IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch),* 2012 BCSC 1851

Date: 20121207
Docket: S121905
Registry: Vancouver

Between:

Beverly Corners Liquor Store Ltd.

Petitioner

And

General Manager Under the Liquor Control and Licensing Act

Respondent

Before: The Honourable Madam Justice Dillon

On judicial review from: A decision of the Liquor Control and Licensing Branch, Ministry of Public Safety and Solicitor General, dated 27 February 2012, (File No. EH11-077)

Reasons for Judgment

Counsel for the Petitioner:	A.D. Gay
Counsel for the Respondent:	T. Mason
Place and Date of Trial/Hearing:	Vancouver, B.C. May 12, 2012
Place and Date of Judgment:	Vancouver, B.C. December 7, 2012

Introduction

[1] The petitioner applies for an order that the decision of the General Manager under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "Act"), dated February 27, 2012 (the "decision"), be set aside or quashed pursuant to sections 2, 3, and 7 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. In the alternative, the petitioner asks that the General Manager be required to reconsider the decision in accordance with directions provided by the Court.

[2] The major issue before this Court, as agreed by both parties, is whether the General Manager applied the correct test for the defence of due diligence, particularly as to whether the employee on duty at the petitioner's premises on the evening of May 11, 2011 was the "directing mind" of the corporation.

Background Facts

[3] The Liquor Control and Licensing Branch (the "branch") grants licences for the purchase and sale of liquor under s. 2(2) of the Act. A General Manager is appointed under s. 3(1) of the Act to administer the Act, including taking action against a licensee for contravention of the Act (s. 20).

[4] Beverly Corners Liquor Store Ltd. ("Beverly Corners") operates a private retail liquor store (known as a "licensee retail store") located in North Cowichan, British Columbia under licence number 195428. That licence is subject to the terms and conditions contained in the publication 'A Guide for Liquor Licences in British Columbia'. With respect to minors, that publication states:

> It is against the law to sell, serve, or supply liquor to a minor. It is expected that you and your staff will put in place effective systems to meet this objective. If you or an employee allow a minor to purchase liquor, your licensing privileges could be jeopardized, and you risk prosecution.

There is then a description of the requirement for two pieces of identification to verify the age of the customer. If two acceptable pieces of identification are not produced to prove that the customer is aged 19 or over, service must be refused.

[5] The General Manager notified the petitioner on July 6, 2011 that the General Manager was pursuing enforcement action against Beverly Corners for contravention of s. 33(1)(a) of the Act for sale of liquor to a minor on May 11, 2011. The General Manager sought a monetary penalty of $7,500.

[6] The circumstances forming the *actus reus* of the offence are not in dispute. Beverly Corners conceded at the hearing into the contravention that a six-pack of beer was sold to a minor and no identification was requested. The minor was employed as an agent of the branch and was working undercover under supervision according to a new programme of using minors as undercover agents.

[7] The female cashier who sold the liquor to the minor was the supervisor on duty that night and was working her last shift at the store before she moved to another province. It was a typically busy Wednesday evening and she planned to leave work early, within a half hour of the controversial sale. There were two cashiers on duty that night who were both supervisors. The cashier had been fully trained and signed off on all policy and practice manuals. She had been assessed for her performance regularly and promoted to supervisor. She had been found to comply with policy, practices, and systems related to minors. She had been observed to faithfully check on young customers who came to her till. Her failure to follow policies and training on May 11, 2011 was inexplicable.

[8] The evidence of the duties and responsibilities of supervisors and management was summarized by the general manager in the decision. The general manager also set out the policies, training, practices and procedures of Beverly Corners as it related to the prevention of the sale of liquor to minors.

[9] Supervisors are not part of management. They do not manage or have authority over staff. Their duties are to ensure that the store is cleaned at the end of the night and ready for business the following day. They put the money into the safe and ensure that the store is locked upon leaving. If they have a problem with staff or another issue, they are to call a manager.

[10] There is a store manager and a general manager. The store manager reports to the general manager but is responsible to manage staff. Managers do not usually work night shifts unless it is expected to be unusually busy. A manager would not normally be expected to be working on a normal Wednesday night. However, they are available on-call. Managers train employees such as the cashier who sold the liquor to the minor on May 11, 2011. Through policy manuals and training, staff learn to record cancelled sales because of failure to produce identification and to maintain a system of alerts for suspected minors in the store. Employees who are trained by the managers are required to sign off on training and policy manuals.

[11] The general manager is responsible for day to day operations and receives reports from the store and other managers. The general manager is also a shareholder in the business that owns the licensee retail store. There had never been compliance issues at Beverly Corners before this matter. Management stressed to employees a no tolerance policy when it came to sale of liquor to minors and took pride in being the toughest store on identification in the area. The general manager testified to the policies, practices and procedures in place to prevent the sale of liquor to minors which was seen as a serious responsibility. Management was shown to be current with licence requirements.

[12] By all accounts, the policies, manuals, training, procedures, and compliance oversight of Beverly Corners are above standard practice for the industry and go beyond that of most operators. The policy errs on the side of caution for checking identification and there are multiple systems in place to constantly remind staff of this duty. Staff and management are regularly reminded of their obligations with respect to minors through various means, including in pay envelopes and on buttons worn on their uniforms.

Decision of the General Manager

[13] The General Manager said that the licensee was entitled to the defence of due diligence. He said:

> The licensee is entitled to a defence to the allegations of the contravention, 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.

He then cited the test of due diligence from *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1331, 85 D.L.R. (3d) 161 (*Sault Ste. Marie*). In the context of liquor enforcement, however, he relied upon the criteria from *Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 at paras. 25, 27 and 28 (*Plaza Cabaret*).

[14] The General Manager then applied *Plaza Cabaret* and said:

> At the time in question in this case three employees were working in the licensee's liquor store. One of the employees was designated as the supervisor and it was she who served the patron. As supervisor she was not designated to be part of management, did not set store policies, nor was she in charge of other employees. Her responsibilities were to ensure that the store was properly prepared for the next day's business and the cash receipts and the store itself secured at the end of the night. She was also a cashier and as such was authorized to sell liquor to customers. She was required to ensure herself that a sale was made only to a person of legal age and not in a state of intoxication or under the influence of liquor. While she had telephone access to management staff if necessary, I do not accept that she would reasonably be expected to contact a manager in order to determine if each customer was of age. She had the authority to make a determination whether the customer was of legal age and if not satisfied in that regard to refuse the sale. I find that when the contravention occurred she was the directing mind of the licensee. Despite the youthful appearance of the minor she completed the sale of liquor to him. She did not request identification nor otherwise satisfy herself that he was of legal age. Consequently, the licensee, notwithstanding its well intentioned efforts to attain compliance by, amongst other things, publishing comprehensive employee manuals, providing training, providing reminders and conducting staff meetings, is not entitled to the benefit of the defence of due diligence.

Standard of Review

[15] The application of the test of due diligence as it pertains to the directing mind is a mixed question of fact and law (*Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497 at 515, 101 D.L.R. (4th) 188 (*Rhône*); *Cambie Malone's Corp. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2009 BCSC 987 at para. 35, 96 Admin. L.R. (4th) 301 (*Cambie Malone's*)). These are reviewable on

a reasonableness standard (*The Publik Restaurant PG Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2009 BCSC 249 at para. 33). Reasonableness requires deference. Courts must determine whether the outcome falls within a range of possible acceptable outcomes which are defensible in terms of the facts and the law (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339).

Legislative Scheme

[16] A licence for the sale of liquor is issued by the General Manager after having regard to the public interest (s. 12(1) of the Act). A licensee is a person licensed to sell liquor. The General Manager may take action against a licensee for failure to comply with a term or condition of the licence (s. 20(1)(a)). This is referred to as an enforcement action in which non-compliance with the Act is alleged against a licensee. Section 20(2.4) of the Act provides:

> (2.4) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

A monetary penalty imposed for contravention of the Act must be paid regardless of whether a person has been convicted of an offence under the Act (s. 20(2.5)). There is a distinction between contraventions of the Act which are enforced by the General Manager and punishable pursuant to regulations, and offences for contravention of the Act which are punishable pursuant to s. 48 of the Act.

[17] Section 33(1)-(a) of the Act specifies that “A person must not sell, give, or otherwise supply liquor to a minor”.

[18] Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 provides for escalating punishment for first and subsequent contraventions of the Act by licensees including a suspension of 10-15 days for a first breach of s. 33 of the Act for selling liquor to minors, in addition to a monetary penalty of $7,500 to $10,000.

[19] Section 48 of the Act provides for offences and penalties whereby a person who contravenes the Act commits an offence. A distinction is made between an individual who commits the offence and a corporation or licensee. In the case of an individual convicted of an offence under s. 33, the punishment may be a fine of not more than $10,000 or imprisonment. In the case of a corporation or licensee, the punishment may be a fine of not more than $50,000.

[20] The structure and purpose of the legislation was generally described in *Miller's Landing Pub Ltd. v. British Columbia (General Manager) Liquor and Licensing Branch)*, 2009 BCSC 1352 at paras. 5-7 and 12 (*Miller's Landing*). The Act is public safety legislation that balances the competing interests of various parties, including the interests of licensees to maximize profits (*Miller's Landing* at para. 5).

[21] As public safety legislation that imposes punishment for contravention, s. 20 of the Act creates what was called in *Sault Ste. Marie* a "public welfare offence" or strict liability offence which has its aim the promotion of higher standards of care in the business of the sale of liquor. In *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2002 BCCA 426 at paras. 20, 29 and 41, 171 B.C.A.C. 231, the British Columbia Court of Appeal acknowledged that the Act is public welfare legislation to which a defence of due diligence or reasonable diligence is available to proceedings under s. 20. This has been the consistent interpretation since *R. v. Larocque* (1958), 120 C.C.C. 246 as described by the Supreme Court of Canada in *Sault Ste. Marie* at 1317. Both parties agreed here that the Act was a public welfare statute as the term was used in *Sault St. Marie*.

[22] The scheme of the legislation is that public safety in the distribution of liquor is maintained through the establishment of high standards in the industry for compliance with statutes and regulations. Licensees control policies, practices, and procedures specifically designed to ensure compliance with statutes and regulations, in this case, the sale of liquor to minors. Control by those in charge of business activities that may endanger the public was described in *Sault Ste. Marie* at 1322 as

"vital to promote the observance of regulations designed to avoid that danger". Licensees who undertake reasonable precautionary measures against selling liquor to minors are encouraged to seek even higher standards because the amount of care that is taken goes to the defence of due diligence in the event of a contravention of the Act. Conviction will have a deterrent effect only if the licensee is encouraged to have better and stricter standards. If it matters not how high the standards are that are employed, then businesses will not be encouraged to impose the highest standards in order to avoid contravention of the legislation, and public safety in the sale of liquor to minors will suffer generally as a result. As phrased in *Sault St. Marie* at 1311*: "*If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach?" In this way, pressure is put upon licensees to do their whole duty in the interest of public safety. Good practices in supervision, inspection, and observance promote efficiency and the welfare of the community.

[23] It is important to note what the legislation does not contain. There is no provision whereby an act or thing done or omitted to be done by an officer, employee or agent of the corporation or licensee acting in the course of his employment or in the performance of his duties is also deemed to be an act or thing done or omitted to be done by the corporation or licensee. A provision of that nature was interpreted in *R. v. Safety-Kleen Canada Inc.*, 145 D.L.R. (4th) 276 at 283, 18, 98 O.A.C. 14 (*Safety-Kleen*) as making the conduct, including a failure to act of an employee, the conduct of the corporate employer where that conduct occurred in the course of the employee's employment. This becomes relevant in strict liability offences that require an element of fault, as opposed to absolute liability offences where the attribution of the employee's conduct to the corporate employer suffices to render the corporate employer vicariously liable for the offence. The statutory language suffices in that circumstance to bring the conduct component home to the corporate employer, but not the fault element which must still be attributed to the corporate employer through the failure to establish due diligence in an offence of strict liability.

[24] As described in *Safety-Kleen* at 284, the legislature can use language that would impose vicarious liability on corporate employers for all offences committed by employees in the course of their employment. This is not the case here. There is no vicarious liability for corporate employers. If the legislature wanted to expand the corporate employer's liability under the legislation so that a corporate employer was liable for all breaches of the Act committed by an employee in the course of his employment, specific language is required.

[25] In reviewing the legislation and regulations here, it is clear that a distinction is made between licensees as corporations and their employees, officers, directors and agents. There is no provision that the conduct of an employee acting in the course of his employment is directly attributable to the licensee, especially as it relates to a component of fault. Therefore, the doctrine of respondeat superior has no application to the determination of the blameworthiness of the licensee.

Defence of Due Diligence

[26] The issue in this case is not whether the defence of due diligence applies. It does and the general manager found that it did. Rather, the issue is how to apply the defence as it pertains to the requirement that the defence prove on a balance of probabilities that the employee was not the directing mind of the licensee.

[27] The General Manager applied the test as stated in *Plaza Cabaret* at paras. 27-28. In *Plaza Cabaret,* it was alleged that drug dealing was taking place in the licensee's night club and that the licensee was permitting this to happen. The bartender was found to have directed an undercover officer to a patron from whom ecstasy could be purchased within the establishment. The patron was a friend of the general manager. At the hearing, it had been found that the bartender was guilty of permitting unlawful activity and that conduct was attributed to the licensee without stating a basis for doing so. The court found that the General Manager was obligated to consider whether the bartender was the directing mind and remitted the matter back for consideration. In *Plaza Cabaret*, Pitfield J. began the analysis at paras. 25-26 with a statement of the defence as follows:

> [25] ...it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities. In this regard, the reasons of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, are relevant at p. 1331:
>
> > 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. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras*, [1979] A.C. 153.
>
> [26] Later, in *Canadian Dredge and Dock Company Ltd. v. The Queen,* [1985] 1 S.C.R. 662, (S.C.C.), Estey J. said the following at 685:
>
> > The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. ...The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing.

The learned justice then said at paras. 27-28:

> [27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender

> were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.
>
> [28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons. That inquiry requires, of course, consideration of who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.

[28] As argued by the respondent, this statement of the test for whether an employee was the directing mind requires that the individual have sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation. This requires consideration of who on the premises at the time was the directing mind in the establishment as far as supervision was concerned and whether that individual on site at the time took reasonable steps. The respondent argued that the requirement that the directing mind be on site is a development specific to the liquor control industry. On that basis, the respondent said that the leading case on the legal test for who is the directing mind, *Rhône,* was not applicable or was distinguishable. The respondent said that *Plaza Cabaret* has been consistently applied as the test for the directing mind within the specialized area of liquor control.

[29] In order to assess this position, I will first review the British Columbia liquor control and licensing cases cited by the respondent that refer to *Plaza Cabaret*, then I will scrutinize *Plaza Cabaret*, before specifically considering the test in *Rhône.*

[30] In *Miller's Landing*, the adjudicator found that the licensee contravened the *Act* by supplying liquor to two minors. The adjudicator considered the statement of

the defence of due diligence from *Plaza Cabaret,* but the matter turned upon whether the licensee had taken all reasonable steps to prevent the contravention, not upon whether the employee involved was the directing mind of the corporate licensee. As stated in paras. 60-61, the adjudicator had found that the manager who served the second minor was the directing mind of the licensee, but did not reach a conclusion with respect to the non-managing employee who had served the first minor. The implication was that the server was not considered the directing mind. However, there had been no challenge to the adjudicator's finding that the manager was the directing mind of the licensee and the case did not turn upon this issue. There was no consideration given to the *Plaza Cabaret* requirement that the directing mind be the onsite supervisor. There was no consideration of *Rhône.*

[31] In *Cambie Malone's*, drug transactions took place in the licensee's premises that were watched by a bartender and doorman. The adjudicator found that the licensee had known about and permitted the activity and had failed to take reasonable steps to prevent illegal drug activity from occurring. As found at para. 58, the adjudicator did not consider whether the bartender and doorman were directing minds because the licensee knew that illegal activities were occurring. The drug transactions were blatant. There had been no finding as to who was the directing mind of the corporation and it did not matter because the licensee had failed, in any event, to establish that it had been duly diligent (*Cambie Malone's* at para. 59). There was no consideration of *Rhône.* This aspect of the decision was upheld on appeal (*Cambie Malone's Corp. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2011 BCCA 439). There was no specific consideration of the directing mind issue.

[32] In *One More Glassy Ltd. v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2009 BCSC 1371, the contravention involved not taking liquor from patrons within a half hour after the time stated on the licence for hours of liquor service. The adjudicator's finding that the on site manager was in control of the premises and the controlling mind was not in issue. Rather, the case turned upon the finding that the licensee had presented only rudimentary evidence of staff

training and no evidence of training of the manager so that reasonable diligence was not established. In this case, as in most of the cases that cite *Plaza Cabaret*, the point taken from *Plaza Cabaret* is the statement of the defence in para. 25. There was no consideration of *Rhône.*

[33] Before considering *Rhône* and the background to *Rhône*, it is worthwhile to return to *Plaza Cabaret* for a moment. In para. 25, the learned justice had described the defence of due diligence as requiring proof that the employee was not the directing mind of the licensee in regard to the activity in question, and then, that those who were responsible for that activity had taken due regard to prevent the occurrence of unlawful conduct or activities. In para. 26, the learned justice then appeared to state the test for a directing mind, quoting from *Canadian Dredge & Dock Company Ltd. v. The Queen*, [1985] 1 S.C.R. 662 at 685, 19 D.L.R. (4th) 314 (*Canadian Dredge & Dock*). The effect of the statement there is that as long as the person is performing within the sector of work assigned to him by the corporation, then the identity of the directing mind and the corporation coincide. However, the quote referred to from *Canadian Dredge & Dock* concerned whether an employee, who was also the directing mind of the corporation, was acting within his scope of employment as it pertained to the attribution of the criminal action of agents to an employing corporate principle, not how to determine whether an employee is a directing mind of the corporation. The full paragraph from *Canadian Dredge & Dock* reads as follows:

> The principle of attribution of criminal actions of agents to the employing corporate principal in order to find criminal liability in the corporation only operates where the directing mind is acting within the scope of his authority (*Beamish*, *supra*, at pp. 890 and 892, and *St. Lawrence*, *supra*, at p. 320), in the sense of acting in the course of the corporations' business (*Halsbury's* (4th ed.), vol. 14, p. 30, paragraph 34, *supra*). Scattered throughout the submissions on behalf of the four appellants, was a translation of the directing mind rule to a requirement that for its application the directing mind must, at all times, be acting in the scope of his employment. Conversely, the argument went, if the directing mind was acting totally outside the 'scope of that employment', the attribution of the acts of the directing mind to the corporate employer would not occur. The terminological problems arise from the fact that the concept of vicarious liability in the law of torts has been traditionally fenced in by the concept of the employee acting within 'the scope of his employment' and not, in the classic words, "on a frolic of his own". The

> identification theory, however, is not concerned with the scope of employment in the tortious sense. "Scope of employment" in the *St. Lawrence* judgment, *supra*, and the other discussions of that term in Canadian law have reference to the field of operations delegated to the directing mind. The charge by His Lordship to the jury makes this abundantly clear, as does the Court of Appeal in its analysis of this defence. The Court in *St. Lawrence*, *supra*, in describing the elements of the delegation theory concluded by adding that attribution to the corporation occurred only so long as the directing will "was acting in the scope of his employment." The expression comes from the law of tort and agency and from master and servant law. It is not apt in relation to the identification theory. It smacks of vicarious liability and it invites the defence that criminal actions must *prima facie* be beyond the scope of an employee's duty and authority. The learned trial judge, in directing the jury, expressed it more accurately: "... so long as he was acting within the scope of the area of the work assigned to him." In *Tesco*, *supra*, at p. 171, Lord Reid employed the phrase acting "within the scope of delegation" of the corporation's business. The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the *ego* of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.

[34] *Canadian Dredge & Dock* dealt with the fundamental principles that apply to the liability of a corporation in criminal law. The question was whether misconduct of a directing mind of the corporation, which was at the same time outside the scope of his employment, was conduct attributable to the corporation for purposes of a criminal offence requiring *mens rea.* The court was not dealing with an offence of strict liability which was acknowledged to give rise to a defence of due diligence following *Sault St. Marie* (*Canadian Dredge & Dock* at 674). Rather, the court was concerned with the identification theory whereby the element of *mens rea* is produced within the corporate entity through an employee who is a directing mind of the company acting within the scope of his employment. The directing mind must be a primary representative of the corporation in the sense of the “ego” or “centre” of

the employer corporation, and not just a vicarious liability employee (*Canadian Dredge & Dock* at paras. 20, 29). This explains Estey J.'s statement that "...the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation" (at 685).

[35] The court in *Canadian Dredge & Dock* chose not to apply the doctrine of vicarious liability simpliciter in the determination of corporate criminal responsibility in criminal *mens rea* offences. It specifically rejected establishing vicarious criminal liability in a corporation for the wrongful acts of all grades and classes of employees, as had developed in the United States (at 686). Rather, the directing mind doctrine or identification doctrine provided a rational relationship for criminal responsibility provided that the employee who was the "...core, mind, and spirit of the corporation..." acted within the scope of his employment. As such, the doctrine of identification was described as follows at 693:

> ...The corporation is but a creature of statute, general or special, and none of the provincial corporation statutes and business corporations statutes, or the federal equivalents, contain any discussion of criminal liability or liability in the common law generally by reason of the doctrine of identification. It is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. In *St. Lawrence*, *supra*, and other authorities, a corporation may, by this means, have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and subdelegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in *Tesco*, *supra*, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made.

[36] Through application of the doctrine of the directing mind, corporations are punished only when the moral turpitude or negligence is attributable to the governing mind of the corporation. Thus, the question in *Rhône* was whether the master of a tug was a directing mind of the shipowner corporation because he exercised some

discretion and performed some non-navigational functions as an incident of his employment. The question arose in the context of the corporation seeking to limit its liability under s. 647(2) of the *Canada Shipping Act*, R.S.C. 1970, c. S-9 for damages caused to other vessels occurring after a collision without the shipowner's actual fault or privity. The master, Captain Kelch, had been the captain of a flotilla of tugs and barges that moved off course under the current and collided with the moored ship, Rhône.

[37] As a preliminary matter, Iacobucci J. pointed out that identification of a particular individual within a corporate structure as a directing mind of that company is a question of mixed fact and law (*Rhône* at 515-16). Once the facts are ascertained, whether a person doing a particular thing is to be regarded as the company or merely as the company's servant or agent is a question of law (ibid.). The subtlety of this principle was addressed in *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 34-35, [2002] 2 S.C.R. 235 as follows:

> 34 A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):
>
> > With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.
>
> 35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing

> mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

[38] The fault or privity of the corporation denotes personal blameworthiness to the corporation as opposed to a constructive fault under the doctrine of respondeat superior (*Rhône* at 516). "The question that arises is at what point in the hierarchy of a company is the fault of a person employed in the organization to be treated as the fault of the company itself" (*Rhône* at 517). In answering this question, the Supreme Court of Canada went back to *Canadian Dredge & Dock* at 520 to demonstrate the focus of inquiry and then said:

> As Estey J.'s reasons demonstrate, the focus of inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.

The question then was whether the master's faults were essentially the faults of the shipowner by reason of his position within the corporate hierarchy of the company.

[39] In answering that question, Iacobucci J. said at 526:

> It should be noted that the managerial complexity of shipping companies is not a novel development of which earlier formulations of the corporate identification doctrine were not cognizant. Keeping in mind Estey J.'s observations in *Canadian Dredge & Dock, supra*, one cannot truly say that the authority over navigational matters enjoyed by Captain Kelch is the sort of delegation which conferred "governing executive authority" over the management of Great Lakes' ships. It is in the very nature of seafaring that the master must be invested with discretion to respond to variations in the weather, the tides, and other navigational matters. It does not flow from this necessary delegation that the master is thereby invested with the full discretion to act without guidance from supervisors in relation to matters of corporate policy, such that he can be said to have been delegated managerial authority. Nor can it be said that a master is free from control and instruction from those at Great Lakes responsible for the supervision and management of its fleet (i.e., Captain Lloyd). The fact that Captain Lloyd may have been lax in his supervision of Captain Kelch does not alter the fact that Kelch was essentially a servant of Great Lakes.

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea. While Captain Kelch no doubt had certain decision-making authority on navigational matters as an incident of his role as master of the tug *Ohio* and was given important operational duties, governing authority over the management and operation of Great Lakes' tugs lay elsewhere. Therefore, I am of the view that the courts below erred in holding that Captain Kelch was part of the directing mind and will of Great Lakes. As a result, the collision between the *Rhône* and the *Widener* did not occur with the actual fault or privity of Great Lakes.

[40] The test in *Rhône* as to who is the directing mind of the corporation was applied within the regulatory offence context in *Safety-Kleen.* After citing *Canadian Dredge & Dock* and then *Rhône* at 281, Doherty J.A., for the Court, said that the inquiry must look beyond titles and job descriptions to the reality of any given situation to determine whether an employee's actual authority was sufficient to justify attributing his culpable mind to the corporation. In answering that question in *Safety-Kleen*, the court said at 282:

> There is no doubt that Mr. Howard had many responsibilities and was given wide discretion in the exercise of those responsibilities. It is equally clear that those, like Mr. Corcoran, who dealt with the appellant in the area, equated Mr. Howard with the appellant corporation. Neither of these facts establish the kind of governing executive authority which must exist before the identification theory will impose liability on the corporation. Mr. Howard had authority over matters arising out of the performance of the task he was employed to do. It was his job to collect and transport waste to its eventual destination in Breslau. His authority extended over all matters, like the preparation of necessary documentation, arising out of the performance of those functions. I find no evidence, however, that he had authority to devise or develop corporate policy or make corporate decisions which went beyond those arising out of the transfer and transportation of waste. In my opinion, Mr. Howard's position is much like that of the tugboat captain in *The Rhône*, *supra*. Both had extensive responsibilities and discretion, but neither had the power to design and supervise the implementation of corporate policy. The majority of the Supreme Court of Canada concluded that the captain was not a directing mind of his corporate employer. I reach the same conclusion with respect to Mr. Howard.

Application of the Defence

[41] The General Manager cited *Plaza Cabaret* at para. 27 for the test as to who is a directing mind of a corporation. As has been analyzed, *Plaza Cabaret* cannot stand for the proposition that a directing mind must be someone who is on the premises at the time as far as supervision was concerned. This is not the test in *Rhône* and *Rhône* was not cited in *Plaza Cabaret.* There is no requirement that the directing mind of the corporation must be on site. The facts of *Rhône* make this perfectly clear. If the directing mind of a corporation is the person on the premises regardless of corporate authority, then the defence of due diligence is essentially eviscerated. The respondent's suggestion that liquor licensing should stand separate and apart in the field of public welfare or public safety legislation without specific statutory language to do so is untenable.

[42] The general manager applied the wrong test to determine whether the supervisor cashier was the directing mind of the licensee. This was an error of law. The test is set out in *Rhône* at 520: has the impugned individual been delegated governing executive authority of the company within the scope of his or her authority in the design and supervision of the implementation of corporate policy? If the employee merely carries out such policy, then he/she is not a directing mind of the corporation.

[43] In this case, the general manager found as a fact that the supervisor was not part of management, did not set store policies, and was not in charge of other employees. Similar to the truck driver/geographical representative in *Safety-Kleen*, the supervisor did not have any managerial or supervisory function in the sense of governing executive authority. While she did have authority over the performance of the tasks assigned to her, including preventing the sale of liquor to minors, she did not have authority to devise or develop corporate policy or make corporate decisions which went beyond the individual sale in question. The authority to determine whether a customer was of legal age and then to refuse sale, as necessary, was part of the discretion given to exercise responsibility in the performance of her job function. This was an operational matter. It does not establish governing authority for

a corporation. While she had discretion and certain responsibility on the night in question to close the store and perform individual sales, she was not a directing mind of the licensee as it related to the sale of liquor to minors. As found by the General Manager, she had no authority to design or supervise the implementation of corporate policy. She merely was supposed to carry it out.

[44] The evidence established that the petitioner had standards above most operators for the prevention of the sale of liquor to minors and that it was not standard in the industry for a manager to always work nights. The General Manager directed his inquiry to whether the employee was the directing mind of the licensee and found that, notwithstanding the reasonable efforts of the licensee to attain compliance through policies and procedures, it was not entitled to the defence of due diligence. The finding of reasonable care by establishing proper systems to prevent the sale of liquor to minors, left whether the supervisor was a directing mind of the petitioner as the only issue. The General Manager made the necessary findings of fact relative to this issue. Because the General Manager applied the wrong test but found facts that support an apparent decision when the correct test is applied, reasonableness requires deference to the reasons that were expressed (*Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2012 BCSC 515 at para. 11). But for the error in law, the contravention would not have been found.

[45] As such, there is no need to refer the matter back for determination on the proper test. It is not necessary to do so when the reasons provide a solid basis for determination of the matter (see *Canadian Airlines International Ltd. v. Canadian Air Line Pilots Association*, 95 B.C.A.C. 40 at paras. 70-71 and 74, 39 B.C.L.R. (3d) 131, lv. app. ref'd [1997] S.C.C.A. No. 488).

Conclusion

[46] The decision of the General Manager under the *Liquor Control and Licensing Act* dated February 27, 2012 is quashed.

"The Honourable Madam Justice Dillon"