



**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: 0839110 B.C. Ltd.
dba Biercraft Bistro
3305 Cambie Street
Vancouver, BC

Case: EH14-068

For the Licensee: Dean Mallel

For the Branch: Cristal Scheer

General Manager's Delegate: Dianne Flood

Date of Hearing: January 20-22, 2015

Date of Decision: February 16, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

0839110 BC Ltd., dba Biercraft Bistro (the “licensee”) owns and operates Biercraft Bistro at 3305 Cambie Street, Vancouver, BC. The licensee holds Food Primary Licence number 146335 (the “licence”).

According to the terms of its licence, the licensee may sell liquor from 9 a.m. to 1 a.m., Sunday through Thursday, and from 9 a.m. to 2 a.m. on Friday and Saturday.

Mr. Dean Mallel is the principal and owner of the corporate licensee and appeared as the licensee’s representative at the hearing.

The licensee is alleged to have contravened the Liquor Control and Licensing Act (the “Act”) on June 14, 2014, by selling liquor to a minor who was acting as an agent of the branch under the Minors as Agents Program (“MAP”). The licensee admits that its employee sold liquor to the minor agent. However, the licensee disputes the finding of a contravention, on the basis that its policies, practices, procedures and training establish a defence of due diligence.

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 dated June 27, 2014 (the “NOEA”) (Exhibit 1, tab 1).

The Branch alleges that on June 14, 2014, the licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty (item 2, Schedule 4, Liquor Control and Licensing Regulation). The branch proposes a monetary penalty of \$7,500.

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.

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 13

Exhibit 2: Copy of photograph and identification of the minor agent

Exhibit 3: Licensee's Documents, A to P

WITNESSES

The branch called as witnesses the two liquor inspectors who attended at Biercraft Bistro with the minor agent on June 14, 2014.

The licensee called nine witnesses: Mr. Mallel, two liquor industry consultants, the general manager, the controller, the floor manager on duty the day of the contravention, the head bartender, the bartender who sold the liquor to the minor, and another bartender.

PROTECTING THE IDENTITY OF THE MINOR AGENT

The minor agent was not called as a witness. At the hearing, the Branch provided the licensee with an opportunity to view the photograph of the minor agent and identification with birth date and also permitted the licensee's witnesses the opportunity to view the minor agent's photograph.

To protect the identity of the minor agent, and with the agreement of the parties, at the conclusion of the hearing the copy of the minor agent's photograph and identification was placed in an envelope, marked as Exhibit 2, with a notation that it is not to be unsealed or disclosed without a court order.

EVIDENCE—BRANCH

The undisputed evidence is that on June 14, 2014, at about 5:57 p.m., two liquor inspectors attended at Biercraft Bistro, together with a minor agent employed by the branch under the Minors as Agents Program (MAP). The inspectors and the minor agent were conducting random tests for compliance with the prohibition against selling liquor to minors. The Branch implemented the MAP in 2011, when the Act was amended to allow the Branch to employ minors as agents for this purpose.

According to the minor's identification, Exhibit 2, and the testimony of the liquor inspectors, the minor agent was 16 years old on that date.

The licensee's Food Primary licence permits the sale of liquor without the purchase of food and minors are allowed to attend in the restaurant without a parent or guardian, however, to remain in the lounge, a minor must be accompanied by an adult. Minors are not permitted to purchase liquor under any circumstances.

On June 14, 2014, the minor agent entered Biercraft Bistro and walked to the bar in the lounge, where she took a seat. The two inspectors then entered the lounge about 20 to 30 seconds later and walked past her to the other end of the bar, where they had a clear and unobstructed view of the minor agent.

Bartender 2 approached the minor agent. The details of their conversation are set out in the minor agent's observation form and statement (Exhibit 1, tab 5). The bartender asked what he could get for the minor agent. She said she was waiting for a friend but would like a Smirnoff Ice while she waited. The bartender told her they did not sell coolers. She then ordered a Caesar. The bartender asked if she would like the Caesar spicy. She said a little bit of spice would be ok. He made the drink and placed it in front of her. At no time during the exchange, did the bartender request identification from the minor agent. No one else requested identification from her, or asked her how old she was.

The minor agent left the bar. The inspectors seized the Caesar, requested to meet with the manager, met with the Manager on Duty and advised him of the contravention, and requested a receipt for the Caesar. They left at about 6:15 p.m. The Contravention Notice, Exhibit 1 tab 2, was issued. The NOEA (Exhibit, 1 tab 1) was sent to the licensee.

The licensee accepted all of that evidence as being accurate.

EVIDENCE—LICENSEE

As noted above, the licensee called nine witnesses to present evidence in support of its claim to a defence of due diligence:

- Mr. Mallel
- Two liquor industry consultants (“Consultant 1” and “Consultant 2”)
- The general manager of the licensee (“GM”)
- The controller of the licensee (“Controller”)
- The manager on duty the day of the contravention (“Duty Manager”)
- The head bartender (“Head Bartender”)
- The bartender who sold the liquor to the minor (“Bartender 2”)
- Another bartender (“Bartender 3”)

Mr. Mallel

Mr. Mallel is the president of the licensee. He testified that he has been a restaurant owner in Vancouver for about 20 years. He currently holds four Food Primary licences and one Manufacturing licence. He has owned the licensed premises for about six years.

He said that the licensee takes its responsibilities under its license and its compliance with all government regulations seriously. He said it strives to create a safe environment for staff and customers. He was personally mortified that the contravention had occurred. Mr. Mallel submitted Exhibits 3A to 3P and reviewed their contents.

Mr. Mallel's evidence was that although he was usually present, he was not at Biercraft Bistro that night due to a family commitment. A Duty Manager was present – ordinarily it would be both a duty manager and himself. He also testified that he sets the licensee's policies and that Bartender 2 had no role in doing that.

Policies and Procedures Manual

Mr. Mallel testified that every employee gets a copy of the licensee's Policies and Procedures Manual (the "Manual") (Exhibit 3A) on their first day of work. He said the goal of the Manual is to outline the licensee's goals and to ensure employees are aware of them and to ensure their compliance with them.

The Manual is 11 pages, and sets out eight major headings. The policies about liquor service are set out under the heading "House Rules and Disciplinary Action", in a separate section under that heading. Mr. Mallel said a separate section was used because of the seriousness of the issue. Point number three of that section states that the sale of alcohol to minors is prohibited by law and the legal drinking age in BC is 19 years. It also says that employees who sell alcohol to minors are breaking the law and put the liquor license in jeopardy. It states employees have the authority to check a guest's identification if the employee suspects the guest is a minor. The policy also says an employee who sells alcohol to a minor will be terminated without exception.

Mr. Mallel drew attention to the licensee's policies, set out in the Manual, that prohibit employees from consuming liquor on the premises after their shift and limit employees to two drinks on their days off. He says this is stricter than the policies in most other licensed establishments and shows how serious the licensee is about "respecting the environment". The Manual gives employees notice that surveillance cameras are in place to ensure compliance with the licensee's policies.

All employees are required to sign off on the Manual, stating they have read and fully understand all elements of it.

Mr. Mallel explained that the Manual refers to “Stella’s”, and not Biercraft Bistro, because Stella’s was an earlier name for the licensee, which had to be changed due to a trademark issue. He also testified that some of the other documents submitted by the licensee refer to “Incendios” which is a corporate name. He said references to Incendios in those other documents are intended to include Biercraft Bistro. There are three restaurants under the Incendios umbrella: the Commercial Drive premises, Biercraft Bistro, and a new UBC location.

Mr. Mallel confirmed that the Manual did not set out any reasons for the policy not to serve minors. He said he thought that the sale to minors being against the law was sufficient reason for the policy.

Mr. Mallel’s evidence was that he drafted the policies and procedures in the Manual. He said that when drafting the policies and procedures, he was familiar with the Serving It Right (“SIR”) program and he also consulted a liquor consultant. Mr. Mallel believed the Guide (Exhibit 1, tab 9) simply offered suggestions for policies and did not believe those suggestions or the SIR manual to be prescriptive.

Mr. Mallel testified that all the servers and bartenders have their Serving It Right (SIR) certificates and are expected to follow the tenants of that policy, as is set out in the Manual. He submitted a list of all the employees’ SIR certificate numbers (Exhibit 3N).

Front of House Contract

Mr. Mallel testified that when the licensee got notice of the MAP, it took that opportunity to create its Front of House (“FOH”) Basics Contract (Exhibit 3B) in order to review the basics and bring the MAP to the attention of staff. The FOH Basic Contract is a one-page document that sets out nine points. Point number three is an undertaking to request identification from anyone who appears to be under the age of 30 years and to ensure all rules and laws regarding the service of alcohol are followed and enforced. The employee also undertakes to practise SIR. Mr. Mallel testified that all employees are required to sign the FOH Basic Contract, and in doing so they acknowledge that these were the minimum requirements to maintain employment with the licensee.

Training Program

Mr. Mallel submitted a checklist for the Front of House Training Program -Server (the "Checklist") (Exhibit 3E). The Checklist sets out 61 competencies that are expected to be completed by new employees, within one week. Mr. Mallel said the Checklist is to be signed off by the new employee and the manager on duty as the new employee completes the various competencies listed on it. He pointed to item number 10, that the employee had received the "New Hire package" and an employee handbook and job description. Mr. Mallel said Exhibits 3A and 3B were the "New Hire package" and the employee handbook. He acknowledged that the Checklist did not include any mention of sales to minors, properly checking for identification, or asking for two pieces of identification.

According to Mr. Mallel's evidence, the in-house training consists of four training shifts. The Manual (Exhibit 3A) and FOH Basic Contract (Exhibit 3B) are gone over and signed off by the employee. Senior staff or a manager on duty acts as a mentor. They will go through the Checklist (Exhibit 3E) with the new employee and sign off on whether the new employee met the required competencies. The new hire is then assigned a small section and their compliance with procedures is viewed. They are then left on their own, subject to oversight by GM. There is a 90 day probation period.

Mr. Mallel stated that the licensee typically only hires serving staff with prior experience in serving liquor. He said that applicants' references are checked for any prior issues. On occasion, he said, the licensee will promote a long serving hostess or bus-person, perhaps after 18 to 24 months of service or when they come of age, if they show they deserve it.

Mr. Mallel stated training is expensive and so the licensee aims to hire and retain responsible staff. He testified that the training of staff about the prevention of sales to minors is achieved through their SIR certification, which he said details the service of alcohol to minors, the licensee's in-house training when hired, and by staff meetings that detail the licensee's policies and procedures.

The licensee also provides specialized training to its employees about the proper service of beer. That course costs \$59.00 US per person. This is a sales program, and does not address the prevention of sales to minors.

Mr. Mallel said he uses the video cameras to monitor who is in the restaurant and what staff are doing. He views the camera monitors in his office and, on occasion, off-site.

Staff Reminders

Mr. Mallel testified about other measures he said were taken in order to avoid the sale of liquor to minors. He said that the Point of Sale system (POS) included flash messages to remind staff to check identification. The messages disappear from the system, but three examples were able to be retrieved and were produced (Exhibit 3G).

He also testified that staff newsletters and emails were sent out to remind staff of the importance to request identification. He thought about eight emails were sent a year. The emails advised staff of various aspects of the business, including the need for identification. Examples of these newsletter and email messages were submitted (Exhibit 3H).

The first example, an undated newsletter, was just over two pages. The second to the last item referred to the need to ask for identification from anyone who appeared younger than 30 years of age. It also said: "They are still out and about on this. If we get caught, we lose our license for 30 days. If that happens, we are just going to close for that month. This means that no one gets paid. Just make sure you are doing it. To help reinforce this policy we will be sending in our own underage secret shoppers. If you serve any of them booze you will be let go. I can't stress how important it is to stay on top of this. Not only will it cost us 30 days, it puts all future licenses in danger."

The second example, again an undated newsletter, is one and a half pages, closing with a list of "Reminders and Focus". Number five of six repeats the same message as set out above from the first example.

Mr. Mallel produced photographs of signs about the need to request identification that he said were posted in the premises (Exhibit 3M). The first photo is a one page internal memorandum about the need to check identification. It sets out the reasons to check identification, including the need to avoid a personal fine and a fine and/or closure of the restaurant, and to keep their job. He said this sign was posted in at least three places: the staff changing room, the pillar between the non-patron area, and the patron area and in the staff washroom (and on occasion other places as well). He said other signs were "littered throughout" the restaurant, some in patron areas, with others in non-patron areas. He testified that various government signs were posted, including on the entry door.

Management Communications

Mr. Mallel outlined the licensee's management structure: Mr. Mallel as president, then the GM and then the managers on duty. He said every shift has a manager on duty. The GM may or may not be present in the restaurant. Mr. Mallel said he is also usually present in the restaurant.

Mr. Mallel testified that management meetings are held at least quarterly but, he said, are generally held more frequently. The minutes of the meetings of November 12, 2013 and February 18, 2014 were presented (Exhibit 3I). Under the topic of Front of House Focus, the November 12 minutes refer to the need to "ID everyone" and the February 18 minutes refer to the need to keep using pre-shift meetings to reinforce asking for identification on anyway (sic) that appears under 30.

Mr. Mallel said manager on duty meetings are held monthly, to review financial and other information. He presented the minutes from the meetings held September 5, 2013, October 31, 2013, December 5, 2013, and April 3, 2014 (Exhibit 3J). Mr. Mallel identified references made in these minutes to the direction to constantly remind staff to request identification and to do this on a regular basis. The minutes also referred to the need to be diligent about checking identification for underage drinkers, including patrons seated with adults if ordering alcohol. Mr. Mallel said these messages, to watch out for the sale of liquor to minors, have been a central theme in all meetings.

Mr. Mallel presented the agendas of bi-monthly general managers meetings for April 17, 2014 and June 26, 2014 (Exhibit 3K). Mr. Mallel said these stress the need for vigilance in requesting identification. Under item 13 of the April 17 agenda is the need to watch and reinforce the policy regarding underage service. Under item 7 of the June 26 agenda is a statement that the liquor and health inspectors were "on the prowl". Hosts were directed to tell guests that they would be asked for identification. Silent shoppers were stated to be visiting weekly and then monthly after that.

Mr. Mallel said the licensee keeps a daily blog, designed to communicate from one shift to the next. The blog is only available to managers. Copies of excerpts from the blog were submitted (Exhibit 3L). He says the blog is used to remind staff to be diligent about service and also to record all aspects of the sale of alcohol. The excerpts provided each set out instances where reminders were given about the need to request identification and/or where service had been refused where identification could not be produced and what was done in relation to that. Mr. Mallel described an incident where a parent, a woman from France, wanted to give her child alcohol. She was told she could not do that and if she did, she would have to be removed from the premises. Mr. Mallel says this is just a small sampling of the number of persons who are refused service because they can't produce identification. I note on page 8, under the date May 26, is a note "we need to get on [bartender 2] for ID'ing people, he needs reminding OFTEN."

Bartender 2

Mr. Mallel said Bartender 2 (the bartender who sold the liquor to the minor) signed off on the Manual and the FOH Basic Contact and he submitted signed copies of those documents as evidence of that (Exhibits 3C and 3D, respectively). Mr. Mallel said he was sure that a Checklist (Exhibit 3E) had been completed for Bartender 2, but he could not find a copy.

With respect to the Bartender 2, Mr. Mallel testified that on or about May 21, 2013, the Head Bartender notified him that Bartender 2 failed to follow proper procedures to check for identification. As a result, Bartender 2 was brought into a formal meeting with Mr. Mallel and given what he described as a stern disciplinary warning.

At that meeting, Bartender 2 was presented with a notice (Exhibit 3F). The notice gave a warning to Bartender 2. The reason for the warning was stated to be for non-compliance with the policy to request identification from any person who appears to be under the age of 25. It also set out the corrective measures to be taken by the bartender. He was to ask for identification from any guest who appeared to be under 25 years of age and to refuse service to anyone without identification.

The notice (Exhibit 3F) also states that if Bartender 2 failed to request proper identification, the consequences would be greater than a \$7,500 fine. The notice states certain consequences for the licensee in terms of fines and closure. The notice also says the consequences of the bartender's failure to comply would be his suspension or termination. Bartender 2 signed the notice on May 27, 2013.

Mr. Mallel agreed that the statement of consequences for the licensee in the notice was inaccurate, but he testified that at the time the document was prepared, he believed those consequences to be true. He said that by stating the consequences he wanted to emphasize for this employee and for others how serious the failure to request identification was to the licensee.

Mr. Mallel said that in addition to the warning to Bartender 2, the Head Bartender was asked to monitor Bartender 2's compliance. He also testified that the GM and the managers on duty were also told of the critical nature that there be no infraction. He confirmed that Bartender 2 was not required to take any re-training or to re-do his SIR course, nor was he asked to do any research or other work relating to the sale of liquor to minors as a consequence of his failure to follow the licensee's policies.

Mr. Mallel testified that despite the policy in the Manual and the written notice (Exhibit 3F) when Bartender 2 sold the liquor to the minor agent in June, 2014, Bartender 2 was not terminated. Mr. Mallel said he considered Bartender 2 to be a good, long-term employee. Mr. Mallel testified that he believed in giving his employees chances. He said Bartender 2 had started as a bus-person and worked his way up to bartender. Mr. Mallel believed Bartender 2's conduct could be corrected. He believed that the bartender would never again fail to request identification.

Mr. Mallel produced a copy of a statement signed by Bartender 2 that sets out the facts of the June 2014 contravention (Exhibit 3O). It states that in serving the minor agent, Bartender 2 was in direct violation of the rules of the workplace. The statement also refers to the oral and written instructions given to Bartender 2 to ask for identification from anyone under the age of 30, the documents he (Bartender 2) had signed related to compliance with this requirement, the numerous reminders to do that and described the types of those reminders.

Compliance History—Other Licences

Mr. Mallel also testified about a contravention at the Commercial Drive premises (which are operated under a different licence) where a bartender at that location sold liquor to a minor in or about May 2013. Mr. Mallel said that in that situation the bartender did not take responsibility for what she had done and he believed she would not learn from what happened, so he did not trust her and she was terminated. He believed that the difference in the outcome in this situation, that Bartender 2 was not terminated, was explained to all the staff.

Mr. Mallel stated that the licensee agreed to a fine in the case of the Commercial Drive contravention. He mistakenly believed that a second offence at either that location or at the Biercraft Bistro Cambie location would constitute a second contravention for the licensee and would result in the potential for more severe penalties.

Checking for Identification

Mr. Mallel agreed that the Manual and the FOH Basic Contract did not set out the need to request two pieces of identification when checking for the age of a customer. He said the licensee did not provide any training or direction on what to look for in conducting a request for identification because he believed that all members of the staff would know what proper identification was, which he described as two pieces, one of which had to be government-issued, with a picture and date of birth. No staff member had ever asked him what was acceptable as identification. He said they often get fake identification but gave no other testimony on this point. He also said that to his knowledge, the Guide (Exhibit 1, tab 9) was not shown to staff during or after training.

Mr. Mallel also agreed that the policies in the Manual and FOH Basic Contract do not address the issue of “passing off”, where a group of youths, some with identification, may share their drinks with others in their group. He said that he relies on the good judgement of his staff and management and that he is, himself, on duty all the time.

Mr. Mallel acknowledged that, in retrospect, the licensee could do better. He said for example the hostess is now telling people that they will have to have identification and to have it ready to be checked. He said this avoids problems where the customers have waited for a table and don’t have identification, and also speeds things for the servers because the customers will have their identification out, ready to be looked at.

Mr. Mallel agreed there were discrepancies in the messaging of the policy about the age for which to check identification, with references to both “under 25” or “under 30”, but he said the policy – to check for identification – was irrefutable. He said that despite the best efforts the licensee took, Bartender 2 was simply human and as a fallible human being, made a mistake.

Mr. Mallel did not make the Guide (Exhibit 1, tab 9) available to all employees but he said it was available to the GM and to the managers on duty. He said it is readily available in his office and in the GM’s office.

Consultant 1

Consultant 1 was a liquor inspector for four years. Since 2007 he has been a private consultant to the hospitality industry.

Consultant 1 testified that the licensee has been one of his clients since about 2009/2010. He said the work he had undertaken for the licensee was primarily related to licensing applications, name changes, the new manufacturing licence, and the new premises at UBC. He testified that with respect to enforcement issues, he met with the licensee to discuss due diligence with respect to Commercial Drive in 2013, and in 2014 about this enforcement action.

Consultant 1 confirmed the following:

- Licensee's serving staff had their SIR certificates.
- Training was provided to staff on alcohol service and service to minors.
- The Manual (Exhibit 3A) addressed service to minors and staff were required to sign off on the policies.
- The FOH Basic Contract (Exhibit 3B) reminded staff to check for identification and staff signed off on this.
- The managers on duty were directed to remind staff to check for identification.
- Staff meetings were held to discuss all aspects of alcohol service.
- The licensee keeps a blog on refusing service and other service related issues.

Consultant 1 testified that he has about 50 clients, with about 20 active projects. He gave his opinion on where the licensee "fit" on due diligence, compared to the industry standards. In his opinion, the licensee exceeds the industry standards. He formed that opinion without a checklist of standards, and based it on hearing decisions and his opinion of best practises. He was of the opinion the licensee was pro-active and not re-active, as many licensees are, consulting him after an event. He said that there was not a lot he could add to what the licensee had done.

Consultant 1 testified that he does provide training to clients about liquor service, including the types of acceptable identification and the kinds of questions to ask to verify identification. In his training sessions, he discusses scenarios, uses examples, and conducts question and answer sessions. He would use these techniques, even if the staff being trained had their SIR certification.

He provides templates for policies, staff sign-offs, minutes for staff meetings and incident logs. Consultant 1's evidence was that he has not provided any training to the licensee's staff, nor was he involved in creating any documents for the licensee.

In his review of the licensee's training procedures, he said he would ask if the licensee covered off identification, but did not ask point-by-point what was done. He did not sit in on any training sessions. He did not go through all the staff meeting minutes and examine what was covered. He did review the ones provided to him to make sure the issues were touched on, in response to the licensee's request.

In terms of what could be added, he said he would sit and talk to staff and go over the Manual, but he was "not looking to create a job for himself". He did not review all the decisions of the General Manager to see what might be missing from the licensee's practises. The things he did mention are reminders on pay cheque stubs and secret shoppers.

Consultant 2

Consultant 2 testified that he has been active in the hospitality industry since 1998. He has had food primary and liquor primary licences. He has a university degree in the food industry. He has been a hospitality industry consultant since 2000 and consults across North America and the Caribbean.

Consultant 2 also confirmed the following:

- The licensee has video surveillance in place.
- The licensee's staff has its SIR certification.
- There is a training program that includes alcohol service and service to minors.
- Staff are required to sign off on the policies and procedures.
- There is a FOH Basic Contract and staff sign off on that.
- The POS system is used to remind staff to check identification.
- Signage reminds staff to check identification.
- Newsletters and emails remind staff to check identification.
- Regular meetings are held with managers on duty and staff.

Consultant 2 testified that in 2013/14, at the request of the licensee, he sent in “secret shoppers” who were over 19 years of age but under 25 years and who were young looking, to see if staff would ask for identification. He said these persons were not served by the licensee’s staff without being asked for identification.

Consultant 2 testified that he had no documentation with respect to these secret shopper tests because he and Mr. Mallel had a long history of working together and they didn’t need that kind of record between them. He also testified that the young looking customers did not complete any forms and simply reported orally to Consultant 2. He said the secret shoppers always reported getting asked for identification before service of liquor.

Consultant 2 testified that the secret shopper tests had been conducted at the Commercial Drive restaurant, not the Biercraft Bistro on Cambie. He testified that three tests were conducted. The same person, a male about 20 or 21 years old was the “secret shopper” in all three tests. Consultant 2 said he did not conduct any tests at the Cambie location because he did not understand there to be a problem there.

Consultant 2 helped Mr. Mallel develop the policies and procedures set out in the Manual (Exhibit 3A). He sat in on meetings on numerous occasions. He had personally seen the managers on duty remind staff to check for identification.

Controller

The Controller testified that he took the minutes at staff meetings and had done so for at least four years. He confirmed the contents of the minutes (Exhibits 3J and 3K) as being accurate. He also confirmed that checking identification to prevent the sale of alcohol to minors was on the agenda and was a central theme to the meetings throughout the four years.

The Controller described Mr. Mallel’s view on the sale of liquor to minors as “no nonsense” and almost aggressive in his delivery of that message. It was a regular agenda item and addressed repeatedly.

The Controller has no direct contact with customers but has seen servers check for identification and heard managers tell the servers to check for identification.

Head Bartender

The Head Bartender has 11 years' experience in the hospitality industry, four of which were with the licensee. She testified that the licensee required staff to have their SIR training and also provided specialized training on the proper service of beer.

She confirmed the Manual (Exhibit 3A) was used for training and that employees were required to sign off on it. She said that after the contravention at the Commercial Drive location, the licensee's efforts with respect to the need to ask for identification became more stringent. She said the licensee went over the policy again with staff.

She confirmed that staff signed off on the FOH Basic Contract (Exhibit 3B). She testified that posters were used and four or five emails were sent to staff, reminding them not to serve minors. She testified that employees were always verbally reminded to check for ID, and written reminders and verbal warnings increased after the Commercial Drive contravention.

The Head Bartender confirmed that the identification requirements were for two pieces of identification: one government issued with a picture and date of birth, the other had to have a signature. She said that when the new government identification with the hologram came out (about one or two years ago) the staff got notice, but she could not remember how that notice was given.

The Head Bartender described the licensee's posters, reminding staff to check for identification, as "vaguely menacing". She said they were posted in the staff room, the staff bathroom and the servery. She also confirmed that government issued posters stating that that minors were not allowed were posted at the bar and in the restaurant, by the fireplace. She could not recall if there was a poster on the door.

She confirmed that she did not have any ambiguity about the licensee's policy on checking for identification and that the management "was to the point about it".

In her opinion, past employers had not done as much to prevent service to minors. It was not drilled in as much, no verbal reminders were given, no newsletters, no posters on the premises. For example, she said, another employer only suspended an employee for one month when they had served liquor to a minor.

She said she and other managers leave reminders to staff in the POS system to check identification. The Head Bartender testified that staff meetings are held seasonally. She said that changes were addressed, and at the end of every meeting there was always a mention to ID under 30. Service to minors was also discussed at the manager on duty meetings.

She testified that staff were told when the MAP was started and warned by the managers to look out for well-dressed minors. She had heard the minors would dress up and order scotch. She said a poster was posted about the MAP but it was no longer up. She thought the poster was a government issued information sheet. She had not seen the Liquor Line newsletter (Exhibit 1, tab 12) nor had she seen the Guide (Exhibit 1, tab 9).

The Head Bartender said, in June 2014, she was working with Bartender 2, at the bar in the lounge. She said it was not busy in the lounge. She remembered she and Bartender 2 had giggled because the minor agent had ordered Smirnoff Ice, which as a beer establishment, they don't sell. She was engaged with other customers so she did not notice the minor agent. After the minor agent left, one of the inspectors told her that a minor had just been served, so the Head Bartender got the manager on duty. She and the other staff were horrified; they were all worried they would lose their jobs.

The Head Bartender testified she had worked with Bartender 2 for several years. She said Bartender 2 was not as diligent as he should have been about checking for identification. She said they would bartend all night together and she would have to remind him to ask customers for identification. She testified that in 2013 she told Mr. Mallel about it. After Bartender 2 was written up, he became more diligent but, she testified, he was still "not good". She said he was still lax about requesting identification, especially when busy. She mentioned the lax behaviour to the GM. She also testified that Bartender 2 did not ask for identification because he was "blinded by

pretty girls” and “blinded by good-looking people”. She understood that on being written up, Bartender 2 may have “lost a few shifts”. After the contravention, she thought he would be fired but he was suspended without pay. She thought that suspension was for a few weeks.

The Head Bartender testified that the managers on duty reminded the bartender and others to check identification, every day, and when doing rounds would actively ask if that had been done with respect to customers who looked under 30 years old. If a server had not requested ID, the Head Bartender would make them go back and request it, even if a drink had already been served, but Bartender 2 was the only one she had to do that with.

The Head Bartender did some training of staff but that was not her primary responsibility. As to the government’s policy for the prohibition on serving liquor to minors, the Head Bartender stated that it was not prudent for the restaurant or the servers as minors can’t hold their liquor and they don’t tip.

General Manager

The General Manager (GM) testified that he has many years’ experience in the hospitality industry. He was responsible for the training and policies related to sales.

He said that all staff provide their SIR number on their first day, without which they are not allowed to serve liquor. He said staff sign off on both the Manual (Exhibit 3A) and the FOH Basic Contract (Exhibit 3B).

On the first training day, he said he covers off the stuff from the SIR about over-service and service to minors. He said he re-iterates that information in the first few days. New hires then shadow other servers and see how things are done. They are told to ask for identification if the customer looks younger than the GM. He said he did not know if the new hires were tested on the need for identification. He said role-playing was not used for that purpose, but he recalled watching new staff see how it was done.

He stated that the acceptable identification was government issued picture identification and credit cards or Care cards as a secondary piece of identification. He had not heard about the new BC Service Card. With respect to fake identification, he said he did not know if the licensee had done much in terms of addressing that.

The GM said that if a customer does not have identification, staff may provide free pop or soda or a non-alcoholic drink as a goodwill gesture, paid for by management. Most customers are annoyed or unhappy when refused service for not having identification, but typically do not "blow up".

The GM testified that sometimes they will see identification they are not comfortable with, like foreign passports. He said that if they cannot verify the documents, they will refuse service. The GM was not aware of any guides for checking identification from various jurisdictions that would assist with that verification, but he said he would be happy to see something like that.

The GM had seen the Guide (Exhibit 1, tab 9) and thought there was a copy of it in the office. He would generally look at the Guide on line, and had done that recently, in preparation for the hearing.

The GM was not sure what the licensee had done when the MAP was implemented. He said that by the time he saw the article about the MAP in the Liquor Line, he knew the MAP was happening and the policies and procedures were already in place.

According to the GM, the last staff meeting was in September 2014. He was not sure if there was an agenda. A sign-in was not kept because attendance was mandatory. Minutes were sent out afterward.

The GM said he had access to the video monitoring and that he would generally look at it if there were issues. For example, if the numbers were off, he could monitor staff regarding beer pouring.

He said the other steps being taken to prevent the sale of liquor to minors included: mentioning it as often as possible, the POS messages, the government issued signs in the restaurant and the service area, and internal memos. He said there was one of the little stickers that government provides on the door to the restaurant.

The GM said at the manager on duty meetings, all managers were reminded to keep an eye on and support servers if customers did not have identification. At the general staff meetings, which are generally held every six months, the issue of checking for identification is brought up.

The GM also said he sent out mass emails to staff, about "the state of the union" including reminders about the need to ask for identification.

In his opinion, when compared to the other places he had worked, with respect to efforts not to sell liquor to minors, the licensee was "by far on top of it". He testified that after the May 2013 Commercial Drive contravention, the licensee really focussed on the issue and tried to do everything to prevent it. He said the signage and reminders became more consistent and the servers were made aware of the seriousness of not asking for identification. He also said additional information about the need for identification was added to the FOH Basic Contract (Exhibit 3B), but did not identify what that information was.

The GM testified that in May 2013, Bartender 2 was disciplined for not taking the licensee's policies and procedures seriously enough. According to the GM, a manager on duty (not the Head Bartender) was not comfortable with Bartender 2 not checking for identification. He said she brought it up to the management and the GM sat down with Bartender 2 to explain how serious it was. The GM believed Bartender 2's behaviour changed and Bartender 2 started to take checking for identification seriously, but given the June 2014 events Bartender 2 "slid back". The GM thought that Bartender 2 now treated checking for identification very seriously and that Bartender 2 now requested identification from anyone who looked under 35 years old. The GM thought that between May 2013 and June 2014, he had to direct Bartender 2 to check for identification "probably a few times, but not a lot".

The GM said that the company policy to terminate an employee for selling liquor to a minor was not applied to Bartender 2. He said management liked Bartender 2. In his opinion, Bartender 2 was a good kid, good at his job and just made a mistake. Instead of termination, Bartender 2 was given a one-week suspension, so the licensee could work with him to address the issue. When Bartender 2 returned from his suspension, the GM talked to him about following the Manual.

The GM said he explained the action taken with respect to Bartender 2 to the other staff verbally and then at a general staff meeting. He said the other staff also liked Bartender 2 and did not want to see him lose his job over a bad decision.

The GM said the situation of the contravention at the Commercial Drive location was different. There the bartender thought she knew it all, whereas Bartender 2 made a mistake. The GM said the Commercial Drive bartender was terminated and that termination was communicated to the staff at Biercraft Bistro at the Cambie location by a memo that was posted. The GM believes that the application of the termination policy will be different in each situation, but that the staff are not going to think the policy requiring the checking of identification is less serious or that they will not get fired for an infraction of the policy.

The GM testified that his understanding of the reason for the government policy against minors being served liquor was because minors were not all responsible enough to know how to handle liquor and the problems and dangers as a result. He said minors did not know how to pace themselves and could quickly be affected and lose control. The reasons for the policy was not communicated to staff because he believed the staff had a good idea of that reasoning, because they took the SIR course and so understood the dangers and concerns.

The GM was at the Commercial Drive location on June 14, 2014. A duty manager was the senior person at Biercraft Bistro at the Cambie location.

Manager on Duty

The manager who was on duty on June 14, 2014 (the "Duty Manager") gave evidence. He has worked for over 20 years in the hospitality industry—as a cook, a server, a bartender, and as a manager.

He testified that the licensee's policies and procedures regarding the sale of liquor to minors is communicated at the monthly manager on duty meetings, monthly emails, POS messages, signage, in the Manual, and the FOH Basic Contract.

He said the signs are everywhere you turn – staff lockers, entering the floor, at the bar, and on the front door. The need to request identification from anyone who looked under 30 years was raised at every meeting. He described the efforts as "almost militant".

His evidence was that after the Commercial Drive location contravention, it was his responsibility to give staff reminders about policy to request identification "virtually everyday".

The Duty Manager worked with Bartender 2 about three to five shifts a week. He reminded Bartender 2 and other staff to check for identification almost everyday, at the pre-shift meeting and throughout the shift. If he saw a table that looked young, he said he would ask staff if they had ordered liquor and if they had, if they had been asked for identification. He said that if they had not been asked for identification, the server would be directed to ask for identification and a verbal or written warning would be given. He said that the need to give a verbal warning "virtually never happened" and he had never given a written warning.

The Duty Manager could not explain how Bartender 2 had failed to request identification. In his opinion, the expectation was that it should have been requested "without question".

He said he was shocked when the inspectors told him about the sale to the minor agent "after all we did". He immediately relieved Bartender 2 of his duties and escorted him out. He then called Mr. Mallel and the GM.

After June 14, 2014 the Head Bartender was upset and she said she thought she had gotten on Bartender 2's case about ID'ing more people. He was surprised to learn about the earlier concerns about Bartender 2 and that they were not communicated to him. After the Head Bartender had told him about her concerns, he kept his eye on Bartender 2 a lot more.

The Duty Manager was certain a hostess was on duty on the evening of June 14, 2014, but he could not recall who the hostess had been. He said a number of guests were coming and going at the time, as there was a sporting event on that day.

He knew that for a minor to be in the lounge, the minor had to be accompanied by an adult. He did not recall noticing the minor agent in the lounge. When shown the photograph of the minor agent, he said that if he had seen her in the lounge he would probably have pulled Bartender 2 aside and asked if he had ID'd her. As a minor, she would be asked to move into the restaurant or to leave.

In the Duty Manager's experience, no other employer was "even close" in the attention given to the prevention of the sale of liquor to minors. He said some others did not even mention it – they assumed that if you had your SIR then you knew.

As a duty manager he was occasionally called upon to look at questionable identification. He said sometimes it was more difficult to verify foreign identification. He expected valid identification to be hard plastic and crisp, with some kind of hologram. He relied on his own judgement and did not use any guide to help verify the identification. He gave as an example that he did not know what Mexican identification looked like. He said usually the foreign identification he was called upon to review was from southeast Asia.

The Duty Manager's understanding of the government policy prohibiting the sale of liquor to minors was that minors did not have the cognitive ability to make proper decisions. The reason for the policy not to sell liquor to minors was not discussed with staff because it is the law not to sell to them, which he believed was a sufficient reason for the licensee's policy on identification.

Bartender 2

Bartender 2 testified that he sold liquor to the minor agent on June 14, 2014.

He said he had been hired about 4½ years previously as a busser, and in 2012 he was promoted to a bartender. Prior to his training as a bartender, he got his SIR certificate. He was given the Manual (Exhibit 3A) which set out the policy on the sale of liquor to minors. He said it was his responsibility to request identification from persons who clearly looked under 25 years of age.

Bartender 2 testified that in May 2013 he attended a general staff meeting and signed the FOH Basic Contract. Also in May 2013, he was written up for not requesting identification from persons who were clearly under 25 years of age. He described the meeting where he was disciplined as serious in tone and there was no doubt in his mind it was intended to send him a message. He said he understood the gravity and got far better at requesting identification from customers after that. He said he had no doubt about the policy to request identification.

Bartender 2 said, since at least May 2013, company posters reminding staff to request identification were posted in the restaurant, the bar, the servery, and the staff room. He could not recall when the government issued signs (posted in the bar, server, and the passage) had gone up.

He said newsletters were sent almost monthly and they brought up the issue of identification. He also said the POS system often had weekly messages that appeared when staff punched in for the day. He acknowledged that the POS message did not include the date of birth for which it was legal to sell liquor. He said signage went up

after May 2013 that says the year of birth by which someone is of legal age to buy liquor.

Bartender 2 agreed the minor agent was clearly not of age and said serving her was a human mistake. He said that he was baffled that he did not ask for identification and re-iterated that he made a mistake. He said he has refused service for no identification, maybe once or twice a month.

Bartender 2 testified that when customers are asked for identification, some are compliant and others are grudging. He said when it was a regular customer with someone who looked younger "it was always difficult to send them away", but said he always did send them away with a warning. He did not say what that warning was.

Bartender 2 said that the two pieces of acceptable identification were a photo ID with the date of birth, which he said would always be a driver's license, and the second piece would be a credit card. He said if the driver's license was expired, he would refuse service because, in his opinion, it was then not a valid piece of identification.

Bartender 2 said that for passports and out of province identification, he would look at the expiry dates. He said he had not had any problems with fake identification being presented but also said he had "not been highly trained to tell if ID was fake or not".

Bartender 2 described Biercraft Bistro as a neighbourhood bar/restaurant that catered to a well-off part of the city. He described the customers as an older crowd of well-meaning, responsible people. He said they don't often get young people in so he tries to check their identification. He said Biercraft Bistro offers a premium product and the price point of it means they don't tend to get younger customers. He thought the average age was over 25 years. He said it was not a student bar. With the focus on premium beer, the bar uses special glassware and they treat the beer product like other places treat wine, applying a rigorous process for all the products that are sold.

With respect to the disciplinary warning, Bartender 2 testified that he had no role in drafting or preparing Exhibit 3F. He said that no re-training or other corrective action was offered to him or required of him. He said a manager brought up his failure to request identification and so Mr. Mallel and the GM had no recourse but to write him up and that anything further was grounds for termination or suspension.

Bartender 2 also testified he had no role in drafting or preparing the August 18, 2014 statement (Exhibit 3O). He thought that Mr. Mallel or the GM had prepared it, but said that they did not "put any words in his mouth". He testified that he signed Exhibit 3O because he agreed with everything set out in it. He said he was suspended for two weeks after selling the liquor to the minor agent. He also said he was not offered or required to do any re-training or required to undertake any other corrective action like testing or to do any research on the consequences of the consumption of liquor by minors.

Bartender 2 testified that he knew how to ascertain who he was required to request identification from. He said he had no doubt that the licensee's policy was to request identification if the customer looked to be under the age of 25 years.

He also said the shift leader would remind staff at the start of shift, and it was mentioned at staff meetings. Mr. Mallel personally reminded him to check for identification many times. The GM frequently reminded him and the shift leaders did that on a weekly basis.

Bartender 2 was unclear whether minors were allowed to be in the lounge if accompanied by an adult. He also agreed that other staff may have made a mistake by allowing the minor to remain in the lounge, as she was unaccompanied by an adult. He stated that he did not know if the other staff persons were busy at the time and in his opinion it was likely they had not observed the minor agent in the lounge. In his estimation he served the minor agent very soon after she sat down.

Bartender 2 had never seen the Guide (Exhibit 1, tab 9). His understanding of the government policy for the prohibition on the sale of liquor to minors was to reflect that minors were not responsible enough to consume liquor and make good choices.

Bartender 3

Bartender 3 had many years in the hospitality industry - 5 ½ years with the licensee and 11 to 12 years with other restaurants and bars.

She testified that the licensee's policy on the need to check for identification was "well-advertised". She testified that the only thing Mr. Mallel said to her every time she saw him was "ID, ID, ID".

She said the licensee's training was to use the Manual (Exhibit 3A), training shifts, and the competencies checklist (Exhibit 3E). She said that the training covered ID'ing people and that if there was any problem to see the manager. She said she came with some training and knew to request two pieces of identification. She said she had signed the Manual (Exhibit 3A). She had been trained by the GM about the sale to minors but could not remember how long that training was. She did not train others.

Bartender 3 recalled a general staff meeting where the licensee went over the FOH Basic Contract (Exhibit 3B) and that it re-affirmed the policy to check identification if the person looked under 30 years of age. She said staff meetings were held about three or four times a year and the need to check for identification was always raised. In her opinion, there was no ambiguity in the policy.

Bartender 3 testified that she looked for two pieces of identification - one a current photo ID and a second piece. If she had any questions, she would get the manager. She had refused service to persons without identification, or only one piece of identification, on a regular basis. She did not know of any incident log for problems with identification and said that the refusal of service was not recorded. She did say servers would let the manager on duty and other servers know if they refused service so that the customer could not move to another area.

She said staff were given visual reminders to check ID with signs at the staff lockers, the server, the bar, and throughout the restaurant. She also said the managers on duty and the GM use the POS system to leave messages, the need for ID is usually talked about pre-shift, and emails are also sent. She said that even before the incident, it was very

well known that servers were to check ID's and there was a no tolerance policy. She understood that the failure to follow the policy meant her job would be in jeopardy.

Bartender 3 was not aware of the bartender being terminated after the Commercial Drive contravention. She did know that Bartender 2 sold the liquor to the minor agent and he was still on staff. She did not know what went on between management and Bartender 2. She had often worked with Bartender 2 and testified that she always saw him ID people, so it was surprising to hear he had not done so and also to hear that a co-worker had raised his failure to ask for ID as an issue with the management. She was not asked to keep an eye on Bartender 2. She said the staff were to keep an eye out for each other.

In her opinion, the other restaurants she worked for did nothing more than the licensee about the sale of liquor to minors, however, the nightclubs used bouncers to check for ID's and also had wristband policies.

SUBMISSIONS – BRANCH

The Branch noted that the licensee had admitted that one of its employees sold liquor to a minor on June 14, 2104. The only issue to be determined is the availability of the defence of due diligence. The Branch submitted that the licensee failed to meet the test for that defence.

The Branch reviewed the documentary and oral evidence presented by the Branch and by the licensee. The branch submitted that the licensee's training, policies and programs were deficient in that they failed to provide instructions on what is proper identification and how to verify the identification presented as authentic.

The Branch submitted that a penalty ought to be imposed given the serious consequences of the sale of liquor to minors and, in these circumstances, a penalty of \$7,500 is appropriate.

SUBMISSIONS – LICENSEE

The licensee, through submissions made by Mr. Mallel, said it did all that could reasonably be expected of it to prevent the sale of liquor to minors. The licensee claimed that it exceeds the industry standards, according to industry experts and its own staff. Mr. Mallel admitted the licensee is not perfect, but says perfection is not required to meet the test of due diligence.

The licensee said it strives to create a safe environment for staff and customers and to prevent the sale of liquor to minors. Mr. Mallel said there was no confusion about the licensee's almost obsessive mantra to check identification. He referred to and relied on the licensee's:

- Policies as set out in the Manual and the FOH Basic contract and which are signed off by staff when hired
- In-house training and the checklist
- Frequent reminders to staff to check identification given:
 - in the numerous visible signs
 - at all staff meetings
 - by the frequent and almost aggressive repeated instructions from management to serving staff at pre-shift meetings and throughout the shift
 - in staff newsletters
 - on the point of sale (POS) system
 - in the managers' blog
 - by emails to staff
- Video surveillance

The licensee said that all of these were in place when the contravention occurred and had been in place for at least a year. The licensee believed that in consulting consultants he had put more than enough safeguards in place to prevent the sale of alcohol to minors.

The licensee further said that when he perceived there might be an issue of not checking identification at the Commercial Drive location, a consultant was retained to test the staff at that location, and the staff was found to be in compliance.

The licensee acknowledged there were some inconsistencies in the policies in terms of the age to request identification (under 30 or under 25). The licensee also acknowledged that some of the information conveyed to staff was erroneous in terms of the consequences of a sale to minors, in that the actual consequences were less dire than those staff were warned of, but the licensee says he believed those to be the consequences and that the warnings show how seriously the licensee took the issue of asking for identification.

The licensee said it supports the work of the Branch in its enforcement duties and takes its responsibilities seriously. That is one reason why the impacts of a contravention were overstated to staff.

The licensee said the restaurant does not appeal to minors because it carries more expensive, higher-end specialized liquor products, not the lower-end products that typically appeal to younger consumers. The licensee also says the establishment is a neighbourhood pub, and most of its clients are known to it.

The licensee said expectations are unclear and if there was a step-by-step guide, he would follow that to make sure that he is in compliance.

The licensee submitted a copy of the January 23, 2013 decision of the General Manager in *Rayman Investments* (EH11-139). He said in that case the licensee was found to be duly diligent, and he believed that his organization had set higher standards of diligence.

REASONS AND DECISION

CONTRAVENTION

The licensee accepts the facts set out in the NOEA (Exhibit 1 tab 1) and as testified to by the liquor inspectors and admits it contravened section 33(1)(a) on June 14, 2014, as detailed in the NOEA and by that testimony.

Based on that evidence and admission, I find that the licensee contravened section 33(1)(a) of the Act by selling liquor to a minor.

DUE DILIGENCE DEFENCE

The licensee is entitled to a defence if it can establish that it was duly diligent in taking reasonable steps to prevent the contravention from occurring.

With respect to the defence of due diligence, the *Canadian Supreme Court, in R. v. Sault Ste. Marie*, (1979) 2 SCR 1299 at page 1331, has said:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

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

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

1. Directing mind: 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. Adequate training and effective application to prevent the sale: If the employee who made the sale was not a directing mind of the licensee, then the question to be considered and answered are whether the licensee had:
 - a. Implemented adequate training and other systems to prevent the contravention (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 depend on the evidence presented. As such, I need to set out the facts of the sale to the minor agent, which the licensee has accepted as true, and the evidence presented of the licensee's efforts to prevent the sale from occurring.

Directing Mind

Based on the evidence presented, I find Mr. Mallel is the directing mind of the licensee and that he was not present when the minor agent was served the liquor. I also find that Bartender 2, who served liquor to the minor agent, was not a directing mind of the licensee and he acted contrary to the licensee's policies. As such, I find the contravention took place without the licensee's direction or approval and I move to the second part of the analysis.

Implemented adequate training and other systems to prevent the contravention

The onus is on a licensee to establish on a balance of probabilities that it exercised all reasonable care by establishing adequate training and other systems to prevent the sale of liquor to minors and ensuring effective application of that training and other systems. The test is what is reasonable, not what is perfection.

In determining what constitutes adequate training and other systems to prevent the sale of liquor to minors, I have considered the Guide (Exhibit 1, tab 9) to which the licence is subject. At page 32, the Guide tells licenses they must demonstrate that they are preventing minors from obtaining liquor. Licensees are directed to do an initial assessment of every patron before selling or serving them liquor. The licensee is told that in verifying the customer's age, the licensee must ask for two pieces of identification. The types of acceptable identification are set out. The Guide sets out an express requirement for licensees to verify identification that may be presented. The second piece of identification is to be used to verify the authenticity of the first piece of identification. Questions are provided as examples of how to verify identification.

I note the letter from the Branch General Manager at the time the MAP was introduced (Exhibit 1, tab 13) tells licensees that when checking identification both the identification and the patron should be reviewed and appropriate questions asked to test the authenticity of the identification. I am further guided by section 33 (5) of the Act which provides that in defending against a contravention under section 33(1), the defendant must have required that the person produce identification and examined and acted on the authenticity of the identification (my emphasis).

Having considered these, I find that adequate training of serving staff to prevent the sale of liquor to minors must address not only the need to ask for two pieces of identification, but also the requirements for assessing that identification for validity and to determine whether the identification, if valid, belongs to the patron that is presenting it. In other words, to prevent the sale of liquor to minors, serving staff must be trained to ask for proper identification and to determine whether that identification is what is colloquially referred to as "fake" either for being invalid or for not belonging to the person presenting it. The licensee must also monitor staff to ensure that all elements of that process are being met on an on-going basis.

I now turn to assessing the evidence of the licensee's program and to determining whether it meets those requirements. Mr. Mallel testified that staff are trained to prevent sales to minors through their SIR certification, the licensee's in-house training when hired, and by staff meetings. I will review each of these to determine the adequacy of the training program.

Serving It Right

Firstly, I find that the SIR certification provides preliminary training respecting the service of liquor to minors but without more is likely insufficient to satisfy the legal test of adequate training for a successful due diligence defence. Something more than simply confirming SIR certification is usually expected of licensees, given the serious consequences of the sale of liquor to minors.

When Consultant 1 was asked to describe the training he gave other clients' staff on the sale of liquor, he specifically said it included the types of acceptable identification and the kinds of questions to ask to verify identification. He testified that in his training sessions he discusses scenarios, uses examples, and conducts question and answer sessions. He said he would use these techniques, even if the staff being trained had their SIR certification. Consultant 1 said that he did not provide any of this training for this licensee.

In this case, I find that the SIR training, without more, is insufficient to meet the test of due diligence.

I turn then to assessing the in-house training, examining first the documents presented as evidence of the licensee's training and then the oral evidence of that training.

Training - Documents

The main training documents presented by the licensee are the Manual (Exhibit 3A) the FOH Basic Contract (Exhibit 3B), and the Checklist (Exhibit 3E).

The Manual (Exhibit 3A) simply states that the law prohibits the sale of liquor to minors and employees who do so are breaking the law and will be terminated. It also authorizes employees to check a patrons' identification if the patron is suspected of being a minor. Nothing is stated about what to require in terms of identification or the need to or how to verify if the identification is valid and belongs to the person. I find the Manual is lacking in specificity about these steps that, under the Guide, are necessary to prevent the sale of liquor to a minor.

Under the FOH Basic Contract (Exhibit 3B) employees undertake to ID anyone who looks under 30 [years of age]. The employee also undertakes “to practise serving it right”. Nothing else is stated about what to require in terms of identification or how to verify if the identification is valid and belongs to the person. I find the FOH Basic Contract to be lacking in terms of what to require as proper identification, the steps to be taken to assess the validity of identification and to determine if the identification belongs to the person presenting it—all necessary to prevent the sale of liquor to minors.

The Checklist (Exhibit 3E) sets out 61 competencies new employees are tested on. These competencies range from knowing how to send a fax to being able to change a beer keg, and include such things as knowing how to mix various named cocktails, how to operate the POS system, how to serve meals, and how to operate the restaurant’s music, lights and windows. The only possible reference to knowing when and how to check identification of minors was under the general item of “have completed the ‘New Hire Package’ and has received an employee handbook as well as a job description.” From the oral evidence, the “New Hire Package” is the Manual and the FOH Basic Contract, referred to above. Nothing else is stated about any competency to know when to request identification or what to require in terms of that identification or how to verify if the identification is valid and belongs to the person. As such, I find the Checklist does not provide any evidence of training employees about these important matters necessary to prevent the sale of liquor to minors.

Therefore, I find the documents the licensee uses to train employees about preventing the sale of liquor to minors are inadequate for that purpose because the documents lack sufficient information and detail about the steps to be taken.

I note two other documents make mention of the licensee’s policy on requesting identification. The disciplinary warning given to Bartender 2 (Exhibit 3F) refers to the policy as being to request identification from any person who appears to be under the age of 25 and to refuse service to anyone who does not have identification. The statement made by Bartender 2, prepared by Mr. Mallel and the GM (Exhibit 3O), refers to the policy to ask for identification from anyone under the age of 30. Only Mr. Mallel, the GM, and Bartender 2 testified that they had seen these documents, so I do not put

any weight on them as documents to train staff in general to prevent the sale of liquor to a minor.

Training – Oral Evidence

I find, based on the oral evidence, that the GM is primarily responsible for the training that is given. However, other than stating he “covered the stuff from the SIR”, the GM gave no evidence that he actually and specifically discussed the acceptable types of identification with new staff or how to verify their authenticity. Additionally, none of the serving staff, when asked to describe the training given to them, mentioned any discussion of or training about what to request in terms of proper documentation, how to assess the validity of those documents, and if the identification presented belonged to the person presenting it.

Mr. Mallel’s evidence was that the licensee did not provide any training or direction on what to look for when requesting identification. He claimed that such training was unnecessary because all members of the staff would know what proper identification was. He drew the analogy that it would be like teaching them to walk.

I find the evidence of the GM and the serving staff does not support Mr. Mallel’s claim that no specific training was necessary. For example, while the GM personally knew that government issued picture identification was acceptable as the first piece of identification and a credit card or BC Care card was an acceptable secondary piece of identification, he did not know about or could not recollect knowing about the new BC Service Cards which are issued as primary identification, starting in February 2013, and are referred to as such in the Guide (Exhibit 1, tab 9). Various of the licensee’s other witnesses were unclear as to what is an adequate secondary piece of identification. Bartender 2 testified that an expired driver’s license was not adequate identification and he would reject it, whereas the Guide clearly states expiry dates do not need to be checked or impact on validity.

I find that the lack of training on what is proper and acceptable identification to be a flaw in the licensee's training of staff to prevent the sale of liquor to minors. Similarly, other than stating he covered "the stuff from the SIR", the GM gave no evidence that he discussed with new staff how to verify the identification that might be presented to them. New staff members were only required to shadow and watch other staff with, presumably, the assumption being that by doing so, the new staff member would learn how to properly request and assess identification. According to the GM, new staff are not tested on how to assess "fake" identification, but they are monitored for a period of time after the shadow period. Bartender 2 specifically testified that he was "not highly trained to tell if ID was fake or not".

In considering the adequacy of training by shadowing, I have reviewed the evidence of the server witnesses to see what new staff may have learned in a shadow experience, in terms of when and how to ask for identification.

- The three bartenders and the Duty Manager varied in their estimates of how frequently they needed to request identification. This raises questions for me whether there is a consistent approach in assessing patrons' ages and the corresponding need to request identification.
- The Head Bartender, Bartender 3 and the Duty Manager each testified about issues of fake identification, indicating to me that they had, at least on occasion, questions about the validity of the identification and whether it belonged to the person presenting it. Mr. Mallel and the GM also mentioned fake identification.
- Only the Duty Manager gave evidence as to how he would assess the validity of the identification provided. His evidence dealt principally with the physical aspects of the identification, with little or no mention of the contents.
- None of the witnesses gave any evidence of how they might test a patron to determine if the identification presented belonged to the patron. The questions set out in the Guide as examples of how to do this were not mentioned.
- Bartender 2 testified that he was "not highly trained to tell if ID was fake or not" but he also testified that he "did not have problems with fake identification". As such, it is unclear if he meant he did not have fake identification presented to him or, unlike the other witnesses, he did not have a problem determining if identification was valid.

Based on the forgoing, I have questions firstly about the certainty that requesting identification always actually arose during the shadow-training period and secondly whether the server being shadowed properly assessed the need and the appropriateness of the identification and/or verified that the identification belonged to the person presenting it. If these matters did not come up in the shadow period or were not demonstrated effectively and repeatedly, a new staff person may be inadequately trained, especially if the new staff person did not have previous experience serving liquor. As such, without any testing by the licensee on these matters, there is a real question whether the training provided is adequate to prevent the sale of liquor to minors.

Further, according to Mr. Mallel's evidence, the licensee typically only hired serving staff with prior experience in serving liquor, except when a hostess or bus-person may be promoted from within the organization. The GM did not give any evidence that he differentiated in his training to new employees depending whether they had prior experience serving liquor or an employee promoted from within and without such experience. Bartender 2 stated that his training was the same as for other employees. I note that where inconsistencies as to proper practise or procedures arose, it was generally between the three more experienced staff members and Bartender 2, who had no prior experience serving liquor and had been promoted from within the licensee's organization. I am concerned about Bartender 2's apparent lack of understanding of the rules applying to when a minor may be in the lounge. This indicates perhaps that more intensive training is required where staff have no prior experience in serving liquor.

Based on all of the above, I find that the licensee's in-house training of staff to prevent the sale of liquor to minors is deficient. However, the licensee submitted that the in-house training is supplemented by meetings and other reminders to staff. I will now address that evidence and determine if those activities are sufficient to remedy the deficiencies in the initial training.

Meetings and Other Communication

The minutes of the Duty Manager meetings (Exhibit 3I) refer to the policy to check the identification of anyone under 30, as do the minutes of the monthly management meetings (Exhibit 3J). The minutes of the bi-monthly meetings (Exhibit 3K) refer to the policy regarding underage service, without stating what that is. None of the minutes mention any other policies in terms of what to require for the purposes of identification or how to verify if the identification is valid and belongs to the person.

There is no evidence that the minutes of the managers' meetings are shared with the serving staff. No minutes of general staff meetings were presented as evidence. The three POS system reminders (Exhibit 3G) differ in terms of what they set out: one says ID everyone, one says ID under 21, and one says ID everyone every time. These messages are inconsistent with the licensee's stated policies to request identification of persons who appeared to be under the age of 25 or 30. None of these reminders say what is required for the purposes of identification or how to verify if the identification is valid and belongs to the person.

The newsletters (Exhibit 3H) include reminders of the policy to check the identification of anyone under [the age of] 30. The newsletters do not mention any other policies in terms of what to require for the purposes of identification or how and the need to verify if the identification is valid and belongs to the person.

The daily managers blog (Exhibit 3L) notes a number of occasions when identification was asked for but not produced, but doesn't say what is required for the purposes of identification (although having only one piece is noted as a reason for refusing service) or how to verify if the identification is valid and belongs to the person. The blog is not shared with the serving staff, it is for managers only.

The signs (Exhibit 3M) refer to checking identification but only two of them, the government issued signs, refer to the need for two pieces of identification and what those pieces might be. The licensee's internal signs make no mention of when to ask for identification, what to ask for, or how to verify the identification.

Firstly, I find that not all of these reminders were shared with the serving staff. Secondly, I find that most of these documents only reference the need for identification and, except for the government issued signs, do not provide any direction or advice on what is required in conducting a check for identification. Simply repeating a mantra to check identification is not actual training on when and how to do it. For this reason, I find that these actions do not supplement the flawed in-house training so as to correct the defects in that training.

Comparisons with Other Licensees

I give little weight to the evidence of the licensee's employees that compared what the licensee does with what former employers did, for the following reasons:

- The evidence of what others employers did was dated. That knowledge was based on experiences from many years prior. What other employers did years ago may have changed in the intervening years. Certainly the evidence was that the licensee's efforts changed after May 2103. Also the MAP had been introduced since the observations were made, which may have affected what the former employers now do.
- The witnesses are all current employees of the licensee, dependent on the licensee for their work. As such, their opinion testimony, concluding their current employer met higher standards than prior employers, generally has little probative weight.
- The failure by licensees generally to meet adequate standards is the principal reason for the MAP. In the letter from the Branch's General Manager (Exhibit 1, tab 13) the General Manager notes that the results of inspections in restaurants had, at the time the MAP was introduced, shown that the risk of sale to a minor was high. And the Liquor Line Newsletter (also at Exhibit 1, tab 13) notes that prior to the MAP, only 29% of liquor stores asked persons for two pieces of identification of young customers who were over the legal age. So simply being better than what in many cases may be substandard is not necessarily indicative that the licensee met the appropriate standard.
- Each licensee situation is unique and what is required will depend on the facts of that situation and the evidence presented to support those facts.

I find the consultants' evidence, which concluded the licensee met a higher standard than other licensees, to be similarly of little probative value. I note that Consultant 1's opinion was based on what might best be described as a very cursory review of the program and the documentation. Additionally, I do not find that the consultants had any specialized training or knowledge that would qualify them to give expert opinion evidence on that issue. Whether the licensee met the standards necessary to satisfy the test of due diligence is the central question to be decided by me, as the delegate of the branch's General Manager. It is not up to the industry, as a regulated industry selling products that may be harmful, to set the standards required to be met for due diligence to apply.

Based on all of the foregoing, I find that the licensee's training fails to meet the first element in the test for a due diligence defence.

Taken reasonable steps to ensure the effective application of that education and the operation of those systems

Because I have found the licensee's training to be inadequate and fails to satisfy the first element of the test for due diligence, I do not need to discuss in detail whether the licensee's systems to monitor the effectiveness of that training were adequate, the second element of the test. However, if I needed to address that question, I note inadequacies in the monitoring systems for the following reasons:

- The inconsistencies in the policy and messages about that policy, whether the age to check is under 21, under 25, or under 30, gives staff confusing and unclear messages.
- The failure to remind serving staff on a regular basis what a proper check of identification entails – that is, not just does the patron have identification but also is that identification sufficient and valid and does it belong to the patron, and to document those reminders.
- The lack of clear communication to the whole of the serving staff about the outcomes when other staff were found to have sold liquor to a minor, that is, whether a suspension or termination was imposed, and if a suspension, for how long, and why that option is chosen and the implications of that for other staff

(respecting, of course, the appropriate confidentiality of the employer/employee relationship).

- Mr. Mallel, the GM and Bartender 2 all differed on the length of his actual suspension.
- Other staff witnesses did not seem to know the length of Bartender 2's suspension and why a suspension had been used and not termination.
- Some of the staff did not know what had happened to the bartender in the Commercial Drive contravention.
- The secret shopper program was not at this location, was not conducted with any degree of formality in terms of documentation or reporting, and the use of the same person as the secret shopper in all three trials is inadequate to constitute an effective secret shopper program.
- The video surveillance is used principally for tracking beer spillage and no actual use of it for monitoring staff compliance with policies was reported either to staff or in the hearing.
- Verbal warnings given to staff for failure to check for identification are not tracked to ensure improvement and the potential for steps to be taken if there is a failure to improve.
- I am not convinced that all that reasonably could have been done was done to ensure Bartender 2 had improved after his May 2013 warning.
 - There was a lack of discussion and follow-up with supervisory staff about Bartender 2's need for improvement after the May 2013.
 - The warning given to Bartender 2 was not communicated to all supervisory staff, to ensure a proper follow-up.
 - The licensee did not follow up on the Head Bartender's monitoring of Bartender 2 to find out if Bartender 2 had improved. The Head Bartender in fact testified that, even after the warning was given, Bartender 2 was still lax about asking for identification.
 - The lack of follow through on monitoring staff progress. For example, the GM did say that he needed to direct Bartender 2 to request identification a few times, but he did not say any verbal or written warning was given to Bartender 2 about this.

- When Bartender 2 sold the liquor to the minor the lounge was not busy, and he had a short dialogue with the minor so that he had time to assess the minor, he had a conversation with the other bartender about the minor's order of a product they did not serve, yet he failed to assess the minor's age and ask for identification.
- I am also concerned about Bartender 2's apparent continuing difficulties when denying service to patrons without identification.

Having concluded that the defence of due diligence fails, I find the licensee has contravened section 33(1)(a) of the Act and I turn now to the issue of penalty.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations 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 NOEA. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 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 Branch has consistently indicated that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the branch considers this a significant public safety issue:

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

Liquor inspector 1 re-iterated that information and also referred to the pressure that the sale of liquor to minors puts on the resources of the health care system, police and the Branch to deal with the consequences.

The MAP demonstrates the Branch's intention to ensure that licensees are not serving or selling liquor to minors. The Branch has taken a number of measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those measures, a 16 year-old minor was served liquor in the lounge of the Biercraft Bistro, without being asked to produce any proof of age. I find that a penalty is warranted here.

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

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

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 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 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

Having found that a penalty is warranted, I am required to impose at least the minimum, which is a \$7,500 monetary penalty for a first contravention. I find this to be reasonable and appropriate given the importance of ensuring minors do not have easy access to liquor, to encourage future compliance from the licensee and to ensure specific and general deterrence in society at large.

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 Liquor Control and Licensing Branch on or before **March 17, 2015**.

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 Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Dianne Flood
General Manager's Delegate

Date: February 16, 2015

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Cristal Scheer, Branch Advocate