



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
*The Liquor Control and Licensing Act RSBC c. 267***

Licensee:	Rayman Investments & Management Inc., dba Coal Harbour Liquor Store 1218 West Pender Street Vancouver, BC V6E 2R1
Case:	EH11-139
For the Licensee:	Andrew D. Gay
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator	George C.E. Fuller
Date of Hearing:	March 6, 2012 & June 28, 2012
Place of Hearing:	Vancouver, BC
Date of Decision:	January 23, 2013

INTRODUCTION

The Corporate Licensee, Rayman Investments & Management Inc. (the "the Licensee") owns and operates an establishment known as Coal Harbour Liquor Store at 1218 West Pender Street, Vancouver, BC. The Licensee holds Licensee Retail Store number 195427 (the "License"). According to the terms of its licence, the Licensee may sell liquor from 9 am to 11 pm, Monday through Sunday.

The licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated September 29, 2011.

The Branch alleges that on September 21, 2011, the Licensee contravened Section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act"), by selling, giving or otherwise supplying liquor to a minor. The proposed penalty is payment of the sum of \$7,500 dollars (item 2, Schedule 4, *Liquor Control and Licensing Regulation*) (the "Regulation").

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.

The Licensee does not dispute that the contravention occurred. It does however, dispute the proposed penalty. The Licensee says that given the circumstances of this case, it is entitled to assert the defence of due diligence or, the alternative, in the event that it fails to establish the defence of due diligence I have the discretion to order that no penalty be levied in accordance with Section 20 of the Act, even if the contravention is proved.

RELEVANT STATUTORY PROVISIONS

Supplying Liquor to Minors

33(1) A person must not

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

ISSUES

1. Did the contravention occur?
2. Was the Licensee duly diligent?
3. If the Licensee was not duly diligent, is a penalty warranted under the circumstances or, in the alternative, should I exercise my discretion and order that no penalty is necessary?
4. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted and were considered:

- Exhibit No. 1:** The Branch's book of documents, Tabs 1 to 14 inclusive.
- Exhibit No. 2:** Excerpts from the Branch's Compliance and Enforcement Policy and Procedures Manual – A Desk Reference.
- Exhibit No. 3:** Copy of policy directive NO:07-02 issued by the General Manager of the Branch, dated February 16, 2007 regarding age verification requirements and penalties for admitting or serving/selling to minors and circulated to all LCLB staff, all industry associations, and all local government, first nations, and police agencies.
- Exhibit No. 4:** Licensee's Book of Documents, Tabs 1 to 22 inclusive.
- Exhibit No. 5:** DVD of the Licensee's operations, dated September 21, 2011.
- Exhibit No. 6:** One page document entitled "Basic Industry Standards for ID Requirements in a Licensee Retail Liquor Store" introduced by witness for the licensee.

EVIDENCE OF THE BRANCH

As previously noted, the Licensee does not dispute that the contravention occurred as alleged and, therefore, it is deemed to accept the facts as put forward by the Branch with respect to the issue of whether the contravention occurred.

Accordingly, the evidence of the branch may be summarized as follows:

These proceedings have arisen out of an inspection conducted under the "Minors As Agents Program" (MAP). These types of inspections are utilized by the Branch in order to monitor compliance with the Act's prohibition against selling liquor to persons under the age of 19 (Minors).

At the beginning of the inspection shift a minor, known as Agent #13, was photographed and identification was reviewed confirming that Agent #13 was eighteen years of age.

At approximately 9:15 pm on September 21, 2011, Agent #13 entered the Licensee's premises. Right behind her entered Inspector 1. Inspector 1 maintained a constant view of Agent #13 and had a clear and unobstructed view of the cashier's area, as well as being close enough to overhear a conversation. Within two minutes of entering the establishment Agent #13 selected a six can package of Palm Bay Vodka Spritzer. At this time, there were no other patrons in the store.

Agent #13 then proceeded to the till where a female cashier served her. Inspector 1 then observed the cashier take the product, scan the package and then request payment. Agent #13 then produced \$20.00 and gave it to the cashier. The cashier opened the till and returned the change to Agent #13. Agent #13 then requested a receipt which was provided to her. The cashier bagged the product and gave it to Agent #13 who then left the establishment. At no time did Inspector 1 hear the cashier request identification from Agent #13 nor did the cashier question Agent #13 in regards to her age. The evidence of this event was then deposited into a secure locker.

At approximately 9:20 pm on this evening, Inspector 1 and Inspector 2 visited the establishment. The cashier who sold the product to Agent #13 ("Cashier AW") was located and was advised regarding the Minor Agents Program and that she had sold liquor to a minor agent contrary to Section 33(1)(a) of the Act. Although requested to do so, Cashier AW was unwilling to give her name or identification to the inspectors. Accordingly, the inspectors left Contravention Notice B000639 on the counter and left the premises.

In addition to the uncontroverted evidence summarized above, Inspector 1 testified that the reason that he had attended at the Licensee's establishment, was to monitor the Licensee's compliance with the Minors As Agent Program. He referred to the fact that the Serving It Right Program Manual contained samples of House Policies and a sample of Incident Report Document. He also identified certain provisions of both the SIR manual and the Guide, describing their respective contents as basic instructions to licensees and employees who deal with the sale of liquor. Several weeks later he was invited by the Licensee to attend at its establishment to provide a brief education seminar on the duties of Licensees and their employees regarding the checking of minors for ID. As for his reasons for pursuing enforcement action in this case he stated that any penalty had to have an impact on the Licensee in order to bring it into voluntary compliance with its licence. Accordingly, in this case, he felt that a \$7,500 monetary penalty would have the desired impact and there was no need to impose the harsher penalty of suspension.

Under cross examination, Inspector 1 testified that although he had known of the establishment for approximately one year he had no knowledge of any difficulties with the store. Furthermore, after the alleged contravention, the Licensee asked if there were any other things the Licensee ought to be doing, and Inspector 1 answered in the negative. Inspector 1 did not make any recommendations regarding the Licensee's operations. Inspector 1 agreed that he did not make reference to the Branch's Desk Reference when considering recommended enforcement action. He testified that public safety was a factor in recommending enforcement action but that the two main factors in this determination were the existence of prior contraventions, and/or the existence of prior penalties, neither of which were present in this case.

Inspector 1 agreed that he never turned his mind to the circumstances of the Licensee in selecting a specific recommendation for enforcement action, as he believed that every case involving minors should go to enforcement. He further agreed that there was nothing in the Branch Manual which mandated that approach. Inspector 1 indicated that he was not specifically aware whether the Branch posted suggestions on its web site for what a Licensee should do to avoid sales to minors.

EVIDENCE OF THE LICENSEE

As the Licensee conceded that the contravention occurred as alleged, it directed its evidence to the issue of whether it was entitled to claim the benefit of due diligence.

EVIDENCE OF JC

At the date of the hearing, JC testified that he had been the general manager of the Licensee for approximately three years. Prior to his engagement by the licensee, JC had managed establishments holding virtually all types of liquor licenses issued by the Branch. His responsibilities as the general manager of the Licensee included hiring and firing, customer service, training, ordering, banking and the payment of bills. The operating structure of the Licensee had general manager JC reporting directly to the principal of the corporate licensee, KD. Employee C reports to either JC or KD and one supervisor, C, reports to JC. Underneath this managerial level are the cashiers who are responsible for customer service, stocking shelves, and customer transactions, including obtaining ID from customers if necessary. In other words, the Licensee's organizational structure is very flat.

JC testified that the cashiers do not have any managerial functions nor do they have any decision making power. Furthermore, they do not have any responsibility for creating policies nor do they have any staff under their command. JC testified that if a cashier is alone on the night shift, he would leave notes for the employee if necessary.

JCs' hours are 10:30 a.m. 'til 5:30 p.m., six days a week. The evening shifts commence at 3 p.m., 4 p.m. and 4:30 p.m. and therefore there was always an overlap. When working in the store, JC prefers to be behind the front counter as it allows him to interact with customers, spending most of his time in proximity to staff at the tills. JC indicated that he had a high comfort level with respect to staff IDing as the process had been drilled into the staff from the beginning of their employment. It was also the feature of staff meetings and was reinforced daily in the interactions with day and the night staff. In fact JC testified that when he leaves the establishment at the end of the day he emphatically states "ID people!" and he literally does that every time he leaves. The store's philosophy is 100% compliance with the law on IDing and that the staff will be provided with as many tools and as much help in achieving that goal. KD takes an active role in the business and visits the store approximately three times a week and mentions the need to be vigilant about IDing to cashiers on those occasions.

JC described the licensee's four step training program as "1) show them, 2) watch them, 3) go over procedures, and 4) shadow them". There are a range of topics covered in the training process. They are introduced to the tills and in particular the specific features which it has for IDing. The date on the till shows the applicable date for achieving 19 years of age and it appears on all tills. This date stays on the screen no matter what other transactions are taking place on the till. In addition, there are electronic swiping devices at the till which will show automatically whether a customer is at least 19, or not.

Where a BC licence looks to be tampered with, it is to be swiped and will then display either "acceptable" or "unacceptable". For out of province ID, the Licensee testified that it has utilized a booklet called the "Able Book" which, again, can be a useful tool in detecting improper ID.

The necessity to obtain two pieces of ID from customers appearing to be under 30 (the "ID Policy") is incorporated into the Licensees' training program. At the time of the "show them", new employees get to see transactions occur and are then given an opportunity to practice implementing the procedure.

The Licensee utilizes 16 surveillance cameras which are blatantly obvious to customers and staff. JC and KD have remote access to all of those cameras on their laptops and occasionally monitor transactions from home, to ensure compliance with the IDing policy.

Additionally, JC testified that the Licensee had posted the IDing policy at 16 locations outside and inside the establishment.

JC testified that on February 12, 2011, approximately seven months prior to this contravention, he provided all staff with a memorandum advising them of the launching of the Branch's MAP program and warning of the fact that an employee would be terminated in the event of the breach of the IDing policy. He testified that all staff signed off agreeing to be bound by the policy. Previously, on May 14, 2009, the Licensee had published written store policies to its staff which contained a reference to the need to ID customers appearing to be under the age of 30 and employees were required to sign off acknowledging their intention to be bound by that policy. All staff hired since that date have been required to sign off on that policy. JC testified that the provision with respect to the requirement to ID was intentionally kept brief in order to accommodate the short attention spans of the establishments' young staff.

On the day after the contravention, JC met with, and wrote to Cashier AW admonishing her for breaching the ID Policy and providing her with a two-week suspension from work, without pay. At the same time, the Licensee put in place an ID Double Check System which was intended as a further deterrent against selling liquor to minors. This system required staff to keep a record of each and every occasion when customers were challenged for ID. JC provided his notes of two staff meetings of January 8, 2011, and August 20, 2011, prior to the contravention, which indicated that the topic of the necessity to properly ID customers was raised and discussed.

JC described Cashier AW as being a bright and outgoing person who was great with customers. She owned her own business, was very reliable and had a strong work ethic. JC had occasion to witness Cashier AW IDing customers and observed that she had no unwillingness to doing it. She was not afraid of customers and wouldn't hesitate to challenge them.

The decision to suspend Cashier AW was a joint decision of JC and KD. They felt there had to be some recognition of the seriousness of the contravention but on the other hand, this was the first time that Cashier AW had engaged in any misconduct, or violation, and JC believed her when she thought that Agent #13 was of age.

At a subsequent meeting with staff, which did not involve the attendance of Inspector 1, the Licensee again went over IDing and how it should be done. The ID Double Check Log book was also implemented after the contravention. This log book is reviewed everyday by JC and sits on the counter so everyone can see it. Finally, additional signs regarding IDing have been placed in the establishment.

On cross examination, JC acknowledged that there was nothing in the store policy manual regarding the sale of liquor to minors other than the one sentence reference, (Exhibit 4, tab 12, page 1) although that reference was capitalized and bolded.

There were no written tests with respect to any of the establishment's operations. Furthermore, employees were not required to prepare incident reports and, in fact, the incident logbook was only used for WorkSafe BC matters. JC also confirmed that staff meetings did not have agendas, nor were minutes kept.

Upon re-direct examination, JC testified that both employees working on the night in question had a lot of experience and there had been no problems in the past where there was no supervision present. In his view there was no reason to write everything down as it was a small staff which was very open and employees and JC communicated on a daily basis.

EVIDENCE OF BH

Witness BH is the principal of a consulting company which specializes in providing advice to licensees in the hospitality industry. I was not requested to qualify BH as an expert witness, and, therefore, will not treat him as such.

He testified that approximately 30% of his clients were involved in the operation of liquor retail stores. He is not currently doing any work for this Licensee and his last involvement with this Licensee was assisting in obtaining the liquor retail store licence. Witness BH's involvement has basically been to take the client through the hiring process and make sure that certain fundamental procedures are in place. In that regard, Witness BH produced a document entitled "Basic Industry Standards for ID Requirements in a Licensee Retail Liquor Store", Exhibit 6 in these proceedings, which identified the following topics:

1. Serving It Right qualifications
2. Written policy on prevention of sales to minors.
3. Training on ID Requirements
4. Signage in the store posted in various locations
5. Communications with employees upon requirements on need to ID
6. Surveillance cameras in store at various locations

With regard to item number five, the form of communication is usually verbal and is an on-going dialogue reminding employees about the requirements to check ID. Staff meetings also fall under item number five. BH testified that the industry norm is to hold informal staff meetings at the point of sale or in an office. Minutes are not kept depending on the formality of the operation - some do, some don't.

Items not on the list include the device allowing for the swipe of a piece of ID which automatically certifies a customer's age. BH testified that this was certainly not standard and involved advanced technology.

The warning memorandum found at Exhibit 4 tab 11, which was signed off prior to the incident, was above the industry standard in his experience. Furthermore, it was not standard for managers to watch a video pre-emptively but it was standard for managers to leave notes for subordinate employees coming on shift.

BH testified that other matters not typically found in the LRS establishments are the use of secret shoppers, the utilization of night managers, and engagement of door persons or written tests.

What a new licensee does receive from the Branch by way of assistance is a copy of the LRS guidelines, which are updated from time to time. In BH's opinion, those guidelines do not set out the requirements of due diligence. Furthermore, BH was of the opinion that when the Branch reduced the requirement to challenging the age of the customer from 25 to 19 in 2007 this lowered the standard when serving minors.

EVIDENCE OF CASHIER AW

Cashier AW testified that she was a part-time cashier of the Licensee at the time of the contravention, and was working 14 hours a week. She had obtained her SIR Certificate and part of the course was devoted to issues involving the serving of liquor to minors. When she was hired in 2010, she was trained by an assistant manager of the Licensee as a cashier and the training covered all of the tools available to determine whether a customer was under 19 years of age. The formal training lasted two days but she was required to be shadowed by a senior employee for approximately two weeks.

Part of the training involved operating the swiping device at the till. She stated that if an employee didn't know how old the customer was and couldn't figure it out, the device would tell you whether the customer was of age or not. The training also included tips on how to detect minors by their body language, by the way they carried themselves and by the clothes that they wore.

Cashier AW read, understood and signed off on the licensees' policies in June of 2010. Since she has been working at the Licensees' establishment, the prohibition against serving minors has been stressed to the point that service to minors absolutely cannot happen and this is emphasized on a daily basis. Staff are told every day by the general manager to ID anybody that looks under 30. She testified further that she was not afraid to ID customers, and felt confident in her ability to do so. She stated that she has received verbal reminders every shift she has worked for the Licensee, from JC and KD. Their standing instructions are "two pieces of ID, no exceptions".

Staff meetings are held quarterly and the proper ID process for minors is stressed in every single meeting. During these meetings JC goes over what is acceptable and not acceptable, what questions to ask the suspect customer, and the available tools for dealing with these situations are reviewed. These are open meetings and employees can ask questions for clarification at any point. In fact, approximately 1 month prior to the contravention, JC had covered the same issues once again.

With regard to the actual contravention, Cashier AW testified that she did not think that the subject minor looked young at all, based on her facial appearance, body shape, frumpy clothing, the confident way in which she carried herself, and because she knew exactly what she wanted in selecting an item which is usually consumed by a middle age customer.

AW testified that more reminders with regard to the identification policy would not have made a difference to her decision in this case. Cashier AW testified that she was never part of management of the store and was never delegated discretion to make decisions on behalf of the store and she did not supervise staff of the store. On September 22, 2011, Cashier AW received notification of the two-week suspension and a warning that any repetition of the contravention would be met with immediate dismissal. In addition, she also talked to JC, who explained how unfortunate the event was for the Licensee. JC reiterated the store policy and went over what to do and how to do it in the future. KD also telephoned her three times to indicate his surprise and disappointment in her. It was a serious situation and it could never happen again. After the event, the Licensee arranged for two meetings more specifically directed at the whole issue of proper identification. All in all, Cashier AW testified that she made a bad judgment call.

EVIDENCE OF CASHIER MS

Cashier MS was the other cashier on duty at the time of the contravention. At that time she was 26 years of age and was working 25 hours per week as a cashier for the Licensee. She had started work for the Licensee in March of 2011. The bulk of her experience in the liquor industry involved working in bars, restaurants and wineries in British Columbia for approximately six years. She also worked in three LRS's during that period of time.

When asked to compare the level of concern with respect to the prohibition against serving minors, she stated that there was a greater emphasis at the Licensee's establishment compared to any of her other jobs. She further stated that the establishment's philosophy with respect to IDing customers was taken very, very seriously, and was reinforced by daily reminders, and by the fact that a breach of the policy could result in termination of employment.

Cashier MS advised that she worked with Cashier AW at least once a week and sometimes twice and had observed her ID her customers on many occasions. She had a comfortable, confident personality and never had any question about her ability to ID customers. She had never witnessed her fail to ID customers when it was appropriate. Cashier MS offered that JC's approach to the issue of the necessity of obtaining ID from minors was to repeat the policy often and at least once per shift. She further stated that, as a result of the training she had received on the topic from the Licensee, she fully understood the legal requirements and store policy regarding service to minors and she did not feel the need for any more training regarding the topic. In addition, KD was quite often in the store and every time that he came in he mentioned the need to ID customers. In fact, the topic was reviewed in the staff meeting held on August 20, 2011 (Exhibit 4, Tab 17) where the importance of IDing was stressed and the available resources were identified and reviewed again. Minutes of these meeting were not

produced but the topics were thoroughly discussed verbally, and in her opinion, minutes of the meeting would not enhance the knowledge of the employees.

With respect to the appearance of the minor agent, Cashier MS testified that the Agent's overall appearance was of an older woman. She dressed in the mid 20's to 30's, which was older than her friends dressed (26). Other impressions which indicated that the minor agent was an older woman included her body type, in which her hips were wider and the fact that her hair was not done. Another indicator of an older age is the demographic of the region, which the Licensee services, that being a middle age, higher class area, which was not frequented by younger individuals.

Cashier MS does not have any authority to make policy and was required to follow store policy.

Under cross examination, Cashier MS testified that the ID Policy was covered in SIR staff meetings and discussions. It was verbally reiterated everyday. Asked whether she would have asked the minor agent for ID in this case, she acknowledged that she would have.

EVIDENCE OF KD

Witness KD testified that he was the vice-president of the Corporate Licensee in charge of the business operations of the Licensee. The day to day operational responsibility had been delegated to JC and this arrangement had been in place for approximately three years. He was also responsible for the overall operations of a nearby hotel, which was owned by the same Corporate Licensee. This arrangement had been in place for approximately 15 years and neither this Corporate Licensee nor the hotel had experienced any contravention history.

Witness KD's personal business philosophy was that the holding of a liquor licence was a privilege and that the conditions attached were to be followed one hundred percent of the time. Without the licence, there simply is no business. Unlike business in his home land of Uganda, laws are valued in this country. Businesses should abide by the law and should remind managers and staff of their obligation and whenever he has had an opportunity to remind them of the laws, he has done so.

Witness KD knows that the sale of liquor to minors is a serious problem and hurts the community. He still attends at the store two to three times a week in order to ensure that the actual business operations are in line with the Corporate philosophy. When he has made these attendances, he has reinforced the issue of service to minors, and the need to properly ID customers. The memorandum to staff of February 20, 2011 advising of the need to properly ID, and the consequences for not doing so was actually his idea. The Witness also testified that he had access to the surveillance system and he would watch the same from time to time looking at how staff were behaving, including whether they were properly IDing customers.

In response to the concern with regard to the brevity of the ID policy regarding minors, Witness KD responded by stating that the policy may be brief, but because the Licensee has both oral and written ongoing communications with regard to policy implementation, it gets engrained in them.

Witness KD testified that Cashier AW did not have any responsibility for making store policy and she had no management duties of any kind. At no time did she have control over the operations of the store.

When Witness KD heard about the incident he was very upset, and couldn't believe it, particularly in light of all the resources which had been provided to the staff. He testified that, after the issuance of the Contravention Notice, he suggested that Inspector 1 meet with him and the staff to discuss the matter. On January 28, 2012, Inspector 1 attended such a meeting and the Licensee showed him all of the systems which the Licensee had in place. Witness KD testified that, at the end of the meeting, Inspector 1 advised of his view that there was nothing more that the Licensee could do in order to prevent the reoccurrence of the contravention, as the Licensee had done everything right.

Witness KD testified that, at the end of the meeting, Inspector 1 stated that Cashier AW was a reliable and dedicated employee and that she was going to be the Licensee's best employee.

SUBMISSIONS – THE BRANCH

The Branch Advocate's submissions can be summarized as follows: Section 33(1)(a) of the Act prohibits the sale of liquor to a minor. The Branch developed a "Minor's as Agents Program" to test Licensee's compliance with the Act. On September 21, 2011, an 18 year old minor agent of the Branch entered and purchased liquor from the Licensee. There was no attempt to deceive the Licensee as to the minor's age. The Licensee has policy and training manuals but does not have a system in place to monitor and test staff compliance. Selling liquor to a minor is a serious public safety issue and can have serious consequences to the minor and to the community. In the circumstances, the minimum penalty of \$7,500 is warranted.

SUBMISSIONS – THE LICENSEE

The submissions of the Licensee can be summarized as follows: The test for due diligence is that of a reasonable person in similar circumstances. The Licensee submits that it has established reasonable policies and procedures to deal with potential problems prior to the alleged contravention and has strengthened those policies and procedures following the incident. The Licensee submits that its policies and procedures are consistent with or exceed the industry standards. Further, the evidence does not suggest there is a systemic problem with the Licensee's policies and procedures. Instead, the evidence is of a momentary lapse on the part of an otherwise well trained and satisfactory employee. No additional policies or training on the part of the Licensee could have prevented that momentary lapse. The employee was a cashier, not a manager and did not have decision making authority on matters of the Licensee's policies. She was not the directing mind of the Corporate Licensee. To hold the Licensee responsible for the actions of the employee in the circumstances of this case would move the due diligence test dangerously close to that of absolute liability. The Licensee did all that a reasonable Licensee would do and as such was duly diligent.

REASONS AND DECISION

I have now had the opportunity to carefully review and consider all of the evidence and the comprehensive submissions of the Branch Advocate and Counsel for the Licensee and find that, on a balance of probabilities, the evidence in this case is that an 18 year old minor purchased liquor at the Coal Harbour Liquor Store at approximately 9:15 p.m. on September 21, 2011. The minor was not requested to produce any identification nor did she produce any identification. That, on its face, is a contravention of Section 33(1)(a) of the *Liquor Control and Licensing Act*.

DUE DILIGENCE

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.

The leading case is: *R. v. Sault Ste. Marie* (1979) 2 SCR 1299, where as 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 respondent 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 willful 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.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch* (2004) BCSC 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 36(2)(b), 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 are, in fact, responsible for that part of the licensee's operation were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in *Plaza Cabaret* clarified that the directing mind need not be an officer or director of the licensee:

[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 relations 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. The 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.

On the evening when the contravention occurred, there were only two employees working at the Licensee's establishment, Cashier AW and Cashier MS. On the totality of the evidence, I have concluded that at the time of the contravention by the Cashier AW, she was not a directing mind of the Licensee. In particular, the evidence of JC, AW, MS and KD was entirely consistent in establishing that cashiers do not have managerial functions, nor do they have any decision making power. They do not have any responsibility for creating policies, nor do they have any staff under their command. They have never been delegated a discretion to make decisions on behalf of the store, and they are not part of the management team. Cashiers do not make store policy, but they are required to follow it. At no time did AW have control over store operations.

On a balance of probabilities, I believe it is clear that JC was the directing mind of the Licensee at the time the contravention occurred. The evidence is clear that he had supervision over the Licensee's establishment, including the cashiers who were working on the evening in question. He created and enforced policies for the Licensee including policies pertaining to checking patrons for identification. Neither of the clerks who worked on the evening in question would be considered a directing mind of the Licensee. I am satisfied the directing mind of the Licensee was not directly involved in the sale of liquor to Agent #13.

In accordance with *R. v. Sault Ste. Marie*, supra., the Licensee must still satisfy a two-part test in order to establish that it acted with due diligence. It must first demonstrate that it has put reasonable systems in place to prevent the commission of the contravention for which it is charged. Second, it must establish that it took reasonable steps to ensure the effective operation of these systems. The test is not one of perfection. Instead, the Licensee has the onus to demonstrate that it took reasonable steps to prevent the occurrence of the contraventions in question.

In respect of the first test, the Licensee testified about the systems that it uses to train and supervise its employees. All staff have Serving it Right training. The Licensee's policy is to ID anyone who appears under 30. This policy is posted in 16 different locations throughout the store.

There is a four step training program, and regular supervision of the store clerks by JC. He introduced notes of meetings held with staff prior to the appearance of Agent #13 in which ID issues were discussed. For example, the requirement to enforce the ID policy was discussed in two staff meetings prior to the contravention, on January 8, 2011 and August 20, 2011, the latter being approximately one month prior to the contravention.

Staff were informed about the Minors as Agents Program when it was introduced, and signed a document acknowledging that they were advised about the program. In order to further imbed its ID policy, the Licensee festooned the establishment with posters to remind clerks and advise patrons that anyone appearing under 30 would be asked for ID. The Licensee also installed 16 surveillance cameras which were obvious to both customers and staff. Both JC and KD had remote access to all of those cameras, and occasionally monitored transactions from home in order to ensure compliance with the ID policy.

In addition, staff are reminded of their obligation regarding the ID policy on at least a daily basis by JC. As well, he monitored the establishment either personally or through the surveillance system, checking how the staff, among other things, were applying the ID policy. In addition, KD attends at the store two or three times per week, and on each occasion; he reminds staff to be sure to apply the ID policy. The Licensee produced evidence consisting of notes where KD met with staff and discussed the importance of asking for ID.

Staff meetings were held quarterly and the ID policy was always a topic of review and discussion. The Licensee had installed a high tech ID checking system and staff are required to swipe all BC ID in order to verify that the customer was permitted to purchase alcohol. Similarly, for out of Province ID, cashiers were instructed to use the ABLE Guide Book. In addition the till has been modified so that each time an employee logged onto a till, the date that the customer had to have been born to be "legal" appears on the screen and stays on the screen the entire time that the till is in use.

The evidence of the clerks at the store also confirmed their training, which included looking both at facial features of patrons and also at their general appearance to assess the age of the customers.

While the Licensee testified about steps taken after the incident with Agent #13 including the ID Double Check system and meeting with the Liquor Inspector, I am satisfied that these are not relevant to the test for establishing due diligence because this requires evidence of steps taken prior to the incident. The evidence is, however, corroborative of the evidence of KD about his concern for compliance with the law on checking patrons for ID. I also conclude that on the evidence of the steps that the Licensee took before the contravention that it meets the first test in *R. v. Sault Ste. Marie, supra* because it had sufficient systems in place to prevent the commission of a contravention. It remains to determine whether sufficient steps were taken to ensure the effective operation of these systems.

Cashier AW sold liquor to Agent #13, and did so despite her training and past experience. There was an obvious failure by her in applying the systems used by the Licensee. It is apparent that the store is left in the hands of its clerks during most evenings when management is absent. As the Branch submitted, there is a legitimate concern about whether the staff are adequately supervised when working alone.

On this issue, however, JC reminds staff to ask for ID each time before he goes home. As well, there is a surveillance camera system in place which is occasionally monitored by him and by KD to ensure compliance with the Licensee's ID policies among other things. As well, the clerks were experienced, and had not exhibited any reluctance to ask patrons for ID in the past.

Notwithstanding the contravention, I was favourably impressed with the "culture of vigilance" which this Licensee had developed, prior to the contravention, in order to attain voluntary compliance with respect to the provision of liquor to minors. Those measures began with training where employees were introduced to the clear policy of requiring two pieces of identification from any customer appearing to be under the age of 30. It was followed by staff meetings and constant reminders to check the ID of any

customer that appeared under 30. I conclude that AW made a serious error in judgment despite the training and supervision that she received from the Licensee.

I agree with the Branch that the Licensee might take additional steps to monitor and test compliance by its staff when they work alone, such as using a secret shopper. The test, however, is one of determining if the Licensee took reasonable steps in the application of its policies. I conclude that it did so here.

PENALTY

In light of all of the above measures taken by the Licensee prior to the contravention, I find, on a balance of probabilities, that the Licensee has demonstrated that it exercised due diligence in the manner in which it supervised its clerical staff concerning their obligation to ID customers. On the night in question, a clerical employee of the Licensee sold liquor to a minor despite the training, and the systems that were in place to supervise and train staff. Accordingly, I find that the Licensee has established the defence of due diligence, which is a complete defence to the contravention of Section 33(1)(a) of the Act.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: January 23, 2013

cc: Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Olubode Fagbamiye, Branch Advocate