



**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:	1075992 Alberta Ltd. dba Holiday Inn – Metrotown 4405 Central Blvd. Burnaby, B.C. V5H 4M3
Third Party Operator	691877 B. C. Ltd. dba Connections Bar and Grill
Case:	EH06-036
For the Licensee:	Donald J. Jordan
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	June 8 and 9, 2006
Place of Hearing:	Vancouver, B.C.
Date of Decision:	July 25, 2006

INTRODUCTION

1075992 Alberta Ltd. is licensed to operate The Connections Bar and Grill (the “bar”) under Liquor Primary Licence No. 129131. The lounge is operated by 681877 B. C. Ltd. as a third party operator (referred to in this decision as the “third party” or as the “operator”). The principal of 681877 B.C. Ltd. was previously involved in the management of the bar.

The licensed hours of sale are 11:00 a.m. to 1:00 a.m. Monday to Thursday, 11:30 a.m. to 1:30 a.m. Friday and Saturday and 11:00 a.m. to midnight on Sunday. The licensed capacity is 208 patrons in the main area and 17 patrons in the designated smoking area.

The licensee authorized the third party operator to conduct this hearing on its behalf.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated March 19, 2006, the Liquor Control and Licensing Branch (“the Branch”) alleged that on February 17, 2006, the licensee.

1. Contravened Section 33 of the *Liquor Control and Licensing Act* (“the Act”), by selling, giving or otherwise supplying liquor to a minor.

The branch’s recommended enforcement action is a seven (7) day suspension of the liquor licence (item 2 of Schedule 4 of *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the “*Regulation*”).

2. Contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

The branch's recommended enforcement action is a five (5) day suspension of the liquor licence (item 11 of Schedule 4 of the *Regulation*).

RELEVANT STATUTORY PROVISIONS

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

Supplying liquor to minors

Section 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.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "*Regulation*")

Minors

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

- (a) a passport;
 - (b) a driver's licence that displays a photograph and the date of birth of the holder;
 - (c) an identification card, issued by a government agency, that displays a photograph and the date of birth of the holder.
- (2) A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before
- (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or
 - (b) selling or serving liquor to the person.
- (3) The pieces of identification required under subsection (2) must include
- (a) one piece of the identification referred to in subsection (1), and
 - (b) one other piece of identification that displays the person's name and at least one of the person's signature and picture.
- (4) A licensee must not allow a minor to have liquor in his or her possession in the licensed establishment unless the licence issued for that establishment is a food primary licence or a liquor primary licence for a stadium and the minor is working as a server in the establishment.

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

Drunkenness

- Section 43** (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.
- (2) A licensee or the licensee's employee must not permit
- (a) a person to become intoxicated, or
 - (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.
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ISSUE(S)

The licensee/third party operator denied that the Section 33 contravention occurred. The licensee/third party operator admitted that the Section 43(2)(b) contravention occurred, but took issue with the recommended enforcement action.

1. Did the licensee “sell, give or otherwise supply liquor to a minor”?
2. Did the licensee require production of identification and act on the authenticity of that identification?
3. If the licensee contravened as alleged, what, if any, is the appropriate penalty?

EXHIBITS

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| Exhibit No. 1 | Licensee’s Brief of Statutory Authorities |
| Exhibit No. 2 | Branch’s Book of Documents |
| Exhibit No. 3 | Excerpts from the branch’s Desk Reference Manuals |

PRELIMINARY APPLICATION

Prior to the commencement of the hearing, the third party made application in writing to have the branch conduct a fresh investigation on the grounds that the branch had breached the rules of natural justice/procedural fairness. The branch declined the application. The third party advised the branch that it would advance its argument at the commencement of the hearing, arguing that the adjudicator lacked jurisdiction to proceed because of the failure of procedural justice.

The third party’s submissions were largely based on the allegation that the branch investigator did not interview the servers involved and, otherwise, did not conduct a sufficient investigation. During discussions with the investigator, the

third party had the impression that the investigator had interviewed the servers and, acting on the views expressed by the investigator, the third party took disciplinary action against one of the servers and wrote to the parents of the minors. Subsequently, the third party discovered that the investigator had not interviewed the servers.

The third party submitted that the Notice of Enforcement Action is the document that commences the enforcement action proceeding, that it was based on an investigation that breached the rules of natural justice, and this hearing is the result of a flawed process and is the 'fruit of the poisoned tree'. The third party underlined the relationship of the branch's personnel – that both the investigator and the adjudicator are delegates of the general manager. In some circumstances, the holding of a hearing could 'cure the defects' in the originating process but that principle is not available under this statutory scheme where the two bodies are delegates of the same entity. Additionally, the flawed document, the NOEA, is part of this proceeding and, therefore, the proceeding cannot cure the defect.

The third party raised the doctrine of reasonable expectations, that the licensee had a legitimate expectation that a proper investigation would be conducted, from which the investigator would form an opinion. The branch's Compliance and Enforcement Policy and Procedures Manual - Desk Reference, Section 4.2, addresses administrative law principles. The third party submitted that once a person has been granted a licence, before those rights can be impinged, there must be adherence to the highest standards of natural justice. Additionally, where the adjudicator is the delegate of the general manager, that person is not in a position to cure a defect in procedural fairness that occurs prior to the hearing.

I stood down to consider the submissions and issued oral reasons. For the purposes of this application, I assumed the facts as set out by the third party to be accurate.

Reasons:

The enforcement process commences with a Contravention Notice which is served on the licensee. This process alerts the licensee/third party to the branch's concerns so that they have the ability to do their own investigation and assessment of whether the branch's allegations are well founded. After the CN is issued, the branch's Compliance and Enforcement officer (C & E officer) investigates by speaking with as many witnesses as the officer believes necessary. There is no policy requirement for the C & E officer to interview all witnesses.

In this instance, the C & E officer spoke with the licensee/third party and told him what the evidence was and his view based on that evidence. The C & E officer then prepared a NOEA.

I agree that the protections afforded by the rules of procedural fairness are of utmost importance in licensing/regulatory regimes. I find that the doctrine of reasonable expectations in this regulatory framework does not go so far as to require the branch's investigator to interview every witness. Additionally, I find that there is no requirement for the C & E officer to investigate all possible defences a licensee might raise.

The NOEA is included as part of the branch's Book of Documents. It includes a statement of the branch's view of the evidence, which led the branch to pursue enforcement action, and which the branch anticipates will be the evidence at the hearing. However, the branch gives the licensee an opportunity to contest the branch's view of the evidence – by asking for an oral hearing at which the

licensee can test the branch's evidence and present additional evidence. I do not accept the statements in the NOEA as the evidence. The evidence comes from the witnesses.

I found that the licensee/third party had not established that the investigative process was flawed or that the NOEA was flawed. I denied the application based on my finding that the facts did not establish a breach of natural justice.

EVIDENCE

The branch presented four witnesses who had been in the bar on February 17, 2006. Three of these witnesses gave testimony with the assistance of an American Sign Language interpreter. Two of those witnesses are the minors who are the subject of the alleged contraventions. The branch also presented evidence through the Compliance and Enforcement officer who is responsible for this geographic area.

The third party presented evidence through the third party operator (referred to below as the "operator") and a former server.

The Branch's Evidence

Two minors who attended the bar on February 17, 2006, testified that they entered the bar together at approximately 8:30 or 9:00 p.m., that "minor #1" left immediately because she forgot her telephone and that when she returned, "minor #2" was seated at a table and had a drink. Minor #2 drank half of the drink and minor #1 had a drink of it. Minor #2 then bought cigarettes and they both went into the smoking room. They were invited to, and did, join a table of older men. A young man they both knew (witness #3) was in the bar and he joined them although he was not drinking liquor.

Minor #1 testified that she was 18 years old as of February 17, 2006. She testified that when she went to Connections that night she was carrying identification – her school card, BC Care Card, and Social Insurance Card. She testified that she was dizzy from her girlfriend's drink but when they joined the others, as more alcohol appeared on the table, she continued drinking. She stated that she was really dizzy and drunk, chatting with the others, and that she could not remember some things from that night. She recalled taking photographs. Another young woman who joined them is in the photographs (Exhibit No. 2, tab 6). She testified that they communicated by writing notes back and forth to each other and to the boys.

Minor #1 testified that she saw a female server in the smoking room. At one point that server wrote a note to her on a matchbook cover saying, "please leave or you'll get into trouble." She stated that minor #2 also saw the note but they did not listen to the server. She testified that she recalled two other servers in the smoking room. She said that everyone else at the table was older and they were ordering the drinks. She testified that she was never asked for identification and that the thought of having false identification had not occurred her. She testified that she had been 'worried and scared' that someone would approach them for identification, but that it turned out to be 'like walking into a restaurant.'

Minor #1 could not recall exactly what she had to drink. Her girlfriend told her she had seven drinks. She recalled having Smirnoff Ice in a fancy martini glass. She recalled a blue-ish drink and a black-ish drink. At the end of the evening, witness #3's father came to drive them home. She recalled falling down a few times, hurting her knee and she recalled leaving the bar with the help of her girlfriend, witness #3 and his father. She recalled seeing a woman at the bar who her girlfriend told her was the manager.

After this incident minor #1 was interviewed by the branch C & E officer. He took photographs which she identified at Exhibit No. 2, tab 7.

Minor #2 testified that she 16 years old on February 17, 2006. She testified that when she went to Connections that night there was no door security. She testified that she did not think she had identification with her but that, regardless whether she had any with her, she did not show identification to anyone. She testified that she did not have identification showing her to be of legal age. She also testified that this was her second time in Connections. She said that she went into Connections out of curiosity and because she thought it was fun. She apologized to the licensee, acknowledging that she has caused a lot of trouble and that it was a stupid thing to do.

When they went inside minor #2 went to a table and sat down. She testified that a server came to her table, asked what she wanted to drink and she ordered a Smirnoff Ice. She testified that she drank part of it, that the server then asked her for identification, and that she said she had left her identification at home. She communicated with the server in writing. She testified that minor #1 returned, had some of her drink and became dizzy. Minor #2 went to buy cigarettes from a dispensing machine and had to ask the server for change for a \$10.00. She bought the cigarettes and the two minors went into the smoking room where they joined a group of men.

During the evening, the men ordered drinks and the server put the drinks in the middle of the table. The men passed drinks to them, or told them "that drink is for you." Minor #2 recalled having about three to five Smirnoff Ice and some martinis. She recalled seeing two servers in the smoking room, one being the server who served her earlier. One of the servers gave her a matchbook with a note saying "please leave or I will get into trouble." Minor #2 indicated to the server that she should not worry and that she and friend would be fine. When witness #3 telephoned his father to come to take them home, minor #2 paid the server for her drink, got her backpack and they left Connections at about 11:30 p.m. She recalled that minor #1 had difficulty standing up, was stumbling

and needed assistance. She also recalled that when they got minor #1 home, she was so drunk she was crawling on the floor.

Minor #2 recalled meeting the branch C & E officer, with the school counsellor and minor #1. The C & E officer took photographs to show how young they looked and he gave them his e-mail address to send the photographs they took that night.

Witness #3 testified that he was 22 years old on February 17, 2006. He had been to Connections four or five times before because it is the bar that deaf people go to. He arrived this evening between 8:00 and 9:00 p.m. He testified that he did not see any door barrier or security. After he was there for a while, he noticed the two minors who he had known in high school. First he saw them in the bar and, when they went into the smoking room, he joined them. At this point the only drink they had was the bottle they brought into the smoking room. He testified that a man he did not know ordered drinks for them. When the server brought the drinks, she placed one in front of the man and asked him where the other drinks should go. The man told him they were for the young women and the server gave them to them. At this point, the minors were at a table separate from the men but then the men joined their tables together.

Witness #3 stated that he was in the smoking section with them for at least an hour. He testified that minor #2 was 'not that drunk' but minor #1 'was completely drunk.' He told her that she had to go home but she was talking with the others, so around 11:00 p.m. he telephoned his father because she was so drunk. Before his father arrived, minor #1 was so drunk she was losing control and she collapsed. He kept trying to move her toward the door.

Witness #4 is the father of witness #3. He testified that he went to Connections on February 17, 2006, at approximately 11:30 p.m. because his son had telephoned saying that a friend of his had been drinking far too much and he

wanted him to take her home. When he arrived he recognized minor #1 who he had met before. He testified that she was really intoxicated and fell down a few times in the lounge. She was making 'happy rounds' and took quite a while to get to the door. When she got to the door she fell down three times. An employee came to the door and told him to get her out. Witness #4 testified that he asked the employee why she had let her get this intoxicated. The employee replied saying get her out of here and don't let her back in.

The witness testified that he received a letter similar to one contained at Exhibit No. 1, tab 5, page 5, from the Connections' night bar supervisor, apologizing for remarks she made to him on February 17, 2006. The only difference he noted was that his letter had not been signed.

The C & E officer testified that he had received a complaint from the mother of one of the minors about this incident. He arranged to meet with the licensee and the third party operator on February 23, 2006. His main concern at that meeting was to ensure they knew the nature of the allegations and that they took steps to ensure that this type of activity would not happen. On the same day, he met with the minors at their school and interviewed them together in the presence of the school youth worker and an interpreter. Between February 23 and 28, he had many conversations with the third party operator about this matter and in reference to an application for a Licensee Retail Store licence. He testified that during a conversation on February 27, the third party operator had told him that staff had not followed the rules and that he had terminated the server.

On February 28, 2006, the C & E officer met with the licensee and the third party operator again and provided them with the information he had received from the minors and the man who had driven them home. He showed them the photographs he had taken on February 23 of the minors. The third party told him there were no written policies or practices for staff instructions, that he had terminated one server and that he would be following up with the remaining staff

to ensure they followed requirements. In his notes from that meeting, the C & E officer noted that

- all the staff have Responsible Beverage Service training,
- the licensee continually reminds staff of the consequences for “breaking the rules and the law”,
- there is no training program,
- there are no written policies or procedures,
- there is nothing signed off by the staff acknowledging any training,
- there is no log book,
- the licensee tests staff by “sending friends into lounge with \$50 to check out what they do concerning minors, drunks – everything and anything”, and
- the licensee’s contract with the third party includes a requirement for due diligence on the part of the third party in the operation of the liquor licenses.

The C & E officer served the Contravention Notices (CN) at the meeting on February 28, 2006.

The C & E officer did not interview the servers and he testified that he believed the third party had undertaken his own investigation and concluded that the server had failed to request identification. There was some dispute over whether the third party had terminated the server prior to the February 28, 2006, meeting. However, the C & E officer was adamant that he knew before the 28th. He also testified that the third party “convinced me his establishment was in contravention on each of those five points [the alleged contraventions set out in the CNs] and that he had this [the CNs] written prior to the meeting.”

Following that meeting, the C & E officer received various documents from the licensee and the third party relating to their contract, apology letters from the third party to the parents, licensee and branch, and employee acknowledgement

forms signed by employees on March 2, 2006, confirming rules regarding over-service, identification, and conduct.

On March 16, 2006, the C & E officer issued the Notice of Enforcement Action for contraventions under Sections 33 and 43(2)(b). The recommended enforcement actions are within the ranges for first contraventions, but above the minimum. This licensee does not have a history of contraventions (“compliance history”). The C & E officer testified that his penalty recommendations recognize the magnitude and severity of the contraventions involving two minors who were allowed to remain in the premises and consume alcohol over a period of approximately three hours. He testified that he recommended licence suspensions rather than monetary penalties to send a strong message to all involved and to ensure that the penalty was not seen as the cost of doing business.

The Licensee’s and Third Party Operator’s Evidence

The third party operator (the “operator”) of the bar has been in the food and beverage industry for 21 years, in managerial positions. He has managed the Connections Bar and Grill for four and half years. Initially, he was the food and beverage manager for Holiday Inn who ran Connections. Then Holiday Inn sold to the current owner who contracted with him as a third party operator, in July 2005.

The operator testified that he has never before had a CN issued against him and that he is confident that he understands his responsibilities as the operator of a liquor licence. At present, there are about 18 employees at Connections. He stated that he goes over policies and procedures with the staff through meetings every three weeks, and on a one-on-one basis. He did not believe that written policies were necessary. However, as a result of these proceedings, he has produced written policies (see Tab 5, Exhibit No. 1) which he has had employees

sign. He testified that these policies are just a reiteration of what has been discussed in staff meetings.

The operator testified that he did not conduct an investigation concerning this incident. He understood that the branch's C & E officer was doing a full investigation. When they spoke on February 27, 2006, the operator understood the C & E officer to say that he had completed his investigation and it was apparent that the server had not checked identification. He testified that he told the C & E officer that he would terminate the employee – not that he already had terminated her. His partner advised the employee that she was fired; she took action for wrongful dismissal and during that process the operator learned that the employee had not been interviewed by the branch's C & E officer. The operator did not have any documents with him regarding the date of the firing. He testified that it was the branch's C & E officer who told him the name of the server and that he accepted that she was the server identified by the witnesses.

The server who was terminated attended the hearing under summons. She testified that she had been employed for six and a half years in the food and beverage industry and that she was familiar with the requirements of the liquor laws. She started work at Connections in the last week of December 2005. She also worked at another restaurant at the same time.

She testified that one of her employers fired her without asking her version of the events. Initially he told her there were five minors she had served. After being fired, she contacted the Labour Relations Board and then spoke with her employer again. At that time, he told her there were two female minors and that she had asked for identification from one. She then recalled the two minors and that she had checked identification for one and did not serve the other. She testified that she recalled one minor had a drink in front of her and she asked the other server if she had checked identification. Since she had not, this server went over and asked for it. At first the minor said she didn't have any with her so

she told her she was not allowed to be there. Then, the minor produced one piece of identification that was out-of-province. The server stated that she knows identification from Ontario and Quebec, but would not know what identification from other provinces looked like. Although the server was suspicious of the identification shown, she felt she could not argue with her. The identification was in her wallet and the server acknowledged in her testimony that she should have taken it out. She testified that she thought the minor looked close to 19 years old.

The server testified that the two minors went into the smoking room and were sitting at a table with one of her customers. She testified that she was only in the smoking room to serve her customer, who had a tab running, or if the other servers needed assistance. She was adamant that she did not serve the minors. She testified that she served pitchers of beer to her customer and said to him – “don’t you think they are a little young?” and he said they were just having fun. The server recognized her patron and the two minors in the photographs taken that night. She testified that she did not serve the minors but that she did see them drinking.

Her employer told her about a note that she had supposedly written, but she testified that she did not write a note. She thought she might have a recollection of another server passing them a note. She recalled that her shift would have ended around 10:00 p.m. and that she stayed in the bar as a customer.

She testified that while she was employed at Connections, she was told that if customers were not able to show B.C. government identification or a birth certificate, they were to ask for secondary identification. She stated that she did not attend any meetings during her employment and that she was not given any training on authenticity of identification. At some point during her employment, she heard that there had been an issue about minors in the bar. After that, her employer started drilling it into their heads about not serving minors.

SUBMISSIONS

The operator submitted that the facts show that two minors came into the bar but when the server approached only one was present and she showed a false identification. There is an issue of credibility as to which witness is to be believed on the factual issue of whether minor #2 was asked for and showed identification. The operator submitted that in testing credibility one must look to “the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (*Faryna v. Chorny* [1972] 2 D.L.R. 354, B.C.C.A.). Applying that authority to this case, the operator submitted that it is beyond common sense to find that a server in a bar would serve someone who appears as young as minor #2. The minors had different recollections of the sequence of events and that is a basis for not preferring their evidence over the server’s evidence.

Other than the first drink to one minor, the servers were never asked to provide liquor to the minors. The operator acknowledged that the minors continued to drink in the bar that night but noted it was other patrons who ordered the drinks and slid the drinks down the table to the minors. The operator also acknowledged that “supplying” does not just mean “serving” but submitted that the fact that the liquor was ordered by and provided to the older men, shows that the servers were not cavalierly serving the minors. The operator submitted that it is open to me to find, that although the minors were consuming, the servers did not supply them with liquor.

ANALYSIS AND DECISION

The licensee accepted the alleged contravention that the licensee’s staff had permitted an intoxicated person to remain on the premises and disputed the alleged contravention of supplying liquor to a minor.

There were some inconsistencies in the witnesses' testimony about time, who the server was who brought the first drink to minor #2, and whether the minors had any purses with them. I have not found it necessary to recite those inconsistencies or to make findings between them. The evidence is not consequential to my decision. Similarly, I have not recited the evidence of the involvement of the mother of minor #1 either on the night in question or in her discussions with other witnesses.

I find as fact, that when the minors first entered the bar, one minor was served alcohol without being required to produce appropriate identification. Even if I accept the most favourable fact situation presented by the licensee and find that the server requested identification prior to serving liquor, the fact is that the server did not require identification as required by the *Act*. The server testified that she checked identification and she admitted that she was not familiar with the identification and remained suspicious. She did not require two pieces of identification as required under Section 45(2) of the *Regulation*. The branch did not pursue that alleged contravention. However, it is relevant in two ways: firstly, it clearly shows that the server was not acting in accordance with the legal requirements; secondly, it defeats the defence afforded under Section 33(5) because the server did not know what the identification was and she did not accept the authenticity of the identification. In this scenario, I find that the licensee contravened Section 33(1).

If the server who attended the hearing was not the server who brought the minor the first Smirnoff Ice, then I find that the evidence is uncontroverted that the server did not require production of identification. In this scenario, I also find that the licensee contravened Section 33(1).

The minors are hearing impaired so they were communicating with hearing people through writing. I find as fact that one server gave one of them a note suggesting they should leave. Both minors were aware of this note although they

had different recollections as to its full content. The server who testified at the hearing stated that she suggested to her customer that the young women were too young. I note that according to her testimony, she was suspicious of the identification of the one minor. She testified that she saw the minors drinking in the smoking room. I find as fact, that at least two of the licensee's servers were in the smoking room during the time that both minors were drinking with the older men and that they were aware they were drinking alcohol. I find as fact that the servers brought alcoholic drinks to the table knowing that some of the drinks were being given to the minors. Further, I find that the minors were in the bar for not less than two hours and that they consumed at least five alcoholic beverages each.

I do not accept the licensee's proposition that in these circumstances it is possible to find that the servers did not supply the minors, within the meaning of Section 33. Clearly, the servers knew that liquor was being purchased for the minors and they continued to serve the customers who were purchasing. I find it is inconsequential that the minors did not order their own drinks. I find that those drinks were "otherwise supplied" within the meaning of Section 33 of the *Act* and I find that the contravention is made out.

DUE DILIGENCE

The licensee referred to my decision in *El Furniture Warehouse Mexican Restaurant*, EH06-004, May 10, 2006. In that decision, I said the following about due diligence:

It is well accepted that the defence of due diligence applies to contraventions under the *Act*. The B.C. Supreme Court addressed due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248, a case involving alleged illegal conduct:

[25] 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.

Since the *Plaza* decision, in cases assessing the evidence of due diligence, the branch has stated that a licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. As a test of due diligence, the branch has considered whether there were more steps the licensee could have taken to ensure that staff were aware of the legislative requirements and were properly trained to do the job, and whether there were more preventative measures the licensee could have taken to prevent the occurrence of the contravention. (For a discussion of due diligence factors, see for example, *Haney Hospitality Ltd. (dba Haney Motor Hotel)*, EH01-170, July 27, 2004; *Sooke River Hotel Ltd.* EH04-182, June 29, 2005; *Frontiersman Pub Inc, dba Frontiersman Cold Beer & Wine Store*, EH04-180, June 14, 2005; *365158 BC Ltd., dba Muddy Waters Pub*, EH04-177 and EH04-181, July 15, 2005.)

In this case, most of the evidence of the licensee's due diligence in ensuring adequate policies and procedures were in place is set out in the branch C & E officer's evidence, above. Additionally, the licensee testified that there are staff meetings every three weeks and that the licensee goes over the rules and requirements of the Legislation during those meetings. He said that he had not thought that written policies and procedures were required, but since this incident he has put some requirements in writing and has had the employees read and acknowledge those.

The only employee to testify in the hearing was the former server. She worked at the bar for approximately two months and testified that she did not attend any staff meetings and did not receive any training on authenticity of identification. Her description of how she handled the identification that evening with minor #2 clearly shows that she was not following the statutory requirements of two pieces of identification. She admitted that she was not familiar with the identification produced but took no further steps. Additionally, the fact that she allowed both

minors to remain in the bar, without asking for identification from minor #1, again indicates that she was not following statutory requirements. I find as fact that there was no door security on duty when the minors entered and that no staff member approached minor #1 for an identification check. There was no evidence from the licensee of any concerted effort by staff to require minor #1 to leave despite the fact that she would have been obviously drunk.

I have found that these minors were in the bar for at least two hours and each had at least five alcoholic beverages. If the licensee had policies and procedures in place and if staff were trained regularly as he claims, surely at least one member of staff would have taken appropriate action. Based on the totality of the evidence, I find that the licensee did not have policies and procedures in place to assist staff in understanding their legal responsibilities. I find that the licensee did not have regular staff meetings around the time of these contraventions.

I find that the licensee's evidence of due diligence is insufficient to establish a defence to these contraventions.

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 have discretion to order one or more of the following enforcement actions:

- 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.
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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*.

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 these incidents. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions. The range for first contraventions for both of these contraventions is four (4) to seven (7) day licence suspension, and/or \$5,000 to \$7,000 monetary penalty.

The branch's primary goal in bringing enforcement action is achieving voluntary compliance. Some factors that are considered in determining whether a penalty should be imposed are 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.

The third party operator submitted that there is no basis for saying that a lengthy licence suspension is required in order to ensure future voluntary compliance. He pointed to the fact that the licensee acted immediately in terminating the server's employment based on their understanding that she had not required identification. That shows his commitment to ensuring that staff comply with the Legislation. The server testified that she was aware of all the matters covered in the employee acknowledgements. Additionally, she testified that when this incident was brought to the operator's attention, he started drilling the staff on proper procedure respecting minors. He submitted that the important consideration is the conduct of the operator as a whole and whether it shows an understanding and willingness to deal with problems and communicate with staff.

The operator submitted that, from a global perspective, the branch's recommended penalty of 12 days licence suspension for a first contravention for an operator with a clean record is beyond the pale and makes a mockery of the fact that there is a range of penalty set out in the *Regulation*. He noted that the general manager did not take any action against the people who bought the drinks for the minors and did not refer the case to any other authorities to take action against those people. These facts, he submitted, suggest that the penalty recommended by the branch is excessive.

The operator submitted that these circumstances cry out for a financial penalty as was imposed in *El Furniture*. It is apparent that the Legislature intended to encourage compliance through graduated and escalating penalties. It is inconsistent with that intent to hop over the lower ranges to the level of penalties recommended here. There is no evidentiary link between that level of penalty and the facts of this case.

Reasons

My first consideration must be whether a penalty should be imposed. I have taken into consideration the facts of the incident, the very young ages of the minors, the amount of liquor they were supplied, the lack of action on the part of the licensee's employees that night and the operator's subsequent actions to ensure that this type of conduct would not happen again.

As I found in *El Furniture* I also find here, that the licensee/third party operator requires a strong message that staff must be alive to issues raised in this case. In *El Furniture* I found that the steps the licensee had taken since the incident were encouraging and indicative of a willingness to be brought into compliance and I found that a monetary penalty was appropriate. In this case the nature of the contravention is much different. This incident demonstrates that none of the staff working that night took the initiative to correct a flagrant contravention that

put two minors at risk. It was only the independent actions of a patron that resulted in the intoxicated patron being safely removed and taken home.

Certainly, the operator has demonstrated that some steps have been taken since the incident, which he submitted indicate a willingness to comply voluntarily in future. The operator fired the server he believed to be responsible and management started 'drilling' staff on not serving minors. The operator also drew up an instruction sheet for employees to acknowledge.

The fact of writing up one sheet of instructions and requiring staff to sign it is not very significant in the task of training and ensuring that staff are fully cognizant of their responsibilities at all times. There was very little evidence of any other training initiatives or staffing changes or additions to ensure proper door security and identification checks. Although the server who testified stated that she was familiar with the requirements set out in the Employee Acknowledgement form, she clearly did not understand the legal requirements for identification, either at the time of the incident or at the date of the hearing. This suggests that any 'drilling' undertaken when she was still employed did not make a lasting imprint.

Some procedures that have been implemented by other licensees/operators include regular staff meetings, development of a manual of practices and procedures, training on identification authenticity, having speakers from the local police department and the branch at staff meetings, ensuring staff know which senior employee to approach if they believe there is a problem, and having sufficient staff and door security at all times. This is not an exhaustive list.

While I accept that the operator has demonstrated a positive reaction to this enforcement action, the steps taken are insufficient to convince me that no penalty is required to bring this operator into voluntary compliance, or that a monetary penalty would be appropriate on either or both counts.

I find that the totality of the situation requires the imposition of a penalty to ensure voluntary compliance in the future and I find that the appropriate penalty is a licence suspension.

The operator submitted that having penalties for both contraventions is not necessary for voluntarily compliance. I agree that it is not always necessary to impose penalties for each contravention proved in the hearing. I am mindful of the comments made by the Court of Appeal in *532871 B.C. Ltd. v. General Manager Liquor Control and Licensing Branch*, CA032081, August 17, 2005, particularly at paragraph [64].

[64] This observation applies equally to the two separate suspensions on the service of food issue, both of which, on the facts found by the General Manger, could have been treated as other contraventions capable of attracting lighter penalties. While the decision to proceed on the more serious allegation is not reviewable, it is a circumstance that is relevant to the decision whether to suspend for each violation proved in the hearing. Also relevant is the presence of numerous other allegations, which are to be dealt with in the same hearing.

The licensee/third party operator has a clean compliance record, which speaks well to its operation. However, as I have noted above, this situation lasted over a number of hours and none of the staff took action, even when one of the minors became increasingly intoxicated. That suggests to me that neither the operator nor the staff have been diligent in enforcing the liquor laws and, perhaps, it is more good luck than good management that this establishment has not had previous enforcement action.

I have given careful consideration to whether there should be penalties for both contraventions. There were two minors, one who was served directly and indirectly by one or more servers and one who was served only indirectly. This conduct could have resulted in two allegations of breach of Section 33. The fact that both minors were in the bar could have resulted in action for two

contraventions of Section 35. There was also failure to request two pieces of identification from persons appearing under the age of 25 years which could have resulted in two additional charges. Then, there is the intoxication which could have resulted in contraventions for permitting a person to become intoxicated and permitting an intoxicated person to remain. In total, that is eight possible contraventions and enforcement actions.

In my estimation, the branch has already taken into consideration the prospect of over penalizing, by reducing the enforcement action to two contraventions. I find that these are distinct contraventions, despite the fact that the same minors are involved. I find that the contraventions are sufficiently serious to warrant individual penalties.

I have considered whether the circumstances warrant going above the minimum of the range for both contraventions. I find that there is reason to go above because there were two minors involved and the incident continued for at least two hours. I find that a penalty at the top of the range for the Section 33 contravention is in order and that a mid range penalty is appropriate for the Section 43 contravention.

The operator invited me to find that a monetary penalty is appropriate and referred to the *El Furniture* case. The Legislature has set ranges of penalties and the scheme of the penalty schedule suggests some form of graduated penalties. However, the Legislature has also set minimums according to the severity of the contraventions. I do not accept the operator's contention that this case cries out for a monetary penalty because it is a first occurrence. As I indicated above, I find that the circumstances here are much different than in *El Furniture* and I find that the operator's steps since this contravention fall short of convincing me that he has turned the tide on the conduct that led to these contraventions. In awarding monetary penalties, there is always a concern that it will be seen as the cost of doing business. In my view, it is necessary to send a

strong message in this case, a message that cannot be interpreted as the cost of doing business. I find that licence suspensions are appropriate for both contraventions.

Accordingly, I find that licence suspensions of seven (7) days for the Section 33 contravention and five (5) days for the Section 43 contravention are appropriate and I so order.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 129131 for a period of twelve (12) days, to commence as of the close of business on Thursday, August 24, 2006, 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 the Liquor Licence No. 129131 be held by the branch or the R.C.M. Police Burnaby Detachment from the close of business on Thursday August 24, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

[ORIGINAL SIGNED]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: July 25, 2006

cc: R.C.M.Police Burnaby Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Advocate
