



**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 and Bistro 1979 Brown Street Port Coquitlam, BC, V3C 2N4
Case:	EH08-005
For the Licensee:	J. Barry Carter, Barrister and Solicitor
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	Kathleen McIsaac
Dates of Hearing:	July 18, August 26 and September 2, 2008
Place of Hearing:	Surrey, BC
Date of Decision:	December 11, 2008

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Miller's Landing Pub Ltd., operates the Cat & Fiddle Pub & Bistro in Port Coquitlam, BC. Adjacent to each other in the same building there is a restaurant with a Food Primary Licence and a pub with a Liquor Primary Licence. It is the pub holding Liquor Primary Licence Number 032708 that is the subject of this hearing. The pub is licensed to serve liquor from 11:00 a.m. to 1:00 a.m. Monday to Saturday and from 11:00 to midnight on Sunday. 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" ("Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action ("NOEA") dated March 10, 2008. The branch alleges that on January 11, 2008, the licensee contravened section 33 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 ("Act") by supplying liquor to two minors. The range of penalties for a first contravention of this type is a 10-15 day licence suspension and/or a monetary penalty of \$7500-\$10,000 (Schedule 4, Item 2 of the *Liquor Control and Licensing Regulation*, ("Regulation")). The branch proposes a 15-day licence suspension as two minors were found in the pub in separate locations at the same time and had consumed liquor that was served to them by staff.

If it is found that the licensee did not contravene section 33, the general manager will consider the alternative contravention of whether on January 11, 2008, the licensee contravened section 35 of the *Act* by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale. The range of penalties for a first contravention of this type is a licence suspension of 4-7 days and/or a monetary penalty of \$5,000-\$7,500 (Schedule 4, Item 3 of the *Regulation*). The branch proposes a 7-day licence suspension due to the history of non-compliance and the presence of more than one minor inside the liquor primary establishment at the same time.

RELEVANT STATUTORY PROVISIONS

Supplying liquor to minors

33 (1) A person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
- (c) in or at a place under his or her control, permit a minor to consume liquor.

(5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant

- (a) required that the person produce identification, and
- (b) examined and acted on the authenticity of the identification.

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.

Regulation

45 (1) For the purposes of section 33 (5) of the Act, identification means both of the following:

(a) one of the following:

(i) a passport;

(ii) a driver's licence that displays a photograph and the date of birth of the holder;

(iii) an identification card, issued by a government agency, that displays a photograph and the date of birth of the holder;

(b) one other piece of identification that displays

(i) the person's name, and

(ii) one or both of the person's signature and picture.

ISSUES

1. Did the licensee contravene section 33 of the *Act*?
2. If so, does section 35(5) of the *Regulation* provide a defence to the alleged contravention? or,
3. Was the licensee duly diligent in taking all reasonable steps to prevent the contravention?
4. If the answer to 2 and 3 is no, what penalty, if any is warranted?

EXHIBITS

- Exhibit No. 1: Branch's Book of Documents
- Exhibit No. 2: Licensee's Book of Documents
- Exhibit No. 3: DVD – excerpts of video surveillance on evening of January 11, 2008 at Cat & Fiddle Pub & Bistro
- Exhibit No. 4: Kokanee Beer Bottle-taken from minor #1
- Exhibit No. 5: Copy of E-mail from RCMP to Liquor Inspector, dated February 2, 2008
- Exhibit No. 6: Branch and licensee's written submissions

EVIDENCE

The Cat & Fiddle Pub & Bistro is located near industrial and residential areas in Port Coquitlam. There are two entrances to the pub: a main entrance provides access to the restaurant and pub through separate doors and a side entrance opens into the pub. It is possible to move from one licensed area to the other from inside the establishment through an area near the main entrance. A hostess table and a sign prohibiting minors mark the entrance to the pub along with stanchion poles and a rope.

The licensees, Brad and Randy Doncaster (the "licensees"), are shareholders of the licensee company along with their mother. The brothers run the business and have been involved in the pub and restaurant industry for most of their lives. Brad Doncaster is the business administrator while Randy manages the operation and staff. One of the brothers is usually on site seven days a week.

On January 11, 2008, at approximately 10 p.m., three members of the RCMP entered the establishment to conduct a licensed premises check. The officers found two minors in the pub at two separate locations. I will deal with the circumstances of each minor separately.

Evidence – Minor #1

Constable #1 testified that he approached a female who told him that she did not have identification (“ID”). When he escorted her out to the police car to check her ID she admitted that she was 18 years old and he confirmed this by checking police records. The minor informed him she had been celebrating her friend’s 19th birthday and that a server had asked her for identification in the restaurant. In his report, the constable indicated that the minor had used her own ID and that the server who checked the minor’s ID, served her after knowing she was 18 years old. He acknowledged that this was a mistake and that the ID the minor presented to the server was that of a 19 year old. The constable seized the bottle of beer in the minor’s possession (Kokanee Beer, Exhibit No. 3). He recorded the minor’s statement and served the pub with a Licence Premises Check (“LPC”). When asked whether he knew the minor previously, the constable replied that he had not seen her before the incident but saw her the following weekend.

The constable testified that he goes to all bars in Port Coquitlam and admitted that the pub is their main focus as it is the most popular pub with the highest volume of patrons.

Minor #1 testified that she entered the establishment through the pub entrance before 8 p.m. There was no doorman and she was not asked for identification. She then went through to the restaurant where her friend was celebrating her 19th birthday. There was a large crowd of approximately 30 people. The minor said she did not order food but ordered a beer. She had a friend’s identification in her wallet, a driver’s licence and a care card behind it. She did not bring her own identification. The server was behind her

when she was asked for ID. She turned around and passed her wallet to the server but did not observe the server checking her identification. The minor testified that she was not asked to remove her ID, nor was she asked for a second piece of ID. At first the minor testified that she ordered a second beer but later was uncertain whether she had one or two beers. I find nothing turns on whether she had one or two beers. After approximately one hour when the group was dispersing, the minor, with a beer in her hand, moved to the pub area with her friends. She said there was a doorperson at the outside entrance to the pub, near the partition, but he did not stop her or ask her for ID. The minor testified that they had only been seated for about five minutes when the police approached her table and asked for ID. Her friends were of age but she did not have ID as she had given the false ID to a friend and was not carrying her own ID. The minor informed the police she was 19 years old, but after being escorted outside she admitted she was 18 years old. She also informed the police she had visited the pub three or four times previously carrying false ID. The minor testified that the police confirmed her age with police records and recorded her statement.

Server #1 testified that she has been a server for six years and has been employed by the licensee for several months. She normally asks for two pieces of ID from any person who appears to be under 25 years old. In the restaurant however, she does not ask for ID if the person does not order alcohol. The server testified that on January 11th she served minor #1 and asked her for ID. Taking her wallet the server looked at the minor's driver's licence then flipped it over to see a care card. She was shocked and upset later when she found out that the girl was underage.

In her written statement completed on the night of January 11, 2008, server #1 states that she does not hesitate to ask for ID from anyone appearing younger than 30 years of age and from her experience and past training she has never had any issues with accepting valid ID. She wrote that to the best of her knowledge and experience, minor #1 presented her with a valid driver's licence that was the age and description of her.

Later she states that the driver's licence was a legitimate piece of ID to the best of her knowledge.

Server #2 testified that she has worked in licensed establishments for six years and for the licensee for over four years. She normally asks for two pieces of ID from anyone under 30 years of age and more than once if the person is new. As she went to school in the area she knows many of the customers and will not ask for ID if she knows their age. When the server first observed minor #1 in the pub she asked for her ID even though the minor already had a beer. The server said she removed the ID from the wallet and the photo on the driver's licence looked like the minor. She did not ask the minor questions related to her ID. When the doorman told her the police were outside she double-checked everyone's ID. The server said she was able to identify minor #1 from their security video system.

Evidence - Minor #2

Constable #2 testified that she approached a table with a group of young people and asked them for identification. One female was holding a light amber beer with a frothy head and she knew it was beer as she had been a bartender for 5 years. The minor said she had lost her purse and didn't know where it was. She gave the officer a false name and false birth date. When the officer took her outside she gave her correct name and birth date, which were confirmed with police records. The minor informed the officer she had not been asked for ID and the group had ordered 2 pitchers of beer. The constable escorted the minor back into the pub to identify the server and then took her back outside while she interviewed the server. The constable said the server informed her that she served the minor a caesar salad, but did not ask for ID because she did not order liquor.

The officer testified the server seemed defensive and did not appear to be telling the truth. However, she felt the server was being truthful when she said she did not ask for ID. The officer said the server did not appear to be aware that the minor should not be there at all. She also got the impression from the server that beers had been served before the minor arrived. After giving the minor a verbal warning, the officer passed her information to constable #1 who wrote the incident report.

Under cross-examination constable #2 admitted that she did not observe the minor holding the beer glass, but said there was a glass of beer in front of the minor and that the minor admitted to consuming the beer. In her report she noted that minor #2 was intoxicated but no evidence was presented to confirm this. The minor admitted to having alcohol on her breath but denied she was intoxicated.

Minor #2 testified that she went to the pub with friends between 6 and 8 p.m. There was no doorman and she had no ID. She said neither she nor her friends were asked for ID. A friend ordered pitchers of beer and the server poured the first drink into the glasses, one for each person, and later a friend poured her a second glass. The minor also ordered a caesar salad that had a hair in it. She paid \$30.00 into the tab. When the constable approached her and asked for ID she said she did not have her purse. Under cross-examination she said that she did not have a purse or jacket with her but had money with her. Minor #2 testified she gave the officer a false name but when she was taken outside the officer asked her to tell the truth, so she did. After recording her statement the officer took her back into pub to identify the server. Minor #2 said she had never been to a pub before. That night she had just got off work and had been drinking with a friend. Under cross-examination she maintained that no one except the police officer asked her for ID and was in the pub for 1 1/2 to 2 hours before the police came.

Server #2 testified that when she approached the table with five people including minor #2, the whole table was rude including the minor. She asked everyone at the table for ID and saw the minor's driver's licence and bankcard. The males ordered two pitchers of beer, but when the server brought the beer she couldn't remember how many glasses she brought. She did not see the minor drink. She was uncomfortable with the group because they only wanted to pay half. When the minor and her friends moved to the floor manager's section the server expressed her discomfort to the manager.

The floor manager testified that she has been employed by the licensees for eight years and has been their floor manager for four years. She is responsible for the front staff, training, scheduling servers and she also serves. On January 11th she served minor #2 and her friends who had moved over to her section from server #2's section. She said they had a bad attitude and complained about the food. When she asked minor #2 for her ID, the minor threw her driver's licence and bankcard at her. The manager did not feel it was necessary to ask the minor questions about her ID.

The head doorman testified that he is an experienced doorman. When on duty he observes the crowd for intoxication. He also roams around the pub and if there is someone new or a person has moved to the pub from the restaurant or appears underage he will ask for identification.

On January 11th, before the police entered the establishment, he double-checked the ID of everyone that appeared to be 25 years old and under. He said it took approximately 10 minutes and he checked between 30 to 40 patrons. The doorperson testified there are usually about 75% repeat customers in the pub and if he knows them he will make sure they have ID on them. He was surprised when the police informed him there were two minors in the pub. He said nothing stood out for him when he ID'd the minors.

The liquor inspector, who has been an inspector for many years, testified that she was concerned about minors walking through from the restaurant to the pub. Previously there was glass separating the two areas but it was removed due to a change in the regulation. In its place is now a pony wall that is extended with a hostess desk, and stanchions and chord. The inspector testified that she approved of this arrangement as long as there was a doorman in place. However, when she visits the establishment she observes patrons moving through the partition without being stopped.

The liquor inspector testified that after the incident on January 11th, she contacted the constables and the minors. She said that minor #1 informed her that she had been to the pub on at least three other occasions with her underage friends to use the dance floor.

The licensee, Randy Doncaster testified that when he arrived at the pub at 9 p.m. there were police cars outside the establishment and when he approached the police to find out what was happening, he was told that they were not at liberty to talk with him but would come and discuss the situation later. After another 25-30 minutes, Mr. Doncaster approached the police again and was given the same response. When the police returned to the pub to issue an Incident Report, Mr. Doncaster was not permitted to speak with the minors or ID them. Later that night, however, the licensee was able to ID the two minors through their video surveillance tapes.

Due Diligence – Evidence

Two doormen are on duty at the pub three nights per week starting at 8 p.m. and, depending on how many patrons arrive, 4-6 doormen start at 9 p.m. The licensee testified that he is vigilant about monitoring the clientele and will sit at the entrance to make sure no one enters that is related to gangs or otherwise may pose a problem. Everyone's driver's licence is swiped to make sure it has not been tampered with or is false, or to identify individuals that are troublemakers. The licensees initiated a security

system amongst liquor establishments in the region. Randy Doncaster is now the head of the Barwatch, a program that includes a police task force for the tri city group. Since the incident, the surveillance cameras have been increased from 16 to 32. The partition between the restaurant and pub is monitored by staff. As a small business it is not feasible to have a doorman there all the time.

The manager trains new employees over a two-week period after which they are shadowed for a further two weeks. The licensee or the manager reviews the in-house manual with new employees and explains policies and the manager conducts a one on one review with employees. Outside professionals such as insurers, police officers and ex-firefighters are also brought in to train staff.

It is the licensee's policy that if a patron looks to be 25 years old or younger the staff must ask them for two pieces of identification and it is everyone's duty to ID patrons. When the doormen are not present then even the busboys must ID. If employees have a question about someone's ID they are instructed to ask the patron for their date of birth and address and to examine the picture to see if there is a resemblance.

The licensee or manager holds staff meetings once a month. The office assistant takes notes of the meetings and the staff sign off. If an issue arises it is entered into the manual. A new copy of the manual is given to the staff every year. Staff meetings are important for role-playing and coaching staff on hospitality issues as well as identifying minors. Examples are used to show how to greet customers and make eye contact and how to deal with intoxicated customers.

The manager testified that she discusses ID at every meeting. She said many of the patrons are regulars and if staff is familiar with them they are just required to make sure they have ID on them. Any new person must be asked for ID regardless if they have been asked for ID at the door. Although their own house manual does not provide ID procedures, the manager role plays at meetings and gives verbal instruction. She believes it is more important to discuss and use examples than give tests.

The in-house 13-page manual (Exhibit 2, Tab 11) includes the policies and procedures for all employees. New employees are required to read and sign the manual and are given a copy. The manual is upgraded continuously.

All employees have completed the Serving It Right ("SIR") course, which is mandatory for employees in liquor establishments. Individuals are given a copy when they take course and it is discussed at meetings.

The licensee's logbook is a sign out sheet that is completed by doormen and also used to report incidents.

SUBMISSIONS

I had the benefit of reading the parties' written submissions after the conclusion of the hearing. I have read and considered them, however, only a summary is included.

Branch's submissions

The branch submits that:

- The RCMP's decision to issue a Licensed Premise Check was predicated on two critical facts: one was that two minors had been found in the Pub at the Cat and Fiddle on the night of the alleged contravention and the identity of the minors was confirmed through the police prime records systems. The other was that the minors had been found with liquor.
- Having no jurisdiction to deal with issues relating to police conduct, the hearing can only determine the narrow issue of whether the licensee supplied liquor to the minors contrary to the *Act*.
- The licensee was not duly diligent in preventing the alleged contravention for the following reasons:
 - Poor Door Control
 - Failure to monitor the partition between the food primary and liquor primary part of the Pub
 - Reliance on a Discontinued Serve it Right Manual and its impact on verifying identification at the Cat and Fiddle. The discontinued Server's manual has no requirement for 2 pieces of ID when verifying a customer's age. The new Serving it Right manual however makes it mandatory that when you verify a customer's age you ask for 2 pieces of identification
 - The Employee Manual, with the exception of the subject of intoxication, contains mostly housekeeping rules and is deficient to the extent that it does not contain, nor articulate procedures to deal with minors and ID checks.
 - The failure of the licensee to develop and administer written tests to its employees does not contribute to due diligence.

- Permitting young looking patrons in the Pub without asking any verification questions belies the reality that young persons continually seek ways to gain entry into liquor primary establishments.
- The ID checks were being carried out in an uncoordinated manner or the verification of identification was so defective that it requires a re-training and re-orientation of the employees
- The failure of the licensee to develop an effective system to check the identification of patrons shows that the licensee was not duly diligent in taking control of its liquor primary establishment even though it had all the opportunity to do so.
- The licensee did not do all that could have been done to prevent the alleged contravention. Despite the exposure to external security training, there is irrefutable evidence that the door-persons and other employees of the Cat and Fiddle failed to act on such.

Licensee's submissions

The licensee's submits that:

- The contravention notices issued on January 11th were just the last in a series of baseless, alleged contraventions and the written statements made by the constables were false and made knowingly to inflame the situation and to motivate the branch into taking enforcement action.

- As minor #1 produced valid identification, although not her own, and the server observed that the driver's licence resembled the likeness of the minor, the licensee was entitled to rely upon the authenticity of the identification in accordance with section 33(5) of the *Act*, and there was no need to "cross examine" the minor with respect to the identification.
- Evidence regarding the purported lack of security between the restaurant and pub is irrelevant to the determination of whether or not the alleged contravention occurred that night; as minor #1 was ID'd in the restaurant and is entitled to be served alcohol, moving from the restaurant to the pub is no different from moving from one table to another within the pub.
- Minor #2 persisted in lying to the police about her name and her age and only cooperated when she was assured by the police that she would not be charged personally.
- The evidence of the witnesses that said they ID'd minor #2 should be accepted over that of the minor who was rude and a liar.
- The licensee was denied access to the two individuals, and even though the licensee was able to identify the minors later that evening, they were not given a reasonable opportunity to defend themselves and would never have known the identity of the minors.
- The minors were ID'd by the staff and as they provided authentic (valid) ID that generally depicted the likenesses in the driver's licence photograph, in accordance with section 33(5) of the *Act*, the licensee is entitled to rely upon the authenticity of that identification.

- It is the responsibility of the branch or police to establish that the servers did not properly verify the identification provided by the minors.
- It was up to the branch or police to obtain the identification produced by minor #1 to establish that the licensee should not have reasonably relied upon that identification or called the individuals sitting with minor #2 to corroborate her allegation that she was never ID'd.

Regarding Due Diligence, the licensee submits that:

- The licensee has commendable internal policies with respect to the training and ongoing education of their staff and go well beyond what is required of them and therefore what might be considered reasonable.
- There was nothing further the licensee could have done on the evening of January 11th to prevent the two individuals from gaining access to the establishment and that they ID'd the minors and that both of them provided valid identification.
- The branch's arguments with respect to the SIR manual, that it was not sufficiently diligent on matters relating to the most recent manual, should be completely disregarded as the new manual was never placed in evidence. He said the manager testified that she is familiar with the new manual and it is the subject matter of ongoing discussions at regular staff meetings.

Branch's final submissions

The branch submits that:

- Poor door control evidenced by the absence of doormen and no identification checks at the point of entry into the pub, failure to monitor the division between the restaurant and pub, reliance on an outdated SIR manual inconsistent with the Guide for Liquor Licensees in BC, failure to utilize verification questions, an employee manual which fails to articulate procedures for the enforcement of policies, minor's previous visits to the pub are indicators which point to a less than diligent approach by the licensee in preventing the alleged contraventions.
- The pub has an obligation to maintain a higher standard than the restaurant because minors are not permitted in the pub. The absence of controls at the partition between the restaurant and pub exposes the licensee to the risk of having minors access its establishment with the possibility of the minors being supplied and consuming liquor in the pub as it has in this case.
- While it is true that no one looks like the photograph in their driver's licence, it is a more important reason for the licensee to verify identification of patrons by asking one or two verification questions which the licensee patently failed to do.
- Steps for verifying identification and sample verification questions are contained in the Guide. These steps are also set out in the new SIR manual. Licensee's reliance on an outdated SIR manual is a serious flaw because the outdated manual does not contain key principles with respect to ID and verification, nor is it consistent with the requirements articulated in the Guide. The Guide prescribes the SIR program and while the licensee is under no obligation to use the SIR manual to train its staff, if licensees use the manual, it is obliged to use the current version.

REASONS AND DECISION

There is no dispute that two minors were in the pub on January 11, 2008, and I find they were both supplied liquor contrary to s.33 of the *Act*. Server #1 served a beer to minor #1 who later moved from the restaurant to the pub with a beer in her hand. An RCMP constable seized a beer bottle in her possession (Exhibit 3). The police also approached the second minor in the pub who was found with ½ glass of beer in her possession. The minor was in the pub for over one hour and admitted to having two glasses of beer. I therefore find the licensee contravened s.33 of the *Act*.

The legislation provides a defence to a contravention under s.33 of the *Act* if, in reaching the conclusion that a patron is not a minor, the licensee or employee required that the person produce identification, which means a government issued identification with the person's name, signature, birth date and picture and one other that displays the person's name and one or both of the person's signature and picture. The licensee or employee must also have examined and acted on the authenticity of the identification.

For a person's ID to be authentic means that the ID must be valid or unchanged and it must belong to the person who is presenting the ID as their own. The law requires that licensees not serve or supply liquor to minors. It is therefore the responsibility of the licensee to ensure that the patron's ID is authentic.

The Guide (Exhibit 1, tab 10, p. 11,12) provides some simple steps for verifying a persons identification including asking questions such as the person's middle name, address or postal code, asking the person for their zodiac sign or asking for a sample signature to compare to the signature on the photo ID.

The licensee's evidence is that it is their policy to check ID of everyone who looks under 25 and that new patrons are asked for ID regardless if their ID has been checked at the door and the manager testified she will double check anyone who seems questionable. Many of the patrons are regulars and are just checked to make sure they have ID with them. The doorperson testified that when he starts his shift he usually roams the premises and double checks any person in the pub that he is not familiar with.

On January 11th, as both minors were new patrons and not familiar to staff and looked under 25 years old, it would have been reasonable to not only check their ID but to authenticate their ID. Given the evidence, I find on a balance of probabilities, that although one minor was asked for identification in the restaurant, both minors were not asked for identification in the pub, and even if they were, their identification was not properly authenticated.

I found minor #1's testimony straightforward and consistent throughout and consistent with her statement to the police on the night of the incident. She was uninhibited and candid in her admission that she used false ID and that she had visited the pub on other occasions with false ID and with her under-aged friends. Although the minor could not remember for sure if she had ordered one or two beers, I find this a minor discrepancy and that nothing turns on it.

While a great deal of the licensee's evidence focused on their difficult relationship with the police, I found the constables' testimonies straightforward and consistent with their reports and the minors' evidence. I am satisfied that the discrepancies in constable #1's reports were minor and were not made to inflame the situation or to motivate the branch into taking enforcement action as counsel submits. Despite being extensively questioned about their motivation for issuing the licensed premises checks, I found they were consistent in their responses and unshaken under cross-examination.

In the restaurant, minor #1 was asked for her identification and she passed her wallet to the server. The minor testified that she was not asked for a second piece of identification or asked to remove her identification from the wallet. As she had her back to the waitress she could not tell if the waitress removed the ID or looked at two pieces.

In server #1's written statement, completed on the night of the incident, she states that the minor presented her with a valid drivers licence, that was the age and description of her and that it was a legitimate piece of ID to the best of her knowledge. She does not state that she viewed a second piece of ID. At the hearing the server testified that she looked at the minor's driver's licence and then flipped it over to view her care card. Although the video surveillance confirms that the server looked at the minor's wallet it does not clearly show whether she flipped it over.

Although I am inclined to accept the server's written statements as the truth as it was written shortly after the incident and fresh in her memory, I find there is insufficient evidence to conclude that only one piece of identification was examined.

However, even if the server checked two pieces of ID there is no evidence that she authenticated minor #1's ID. Had she done so the server would likely have discovered the ID did not belong to the minor and that she was under-age.

Server #2 testified that when minor #1 moved to the pub she checked the minor's ID and as the picture on the ID looked like the minor, she did not asked any questions. This is contrary to the evidence of minor #1 who testified and reported to police that she was not asked for identification in the pub and had no ID with her. I prefer the minor's evidence as server #2's evidence was not only inconsistent with minor #1's evidence, but also with minor #2 and constable #2's evidence. I also found server #2's testimony self-serving.

Server #2's testified that she asked minor #2 for identification when she approached the table to take the group's order, and that that is what she told police. Constable #2 however, testified that the server informed her that she did not ask the minor for identification as she had not served her alcohol. The officer also had the impression that the server brought the pitcher of beer and glasses to the table before the minor arrived. Constable #2 noted that the server was extremely defensive during their conversation and did not feel she was being truthful.

Minor #2's evidence, that she was not asked for identification and did not have any identification with her, is also contrary to server #2's evidence. Although minor #2 appeared to be apprehensive and somewhat defensive, I found her testimony consistent throughout and consistent with her recorded statement to the officer.

The floor manager also testified that she asked minor #2 for identification. However, I do not find her evidence credible that minor #2 threw the ID at her. This information was not included in the manager's statement or the Security Records written shortly after the incident.

The manager also testified that she observed minor #2 on the patio handing something to a friend and implied that it may be the minor's purse. However, I find this is mere speculation and without more evidence I cannot conclude whether the minor had a purse or whether it was removed before the police arrived.

I also do not accept counsel's submission that minor #2 was told she would not be charged if she told the truth. I find that the minor decided to tell the truth after the officer informed her she would not be charged. This is also consistent with the officer's evidence that after she explained to the minor that lying was a criminal offence and that she could be charged, the minor told the truth because she did not want to get into trouble.

In reviewing the evidence, I have also considered the licensee's video surveillance CD (Exhibit #4) and the Security Records, a written summary of the CD. Although the licensee states in the Security Records that the video shows the minors being asked for identification, at the hearing the licensee admitted that the surveillance cameras in the pub did not capture the tables where the minors were sitting and therefore did not show the minors being asked for ID.

As I have found the minor's were not properly identified or their identification authenticated, the defence under section 33(5) fails.

The licensee submitted that it is up to the branch to prove the ID was not authenticated. In liquor enforcement hearings, while it is up to the branch to establish that a contravention took place, it is up to the licensee to present evidence to support its case and that it meets the criteria of the defence relied upon. Although there is no requirement to authenticate identification, it was open to the licensee to bring evidence to show that their employees authenticated the minor's ID pursuant to the requirements of section 35(5) of the *Act*.

Due Diligence

The defence of due diligence, if successful, will completely exonerate a licensee from having contravened the *Act*. The licensee must demonstrate, on a balance of probabilities, that it took all reasonable steps to prevent the contravention.

In the leading case of *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 p. 1325, 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 respondent 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. For a useful discussion of this matter in the context of a statutory defence of due diligence, see *Tesco Supermarkets v. Natras* [[1972] A.C. 153].

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC (para 25), set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*:

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who

were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in Plaza clarified that the directing mind need not be an officer or director of the licensee:

It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee. (para 27)

Therefore, the licensee must establish on a balance of probabilities that those involved in the incidents were not the directing mind of the licensee at the time of the incident and, that it

- a. Implemented adequate training and other systems to prevent the contravention, and
- b. Took reasonable steps to ensure the effective operation of the system.

I find that on the evening of January 11, 2008, the manager was the directing mind of the licensee at the time of the incident. As manager, she was in charge of the servers and doorpersons. The licensee testified that when he arrived later that evening he saw the police vehicles outside the establishment and his manager informed him that the police has escorted two females out of the pub.

As the manager was the directing mind of the licensee and as she was involved in the incident by serving minor #2, the defence of due diligence must fail. However, I find the defence cannot succeed for other reasons.

The two licensees appeared dedicated and hard working and I was impressed with their efforts to ensure their establishment is part of and serves the community. It is apparent that they care about the business and the working environment for their employees. However, I find their systems in place for identifying minors and authenticating patron's identification is not reasonably effective.

While I accept the initial training of employees may be adequate, the licensee does not appear to have a reasonably consistent method or procedure in place to test employee's knowledge and performance on an ongoing basis, particularly with respect to identifying minors. The licensee's evidence is that their employees are not tested on their knowledge or spot-checked to check their performance in authenticating a patron's ID. There is no "secret shopper" program to randomly test their performance to see if they are up to date. While there is no requirement to incorporate a particular system, it is up to the licensee to put a system into place that will reasonably prevent minors from entering their liquor primary establishment and being supplied with alcohol. Without an adequate system of testing an employee's knowledge as well as ongoing individual checks, a licensee cannot reasonably be sure that the employees are effective in their duties with respect to minors.

The monthly staff meetings provide an opportunity for discussion and role-plays; however, with a high turn over of staff and part-time employees, this opportunity for ongoing training is only a benefit to those who are able to attend on a consistent basis.

The licensee's in-house manual does not adequately deal with minors. The manual states that employees are legally required to refuse service to persons who are minors, but does not provide guidance as to how to authenticate their identification. I also note in the staff meeting notes of January 20th, a week or so after the incident, item 5 indicates that the "Identification Memory Aid" section in the SIR manual was reviewed. The licensees have included a copy of an SIR manual (Exhibit 2, tab 12) that is an earlier version and its explanation of ID procedures is not as thorough or detailed as the

newer version of October 2007. I found the licensee and manager's response vague and unsure when asked if the new manual was being used.

The licensee has intensified its screening system at the door but only after 8 p.m. and three days a week. Although the licensee's evidence is that there are a minimum of two doormen between 8 and 9 p.m., records indicate there is often one doorman present from 8 to 9 p.m. On January 11th, the two minors who entered the premises were not detected until the police arrived. One minor had been in the pub for over one hour and the other minor said she had been to the pub on other occasions using false ID and with her underage friends.

I find the licensee's system for monitoring minors travelling from the restaurant to the pub, was also not reasonably effective on January 11th. Although the doorman testified that he always asks for ID from any patron who is new or is going from the restaurant to the pub, minor #1, a new patron, passed from the restaurant to the pub without being stopped or ID'd by the doorman although he was standing at the entrance, a short distance away. This was a concern for the liquor inspector and if a reasonably effective system had been in place on January 11th, as recommended by the inspector, minor #1 may have been prevented from entering the pub.

As I find the licensee's systems in place were not adequate to prevent the contraventions, the defence of due diligence is not successful.

The licensees testified a great deal about their involvement with the police over a period of time from November 2007 to February 2008 in order to put into context the incidents of January 11th. The licensees' believed that they were singled out by the police during that time and that the incidents of January 11th were just another example of harassment.

While I acknowledge the licensee's relationship with the police may have deteriorated after November 2007 and was not restored until February 2008, it is outside the jurisdiction of this hearing to make any findings or to comment on the cause of the difficult relationship or conduct of police. The licensees and their staff felt frustrated when they were not permitted to interview or identify the minors and possibly their frustration was heightened because of their perception of previous events. However, I find the police conducted the licensed premises check on January 11th as they were entitled to, and I am satisfied the licensees were able to identify the minors later that evening through their video surveillance system.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* and/or the terms and conditions of the licence, I may do any one or more of the following:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident.

In determining the appropriate penalty in this case, I have considered the licence and licensee's history of similar types of contraventions and the licensee's explanations of the circumstances of some past incidents from their perspective. The last contravention of this type that resulted in a penalty was in February 2005. In September 2006 the licensee was issued a Contravention Notice for supplying liquor to minors and for allowing minors on the premises. These alleged contraventions did not result in enforcement actions.

I have also considered the seriousness of this contravention, particularly as the officers were able to identify the two minors during the short time they were there while the minors remained undetected by the staff for a considerable time.

The range of penalties for a first contravention of section 33 of the *Act* pursuant to the *Regulation*, Schedule 4, Item 2, is a 10-15 day licence suspension. The branch proposes a 15-day suspension because two minors were found in the pub at the same time. While the fact of two minors being found in the pub at the same time is significant, I find its significance lies in the fact that it is further evidence that the licensee's system for preventing minors from being served or supplied alcohol is ineffective. Having considered the evidence and circumstances as a whole, I am satisfied that a penalty of 10 days will be sufficient to encourage voluntary compliance.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 032708 for a period of ten (10) days to commence at the close of business on Thursday, January 8, 2009, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulation*).

To ensure this order is effective, I direct that Liquor Primary Licence No. 032708 be held by the branch or the Coquitlam R.C.M.P. Police Department from the close of business on Thursday, January 8, 2009, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

K. McIsaac
Enforcement Hearing Adjudicator

Date: December 11, 2008

cc: Coquitlam District RCMP
Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Olubode Fagbamiye, Branch Advocate