



**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:	Miller's Landing Pub Ltd. dba Cat & Fiddle Pub & Bistro 1979 Brown Street Port Coquitlam, B.C. V3C 2N4
Case:	EH14-119
For the Licensee:	Randy Doncaster and Brad Doncaster
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Daniel M. Graham
Date of Hearing:	October 20, 2015
Date of Decision:	November 23, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Miller's Landing Pub Ltd. (the "Licensee") operates the Cat & Fiddle Pub & Bistro (the "Establishment") under Liquor Primary Licence #032708 (the "Licence"). The Establishment is located at 1979 Brown Street, Port Coquitlam, B.C.

The Licence specifies hours of liquor sales Monday through Thursday 11:00 a.m. – 1:00 a.m., Friday and Saturday 11:00 a.m. – 2:00 a.m., and Sunday 11:00 a.m. – midnight. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication *A Guide for Liquor Licensees in British Columbia* (the "Guide").

Mr. Randy Doncaster and Mr. Brad Doncaster, principals of the corporate Licensee, represented the Licensee for the purposes of this hearing. Throughout these reasons for decision, both the principals and the corporate Licensee will be referred to as "the Licensee" as the context requires.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated October 21, 2014 (the "NOEA"). The Branch alleges that on Wednesday, September 17, 2014 the Licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act") by selling, giving or otherwise supplying liquor to two minors who were acting as agents of the Branch under the Minors as Agents Program ("MAP").

The proposed penalty is a \$7,500 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 2, schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

The Licensee admits that its employee sold liquor to the minor agents, and accepts the facts as outlined in the NOEA. However, the Licensee disputes the finding of a contravention on the basis that its policies, practices, procedures and training establish a defence of due diligence.

For the purposes of this hearing, and in accordance with section 6.1 of the Act, the general manager has delegated to me the powers, duties and functions provided to the general manager by section 20 of the Act and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

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

33 (1) A person must not

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

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

Schedule 4

Enforcement Actions

Minors

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

ISSUES

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

EXHIBITS

- Exhibit 1: The Branch's Book of Documents, Tabs 1 to 21 inclusive.
- Exhibit 2: Copy of an e-mail dated Tuesday, October 21, 2014 sent from the Licensee's employee (the "Server") to the Branch
- Exhibit 3: The Licensee's Book of Documents, Tabs 1 to 19 inclusive.

WITNESSES

A liquor inspector (the "Inspector") provided evidence on behalf of the Branch.

The Licensee called the Server as a witness.

FACTS

The Licensee accepts the facts of the contravention as set out in the NOEA (Exhibit 1, tab 1).

On September 17, 2014, the Inspector and two other inspectors were conducting MAP inspections with two minor agents in Port Coquitlam to test compliance. At the start of the shift the inspectors photographed the minor agents and reviewed their identification to confirm the minor agents were 16 and 17 years of age.

The minor agents entered the Establishment at 3:57 p.m. followed by the Inspector and one other inspector, while the third inspector remained with their vehicle. The minor agents were seated at a table across the aisle from the off sales bar area. The inspectors were seated about 10 feet away where they had a clear view of the minor agents. The Server approached the minor agents and asked if she could get them anything to drink. The minor agents ordered a Smirnoff Ice and a Guinness beer. The Server responded "Sure" and walked away, returning moments later with the drinks that had been ordered. She placed the drinks in front of the minor agents, at no time asking the minor agents for identification.

Inspector 1 then led the minor agents out of the Establishment while the other inspector spoke to the Server. The Server introduced herself as the bar manager. Inspector 1 rejoined the other inspector and both inspectors were then introduced to the Licensee. Inspector 1 completed a contravention notice (Exhibit 1, tab 8) and explained the contravention, the enforcement process and the recommended penalty. She then issued the contravention notice to the Licensee.

LICENSEE'S HISTORY AND ITS POLICIES, PROCEDURES AND TRAINING

The Licensee cross-examined Inspector 1 on the Establishment's compliance history, which is detailed in Exhibit 1, tabs 15-20. Details of the compliance history are as follows:

- Exhibit 1, tab 15: A compliance meeting was held in October, 2004 regarding an allegation of overcrowding. The Licensee holds the Licence as well as a Food Primary Licence for a separate part of the Establishment, and discussion touched on the fact that because of the unique layout the Licensee needs to maintain separate counts for the two licences.
- Exhibit 1, tab 16: A compliance meeting was held in June, 2005 regarding allegations of unauthorized structural changes being made.
- Exhibit 1, tab 17: A meeting was held in June, 2005 at the request of the Licensee to discuss security issues. The meeting involved no allegations of non-compliance.
- Exhibit 1, tab 18: A compliance meeting was held in June, 2006 regarding an incident where the Licensee had asked a minor to leave the Food Primary section of the Establishment for obstructing a hallway. An unspecified contravention of a term and condition was alleged, contrary to section 12 of the Act.
- Exhibit 1, tab 19: A compliance meeting was held in November, 2010 regarding an allegation of permitting an intoxicated person to remain in the Establishment. Enforcement action was not recommended as it could not be determined whether the person was intoxicated or suffered from a sleep disorder.

- Exhibit 1, tab 20: A compliance meeting was held in June, 2011 regarding allegations that the Licensee contravened section 38 of the Act by allowing liquor to be given as a prize item through a raffle held by patrons conducting a fundraiser.

The Licensee's record does not include any formal findings of contravention.

The Licensee called the Server to adduce evidence of the management of the Establishment and the Server's role on September 17, 2014 as well as evidence of the Licensee's policies and procedures, the training given to its employees, and the implementation of its policies.

Management of the Establishment and the Server's Role

The Server testified that she had been employed by the Licensee for 15 years and that she held no ownership stake in the Licensee. She confirmed that payroll records dating back to 2003 (Exhibit 3, tabs 1 and 2), demonstrate that she was paid an hourly wage. She stated that she was not paid on commission or as a percentage of sales and that she had no financial incentive to push liquor sales or to serve minors. Her position for the last five years with the Licensee was floor leader, with duties primarily including serving patrons, and supervising more junior servers/bartender/door staff as well as training servers.

She testified she had never been responsible for cashing out the business at the end of the day, ordering supplies, hiring/firing staff, scheduling other staff, or for developing or implementing policy in the staff manual. She stated that those functions were all performed by the Licensee.

In January, 2014 the Server went on maternity leave. September 17, 2014 was her first day back on the job after about nine months. She was returning to work on a part time basis (one or two shifts a week) at a lower hourly wage, with duties strictly as a server rather than as floor leader (as evidenced by a handwritten slip at Exhibit 3, tab 3 and by an organization chart in the amended Employee Manual at Exhibit 3, tab 7).

The Server testified that she was excited and happy to return to work, but that during her shift she received a number of phone calls from her child minder to tell her that things were not going well and her child was crying almost continuously. She did not bring this situation to the Licensee's attention. She said that also, immediately before serving the two minor agents, she had been advised by her grandmother that her grandfather had suffered a heart attack in hospital. She stated that in the circumstances, she was not on her "A" game at the time she served the minor agents, and that the contravention would never have occurred under normal circumstances. The Server stated that it is very well known in the community that the Establishment IDs its patrons.

The Server testified that she was responsible for training staff with respect to identification of minors, and that she had always taken great pride in her leadership in that area. She stated that she was so devastated by her lapse on September 17, 2014 that she has not been able to face the Licensee and she has never returned to work at the Establishment.

The Server stated that on October 21, 2014, while still in a devastated and emotional state, she sent an e-mail to the Inspector taking full personal responsibility for the contravention (Exhibit 2). In this e-mail she referred to herself as the "manager" of the Establishment and stated that the Licensee had given her the chance to run the business. She stated that she is now embarrassed to have overstated her position in the Establishment, and acknowledged that it was a misguided attempt to protect the Licensee from enforcement action. She also stated that the e-mail was her own idea, and that the Licensee had not directed her to prepare or send the e-mail.

In response to questions from me the Server responded that she had only heard of MAP through "hearsay" prior to the contravention, and that she was not familiar with the Guide.

Hiring, Training, and Testing of Employees

The Server confirmed that she has a Serving It Right ("SIR") certificate (Exhibit 3, tab 5) and that all employees are required to have a SIR certificate to serve alcohol. The Licensee personally hired the Server and went through the Employee Manual with her, and trained her with respect to identifying minors.

While it is the Licensee who hires new staff, it was the Server's responsibility to go over the Employee Manual (Exhibit 3, tabs 6 and 7) with new staff. New hires are required to sign and date a copy of the Employee Manual to confirm that it has been reviewed with them. The SIR manual is referenced frequently during training. New employees are subject to a three month probationary period and a minimum three week period shadowing more senior staff. During this period new employees watch the Server (or other senior server) ID'ing patrons and learn about primary and secondary ID. During slow periods role-playing exercises are used to train staff about checking ID and denial of service for inadequate ID.

Staff are subject to quizzes during training. The Licensee also conducts a Secret Shopper program for quality control. The Satisfaction Questionnaire completed by Secret Shoppers (Exhibit 3, tab 8) asks a number of questions including naming the server, whether the patron was ID'd at the table, whether the server asked for two pieces of ID, and whether the server verified that the two pieces of ID were valid and that they actually belonged to the patron.

Policies and Practices Related to Prevention of Service to Minors

The current version of the Licensee's Employee Manual, dated February 2, 2014, (Exhibit 3, tab 7) includes a section on identifying customers, which provides as follows:

"Every patron who is considered 40 years or under must show proper government issued ID stating legal age of 19 years or over. These include BC ID card, Driver's license, Passport, Citizen Card. As secondary pieces these include-any major credit card, SIN number, Care Card. Must have Picture Id and a printed name matching both pieces. Any suspicions please alert management.

First ID – must be Government Issued (Canadian or other) and MUST INCLUDE:

- Name
- Photo
- Birthdate
- Signature
- Expiry date

2nd ID: Name imprinted on card and includes person's signature and/or picture.

Sometimes people will have ID that isn't theirs. If you are not sure that the ID belongs to the person giving it to you, here are some ways to verify if the ID is in fact their own.

- Body language: is the person fidgeting, not making eye contact or overly talkative? Is the person rushing to complete the transaction or reaching to take the card back quickly? Check for nervous behaviour.
- Facial features: make sure the photo matches the person. Check eye colour, nose shape, chin shape, etc.
- Take the ID and ask that the person sign their name on a piece of paper. Does it match?
- Ask what their astrological sign is, or a similar question.

If you are unsure, you have the right to refuse service."

The Employee Manual also contains a section on Exercising Your Duty of Care, including a statement about the legal responsibility to "serve only patrons legally old enough (19 years and older with proper identification) to drink", and "to refuse service to persons who are...minors (anyone who does not have identification to prove they are legally of age 19 yrs or older)...[and] those who do not show **2 Pieces of Legal Government issued ID stating the age of 19 or older.**" This section of the Employee Manual ends with the statement that "It is important that you understand your legal right and obligation to refuse service and to be consistent in applying it."

As a front line of defence against admitting minors to the area of the Establishment covered by the Licence, the Licensee has door staff in the evenings that operate an electronic card scanning device. The device was not in operation at the time of day the minor agents attended the Establishment. The Licensee also operates more than 30 surveillance cameras.

The Licensee conducts a Customer Survey program in which patrons are asked to complete a questionnaire on their experience at the Establishment. Questionnaires related to the Server are included in Exhibit 3, tab 9. Questions include whether the patron was ID'd by the doorman at the door or by the server at the table, whether ID was verified by being asked questions about name/birthdate/address, and whether 2 pieces of ID were requested.

Signage

The Licensee has tent cards at each table (Exhibit 3, tab 11) informing patrons that the Establishment ID's under 30, and asks patrons to be prepared to show two pieces of ID. Tab 13 of Exhibit 3 includes photos of signage posted throughout the Establishment advising that 19+ two pieces of ID is required, and listing the forms of acceptable primary and secondary ID. The photos show signs at the front entrance, the servers' kitchen door, the staff washroom, behind the bar, at the server's cash out desk, and in a display case at the back door.

Reminders to Staff

Each cash till and computer screen in the Establishment has a sign at the top asking Did you ID?, and each displays a date which changes each day to remind staff of the birthdate required to demonstrate the legal drinking age of 19 years (Exhibit 3, tab 12).

Meetings and Minutes

Staff meetings are held each four to six weeks. Attendance is mandatory. Branch inspectors are invited to participate in staff meetings from time to time to provide their perspective and to answer questions from staff. An agenda is printed for each meeting

and employees are required to keep minutes in the form of notes of the discussion on their copy of the agenda. Each employee is then required to sign the agenda with notes to indicate that they understand the importance of each topic and that they will follow policies to the best of their ability. Identification of minors is a frequent topic. Exhibit 3, tab 10 includes the agendas and notes for a number of meetings signed by the Server during the period December 4, 2011 to January 12, 2014.

Role playing is frequently used at staff meetings. Young people, including those looking older than their age, are often brought in as part of a discussion of how to estimate a person's age and to determine when to ask for ID. Acceptable forms of ID and verification of ID are frequently topics of discussion.

Recording Incidents

The Employee Manual includes two sections dealing with the recording of events in an Incident Logbook. After each incident the floor leader is required to have a debriefing session with staff to help everyone learn from the experience. Incident reports are also used to reinforce policies and procedures. All staff are encouraged to add their own perspective of a logged incident within 49 hours of the incident.

The Server testified that employees are required to complete an incident report for each instance of refusal of service for lack of ID. An incident report completed by the Server regarding the September 17, 2014 contravention is included in Exhibit 3, tab 19. The incident report form includes spaces for identifying and describing persons involved in the incident, an explanation of what happened, and a listing of which staff were working at the time of the incident.

Discipline

The Server was suspended from duty for two weeks as a result of the contravention. A Written Warning/Discipline Notice for the Server is located at Exhibit 3, tab 19. The document includes a statement that "Employee, please take note that, serving alcohol to a minor results in an immediate two week suspension. If you serve a minor again following your suspension you will be terminated with JUST CAUSE."

SUBMISSIONS – BRANCH

The Branch advocate submitted that the Licensee had admitted that the contravention occurred, and that the elements of the contravention had been established.

Regarding the defence of due diligence, the Branch stated that:

- The Branch would not make any submissions as to whether the Server was a directing mind of the Licensee.
- There is a degree of subjectivity in assessing a person's age, and there seems to be a degree of ambiguity in the Licensee's training about how to assess age.

The Branch advocate deferred to the NOEA with respect to the recommended penalty.

SUBMISSIONS – LICENSEE

The Licensee admitted that the contravention occurred and that the minor agents had been served alcohol.

With respect to due diligence, the Licensee submitted that the Server was not a directing mind of the Licensee. He also submitted that the evidence of the Licensee's policies, procedures, training, and implementation establish a defence of due diligence. He stated that there was nothing more he could have done to prevent the contravention other than to listen in on the Server's telephone conversations and to send her home. He stated that the Server was his "number one, go to trainer" and that the contravention should never have happened. The Licensee observed that the Server had more than enough knowledge and training and that she "just had an extremely sad day." Finally, the Licensee stated that he does not copy and distribute the Guide to staff because it is "80% about running a business."

The Licensee referred to a number of previous decisions of the general manager regarding service to a minor. He also referred to the judgment in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)* 2012 BCSC 1851.

REASONS AND DECISION

Contravention

The Licensee admits that alcohol was served to two minors.

The evidence and the submissions filed in these proceedings demonstrate on the balance of probabilities that, with reference to section 33(1)(a) of the Act:

- a person (the Licensee, acting through its employee the Server)
- sold liquor (a Smirnoff Ice and a Guinness)
- to two minors (the minor agents).

Accordingly, I find that on September 17, 2014 the Licensee contravened section 33(1)(a) of the Act by selling, giving or otherwise supplying liquor to a minor.

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:

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.

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.

Analysis

a. *Directing Mind*

The evidence indicates that the Server did not have the degree of express or implied authority to “design and supervise the implementation of corporate policy” to constitute her being a directing mind, as described in *Beverly Corners*. The Branch made no submissions in this regard. Accordingly, I find that the Server who sold the liquor to the minor agents was not a directing mind of the Licensee. The Licensee (whom I

conclude is a directing mind) was in his office at the time and had no direct role in the sale of the alcohol to the minor agents.

Since a directing mind did not commit the contravention I must consider the second stage of the due diligence analysis.

b. Adequate Training and Systems

Due diligence requires that a Licensee takes reasonable steps to try to ensure that a contravention does not occur. The exercise of due diligence does not guarantee that a contravention will never occur. It is intended, however, to reduce the likelihood of a contravention occurring to a reasonable and acceptable level. The analysis of what is adequate or reasonable must take place in the context of the public policy considerations and potential consequences underlying the prohibition against selling liquor to minors:

- the effects of alcohol on growing bodies and developing minds;
- the effects on individuals and society of irresponsible drinking behaviour learned at an early age;
- a minor's lack of capacity to metabolize alcohol in the same manner as an adult; and
- liquor is a significant factor in many crimes committed by youth.

The Licensee's witness provided extensive evidence about the training provided to new staff, ongoing training and other systems in place with respect to identification of minors and preventing the service of alcohol to minors. This included:

- new employees are subject to a formal training program conducted by a floor leader, including a minimum three week period of shadowing with a more senior server. Trainers employ role-playing strategies during slow periods with respect to asking for ID and denial of service.
- new employees are required to have Serving it Right certification.
- the training includes information about the legal drinking age of 19, the requirement for 2 pieces of ID, what kinds of ID are acceptable, how to recognize altered ID, and how to ask for verification of ID.

- staff are trained with respect to recognizing indicators of underage patrons, such as their style of dress, demeanor etc., and participate in exercises designed to improve their ability to estimate a patron's age.
- testing of staff regarding identification of minors takes place in the form of informal quizzes, a Secret Shopper program, and Satisfaction Surveys.
- a debriefing session is held with staff after each incident.

The evidence demonstrates that the Server was trained in accordance with the Licensee's standards, and that she in turn was viewed as the Licensee's "go to" trainer herself.

The due diligence standard is not one of perfection, but of adequate training and systems. As with most training programs and systems, there are improvements that the Licensee could make. On balance, however, I am satisfied that the evidence demonstrates that the Licensee has adequate training and systems in place with respect to contraventions of section 33(1)(a) of the Act.

c. Steps to Ensure Effectiveness

This aspect of due diligence requires the Licensee to take reasonable steps to supervise and monitor its operations sufficiently to ensure that staff are applying their skills and knowledge appropriately, and to ensure that risk-reducing systems are operating effectively.

In the current case, the evidence indicates that:

- mandatory staff meetings are scheduled on a regular basis, during which both new and existing policies are gone over. Employees are required to take notes on the meeting agenda and sign to indicate their understanding of the subject topics. The Licensee has been proactive about asking Branch inspectors to share their experience and advice with the Licensee and staff.
- several signs are posted at strategic points within the Establishment to inform and remind staff and patrons that 2 pieces of ID are required and that staff and patrons can be fined for minors possessing, purchasing or consuming alcohol.

The Licensee also employs a staff reminder system that reminds staff about checking ID with each transaction.

- the Licensee employs a card scanning device in the evenings to reduce the risk of a minor entering the Establishment.
- the Licensee's incident reporting system was implemented and documented immediately after the contravention.
- a disciplinary process with respect to the contravention was initiated and documented immediately.

On balance, the evidence indicates to me that the Licensee has taken reasonable steps to supervise and monitor its operations to ensure the effectiveness of its training and systems.

Given my conclusions with respect to the adequacy of the Licensee's training and systems, and the reasonableness of its monitoring and supervision, I am satisfied that the Licensee has established the defence of due diligence on the balance of probabilities.

CONCLUSION

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

I find further that the Licensee has established a defence of due diligence and thus has a complete defence to the contravention.

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

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: November 23, 2015

cc: Liquor Control and Licensing Branch, Surrey Office
Attention: Rupi Gill, Regional Manager

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