



**DECISION OF THE
GENERAL MANAGER
LIQUOR AND CANNABIS REGULATION 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: AB-BC Recreation & Resources Ltd.
dba Ricky's All Day Grill
c/o Lionel Gartner
1809 3A HWY
Creston, BC V0B 1G8

Case: EH18-065

For the Licensee: Jeffrey L. Martin, Legal Counsel

For the Branch: Maria Caduhada

General Manager's Delegate: R. John Rogers

Date of Hearing: December 6, 2018

Date of Decision: January 10, 2019

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

AB-BC Recreation & Resources Ltd. (the "Licensee") holds Food Primary Licence No. 304924 (the "Food Primary Licence"), pursuant to which it operates the establishment called "Ricky's All Day Grill" (the "Restaurant") located at 1809 3A HWY, Creston, B.C., V0B 1G8.

According to the terms of the Food Primary Licence, the Licensee may sell liquor from 9:00 a.m. to Midnight on Monday through Thursday, from 9:00 AM to 1:00 AM on Friday and Saturday, and from 9:00 a.m. to Midnight on Sunday.

The Food Primary Licence is, as are all food primary liquor licences issued in the Province, subject to the terms and conditions contained in the publication "Food Primary, Terms and Conditions" (the "Food Primary Terms and Conditions Handbook").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated September 17, 2018 (the "NOEA") (Exhibit 1 tab 1).

The Branch alleges that on August 21, 2018, the Licensee contravened Section 77(1)(a) of the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act") by selling, giving or otherwise supplying liquor to a minor ("Minor Agent #96"). Item 3, Schedule 2 of the *Liquor Control and Licensing Regulation* BC Reg 241/2016 (the "Regulation") sets out the range of penalties for a first contravention of this type as being a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty. The Branch proposes either a 10 day licence suspension starting on a Tuesday and continuing for successive business days until completed or a monetary penalty of \$7,500.

The Licensee has admitted that its employee sold liquor to Minor Agent #96 and to the facts as set out in the NOEA. However, the Licensee is pursuing a due diligence defence to the contravention.

The Licensee in its submissions at the hearing has requested that if a penalty is imposed for the contravention alleged in the NOEA, that the penalty be a suspension of the Food Primary Licence rather than a monetary penalty.

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.

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016

Schedule 2

Monetary Penalties and Licence Suspensions

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
3	Contravention of section 77 of the Act [<i>supplying liquor to minors</i>]	10-15	20-30	30-60	\$7 500 - \$10 000

ISSUES

1. Did the contraventions 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 13;

Exhibit 2: An envelope containing:

1. A certified true copy of a full body picture of Minor Agent #96 taken at the start of her shift on August 21, 2018 prior to the occurrence of the alleged contravention;
2. A certified true copy of a head and shoulder picture of Minor Agent #96 taken at the start of her shift on August 21, 2018 prior to the occurrence of the alleged contravention;
3. A certified true copy of a picture of the front and back of the British Columbia driver's license of Minor Agent #96 taken on August 21, 2018 together with a certified true copy of a picture of the front and back of the British Columbia Services Card of Minor Agent #96 also taken on August 21, 2018;
4. A copy of a Minor Agent Observation Form dated August 21, 2018 completed by Minor Agent #96 following the occurrence of the alleged contravention, which form is signed by Minor Agent #96;
5. A certified true copy of a full body picture of Minor Agent #96 taken at the end of her shift on August 21, 2018 after the occurrence of the alleged contravention; and
6. A certified true copy of a head and shoulder picture of Minor Agent #96 taken at the end of her shift on August 21, 2018 after the occurrence of the alleged contravention;

Exhibit 3: Licensee's book of documents tabs 1-4;

Exhibit 4: A copy of a document entitled "Ricky's All Day Grill Service Training Workbook Supplement Guide November 2017";

Exhibit 5: A copy of the Liquor Training Workbook for the Restaurant; and

Exhibit 6: A copy of a document which is described as "The Daily Rocket".

WITNESSES

The Branch called Inspector A, a member of the inspection team referenced in the NOEA and the author of the NOEA.

The Licensee called the manager of the Restaurant (the "Manager"), the server who allegedly took the order for liquor from Minor Agent #96 ("Server 1"), and the server who allegedly delivered the liquor to Minor Agent #96 ("Server 2") and was paid therefor.

PROTECTING THE IDENTITY OF THE MINOR AGENT

As the Licensee was not disputing that the contravention alleged in the NOEA had occurred, with the agreement of the parties and in order to protect the identity of Minor Agent #96, redacted photocopies of the photographs contained in the envelope identified as Exhibit 2 were provided to the Licensee. These redacted photocopies of the pictures of Minor Agent #96 and her identification are included Exhibit 1, tabs 3 and 4, and the redacted photocopy of the Minor Agent Observation Form is included in Exhibit 1, tab 5.

The original of these photographs within the envelope identified as Exhibit 1 will be sealed in the envelope in which they are contained and will be kept on file with the Branch and not disclosed without a court order.

EVIDENCE – BRANCH

The NOEA

The evidence given by the Branch with respect to the allegation contained in the NOEA might be summarized as follows.

The Minors as Agents Program

The NOEA notes that in 2011 the Act was amended to permit the Branch to establish its Minors as Agents Program ("MAP") for the purpose of carrying out MAP inspections to ensure that a licensee was not selling or supplying liquor to persons under the age of 19 in contravention of the Act. Best practices for a licensee where a patron appeared to be of a young age were to inspect two pieces of identification to verify the age of this patron. To ensure that these best practices are being followed by licensees, the Branch has hired 16-18 year old minors as agents of the Branch to carry out compliance inspections, which inspections are often complaint driven. These minor agents so hired

are given training on the Act and the Regulation, on making and documenting observations, and on safety considerations.

Establishments licensed under the Act and the Regulation were first notified of the institution of MAP by way of a letter from the General Manager of the then Liquor Control and Licensing Branch. Following this initial notification, there have been numerous ongoing and regular communications from the Branch to these licensees and to the industry about MAP and its continuing activities. These communications have been augmented through education sessions provided by the Branch from time to time and by the Branch's local liquor and cannabis inspectors through interaction during inspections of licensed establishments.

The Alleged Contravention

The NOEA states that during the week commencing the 20th of August 2018, MAP inspections were carried out at various establishments across the Kootenay Region of British Columbia. Inspectors A and B together with Minor Agent #96 were included in the inspection team carrying out these inspections.

At the start of the shift on Tuesday, August 21, 2018, Minor Agent #96 was photographed (redacted copies of which are included in Exhibit 1, tab 3) her identification was viewed and photographed (redacted copies of which are also included in Exhibit 1, tab 4), and her age was confirmed to be less than 19 years of age.

At 12:05 p.m. on Tuesday, August 21, 2018 Inspector B entered the Restaurant and was seated near the entry door on the left side of the Restaurant.

Following the entry of Inspector B, at 12:07 Minor Agent #96 entered the Restaurant and was seated at a booth in the far back corner. She was given a menu by the server ("Server 1") and was asked if she wanted anything to drink. Minor Agent #96 asked what kind of basic domestic beer was being offered, and, when given a list of beers on offer, asked for a Budweiser in a bottle. Server 1 asked Minor Agent #96 if she wanted a glass, and Minor Agent #96 replied that she did.

Shortly thereafter, another server ("Server 2) delivered the ordered bottle of Budweiser beer to Minor Agent #96.

Minor Agent #96 took a photo of the beer delivered to her, advised Server 2 that there was an emergency and that she had to leave, paid Server 2 for the beer, receiving \$14.25 in change from a \$20 bill, and left the Restaurant at 12:14, followed shortly thereafter by Inspector B.

At no time was Minor Agent #96 asked to provide identification, nor were there any questions as to her age.

Upon returning to their vehicle, Minor Agent #96 completed the Minor Agent Observation Form (Exhibit 1, tab 5) and Minor Agent Statement (Exhibit 1, tab 6).

Later that evening at 7:43 p.m., Inspector A called the Restaurant and spoke to the Manager who advised Inspector A that the owner of the Restaurant was not present. Inspector A advised the Manager of the alleged contravention and then issued Contravention Notice B020004 ("Contravention Notice")(Exhibit 1 tab 8), a copy of which was sent to the Licensee by email on August 23, 2018. This email also advised the Licensee that an Enforcement Action would follow and steps that the Licensee should consider taking to ensure that there was no reoccurrence of the contravention. In this email, Inspector A also advised the Licensee that as the Restaurant had failed a MAP inspection, that it was extremely likely that the Restaurant would be retested to ensure that in the future the Restaurant was operating in compliance with the Food Primary Licence.

Evidence of Inspector A

Inspector A testified that he was the Regional Inspector for the Branch with responsibility which included the Kootenay area of British Columbia, a post that he has held for 3 years. He confirmed that he oversees the activities of the liquor inspector responsible for ensuring the Licensee's compliance with the terms and conditions of the Food Primary Licence. Inspector A has been employed as a liquor inspector with the Branch for 8 years.

Inspector A identified a copy of the NOEA (Exhibit 1, tab 1) and testified that he was its author and confirmed its accuracy. He testified that he together with Inspector B were members of the inspection team of which Minor Agent #96 was a part on August 21, 2018.

Inspector A confirmed the identity of the following items in Exhibit 1:

- The Food Primary Licence (Exhibit 1, tab 9), testifying that this was in effect on August 21, 2018;
- The floor plan of the Restaurant (Exhibit 1, tab 10), identifying where the sale of the liquor to Minor Agent #96 is alleged to have occurred and confirming that this sale was within the licensed service area of the Restaurant;
- A copy of the Food Primary Terms and Conditions Handbook (Exhibit 1, tab 11) and testified that the terms and conditions in this document were binding on the Licensee on August 21, 2018 pursuant to the terms and conditions of the Food Primary Licence, specifically with respect to the requirement to request identification from patrons who appeared to be minors;
- A copy of a document entitled "Legal Entity Summary" (Exhibit 1, tab 12), noting that this document identified and set out that there was a single shareholder of the Licensee;
- Copies of documents (Exhibit 1, tab 13) notifying licensees since the amending of the Act in 2010 of the creation and ongoing existence of MAP;
- A copy of the notes of Inspector B made following the alleged sale of liquor to Minor Agent #96 (Exhibit 1, tab 2), a redacted copy of the Minor Agent Observation Form completed and signed by Minor Agent #96 immediately following the alleged contravention (Exhibit 1, tab 5), a redacted copy of the Minor Agent Statement completed and signed by Minor Agent #96 immediately following the alleged contravention (Exhibit 1, tab 6), and a copy of a picture of the Budweiser beer bottle served to Minor Agent #96, which picture was taken following the alleged contravention (Exhibit 1, tab 7); and
- Redacted copies of pictures taken by him of Minor Agent #96 before and after the inspection shift on August 21, 2018 and pictures showing two pieces of identification for Minor Agent #96 (Exhibit 1, tabs 3 and 4), which identification confirmed that Minor Agent #96 was born in 2000 and was, therefore, 18 years old on August 21, 2018.

Inspector A testified that given the seriousness of selling liquor to minors, that the Branch considers a penalty appropriate for the alleged contravention. As this was a first contravention involving the Licensee, the Branch is recommending either a monetary penalty of \$7,500 or a suspension of the Food Primary Licence for a period of 10 days.

EVIDENCE – LICENSEE

Evidence of the Manager

The Manager testified that she has been the manager of the Restaurant since August of 2018.

She noted that although she is a new employee of the Licensee as the manager of the Restaurant, she testified that she has had extensive experience in the hospitality industry, having started in the industry twenty-one years ago with her own restaurant and subsequently owning and operating a number of restaurants. With her experience in the industry, she emphasized, she takes very seriously responsible liquor service.

The Licensee's Employee Training Manual

The Manager identified the documents entitled "Liquor Program Manual", "Liquor Training Workbook", and "Service Training Workbook" included in Exhibit 3 and testified that all these documents were given to a new employee of the Licensee during the hiring process. She testified that this hiring process for the Restaurant involved firstly an orientation process for the new employee, then the new employee would shadow an experienced employee, and then the new employee would receive specific training on responsible liquor service. She noted that the training workbooks in Exhibit 3 clearly laid out what was expected of each new employee.

The Manager noted the section entitled "Alcohol Awareness" in the workbook entitled "Liquor Program Manual" and referenced the emphasis on responsible beverage service. She referenced, as well, this emphasis in the workbook entitled "Liquor Training Workbook". She testified that although these manuals require that the server ask for identification if the patron appears to be under the age of 25, that the current policy at the Restaurant was that this age limit was 30 rather than 25.

In her testimony, the Manager confirmed that the entire culture at the Restaurant was to check for identification as the majority of servers working at the Restaurant were experienced servers. She testified that she regularly quizzes staff members as to what dates need to be on the offered identification if it is to demonstrate that its owner is of legal drinking age. Similarly, she stated, the regional manager of the franchise organization of which the Licensee is a member makes regular visits to the Restaurant every three months and has personally emphasized the importance of responsible liquor service.

The Manager identified Exhibit 6 as the "Daily Rocket" or the "Pocket Rocket" and testified that this document is prepared and posted in the Restaurant every day. She noted that Exhibit 6 stated on its face "check ID". However, she stated, in the unlikely event that this written note gets ignored, she is constantly emphasizing responsible liquor service to the servers in the Restaurant.

The Manager noted that Exhibit 3 contained copies of notes that she started posting with the "Daily Rocket" when she took up her position as manager. These notes she pointed out require that each of the servers in the Restaurant had to initial the document to demonstrate that they had read and understood the message in the note. These notes she pointed out dealt with responsible liquor serving.

If an employee did not follow the requirement of responsible liquor service, the Manager testified, the employee would be subject to a written reprimand, and, if the breach was sufficiently severe, would be subject to dismissal.

The Manager further noted that Exhibit 3 includes copies of pictures of signs from the Branch which are posted in the Restaurant, which warn of fines for not following responsible liquor serving guidelines, and which provide for the requirement to ask for two pieces of identification.

The Manager testified that the franchise organization of which the Licensee is a member has a secret shopper program so that the servers in the Restaurant are being reviewed on a regular basis.

Cross Examination of the Manager

On cross-examination, the Manager testified that she was employed by the Licensee on August 21, 2018 as the manager of the Restaurant, but that she was not present in the serving area of the Restaurant at the time of the alleged contravention.

When asked about her policy of orally quizzing the staff of the Restaurant about responsible liquor service, the Manager confirmed that she has not in the past documented the employee's responses but testified that she intended to do so in the future.

The Manager confirmed that the present policy of the franchise to which the Licensee is a member is as stated in the workbooks in Exhibit 3, namely that a staff member is to ask anyone who appears to be under the age of 25 for identification. The Manager testified that she has attempted to get this policy altered so that this age is now 30, and believes that she has accomplished this change.

With respect to staff training to assist staff of the Restaurant to identify false identification or on how to determine when to ask a patron for identification, the Manager testified that there was no formal training in these areas, but that from time to time there was informal assistance to the staff. However, she stated, there is a semi-annual meeting with the Licensee's Restaurant staff to discuss liquor policy. When asked whether or not written minutes of these meetings were kept, she testified that she was unaware of such minutes.

The Manager was directed to the last page of the workbook entitled "Liquor Program Manual" in Exhibit 3 which was a copy of a form of incident log. She was asked if this form or a similar incident log was used by the Licensee in the Restaurant. The Manager testified that the Licensee does not, at the present time, use such an incident log. Nor is a staff member of the Restaurant required to record when a patron is refused service of liquor. She stated that she was unaware if such a log was kept for August 21, 2018, the date of the alleged contravention.

When asked, the Manager confirmed that there was no follow up meeting of staff of the Restaurant following the alleged contravention.

The Manager testified that other than the notices from the Branch posted in the Restaurant and the notes on the "Daily Rocket", there are no posted written reminders to the staff about responsible liquor service. Nor, she confirmed, were there regular follow up training meetings for staff to remind them about responsible liquor service.

When asked about the copy of the "Daily Rocket" contained in Exhibit 6, the Manager confirmed that this document was dated October 29, 2018, well after the alleged contravention.

The Manager was directed to the last pages of the "Service Training Workbook" in Exhibit 3 which constituted a "Beverage Test" for a new trainee. She confirmed that of the 25 questions contained in this test, only one question dealt with "responsible service" and that the balance of the questions dealt with what types of beverages, including liquor, was offered by the Licensee and how to make and serve these beverages. She also confirmed that after the initial test of a new trainee, there was no ongoing testing of servers.

The Manager stated that she wasn't involved in the disciplining of the servers who allegedly served Minor Agent #96 on August 21, 2018, both of whom are still employed by the Licensee.

Similarly, with respect to the secret shopper program performed by the franchise organization of which the Licensee is a member, the Manager stated that she was unaware of any reports issued.

Evidence of Server 1

Server 1 testified that she had been employed by the Licensee for approximately two months prior to the alleged contravention. Prior to commencing her employment with the Licensee, she stated that she had worked in the hospitality industry since 1993 as both a server and a manager and had never before had an incident such as the alleged contravention.

Server 1 stated that she didn't think that Agent #96 was a minor and that, therefore, there was no need to ask her for identification.

She identified Ex 4 and Ex 5 as copies of the training workbooks she had been given at the commencement of her employment with the Licensee. She stated that she had spent the first two weeks of her employment working through these workbooks and shadowing experienced employees.

Following her initial training, she testified, there were oral quizzes on procedures in the Restaurant, some of which included responsible liquor service.

Cross Examination of Server 1

Server 1 testified that prior to the alleged contravention, she was not aware of MAP, however she had heard of the mystery shopping program operated by the franchise organization of which the Licensee was a member.

When referred to the test attached to the last page of the workbook in Ex 5, Server 1 confirmed that she had taken this test within the first month and a half of the start of her employment with the Licensee, and that there had been no follow up or discussion about her answers on the test.

She stated that although she was told on the day following the alleged contravention that it had occurred, she was not advised of her alleged involvement in the contravention until approximately three months after it had occurred.

Server 1 testified that the happening of the alleged contravention was a "wake up call" for her to be more diligent in asking for identification.

Evidence of Server 2

Server 2 testified that she had been working for the Licensee at the Restaurant for over five years and that, prior to commencing her employment with the Licensee, she had had extensive experience in the hospitality industry. She stated that she had never before had an incident similar to the alleged contravention.

When she started working for the Licensee, Server 2 testified that she had taken the training contained in the workbooks included in Exhibit 3 and confirmed that these workbooks were copies of the documents which she had used as was evident from her

name on them. She stated that as well as the training in the workbooks, she had taken an online training course, and that she had redone this online training course again in 2014. She confirmed that all of this training included training in responsible liquor service.

She stated that in the Restaurant, the focus on a day to day basis was for staff members to check each other and to ensure that they were aware of the requirement to ask for identification.

Server 2 testified that when Minor Agent #96 entered the Restaurant, she was not present. However, as Minor Agent #96 was seated at the table for which Server 2 was responsible, she delivered the beer ordered by Minor Agent #96 and received payment therefor from Minor Agent #96. She testified that she did not ask Minor Agent #96 for her identification as she assumed that Server 1 had done so.

Cross Examination of Server 2

Server 2 testified that at the time of the alleged contravention, the Restaurant was busy, but confirmed that she still had had time to assess the age of Minor Agent #96 when she delivered the beer.

Server 2 stated that it was her understanding that the Licensee's policy was to ask anyone under the age of 25 for one piece of identification and agreed that this policy was different from the posted signs from the Branch which required two pieces of identification.

Following the alleged contravention, Server 2 testified that she was verbally reprimanded. She was not required to complete an incident report, nor was there a special meeting of employees of the Licensee to discuss the alleged contravention.

SUBMISSIONS – BRANCH

The Branch noted that the Licensee has agreed that its employee, Server 2, served liquor to Minor Agent #96 on August 21, 2018 as set out in the NOEA in contravention of section 77 (1) (a) of the Act which prohibits the sale of liquor to a minor.

With respect to the Licensee's claim of due diligence, the Branch submitted that the evidence revealed that although there appeared to be a system of fairly extensive training for new employees, that not a lot of this training dealt with responsible liquor service. More importantly, the evidence did not demonstrate that the Licensee deployed ongoing systems of follow up training which included an emphasis on responsible liquor service.

The Branch noted that with a Food Primary Licence the Licensee should expect that minors would be present in the Restaurant on a regular basis and that, therefore, the Restaurant staff should be particularly sensitive to ensure that identification was requested prior to liquor service. The fact that Server 2 had mistakenly assumed that Server 1 had checked for identification of Minor Agent #96 rather than asking Minor Agent #96 for identification prior to serving her liquor highlighted the need for this sensitivity.

What the evidence showed, the Branch submitted, was an apparent confusion of policy with respect to responsible liquor service. The Branch noted that there appeared to be some inconsistency as to whether the operative age for asking for identification was 25 or 30, and as to whether one or two pieces of identification were required.

Notwithstanding that both Server 1 and Server 2 were experienced servers, the Branch also noted a lack of ongoing training or follow up training following the alleged contravention, or an auditing of the staff performance to ensure compliance with responsible liquor policy.

Regular training about the forms of acceptable identification and how to determine ages might have suggested a culture of compliance. Nor did there appear to be the use of an incident log book which might encourage staff on a regular basis to be aware of responsible liquor policy.

SUBMISSIONS – LICENSEE

The Licensee submitted that it takes the alleged contravention very seriously.

The Licensee is very sensitive to ensuring that there is an atmosphere in the Restaurant of responsible liquor policy and to ensure that this exists, the Manager checks staff compliance on a regular basis with daily oral reminders. As importantly, the staff cross check each other.

The Licensee submitted that its training program is and was on August 21, 2018 extensive and consistent to ensure a climate of compliance with the Licensee's policy of responsible liquor service.

Server 1 and Server 2 are experienced servers who although subject to this training program made a mistake. Each of these servers had their Serving it Right certificates, had read through and been quizzed on the workbooks in Ex 3, Ex4 and Ex5, and were subject to quizzes and shadowing of experienced servers.

The "Daily Rocket" as demonstrated by Ex 6 and the notes attached thereto clearly reflected an ongoing written communication with staff.

Based upon the evidence, the Licensee submitted, the defence of due diligence was established and the Licensee should be found not to be liable.

REASONS AND DECISION

Contravention

The Licensee has admitted that on August 26, 2018, as alleged in the NOEA, liquor was sold to Minor Agent #96 by Server 2, one of its employees, in contravention of section 77(1)(a) of the Act.

To address the Licensee's submissions on the defence of due diligence:

Due Diligence

As Server 2 sold liquor to Minor Agent #96 in contravention of section 77(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 onus falls on the Licensee to demonstrate on a balance of probabilities this due diligence and, in doing so, the Licensee must not only clearly demonstrate that it has established procedures to identify and prevent from happening activities that might lead to this contravention of the Act, it must also clearly demonstrate that it continues to 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 *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 their determination will depend upon the evidence presented. In summary, *Beverly Corners* provides that as referenced above 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 Licensee’s “directing mind” is someone who is responsible to design and supervise the policies of the Licensee rather than an employee who carries out these policies.

The evidence before me suggests that the Manager would be considered to be the directing mind of the Licensee on August 21, 2018, and I so find. As the Manager was not involved in serving in the Restaurant when the contravention occurred, I find that the Licensee’s directing mind did not sell liquor to Minor Agent #96 and move to the second part of the analysis as set out in *Beverly Corners*.

Implementation of Adequate Training and Systems and Effective Application and Operation of these Systems

The onus is on the Licensee to prove on the evidence before me that it has met the test for due diligence and can demonstrate that it 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.

Therefore, in addition to evidence of a reasonably rigorous initial training environment, the Licensee must provide evidence of ongoing reinforcement of this training and culture which should most likely include at a minimum the following:

1. A well defined minimum age policy which requires that any customer under a certain age be asked for identification
2. Appropriate signage;
3. Appropriate training manuals including current best practices;
4. An incident log book utilized and regularly reviewed;
5. Regular staff meetings at which compliance matters are stressed and the discussions of these matters recorded by way of minutes; and
6. Written quizzes for the employees testing them for an understanding of the Act, the Regulation and the Food Primary Terms and Conditions Handbook.

In the testimony before me by the Manager and Server 1 and Server 2 it was quite clear that the overall intention of the Licensee in the operation of the Restaurant was to operate in compliance with responsible liquor service practice.

In its submissions, the Licensee noted that the test for due diligence is not perfection. I quite agree. However, even if perfection is not required, as is clearly stated in the *Beverly Corners* case, to be found duly diligent a licensee must clearly demonstrate the delivery of both initial training and ongoing training procedures to establish and deliver an atmosphere of compliance within the licensed establishment. In other words, good intentions are not sufficient to meet the onus placed upon a licensee seeking to establish a defence of due diligence.

The matter at hand demonstrates this. The evidence before me illustrates two experienced, competent servers, who initially through lack of communication failed to ask Agent #96 for two pieces of identification prior to serving her liquor. It is obviously easy to speculate in hindsight, but the evidence of these two servers suggests to me that if there had been in place a clearly defined atmosphere of compliance within the Restaurant, that this incident would not have happened. Server 2 would not have "assumed" that Server 1 had asked Agent #96 for identification and would have felt

quite comfortable in asking Agent #96 for identification, even if it meant that she was upsetting a patron by being twice asked for identification.

Some of the indices which from the evidence before me suggest to me this lack of compliance atmosphere in the Restaurant include the following:

1. The apparent confusion as to whether the trigger age was 25 or 30;
2. The apparent confusion as to whether to ask for one or two pieces of identification;
3. The fact that there was not a meeting of the Licensee's staff following the alleged contravention at which a discussion was held as to why the incident occurred and how such occurrence could be prevented in the future;
4. The lack of an incident report requiring Restaurant staff to record when they had denied service to a patron for failure to produce the asked for identification; and
5. The fact that Server 1, the party who initially took the order for liquor without asking for identification, was not made aware of her mistake until three months after the alleged contravention had occurred.

Based upon the evidence before me, I find that there was not the requisite climate of compliance at the Restaurant when the contravention alleged in the NOEA occurred on August 21, 2018. I find, therefore, that the Licensee has not established a defence of due diligence with respect to this contravention.

Having denied the Licensee's claim of a defence of due diligence, I therefore find that on August 21, 2018 the Licensee contravened section 77(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor at the Restaurant.

PENALTY

Pursuant to section 51(2)(b) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the Food Primary Licence by selling, giving or otherwise supplying liquor to a minor at the Restaurant, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the Food Primary Licence or rescind or amend existing terms and conditions

- Impose a monetary penalty on the Licensee
- Suspend all or any part of the Food Primary Licence
- Cancel all or any part of the Food Primary Licence
- Order the Licensee to transfer the Food Primary Licence

I am not bound to order the penalty proposed in the NOEA. However, if I find that either a suspension of the Food Primary Licence or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 2 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

As there is no record of a proven contravention of the same type as dealt with here for the Licensee within the preceding 12 months of this incident, I find this to be a first contravention for the purposes of Schedule 2 and calculating a penalty. As noted above, Item 3 in Schedule 2 provides a range of penalties for a first contravention of this type to be a 10 to 15 day suspension of the Food Primary Licence and/or a \$7,500 to \$10,000 monetary penalty.

The Branch has recommended either a 10 day suspension of the Food Primary Licence or a monetary fine of \$7,500. The Licensee has requested that if a penalty is to be imposed that it be a suspension of the Food Primary Licence.

The factors that I have considered in determining the appropriate penalty in this matter include:

- whether there is a proven compliance history;
- a past history of warnings by the Branch;
- the seriousness of the contraventions;
- the threat to the public safety; and
- the well-being of the community.

As the matter involves the sale of liquor to a minor, the most important of these factors is the public safety issue because of:

- The effects of alcohol on growing bodies and developing minds;

- The effects on individuals and society of irresponsible drinking behavior learned at an early age;
- A minor's lack of capacity to metabolize alcohol in the same manner as an adult with the result being a more intoxicating effect on minors; and
- The fact that liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft.

I find that the Branch's recommended 10 day suspension of the Food Primary Licence is appropriate in the matter at hand.

ORDER

I order a suspension of the Food Primary Licence (Food Primary Licence No. 304924) for a period of 10 days to commence at the close of business on Monday, February 11, 2019 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Food Primary Licence be held by the Branch or the Creston RCMP from the close of business on Monday, February 11, 2019 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the Food Primary Licence is suspended will be placed in a prominent location in the Restaurant by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

R. John Rogers
General Manager's Delegate

Date: January 10, 2019

cc: Liquor and Cannabis Regulation Branch, Kelowna Office
Attn: Kurt Lozinski, Regional Manager

Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Maria Caduhada, Branch Advocate