



**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:	Cascadia Brewing Company Ltd. dba Rogue Kitchen & Wetbar 602 Broadway W Vancouver, BC V5Z 1G1
Case:	EH15-068
For the Licensee:	Eli Gershkovitch
For the Branch:	Hugh Trenchard
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	September 22 & 23, 2015
Date of Decision:	December 9, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Cascadia Brewing Co. Ltd. (the “licensee”) owns and operates the Rogue Kitchen & Wetbar at 602 West Broadway Street, Vancouver, BC (the “Rogue”). The licensee holds Food Primary Licence number 305012 for the Rogue. Mr. Gershkovitch is a principal of the licensee, and appeared as the licensee’s representative at the hearing. For ease of reference, he will be referred to as the “licensee.”

According to the terms of its licence, the Rogue’s hours of liquor service as a food primary facility are from 9:00 a.m. to 1:00 a.m. from Sunday to Thursday inclusive, and from 9 a.m. to 2 a.m. on Friday and Saturday.

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”).

The licensee is alleged to have contravened the *Liquor Control and Licensing Act* (the “Act”) on May 23, 2015, by selling liquor to a minor who was acting as an agent for the Liquor Control and Licensing Branch (“branch”) under the Minors as Agents Program or “MAP.” Legislative changes allow the branch to engage minors for the purpose of testing licensee compliance with the provisions of the liquor legislation that prohibit the sale of liquor to minors.

The branch alleges that the licensee breached section 33(1)(a) of the Act by selling liquor to a minor, and proposes a penalty of \$7,500 for the contravention. The branch submits the evidence establishes an individual who was engaged by it was a minor, and was sold liquor by an employee of the licensee on May 23, 2015. The elements of the offence under section 33 of the Act are therefore established.

The licensee does not take issue with the age of the minor agent, or the fact that she was a minor at the time the contravention took place. Instead, prior to the contravention, it had acted with due diligence, and at the time of the time of the contravention it acted upon a reasonable but mistaken state of fact. As a result, a contravention is not established.

ISSUES

1. Did the contravention as alleged take place?
2. If so, has the licensee established a defence to the contravention?
3. If the contravention is proved, what penalty, if any, should apply?

EXHIBITS

Exhibit 1: branch book of documents;

Exhibit 2: branch - pictures of the minor agent;

Exhibit 3: licensee - Sign inside the Rogue advising that identification will be requested if appearing under 25 years of age;

Exhibit 4: licensee – Black and White Rules

Exhibit 5: licensee – Pre-shift Notes January 22, 2015

Exhibit 6: licensee – Pre-shift Notes February 5, 2015

Exhibit 7: licensee - Picture of typical White Board

RELEVANT STATUTORY PROVISIONS:

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (“Act”)

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

BRANCH EVIDENCE ON THE CONTRAVENTION

While the licensee does not dispute the occurrence of the contravention, the matter in which it occurred is relevant to its defence of the diligence. I will therefore set out the evidence of the contravention in some detail.

Liquor Inspector A testified about the events leading to the issuing of a Contravention Noticed ("CN") against the licensee. Inspections are carried out routinely for the purpose of ensuring the public safety. Typically, they involve ascertaining that the licence of a facility is appropriate for the use that it is being put to, that the floor plan in place is valid, and that the licensee is purchasing liquor from an approved source. The Rogue on Broadway falls within the region where the Liquor Inspector normally carries out inspections.

During his inspections, the Liquor Inspector normally discusses the Branch's Minors as Agents Program ("MAP".) Under MAP, the branch is permitted under a provision of the Act to engage the services of minors to assist in the testing of compliance with the prohibition of selling liquor to minors. Licensees were also advised of the program by publications issued by the Branch from time to time.

The Inspector identified the Guide which is applicable to Food Primary licenses such as the one held by the Licensee. It provides *inter alia* that the licensee is responsible for understanding its role in respect of the application of the Act. Service to minors is specifically mentioned as a contravention.

On May 23, 2015, the Liquor Inspector was involved in conducting MAP inspections. Prior to setting out, he took pictures of the minor agent which confirmed the manner in which she was dressed for the inspections. Pictures were also taken of her ID to establish that she was a minor at the time.

The Rogue was one of the facilities selected for inspection by the Regional Inspector of the branch. Six inspections were conducted on the day in question. Of these, three of the establishments asked the minor agent for identification.

The minor agent entered the facility of the licensee at about 4:30 p.m. She sat in an area of the premises that was relatively empty. The seating consisted of high stools and tables. Once seated, the minor agent was approached by a server. The Liquor Inspector observed a conversation between them but could not hear what was said. Later, the server brought the Minor Agent a bottle of Smirnoff Ice. She was not asked for identification. After this, the liquor inspectors took control of the bottle of alcohol, and spoke to the manager on duty about the incident. Photographs were taken of the alcohol, and of the receipt which was provided for purchase of the product.

The Liquor Inspector testified that the inspectors decided to take enforcement action against the licensee because of public safety concerns surrounding the sale of liquor to minors. In particular, the concerns relate to the effects of alcohol on young minds, and the fact that impaired judgment may lead to actions which will put the public at risk. The penalty of \$7,500 was selected because it represents the lowest monetary penalty available for a first contravention under the *Liquor Control and Licensing Regulation* ("Regulation"). While a suspension was also available for a first contravention, it was felt that it would unduly punish staff.

In cross-examination, the Liquor Inspector agreed that the minor agent was seated in an open area in the Food Primary section, and so minors were entitled to be there without being asked for identification first. The hostess, therefore, would not normally require identification before seating people in this area. The Inspector agreed that the statutory requirement is to ensure that patrons are 19 years of age or over while signs in the facility stated that staff were required to check for identification from anyone who appeared to be under 25. The Liquor Inspector also recalled having inspected the facility several months previously and had no concerns at that time. The Inspector recalled that the MAP was discussed during the previous inspection.

The Liquor Inspector stated that no Contravention Notice was given to the server who had provided liquor to the minor agent although there is a penalty under the Act for individuals who provide service to minors.

Liquor Inspector B testified that she has been involved in the liquor licensing process with the branch for about 11 years. Part of her duties are to inspect licensees in the downtown Vancouver area. She inspects all types of licenses that are issued by the branch. During the inspections, she is concerned about public safety issues such as overcrowding, over service, and service to minors. During her time with the branch, she has been involved in thousands of inspections of liquor facilities, including food primary facilities such as the Rogue. Normally, a list of the inspections that are to be carried out is provided by the Regional Inspector of the branch in her area.

Liquor Inspector B described the process used prior to engaging in the MAP inspections in a similar vein to the prior evidence of Liquor Inspector A. She recalled that they went to inspect the Rogue at 4:34 p.m. The minor agent who was engaged in the inspections was identified by the number #71. The inspectors followed right behind the minor agent when she entered through the front doors of the Rogue.

Liquor Inspector B recalled that the minor agent went into lounge area on the right side of the restaurant. Both inspectors had a good view of her when she was seated as she was about 15 – 20 feet away. It was still day time and the lighting was good. There was a bit of a lull in service, and the server was behind the bar initially. She brought a menu to the minor agent, and later returned to take her order. The server and the minor agent were physically close when the order was taken but the server did not stay long at the table. The table itself was of the higher style, and there were no other customers in the area at the time. The facility seemed to be at about 50% capacity at the time but it was not busy in this particular area.

The Liquor Inspector could not hear the conversation between the minor agent and the server, but she next observed the server leaving and returning with an alcohol drink. As she was trained to do, the minor agent excused herself, and the liquor inspectors went to her table. Once there, they asked to see the manager on duty.

The Liquor Inspector issued a Contravention Notice against the Rogue. This was given to the person who was identified as the manager on shift at the time. As far as the selection of a penalty was concerned, Liquor Inspector B also testified about the public safety issues surrounding the sale of liquor to minors. She observed that the Schedule in

the Regulation allows a minimum monetary penalty and/or a 10 day suspension of liquor service. The Rogue operates as a food primary, has an appropriate record of liquor purchases from the Liquor Distribution Branch, and also has a good compliance history. In the circumstances, a monetary penalty was considered to be less punitive than a licence suspension.

The Liquor Inspector testified that in her opinion, the minor agent looked like a young girl. She was 17 years of age at the time the contravention occurred, and nothing was done to make her look older. The training of minor agents is done by other inspectors but they are told before going out to inspect liquor facilities that they should dress normally as they would in daily life.

In cross-examination, the Liquor Inspector agreed the area where the minor agent sat was not in a lounge area where an individual must be an adult to be seated. The Inspector did not issue a violation ticket upon the server, and had never issued one in her time with the branch. She agreed that the restaurant is built on an open space plan, and there are good site lines. She agreed that the server was not busy in the area around where the minor agents sat. As well, the minor agent was not fidgety, and appeared to be composed when she was seated. She observed that some minor agents will look at their cell phone, and the branch will permit this if it makes them feel more comfortable.

Minor Agent and Server Evidence

The minor agent was called by the branch to testify upon the request of the licensee. She is 17 years of age, the same age she was at the time of the contravention. She has been in the MAP for about 1 ½ years. Her interest in the program developed as a result of her sister who had been involved in a similar program for tobacco sales. Prior to going out on inspections, she was given a one day training course in which she learned to fill in the appropriate reporting forms required by the branch. Prior to going out on the road on inspections, she always meets with the inspectors to be photographed along with her identification. The clothing she wears on inspections is what she would normally wear to school. She is told to look like she would normally, and not make any changes.

The minor agent did not recall how often she was asked for identification on the day that the Rogue was inspected. As a rule, she is asked for identification in about 25 – 50% of the facilities that she visits.

Upon entering the Rogue, she walked past the hostess into an area of raised tables and sat down. A server brought her a menu including a happy hour menu. She was asked if she would like a drink. She ordered a Smirnoff Ice, and the server went to the bar to get it. She always orders the same drink on inspections because it is easy for her to remember. The server brought her the drink without asking for identification. When it was delivered, she looked at her inspectors and then left the table. It was about 4:30 in the afternoon at the time.

The minor agent recalled that she and the server were close together when her order was taken. They made eye contact. At the time her hair was darker than it was when she testified. There were no other changes to her physical appearance. In her opinion, some of her peers look older than her while some look younger.

In cross-examination, she stated that she is 5'10" tall. During inspections, she normally wears flat shoes. Compared to the server, she stood about 6 inches taller. After she was seated, she looked at her cell phone to check the time. She agreed that she normally appears confident and poised. She recalled that the discussion with the server was cordial and hospitable. Her appearance was no different than when she testified because she does not wear a lot of makeup. She described her clothing style as casual and younger looking. She likes to wear comfortable clothes. Her inspections to date have included licensed retail stores and government liquor stores.

The server also testified about the incident involving the minor agent. She was 26 years of age at the time. She graduated high school with an honours degree and has since obtained a Bachelor of Education from the University of Victoria. Since then, she has been teaching on call primarily as an elementary school teacher. There have been teenagers in the school where she taught, and as well, in the extracurricular school activities in which she has been involved.

Her hospitality career began at the age of 16 working for Earls Restaurant as a busser. She has had her Serving it Right certification, and had some training additional training in 2004 – 2007. In May 2008, she began working as a server and bartender at the UBC Golf course, and she is still employed at that facility. At the UBC Golf course, she was trained to ask for identification if there was any question about age. The policy there is to ask for identification from anyone who appeared to be 25 years of age or under. She had never experienced any incidents or problems working there.

The Server worked at the Rogue beginning in December 2014 or January 2015. The Rogue gave her two weeks of formal training at the outset of her employment. It began with General Manager Orientation. The General Manager discussed matters that were going on in the restaurant. Included in this was a fairly lengthy discussion about issues around liquor sales. The policy of the restaurant when she started was to ask for identification of any patron that appears to be under 25.

The Server testified that she was shown what are described as the “Black and White Rules” of the restaurant. These provide she would be disciplined if she did not ask for identification of any one appearing to be under 25. In fact, it was the policy of the General Manager that trained her to ask for identification from anyone who appeared to be under the age of 30, and always 2 pieces of proper identification was required. This meant that there had to be one piece of government ID with a photograph and other appropriate identification.

As well as this, during her initial training she received hostess training, and training in wine and beer service with a bartender. There was server training which included the policies of the restaurant on asking for identification once again. Following this, she worked on a shadow shift following another server, and then worked on a shift where she was shadowed. Before these shadow shifts, there were discussions about serving sizes, checking for identification, and ensuring there was no over service of patrons.

During her shadow shift, she worked with a manager. He asked for identification from some patrons, and they talked about what was required. After this, she worked a partial section shift, during which she was followed by the Manager that she worked under. He was explicit about the policies of the restaurant, and they have not changed. Since

she has worked following her training, she has been queried several times about whether she asked for identification from certain patrons. As well, she has spoken to managers on several occasions about the identification she has been given by patrons. The policy of the restaurant is that if there are any doubts, ask for identification. If a server feels nervous about asking, he or she can call a manager to ask instead.

The Server testified that there have been many occasions when she has turned people away. For example, some patrons will try to use a temporary driver's licence or some will say they forgot their ID. Also at the UBC Golf club, she has refused to allow a customer to buy 2 drinks, and when others joined the customer, she asked and found they did not have proper ID. She has also refused service for over service reasons. In one case at the UBC Golf club an issue of over service, they had to call a cab for the customer. The manager on duty took responsibility for this incident.

The Server testified that she has never knowingly served someone who is under age. If the ID looks unsuitable, she will ask the customer to confirm his or her address. For secondary ID, she looks for bank cards. This is compared with the primary identification to make sure the signatures match. She has asked people in their 40's for ID and probably weekly gets ID from people 30 and over. Sometimes there is push back from patrons but the practice is to say it is the law. Some patrons will walk if they do not have ID but they never walk for being asked.

The Server testified that they have frequent meetings at restaurant during which the issue of ID is discussed. She identified several pre-shift documents which are used by the restaurant to discuss current specials and other things that are going on in the facility. In each of these, there is a statement about the policy to check for identification for anyone who appears to be under 30. There is a pre-shift conducted by manager before each shift. The policy at the Rogue is stricter than UBC where the policy is to ask for ID from anyone who appears to be under 25. As well as the pre-shift documents, there are Traffic Light stickers posted in the restaurant. These referred to asking for identification for anyone that appears to be under 25, and they set out year in which ID is needed. They are posted in conspicuous places.

The Server testified that as an educator, she is aware of the problems arising from minors using alcohol, and would not deliberately allow it to happen. It is not an issue with elementary students usually.

On May 23, the Server recalled that she was responsible for all of high top tables in lounge area. The volume was light. She saw the minor agent as she came in and sat down. She is very tall, and the Server assessed her as being her age, 26 or 27. She based her assessment on the appearance of the minor agent, and the way in which she was dressed. She was wearing things that the Server often wore. As well, she ordered a Smirnoff Ice like someone who knew what she wanted. This was significant because the product is not on the menu of the restaurant, but is ordered by some of the regular patrons. The Server thought that the minor agent appeared to be her age, not like students she had seen at the UBC Golf club. Therefore she had no reservation about serving the minor agent using her own age as a marker. This turned out to be a bad error in judgment.

On cross-examination, the Server testified that she had been provided with a training manual that was several inches thick before she began her scheduled training. At the start, they went through everything that was in the manual, including the pages on service to minors. She did not recall any specific training in the manual about how to assess age but it was discussed frequently. The process is subjective, and it is not easy to tell on some occasions. The Server said that she is normally fairly accurate about assessing age although clearly not in the case of the minor agent. She testified that she assessed the age of the minor agent to be the same as hers. Given that she is under 30, under the policy of the restaurant, she should have asked for identification. She thought that she might have mixed up the policy of the restaurant with the policy at the UBC Golf club.

The Server testified that the restaurant does not have an incident log for asking about identification because it happens so frequently. There are, however, pre-shift meetings before each shift in which asking for identification is a standard item on the agenda.

She agreed that she was not busy on the night in question. Even when the restaurant is busy, however, the policy is to ask anyway. Moreover, she was not distracted by other matters personally. Instead, she was struck by what the minor agent ordered, by the fact she was on her own, and her confident appearance. In a group setting, she might have been more inclined to ask her for identification.

The Server said that staff talk about incidents where customers are turned away. It is part of the culture, and staff are supported because there is the strict policy against service to minors. Moreover, there was no confusion in her mind about the distinction between asking for identification from customers who appear to be under the age of 30 as opposed to those appearing to be under the age of 25.

The Server said she had not discussed MAP at the restaurant prior to the incident. She was made aware afterwards by staff. She said that asking for identification often lead to resistance from customers but she is always backed up by management. Staff always back each other up. They may ask each other if a table of patrons has been checked for ID.

General Manager

The General Manager has been employed at the West Broadway Rogue facility since October 2014. There are four related restaurants in the chain altogether. He began working at one of the other facilities as a busser in 2009. He worked to a management position after one year. He worked as an Operations Manager, then Assistant General Manager, then to his current position.

Along the way, he was trained at each position. The policy of the licensee on serving minors was taught right from the beginning. It is part of the "Black and White Rules" in the manual. Do not serve. There are no grey areas in the policy. Server training stresses asking for identification from anyone who appears to be under 25 years of age. As well, when there are large parties in the restaurant, care has to be taken to ensure that adults do not provide liquor to minors.

The server who was involved in the MAP incident was hired in December 2014 and began her server training in January. His introduction, called the General Managers Orientation or GMO, takes 1 ½ to 2 hours. The issue of service to minors is covered in each session. It is covered again near the end of training because people may lose attention. There is also a stress on no drinking on shift, and no liquor or drugs on site.

It takes a server 2 to 2 1/2 weeks to get on floor. Server specific training also involves waiting tables, dealing with customers, and dealing with kitchen staff. The policy of the General Manager is that identification is to be requested from anyone who looks to be under the age of 30 years. In his opinion, it is too hard to tell a person's age otherwise. Different racial profiles also make estimating age difficult. The General Manager therefore tells staff to check identification for customers appearing to be under 30. It is not a policy of the licensee, it is his policy. It comes up when new staff are involved in their shadow shifts because the restaurant does not know about their past training. In his experience, the server was involved in the MAP incident never had a problem asking for ID. When she was busy, she would often ask him to check her tables for ID.

The General Manager testified that there are pre-shifts for staff two – three times per week. The subjects for discussion are concerning what is going on in the restaurant at the time. For example, staff may need to know that the restaurant is out of certain items. As well, there may be new beers available, and staff need to know about them as well. During these pre-shift meeting, the practice is to reiterate the issue of checking ID for minors. It is normal get one of staff to talk about the issue so others don't fail to pay attention. Servers are trained to ask management to ID guests if they feel uncomfortable. For example, some of the younger servers may feel uncomfortable asking guests for ID who appear to be older than them. If so, a member of management will do it instead.

Issues about ID come up 5-7 times per week on average. The ownership of the restaurant also discusses the issue of service frequently. Special attention is needed during the holidays such as Halloween when people are in costumes or when large parties come together for events like Xmas parties. The rule of ownership is there are no grey areas. There is always a member of management on the floor. One of the functions of management is to double check to ensure whether guests appear to be over 30 years

of age. The restaurant is based on an open plan, so it is easy to scan the whole room at once.

Pre-shift records were kept by hand at one time. Now, the practice is to use a whiteboard which includes a reminder about the issue of checking for ID. There is a culture among staff to check for ID. They talk about incidents that occur involving their ID checks. As well, management will ask as they do their rounds about ID checks, whether two pieces of identification were looked at, etc. During the crossover between shifts, managers and floor leaders talk about issues which always include ID. Employees wonder a bit about the under 30 policy at the Rogue when posters show the age to be 25. Senior management, however, has supported the policy of the General Manager. It does not lead to confusion among staff in his experience.

The General Manager was questioned about using a log book at the restaurant. There is one that is kept by management. In the bigger restaurants, a log book is needed for all staff. About the whiteboard which sets out pre-shift notices, he testified that there is always a notice about checking for identification. There is also policy about how to hand off tables between servers that is set out in the manual.

The Floor Manager at the Rogue also testified about staff training and supervision. Training begins with the GMO. It covers orientation about the company and how it is run, and about the position the employee is going to fulfil. Always included is a discussion about liquor service and asking for identification. The "Black and White Rules" are always discussed. The first item in these is asking for identification from customers who appear to be under 25. There is no ambiguity on this issue. There is also discussion about acceptable forms of identification.

The Floor Manager does not train staff but instead, follows people who have been trained. Employees who are on shadow shifts are followed, and questioned after their shift. Employees are questioned whether or not they have asked for identification from customers. He also supervises partial sections in the restaurant. This is an opportunity to ensure that employees are acting in accordance with company policies. Questions that may arise are addressed by management. For example, a client from Honduras produced identification that was not familiar to the server. The Floor Manager was

called over and three – four pieces of identification were examined in order to determine whether the customer could be served.

The Floor Manager conducts 3 to 4 pre-shifts per week. The General Manager does the same number as well. They also both discuss what is being done on their shifts. Questions on the issue of asking for identification are discussed on almost every pre-shift.

Exhibit 7 was a picture from what was described as a typical whiteboard used in a pre-shift meeting. It sets out items missing from the kitchen or other areas, items that are no longer available, new items on the menu etc. The comment about asking for identification for customers appearing under 30 years of age is always present. The words are often changed so that staff don't gloss over the wording. The same kind of daily whiteboard was used in the weeks and months prior to the MAP incident.

The Floor Manager and the General Manager talk about pre-shifts during their crossover discussions. Issues of customer identification are discussed on a daily basis. The Floor Manager will also talk to servers about whether they asked for identification from certain customers. If the server does not feel comfortable, the Floor Manager will ask for identification instead. He also has discussions with servers on how to approach customers so they don't feel uncomfortable. There is always a manager on the floor available to staff.

Staff always pay attention to the issue of ID including the licensee's CEO. There is a culture of compliance in the restaurants, so the issue rolls smoothly. When the Floor Manager began working at the Rogue on Broadway, the age for asking for identification was 25. Now it is 30, and this change saves a lot of second-guessing. Now customers who are older are asked for identification. They may be grumpy about being asked but it is part of the job. Now customers who have grey hair and wrinkles are nevertheless asked for identification.

The Floor Manager does not train servers, but instead speaks to them about issues such as not serving when someone away from table or not letting someone buy for another customer. Bartenders are also trained to watch and ask whether a customer was ID'd.

The Floor Manager opined that the server who was involved in the MAP incident is known to be diligent at her job.

Evidence of the Licensee

The licensee acts as the CEO of the restaurant chain which includes the Rogue and also includes the Steamworks restaurant in Gastown. His past work experience includes legal work, and working in the human resources and labour relations field in Québec and Ontario. As result of this background, his focus is on human resources primarily. Part of this focus is to ensure compliance with the obligations of the licensee under prevailing liquor legislation. The focus of the management structure is of a strong and frequent interaction between staff and supervisors. The managers back up and educate front line staff, and supervise their activities. They are trained in issues of compliance in a number of areas, including asking for ID and avoidance of inappropriate liquor service. These concerns are driven from ownership down to management and from management down to staff.

The licensee deliberately does not train employees on factors pertaining to age. These factors can be misleading. For example, grey hair can be found in very young individuals. The position of the licensee is to ask for ID if there is any doubt, and do not analyze age based on appearances. As a result, the staff training manual does not set out indicia for determining the age of customers. There will always be an exception, so consciously it is part of the training of staff that if in doubt ask. The licensee conducts spot checks frequently, and has done so since 2002, perhaps 1500 – 2000 times. There is a strong culture of compliance with house rules. If there are any issues among staff, they are referred to a manager for immediate follow up, and he will follow up at later date to ensure compliance.

Managers are encouraged to work on the floor, not stay in their offices. While a reasonable customer is always right, the manager will back up employees when there are disputes over bills, issue of continued service, issues of ID produced, etc. There is a balance between supervising staff, and allowing them some latitude. An example is when the General Manager of the Rogue raised the age for checking ID to 30 and under.

He wanted to be extra diligent, and he was supported in his efforts. The change was approved for this restaurant.

The licensee often takes his family to the restaurant and when there, focuses on issues of oversight. Service to minors is an issue, and he is aware of the MAP. Determining age is a subjective exercise, and so does require oversight. Staff are questioned randomly at all facilities, often when they are busy so one can see if the policies are working. Spot checks are effective as a motivator. He tries to be systematic. This incident is the first time there have been issues with staff and the MAP.

Service to minors can be an issue at Halloween because people are dressed in costumes. Staff are given alerts and reminders to be vigilant. The licensee attends at the facilities on Halloween to be sure policies on ID and over service are followed. Similar actions applied to the Xmas party season beginning at the end of November. Staff engage in discussions about higher volumes. Families go to parties too, so there is a need to renew vigilance. Next is St. Patrick's Day because it is a drinking holiday. Memos to staff are not enough, there is a need to seeing what is going on directly. The next holiday to be vigilant on is the Victoria Day long weekend, followed by the Canada Day long weekend. There are good intervals between holidays, and almost daily reminders to staff in pre-shifts and in training. Hyper vigilance was necessary during the Olympics and during Canucks playoffs.

Pre-shift boards are strategically designed so they have continued impact. The culture of compliance is applied in a manner that engages staff instead of lecturing them. The employee training manual is 109 pages thick, so there is a need to have certain items stick out. The Black and White Rules do this because they consist of only one page and no ambiguity in their application. The licensee is the penultimate check on the culture of compliance and staff vigilance. In the past he has also used secret shoppers. One was an employee who was 20 but looked young. In August of 2013 he went to all of the licensee's restaurants. He was a kitchen employee so was not recognized. He was asked for identification at all of the restaurants. The licensee's son was used in the Fall of 2013 and the Spring of 2014. He was attending at the University of Victoria, so was not well known in the restaurants. He was 22 years of age at the time and was asked for identification at all facilities.

In hiring, the licensee tries to engage mature individuals who normally have life experience elsewhere. The server who was involved in the MAP incident is a good example. Persons like her will normally make good decisions. She knew the policy of asking for identification from customers who appear to be under the age of 30, and has a good record of asking for help and of rejecting improper ID. She made a bad judgment call, and her experience is now in the cycle of discussion. She used her own age as a guideline. Now the licensee has added as a policy that staff should not use their own age to try and assess the age of customers. This was not the case where a server acted totally unreasonably.

In cross-examination, the licensee was asked if it would now include training on indicia of age. He continued to maintain that this approach is misleading, and if there is any doubt, one is to ask. If a server feels uncomfortable doing so, he or she is trained to ask a manager to help. Staff are told not to rely on any one factor to determine or assess age. Doubt is the issue, and verification is the key. All staff are required to make judgment calls. Demographics about age are stressed in training, and if there are any doubts, ask. The restaurant is not like a licensed retail store where staff work unsupervised.

ARGUMENT – THE BRANCH

The branch did not provide a detailed submission. It submits that on the balance of probabilities the evidence satisfies the three elements of a contravention of section 33 of the Act. There was a minor, she was inside the licensed area of the Rogue on May 23, 2015, and at that time was sold liquor by the licensee. On the defence of acting on an honest mistake of fact, the seminal authority of *R v. Sault Ste. Marie* (1979) 2 SCR 1299 provides that there must be a mistake made on a reasonable state of fact. In this case both the licensee and the branch agree that it is difficult to determine age. Both agree that appearance is not necessarily an indicator of age. Even baldness or gray hair may be found in people who are minors. Demeanor as well is not determinative. This server had experience as a teacher, and saw teenage students on the school grounds where she taught, so was aware of the features of younger teenagers. In this context it was not reasonable for her to conclude the minor agent was 25 or 26 years of age, and so could not in the circumstances conclude she was reasonably over 19. It is difficult to determine the threshold of a reasonable mistake of fact but it was not met here.

ARGUMENT – THE LICENSEE

The licensee begins by observing that if the branch views training on the indicia of factors which determine age is efficacious, it should have provided evidence to that effect. There was no such evidence provided here, and while it is an interesting theory, it is only a theory. The licensee submits it would not know how to apply factors which are an indicia of age because they are unreliable. The determination of age is complex, and such training would not lead to a better result but instead would be distracting.

It is not disputed that the minor agent was under the age of 19 and was given alcohol by the licensee. On the evidence, Liquor Inspector A would not give a guess as to age of minor, not even to give a range. Liquor Inspector B was definitive – she is 17, and that maybe true based on her own age and experience. The Floor Manager did not see her in person, and said 19 or 20 based on the picture of the minor agent. The server thought that she was 26 – 27. This demonstrates the weakness of eye witness guessing about age. The variety of responses highlights the reason for the policy of the licensee on asking for identification whenever there is a doubt.

It is clear that the server turned her mind to the age of the minor agent in a serious way. She considered appearance, posture, circumstances including the fact that the minor agent attended the restaurant alone, and she also considered the type of drink that the minor agent ordered. If the server had properly applied the policy of asking for identification from anyone who appeared to be under the age of 30, she would have asked the minor agent for identification. There are two issues. First, did she attempt to determine the age of the minor agent reasonably? Second, did she follow the policy of the licensee on asking for identification?

There is no reason to believe the server would not normally ask for identification. Several instances were provided in the evidence where she did ask customers for their identification. The evidence provides indicia that the policy of the licensee works but for in this instance. The licensee submits that its documents should be considered in context of its culture and manner of doing business. The Black and White Rules stand out because they are the 10 commandments for staff. The first commandment is to check for ID. It is also part of the overall culture of compliance that after training the licensee continues to enforce these policies and to engage and dialogue with staff. Here the

evidence shows the licensee trains its staff, supervises them on an ongoing basis, and provides them with management support. There have been no other contraventions noted by the branch since 1995. The policies of the licensee are shown to be effective.

The licensee does not agree with the suggestion of the branch that training on the indicia of age is effective. There are significant risks of errors which would result in liability for the licensee. Instead, the better policy is to engage employees, and encourage discussion among servers, bartenders, and managers. As such, the corporate culture should be encouraged.

On the legal tests for due diligence, the licensee submits the evidence shows it has a clear policy to check for identification from any customer who appears to be under the age of 30. The Black and White Rules advise employees to check if customers appear to be under 25 but the stricter test at the Rogue restaurant does not lead to any confusion. It is clearly spelled out on the white board used for pre-shifts. Further, the evidence is that the policy was communicated to staff effectively and consistently. The server who provided liquor to the minor agent was well aware of the policy.

In the course of training there is reinforcement on the policies of the licensee. Employees are quizzed verbally and engaged by management about these policies. There is a system of reminders in place. Secret shoppers have been used effectively. There is no suggestion that staff as a rule are unaware of or fail to apply company policy on checking for identification. The server knew the policy even though it was not followed here. No policy will be perfect because it still relies on a subjective assessment. The policy would have worked if it had been adhered to by the server, but there was no evidence she erred for reasons of trying to make the licensee more money or because of personal laziness. Her age and education make her an ideal employee compared to others in industry. Age guidelines would not be applicable here because the server had an honest belief that the minor agent was over 25, and so she was certain the minor agent was over 19. Projecting from one's own age is a weakness. It was not something which was encouraged by the licensee and is not discussed in the material used by the licensee for training or in the Serving it Right manual. Nevertheless, the server thought she had a good margin of error, and so had an honest and rational belief as to the age of the minor agent.

Some cases on due diligence suggest that effective communications is a key. The clarity of the policies of the licensee, the number of times and ways they are communicated, and the consistency of their application all lead to a finding of due diligence. Here the server took matters in her own hands instead of following the policies and guidelines of the licensee which provide an extra margin of error. The server acted outside of normal rules but there is no evidence that the licensee is lax on the application of these rules.

In reply, the branch notes there is a discrepancy between the Black and White Rules that stipulate asking for age identification when customers appear under 25 and the policy of the Rogue to ask under 30. Reasonableness requires us to look at the industry and the factors that apply to assessment of age. The server is experienced in the industry and should be aware of such issues. The reasonable server is the applicable standard.

REASONS AND DECISION

Contravention

There is no dispute on the evidence that the minor agent was under the age of 19 on May 23, 2015, and on that date at about 4:35 p.m. was within the red lined premises of the licensee where it permitted to serve liquor. It is not disputed that the minor agent was served a product which contained alcohol during the service hours of licensee. As a result, the elements of a contravention under section 33(1)(a) of the Act are made out, and I find that the licensee was in contravention of the Act as alleged in the NOEA

Due Diligence

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with. The leading case, as previously noted, is *R v. Sault Ste. Marie, supra*. At page 1331 of this decision, Mr. Justice Dickson sets out the test of due diligence as follows:

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

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

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.

The licensee submits that in addition to the above-described test, the language in *Sault Ste-Marie, supra* allows for a defence of due diligence if one acts upon a reasonable belief in a mistaken set of facts. While this defence is discussed in detail in this case, it is more properly applicable to the person that actually committed the contravention. In any event, the server was involved in the MAP incident failed to apply a policy of the licensee of which she was aware, and if she had followed, would have avoided the occurrence of the incident. In the circumstances, she did not act reasonably based on the facts as she understood them.

The defence of due diligence is one that is available when an employer is charged as the result of an act which was committed by an employee in the course of employment. Then the question is, assuming that the employee was not acting under the directions of the employer, whether there was reasonable care taken to establish a proper system to prevent commission of the contravention, and whether reasonable steps were taken to ensure the effective operation of the system. The obligation is on the licensee to establish these facts, and if they are established, the licensee is entitled to be relieved of liability.

Directing Mind:

The test of what constitutes a “directing mind” of a company is set out in *Beverly Corners, supra*. In paragraph 42, the Court describes the test as someone who has been delegated governing executive authority in the design and supervision of the implementation of corporate policy. An employee who carries out the policy is not a directing mind of the Corporation. The licensee as CEO of the business of the Rogue and the other associated restaurants is clearly a directing mind of the business. I make no finding as to whether or not the General Manager or the Floor Manager would have similar authority and so be similarly responsible. It is clear, however, that the server is not a directing mind of the Rogue. Neither the licensee nor the General Manager or the Floor Manager were directly in the area when the MAP incident took place. I find therefore that the sale of liquor was not made by a directing mind of the licensee, and the other stages of due diligence are available for consideration.

Adequate Training and Other Systems:

The licensee provided a large body of evidence about the procedures for employing its staff and training them. Included in this evidence is:

- Top down culture of compliance which is transmitted from the highest echelon of management to servers, bartenders and other line staff;
- Employment of mature individuals with relevant life experience that the licensee finds more amenable to training. The server in this case was a mature individual with training as a teacher, and related experience to the business of the licensee working at the University Golf club;
- General Manager Orientation followed by 2 to 2 ½ weeks of training prior to allowing staff to begin work in the food primary business.
- Staff training includes introduction and exposure to the Black and White Rules. Breach of the Rules can lead to staff discipline. The first Rule requires staff to ask anyone that appears to be under 25 to ask for 2 pieces of ID during liquor service;
- Shadow training in which a new employee follows and observes the work of experienced employees, after which the new employee is shadowed by experienced management during the first part of his or her work in the restaurant;
- Traffic Light stickers are posted in prominent places to remind employees about asking for ID;
- Management of the licensee has frequent discussions with staff about checking for ID.

Effective Application and Operation of the Systems

- There are frequent discussions with staff about the need to ask for identification from customers. The server testified that the issue is discussed often during the course of her employment;
- Frequent pre-shift meetings occur on almost a daily basis during which current matters that are ongoing in the restaurant are discussed. The issue of asking for identification is frequently discussed in this context.

- Whiteboards used for pre-shifts warn about asking for ID; the warning is changed frequently so that it is not glossed over by staff;
- Staff are encouraged to discuss their experiences checking for ID to engage them in the discussion.
- Servers assist each other to ID groups of customers;
- Bartenders will ask if certain customers have been asked for ID.
- Management working on the floor will frequently ask if a server or bartender has asked for identification from certain customers;
- Management will also offer to ask customers for ID if a server feels uncomfortable doing so;
- Frequent discussions occur about special events such as Halloween or Christmas where larger crowds and families may give rise to challenges in asking for identification;
- Staff are taught to be alert to issues such as a customer buying a drink for another customer, or leaving the room while another customer tries to buy a drink for the absent individual;
- Spot checks are conducted by the CEO to ensure implementation of the culture of compliance which is fostered by the licensee.

I find on the evidence presented that the licensee has established a defence of due diligence in respect of the contravention that occurred on May 23, 2015. This conclusion is supported by the evidence that the licensee has instituted a culture of compliance with its staff that runs from the CEO to the on-site management, and to the staff of the food primary facility. Each new employee undergoes extensive training both in the requirements for ensuring compliance with liquor licensing obligations, and in the practical application of those requirements in practice. The Black and White Rules clearly set out the requirements for compliance in unambiguous language. The licensee does not pay lip service to these requirements but instead, reinforces their application in practice. As a licensee noted, the facility at the Rogue is based on an open plan, and so the decisions made by servers and other employees in respect of service issues can be readily observed. Further, it is the evidence that management is trained to make those observations, and to follow-up with staff about the decisions they have made on a day-to-day basis.

The server who was involved in the MAP inspection was aware of the obligation to ensure compliance with issues such as checking for proper ID. She was aware of the policy of the licensee to ask for ID from anyone who appeared to be under the age of 30. She has a personal understanding about the problems that can arise from selling liquor to minors and resolves never to do so. Nevertheless, she made an error of judgment by assuming that the minor agent was about her age, which is 26 – 27. In so doing, she failed to follow the policies of the licensee. Her decision, although reasoned, was wrong both in fact and in the application of the policies of her employer. The licensee has since added to its policies that one must not make a decision about whether to ask for identification based upon an assessment that the customer looks in appearance to be at about the age of the server.

The Rogue has a policy adopted by the present General Manager to ask for ID from customers under 30. The policy in other restaurants owned by the licensee is to ask customers who appear to be under 25. The Black and White Rules also state the age as 25. I do not find, however, that this policy causes undo confusion. The Floor Manager testified the new policy makes his work easier. The server involved in the MAP inspection also understood the policy. She stated it was possible she confused the Rogue's policy with that of the UBC Golf club when she failed to ask the minor agent for ID. The confusion at worst will mean a server would assess age at 25 instead of 30. There is no evidence it would cause employees not to ask for ID.

The branch suggested that the licensee might incorporate training of its employees on factors which help to assess the age of clientele. The licensee strongly resists this approach, maintaining that the best policy is to ask for identification whenever there is a doubt as to the customer's age. There is no evidence before me as to the efficacy of one approach over the other. I therefore cannot find that the approach adopted by the licensee to ask whenever there is a doubt is ineffective or inappropriate.

CONCLUSION

I find that the licensee contravened section 33(1)(a) of the Act on May 23, 2015. I also find that the licensee has met the onus upon it of establishing a defence of due diligence. As a result, it has a complete defence to the contravention, and the finding of a contravention is vacated.

Original signed by

A. P. Devine

Date: December 9, 2015

General Manager's Delegate

cc: Liquor Control and Licensing Branch, Vancouver Office

Attention: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Victoria Office

Attention: Hugh Trenchard, Branch Advocate