



**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:	Italian Tomato Restaurant Inc. dba Italian Tomato Restaurant 1047 Davie Street Vancouver, BC V6E 1M5
Case:	EH19-088
For the Licensee:	Pejman Ghassemikian (the "Licensee's Representative")
For the Branch:	Hugh Trenchard
General Manager's Delegate:	R. John Rogers
Date of Hearing:	February 19, 2020
Date of Decision:	March 16, 2020

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

Italian Tomato Restaurant Inc. (the "Licensee") holds Food Primary Licence No. 308255 (the "Licence"), pursuant to which it operates the establishment called the "Italian Tomato Restaurant" (the "Establishment") located at 1047 Davie Street, Vancouver B.C. V6E 1M5.

According to the terms of the Licence, the Licensee may sell liquor from 9:00 a.m. to Midnight, Monday through to Sunday.

The Licence is, as are all food primary licences issued in the Province, subject to the terms and conditions contained in the publication "Food Primary Terms and Conditions Handbook" (the "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 30, 2019 (the "NOEA"), (Exhibit 1 tab 1).

The Branch alleges that on September 19, 2019, 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 #127"). Item 7, 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 7 to 11-day licence suspension and/or a \$7,000 to \$11,000 monetary penalty.

The Branch proposes either a 7-day licence suspension starting on a Thursday and continuing for successive business days until completed or a monetary penalty of \$7,000.

The Licensee has admitted that the Licensee's staff member sold liquor to Minor Agent #127 and to the facts as set out in the NOEA. The Licensee has acknowledged that Minor Agent #127 was under 19 years of age at the time of this contravention and, therefore, confirmed that it does not require to see copies of unredacted versions of the

photographs of Minor Agent #127 and of her identification taken at the beginning and ending of her inspection shift on September 19, 2019.

The Licensee confirmed that it is pursuing a due diligence defence to the contravention.

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

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*.

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	Monetary Penalty			Period of Suspension (Days)		
		First Contravention	Second Contravention	Subsequent Contraventions	First Contravention	Second Contravention	Subsequent Contraventions
7	Contravention of section 77 of the Act (supplying liquor to minors)	\$7,000 - \$11,000	\$11,000 - \$15,000	\$15,000 - \$25,000	7-11	11-21	21-41

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 15, and

Exhibit 2: The Licensee's book of documents entitled "Server Training Italian Tomato".

WITNESSES

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

The Licensee called a member of the Licensee's management team responsible for staff training (the "Manager") and the lead server working in the Establishment (the "Lead Server").

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 to 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.

The Alleged Contravention

The NOEA states that on September 19, 2019, MAP inspections were carried out at various licensed establishments in Vancouver. Liquor and Cannabis Inspector A and Liquor and Cannabis Inspector B (respectively “Inspector A” and “Inspector “B”) together with Minor Agent #127 were included in the inspection team carrying out these inspections.

Prior to the inspection of the Establishment, Minor Agent #127 was photographed (redacted copies of which are included in Exhibit 1, tab 7), her identification was viewed and photographed (redacted copies of which are also included in Exhibit 1, tab 7), and Inspector A confirmed her to be 17 years old.

At 7:43 p.m. on September 19, 2019, Inspector B entered the Establishment and seated herself at the bar which was located within the red-lined service area of the Establishment. Two minutes later, Minor Agent #127 entered the Establishment and seated herself at the same bar, six seats away from Inspector B, with other patrons of the Establishment seated between them. Inspector A remained outside the Establishment with a clear view of Minor Agent #127, Inspector B and the bartender who was about to serve Minor Agent #127 (the “Bartender”).

The Bartender placed a glass of water in front of Minor Agent #127. Minor Agent #127 ordered and was served by the Bartender a Moscow Mule Cocktail, a drink described in the Establishment’s drink menu as containing 1.5 oz. of Stolli Vodka.

Observing this service by the Bartender, Inspector A entered the Establishment and advised the Bartender that he had served liquor to a minor without asking for identification. Inspector B escorted Minor Agent #127 out of the Establishment.

Inspector A paid for the Moscow Mule Cocktail, advised the Bartender’s supervisor (the “Supervisor”) of the contravention that Inspector A had just observed, and issued contravention notice CN #BN000243, (the “Contravention Notice”), providing a copy thereof to the Supervisor.

Evidence of Inspector A

Inspector A testified that he has been a liquor and cannabis inspector for just over a year. His current area of responsibility is the Granville Entertainment District which he is looking after while the liquor and cannabis inspector who is charged with this responsibility is on parental leave. Prior to his employment with the Branch, for 2 seasons, he testified, he was an auxiliary conservation officer in Golden, B.C.

Inspector A identified a copy of the *Liquor Line*, a newsletter distributed by the Branch to all licensees in the spring of 2015 (Ex 1 tab 12) and confirmed that 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. Indeed, Inspector A testified, on April 25, 2019 he had met with the Supervisor, a 50% shareholder of the Licensee, for the purpose of discussing MAP.

Inspector A also identified:

- A copy of the NOEA (Ex 1 tab 1), of which he confirmed he was the author. He testified that it accurately reflected the events leading to the alleged contravention;
- A copy of the Contravention Notice (Ex 1 tab 2), which he had issued, and which was signed by the Supervisor at the time of the alleged contravention;
- A copy of the Licence (Ex 1 tab 3) and a copy of the Terms and Conditions Handbook (Ex 1 tab 13). He confirmed that the terms and conditions in the Licence included the terms and conditions set out in the Terms and Conditions Handbook;
- A copy of the floor plan for the Establishment (Ex 1 tab 4) with the permitted service area for liquor in the Establishment outlined in red;
- A copy of the compliance history of the Licensee (Ex 1 tab 5);
- A copy of the Minor Agent Observation Form and a copy of the Minor Agent Statement, both completed by Minor Agent #127 immediately following the alleged contravention (Ex 1 tab 6);

- Copies of the redacted copies of the pictures of Minor Agent #127 and her identification (Ex 1 tab 7);
- A copy of a picture of and a copy of the sales receipt for the Moscow Mule Cocktail served to Minor Agent #127 on April 19, 2019, plus a copy of a picture of the menu posted by the Establishment setting out the amount of liquor in the Moscow Mule Cocktail (Ex 1 tab 8);
- A copy of the Serving it Right certificate for the Bartender, the original of which, he testified, was produced by the Supervisor following the alleged contravention (Ex 1 tab 9);
- A copy of the notes of Inspector B (Ex 1 tab 10); and
- A copy of his notes (Ex 1 tab 11) made by him right after the alleged contravention.

Inspector A testified that, on the date of the alleged contravention, Minor Agent #127 was 17 years old and, given the public safety issued resulting from the seriousness of selling liquor to minors, the Branch considers a penalty appropriate for the alleged contravention. As this is the first contravention involving the Licensee during the preceding 24 months, the Branch is recommending either a monetary penalty of \$7,000 or a suspension of the Licence for a period of 7 days.

EVIDENCE – LICENSEE

Evidence of the Manager

The Manager testified that he is the member of the Licensee's management team responsible for managing the Licensee's fifteen employees working at the Establishment. He testified that he has worked for the Licensee as the Establishment's floor manager since the Establishment opened in March of 2019. Prior to that he had worked in the restaurant industry for well over 20 years, with the first 10 years as a chef and the next 10 years as a floor manager with the Keg Restaurants.

Every Friday before the start of his shift, he testified, he sits down with the Licensee's Representative and the Lead Server for an informal meeting to discuss the operations of the Establishment and what matters needed to be worked on, including staff issues and

ensuring that customers are being asked for identification. He noted that the Licensee is a family-oriented organization, so that there is not a lot of staff turnover.

The Manager identified Ex 2 as the Licensee's employee training guide and noted that it included a 5-day staff training program for each new employee. Following this training, there is a 24-question quiz about the Licensee's practices and procedures. He testified that he had created these documents and the Licensee's employee training program and policies for which he was responsible, based upon his experience as a service manager with a large corporate restaurant.

He noted that he spends a lot of time with the Licensee's front of house staff to work on practices involved with asking for identification as he has noted over his years in the hospitality industry that new employees are often quite nervous about asking patrons for identification. Part of this training involves role playing for the new employee, showing them techniques and best practices for this procedure to assist especially younger employees in taking away the stigma of asking for identification from a customer who might be older than the employee.

Day 1 Training

The Manager testified that the Licensee's Day 1 training involves training the new employee on the Licensee's rules and regulations and on guest interaction in order to get the employee ready for guest service. He noted that the first page of the Licensee's Server Training guide (Ex 2) deals with instructing a new employee as to how to go about asking a patron for identification and noted that in bold type it states "no reprimand will be given if there is a wasted drink" emphasizing that the Licensee does not put its business ahead of the law.

Day 2 Training

The Day 2 training, he stated, is to assist the new employee with learning the table layout of the Establishment in order to expedite the delivery of food to customers sitting at a particular table.

Day 3 Training

The Day 3 training, he testified, is the bar training for the new employee conducted by either the Manager or one of the other members of the Licensee's bar staff. The purpose of this training is not to make the new employee into a bartender, but rather to familiarize the new employee with liquor service. The Manager noted specifically on page 3 of the Licensee's Server Training guide (Ex 2) the provision entitled "IDing guests" and to the fact that this section has a number of points on this topic, including the reasons for asking anyone who looks under the age of 30 for identification and the consequences for not having done so if liquor is served to that person.

He stated that part of the training on this day is role playing during which the Manager acts as the guest and the new employee is expected to ask him for identification.

The Manager testified that since the occurrence of the alleged contravention on September 19, 2019, the training on this day includes reference to this alleged contravention as a very good reason why the new employee should not become complacent when dealing with a person who appears to be under the age of 30 years old.

Day 4 Training

This portion of the new employee's training, the Manager testified, is where the new employee is actively involved around the customer tables in the Establishment and this training involves both him and the Lead Server. He noted that this training as set out on page 4 of the Licensee's Server Training guide (Ex 2) again includes a large portion on what is called "IDing tables" and deals with items such as "how to deal with irate guests who refuse", "documenting ID refusals" and "how to refuse alcohol service". He noted that the portion on documenting ID refusals references the Licensee's logbook with instructions to document the employee's name, the table the customer sat at, the date and time of the occurrence, and any comments the employee might have which were relevant to the incident.

Day 5 Training

The Manager testified that Day 5 training is where the new employee takes responsibility for a full section of tables of the Establishment with support and guidance from the trainer.

Staff Communications Bulletin Board

The Manager then referenced the picture on page 7 of Ex 2 of the staff communication board posted in the server area near the coffee station at the Establishment. He stated that this board showcases the specials at the Establishment and noted that it stated at the top "ID anyone who looks under 30" and contains the additional comment "ID Date – This day on the year 2001". He testified that this ID date feature was to ensure that each employee was well aware of what was the critical date when reviewing a customer's identification. He noted that this bulletin board was installed upon the opening of the Establishment and is located so that both the kitchen staff as well as servers can clearly see board and be aware of its contents.

Notices in the Establishment

The Manager noted that pages 8 and 9 of Ex 2 were copies of pictures of notices issued by the Branch with respect to asking for identification and testified that these pictures were placed both by the four computer terminals in the Establishment and by the bar to remind Licensee's staff of the requirement to ask for identification. These notices, he testified, were put in place upon the opening of the Establishment. He confirmed that there are also similar notices provided by the Branch at the Establishment's front door.

ID Check Refusal Log Sheet

Page 10 of Ex 2, the Manager testified, was a copy of a sheet of the Licensee's logbook which indicated the date, the server's name, the table number and comments on an incident where a patron was asked for but was unable to produce identification. This logbook is available for staff in the office at the back of the Establishment.

The Manager stated that the Licensee uses this logbook as a training tool to discuss with staff members incidents which have occurred in the Establishment and how to deal with them, especially with respect to the stigma of a server asking a person older than the server for identification.

The Licensee's Training Workbook

The Manager next identified page 11 to 15 of Ex 2 as being a copy of the Licensee's daily training workbook whereby the new employee's trainer and the new employee collectively identify a portion of the training for that day and the trainer, by initialing the entry, confirms that that training has been completed.

The Licensee's Training Questionnaire

The Manager identified a copy of the questionnaire which each new employee is required to complete once the training has been completed, (Ex 2 pages 16 & 17), and on which the new employee is required to achieve a mark of 80% to pass. If this mark is not obtained, he testified, the test has to be rewritten after the trainer has provided retraining for the new employee based upon the test results.

The Balance of the Documents in Ex 2

The Manager testified that the balance of the documents in Ex 2 consisted of copies of the Serving it Right certificates of all of the employees working in the Establishment, together with copies of the Licensee's training workbook for each such employee and the questionnaire completed by that employee following this training.

Licensee's Procedures Following the Initial Training

The Manager stated that in his opinion it takes about a month to ensure a new employee is properly trained. During this time, he testified, senior employees of the Licensee, such as the Manager and the Lead Server, act as mentors for the new employee. This mentoring includes a lot of role playing and asking questions, such as "did you ask the customers at that table for identification".

With respect to employees who have completed their training regime, the Manager testified that he or the Lead Server are present in the Establishment and are constantly reminding them about responsible liquor service and asking them whether or not they had asked a certain customer or group of customers for identification.

The Manager testified that the Bartender committed a mistake when he served liquor to Minor Agent #127 and that, following this incident, the Licensee has redoubled its efforts to make sure this does not happen again.

Cross Examination of the Manager

The Manager was asked upon cross examination if the Licensee had a written statement of its policies and procedures and the Manager testified that it did not.

The Manager testified that the Bartender had been hired in late March of 2019. The Manager stated that the Bartender was impressive in his job interview and that he has proven to be an excellent employee with a wealth of experience from having worked in the service industry for over 6 years in a number of different venues. This experience and knowledge were evidenced, the Manager testified, in the fact that, in the Licensee's Training Questionnaire, the Bartender was the only new employee who scored a perfect mark. The Manager stated that the Bartender has been very instrumental in the success of the Establishment.

With respect to the alleged contravention, the Manager testified on cross examination that it was an exceptionally busy day and that the Establishment might have been an employee short from its regular roster. He stated that he was working that day at a set of tables and was, himself, extremely busy, so that he was not able to keep an eye on things as he normally does. The Supervisor was, as well, very busy helping out in the kitchen.

The Manager stated that the Bartender was running his section of tables in the Establishment consisting of 22 seats plus the 6 seats at the bar. The Bartender was also responsible for the bar service for the entire Establishment. The Manager confirmed that he had no oversight over the Bartender's tables.

When asked why the Bartender committed the alleged contravention, the Manager opined that the Bartender was so busy that he exercised poor judgment in serving liquor to Minor Agent #127. As a result of this, he confirmed, the Licensee has adjusted its staffing levels to ensure that in the future its staff members are not similarly stressed. These adjustments include putting host controls at the door to slow down seating.

After the Bartender had served Minor Agent #127, the Manager on cross examination testified that he had had a discussion with the Bartender to understand how this event had happened and how to ensure that this will not happen again in the future. The Bartender was very upset, closed the bar, and had to leave the Establishment for two and a half hours. The Bartender claimed, the Manager stated, that the reason the alleged contravention had happened was that he was too busy.

When asked about the Bartender's continued employment at the Establishment, the Manager testified that the Licensee had determined that people make mistakes and that the Bartender deserved a second chance, so his employment was not terminated. The Manager testified that the Bartender is now the champion of ensuring that servers ask for identification from all the customers and is the Manager's "right hand man".

The Manager confirmed, when asked on cross examination, that as a result of this alleged contravention, the Licensee needs to tighten up its procedures and policies to ensure that it never happens again.

The Manager testified that, aside from the informal weekly meetings involving himself, the Lead Server and the Licensee's Representative, there are staff meetings held every six months. He testified that there had been one such staff meeting at the Establishment and that there is another one due soon. The first one, he noted, was prior to the alleged contravention. During that meeting, they spent 15 to 20 minutes going over why the staff members had to ask for identification and how they can assist each other with ensuring that identification is asked for.

He testified that the Licensee has shift meetings at the Establishment discussing what is coming up and stressing the importance of asking for identification in situations such as when there were singers in the Establishment and how to maneuver around them. He testified that minutes are kept for the semi-annual staff meetings, but not for the shift meetings.

Evidence of the Lead Server

The Lead Server testified that, about three and a half years ago, he started his employment with the Licensee as a line cook in the Licensee's Richmond location. Since then, he has successfully progressed to become the Licensee's Lead Server. He confirmed that he still works both at the Licensee's Richmond location and at the Establishment.

He testified that his initial training as a server focused on the requirement to ask for identification of any patron who appeared to be under the age of 30. This training, he stated, included various practices to assist him in asking a patron for identification.

Cross Examination of the Lead Server

The Lead Server confirmed that he had gone through the Licensee's 5-day training program when he started at the Licensee's Richmond location. He stated that this training included the requirement to ask anyone whom he thought to be under 30 years old for identification, with the emphasis being that it was better to be safe even if the staff member asking felt uncomfortable in doing so. He confirmed that he was required to answer a test quiz at the end of his training and confirmed that he has his Serving it Right certificate.

During this training and then for the months afterwards, he testified, there was a constant focus on asking for identification. Indeed, he stated, the Supervisor or the Licensee's Representative were constantly asking him if he had asked patrons for identification.

The Lead Server testified that he was not working in the Establishment when the alleged contravention occurred. He testified that, in his discussions with the Bartender after its occurrence, the Bartender stated that he felt very badly about having made such a mistake and that the Bartender's explanation was that he was overworked and it was human error.

He confirmed on cross examination that he provided daily reminders to the Licensee's staff members to ensure that they asked people for their identification. He also confirmed that there were pre-shift meetings with the staff, usually centered around the Staff Communications Bulletin Board.

When he was referred to the ID Check Refusal Log Sheet, he noted that the first entry on this log sheet was his. He testified that this item related to his refusal to serve beer to a patron who could not produce identification.

He noted that the work atmosphere promoted by the Licensee was very "family oriented" and more casual than in a more corporate run establishment.

SUBMISSIONS – BRANCH

The Branch submitted that the Licensee has agreed that its employee, the Bartender, sold liquor to Minor Agent #127 on September 19, 2019 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 questioned whether or not the Licensee's directing mind was working in the Establishment at the time of the alleged contravention.

SUBMISSIONS – LICENSEE

The Licensee's Representative submitted that Licensee takes the alleged contravention very seriously. The Licensee has been in the business for 14 years at its Richmond location and has had no contraventions of the *Act* or the *Regulation* during that time.

The Licensee's Representative noted that the Licensee opened the Establishment as a new location and that shortly thereafter the alleged contravention occurred. He observed that the contravention was not caused by a young employee, but by the Bartender who has been working in the hospitality industry for a long time as a bartender and who is good at what he does. He noted that after the event occurred, the

Bartender came to the Licensee's Representative, admitted that he had committed a bad mistake, and stated that he would understand if the Licensee fired him.

The Licensee's Representative stated that Licensee would not do this as the Licensee considers itself a "family business". The Licensee does not have turnover. It has staff who have been working at its Richmond location for over 11 years. It takes care of its employees.

REASONS AND DECISION

Contravention

The Licensee has admitted that on September 19, 2019, as alleged in the NOEA, liquor was sold to Minor Agent #127 by the Bartender, 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 the Bartender sold liquor to Minor Agent #127 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.

In its submissions, the Branch queries whether or not the Licensee's directing mind was present in the Establishment during the evening of September 19, 2019. In the evidence before me, it appears that the Licensee's Representative, the Supervisor, the Manager and the Lead Server might be considered parties who are responsible to design and supervise the policies of the Licensee. On the evening in question, the evidence is that the Supervisor and the Manager were both present in the Establishment, but that the Supervisor was very busy working in the Establishment's kitchen, while the Manager was actively involved as a server looking after his own customers. Neither, therefore, were involved in the sale of liquor to Minor Agent #127.

The evidence before me further suggests that although the Bartender is a senior member of the Licensee's employee team working at the Establishment, he is not responsible for designing and supervising the policies of the Licensee. Therefore, as it was the Bartender who sold liquor to Minor Agent #127 on September 19, 2019, I find that the Licensee's directing mind was not involved in the sale of liquor to Minor Agent #127 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 to identify if a patron is over 19 years old and, further, that it has taken reasonable steps to ensure the application of this training and the operation of its systems in a consistent and effective manner.

In the matter at hand, what constitutes reasonable steps must be considered in light of the reasons for the prohibition against selling liquor to minors, including:

- the effects of liquor on growing bodies and developing minds,
- the effects on individuals and society of irresponsible drinking behaviour learned at an early age,
- a minor's lack of capacity to metabolize liquor in the same manner as an adult, and, therefore, liquor having a more intoxicating effect on minors, and
- liquor being a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft.

In addition to evidence of a reasonably rigorous initial staff 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 together with assistance in identifying such customers,
2. The clear communication of the rationale for this policy as being the effect of liquor on youth,
3. Appropriate signage,
4. Appropriate training manuals including current best practices,
5. An incident logbook utilized and regularly reviewed,
6. Regular staff meetings at which compliance matters are stressed and the discussions of these matters recorded by way of minutes, and
7. Written quizzes for the employees testing them for an understanding of the *Act*, the *Regulation* and the Terms and Conditions Handbook.

The test for due diligence is not perfection. However, to be found duly diligent the Licensee must clearly demonstrate an atmosphere of compliance within the Establishment. In other words, good intentions are not sufficient to meet the onus placed upon the Licensee for it to establish a defence of due diligence.

Adequate Training of the Bartender

The evidence before me demonstrates that the initial employee training for the Bartender was quite thorough with the Bartender being tested to ensure that a complete understanding of the Licensee's policies and procedures was achieved. His

understanding of this training was confirmed by the detailed signing off by his trainer in the Licensee's Training Workbook and by the Licensee's Training Questionnaire on which he scored perfect marks when he completed it on April 1, 2019.

Effective Application

However, although the Bartender achieved perfect marks in his questionnaire on April 1, 2019, less than six months later he served liquor to Minor Agent #127. This to me indicates that although the Licensee has implemented such ongoing reinforcement practices such as six-monthly staff meetings, pre-shift staff meetings, the Staff Communications Bulletin Board, and the ID Check Refusal Log Sheet, all with a view to emphasizing the importance of asking for identification before serving liquor to anyone who appears to be under the age of 30, the hope for culture of compliance with responsible liquor service would not appear to have been achieved among its staff members at the Establishment as of September 19, 2019.

The evidence before me is that on the evening in question, the Bartender was extremely busy and that, therefore, he made a mistake. However, as the Licensee's Representative acknowledged, the Bartender is not a young server with limited experience. He is a person who has worked as a bartender for many years in a number of different venues. On the evening in question, he was the staff member in the Establishment serving liquor not only to patrons at the bar and at the tables for which he was responsible, but he was also the staff member who was pouring the liquor for the servers to serve to the customers for whom they were responsible. Of all the Licensee's staff members in the Establishment that evening, no matter how busy he was, he was the one who should have had top of mind the requirement to ask for identification, both from his own customers and to question servers as to whether they had done so from their customers.

Unfortunately, the Bartender did not give evidence at the hearing, so what occurred on the evening of September 19, 2019 and his state of mind at the time is only before me in the form of evidence provided by the Manager, the Lead Server and the Licensee's Representative. Their evidence is that the Bartender made a mistake as he was too busy. Although I acknowledge that mistakes do happen, what is relevant is the compliance culture in which the Bartender was operating. Surely if there was a strong culture of compliance extant in the Establishment, somewhere between placing a glass

water in front of Minor Agent #127, taking the cocktail order from her, mixing the Moscow Mule cocktail, and delivering this mixed cocktail to Minor Agent #127, if asking patrons who appeared under 30 was, in fact, top of mind, he would have paused and made the request of identification from Minor Agent #127.

The fact that the Bartender sold liquor to Minor Agent #127, I find, clearly demonstrates that notwithstanding the Licensee's best intentions, on the evening of September 19, 2019, a culture of compliance with respect to responsible liquor service has not been demonstrated by the Licensee to ensure that its staff effectively applied its policies and procedures with respect to responsible liquor service.

I, therefore, find that the Licensee has not satisfied the onus on it to demonstrate that it has met the second stage as referenced in *Beverly Corners* and, therefore, with respect to the contravention, has not established a defence of due diligence.

Additional Features

To ensure that, going forward, it does establish such a culture of compliance, the Licensee might consider the following additions to its compliance program:

- The establishment and maintenance of a written manual outlining its practices and procedures, with a copy available for each staff member and a copy kept at the Establishment;
- Establishing a system of regular quizzes for its employees which the employees would be required to answer relating to responsible liquor service. The Licensee might then use the responses to these quizzes to identify areas of its practices and procedures which required reinforcement;
- A periodic secret shopper program testing compliance at both locations operated by the Licensee; and
- Taking and circulating minutes following the semi-annual employee meetings.

CONCLUSION

Having found that the Licensee has not established a defence of due diligence, I find the Licensee was in contravention of section 77(1)(a) of the *Act* when the Bartender, its employee, on September 19, 2019 sold liquor to Minor Agent #127 as alleged in the NOEA.

PENALTY

Pursuant to section 51(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulation* and/or the terms and conditions of the Licence, I may do one or more of the following:

- Take no enforcement action,
- Impose terms and conditions on the Licence or rescind or amend its existing terms and conditions,
- Impose a monetary penalty on the Licensee,
- Suspend all or any part of the Licence,
- Cancel all or any part of the Licence, or
- Order the Licensee to transfer the Licence

I am not bound to order the penalty proposed in the NOEA. However, if I find that either a licence suspension 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.

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

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

Licensees are obliged to comply with the legislation and the terms and conditions of their licenses. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the 24-month period preceding this incident. In fact, there has been no history of a lack of compliance by the Licensee since it commenced business 14 years ago. This contravention is therefore properly treated as a first contravention for the purposes of the penalties set out in Schedule 2.

The Licensee indicated that if I determine that a penalty is to be ordered, a monetary penalty is preferred to that of a licence suspension.

ORDER

Pursuant to section 51(2)(b) of the *Act*, and Schedule 2 Item 7 of the Regulation, I order that the Licensee pay a monetary penalty in the amount of \$7000.00 to be paid to the General Manager of the Liquor Control and Cannabis Regulation Branch within 30 days of this decision.

Original signed by

R. John Rogers
General Manager's Delegate

Date: March 16, 2020

cc: Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Peter Mior, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate