



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: Kennedy's Pub Ltd.
dba Kennedy's Liquor, Beer & Wine Store
8899 120th Street
Delta, BC

Case: EH14-096

For the Licensee: James Spooner

For the Branch: Cristal Scheer

General Manager's Delegate: R. John Rogers

Date of Hearing: December 3, 2014

Date of Decision: January 9, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Kennedy's Pub Ltd. (the "Licensee") owns and operates Kennedy's Liquor, Beer & Wine Store at 8899 120th Street, Delta, BC (the "LRS"). The Licensee holds Licensee Retail Store Licence number 195385 (the "Licence"). According to the terms of its Licence, the Licensee may sell liquor from 9 a.m. to 11 p.m., Monday through Sunday.

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

Mr. James Spooner, a principal of the corporate Licensee, appeared at the hearing as the representative of the Licensee (the "Licensee's Representative") and gave some of the evidence of the Licensee's policies and procedures.

The Licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the "Act") on July 21, 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.

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 August 5, 2014 (the "NOEA") (Exhibit 1, tab 1).

The Branch alleges that on July 21, 2014, the Licensee contravened section 33(1)(a) of the Act, by selling, giving or otherwise supplying liquor to a minor. Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out the 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. 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.

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

**Schedule 4
Enforcement Actions**

Minors

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

ISSUES

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

EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 12.
- Exhibit 2: Package of copies of Licensee's due diligence materials, with the first page of this package a copy of a handwritten letter dated November 19, 2014.
- Exhibit 3: Copy of minor agent's photograph and identification – to be sealed at close of hearing.

Order to delete any reference to Minor Agent's name or other identifying factor

With the agreement of the parties, a copy of the minor agent's photo and identification were placed in an envelope and marked as Exhibit 3, with a notation that it is not to be unsealed or disclosed without a Court order. Exhibit 3 has been sealed to protect the identity of the minor agent. At the hearing, the Branch provided the Licensee and its witnesses with an opportunity to view the photo of the minor agent and his identification with birth date. The minor agent did not appear as a witness for the Branch.

WITNESSES

The Branch called two witnesses:

1. The liquor inspector ("Liquor Inspector A") who attended the LRS with the minor agent ("Agent #56") on July 21, 2014 and who:
 - At the beginning of the shift on July 21, 2014, photographed Agent #56 and checked and photocopied his identification, confirming that Agent #56 on July 21, 2014 was 16 years of age; and,
 - Was the author of the NOEA.
2. The liquor inspector ("Liquor Inspector B") who:
 - Together with Liquor Inspector A accompanied Agent #56 into the LRS on July 21, 2014; and,
 - Issued and served the Contravention Notice #B014104 (the "Contravention Notice") (Exhibit 1, tab 2) to the Licensee's employee who allegedly served Agent #56.

The Licensee called three witnesses:

1. The manager of the LRS (the "LRS Manager").
2. The assistant manager of the LRS (the "LRS Assistant Manager").
3. The Licensee's employee who served Agent #56 on July 21, 2014 (the "Cashier").

EVIDENCE—BRANCH

The Licensee accepts the facts as set out in the NOEA as expanded upon in the testimony given by Liquor Inspector A and Liquor Inspector B at the hearing of this matter.

On July 21, 2014, Liquor Inspector A and Liquor Inspector B attended the LRS together with Agent #56, a minor who was employed by the Branch under MAP. The purpose of this inspection team attending the LRS was to test compliance with the Act's prohibition against selling liquor to minors.

The Branch implemented MAP in 2011 after the Act was amended to allow the Branch to employ minors as agents for this purpose. All Licensed Retail Store licensees were directly notified of MAP by way of a letter sent to all Licensed Retail Store licensees from the General Manager on February 7, 2011 (Exhibit 1, tab 11). An update on MAP was provided by the Branch in Issue 7, the summer of 2014 edition of the *Liquor Line*, the publication providing ongoing communication between the Branch and licensees (Exhibit 1, tab 11).

As confirmed by Exhibit 3, Agent #56 was 16 years old at the time of his attendance at the LRS on July 21, 2014.

At approximately 7:00 p.m. on July 21, 2014, the inspection team arrived at the LRS in a shared vehicle. The liquor inspectors entered ahead of Agent #56 and stood in the middle of the LRS facing towards the cashier counters. The liquor inspectors testified that they had observed that the lighting in the LRS was good, that the LRS was not crowded, and that at the time there were two clerks on duty in the LRS.

Agent #56 entered the LRS and proceeded directly to the rear of the LRS where from the beer cooler he selected a six pack of Kokanee beer in cans (the "Product"), which he took to a cashier counter. At the cashier counter, the Cashier took the \$10 bill offered by Agent #56, gave him 5 cents change, and proceeded to put the Product into a plain white plastic bag. Agent #56 took the bag and exited the LRS at approximately 7:01p.m. At no time did the Cashier request identification from Agent #56.

While Agent #56 was purchasing the Product, the liquor inspectors were able to observe the transaction, and although they observed a conversation between the Cashier and Agent #56, they were unable to hear what was being said.

Liquor Inspector A remained in the LRS while Liquor Inspector B left the store and returned to the vehicle.

Upon returning to the vehicle, Agent #56 turned the bag with the Product over to the Liquor Inspector B who tagged the Product and placed an exhibit sticker on it. At this time, Agent #56 completed the Minor Agent Observation Form and the Minor Agent Statement setting out his record of the details of the purchase (Exhibit 1, tab 5).

After Agent #56 left the LRS, Liquor Inspector A identified herself to the Cashier, informed the Cashier that she had sold liquor to a minor, and asked to see the Cashier's Serving It Right ("SIR") certificate. The Cashier did not have a copy of her SIR on hand, but claimed to have received it. When asked if she was aware of MAP, the Cashier said that she was. However, the Cashier claimed that she had earlier been dealing with a matter involving a theft in which the police were involved. Although she usually asked all customers for identification, this police matter had left her distracted causing her to fail to ask Agent #56 for his identification.

Liquor Inspector B returned to the LRS and issued the Contravention Notice, receipt of which was acknowledged by the Cashier.

Both liquor inspectors then left the LRS, returned to the vehicle where they completed their notes of the details of the purchase (Exhibit 1, tab 4) and Liquor Inspector A photographed the Product displaying the exhibit sticker as well as a copy of the receipt for the sale of the Product to Agent #56 (Exhibit 1, tab 6).

EVIDENCE—LICENSEE

The Licensee's three witnesses gave evidence about the management of the LRS, its policies and procedures, the training given to employees, and how its policies are implemented in the LRS.

The LRS Manager

The LRS Manager testified that he had been working in the hospitality industry for over 17 years and was well aware of the requirement for customers to produce identification. The LRS has been in business for over 10 years and there has never before been an infraction involving a breach of the Act, the Regulation or the Licence.

He confirmed that he and the owners of the Licensee take very seriously the requirement to ask for identification as is demonstrated by the fact that during the previous week the software on the tills for the LRS had been upgraded to require an employee prior to completing a sale to indicate that they had asked for identification or that the purchaser was clearly over 25 years old.

On cross-examination, the LRS Manager stated that he had his SIR for at least 12-14 years, but that since obtaining it he had no additional training with respect to responsible beverage service. When asked, he stated that he had not reviewed the SIR manual for its recommendations on creating and implementing a house policy for ensuring the identification of minors.

He confirmed when looking at the picture of Agent #56 in Exhibit 3 that he would have required that Agent #56 produce identification before selling him liquor.

The LRS Manager testified that, other than the Licensee's Representative, only he or the LRS Assistant Manager had managerial authority with respect to the LRS and that none of these parties were present at the LRS on July 21, 2014 when the incident occurred. His evidence was that the Cashier had no managerial authority.

The LRS Manager confirmed that the Cashier had been employed by the Licensee for over two years and had been an excellent employee. As a result of the incident on July 21, 2014, the Cashier was penalized with a week off work without pay. The LRS Manager referred to a copy of a letter dated July 23, 2014 ("Suspension Letter") (Exhibit 2 Pages 21 & 22) from the Licensee to the Cashier referencing the issuance of the Contravention Notice on July 21, 2014 and confirming that the Cashier was suspended from her employment for a week without pay. The Suspension Letter notes the fact

referenced by Liquor Inspector A that the Cashier believed that there were extenuating circumstances leading to her making the mistake in that she was assisting the police in a matter involving a theft.

The LRS Manager provided copies of what he testified were the daily staff sheets that were provided each day to each of the Licensee's eight employees when they collected their tills as they reported for work. These sheets, he pointed out, listed a number of tasks the Licensee expected that particular employee to perform during a shift. These staff sheets also enumerated a number of the policies of the Licensee.

He noted that there were different staff sheets depending upon whether the employee was working a morning or an afternoon shift and testified that each sheet was expected to be signed by the employee receiving it and to be turned in to management at the end of that employee's shift. He stated that each of these sheets was reviewed either by the LRS Manager or the LRS Assistant Manager and then filed.

He testified that the purpose for these sheets was to ensure that each employee was aware of what was expected of them by the Licensee.

The staff sheet for the morning shift employee was entitled "AM Procedures" (Exhibit 2 page 5) and provided a space for the employee to enter the employee's name and the date worked. This morning staff sheet commences with the emboldened instruction to "*CROSS OFF EACH JOB AS YOU COMPLETE THEM" and lists 26 bulleted items with the first item instructing the employee to "Sign in". The final instruction on this sheet states "*****pop refilling***** please fill only 4 items per each product in both the Pepsi and Coke coolers this should reduce the number of expired products. Please rotate always".

The LRS Manager pointed out in his testimony that the eighth bulleted item on this morning staff sheet states "ID, you must request from anyone under 25, 2pc's please."

The staff sheet for the afternoon shift was entitled "PM Procedures" (Exhibit 2, page 6) and, as with the morning shift staff sheet, provides a space for the employee to enter the employee's name and the date worked. This afternoon staff sheet lists 28 bulleted items ranging from the first one instructing the employee to "Cross off each job as you complete them" to "LEAVE THE STORE LIKE YOU WOULD LIKE TO FIND IT. STOCKED AND CLEAN! This includes taking home your food and items left around the till area. Clean and tidy, please." Similar to the staff sheet for the morning shift, the final instruction on this sheet states: "*****pop refill***** 4 items of each product to refill the Pepsi and Coke coolers. Always rotate to avoid expired products. Thanks".

The LRS Manager pointed out in his testimony that the fifth bulleted item on this afternoon staff sheet states "Remember to ID, 2 pieces are required and anyone under 25 must have ID!"

When asked on cross-examination whether or not the Licensee kept an incident log book in the LRS, the LRS Manager confirmed that if an incident occurs that the relevant employee records the incident on the back of one of these staff sheets.

The LRS Manager provided a copy of what he testified was a sign posted in the back of the LRS where the time sheets are located and where staff members cash in and out. He testified that this sign is meant to be a reminder to the Licensee's staff (Exhibit 2, page 7). This document states:

MAKE SURE YOU ARE ASKING FOR I.D. !!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!
ASK ANYONE WHO APPEARS TO BE UNDER 25 !!!!!!!!!!!!!!!!!!!!!!!
THEY MUST HAVE TWO PCS AND ONE MUST BE PICTURE I.D.
NO I.D. NO PURCHASE !!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!
THIS MEANS YOU.

Similarly, the LRS Manager produced a copy of a handwritten sign dated October 31, 2014, and signed by him (Exhibit 2, page 13). He stated that this document was presented as an example of what he will do around times that he suggests might be busy, such as Halloween, Christmas Eve or New Year's Eve. On these dates, he testified,

he will provide a handwritten sign similar to this document and will post it on the counter at the front of the store as an extra reminder to the staff.

Exhibit 2, Page 13 states:

PLEASE MAKE SURE YOUR (sic) EXTRA CAREFUL WITH CHECKNG I.D.
TONIGHT !!!!
SOME CUSTOMERS WILL BE DRESSED UP DON'T LET THAT FOOL YOU.
NO I.D. NO PURCHASE. THANKS.

A copy of a third sign (Exhibit 2, page 19) was introduced into evidence by the LRS Manager as an example of a sign which he testified was posted in the back and in the front of the LRS every summer when high school students started summer holidays. The purpose of this sign was to serve as a reminder to the staff of the Licensee to be sure to check for identification. This sign states:

JULY 1, 2013
TO ALL STAFF
THE LIQUOR CONTROL BOARD IS GOING TO BE SENDING MINORS INTO
LOCAL LIQUOR STORES TO SEE IF STAFF ARE ASKING FOR I.D. ! MAKE
SURE YOU ARE CHECKING ID.

On cross-examination, the LRS Manager stated that since he had been manager of the LRS that there had been no updating to the signs used in the LRS with respect to asking for identification.

Upon hiring, the LRS Manager testified, each new employee is provided with a copy of a document entitled "KENNEDY'S LIQUOR STORE POLICY AND DUTIES" ("First Policy Document")(Exhibit 2, pages 8-10) together with an additional document which he testified contain additional policy and rules of the Licensee ("Second Policy Document") (Exhibit 2, pages 14-18).

He stated that either he or the LRS Assistant Manager took the new employee through these documents on an item by item basis. The new employee is required to complete, date and sign the First Policy Document confirming that the employee has read this policy statement and understands it fully. Included in this confirmation is that the new employee acknowledges that failure to comply with any of the items listed in this document will result in "1st a verbal warning, 2nd a written warning, and 3rd termination of employment". Once signed, he testified, the document is kept on the employee's employment file.

The First Policy Document contains 17 items, with item 1 stating that "There are to be no cellular phones used while on shift. No personal call on store phone, unless it is an emergency." Item 17 is the one that the LRS Manager emphasized in his testimony with this item stating:

17. I.D. MUST BE ASKED FOR. ANYONE UNDER 25 SHOULD HAVE TWO PIECES AND MUST SHOW THEM WHEN ASKED. IT IS EVERYONES DUTY TO ASK FOR I.D. YOU MUST HAVE YOUR PARTNERS BACK IN THIS MATTER. IF ID CAN NOT BE PRODUCED THEN THE SALE MUST NOT HAPPEN. IT IS THE LAW AND YOUR S.I.R. IS DEPENDENT OF THE FACT THAT YOU WILL ASK FOR THE REQUIRED I.D. EVEN IF YOU KNOW THAT PATRION (sic) UNLESS YOU HAVE A COPY OF THEIR I.D. YOU MUST ASK. PLEASE FOR YOUR OWN SAFETY ID ID ID"

The Second Policy Document commences with a policy entitled "CASH HANDLING RULES", and sets out 17 of the Licensee's policies ending with the policy entitled "ROBBERY PROCEDURES". Included among these policies is a policy entitled "S.I.R. COMPLIANCE" and states:

All staff are required to have a serving it right certificate prior to starting employment here. All staff are required to follow the rules set out by the liquor control board and must ask for 2 pieces of identification when a patron under the age of 25 is in the store and is trying to make a purchase or is touching the products with the intent of purchasing. I.D. that is accepted BC drivers, BC ID,

Picture Student ID with Social Insurance, Birth Certificate, Passport, Gun License, and Medical Card.

On cross-examination, the LRS Manager confirmed that the Licensee upgrades its policies from time to time as the situation requires, but has no specific process for reviewing its policies. When asked if there was any specificity in the First Policy Document or in the Second Policy Document as to what type of identification an employee of the Licensee was to ask for when requesting a primary or secondary identification, the LRS Manager confirmed that there was not.

When on cross-examination the LRS Manager was asked if he had recently updated the terms of the Second Policy Document, he confirmed that he had not. He also confirmed that he was aware of a new British Columbia Services identification card that had recently been available, that he was not aware of reference to this card in the Guide, and that neither the First Policy Document, nor the Second Policy Document had been updated to reflect this new form of identification. However, he stated, each employee has been advised verbally that there must be two pieces of identification and that one of these documents has to have a picture of the patron and the other must be a form of government identification.

The LRS Manager introduced into evidence (Exhibit 2, page 11) a document entitled "RECORD OF I.D. REQUESTS BY HOUR PLEASE INITIAL WHEN YOU ASK FOR I.D." He testified that a blank copy of this document was provided to each employee at the start of each shift and was then collected from the employee when he or she cashed in. The purpose this document, he testified, was to serve as a record of the number of times an employee asks a customer for identification, with the completed document reviewed on a regular basis by management and then stored.

He testified that this document was kept at the till with the purpose of making the employee aware of the need to ask for identification and enabling management to be aware of how often customers are being asked for their identification. By way of example, the LRS Manager produced a copy of one of these sheets that had been completed on Halloween, October 31, 2014, (Exhibit 2, page 12).

On cross-examination, the LRS Manager confirmed that both the example of the sheet recording the number of times an employee requested identification (Exhibit 2, page 12), and the handwritten sign (Exhibit 2, page 13) were dated October 31, 2014, a date after the date of the incident involved in the Contravention Notice. He confirmed that he did not have an example of either of these documents from July 21, 2014, the date of the incident. He agreed that the sheet to record identification requests (Exhibit 2, page 11) did not have a place for the employee making the entry to specify why the patron was asked for identification, similar to the type of entry that might be made in an incident log book.

The LRS Manager also confirmed that he had not produced any agendas for staff meetings, minutes from these meetings, records of follow up proceedings from items dealt with at these meetings, or attendance sheets. He also testified when asked on cross-examination that apart from requiring that each employee have SIR, that there is no specific additional training or testing of their knowledge required of each employee, nor is there a mystery shopper program instituted. Nor, he advised, was there a form of written guide in the LRS to assist staff in determining what constituted an acceptable form of identification.

When asked on cross-examination if the Licensee had a policy of excluding minors from being in the LRS with other customers who have identification, the LRS Manager confirmed that it was the Licensee's policy. However, he agreed that this policy was not referred to in either the First Policy Document or the Second Policy Document. Similarly, the LRS Manager confirmed that it was the Licensee's policy to exclude from the LRS adults who attempt to bootleg liquor to minors, but that this policy was not stated in writing.

The Cashier

The Cashier testified that she has had her SIR for over 20 years and that this was the first time that something of this nature had occurred.

She stated that immediately prior to the incident for which the Contravention Notice was issued, she had been dealing with a police officer who had come into the LRS and had asked her to find some tapes dealing with a police incident that the officer was investigating. When Agent #56 came to her till, she testified, her mind was still on looking for the requested tapes, and, therefore, she wasn't focusing on the transaction with Agent #56. She confirmed that she sold liquor to Agent #56 without asking him for identification. She testified that normally she would have asked Agent #56 for identification, but because there was so much going on in the confusion she did not do so.

On cross-examination, the Cashier testified that, other than an upgrading to her SIR a number of years ago, she had not taken any additional training since starting to work for the Licensee. She also confirmed that she believed that she had not before seen a copy of the Guide and that she did not have any specific recollection of having been shown information received by the Licensee with respect material published by the Branch on MAP.

LRS Assistant Manager

The LRS Assistant Manager testified that the LRS is a neighbourhood store so most of the customers are known to the staff. She stated that she taught at the local Catholic School and that she sits on the parents' advisory committee, so she knows many of the minors in the neighbourhood and is well aware of their age.

SUBMISSIONS – BRANCH

The Branch submitted that the Licensee has admitted to the occurrence of the facts leading to the issuance of the Contravention Notice, as such facts were outlined in the NOEA and further supplemented by the testimony of Liquor Inspector A and Liquor Inspector B.

The Branch submitted that the policy and procedures material used by the Licensee to train its staff has not been updated over time to reflect changes made to the material contained in the Guide. The Branch noted that the Licence is specifically stated to include the terms and conditions contained in the Guide as the Guide is amended from time to time. Specifically, the Branch submitted, the Licensee has not provided updated training to its staff with respect to the policy concerning the identification of minors as provided in the current edition of the Guide.

Concerning the materials submitted by the Licensee as contained in Exhibit 2, the Branch submitted that although it is unclear whether or not all the employees were aware of MAP, these materials constitute some evidence of the Licensee taking steps towards creating policies and procedures to prevent the sale of alcohol to minors. However, the evidence suggests a lack of implementation of these policies and procedures in a manner pithy enough to prevent such sales. And any procedures implemented by the Licensee following the incident referenced in the Contravention Notice are not relevant to the matter at hand.

The Branch submitted that the materials contained in Exhibit 2 to a large extent do not sufficiently emphasize the important requirement to prevent the sale of liquor to minors given the public safety concern involved with such sale.

As to the matter of penalty, the Branch submitted that as this is the Licensee's first contravention, the minimum recommended penalty here of \$7,500 is reasonable and appropriate.

SUBMISSIONS – LICENSEE

The Licensee agreed that the Cashier sold liquor to the minor agent on July 21, 2014. Such an incident has not before happened to the Licensee and it does not take this lightly. Serving alcohol to a minor is a major mistake and is uncharacteristic of the Licensee's staff as they are refusing service to underage customers on a regular basis. This incident slipped through the cracks. Without the extenuating circumstance, it wouldn't have happened.

Even though its policies might not be government-issued and by the book, the Licensee submitted that its policies, including the prohibition against the sale of alcohol to minors, are expected to be followed by the Licensee's staff and followed to the best of the staff's ability. The ID requirement is talked about every day, it is posted by the door and by the till. The staff is constantly reminded of this requirement.

The Licensee submitted that it has a full defence to the contravention as shown by its policies and procedures that were in place at the time of incident for which the Contravention Notice was issued.

The Licensee submitted that the directing mind was not on site at the time of the contravention, as the Licensee's Representative, the LRS Manager, and the LRS Assistant Managers, as the creators of the policies for the Licensee, are the directing mind of the corporate Licensee and none of these parties were present at that time.

The Licensee pointed out in its submissions that the LRS Manager has eight employees who are constantly discussing matters among themselves, matters which make a huge difference in the business. And not serving liquor to minors is definitely one of these matters. The Licensee's policies and procedures are not that bad. There are lots of bulletins put out, and with the assistance of the Branch, the Licensee might be able to do a better job.

REASONS AND DECISION

Contravention

The Licensee has admitted that the contravention of section 33(1)(a) of the Act occurred on July 21, 2014. I find, therefore, that the Licensee contravened section 33(1)(a) of the Act by selling liquor to a minor.

I turn now to the defence of due diligence.

Due Diligence

As the Licensee has admitted to the contravention of section 33(1) of the Act, the Licensee is liable unless it can demonstrate that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensee must not only establish procedures to identify and prevent from happening activities that might lead to this contravention of the Act, it must ensure that such procedures are consistently in operation and acted upon by its employees.

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

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

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

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

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.

2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a "directing mind" must be on the premises when the sale is made), then the questions to be considered and answered are whether the Licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

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

Directing Mind

I find that the Cashier was not the directing mind of the Licensee and that the directing mind of the Licensee was not present at the LRS during the incident on the evening of July 21, 2014.

I move to the second part of the analysis as set out in *Beverly Corners*.

Implementation of Adequate Training and Systems

I find that the Licensee had a number of systems and policies in place with respect to checking for identification of minors at the time of the incident. These include:

- A policy of requiring its employees to check identification of anyone who appears to be under the age of 25
- The requirement for all staff to have the Serving It Right certificate
- Daily work sheets on which each employee signs off, which sheets include a reminder that staff must ask anyone who looks as though they may be under 25 years of age for two pieces of ID
- Daily verbal reminders from the LRS Manager and/or the LRS Assistant Manager about the importance of checking ID

- Notices posted at the back of the LRS and at the tills reminding staff of the requirement to ask for ID during periods when the LRS was expected to be busy, such as Halloween

With respect to the training of employees, I find that there is little evidence about the training given to new employees or updated training for existing employees.

The Licensee has no written instructions for its staff, similar to the information about verification of identification as set out in the Guide (tab 1, tab 9, pages 21 & 22).

The LRS Manager presented evidence about daily reminders to staff about checking for ID and that ID checking is reinforced at staff meetings. These reminders are an important element of any system to ensure that staff members are aware of the Licensee's ID policy; however, they are only one aspect of an effective system.

The Licensee does not record ID checks in a logbook to use as a training tool in making employees aware of the importance of these ID checks.

I find that the Licensee has policies with respect to identification of anyone who appears under 25. However, I find that the evidence of the staff training falls well short of establishing that the training was adequate to prevent the contravention of selling liquor to minors.

I turn now to the question as to whether the Licensee has taken reasonable steps to supervise and monitor its operations in a manner sufficient to ensure the effective application of its training in the actions of its staff members and in the operation of its risk-reducing systems.

Effective Application and Operation of the Systems

As noted above, the Licensee has a stated policy of requiring staff to ask for ID of anyone who appears to be under 25. I find that the Licensee has not proven on a balance of probabilities that these systems are effectively applied in the operation of the LRS.

The Licensee has presented some documentary evidence to show that staff members receive information at the time of their hiring and that they are regularly reminded of the Licensee's ID policy. Exhibit 2 includes:

- First Policy Document; and
- Second Policy Document

The Licensee did not provide any documentary evidence that the Cashier had signed any of the above forms.

Both the LRS Manager and the Cashier were quite vague when asked about their knowledge of the Guide. It appeared that the Licensee considered it sufficient that a dated Serving It Right certificate was all that was required.

The test for due diligence is not perfection. The test is whether a Licensee has implemented adequate training and other systems and taken reasonable steps to ensure the application of this training and the operation of its systems in a consistent and effective manner.

I have no doubt on the evidence before me that the Licensee and all members of its staff take their position as a neighbourhood enterprise very seriously and are extremely distressed by the mistake made by the Cashier in selling alcohol to Agent #56. I also take them at their word that they are very conscious of their previous unblemished record and will take steps to ensure that such a mistake will not happen again. It is the goal of the Branch to achieve such compliance.

However, unfortunately for the Licensee, good intentions are not sufficient to meet the test for due diligence. The onus is the Licensee to prove that it has met this test and on the evidence before me, I find that the Licensee has not met this test and proven the defence of due diligence on a balance of probabilities.

Having concluded that the defence of due diligence fails, I find that the Licensee is liable for the contravention of 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

MAP demonstrates the Branch's intention to ensure that licensees are not serving or selling liquor to minors. The Branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities. Despite those initiatives, a 16 year old minor was able to purchase liquor from the Cashier, 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 a licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for the Licensee 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 voluntary 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 February 13, 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

R. John Rogers
General Manager's Delegate

Date: January 9, 2015

cc: Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Rupi Gill, A/Regional Manager

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