



DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licensee: Ramblin' Man Enterprises Ltd.
dba Stag's Head Liquor Store
402-1801 Princeton – Kamloops Hwy
Kamloops, BC V2E 2J7

Case: EH12-064

For the Licensee: Peter Milobar

For the Branch: Hugh Trenchard

Enforcement Hearing Adjudicator: R. John Rogers

Date of Hearing: October 2, 2013

Date of Decision: November 22, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The corporate licensee, Ramblin' Man Enterprises Ltd. (the "Licensee"), owns and operates the *Stag's Head Liquor Store* at #402-1801 Princeton - Kamloops Hwy, in Kamloops, B.C. (the "*Stag's Head Liquor Store*") under Licensee Retail Store Licence Number 195262 (the "Licence").

Under the Licence, liquor sales are permitted from Monday to Sunday, inclusive, between the hours of 9:00 a.m. and 11:00 p.m.

Mr. Peter Milobar is President and an owner of the Licensee and represented the Licensee at the hearing.

The Licence is, as are all liquor licences 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 penalties are set out in the Notice of Enforcement Action (the "NOEA") dated June 13, 2012.

The Branch alleges that on March 15, 2012 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 enforcement action as outlined in the NOEA is a monetary penalty of \$7,500 as provided in item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The penalty range for a first contravention of section 33(1)(a) of the Act is a 10-15 day licence suspension and/or a \$7,500-\$10,000 monetary penalty (see item 2, Schedule 4 of the Regulation).

The Licensee questions whether or not the sale as alleged in the NOEA occurred, and, if it did, takes the position that the Licensee's employee did not intentionally sell liquor to a minor.

Pursuant to section 3 of the Regulation, the General Manager of the Branch has delegated to the undersigned the powers, duties and functions imposed upon the General Manager by, and referred to in, section 20 of the Act and section 65-69 of the Regulation for the purpose of this enforcement hearing.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Supplying liquor to minors

33 (1) A person must not

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

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Schedule 4

Enforcement Actions

Minors

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
2	A breach of section 33 of the Act (Selling liquor to minors)	10-15	20-30	30-60	\$7,500- \$10,000

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: Branch's Book of Documents, tabs 1 to 14 inclusive.

Exhibit 2: A sealed envelope with a notation that it is to be opened only upon an order of the Supreme Court of British Columbia or the undersigned adjudicator and containing copies of four photographs of the Branch's minor agent identified below as "Agent #24", together with a copy of a photograph of his British Columbia Driver's License and his Care Card.

Agreement of the Parties Protecting the Identity of the Minor Agent

The Licensee's representative agreed that the identity of Agent #24 was to be kept confidential and that he would maintain this confidentiality outside the confines of this hearing. Redacted copies of the documents contained in Exhibit 2 are included in tab 9 of Exhibit 1.

At the hearing, the Licensee's representative was given an opportunity to view the photographs in Exhibit 2 prior to them being placed in the sealed envelope.

Agent #24 did not appear as a witness at the hearing.

EVIDENCE – BRANCH

The Branch called as witnesses Liquor Inspector A ("Inspector A") and Liquor Inspector B ("Inspector B").

The Minors as Agents Program

Inspectors A and B testified as to the following with respect to the Minors as Agents Program ("MAP").

In June 2010 the Act was amended to permit the Branch to employ minors as agents to test compliance with the Act's prohibition against selling, giving or otherwise supplying liquor to minors. Pursuant to this authority, the Branch established MAP.

Under this program, the Branch hires as agents 17 and 18 year old minors who clearly appear to be under the age of 19 for the purpose of carrying out inspections to determine compliance with the Act with respect to supplying liquor to minors. In the delivery of MAP, no attempt is made to hide the minor's age or to otherwise deceive a licensee in order to make it appear that the agent is older than 19 years of age. MAP includes training for the newly hired MAP agents on the relevant provisions of the Act together with training on how to make and document observations during an inspection and important safety considerations in carrying out their duties. A MAP agent is specifically instructed that if asked for identification during an inspection that the minor agent is to advise the questioner that the minor agent is not carrying any identification and is to be truthful if responding to questions about age.

Commencing in 2011, the General Manager has communicated with all parties licensed under the Act to advise them of MAP and of the fact that MAP inspections are being conducted whereby minors under the supervision of a liquor inspector would be visiting government and private liquor stores and attempting to purchase liquor. In this communication, the General Manager identified the penalties for licensees found to be non-compliant.

Inspectors A and B identified the documents in tabs 10, 11 and 12 of Exhibit 1 as copies of some of the communications from the General Manager to licensees with respect to MAP.

The Guide

Inspector B identified the document in tab 3 of Exhibit 1 as a copy of the Licence. He noted that on its face the Licence states that it is subject to the terms and conditions contained in the Guide. He also identified the document in tab 5 of Exhibit 1 as a copy of the Guide.

Inspector B noted that page 10 of the Guide provides that the Licensee is legally responsible for understanding how the Act, the Regulation and the terms of the Licence affect the operation of the *Stag's Head Liquor Store*. He observed that the Guide on this page goes on to state that if the Licensee does not carry out these legal responsibilities, it could face serious penalties, including the suspension or loss of the Licence. And, he noted, the Licensee is responsible for ensuring that its employees follow British Columbia liquor laws and the terms and conditions of the Licence, even when the Licensee's representative is not on site.

At page 21 of the Guide, Inspector B noted the provisions dealing with minors. He observed that they state that:

- Minors are allowed in a licensee retail store only when accompanied by a parent or guardian
- It is against the law to sell, serve, or supply liquor to a minor and it is expected that the licensee and its staff will put in place effective systems to enforce this prohibition
- If the licensee or a member of its staff allows a minor to purchase liquor, the licensee's privileges could be jeopardized and it could risk prosecution
- When seeking to verify a customer's age, the licensee and its employees must ask for two pieces of identification and if the person cannot produce two pieces of acceptable identification that proves that they are 19 or older, that this customer must be refused service

The Investigation Team

Inspector B identified the document in tab 1 of Exhibit 1 as a copy of the NOEA which he had authored. As well, Inspector B identified the document in tab 6 of Exhibit 1 as a copy of his notes made on the evening of March 15, 2012 on his iPhone, which notes he downloaded to his computer on June 5, 2012.

Inspectors A and B testified that, as detailed in the NOEA, on March 15, 2012 they, together with a third liquor inspector (Inspector "C") and minor agent #24, constituted an investigation team. The task of this investigation team was to assess compliance by licensee retail stores in the Kamloops area regarding the identifying and requesting of identification from a person under the age of 19 who has ordered liquor. Over the two weeks following March 15, 2012, the entire City of Kamloops, including the outlying areas, was canvassed under MAP. Included in this canvass were Government Liquor Stores.

Identification of Agent #24

At the start of their shift on March 15, 2012, Inspector B testified that at the Branch's Kamloops regional office Agent #24 was photographed, along with his driver's licence and secondary piece of identification to confirm his identity and his age. At this time, Agent #24's identification was taken from him and held until the end of the shift. At the end of the shift, Agent#24 was again photographed to confirm that his appearance had not changed and his identification was returned to him.

Inspector B confirmed that the photographs contained in Exhibit 2 were photographs of Agent #24, his driver's licence and Care Card. Inspector A noted that this driver's license indicated that, on March 15, 2012, Agent #24 was 17 years of age.

Inspection of the *Stag's Head Liquor Store*

On March 15, 2012, Inspector B testified that he entered the *Stag's Head Liquor Store* with the time on his iPhone showing 17:44. Upon entering the store, he stated that he saw a male employee of the Licensee standing behind the cash till, one other female employee on the floor, and one older couple who were patrons of the store. He observed that the store was well-lit, had an attractive layout, and that he could see most areas of the store very easily with an unobstructed view of the cash till. Inspector B identified the document at tab 4 of Exhibit 1 as the floor plan for the *Stag's Head Liquor Store* and demonstrated on this document where he was standing in the store following his entry.

Inspector B testified that he observed Agent #24 walking into the store and crossing in front of the cash till to go to the beer cooler section, approximately 50 feet in front of him. Inspector B stated that he then saw Agent #24 select a six pack of beer and walk to the cash till approximately 15 feet away from where Inspector B was standing. He stated that he observed Agent #24 put the selected beer on the sales counter and proceed to have an interaction with the cashier. Inspector B confirmed that he did not see Agent #24 present identification to the Licensee's employee at the cash till nor did he see Agent #24 obtain a receipt. He also confirmed that he did not hear any conversation between Agent #24 and the Licensee's employee.

Inspector B testified that there was no one else in the line at the cash till and so the entire transaction between the Licensee's employee and Agent #24 took about a minute and a half. Inspector B then observed the Licensee's employee place the beer into a plastic bag, and then Agent #24 picked up the bag and left the store.

Inspector B stated that after Agent #24 had left the store that he lingered in the store and was asked by a female sales clerk if she could help him. He stated that he refused her offer of help and that he then left the store at 17:48.

At 17:47 on March 15, 2012, Inspector A testified that he saw Agent #24 enter the *Stag's Head Liquor Store* with the \$20 that he had given him. Subsequently, at 17:52, Inspector A testified he saw Agent #24 came out of the *Stag's Head Liquor Store* with a white plastic bag. It turned out that the bag contained a six pack of Okanagan Springs Pale Ale, a liquor product. Agent #24 gave Inspector A this white plastic bag and the sum \$5.15, which Inspector A testified was the change left over from the purchase of the liquor.

Both Inspectors A and B identified the document at tab 13 of Exhibit 1 as a photograph of a six pack of Okanagan Pale Ale which Inspector B confirmed was the beer he saw the Licensee's employee put in a white plastic bag at the sales registry and which was in the possession of Agent #24 as he left the store. Inspector A confirmed that this was a photograph of the beer that he took from Agent #24 after he left the store. Inspector A noted that one of the tins of beer in the picture at tab 13 of Exhibit 1 was marked with an exhibit sticker attached by him.

Delivery of the Contravention Notice

On March 16, 2012, Inspector A went to the office of the Licensee's representative and advised him that Inspector A believed that a contravention of the Act had occurred the previous evening at the *Stag's Head Liquor Store*. Inspector A then issued to the Licensee's representative contravention notice #009187 (the "Contravention Notice"), a copy of which Inspector A identified at tab 2 of Exhibit 1. Inspector A noted the signature of the Licensee's representative on the Contravention Notice acknowledging receipt of the original copy of this document.

As the author of the NOEA, Inspector B testified that the NOEA was incorrect when it stated that Inspector A had attended the *Stag's Head Liquor Store* and issued the Contravention Notice at the store. In fact, Inspector A had issued the Contravention Notice to the Licensee's representative at the Licensee's representative office on March 16, 2012. Inspector B testified that this discrepancy was an "administrative error".

Inspector B noted that the NOEA confirmed that the contravention alleged in the Contravention Notice was the Licensee's first contravention and that there was no compliance history for the Licensee. He testified that the Branch considers the selling of liquor to a minor to be a serious matter which can affect the safety of the minor. It was for this reason that he recommended a monetary penalty of \$7,500.

Cross-Examination of Inspectors A and B

On cross-examination, Inspector A testified that to his knowledge the purpose of MAP and the amount of the fines levied under the program was not limited to dealing with binge drinking, but was to deal directly with the broader concern about the sale of alcohol to minors and to ensure that licensees and their staff were taking seriously the prohibition against the sale of liquor to minors. He acknowledged that, if following a MAP inspection a licensee had refused to sell liquor to a MAP agent because the MAP agent could not produce identification, it is not Branch policy to let the licensee know that it had successfully passed the inspection.

Inspector A confirmed that the Contravention Notice was the only one that he had issued under MAP during his two and a half years of working with the Branch.

When asked on cross-examination why there was no receipt obtained from *Stag's Head Liquor Store* by Agent #24 for the liquor he purchased, both Inspectors A and B responded that a receipt was not offered by the Licensee's employee. Both inspectors testified that under MAP a minor agent is instructed that if a receipt is offered in connection with the purchase of liquor that the minor agent is to accept the receipt, but if one is not offered the minor agent should not ask for one.

During the course of his cross-examination, Inspector B testified that prior to entering the *Stag's Head Liquor Store*, Agent #24 had gone into approximately three other establishments on the evening of March 15, 2012 as part of the MAP assessments on that evening. He confirmed that, by the time he entered the *Stag's Head Liquor Store*, Agent #24 was quite comfortable with the feel of being in a liquor store.

Inspector B was asked if a person who was over 6 feet tall, was quite comfortable in walking into a liquor store (at what might be considered an after work time period), who proceeded directly to the beer cooler and selected a higher end craft beer (rather than cheap high volume product), wouldn't have reasonably appeared to be someone over the age of 19 to a sales clerk? Inspector B disagreed stating that in his opinion Agent #24 looked as if he was at an age whereby he should be asked for identification.

Inspector B also testified on cross-examination that he believed that Agent #24 followed his training, that he had had no identification with him, and that he had not lied about his age to the sales clerk in connection with the purchase of the beer. Inspector B confirmed that the Branch's policy with respect to MAP is not to trick or deceive anyone and that, to his knowledge; Agent #24 followed this policy in his interaction with the Licensee's sales clerk at the *Stag's Head Liquor Store*.

When asked on cross-examination whether or not Agent #24 was instructed on what type of product to attempt to purchase, Inspector B testified that a MAP agent is given \$20 and then it is up to the minor agent to decide what item he or she selects.

In his cross-examination of the inspectors, the Licensee's representative noted that Inspector B's evidence was that he had entered the *Stag's Head Liquor Store* at 17:44 and left at 17:48, while the Minor Agent Observation Form (tab 7 of Exhibit 1) signed by Inspector A, stated that Agent #24 entered the *Stag's Head Liquor Store* at 17:47 and left the store at 17:52. When asked to explain this discrepancy, Inspector B suggested that it

was most likely caused by the fact that he and Inspector A were using different time pieces which were not coordinated.

Inspector B testified that the NOEA would have been written prior to June 5, 2012 when he moved his notes from his iPhone onto his computer. He stated that he drafted the NOEA, sent the draft to the Branch's office in Victoria for approval, and once this approval had been obtained, issued the final NOEA with a date of June 13, 2012. When questioned on the occurrence of the administrative error in the NOEA, Inspector B claimed that the reason for incorrectly describing in the NOEA how the Contravention Notice had been served was caused by Inspector B misinterpreting Inspector A's notes. As Inspector A was on holiday at the time of the release of the NOEA, Inspector A did not have the opportunity to review the NOEA prior to its issuance.

When asked on cross-examination whether he had been involved in the selection of the minor agents to participate in MAP in the Kamloops area, Inspector B advised that they were selected by Inspectors A and C.

Further on cross-examination, when asked why the Contravention Notice was not issued to the Licensee's staff at the *Stag's Head Liquor Store* immediately after Agent #24 had left the store and Inspector A had taken and confirmed the liquor that had been purchased, Inspector B responded that it was not the policy of the Branch to do so. This matter was an ongoing investigation and, in some instances, it was found that licensees who had allegedly sold liquor to a minor and had been confronted with this allegation had called ahead to other liquor stores in the area to warn that an assessment program under MAP was ongoing. There was a concern that such action might prove to be dangerous to the minor agent involved.

EVIDENCE – LICENSEE

The Licensee called as its witness the Manager of the *Stag's Head Liquor Store* (the "Manager").

Manager

Prior to coming to work for the Licensee, the Manager worked for 10 years for a charitable organization in Kamloops which dealt with young people. His final position at this organization was that of its Executive Director.

The Manager described the Licensee's customer base as one that was more affluent. The Licensee specializes in B.C. wines which are typically more expensive than other wines. The Licensee sells mainly more expensive craft beers. The Licensee purposely does not carry the inexpensive beers which come in big bottles and are more popular with minors or with people who are purchasing liquor on behalf of minors.

The Manager testified that he works at the *Stag's Head Liquor Store* most of the time between Mondays and Fridays. As some of the store's employees start their shift at 3:15 in the afternoon, the Manager interacts with all of the staff of the *Stag's Head Liquor Store* on a daily basis.

After the issuance of the Contravention Notice, the Manager testified that he organized conversations among the Licensee's staff, and along with the usual oral reminders, he posted in the staff book specific reminders about asking for identification from anyone who might be a minor. He noted that although the Licensee does not conduct regular training programs for its staff, during certain time periods such as school graduation, the commencement of hockey and football season, and the shopping rush for the Christmas season, he is issuing ongoing verbal reminders to the Licensee's staff about asking for identification.

The Manager testified that the Licensee's pricing structure is very consistent so that customers coming into the *Stag's Head Liquor Store* can expect standardized approach and this means that there are:

- No club cards
- No discounts offered on beer purchases
- No flyer sales, and
- No store wide sales

This marketing strategy also means that there is a minimal amount of sales of hard alcohol and it is very rare that the Licensee puts products on sale.

In terms of product offerings, the Licensee does not offer:

- Mickey sized 375 ml products on the floor, they are all behind the cash till, and only one size is sold
- Cigarettes, rolling paper or Red Bull which might cater to a younger demographic, or
- Despite repeated requests from a few customers, alcoholic products which are popular with a youthful market, such as Old English beer which comes in a large container and is extremely inexpensive

The Manager testified that this conservative approach to marketing of products has been a hallmark since 1989 of both the Licensee and of its predecessor licensee for which the Manager also worked. During this time period, the Manager confirmed that neither the Licensee nor its predecessor licensee had been accused of selling liquor to minors. The Manager also confirmed that the majority of the Licensee's staff has been working for the Licensee or its predecessor licensee for a long time and that these staff members were a mature work force, well aware of the Licensee's conservative approach to marketing and to its strict policy against serving liquor to minors.

The Manager stated that the Licensee's staff had on occasion refused to sell liquor to a customer when the customer could not produce the required identification. It was the Licensee's policy to encourage such action by its staff. Unfortunately, in the case of the allegation in the Contravention Notice, as there was no receipt produced for the beer purchased, the Manager stated that he was not able to positively identify the staff member who allegedly sold the beer to Agent #24, nor did he know the time at which the transaction took place.

However, based upon the Licensee's payroll records, the Manager stated that it would appear that the staff member in question was a person who has worked for the Licensee for about six years and had been employed elsewhere in the industry before being employed by the Licensee. This employee is, therefore, an experienced employee and should be sufficiently trained to ensure that he asks for identification prior to selling liquor to minors. Unfortunately, when queried about the alleged transaction, the Manager stated that this staff member could not remember the incident.

Cross-examination of the Manager

The Manager testified that the Licensee's policy on requesting identification from customers was to ask for identification from anyone who is attempting to purchase liquor who appears to be under the age of 25. When asked if from the pictures in Exhibit 2 the Manager thought that Agent #24 appeared to be older than 25, the Manager confirmed that he thought that from these pictures Agent #24 appeared to be younger than 25.

The Manager confirmed that he had not brought with him to the hearing any of the written staff policies employed by the Licensee and that he did not keep any records of employee training. However, he noted, that with only five staff members, the majority who had been working for the Licensee for a long time, he was constantly reminding staff of the Licensee's policies on a regular basis.

SUBMISSIONS – BRANCH

The Branch submitted that Agent #24 was a minor who received and paid for liquor. Inspector B saw Agent #24 take the liquor to the counter, take the \$20 bill out of his pocket, give it to the cashier, and receive change for the purchase.

Inspector B saw the sales clerk put the liquor in a white plastic bag and saw Agent #24 take this liquor with him when he exited the store. Outside the store, Agent #24 gave the white plastic bag to Inspector A together with the sum of \$5.15. Inspector A took the liquor from it and marked the liquor for identification. The liquor in the white plastic bag has been identified as a six pack of Okanagan Springs Pale Ale

The Licensee presented no documentary evidence of written staff policies or training manuals or of an ongoing system in place to re-enforce and monitor this training in order to support a claim for due diligence.

SUBMISSIONS – LICENSEE

The Licensee's representative submitted forcefully that the Licensee is an operator which, in terms of pricing, marketing and product selection, discourages the sale of liquor to minors. And the Licensee, to the extent that it is able, encourages its staff to adhere to similar policies.

However, the licensee's representative submitted that how a customer conducts himself in a store very much plays into how an employee treats the customer and whether or not the employee asks the customer for identification. Therefore, it is quite understandable how a customer is served without being asked for identification when that customer is:

- over 6 feet tall
- quite comfortable in a liquor store
- not buying a product which minors typically purchase, and
- leaving with \$5 in change from a \$20 bill rather than spending most of it

The Licensee representative suggested that there is a fair amount of discrepancy in the evidence presented by the Branch in matters such as:

- timelines
- the length of time taken to generate reports, and
- the "administrative error" in the NOEA

Given the amount of the monetary penalty being proposed by the Branch, and its affect upon a small operator with five staff, these discrepancies are important.

The Licensee's representative noted that no one heard the conversation between the Licensee's employee and Agent #24. He also noted that the timelines in the Branch's evidence is not consistent with industry standards. He noted that the industry standard for the elapsed time between walking into a liquor store, making a selection of a liquor product, and paying by way of cash is 45 seconds. He observed that in their evidence, the Inspectors suggest a five to six minute window of time between when Agent #24 entered and exited the *Stag's Head Liquor Store*.

The Licensee's representative submitted that Agent #24 should have asked for a receipt from the Licensee's employee so that the sale of the liquor could have been fully documented and tracked by the Licensee with its internal accounting system. The fact that it is left to a 17 year old to determine as to whether or not to ask for a receipt is, he submitted, wrong.

The Licensee's representative noted that the Licensee and its predecessor licensee have an excellent compliance record. Their entire operating philosophy is to ensure that liquor is not sold to minors. This is reflected in their actions, pricing structure, and conservative marketing approach. The Licensee does not take lightly the allegations in the Contravention Notice. He stated that the Licensee understands and supports the need to prevent underage drinking.

If the purpose of MAP is to bring awareness and voluntary compliance, the Licensee's representative submitted, it has succeeded with *Stag's Head Liquor Store*. He noted that the Licensee has had no issues since the alleged contravention over a year ago. The Licensee does take compliance seriously, the Licensee's representative concluded – this is demonstrated by its excellent compliance record both before and after the alleged sale.

REASONS AND DECISION

The Witnesses and Their Evidence

I found the witnesses who appeared before me credible. Especially, I found the Manager to be a credible party and one who was extremely concerned that the alleged contravention had occurred on his watch and that the Contravention Notice had been issued.

Contravention

To establish liability on the part of the Licensee for the allegations contained in the Contravention Notice, the Branch must demonstrate on a balance of probabilities that the Licensee sold, gave or otherwise supplied liquor to a minor. This requires the Branch to prove on a balance of probabilities that on March 15, 2012, Agent #24 was a minor and that on that date he acquired liquor at the *Stag's Head Liquor Store*.

The evidence before me clearly establishes that Agent #24 was 17 years of age on March 15, 2012 and, therefore, on that date he was a minor as defined by the Act.

Inspector B's uncontested evidence is that, on March 15, 2012, he saw Agent #24 enter the *Stag's Head Liquor Store*, walk to the beer cooler, take a six pack of Okanagan Springs Pale Ale, and bring it to the cash till. Inspector B testified that he saw the Licensee's employee deposit this six pack of Okanagan Springs Pale Ale in a white plastic bag, give it to Agent #24, and Agent #24 depart the store carrying the bag.

Similarly, the uncontested evidence of Inspector A is that he saw Agent #24 depart the *Stag's Head Liquor Store* with a white plastic bag containing the six pack of Okanagan Springs Pale Ale. Agent #24 gave the white plastic bag to Inspector A, who then took out the beer and marked it with an exhibit stamp and photographed the six pack of Okanagan Springs Pale Ale.

The Licensee submitted that the Branch's evidence contained the following deficiencies:

- There was no evidence of a sales receipt to confirm that Agent #24 had in fact purchased the liquor as alleged by the Branch
- There was a discrepancy in the times reported by Inspectors A and B as to when Inspector B and Agent #24 entered and departed the *Stag's Head Liquor Store*
- Despite the discrepancy in the times reported by Inspectors A and B, a lapsed time of over five minutes to enter a store, select a product, pay for it in cash, and then to leave the store, is much too long a time and affects the credibility of the Branch's witnesses
- Inspector B did not hear the conversation between the Licensee's sales clerk and Agent #24 when Agent #24 acquired the liquor, and
- The NOEA was incorrect in that it contained what Inspector B defined as an "administrative error"

The Licensee's submissions are valid and from the evidence before me correct. However, they are not fatal for the Branch to be in a position to establish its case. The evidence before me clearly demonstrates that on March 15, 2012, Agent #24 went into the *Stag's Head Liquor Store* with a \$20 bill. Once in the store, he went to the beer cooler, selected six pack of Okanagan Springs Pale Ale, and took this liquor to the cash till. At the cash till, Agent #24 gave the \$20 bill to the Licensee's employee working at the cash till, and received back the sum of \$5.15 in change. The Licensee's employee then put the six pack of Okanagan Springs Pale Ale in a white plastic bag, gave the bag to Agent #24, and then Agent #24 left the liquor store with the white plastic bag.

Although the existence of a sales receipt and a more accurate definition of the length of time required for this transaction to have occurred would certainly have been beneficial, I find that on the evidence before me the Branch has demonstrated sufficient elements of a sale to prove on a balance of probabilities that the Licensee sold liquor to Agent #24 on March 15, 2012 as alleged by the Branch in the NOEA.

The Licensee further submitted that, given Agent #24's physical appearance, the fact that he was quite comfortable in a liquor store, that he was not buying a product which minors typically purchase, and that he was someone who left the store with \$5 in change from a \$20 bill rather than spending most of it, it was not unreasonable for the Licensee's employee to have mistaken Agent #24 for being over the age of 19 and not to have asked him for identification.

Even though the Manager candidly admitted that the Licensee's policy was to have the Licensee's employees ask anyone who they considered to be under the age of 25 for identification and that Agent #24 from his picture did not look to be older than 25, unfortunately the Licensee's argument as to Agent #24's physical appearance and mannerism while in the store do not affect the Branch's case. Section 33 (1)(a) of the Act is what is called a "strict liability" provision. This means that to establish its case, the Branch need only demonstrate the fact that liquor was sold, given or otherwise supplied to a minor. The fact that the person performing this act mistakenly thought that the minor was over the age of 19 is not a defence to the Branch's allegations.

Therefore, I find that on a balance of probabilities the Branch has proven the contravention alleged in the Contravention Notice to have occurred.

Due Diligence

Even though I have found that the Branch has proven the contravention alleged in the Contravention Notice, the Licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. To successfully establish such a due diligence defence, the Licensee must not only demonstrate on the balance of probabilities that it has established procedures to identify and deal with ensuring that liquor is not sold to minors, it must also demonstrate that those procedures are consistently acted upon and that any problems arising are dealt with.

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when

the sale is made), then the questions to be considered and answered are whether the licensee had:

- a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. It is to be noted that the onus is on the Licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing such adequate training and other systems and ensuring effective application of them.

Directing Mind

On the evidence before me, it is clear that the Licensee's employee who provided the liquor to Agent #24 is not the directing mind of the Licensee. For onsite matters, the directing mind is clearly the Manager who was not present when the contravention described in the Contravention Notice occurred. Therefore, I find that the directing mind of the Licensee was not involved in the sale of liquor to Agent #24 on March 15, 2012 and will now consider the second part of the test.

Implementation of Systems and Steps to Prevent the Contravention

The evidence before me is that the Licensee runs a small business with five employees plus the Manager. The Manager gave very credible evidence that he is a "hands on" manager and has excellent communication with his staff. He testified that part of this communication is an expression of an ongoing concern to ensure that liquor is not sold to minors, especially during times such as around school graduation. In addition, the Manager testified that the Licensee's entire approach to its business is to cater to a higher end, more affluent clientele, both in its product selection and in its product pricing.

Therefore, it is the Licensee's position that even though it did not present evidence of a training program or ongoing systems to ensure that liquor is not sold to minors, its entire approach with its staff and with the way it runs its business demonstrates its concern against selling liquor to minors. Moreover, the Licensee submits, the fact that the Contravention Notice is the first infraction it has received over many years of operations, and the fact that there has not been another contravention in the year and a half since the Contravention Notice was issued suggests very strongly that this approach taken by the Licensee is effective.

It was quite clear in the evidence and submissions made by the Licensee that this entire matter was quite upsetting to the Licensee and an unfortunate mistake in its otherwise successful operating history. However, I do not find that the Licensee has successfully satisfied the onus on it to demonstrate to me that, at the time of the sale of liquor to Agent #24 on March 15, 2012, it in fact had training programs in existence and that these training programs were effective to ensure that liquor was not to be sold to minors. There is no evidence before me of signage, manuals, documented policies, records of meetings, log books or other indicia of an effective training program and ongoing maintenance system to ensure compliance with the Act, Regulation and terms and conditions of the Licence.

I therefore find that the Licensee has not demonstrated a due diligence defence.

Consequently, I find that on March 15, 2012, the Licensee contravened section 33(1) (a) of the Act and the terms and conditions of the Licence by selling, giving or otherwise supplying liquor to a minor.

PENALTY

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the Licence, I may do one or more of the following:

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

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

Licenses are obliged to comply with the legislation and the terms and conditions of their licences. The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve this compliance. In addition, enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for the Licensee at the *Stag's Head Liquor Store* within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 2 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10-15 day licence suspension and/or a \$7,500-\$10,000 penalty.

Due to a concern that minors are being permitted to purchase liquor in licensed establishments, the Branch has instituted and is carrying out MAP. Concurrently with the introduction of and the operation of MAP, the Branch has taken measures to advise licensees of the seriousness of serving liquor to minors and to ensure that licensees are fully aware of their responsibilities and of the consequences if they do not meet these responsibilities. Despite these initiatives of the Branch and despite the Licensee's expressed concern to ensure that it meets its responsibilities and does not supply liquor to minors, we have this situation where liquor has been supplied to a minor without the minor being asked for identification.

It is clear that supplying liquor to minors is a serious contravention giving rise to significant public safety concerns. Early learned behaviour with respect to abuse of alcohol and less effective metabolism of alcohol by minors has proven to be a factor in crimes committed by minors, including assault and driving offences.

The Branch has recommended a minimum penalty of \$7,500. I find that this penalty is appropriate given the Licensee's excellent compliance history and professed concern with ensuring future compliance with the Act, the Regulation and the terms and conditions of its Licence.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the General Manager of the Branch on or before January 3, 2014.

Signs satisfactory to the General Manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Branch inspector or a police officer.

Original signed by

R. John Rogers
Enforcement Hearing Adjudicator

Date: November 22, 2013

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Hugh Trenchard, Branch Advocate