



**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: Irish Times Pub Co. Ltd.
dba Irish Times Pub & Oyster Bar
1200 Government Street
Victoria, BC V8W 1Y2

Case: EH13-036

For the Licensee: Dennis Coates

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: March 6 & 7, 2014

Date of Decision: April 16, 2014

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8

Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

Irish Times Pub Co. Ltd. (the "licensee") holds Liquor Primary Licence number 301113 (the "licence") for the operation of a liquor primary establishment known as Irish Times Pub & Oyster Bar (the "Pub") located in Victoria, BC. The Pub is permitted to sell liquor from 11:00 a.m. to 1:00 a.m. seven days a week.

A principal and owner of the corporate licensee appeared as the representative of the licensee and as a witness. Mr. Dennis Coates appeared at the hearing as legal counsel for the licensee.

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

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated May 22, 2013 (the "NOEA"). (Exhibit 1, tab 1)

The branch alleges that on February 15, 2013, the licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act") by selling, giving, or otherwise supplying liquor to a minor.

The proposed enforcement action outlined in the NOEA is a ten day suspension. Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") sets out 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.

The licensee disputes the contravention of section 33(1)(a), saying there is no evidence that the Pub sold, gave or otherwise supplied any liquor to the minors.

In the alternative to a finding of a contravention of section 33(1)(a) of the Act, the branch alleges that the licensee contravened section 35 of the Act by permitting a minor to enter or to be on the premises.

The proposed enforcement action outlined in the NOEA is a five day suspension. Item 3, Schedule 4 of the Regulation sets out a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a \$5,000 to \$7,500 monetary penalty.

The licensee conceded at the hearing that the minors were on the premises. However, the licensee says that its staff did not permit the minors to be on the premises and/or that it has established a defence of due diligence to this contravention.

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.

Minors on licensed premises

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances.

ISSUES

1. Did the contravention of section 33(1)(a) occur?
2. In the alternative, did the contravention of section 35 occur?
3. If I find a contravention occurred, has the Licensee established a defence to the contravention?
4. If either contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1:** Branch book of documents, tabs 1 to 15
- Exhibit 2:** Photos of interior and exterior of the Pub (7 pages, 14 photos)
- Exhibit 3:** Licensee's detailed invoices report for tables 19 and 18
- Exhibit 4:** Licensee's sign posted above and behind the hostess at the entrance way
- Exhibit 5:** Licensee's employee manual, liquor policy and one page New Hire Input Screen
- Exhibit 6:** Licensee's front desk logbook, beginning in March of 2013
- Exhibit 7:** Business card size notes for Drive Smart and phone numbers of taxis etc. (2 cards)

RULING ON ADMISSIBILITY OF MINORS' STATEMENTS

At the beginning of the hearing, the licensee objected to having one of the minors testify by phone. This issue became moot when the branch was unable to connect with the minor witness by phone. The licensee also objected to the inclusion of the two minors' handwritten statements at Exhibit 1, tabs 4 and 5. I made a ruling on this issue after hearing from both the licensee and the branch, just before the final submissions.

I ruled the statements admissible and stated as follows. Under *Enforcement Hearing Rules* 12 and 14, I have the authority to make decisions on admissibility of evidence and the discretion to admit and consider evidence whether or not the evidence would be admissible in a court of law. The minors wrote both statements on February 27, 2013, less than two weeks after the incident. Two liquor inspectors met with the two minors and requested they write out a statement about the evening of February 15, 2013. The liquor inspector who testified stated that she provided very little direction to the

minors, asking them to add something at the end of their initial statements about what they drank in the Pub. The minors signed their statements and the liquor inspectors witnessed their signatures.

These enforcement hearings are intended to be informal. Signed statements are often admitted without the opportunity for cross-examination, usually in the case of a hearing by written submissions. This can also occur by agreement in oral hearings, often when submitted by a licensee who is no longer in contact with an employee who may have been dismissed.

I acknowledged that the licensee was not provided with the opportunity to cross-examine either minor on these statements. The licensee emphasized this in its objection to the admission of these statements. Although I have admitted the statements, I am giving them very little weight in this decision. The licensee has had no opportunity to test the evidence through cross-examination, a fundamental right in testing the soundness of any evidence. Under the Reasons and Decision section below, I note further concerns I have with the reliability of the minors' statements.

WITNESSES

The branch called two witnesses:

- The City of Victoria Police Officer who attended at the Pub on the evening of February 15, 2013 and who asked for identification from the two minors (the "Police Officer")
- The branch liquor inspector who attended at the Pub on the evening of February 15, 2013 and who wrote the NOEA (the "Liquor Inspector")

The licensee called six witnesses:

- The principal and one of the owners of the corporate licensee (the "Owner")
- The General Manager of the Pub (the "Pub GM")
- The Assistant Manager of the Pub (the "Assistant Manager")
- A Pub hostess who was working on the evening of February 15, 2013 ("Hostess 1")

- A second Pub hostess who was working on the evening of February 15, 2013 ("Hostess 2")
- A server who was working on the evening of February 15, 2013 (the "Server")

Neither the Owner nor the Pub GM was present in the Pub at the time of the alleged contravention. The Pub GM was present earlier in the evening but left around 9:30, about two hours prior to the entry of the police officers and the liquor inspector.

Hostess 2 was working on the evening of February 15, 2013, but left the Pub just prior to the entry of the police officers and the liquor inspector. The Assistant Manager, Hostess 1 and the Server were all present in the Pub at the time of the alleged contravention and during the police inspection.

FACTS - FEBRUARY 15, 2013 INCIDENT

The following facts are undisputed.

On the evening of February 15, 2013, at approximately 11:30 p.m., a team of Victoria police officers with a branch liquor inspector, operating as the Late Night Liquor Task Force, conducted an inspection of the Pub. The Victoria police perform regular weekly inspections of the Victoria area pubs. The licensee expects these checks on Friday and Saturday evenings and has a good relationship with the police.

On his first walk through the Pub, the Police Officer observed two youthful looking young men at a table in the rear of the Pub. He did another walk around the Pub and then approached the same table where only one young man was now seated. The Police Officer identified this young man from his photo at Exhibit 1, tab 4 (described as Minor 1 in this decision). When the Police Officer asked for identification, Minor 1 produced ID with a birth date showing he was 18 years old, confirmed by the copy in Exhibit 1, tab 4.

After requesting ID from Minor 1, the Police Officer noticed the second young male near the bar, who then returned to the table. The Police Officer identified the second male from his photo at Exhibit 1, tab 5 (described as Minor 2 in this decision). The Police Officer asked him for ID and Minor 2 produced his ID showing he was 18 years old, confirmed by the copy in Exhibit 1, tab 5.

Both the minors told the Police Officer that they thought the legal age in British Columbia was 18 years, the same as in their home province.

The Police Officer did not witness the two minors buying any alcohol. He could not recall if there was anything on the table. The Liquor Inspector observed a glass of partially consumed beer on the table and saw Minor 1 pick up the glass and drink from it. She also observed another empty glass on the table.

The Liquor Inspector approached the Assistant Manager and advised him that two minors were in the Pub. The Assistant Manager's response was that the minors must have entered the Pub through the side patio door, and not through the front entrance.

Once the Assistant Manager was told of the minors in the Pub, the Assistant Manager asked Hostess 1 to accompany him to the rear of the Pub to ask her if she had seen them enter at the front entrance. Hostess 1 began her shift at the front entrance at 7:00 p.m. on the evening of February 15, 2013. Hostess 1 told the Assistant Manager at the time that she had not seen the minors earlier in the evening and, if she had, she would have asked them for ID. She repeated this in her testimony.

The Assistant Manager had not seen them before and testified that, if he had, he would have checked to see if any staff had requested ID from them. Hostess 2, who left just prior to the entry of the police, when asked at the hearing about the age of the minors from their photos and whether she would ask them for ID, stated that she would have asked the two of them for ID if she had seen them at the front entrance.

The Server was responsible for serving the table where the two minors were later seated ("Table 19"). The receipts from Table 19 (Exhibit 3) show service to that table ending at 10:28 p.m. This was her last bill for Table 19. The Server stated the table was then empty for about half an hour and that at no time did she serve the minors. She noticed the two young men seated at Table 19 about 10 to 15 minutes prior to the entry of the police. She saw drinks on the table. She asked the two young men if they had seen a jacket that a guest thought she had left behind at the table. She did not ask them for ID.

Both minors left the bar immediately after the Police Officer instructed them to do so. The Police Officer did not issue them a violation ticket for being a minor in a liquor establishment. The inspection team exited the Pub at midnight.

The Liquor Inspector issued the Contravention Notice on February 18, 2013, citing section 33(1)(a) and section 35, and noting "minors located in the Pub consuming beer" (Exhibit 1, tab 6). The Liquor Inspector prepared and issued the NOEA. The Liquor Inspector took the written statements from the minors on February 27, 2013. (Exhibit 1, tabs 4 and 5)

LICENSEE'S POLICIES, PROCEDURES AND TRAINING

The licensee's witnesses gave evidence about the policies, procedures and training implemented by the licensee to prevent any contraventions of the liquor laws, and in particular to prevent minors from entering the premises.

Pub's Employee Manual

The Pub has an employee manual that includes its liquor policy (Exhibit 5). The Pub had been using this manual prior to and at the time of the incident on February 15, 2013. According to the Pub GM and the Owner, they are constantly revising the manual as needed and to conform to changes in the liquor laws. The manual includes a heading "Responsible Alcohol Service and Consumption" and states:

All Servers and Bartenders are required to have a valid "Serving It Right" certificate to be on the floor. Be aware of how much guests have had to drink and determine acceptable levels of intoxication. Communicate with the

manager on duty. It is the Law that we ID everyone under 30 years of age; two pieces of ID, one with picture (see the Victoria Pub Company Liquor Act for details). If you work in the Front of House you will receive more detailed training in this area.

The employee manual includes several job descriptions. Both the Server Job Description and the Bartender Job Description require all servers and bartenders to have a current Serving It Right number. In addition, the job functions listed include:

- The ability to adhere to correct ID policies congruent to the BC Liquor Board Regulations.
- The ability to adhere to correct methods of serving alcohol outlined by Serving It Right, as well as the BC Liquor Board.

The Expeditor/Food Runner job description requires them to have a current Serving It Right number but does not contain any reference to the ability to adhere to correct ID policies or to correct methods of serving alcohol as noted above.

A section on Hostess Overview, created in 2008 according to the Pub GM, emphasizes the role of the hostess in checking ID and states:

As a Hostess you are also responsible for following the rules of law as set out in the ID policy and Liquor Policy. You must ID anyone under the age of 30, look for signs of intoxication and control flow of room.

Under Pre Shift Check list, there is a note to discuss ID policy and Liquor Policy.

At the end of the employee manual is a section titled Victoria Pub Company Liquor Policy, with a reference to the Serving It Right course, how to take the course and the requirement for “all licensees, managers, bartenders and servers” to complete the course. Under “ID Requirements” in this section is the following:

You must demonstrate that you are preventing minors from obtaining liquor. You must do an initial assessment of every patron before allowing them to enter our establishment or before selling or serving them liquor. When you verify a customer’s age, you must ask for two pieces of identification.

The **first piece** of identification must:

- be issued by a government agency (e.g. a passport or driver's licence) and
- include the person's name, signature, birth date and picture.

The **second piece** must:

- include the holder's name (e.g. a credit card or Care Card) and
- include the person's signature and/or picture.

If the person cannot produce two pieces of acceptable identification that proves they are 19 or older, you must refuse entry.

There is additional advice provided on how to verify a piece of identification.

And under a heading **Important!**:

There is an ongoing obligation on the part of a licensee to ensure that minors are not served or sold liquor. A server or bartender cannot rely on the fact that door staff admitted a patron into the licensed establishment as the basis for serving that patron. The server or bartender must also make a determination that the patron is not a minor prior to serving them liquor or allowing them to remain in the licensed establishment.

Immediately after the liquor policy section, there is a page titled "Statement of Understanding" with a space for employee to sign and date and a space for Manager/HR to sign and date. The employee states the following:

I hereby certify that the information given by me in this document, all information I have read and understood in the Victoria Pub Company new hire package and herein subsection as outlined by the table of contents are true and complete, and I understand that any false answers or statements made by me will be grounds for termination of employment.

Both the Owner and the Pub GM stated all new employees are required to sign this Statement of Understanding and to review the policy manual prior to signing. Other staff witnesses confirmed this was done. Management often reviews the manual with staff and they use it in any staff training. Management requires staff to review the policies every six months and to sign the Statement of Understanding again at that time.

Management instructs all employees to review its liquor policy and regularly emphasizes the importance of checking ID of anyone who appears to be under 30.

ID Checking Procedures at the Front Entrance

The licensee submitted a copy of the notice located at the hostess station at the front of the Pub (Exhibit 4, photo of notice at Exhibit 2) which states:

Welcome! Just so you are aware, we require every person on the premises to be 19 years of age or older with two pieces valid ID. Sorry for any inconvenience!

Staff are always present at the front entrance to greet guests and to check ID. Two hostesses are required to be present so that one may show guests to their tables while another will always remain at the entrance. If one hostess has to leave for a reason other than showing guests to a table, she must wait for the assistant manager or a food runner or other staff to replace her.

Management instructs staff to ask for ID of anyone who appears to be under the age of 30. Staff are given no specific training about how to identify if someone is under the age of 30. They make their own judgement from the appearance, voice, dress, demeanour, etc. On any given night, anywhere from one quarter to one half of the people coming into the Pub are asked for ID. If people are unable to produce two pieces of ID, one a government-issued ID with a photo, they are turned away.

If customers leave the Pub to go out for a smoke, the front staff will again ask them for their ID when they return. Staff testified that this often irritates people but they do it to ensure someone is not trying to enter who had not been checked before.

Staff testified about the support they receive from the Assistant Manager or the Pub GM if they are dealing with any customers who are upset about the request for ID or about being turned away when they do not have the necessary two pieces.

The Pub GM testified, that in her eight and a half years working in the Pub, she has never encountered a minor in the Pub. She has found them at the front door and refused them entry. She has also refused entry to anyone who did not have the necessary valid ID even though she knew the person to be over 19. She mentioned that they would turn away an individual if all they had was a passport or they would turn away someone with an expired driver's licence as one of the pieces of ID.

ID Checking Procedures by Servers and/or Bartenders

All servers and bartenders receive the Hostess Job Description setting out the requirement for requesting ID of anyone under 30. At every pre-shift meeting, management reminds servers and bartenders of the ID policy. Many servers and bartenders begin their employment at the Pub as hostesses. All servers are instructed to ask anyone who appears under 30 for ID. Many people are asked at the front entrance and again asked by a server. The employee manual, as noted above, reminds servers and bartenders not to rely on the front door staff to check ID and to check themselves when in doubt.

Meetings, Bulletin Board Notices and the Guide

The Pub GM holds a pre-shift meeting with all staff. At these meetings, she reviews a checklist that includes a reference to the ID policies and she reminds staff about the requirement to request two pieces of ID of anyone who appears under 30. These meetings are held twice a day for the two shifts.

The Pub GM or the Assistant Manager holds other staff meetings every two to three months. The Pub GM prepares an agenda and keeps notes from these meetings. At these meetings, management reminds staff of the ID policy and the requirement to ask anyone who appears under 30. Staff are required to attend these meetings. If they do not, they will lose shifts.

Management meets at least every two weeks to review all policies and any food issues or service issues. At these meetings, they discuss the liquor policy and any issues arising from it.

The bulletin board in the staff room contains notices about liquor policies and reminders about requirements for checking ID. Staff are required to check the bulletin board for any notices prior to the start of their shift.

The Assistant Manager testified that the Pub keeps copies of the Guide at various places in the Pub, available for staff to review. He stated he has reviewed the Guide a number of times.

Training

The Pub GM trains any new staff. On an employee's first day of work, the Pub GM prints out the employee manual and spends about two hours reading through the policies with the new employee. This includes the liquor policy and the requirement to request two pieces of ID of anyone under 30. New employees must sign off on the Statement of Understanding, which is then sent to head office and filed in the employee's file. New employees spend about three shifts shadowing a more experienced employee, before starting on his/her own.

All employees, including kitchen staff, are trained on the ID policies. New staff are given training in every position so that they are able to act as support staff when other staff are sick. All staff must have their Serving It Right certificate before they begin work on the floor.

Testing

There is no formal testing of the staff, either written or through a secret shopper program. The Pub GM stated she often observes the hostesses when she is seated at the table near the front. She checks on whether the ID procedures are being followed at the front entrance by asking young-looking friends of hers who come into the bar if they were asked for ID.

SUBMISSIONS – BRANCH

The branch submits that the minors were permitted entry into the Pub, either through the front door or a side door from downstairs or the patio. They were not asked for ID, as recorded in their signed statements. They were both 18 years old. The Liquor Inspector observed one of them drinking from a glass of beer. This is consistent with the minors' statements that they were drinking in the Pub. The minors claimed in their statements that they entered through the front door.

The Server testified that she saw the two minors at Table 19, but did not ask them for ID. The hostesses both stated they would have asked them for ID if they had seen them. The Server should have asked them for ID when she observed them sitting at the table, whether or not she was serving them.

As to evidence of due diligence, there is no testing of staff to be sure they understand the policies and procedures as they relate to them.

The branch says that the licensee's system failed on February 15, 2013. After 11:00 p.m., Hostess 1 was the only hostess at the front entrance. The other one had been sent home as it was not a busy night.

Because of the seriousness of the section 33(1)(a) contravention, i.e. the effect of alcohol on young people, the branch submits that a ten day suspension is warranted.

In the alternative, if I find that the licensee did not sell, give or otherwise supply the minors with liquor, the branch submits that the licensee has agreed that the minors were in the premises and thus the five day suspension is warranted.

SUBMISSIONS – LICENSEE

The licensee concedes that the minors were on the premises. The licensee submits there is no evidence of anyone supplying liquor to minors, and therefore there is no contravention of section 33(1)(a). The licensee opines that the minors may have received

drinks from other patrons who were part of a large group that had entered at the same time.

The licensee submits that it did not “permit” the minors to be on the premises and that the licensee’s evidence of due diligence demonstrates a standard that meets the defence of due diligence to the contravention of section 35.

With respect to the defence of due diligence, the licensee says that the directing mind of the licensee was the principal and one of the owners of the corporate licensee and that, as he was not on the premises, the policies, procedures and training of its employees are relevant to the question of due diligence.

There was no evidence of any liquor sold to the minors. There was evidence of a partial glass of beer on a table. The licensee provided the sale slips from Table 19 where the two minors were sitting and there was no evidence of any liquor being sold to the minors while at the table.

The Owner testified that one million patrons go through the Pub within a year. He further confirmed that, in his 32 years of experience in the many liquor establishments he has been involved with, he has never had an issue with minors.

He confirmed that their employee manual is revised, read and reviewed with staff on a regular basis.

The Pub emphasizes a culture of compliance with liquor laws, through their initial training, their employee manual, their signs, and their regular meetings with staff where reminders about liquor policy are constantly given.

REASONS AND DECISION

Contravention of section 33(1)(a) – minor sold, given or otherwise supplied liquor

I do not agree with the licensee that there was no evidence of any liquor sold, given or otherwise supplied to the minors. The Liquor Inspector testified that she observed Minor 1 drinking from a glass of beer on the table. The Server observed glasses on the table. The statements from the minors (Exhibit 1, tabs 4 and 5) list what they drank in the Pub. Just above the list they have both written “male bartender” but did not specifically state whether the bartender sold them the drinks.

The licensee has suggested the minors may have received drinks from other patrons. I find it is a reasonable assumption that the minors received drinks from their friends in the Pub, and that they may not have been directly served by the bartender. Nevertheless, in a licensed establishment that has the responsibility of ensuring its patrons are not minors, I find that a licensee contravenes section 33(1)(a) when it supplies liquor to minors directly through its staff or indirectly through other customers.

I therefore find that, in the circumstances of this case, the licensee has contravened section 33(1)(a) by supplying liquor to minors.

I address the question of due diligence below.

Contravention of section 35 – minor on the premises

The branch has alleged a contravention of section 35 as an alternative to the section 33(1)(a) contravention. Having found a contravention of section 33(1)(a), I do not need to find a contravention of section 35. However, I note the licensee has admitted that the minors were in the Pub on February 15, 2013.

There was considerable speculation about how the minors entered the Pub, whether through the front door or whether they may have entered through the patio door or a downstairs door. I discuss this further below under the analysis of due diligence.

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 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 directing mind was not present during the incident on the evening of February 15, 2013. At the hearing, the Owner stated he was the directing mind and the Pub GM agreed with this statement. The determination as to who may be the directing mind is a matter of mixed fact and law and not simply a factual issue for a witness to state. In making a determination as to who may be the directing mind, I have considered the evidence about who makes the policy decisions, who crafts the policies, and who is responsible for implementing those policies with staff. There is no requirement for the directing mind to be on site at the time of an incident.

The Pub GM gave evidence about her duties and her involvement in the development of the policies and revisions to the employee manual, her training of staff and the implementation of those policies with staff. I find that the Pub GM may also be a directing mind of the licensee. As neither the Pub GM nor the Owner were present in the Pub at the time of the incident on February 15, 2013, I move to the second part of the analysis as set out in *Beverly Corners*.

Adequate Training and Other Systems

As noted above, the licensee's witnesses provided considerable evidence about the training to new staff, and ongoing training and other systems in place, with respect to ensuring minors are prevented from entering the Pub. This included:

- The employee manual, which includes the ID policies
- Review of the employee manual with all new hires and a review with all staff every six months
- Requirement for staff to sign the Statement of Understanding after the review of the employee manual
- Training of new staff by shadowing more experienced employees for several shifts
- Policy of the licensee to require staff to request ID of anyone who appears to be under 30
- Policy of the licensee to require two pieces of ID, with one being a government-issued ID with photo
- Pre-shift meetings to remind staff of the ID policies

I find that the licensee has drafted policies and implemented training on these policies to guide staff to ask for ID of anyone under 30. Through this policy, the licensee has created a buffer for staff to help ensure anyone under 19 is asked for ID. I further find that this ID policy has served the licensee well, as evidenced by the fact that many are turned away on a regular basis, and the Pub GM had never before this incident found a minor in the Pub. I note the evidence of the Liquor Inspector, that she had never before had an incident with minors in the Pub.

Effective Application and Operation of the Systems

The licensee has taken reasonable steps to ensure the application and operation of its systems. I find there are a few deficiencies in its system which I discuss below.

The steps taken to ensure the ID policies are followed include:

- The presence of two front door hostesses, with at least one always present to greet and request ID from incoming guests
- The requirement that another staff member or manager replace a hostess if he/she has to leave for a period of time
- Regular reminders to all staff of the ID policy, through regular meetings, notices on bulletin boards, and at pre-shift meetings
- Requirement for all staff to have their Serving It Right certificates
- Evidence that up to one half of customers may be turned away on any given night because of failure to produce the required ID
- Evidence of a good compliance history with respect to ensuring minors are not in the Pub
- Evidence of double requests for ID of any smokers who re-enter the Pub

I have identified a few areas where improvements can be made to the operation of the Pub to help prevent incidents like the one on February 15, 2013. These areas of improvement relate to improving the monitoring of the door access other than the front door, and to enforcement of the licensee's ID policies to ensure all staff ask for ID when they observe someone who may be underage, even if they are not serving them.

There was considerable speculation about how the minors may have entered the Pub. In their written statements, the minors said they entered through the front door. When confronted by the Police Officer in the Pub, both minors stated they were under the impression that 18 was the legal age, the same as in their home province. I conclude that the minors, to be consistent and not contradict their initial statement to the Police Officer that they believed they were of legal age, would have to say they entered through the front door.

The minors were not available to testify and thus not subject to any cross-examination of their statements. I find the testimony of both hostesses and the Assistant Manager to be credible and forthright and I have concluded that it is very unlikely that the minors entered through the front door. As noted above, I have given very little weight to the minors' statements because of my doubts about their reliability as well as the licensee's inability to cross-examine them.

The Owner speculated that someone could have entered through the downstairs door by the washroom, with a friend opening the door there as it was locked from the outside. The Assistant Manager thought it was possible that they entered through the patio door. Neither of these doors is locked from the inside and someone could allow entry to a friend if they wanted to. As both of these are fire exits, they must not be locked from the inside. The Pub GM, when asked, considered the possibility of a camera to monitor these doors. Both the Owner and the Pub GM indicated an alarm system on these doors would be too disruptive to the Pub.

In order to prevent another such incident as happened on February 15, 2013, the licensee may wish to consider the placement of a camera at the other two exit doors and some regular staff monitoring of the camera.

The Server who testified about the evening of February 15, 2013, observed the two minors sitting at Table 19 about 10 to 15 minutes prior to the entry of the police. She even spoke to them about a missing jacket. At no time did she ask them for ID. This was not consistent with the direction given to servers in the employee manual about the requirement for servers to make a determination that a patron is not a minor prior to serving them alcohol or allowing them to remain in the licensed establishment.

The Server seemed to rely on the fact that she had not served these two young men. However, she did interact with them, and given their youthful appearance, she should have requested ID from them. Alternatively, if the Server here believed they had been served drinks by the bartender, she should have checked with the bartender when she noticed the two of them sitting at her table. I recommend that the licensee emphasize in its ongoing staff training the importance of all staff requesting ID of anyone they notice to be young-looking in the Pub.

The branch raised the absence of any formal testing or secret shopper program. I consider this as one practice a licensee may adopt to help ensure its employees are implementing its ID policy. However, I note the evidence of the Pub GM that she will often observe the hostesses to ensure they are checking for ID and that she often asks young-looking friends to confirm that they were asked for ID at the front. Although there is no formal testing, staff are constantly being reminded, through notices, pre-shift

meetings and verbal reminders, of the ID policy. Therefore, I find that the absence of any formal testing or secret shopper program is not fatal to establishing the defence of due diligence.

The onus is on the licensee to establish the defence of due diligence. I have noted above where I consider the licensee may make some improvements to its systems. I also note that the licensee has introduced a logbook since the incident on February 15, 2013, another factor often introduced to demonstrate due diligence of a licensee. As this occurred after the incident, I am not considering it in my analysis of due diligence at the time of the incident. However, I note that the licensee is willing to improve its systems to help prevent such incidents.

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 its application and operation of its systems. The fact that the Server failed to ID the minors when she saw them, or the fact that the door control failed in some way (whether at the front door or through another access door) is why the minors were in the Pub. Their presence in the Pub (and how they got there) does not prevent a positive finding on the due diligence of the licensee.

As noted in *Central City Brewing Company Ltd. v. British Columbia (Liquor Control and Licensing Branch)* 2013 BCSC 2301, at para.39, the fact that a sale was made to a minor (or in this case, the fact that minors were observed drinking in the Pub) does not mean that the due diligence defence is unavailable. I find that the licensee had good ID policies, training and practices in place, and effective application of those policies at the time of the incident.

Conclusion

I find that the contravention of section 33(1)(a) has been proven on a balance of probabilities.

I find further that the licensee has met the onus of establishing a defence of due diligence and thus has a complete defence to the contravention.

Thus, I do not need to consider the issue of penalty.

Original signed by

Nerys Poole
General Manager's Delegate

Date: April 16, 2014

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Peter Mior, Branch Advocate