



**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:	Camarillo-Burnett Specialty Foods Ltd. dba El Taquero 1443 Ellis Street Kelowna, BC V1Y 2A3
Case:	EH19-034
For the Licensee:	Jay Blackwell
For the Branch:	Andeep Kang
General Manager's Delegate:	Nerys Poole
Date of Hearing:	September 24, 2019
Date of Decision:	October 17, 2019

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

Camarillo-Burnett Specialty Foods Ltd. (the "Licensee") operates a restaurant doing business as El Taquero, under its Food Primary Licence number 306514 (the "Licence"). Hours of business under the terms of the Licence are 9:00 a.m. to midnight, Monday to Sunday. The restaurant is located at 1443 Ellis Street in Kelowna, B.C.

Jay Blackwell represented the Licensee at the hearing.

The Licence is, as are all liquor licences issued in the Province of British Columbia, subject to the terms and conditions contained in the publication "Food Primary Terms and Conditions" (the "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 April 9, 2019 (the "NOEA"). (Exhibit 1, tab 1)

The Branch alleges that, on March 16, 2019, 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.

The Licensee does not dispute that an employee sold liquor to the minor. The Licensee submits that it has a defence of due diligence to the contravention. In addition, the Licensee raises a question about the fairness of this Minors as Agents Program inspection.

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. Is there a standard of fairness for Minors as Agents Program ("MAP") inspections and if so, do the facts of this incident meet the standard?
3. Has the Licensee established a defence to the contravention with its evidence of due diligence?
4. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: Branch Book of Documents, Tabs 1 to 13
- Exhibit 2: Sealed copy of all unredacted documents relating to the minor agent
- Exhibit 3: Licensee's Book of Documents, Tabs 1 to 5

WITNESSES

The Branch called two witnesses:

- the liquor inspector who wrote the NOEA and was present at the restaurant on March 16, 2019 ("liquor inspector 1")
- the minor agent who purchased the liquor at the restaurant on March 16, 2019 (the "minor agent")

The Licensee requested that the minor agent testify at the hearing.

The Licensee called two witnesses:

- the owner of the restaurant (the “owner”)
- the server who sold the liquor to the minor agent (the “server”)

EVIDENCE - ALLEGED CONTRAVENTION ON MARCH 16, 2019

The Licensee does not dispute that the server sold the liquor to the minor agent. There are however inconsistencies between the evidence of the minor agent and of the server as to the interaction between the two of them. I will therefore review the Branch’s evidence and the Licensee’s evidence of the events on March 16, 2019.

Branch – Liquor Inspector 1

Liquor inspector 1 testified about her experience as a liquor inspector and her observations at the restaurant on March 16, 2019. She began working as a liquor inspector in January of 2019. Her geographical region was up north in the Prince George region. Her regional manager had directed her to assist in these MAP inspections in the Kelowna area. This was her second day of conducting MAP inspections.

Liquor inspector 1 reviewed the Branch’s book of documents, highlighting the expectations on licensees to be familiar with the contents of the Handbook, particularly in this case with the section on service to minors, (exhibit 1, tab 10). She also reviewed the Branch practice of informing licensees of the requirements of their licence, the liquor laws and policies at the time a licensee receives its licence. She was not the liquor inspector who did this review with the Licensee and thus was unable to say with certainty that a branch inspector conducted a final inspection with this Licensee. She explained the regular communication materials sent out by the Branch. She reviewed the Minors as Agents Program and referred to the liquor line information about minors included in exhibit 1, tab 9.

On March 16, 2019, she was working with the minor agent and liquor inspector 2. They conducted MAP inspections at several licensed establishments in the Kelowna area. Liquor inspector 1 entered the restaurant at 2:27 pm. She sat to the left of the main entrance and, from there, was able to observe the minor agent who entered shortly after her. She observed the minor agent go to the front counter of the restaurant and saw her speaking with the server at the counter. She could hear the conversation between the minor agent and the server at the counter. She heard her ask for a Modelo beer and then agree to a Negra beer when the server told her they did not have any Modelo beer. She heard the minor agent ask for a quesadilla as well. She heard no request for identification. She observed the money exchange as the minor agent paid for the order. She saw the minor agent take a seat at a table to the right of the front entrance. She then saw the server from the counter bring a bottle of beer to the table. She observed a second female server bring the minor agent the food that she ordered. She observed a male sit down near the minor agent and speak with her (later identified by the minor agent as a co-worker). Liquor inspector 1 was unable to hear any conversations between the minor agent and the male or between the server and the minor agent at the table. She did not notice any young people in the restaurant while she was there. She stated it was not very busy.

At 2:58 p.m., the minor agent left the restaurant. Liquor inspector 1 followed her and the two of them returned to the Branch's vehicle where the minor agent filled out the observation form and her written statement about the incident, (exhibit 1, tab 7).

When asked in cross-examination about the length of time that the minor agent was in the restaurant, liquor inspector 1 explained that this was a bit unusual. In this case, the minor agent remained in the restaurant longer than the normal time as she had asked liquor inspector 2 if she could order something to eat as she was hungry. The presence of the minor agent's male co-worker may have added to the delay.

Branch – Minor Agent

She stated her age at the time of the contravention and at the date of the hearing as 17 years old. She has worked as a minor agent for the branch since March of 2018. She may have performed between 20 to 30 MAP inspections. She wears her normal clothes

to the inspections; she does not wear makeup. She stated that she might wear something similar to what she was wearing at the hearing. She said that the instructions during her MAP training were to wear what she might normally wear, not to dress up in any way.

The minor agent recounted the events of March 16, 2019. She stated that she and the two liquor inspectors had conducted MAP inspections at several other establishments before coming to this restaurant. Prior to entering the restaurant, she had told liquor inspector 2 that she was hungry and he gave his permission for her to order food at the restaurant. She entered the restaurant at 2:28 pm and left at 2:58 pm, as noted on her observation form, (exhibit 1, tab 7). She went to the counter to order the beer and a quesadilla. She said there was perhaps one person ahead of her at the counter. She saw a line of beer bottles and noted one was called Modelo which is why she requested this. The server at the counter told her they were out of Modelo and if she wanted a Negra instead. The minor agent answered yes. She also requested a quesadilla. She sat down at a table to the right of the front entrance. The server from the counter brought her the Negra bottle of beer first. According to the minor agent's written statement, five minutes later, a second server brought her the quesadilla. In her testimony at the hearing, she was a little unsure of this and stated that the same person who brought the beer to her also brought the quesadilla. She did say this was a different person from the person who took the order at the front counter. At no time, did anyone in the restaurant request identification from her. She testified that at no time did she have a conversation with the server about where she worked. Their interaction was solely related to her order.

She said the restaurant was not very busy. At some point, almost immediately after she sat at the table, a co-worker of hers sat near her and started speaking to her. She described him as a male in his late 20s. He asked her what she was doing and she explained she was waiting for a friend and then going shopping. He was not aware of her role as a minor agent. They made some further small talk. She said she waited for him to leave before she felt comfortable leaving as there was a full beer sitting in front of her. Liquor inspector 2 was sending her a text telling her to leave but she wanted to wait for this co-worker to leave first.

In cross-examination, the minor agent agreed she had been very nervous when she first started working as a minor agent and that now, she realizes it is just a job and she doesn't stress out as much. When asked if she had a "go to" drink to order, she stated that in licensed retail stores she would choose a bottle of wine or a six-pack. In restaurants and pubs, she has been told to order something in a bottle and not in a glass so that it is easily identifiable as liquor. When asked why Modelo, she answered that she chose it because it was there in a line of bottles. When questioned further about her conversation with the server, she said she did not have a conversation with her, other than about her order. She repeated that there was no conversation about where she worked. She added that she prefers not to converse with servers, just to limit her conversation to the order.

She agreed the redacted photos and ID contained at tab 8 of exhibit 1 were hers. She said her appearance remained the same throughout all the inspections that day.

Licensee – Owner

The owner was working on the day of the alleged contravention. She however was not nearby when the server took the order from the minor agent and was not involved in any way in the actual sale. She thought, after hearing about the incident, that she recalled seeing the minor agent at some point but, when she saw the minor agent at the hearing, she realized she had thought it was someone else. She thought the minor agent was someone sitting by herself to the left of the counter. She realized at the hearing she had the wrong person in mind.

The owner stated she had a conversation with the server after liquor inspector 2 phoned to tell her of the alleged contravention. The server told her that she thought she recognized the minor agent and that she told her she worked at the El Dorado and they had a mutual friend who worked there. Just prior to the minor agent entering the restaurant, they had a group of young-looking people enter. The server did her job and requested ID of those who appeared under 30.

She held a meeting with staff within two weeks after the contravention. They discussed the incident and the importance of asking for ID. She wanted all staff to recognize the severity of the incident.

Licensee – Server

The server testified about her experience in the hospitality industry. Her resume, included at tab 3 of exhibit 3, shows her work in the restaurant business since 2016. She has her Pro-Serve certificate from Alberta and her Serving It Right in British Columbia.

She described the events of March 16, 2019. Exhibit 3 includes a written statement from her dated March 29, 2019. She stated she handed the minor agent the beer over the counter. She remembered they had a conversation about a mutual friend who worked at the El Dorado and that the minor agent said she worked at the El Dorado. She thought the minor agent looked older than the group of young-looking people she had just served – and IDed. Because she thought she worked at the El Dorado, she assumed she was 19 or older. She said her request for the Modelo made her think she knew what she wanted. Based on her interactions and conversation with the minor agent, the server assumed she was older and did not ask for ID.

She admitted that, when the owner first spoke to her about the incident, she was a bit confused about who was the minor agent.

She confirmed what she wrote in her written statement:

When I first started at El Taquero on February 6, 2019, I signed off on their policies which included their liquor service. I also gave them my serving it right certificate. [number noted]. [The owners] were both very clear about making sure to ID before serving alcohol.

I have never had an infraction before and am generally very dilligent [sic] on checking IDs as I have worked in the serving industry for about 2 years, there was a group of 10 younger people that came in about 30 minutes before, I went through and checked all of their IDs, when the young lady [the minor agent]

approached she looked familiar, I asked if she worked around here thinking that maybe she worked at the bar down the road, she told me she worked at the Eldorado, I used to know someone that worked at the bar there she told me she knew them as well.

I know that this is no excuse for not checking ID but I did make a mistake and did not ask for ID. I am writing this letter in hopes that you may review the situation before coming to a decision as it was my mistake and not the establishment.

She testified about her understanding of the ID policy – to ask anyone who appears to be under 30. Her training did not include advice on what to look for and how to assess – just to ask anyone who appeared to be under 30.

She stated that she came to the hearing in order to testify that this was her mistake and not the mistake of the owners. The owners had been very clear about the importance of IDing and of asking for ID of anyone who appeared to be under 30.

When questioned about the pop-up question on the till, she said she pressed confirm even though she had not asked the minor agent for ID.

EVIDENCE – DUE DILIGENCE

The owner testified about her experience in the hospitality industry prior to acquiring ownership of the restaurant in Kelowna. She had worked for years with Steamworks Industries first as an assistant manager, then a general manager, and was then promoted as Director of Business Development. In this role, her job was to oversee the licensed retail stores owned by Steamworks and to conduct staff training to ensure compliance with the liquor laws, etc. She was the liaison between the company and the Branch. She developed all the training documents for Steamworks and regularly talked to the managers to see where they might need help with training.

She and her husband opened the restaurant in 2015. She developed the procedures for the restaurant and trained new staff. She stated the restaurant is a small business and that either she or her husband are present at all times.

Serving It Right

All staff must produce proof of the Serving-It-Right certificate at the time of hire. The owner has her Serving It Right.

Training

The owner explained the Licensee's training procedures for new staff and reviewed the Licensee's book of documents (exhibit 3). She trains new staff in the restaurant. She stated she trains new hires for about one week. She rotates him/her through the different positions and reviews all the restaurant's policies with the new staff. She said staff are never totally on their own as she and/or her husband are always in the small restaurant and observing their staff.

The owner starts the training week with the job description which is posted on line when they are hiring. She referred to the job description of margarita shaker/server at tab 1 of exhibit 3, and noted the reference to "ensuring liquor service procedures are being followed" under job summary. She pointed to the Primary list of tasks for a server and noted "Ensure Proper identification is collected from all guests 30 or under ordering or consuming alcohol" as the third bullet. On page 3 of the job description is a heading in bold: PRIMARY – Greet Guests, Take Orders, I.D. Guests, Suggest Additions. Under this heading is a second bullet – "ensure proper ID is presented from guests ordering alcoholic beverages." Under Bar/Host (Mid Shift) on the same page is a bullet:

Ensure identification is collected by anyone consuming alcoholic beverages when they haven't presented ID at the till. i.e. A person orders drinks for the table, ID the remaining people at the table who didn't present ID.

The owner explained this last point in her testimony. A group may enter and go and sit down to reserve their table. One person from the group may then order a pitcher of margaritas at the counter. She emphasizes to servers that they must request ID of all guests who may be drinking alcohol at the table and who appear under 30.

Further information and guidelines, re. responsible alcohol service, are set out at page 4 of the job description:

. . . El Taquero has an obligation to provide a SAFE environment for people in and around our business. These are simply just great principles for running a business. However, the ever-increasing trend for the Ownership and staff of an establishment serving alcohol to potentially be found liable for guests actions after they leave the store causes us to pause and emphasize a few very important points.

- OBTAIN two pieces of identification from anyone who appears to be under 30 prior to serving them alcohol
- DO NOT serve anyone under the age of 19 under any circumstances
- DO NOT over serve any guest under any circumstances
- DO NOT be afraid to deny a guest service at all if you feel they are already intoxicated. Typically, if a person appears intoxicated at first glance, they've had more than you realize.
- We do not discourage having a few drinks with friends, that's why we're here. If a situation presents itself in which any other guest is made to feel uncomfortable or the drinker has intentions of driving, management must take a role in rectifying the situation.
- Taxi services are readily available to our guests. Our preferred service is Current taxi, their app can be found on our POS.
- Driver's Alternatives is a great option if a guest must get a vehicle home.
- Be sure to consider not only the amount of alcohol being consumed but also at the speed which it's consumed.
- If a customer becomes belligerent and refuses all options to avoiding driving, the authorities must be notified.

The owner referred to the Onboarding Checklist at tab 1 of exhibit 3, which may have been developed after the date of the alleged contravention. The checklist provides a reminder as to what must be covered with new employees. Under 'Part 6 Compliance' is Alcohol serving policy.

Under 'Guest Expectation Times & Service Standards,' in place before the alleged contravention, is a notation in bold and italics in the line Beverage Service: **Be Sure to follow ID Policy & Serving It Right Standards.**

The next document at tab 1 has three headings – Swing, Counter, Host/Bar – the three main positions at the front of house of the restaurant. Under each of these positions is a list for each employee's tasks. Under Swing is Assistance with bar and payments and includes the task of "Run Drinks to Patio" with the following: "ensure all guests have presented ID i.e. if two drinks are ordered at the till, but the other person wasn't present, collect ID from the second person." Under Counter is Greet Guests, Take Orders, Suggest Additions, Prep. The third bullet under this is "ID Guests when alcohol is ordered."

The next document at tab 1 is the New Hire Information Sheet. The server signed this sheet on February 11, 2019, (exhibit 3, tab 3). Above her signature is the statement: "I have read and understand the policies and procedures concerning my employment, pay and conduct at El Taquero."

The one-week training schedule and list of points to cover is the last document at tab 1, directly after a blank New Hire Information Sheet requiring the new hire's signature. Number 7 in the list states:

Serving it Right & liquor service

- a. All guests appearing under the age of 30 need to provide ID in order to receive liquor service. Guests under the age of 25 are to provide two pieces. One photo and one supplementary. You as an individual as well as us as business owners can be fined up to \$10,000.00 for serving a minor.
- b. You may not serve liquor in our establishment without a valid serving it right number.

- c. GUESTS MAY DRINK ON THE PATIO HOWEVER WE MUST CARRY THEIR DRINKS ACROSS THE SIDEWALK FOR THEM

After this paragraph at number 7, the employee is required to place his/her initial to show they have read and understand the full page. Similarly, the new staff must initial on the second page of this document.

The server testified about the training she received from the owner when she started working at the restaurant in February of 2019. She said the owner trained her about all the front of house information and emphasized the policies with respect to checking for ID. The server reviewed everything as required and signed the New Hire Information sheet, (exhibit 3, tab 3).

Reminders to Staff

The owner stated that they regularly give reminders to their staff about ID checking. When there are special events, like Halloween, she said they remind staff to be extra diligent about checking ID because of the difficulty with assessing age if someone is made up or disguised. They remind staff about watching for under-age Mexican students on Mexican Independence Day as the age in Mexico is 15.

Tab 2 of exhibit 3 shows a photo of the white board taken not long before the hearing date. The bottom right hand corner has the words "Reminder: ID 35 & under." The owner testified that they made this change to the age after the date of the alleged contravention. Prior to this, the Reminder would have read: "ID 30 & under." The owner pointed to a photo at tab 2 of a large board with ads about tequila and cerveza and at the bottom in large lettering: "Please Present your I.D. upon ordering 25 & under, 2 pieces photo - over 25, 1-piece photo."

The server testified that she received daily reminders about ID checking from the owner.

Pop-up Reminder at Till

The final photo at tab 3 is a photo of the cash till with the pop-up that appears when ringing in a sale:

Age Verification

Customer must be born before 2000-08-30 to purchase this product. Please confirm the Customer's ID & Birthdate.

The servers must press Cancel or Confirm. The date changes every day and operates as a quick reference for servers checking ID of persons who may have recently turned 19. It also operates as a reminder to servers to check ID. The server who served the minor agent just pressed Confirm and ignored the pop-up when ringing in the beer for the minor agent.

Minors as Agents Program

Both the owner and the server were aware of this program.

Meetings

The owner testified that they hold meetings twice a year with staff to discuss any changes to restaurant policies and reminders about liquor service policies. She said she spoke with liquor inspector 2 after receiving the contravention notice and she spoke with the server about the incident. They later discussed the incident and its severity with all staff.

The owner stated they do not document their meetings with minutes. She said they are a small crew.

Monitoring Staff

The owner stated they do an annual performance review with each staff. She said, as she and her husband are present in the restaurant, they monitor them daily and give them reminders about things as they observe their actions in the restaurant.

Incident Log

The Licensee does not have an incident log. They discuss incidents directly with their staff when something comes up.

Post-Contravention Changes

The owner stated that she saw an Instagram post by Jay Blackwell and decided to contact him. She says he has a list of due diligence policies and they are now working on implementing what works in their small operation. She recognizes that their policies and implementation of some policies needs improvement. She is aware that, although they are a small operation, with owners always present, they are unable to have their eyes on everything at all times, as occurred in the incident here.

She says their policy manual is much bigger now as a result of working with Jay Blackwell on making some changes and introducing improvements to their systems. They are now recording any incidents.

She said they have now changed the age at which servers must request ID of customers – from 30 to 35. The server stated that she now requests ID from everyone.

The owner emphasized that they are taking additional steps to make sure this never happens again.

SUBMISSIONS – BRANCH

The Licensee admits that the server sold alcohol to the minor agent on March 16, 2019.

With respect to the evidence of due diligence, the branch submits that the Licensee has not proven due diligence on a balance of probabilities.

The Branch recommends a penalty of either \$7,500 or a ten-day suspension.

SUBMISSIONS – LICENSEE

As noted, the Licensee does not dispute the server sold a bottle of beer to the minor agent on March 16, 2019.

The Licensee submits that it has a defence to this contravention. First, the Licensee says that the owner is the directing mind. She was present on the day of the alleged contravention, but she was not in the area and was not aware of the sale until later.

The Licensee says it has provided evidence of its due diligence through its documents as well as through the two witnesses. The documents and the Licensee's witnesses describe the Licensee's policies and the training of new hires. The Licensee lists the systems that were in place at the time of the alleged contraventions:

- Detailed job description with ID checking requirements
- Onboarding checklist for new hires
- List of service standards including ID checking
- New hire information and sign-off sheet
- Pre-shift meetings
- White board with reminder about ID checking
- Patron signage in the restaurant re. ID checking
- Age verification prompts at the till when liquor is purchased

The Licensee says the owner reviewed all the policies and practices of the restaurant with the server prior to her starting work at the restaurant. The server had been working there about one month. The restaurant is a small operation. The Licensee submits that the test for due diligence is not perfection, but whether the systems in place are adequate to prevent the sale of liquor to a minor.

The Licensee submits several branch enforcement decisions to demonstrate that the Licensee here has similar systems in place as those decisions where due diligence was found, or the delegate found that no penalty was warranted in the particular circumstances. The Licensee submits further that the evidence of post-contravention improvements demonstrates the Licensee's sincere desire to ensure something like this never happens again.

In addition to the due diligence defence, the Licensee submits that the inspection itself must be a fair one before there can be a finding of a contravention. The Branch must follow its own policies and procedures on MAP and to be held accountable if it does not follow them. In this incident, the Licensee says that the minor agent had performed about 30 MAP inspections. Her level of confidence increased from her first inspections and she was less nervous than at the beginning. She probably showed more competence in ordering alcohol. The server testified that, because of a conversation she had with the minor agent, she believed she was over 19. The Licensee questions why the presence of this male co-worker who sat down by the minor agent was not noted in liquor inspector's 1 notes of the incident. The Licensee submits that his presence may have affected whether or not this was a fair test in a typical MAP inspection.

In conclusion, the Licensee emphasizes that the owners understand the seriousness of this contravention and sincerely regret that this incident occurred, despite the policies they had in place. The owners are making every effort to make further improvements to the operation. The Licensee has no compliance history and has been operating since 2015.

REASONS AND DECISION

Contravention

The Licensee has admitted that the server, an employee of the licensee, sold liquor to a minor.

I find that an employee of the Licensee sold liquor to a 17 year old minor on March 16, 2019.

Fairness Test

The licensee has argued that the MAP inspection must be fair in order for me to find a contravention. He argues that in this case, there was some unfairness, which he lists as:

- The confidence of the minor agent, given her experience in MAP
- The server's familiarity with the minor agent
- The presence of the male co-worker

I find there was no unfairness in this MAP inspection. I address each of the points raised by the Licensee. The confidence of the minor agent in making a request for service of alcohol is irrelevant to the facts of any given MAP inspection. Licensees and servers must expect a variety of behaviour and confidence levels from under-age people asking to be served alcohol. The confidence level is not a factor in assessing a person's age. A young person may appear extremely relaxed and confident. According to the Licensee's policies, a server must ask for ID if the person appears to be under 30. From my assessment of the minor agent at the hearing, she did not look 19 years old and she certainly did not appear to be over 30. By her own admission, the server should have requested ID.

The Licensee may wish to consider specific training on this issue and to discuss ways to assess a customer's age. Servers should be encouraged to always err on the side of requesting ID.

I heard inconsistent evidence about what occurred between the server and the minor agent at the counter. I have concluded that the server was mistaken about her conversation with the minor agent, as well as in her recollection that she handed the beer to the minor agent at the counter. Both the minor agent and liquor inspector 1, who could hear the interaction between the two at the counter, were very clear in their statements and their testimony as to what took place between the minor agent and the server. There was no conversation about where the minor agent worked according to both of them. Both the minor agent and liquor inspector 1 testified and confirmed their written statements that the beer was brought to the minor agent after she sat down by the window.

Unfortunately, the written statement of the server (referring to the minor agent telling her that she worked at the Eldorado) and her testimony about the same thing did not come to my attention until the server testified, after the minor agent had testified. Neither the Licensee's representative nor the branch advocate asked the minor agent whether she worked at the El Dorado. As this conversation was a significant issue for the Licensee in its argument about fairness, I would have thought the Licensee's representative would have asked the question of the minor agent when she testified. He did not.

The server may have been confused as to who actually was the minor agent. The owner admitted that she thought the minor agent was someone else and only recognized her mistake when the minor agent testified. The server was not present when the minor agent testified and thus was not able to say for sure this was the person she remembered.

As the owner did not learn of the alleged contravention until 2 ½ hours after the incident and questioned the server at that time, the server may not have been able to recall who was the minor agent.

She did not describe the minor agent in her written statement. The server wrote her statement on March 29, 2016, almost two weeks after the incident. (exhibit 3, tab 4)

The server relied on this conversation about the workplace as an excuse for not asking for ID of someone she thought worked in a place where she would have to be 19. I have noted that assumptions with respect to confidence level are not a guideline as to when to request for ID. Neither are conversations with a customer and assumptions about where they may work. The server admits she was trained in the policy of asking for ID of anyone who appeared to be under 30. In this case, she did not.

With respect to the presence of the male co-worker near the table of the minor agent and the ensuing conversation, I acknowledge that this was probably difficult for the minor agent and delayed her leaving the restaurant in a more timely manner. However, his presence had nothing to do with the service of alcohol to the minor agent and the failure of the server to ask for ID of someone who appeared to be under 30. He sat near the minor agent after she had been served the beer. In any event, the presence of someone conversing with a minor is no excuse not to ask the minor for ID.

I find the MAP inspection here was conducted fairly.

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.

As set out in *Beverly Corners* above, the three questions I must answer are:

1. Was the employee who committed the contravention the directing mind?
2. If no, did the Licensee implement adequate training and other systems to prevent the sale of liquor to minors?
3. Did the Licensee take reasonable steps to ensure the effective application of that education and the operation of those systems?

Directing Mind

The Licensee stated that the owner was the directing mind of the restaurant and was present in the restaurant at the time of the alleged contravention. The Licensee submitted however that the owner was not in the immediate vicinity where the sale took place and was not aware of the alleged contravention until liquor inspector 2 called her 2 ½ hours after the incident.

I find the server who served the minor agent was not a directing mind and that the directing mind was not aware of the sale at the time that it occurred. I therefore move to the second stage of the *Beverley Corners* analysis.

Adequate Training

The owner and the server testified about the training for new hires and the process followed for each new hire:

- Owner reviews the job description and has them sign the new hire information sheet that describes the duties and responsibilities to indicate their understanding of the licensee's policies and procedures, including IDing anyone who appears to be under 30.

- All new hires must have their Serving It Right certificate.
- Training lasts about one week.
- Owner rotates new hires through the three different positions at the front of house, described in the document at tab 1 of exhibit 3 as “Swing, Counter, Host/Bar”.
- Owner emphasizes the importance of checking for ID of anyone who appears to be under 30.
- Monitoring continues after first week, as she and/or her husband are always in the small restaurant and observing their staff.

I find that the training of new hires emphasizes the importance of requesting ID and that the training does not end at the time of hiring. The owner continues to give reminders to her staff after the training week. The server testified about her training and stated that the owner had trained her in all the policies and procedures, including the importance of requesting ID of anyone under 30. She also stated that she received daily reminders about requesting ID.

I find that the server was trained on the importance of requesting ID of anyone who appeared to be under 30.

I find that the new hire information sheet provides further evidence of the importance the Licensee places on its ID policy of asking anyone under the age of 30 for ID. I find that the server had reviewed this policy and signed off on this policy only one month before the alleged contravention.

I find that the training provided by the Licensee is adequate. In a larger, busier operation with more staff, where owners are not regularly present on site, the training here may not be considered adequate. The owner, in her testimony, emphasized that she is constantly observing her staff and giving them reminders after their training period, if she observes something not in conformity with their policies.

Effective Application and Operation of its Systems

In addition to the training described above and the daily reminders, I find that the Licensee had the following systems in place to help ensure staff are not serving minors:

- White board with reminder about ID checking
- Patron signage in the restaurant re. ID checking
- Age verification prompts at the till when liquor is purchased
- Yearly performance appraisals of staff
- Staff meetings twice a year

A Licensee must not only demonstrate it has policies in place and has provided the necessary training to its employees, it must also demonstrate that it has taken reasonable steps to ensure the effective application of that education and the day-to-day operation of those systems.

The owner emphasized in her testimony that she regularly reminds her staff of the importance of asking for ID of anyone who appears to be under 30. The Licensee's policy is to ask for two pieces of ID of anyone who appears to be under 25 and one piece of ID of anyone who appears to be under 30. The new policy, since the alleged contravention, is to ask for ID of anyone who appears to be under 35. Both the owner and the server were aware of MAP.

Although the Act, the regulations and the handbook do not provide a specific age for Licensees to follow when asking for ID, in order to meet a standard of due diligence, the Branch decisions have emphasized the importance of instructing staff to request ID of those who might appear older than 19 but under 25 or 30. This provides a safeguard to ensure that serving staff are requesting ID of all those who may be under 19. I am not sure why the Licensee here decided to have a policy of requesting two pieces of ID of those under 25 and one piece of ID who appear under 30. I asked this question of the owner and the answer was just that this is the way she has always done it.

The distinction between the two ages of 25 and 30 and requests for ID may lead to confusion for some staff. I note the Licensee has now changed to a policy of requesting ID of anyone who appears to be under 35. I heard no evidence as to whether there is still an age distinction in the requirement for two pieces of ID.

The Licensee holds meetings twice a year with staff to discuss any issues and changes to restaurant policies. Twice-a-year meetings may be sufficient for this small operation with few staff as the owner is interacting on a daily basis with its staff. No minutes are kept at these meetings. I would recommend keeping notes or a record of what is discussed. If for no other reason, any such notes or minutes will serve as documentation if the Licensee were faced with having to prove due diligence in future.

The Licensee presented evidence to demonstrate the Licensee's application of its policy with respect to requesting ID:

- regular monitoring by the owner to ensure staff are requesting ID of anyone who appears under 30.
- regular reminders from the owner about checking ID.
- direction to staff to consult with the owner if in doubt about requesting ID or about the type of ID being presented.
- directions in written policy and in oral instructions to staff to ask for ID of anyone sitting at a table when a friend has made the initial order at the counter for alcoholic drinks.

There are a few additional practices that the Licensee may consider implementing to further strengthen its due diligence:

- testing of staff through oral or written testing – to ensure their understanding of the restaurant's policies with respect to responsible alcohol service.
- using "secret shoppers" to ensure employees are requesting ID and using these as discussion points as to how one assesses a person's age.

Although the Licensee's systems are not perfect, perfection is not the standard in due diligence. Circumstances vary greatly among licensed establishments. Formal procedures and set meetings with minutes may be necessary in larger establishments while less formal reminders and undocumented meetings may be sufficient in a smaller establishment. I have taken into account that this is a small "mom and pop" operation and therefore does not require the same level of formal procedures and documentation that may be necessary in a large operation. I have accepted the oral testimony of the owner with respect to the emphasis the Licensee places on ensuring minors are not served. I have also accepted the server's testimony that this was solely her error and, had she followed the training and reminders, she would not have made this mistake.

I find that the above practices demonstrate that the Licensee is ensuring the effective application of its policies and the day to day operation of its systems to prevent the sale of alcohol to minors.

I find that the owner is very sincere in her desire to ensure this never happens again. Her post-contravention efforts support this. Although not evidence of due diligence prior to an alleged contravention, I note the efforts the Licensee has made since the alleged contravention to put further policies and practices in place to ensure it is practising due diligence. One of those efforts was to hire Jay Blackwell to review their policies and recommend any improvements. In addition to representing the Licensee at the hearing, Jay Blackwell has provided the Licensee with a manual, listing good practices and procedures to meet the test of due diligence. The Licensee, as noted, has increased the age for servers to request ID. The Licensee is now recording incidents for discussion with staff.

I find that the failure to ask for ID of the minor agent on March 16, 2019 was an error of judgment on the part of the server. The server admitted she did not follow the Licensee's policy and that she had been trained in the importance of following the ID checking policy. In her statement and in her testimony, she emphasized this was her error and not a fault of the Licensee's policies and training. I find that this error was not caused by poor training or the absence of a proper system or by the ineffective operation of the system established by the Licensee. This was the mistake of the server. The fact that the mistake was made does not preclude a finding of due diligence.

CONCLUSION

In conclusion, I find that the Licensee has met the onus of establishing a defence of due diligence on a balance of probabilities 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: October 17, 2019

cc: Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Andeep Kang, Branch Advocate

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