



**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:	West Coast Liquor Company Ltd. dba West Coast Liquor Company 7651 Royal Oak Avenue Burnaby, BC
Case:	EH17-062
For the Licensee:	Roger Gibson and John Teti
For the Branch:	Maria Caduhada
General Manager's Delegate:	Nerys Poole
Date of Hearing:	January 16, 2018
Date of Decision:	February 13, 2018

**Liquor Control and
Licensing Branch**

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INTRODUCTION

West Coast Liquor Company Ltd. dba West Coast Liquor Company (the "licensee") owns and operates a licensed retail store, with Licensee Retail Store licence number 195419 (the "licence") at 7651 Royal Oak Avenue in Burnaby (the "LRS"). Roger Gibson and John Teti appeared at the hearing as the licensee's representatives.

According to the terms of its licence, the licensee may sell liquor from 9:00 a.m. to 11:00 p.m. Monday to Sunday. The licence is subject to the terms and conditions contained in the publication "Licensee Retail Store Terms and Conditions" (the "Guide"). (Exhibit 1, tab 11)

The licensee is alleged to have contravened *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act") on July 19, 2017, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program ("MAP"). The licensee admits that its employee sold liquor to the minor agent. However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence. The licensee states that there was no directing mind in the LRS at the time of the alleged contravention.

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

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 August 11, 2017 (the "NOEA"). (Exhibit 1, tab 1)

The branch alleges that on July 19, 2017, the licensee contravened section 77(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 3 of Schedule 2 of the *Liquor Control and Licensing Regulation*). The branch recommends either a ten day suspension or a monetary penalty of \$7,500.

RELEVANT STATUTORY PROVISIONS

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

Supplying liquor to minors

77 (1) Subject to the regulations, a person must not

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

ISSUES

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

EXHIBITS

Exhibit 1: Branch book of documents, tabs 1 to 15

Exhibit 2: Outline of Roger Gibson's and John Teti's experience in the liquor industry

Exhibit 3: Report from Sting Investigations dated October 12, 2017

Exhibit 4: Four pages of photos of signage re. ID checking in LRS

Exhibit 5: Daily sign-in sheet for staff with ID checking requirements

Exhibit 6: Licensee's Employee Handbook

Exhibit 7: Photo of pop-up question on till regarding checking ID

WITNESSES

The Branch called one witness:

- The liquor inspector who was part of the inspection team on the evening of July 19, 2017 ("liquor inspector 1").

The licensee called three witnesses:

- John Teti, the licensee's representative and co-owner of the licensee
- the cashier who sold the liquor to the minor agent (the "LRS clerk")
- the general manager of the LRS (the "LRS manager").

FACTS OF THE ALLEGED CONTRAVENTION

The Licensee accepts the facts of the contravention as set out in the NOEA (Exhibit 1, tab 1) and in the testimony of the liquor inspector.

Liquor inspector 1 remained in the vehicle during the MAP inspection. She confirmed the accuracy of the description of the events on the evening of July 19, 2017 as described in the NOEA. Her notes, the second liquor inspector's notes and the observations and statement of the minor agent are all included in the branch book of documents (Exhibit 1, tabs 2, 3, 4 and 5)

She explained the history of the MAP and the inspections of licensed establishments in Burnaby on July 19, 2017. Liquor inspector 1 and another liquor inspector ("liquor inspector 2") met with the minor agent on that date at their office. They photographed the minor agent and her ID and confirmed that she was 17 years old. (Exhibit 1, tab 7)

At approximately 5:42 p.m., the minor agent entered the LRS, with liquor inspector 2 entering at the same time. The minor agent walked towards the refrigeration units at the back of the store and selected a liquor product, later identified as a 6-pack of Parallel 49 Tricycle light beer (photo at Exhibit 1, tab 6). Liquor inspector 2 positioned herself at the wine section, facing the cash register, so she was able to observe the minor agent. Liquor inspector 2 noticed that there was one cash register open, with a young female cashier (the LRS clerk). There was no one in line as the minor agent approached the cash register. The LRS clerk proceeded to ring in the sale. Liquor inspector 2 watched as the minor agent provided cash to the LRS clerk for the liquor product. Liquor inspector 2 saw the minor agent then walking away from the till with the liquor product in her possession. The LRS clerk did not request identification at the time of purchase or prior to the minor agent exiting the LRS.

At 5:43 p.m., liquor inspector 2 and the minor agent both exited the LRS. Liquor inspector 2 escorted the minor agent back to the vehicle where liquor inspector 1 was waiting. Liquor inspector 2 took the liquor product from the minor agent and photographed it as evidence. The minor agent and liquor inspector 2 both composed their notes independently in the vehicle. Liquor inspector 1 wrote out the contravention notice B021723 for the contravention of section 77(1)(a) of the Act.

The two liquor inspectors entered the LRS at 5:55 p.m. Liquor inspector 2 noted that the LRS clerk was working at the same cash register. The two liquor inspectors approached the customer service desk and asked to speak with a manager. The assistant manager appeared and spoke with them upstairs in an office. Liquor inspector 1 explained that a staff member had sold liquor to a minor agent. The assistant manager provided the Serving It Right certificate for the LRS clerk.

Liquor inspector 1 explained the contravention of section 77(1)(a) of the Act. The assistant manager signed the contravention notice acknowledging its receipt, and received a copy. Liquor inspector 1 asked if the store was equipped with video surveillance and advised him to secure or hold the evidence for future evidentiary purposes. Liquor inspector 2 asked the assistant manager to notify the manager and the owners as the branch would be conducting a follow-up with them. The two liquor inspectors left the LRS at 6:02 p.m.

On Friday, July 21, 2017, liquor inspector 2 spoke with the licensee's representative, John Teti, by telephone. John Teti advised that he was aware of the sale and had reviewed the video surveillance. He further confirmed that his company had employed the LRS clerk for a year and that she had worked at different locations for them. Liquor inspector 2 advised that she would be preparing a Notice of Enforcement Action and would send it by mail.

EVIDENCE – LICENSEE

The Contravention and LRS Clerk

As noted, the licensee does not dispute the facts of the contravention. The LRS clerk gave evidence about the incident, her experience and her training at the LRS. John Teti explained his reactions to the incident and gave his reasons for not dismissing the LRS clerk.

The LRS clerk testified that she has worked for the licensee for about a year and a half. She works part-time, usually on weekend mornings and sometimes, if needed, on evenings. She has a fulltime job in the ophthalmology department at the Children's Hospital.

The LRS clerk recalled the incident on July 19, 2017 and remembered serving the minor agent. She testified that she thought the minor agent was over the age of 25. As the store policy is to ask for ID of anyone who appears under 25, she did not ask the minor agent for ID. She said she took a good look at her. The minor agent appeared confident and to know what she was doing. The minor agent was about 5 feet, 10 inches tall. The LRS clerk is about 5 feet tall. She said the minor agent's height and her level of confidence as well as her very casual dress made her believe she was over the age of 25. When she is in doubt about the age of a customer, she will often ask her supervisor for his opinion. In this case, she had no doubt that the minor agent was over 25. Because she believed the minor agent was over 25, she responded to the pop-up question on the till – "Have you checked ID for this customer?" – by pressing the button for "over 25." (photo at Exhibit 7) This allowed her to continue with the transaction.

She testified about her practice with respect to asking for ID. She will ask for ID about 75% to 80% of the time during a shift. She said she asked for ID of customers just before the minor agent and just after. John Teti confirmed that she did this as he watched the video showing her asking for ID both before and after.

The LRS clerk explained her reaction when the assistant manager who was on duty that evening told her that she had served a minor. When the assistant manager called her into his office and showed her the contravention notice, they reviewed the video camera footage as she could not guess which customer was the minor agent.

She was extremely upset that she had sold to a minor. She said she regularly asks for ID, often of people as old as her mother. She was so upset with herself that she left work at that point. Management told her to appear for her next shift on Saturday, July 22, as John Teti wanted to speak with her.

John Teti explained his reasons for not dismissing the LRS clerk as a result of the contravention. He arrived at the LRS on the Saturday morning, with every intention of dismissing her, as he was so shocked by the news that the LRS clerk had served a minor. After speaking with her about the incident and her experience in the LRS, he decided to write up the incident as a disciplinary note on her file, instead of terminating her employment. He stated he was very impressed with her. He explained that the LRS clerk was 28 years old, held a responsible position at the children's hospital as well as having worked at the LRS for about a year and that there had been no previous concerns with her as an employee who consistently asked for ID of the younger customers. He accepted her explanation that she honestly believed the minor agent was over the age of 25.

The LRS manager confirmed that the LRS clerk had been a good and valued employee, who was very familiar with the store policies. He stated that she was quick to pick up things, had confidence in her abilities, was good with customers, always punctual and had no problems handling cash or learning about their products. He also stated that she regularly asked for ID of customers who appeared to be under 25. On the day following the contravention, the LRS manager spoke to the other staff individually about what had happened and again emphasized the importance of ID checking.

Licensee's Experience

John Teti and Roger Gibson, the corporate licensee's representatives at the hearing, provided a one page document that outlines their years of experience in the liquor and entertainment industry. (Exhibit 2) The document lists the licensed establishments that they have owned and managed in the Vancouver area since 1967. Some have a large seating capacity, like the 900 seat Commodore that they still own. Since 1998, they have owned and operated a number of licensed retail stores. They currently own and operate four licensed retail stores in the Greater Vancouver area, including the LRS that is the subject of this hearing. John Teti testified that, in all their years of operating licensed establishments, they have never had a contravention for service to a minor.

Licensee's Training

All three witnesses testified about the training of new hires in the LRS. The LRS manager is the primary person responsible for training new staff. When he is unable to do the training, the assistant manager does it.

The LRS manager has been the manager at the LRS since 2015. Since 2005, he has worked in various positions in other licensed retail stores owned by the licensee.

The LRS manager explained about the process with new hires. He stated that he shows a new hire around the store and he reviews the policies and procedures of the LRS. He reviews the employee handbook with the new hires and stresses key points like requesting ID of customers, customer service, using the till, etc. (Exhibit 6) Depending on the previous experience of the new hire, she will generally work five training shifts, usually two or three where the new hire shadows a senior employee and then a senior employee shadows the new hire for several shifts. All new employees are required to sign a page acknowledging they have read and understood the contents of the employee handbook. He then puts this signed page in the employee's file. After the three month probationary period, he reviews the employee handbook with the new hire again and reviews any issues that may have arisen during the three month period.

He stated that he does not use any training materials, other than the employee handbook. The training is primarily hands on. The new hire watches and learns as a senior employee uses the till and interacts with customers, including determining when to ask for ID. The new hire then performs the tasks herself, while being watched for a few shifts. The LRS manager or a senior employee is available to discuss any issues or questions that the new hire may have.

John Teti emphasized the LRS is a small operation, with perhaps two persons on duty as clerks plus a senior manager for each shift. The manager has time to talk individually with the staff and to remind them about the house policies.

When asked about specific instructions given to employees as to how to identify if someone is under the age of 25, the LRS manager stated that they give no specific guidelines on how to assess age. The LRS clerk confirmed this too. All three of the licensee's witnesses believe assessing age is a judgement call, learned from experience, both from watching others and from making the assessment oneself. Staff are encouraged to check with the manager or the assistant manager if they have any doubt. Either the manager or the assistant manager are on site at all times. He stated: "if we see them not requesting ID, we let them know it is someone you need to ID."

John Teti testified that the Sting Investigations reports provide them with a learning tool on when to check for ID. If there are any failures with the under 25 agents used by Sting, management uses this to discuss why a clerk may not have asked for ID and to emphasize the importance of requesting ID if there is any doubt at all as to whether the person is under 25.

The LRS manager stated they do not have a regular ongoing training program. He or the assistant manager reviews things with employees if management thinks they need a refresher. He stated they have conversations with individual employees about any concerns they may have about that employee. If there is an issue in which someone needs more training, they will give it to her.

The LRS clerk testified about the training she received. The assistant manager trained her. She received the employee handbook to review. She read it and then signed the acknowledgement page and returned it. She stated that the assistant manager did not review it with her, but asked if she had any questions after she had read through it.

The assistant manager showed her around the store and gave her information about the products. She then shadowed him on the till for about three days. She said she probably spent less time being shadowed herself as she is a fast learner and she had had experience on the till from previous jobs.

The LRS clerk said that if a purchaser has ID and is with others in the LRS, staff ask the others for ID as well. If they cannot produce the appropriate ID, they are asked to leave. The same goes for anyone who has entered the store and is wandering around. She said she asks for ID of family and friends even though she may be familiar with their age, if they appear to be under 25.

Licensee's Policies and Practices

The licensee's witnesses gave evidence about the policies and procedures in the LRS. John Teti explained that no staff member nor the LRS manager has the authority to revise or amend the store policies. He stated that he attends three of their stores every weekday and attends their airport store about twice a week. He interacts with the manager at the LRS every day.

Employee Handbook

The licensee testified that the employee handbook submitted as Exhibit 6 is a current copy that was in effect on July 19, 2017. He stated that the handbook has been revised over the years since they first introduced it about 14 to 15 years ago. He believed the last update would have been when they opened their Kerrisdale store about seven years ago.

In John Teti's direct and the cross-examination by the branch advocate, they both referred to the employee sign-off page near the end of the handbook. It may have been an oversight but the copy that the licensee provided to me to mark as an exhibit does not have an employee sign-off page. I accept from the testimony of John Teti and the LRS clerk that there is such a page that employees are required to sign, and the page is then placed in the employee's file.

The LRS manager testified that he goes through the employee handbook with new hires. The LRS clerk stated she reviewed it on her own before signing the acknowledgement page. The LRS manager thought this might have been because he had not been clear enough with the assistant manager, who trained the LRS clerk, about reviewing the contents of the handbook with her.

At page 3 of the handbook is a section on "Checking ID" which states:

It is a requirement of the Liquor Control and Licensing Branch that all persons that appear to be under 25 years of age produce two pieces of identification. Only one is required to have a picture. The only forms of acceptable picture ID are:

- Valid drivers license
- Provincial government ID
- Passport
- Military ID

A Social Insurance card, CareCard or credit card are all acceptable forms of secondary ID.

At page 20 of the handbook is a section titled "Providing Safe and Responsible Service." This section refers to Serving It Right and uses the language in the Guide about the importance of ensuring all employees have their Serving It Right certificate, and requiring a licensee to have copies of certificates ready for inspection at all times.

This section includes several paragraphs about preventing the sale of liquor to minors and ID requirements, with the information about the types of acceptable ID, as well as how to verify identification. Much of this information comes directly from earlier versions of the Guide.

On cross-examination, John Teti and the LRS manager were asked about the inclusion of this section on safe and responsible service and when it was included in the employee handbook, as the table of contents does not include page 20. Both maintained this section has been in the handbook for a number of years and were unsure why the table of contents did not show it.

Page 11 of the employee handbook sets out the licensee's policy on progressive discipline, with a series of escalating steps from a verbal warning, written warning, suspension and finally termination. The final paragraph notes: "It should be emphasized that the primary objective of progressive discipline is to correct the problem rather than punishing the offender."

The LRS clerk stated there is a copy of the employee handbook in the office and in the main customer area.

Reminders

The licensee submitted a copy of a pre-shift sign in sheet. Every employee must sign this sheet prior to starting a shift. They must note their name, the time they sign in, the time they sign out, number of hours worked, their position and their signature. At the top of this sign-in sheet are the words in bold and capitalized:

**I ACKNOWLEDGE THAT IT IS THE LAW, AND MY JOB, TO ASK ANYONE
WHO LOOKS AS THOUGH THEY MAY BE A MINOR (UNDER 19)
FOR 2 PIECES OF VALID ID!!!**

At the bottom of the sign-in sheet is a description of the two types of acceptable ID and underneath this are the following words:

ALWAYS MAKE IT A HABIT TO ASK FOR 2 PIECES OF VALID ID!!!

Selling liquor to a minor can result in a \$7500 to \$10,000 fine
and a 10 to 30 day closure.

The LRS manager stated that he and the assistant manager are always reminding staff to check for ID. He stated he observes staff and will speak with them if he thinks they have not asked someone who appears to be under 25.

John Teti stated their system of speaking with staff individually and giving them reminders works in a small operation as there are seldom more than two staff (other than manager and assistant manager) on duty at the same time. John Teti stated that their staff bulletin board includes reminders about ID checking.

In addition to the regular verbal reminders and the written reminder on the sign-up sheet, the LRS till has a pop-up question "have you checked ID for this customer?" (Exhibit 7) In order to complete the transaction, the clerk must push one of the four buttons below which indicate: "Yes", "over 25", "No" (in red), "scan/swipe" If the clerk indicates No, the transaction is cancelled.

The LRS clerk testified about how they use these buttons. They use the scan/swipe button to test BC ID. After pressing the scan/swipe button, another box pops up and will say "accepted or real." If the ID is not accepted, the transaction ends.

In the top right hand corner of the photo of the till are the words: "Legal age: Jan.16, 1999." This changes every day and provides an alert to the clerks as to the birthdate of anyone 19 or over.

The LRS manager testified about the log or printout that will show how often and which buttons are used on the till. He reviews the log and will question staff if there is any irregularity in the use of the buttons or a button is not being used for some reason. He will often observe staff's use of the till and will clarify the importance of using the

buttons correctly to ensure they have checked ID if the customer appears to be under 25.

Signage

The licensee submitted several photos of signs in the LRS, which note the requirements re. minors. (Exhibit 4) The branch provides licensees with these signs for posting in licensed establishments. Page 1 is a photo showing a sign at the door stating "19 + 2 pieces of ID required" and below this, the type of ID that must be shown. Pages 2 and 3 are photos of the tills with signs plainly in evidence, the same as the one on the door. Page 4 is a photo of a sign that notes the types of ID required and in smaller print the following: "We are required by law to ask ANYONE who appears to be under the age of 25 for two pieces of identification."

The LRS washrooms have signs, as reminders that two pieces of ID are required.

Familiarity with MAP

The LRS clerk stated she was well aware of the MAP. She was informed about MAP when she first started working at the LRS. John Teti stated he was aware of the MAP but said he would have no way of knowing if any of their stores had been the subject of a MAP inspection previously. Licensees are not informed if they have successfully passed a MAP inspection.

Meetings

John Teti stated that they hold quarterly meetings with the general managers of the stores. Sometimes assistant managers will attend too. He said they keep minutes of these meetings but he did not bring any copies of them. He said that he usually does not meet with employees at the stores as the licensee wants the general managers to have authority over their employees and to be responsible for dealing with them.

When the LRS manager was asked if he held a meeting with all LRS staff after the alleged contravention, he said he met individually with each employee as they came on shift to explain what happened.

Incident Log

The manager testified that they have an incident log, in which they record any incidents to bring them to the attention of staff on other shifts. He was pretty sure that the assistant manager had written up the incident of July 19, 2017 in the logbook. The licensee did not submit any copies of logbook entries.

Mystery Shopper Program

John Teti testified about the licensee's contract with a company called Sting Investigations to secretly test whether or not their employees are requesting ID of customers under 25. He said they started using this company in 2014.

The Sting agents, usually about age 23 or 24, pose as customers. Their primary purpose is to test the LRS employees on ID checking. The agents will also report on customer service, etc. John Teti stated that management uses the Sting reports as a learning tool to reinforce how important it is to ask for ID. He said that staff have occasionally failed the Sting test and when they have, they receive a written warning that goes on their file, as well as a reminder again about how important it is to ask for ID of anyone who appears under 25. Management discusses the Sting reports with all staff.

John Teti testified that they used to contract with this company to attend each of their licensed retail stores about four times a year. After the alleged contravention, they bumped it up to every other month, about six times a year. Neither John Teti nor the manager are made aware of when the company's agents might be attending the LRS.

Exhibit 3 is a report from October of 2017. John Teti stated they submitted a recent report, as an example of the kinds of things that Sting reports on. He testified that Sting has been under contract with them and providing similar reports for at least 3 years.

The report shows that a 23 year old agent attended the LRS at 18:46 hours on October 12, 2017. The Sting agent purchased an 8 pack of Pabst Blue Ribbon beer. The agent noted the clerk's name who specifically asked him for 2 pieces of ID. The agent showed him a driver's licence and a credit card before the clerk completed the purchase. The report includes answers to other questions about the service to the customer and general cleanliness of the store and the attitude of the clerk. In the narrative section of the report, the agent provides further details about entering the store, number of customers (3 or 4), the transaction itself and the conversation between the agent and the clerk.

Since the alleged contravention on July 19, 2017, John Teti stated that, after any Sting operation and after receipt of their report, he now conducts the review with employees in their various stores, including the LRS. He feels that, as the owner, if the review comes from him, it may have more of an impact on employees than if it comes from senior management in the LRS with whom they work every day.

The LRS clerk was aware of the Sting investigations and reports. She has never failed one. She said that management informs staff if someone has failed but will not give out the employee's name to all the staff. Management reminds them all to be more alert and to ensure this does not happen again.

SUBMISSIONS – BRANCH

The licensee does not dispute that an employee served the minor agent. The licensee has contravened section 77(1)(a) of the Act. The branch advocate submits that the licensee's evidence does not establish a defence of due diligence. The licensee provides no specific training on how to identify age and has failed to implement a system to test its employees on how to correctly assess age. The licensee has failed to provide some documentation, i.e. no copy of logbook, no pre-contravention report from Sting, no written testing. Therefore the proposed penalty of \$7500 is warranted.

SUBMISSIONS – LICENSEE

The licensee agrees that the contravention of serving a minor occurred. The licensee says that the fact that the contravention occurred does not mean the defence of due diligence fails.

The licensee says it has the training, policies and systems designed to prevent service to minors. The licensee points to its many years of experience in the liquor industry without a contravention of service to minors. It takes its responsibilities very seriously.

As to instructing its employees on how to identify an under-age customer, the licensee says its senior staff discuss regularly with its staff as to why they should ask for ID of a customer. The senior staff is there for backup and consultation if a staff member is in doubt. This did not occur on July 19, 2017 as the LRS clerk testified she was not in doubt. She was sure that the minor agent was over 25. Her mistake does not mean that the licensee's defence of due diligence fails.

The licensee refers to the report from Sting investigations about the use of under 25 agents to test employees. The testimony of the licensee's witnesses indicates that the licensee uses this as its testing system. If an employee fails to request ID during a Sting visit, the licensee uses this as an opportunity to discuss and emphasize the importance of requesting ID and of being cautious about over-estimating age. The licensee feels the Sting investigations operate as a deterrent to staff and that, if a staff member fails to ask, the Sting report is used as a learning tool for all staff.

The licensee submits it does not know what more it can do to prevent such contraventions.

The licensee says the evidence proves that the LRS clerk is not a directing mind and that the licensee's evidence of its policies, systems and training establishes a defence of due diligence on the balance of probabilities.

REASONS AND DECISION

Contravention

The licensee has admitted that the contravention of section 77(1)(a) occurred on July 19, 2017. I find, therefore, that the licensee contravened section 77(1)(a) of the Act by selling liquor to a minor.

I now address whether the evidence of due diligence provides a defence to the contravention.

Due Diligence

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

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

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

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

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

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

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

Directing Mind

The LRS clerk who made the sale is a part-time employee of the licensee and has no involvement with the development of the LRS policies or with staff training. John Teti testified that he and Roger Gibson set the policies for the LRS. The LRS manager and the assistant manager are responsible for training the employees.

I find that the LRS clerk who sold the liquor to the minor agent is not a directing mind of the licensee.

Adequate training

The licensee requires its clerks to have Serving It Right certificates. The LRS clerk has her Serving It Right. The NOEA refers to the fact that the assistant manager did not have his Serving It Right certificate at the LRS when the liquor inspectors requested it after the incident. This was not raised at the hearing and therefore I draw no conclusions from this statement in the NOEA, except to remind the licensee that Serving It Right certificates must be available to liquor inspectors if requested.

The training process for new employees consists of either the LRS manager or the assistant manager reviewing the employee handbook with the new employee and then having the employee sign off acknowledging they have read and understood the contents. The LRS clerk testified that she was given the employee handbook to read herself and then she signed it. I recommend that the licensee ensure consistency in its training of new hires by setting out in writing what is required so that all trainers follow the process.

In addition, the training consists of the new employee shadowing a senior employee for several shifts and then being shadowed for several shifts. The shadowing shifts range from three to five days. The LRS clerk testified that she shadowed the assistant manager for three days. At the end of the three month probationary period, senior management again reviews the employee handbook and any issues that may have arisen with the new hire. I find that this three month review provides an opportunity to reinforce key training points, including emphasizing ID checking.

I find that the training regime is adequate given the size of the LRS and number of employees and the fact that there is always a senior manager or assistant manager present in the LRS. There is no formal process of ongoing training of employees. I find that the mystery shoppers used by Sting and the reports of these mystery shoppers provide an effective learning tool and an opportunity for discussion about ID checking with staff. I find that the use of these mystery shoppers is the licensee's testing system for checking on its employees with respect to requests for identification of those customers under 25.

Policies of the LRS

The LRS policy is to instruct its staff to request ID of anyone who may appear to be under 25. Given the wording in the employee handbook about this being a legal requirement, this policy obviously derives from a prior legislative requirement that all licensed establishments ask for ID of anyone under 25. This requirement has since been repealed. The handbook directs staff to ask for two pieces of ID and describes what is acceptable ID.

Instructing employees to ask for ID of anyone who may appear under 25 provides some safeguard to avoiding service to minors. Changing the policy to under 30 may avoid what happened here, as the LRS clerk sincerely believed the minor agent was around 26.

The employee handbook sets out a process for disciplinary action. In the situation here, the LRS clerk received a written warning that was placed in her file. I accept John Teti's explanation as to why he chose not to terminate her.

Effective Application of LRS Policies

The next step in the due diligence analysis is the question as to whether the licensee has taken reasonable steps to ensure its staff consistently apply the LRS policies. In the context of service to minors, what does the licensee and its senior managers do to ensure its staff understand the importance of ID checking, understand how to assess someone who may be a minor, and are consistently asking for ID of anyone who may appear to be under 25?

The licensee has the following practices in place as reminders to ask for ID:

- Pre-shift sign-in sheet that provides a daily written reminder to staff about checking ID and asking for two pieces of ID
- Regular verbal reminders from senior staff to the clerks to ask for ID, and monitoring by these senior staff of ID requests
- Opportunity for staff to consult with senior staff if in doubt

- Signage throughout the LRS about ID requests
- Staff bulletin board with reminders about ID checking
- System at the till that prevents a transaction unless cashier pushes a button to say ID checked or customer over 25
- Legal age reminder on the till that changes every day showing birthdate of someone 19 or over
- Mystery shopper program to test staff on ID requests

In addition, the licensee keeps an incident logbook and uses it for discussion with staff. The licensee holds quarterly management meetings. The LRS has a video surveillance system that management can use to review incidents. The licensee and the LRS clerk both testified that they were familiar with MAP and aware that such inspections could happen anytime.

The licensee does not provide specific guidelines on how to assess for age. John Teti maintained that there are too many factors in assessing age and that ultimately it comes down to a person's experience and judgement. In the case of the LRS clerk, she erred in her judgement. The height of the minor agent was a factor she mentioned in leading her to believe that the minor agent was over 25.

I find that a complete failure to discuss how to assess for age is a flaw in a due diligence defence. However, I find that the licensee provides opportunities to its staff to discuss why ID should be requested of a specific customer, and this inevitably involves discussion of a customer's appearance. These opportunities arise as a result of the Sting reports and the discussions about why someone may have missed a request for ID and how to correct this failure the next time. To a certain extent, I agree with the licensee that listing factors to look for in assessing age does not guarantee an accurate assessment every time. Here, the LRS clerk considered the minor agent's height and style of very casual dress and confident demeanour to be an indicator that she was not a minor. Not only did the LRS clerk believe she was not a minor, she thought she was over 25. I find that the licensee provides the opportunity to discuss when someone fails to ask for ID and in doing so, reinforces the point about asking for ID if there is any doubt. The belief of the LRS clerk here demonstrates that moving the age to make the request for ID to 30 may go a long way to reducing errors such as this one.

I find that the system of testing its employees, through the Sting investigations, is a very effective learning tool. Although the licensee did not describe this as ongoing training of its staff, I find that the discussions that arise from these reports function as ongoing training to staff about ID checking and when to ask.

I find that the licensee and its witnesses were very sincere in their desire to comply with the legislation and to act responsibly. I also find that the experience of John Teti and Roger Gibson attest to their commitment to maintaining a culture of compliance in their establishments, particularly with respect to preventing service to minors.

The licensee stated at the hearing that it felt it was doing everything possible to avoid contraventions such as this one and did not know what more it can do. I recommend to the licensee that it continue its use of the mystery shopper program and continue to use it as a training tool. In particular, I recommend that the licensee use these reports, even when a staff member has asked for ID, to discuss how the decision was made to assess a customer. The video surveillance is another tool for the licensee to use for discussion with staff as to why or why not a particular customer is not asked for ID. In this way, staff will improve their ability to estimate a customer's age.

I further recommend that the licensee consider raising the age for making ID requests of customers to age 30 and that this be stated as the policy in all its documents, including on the daily pre-shift signing sheet. Raising the age to 30 will provide a further safeguard to avoiding service to minors.

CONCLUSION

The due diligence standard is not one of perfection, but of adequate training and systems. As with most training programs and systems, there are improvements that the licensee can make. I have noted a few suggested improvements. On balance, however, I am satisfied that the evidence demonstrates that the licensee has adequate training and systems in place with respect to contraventions of section 77(1)(a) of the Act.

I, therefore, find that the licensee has met the onus of establishing a defence of due diligence and thus has a complete defence to the contravention of section 77(1)(a) of the Act.

Original signed by

Nerys Poole
General Manager's Delegate

Date: February 13, 2018

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

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