about the date of birth for legal age;
 - a notice about the legal age on the printer, which is out-of-date by several years;
- and

- signs about the need to be 19 that refer to the purchase of tobacco.

I find that the prompts and automatic notice are good indicators of meaningful steps to prevent the sale of liquor to minors, but without occasional review or testing on whether the prompts are being properly used, there is no way to know if they are as effective as suggested. The September 11, 2016 sale to the Minor Agent indicates that the prompts alone, without more, do not prevent underage sales.

I further find that the out-of-date notice on the printer is perhaps an indication that the attention paid to this issue is not quite of the standard it ought to be. And while the signs about the need to be 19 for the sale of tobacco provide at least some indication that age is an issue, I find that the lack of signage about the age to purchase liquor is another indicator that the attention paid is not quite of the standard it might be.

I have noted the evidence that the supervisors apparently prompt and warn employees if they note a failure to request identification when it should have been requested. The evidence is that in two cases, written warnings were noted and in one case, an employee terminated for continued failure to appropriately request identification. However, I note that the verbal warnings are not recorded or otherwise noted and the General Manager may be unaware if given by a supervisor. As such, I find that he may also be unaware whether there is a reoccurring problem with a particular employee, and thus not be aware that action needs to be taken. There was no evidence the supervisors discussed employee performance on requesting identification with each other or with the General Manager. With the number of employees the Licensee apparently has, such discussion could be helpful.

Further while employees are encouraged to seek assistance from supervisors when unsure of what they should do, I find that at the time of the incident, there was no supervisor on duty that the Staff Member could consult, should he have wanted to. While the Licensee has since corrected this, I find that it shows a lack of proper systems in place at the time of the sale.

The Licensee also holds staff meetings every three or four months at which the need for identification was discussed, but no agendas are made and no minutes kept, which

makes it difficult to assess how effectively that messaging is delivered. To reinforce the message on the need for proper identification, agendas and minutes can be helpful for employees to review and also to illustrate and substantiate the Licensee's systems and commitment to taking action to prevent sales to minors.

I accept that the Licensee has good intentions and is truly troubled by the sale to the Minor Agent. However, for the reasons articulated above, I find that the Licensee's systems and procedures fall short of what is reasonable to expect to prevent the sale of liquor to minors.

Based on the foregoing, I find that the Licensee has not established a defence of due diligence.

PENALTY

Pursuant to section 20(2) of the Former Act, having found that the Licensee has contravened the Act, the Regulation 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

The Branch has consistently maintained that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement.

In this case the facts are that the Licensee's employee sold liquor to a minor without any request for identification. For the reasons detailed above the Licensee has fallen short of proving due diligence. In these circumstances, I find that a penalty is warranted.

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.

The factors that I considered in this case in determining the appropriate penalty include: consideration of 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.

There is no record of a proven contravention of the same type for the Licensee at the 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. The Establishment's compliance history record (Exhibit 1, tab 6) shows no previous compliance or enforcement history against the Licensee.

In consideration of the serious public safety concerns related to selling alcohol to minors, but noting the Licensee's good compliance record, I find the minimum monetary penalty of \$7,500 to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific deterrence.

ORDER

Pursuant to section 20(2) of the Former 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 June 14, 2017.

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

Dianne Flood
General Manager's Delegate

Date: May 15, 2017

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

Liquor Control and Licensing Branch, Vancouver Office
Attn: Maria Caduhada, Branch Advocate