

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Miller's Landing Pub Ltd. v.
Liquor Control Licensing Branch
(General Manager),
2009 BCSC 1352***

Date: 20091002
Docket: S090049
Registry: Vancouver

Between:

**Miller's Landing Pub Ltd.
doing business as Cat and Fiddle Pub and Bistro**

Petitioner

And

**General Manager of the
Liquor Control and Licensing Branch**

Respondent

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Petitioner:	J. Barry Carter
Counsel for Respondent:	N. Brown
Place and Date of Hearing:	Vancouver, B.C. June 29, 2009
Place and Date of Judgment:	Vancouver, B.C. October 2, 2009

INTRODUCTION

[1] This is a petition for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of an order of the General Manager, Liquor Control and Licensing Branch (the "General Manager").

[2] The petitioner Miller's Landing Pub Ltd. ("Miller's") holds both a "food primary license" for a restaurant and a "liquor primary license" for a pub. The pub and restaurant operate next to one another in the same building in Port Coquitlam, under the name "Cat and Fiddle Pub and Bistro".

[3] The review is sought of the December 11, 2008, decision of the respondent General Manager. Following three days of hearing, an Enforcement Hearing Adjudicator, Kathleen McIsaac ("the Adjudicator"), as the General Manager's delegate, found that Miller's had contravened s. 33 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, (the "Act") by supplying liquor to two minors on January 11, 2008. The General Manager suspended Miller's license for ten days.

[4] Miller's challenges that decision on the following grounds, as set out in the petition:

1. That the Enforcement Hearing Adjudicator's decision is unreasonable in that it does not fall within the range of acceptable outcomes that are defensible with respect to the particular facts and/or their application to the *Liquor Control and Licensing Act and Regulations* and related enunciated policies of the Liquor Control and Licensing Branch.
2. That it was unreasonable for the Enforcement Hearing Adjudicator to find on a balance of probabilities that the two minors had not been properly identified.
3. That it was unreasonable for the Enforcement Hearing Adjudicator to find and/or she erred in law by finding:
 - a. that Section 33(5) of the Act requires the licensee to authenticate identification;
 - b. that it is the responsibility of a licensee to properly authenticate identification;
 - c. that, in these circumstances, the server should have authenticated minor #1's identification.

4. It was unreasonable for the Enforcement Hearing Adjudicator to find and she erred in law in finding that authentic means identification which must be valid and unchanged and must belong to the person who is presenting the identification as their own.
5. It was unreasonable for the Enforcement Hearing Adjudicator to find and she erred in law in finding that all liquor licensees have an obligation to ensure that patron's identification is authentic.
6. It was unreasonable for the Enforcement Hearing Adjudicator to find on a balance of probabilities that the licensee had failed to take all reasonable steps to prevent these contraventions.
7. It was unreasonable for the Enforcement Hearing Adjudicator when considering the defence of due diligence to consider:
 - a. that the in house manual of the licensee should have provided guidance on to how to authenticate identification;
 - b. the contents of the "new" Serving it Right manual (which was never produced in evidence);
 - c. the licensee's system for monitoring minors traveling from the restaurant to the pub.

STATUTORY PROVISIONS

[5] It is common ground that the *Act* is public safety legislation that balances the competing interests of various parties, including the interests of licensees to maximize profits: *Butterworth Holdings Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2007 BCSC 6, 154 A.C.W.S. (3d) 670 [Butterworth Holdings Ltd. #1] at para. 19. The focus is on the protection of society: *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2002 BCCA 426, 171 B.C.A.C. 231.

[6] The *Act* and the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002, (the "*Regulation*") set out the statutory framework for the licensing and administration of all establishments in British Columbia that sell liquor. The respondent has a statutory duty to administer the *Act* and to supervise all licensed establishments.

[7] Section 20(1) of the *Act* sets out the respondent's powers and s. 20(2) the kinds of restrictions and penalties that the respondent may impose on a licensee, with or without a hearing. This includes the power to impose a monetary penalty in

accordance with Schedule A of the *Regulation* and the power to suspend all or any part of the licensee's license in accordance with the prescribed schedule of license suspensions.

[8] Section 33 of the *Act* prohibits the provision of liquor to a minor, and provides a specific defence under s. 33(5):

- 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.
- (2) Subsection (1) does not apply if liquor is
 - (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
 - (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
 - (c) given or otherwise supplied to a minor in accordance with the regulations.
- (3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly
 - (a) has it in the actual possession or custody of another person, or
 - (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.
- (4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.
- (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.
- (6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

[9] Section 35 of the *Act* addresses the presence of minors on licensed premises:

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

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

[10] Section 11(2) of the *Regulation* provides that minors are permitted in an establishment with a "food primary license".

[11] Section 45 of the *Regulation* provides that, when verifying that a patron is not a minor, the licensee must request two pieces of identification that meet specific requirements:

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.

[12] Schedule 4 of the *Regulation* sets out the range of suspensions and monetary penalties for various contraventions of the *Act* and defines what is a "first" contravention and a "second" or "subsequent" contravention. The penalty for a first contravention of s. 33 of the *Act* pursuant to the *Regulation*, Schedule 4, Item 2, is a 10-15 day license suspension. Thus, since this case involved a first contravention, any suspension was required to be for a minimum period of ten days.

[13] In addition to the statutory provisions, the *Liquor Licensing Policy Manual* sets out policies. Further, all liquor primary establishments and food primary establishments have additional terms and conditions attached to their licenses. The

liquor primary and food primary license terms and conditions state that the licensee is legally responsible for understanding how the *Act*, the *Regulation* and the specific terms and conditions of its license affect the operation of the licensee's establishment, and for complying with the *Act*, the *Regulation* and the terms and conditions of the license.

[14] With respect to the identification of minors, the Cat and Fiddle Pub's liquor primary license terms and conditions state:

Minors

You must not allow minors in your establishment, unless you have applied for and received special authorization from the general manager.

It is against the law to sell, serve, or supply liquor to a minor. You and your staff are expected to put in place effective systems to meet this obligation. If you or an employee allows a minor to enter your establishment or to purchase liquor, your licensing privileges could be jeopardized and you risk prosecution.

[15] In addition, both the petitioner's liquor primary and food primary license terms and conditions set out the following requirements:

ID requirements

You must demonstrate that you are preventing minors from obtaining liquor. When you verify a customer's age, you and your employees must ask for two pieces of identification.

The first piece of identification must:

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

The second piece must:

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

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

To verify identification, ask the person for:

- A sample signature to compare to the signature on the photo identification.
- His or her zodiac sign – people with false identification often will be unable to answer quickly.

- His or her middle name and how to spell it.
- Information that is on the identification, such as the person's address or postal code.

[16] Liquor primary establishments must also provide a separate area to enable staff to properly scrutinize identification of the patron:

Setting aside an area to check ID

You must provide an area in your establishment that is well lit and protected from entertainment noise so that staff can properly review both the offered identification and the patron, and ask appropriate questions to test the ID's authenticity.

If you operate an establishment that is particularly attractive to young people, you will be expected to maintain a sufficient standard of scrutiny to prevent access by minors. To help deter minors, we suggest you:

- record each person's name and the ID serial number
- assign an experienced doorperson to check ID
- secure any uncontrolled exits, as allowed in fire safety rules, regulations or codes, and
- use video surveillance to record an image of the person and his or her ID.

If your procedures are not effective, your local liquor inspector may direct you to install the appropriate lighting, signage, video cameras and noise barriers to ensure your staff can check identification properly. (Licensees directed to install and operate video cameras may be required to provide the film from those cameras for review by the branch.)

FACTS

[17] The Adjudicator heard evidence from two police officers, two minors, a liquor inspector, two of the principals of Miller's and four of its employees.

[18] On January 11, 2008 at 22:11 hours, Constables Bhandar, Fortin and Parsons of the Royal Canadian Mounted Police performed a licensed premises check at the Cat and Fiddle Pub and Bistro. They found two minors in the pub, at separate locations, neither of whom was able to provide any identification. One of the minors (Minor #1) had previously been in the restaurant and a server there had looked at her identification, which the minor later said belonged to another person. Minor #1 no longer had any identification when interviewed by the police; she told the police that she had loaned it to someone else. The other minor (Minor #2) did

not have any identification when the police spoke to her, and testified that she had not been asked for identification at any time until the police came. Her evidence was inconsistent with that of the floor manager and one of the servers in the pub, who both testified that they had checked Minor #2's identification.

[19] The Adjudicator's findings of fact are set out in these passages from her decision at 19-22:

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 door person 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 license, 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 license 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 ask 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 of 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 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 minors were not properly identified or their identification authenticated, the defense under section 33(5) fails.

STANDARD OF REVIEW AND PRINCIPLES GOVERNING JUDICIAL REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada re-examined its approach to judicial review of administrative decisions and stated that there are to be two possible standards of review (correctness and reasonableness) rather than the previous three (which also included patent unreasonableness).

[21] The reasonableness standard will generally apply to "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues", while the correctness standard will often—but not always—apply to "legal issues". Those legal issues to which the correctness standard is applicable will include constitutional issues and "true questions of jurisdiction or vires". However, the Court cautioned that "reviewing judges must not brand as jurisdictional issues that are doubtfully so." (See para. 59.)

[22] Deference should usually be given where a tribunal is interpreting its own legislation, but not where a question of law is "of central importance to the legal system" and outside the tribunal's area of expertise: in such cases, the Court indicated (at para. 55) that the standard of review is correctness. In addition, administrative bodies must be correct in their determination of true questions of jurisdiction (that is, in the narrow sense of whether or not the tribunal has the authority to make the decision): *Dunsmuir* at para. 59.

[23] Findings of fact are to be reviewed on the “reasonableness” standard. Counsel for the respondent submits that the discretionary decisions of the General Manager should be reviewed with considerable deference given the General Manager’s specialized knowledge and the public safety purposes of the liquor licensing regime in British Columbia, citing *693753 B.C. Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2008 BCSC 1037, 170 A.C.W.S. (3d) 132; *Jacobsen Enterprises Ltd. (c.o.b. Lakewood Inn/Jake’s Pub) v. The General Manager of the Liquor Control and Licensing Branch*, 2008 BCSC 1058, 169 A.C.W.S. (3d) 837; and *Bastion Inn Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2008 BCSC 976.

[24] Findings of mixed fact and law are also to be reviewed on a “reasonableness” standard. Where there is some evidence on which the Adjudicator could reasonably base her findings, a court cannot intervene: *Jacobsen Enterprises Ltd.*, at para. 48; *Publik Restaurant PG Ltd v. General Manager of the Liquor Control and Licensing Branch*, 2009 BCSC 249, at paras. 32-37.

[25] Counsel for the petitioner submitted that there is no spectrum of standards of review within the reasonableness standard, referring to *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71, where the Court stated at paras. 18-19:

I understand the majority in *Dunsmuir* to be referring now to only two degrees of deference, correctness, where no deference is accorded, and reasonableness, where deference is accorded. It is not necessary or appropriate to then assess the degree of deference within the reasonableness standard.

In my view, by collapsing the patently unreasonable standard and the reasonable standard, the majority has not set aside the court's earlier decision in *Ryan v. Law Society (New Brunswick)*, nor has it signalled that courts must now puzzle over the degree of deference to give to a tribunal within the reasonableness standard. The existence of varying degrees of deference within the single reasonableness standard suggests that a decision made by a tribunal will be found to be unreasonable if the court accords the tribunal a low degree of deference but that same decision will be found to be reasonable if the court decides to accord the tribunal a high degree of deference. I do not read the decision of the majority in *Dunsmuir* as encompassing any such approach.

[26] *Mills* does not appear yet to have been followed in British Columbia. It has been followed in Manitoba, in *Guinn v. Manitoba*, 2009 MBCA 82, where Madam Justice Steel wrote as follows at paras. 28-30:

It is true that Justice Binnie, in his concurring reasons in *Dunsmuir*, seemed to be suggesting a return to varying levels of deference. Justice Binnie states that the decision to collapse reasonableness *simpliciter* and patent unreasonableness seemed to "shift the debate (slightly) from choosing between two standards of reasonableness that each represent a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference" (at para. 139).

However, I agree with the Ontario Court of Appeal's comments in *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at paras. 14 to 24 and particularly, at paras. 18 to 19 ...

Thus, once the standard of reasonableness is chosen, so long as the explanation for the Board's decision was intelligible and justifiable and the decision itself "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law," the court must defer to the outcome chosen by the tribunal. As explained in *Dunsmuir* (at para. 47):

.... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[27] Thus, the authorities indicate that *Dunsmuir* provides for only two degrees of deference, that is, no deference (under the correctness standard of review) and some deference (under the reasonableness standard). As the Ontario Court of Appeal stated in *Mills* at para. 22, it does not follow that the context of the decision is to be ignored. This is because factors such as the mandate of the decision-maker, the decision-maker's expertise, and the nature of the question being decided affect the range of reasonable and defensible outcomes.

[28] The Court in *Dunsmuir* discussed the circumstances in which the two standards will apply, stating at paras. 54-55:

Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes

closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[29] A court is to ascertain first whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with respect to a particular category of question; second, and only if the jurisprudence has not determined this question, the court is to analyze the factors bearing on identification of the standard of review: *Dunsmuir* at para. 62.

[30] In *Jacobsen Enterprises*, Mr. Justice Warren considered the question of the appropriate standard of review of an Adjudicator's decision under the *Act*. He concluded as follows at para. 48:

In my view the jurisprudence has established the degree of deference and it is that stated by Blair J. in *Zodiac*: "reasonableness *simpliciter*", that is whether any reasons support the decision. Is there a defect in the evidentiary foundation, that is, an assumption without a basis in the evidence or contrary to the overwhelming weight of the evidence, or is there a defect in the logical process by which the conclusions are sought to be drawn from it, that is a contradiction in the premise or an invalid inference: per Iacobucci J. in

Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748 (S.C.C.).

[31] The role of the Court on judicial review is supervisory – its mandate is to ensure that the tribunal acted within its jurisdiction, according to the correct legal principles, and that the parties affected by its decision received a fair hearing.

[32] The Court is not to re-weigh or re-assess evidence. The assessment of credibility and the weight to be given to the evidence in this case is for the Adjudicator to decide. The question is whether there was evidence on which the Adjudicator could base her findings, and if there was, the Court must not intervene: *Publik Restaurant PG Ltd.*, at para 34; *Butterworth Holdings Ltd. #1*, at para. 17; and *Butterworth Holdings Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2007 BCSC 1513, 163 A.C.W.S. (3d) 1012 [*Butterworth Holdings Ltd. #2*], at para. 19.

[33] When a court is reviewing a tribunal's findings of fact or the inferences made from the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Butterworth Holdings Ltd #1* at para. 17, citing *Wells v. British Columbia (Superintendent of Motor Vehicles)*, 2000 BCSC 1857 at paras. 9-11, following *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, 144 D.L.R. (4th) 385.

[34] A tribunal is entitled to consider any evidence that it deems relevant. A tribunal may reject portions of evidence and accept other portions, and it may determine what weight to place on those portions of the evidence which it accepts: *Re McInnes and Simon Fraser University* (1982), 140 D.L.R. (3d) 694 at 701 (B.C.S.C.), aff'd (1984), 3 D.L.R. (4th) 708, 52 B.C.L.R. 26 (C.A.); *Butterworth Holdings Ltd. #1 & #2*.

[35] As for the standard of proof, the Adjudicator need only find that the contravention alleged by the General Manager was made out on the evidence on a balance of probabilities. There is no higher standard within that test: *Empress Towers Ltd. v. British Columbia (General Manager, Liquor Control and Licensing*

Branch), 2006 BCSC 325, 147 A.C.W.S. (3d) 850; and *F.H. v. McDougall*, 2008 SCC 58, [2008] 3 S.C.R. 41.

POSITIONS OF THE PARTIES

Petitioner

[36] I have already set out in full the grounds for the petition.

[37] The petitioner's main points, as I understand them, are these:

1. The Adjudicator's treatment of the evidence did not meet the standard of reasonableness, in that she found on the balance of probabilities that the two minors had not been properly identified.
2. The Adjudicator erred in her treatment of the defences available to the licensee, under s. 33(5) of the *Act* at common law, in that:
 - a. She found that it is the responsibility of the licensee to properly authenticate identification;
 - b. She found that to authenticate identification is to confirm that it is "valid and unchanged and must belong to the person who is presenting the identification as their own".
 - c. She took into account irrelevant considerations and found on the balance of probabilities that the licensee had failed to take all reasonable steps to prevent the contraventions.

[38] With respect to the first point, Mr. Carter, counsel for the petitioner, made detailed submissions about the evidence, pointing to various reasons which he submitted would undermine the evidence called by the Branch and would support the evidence called by the petitioner. Mr. Carter conceded that the Adjudicator's decision was entitled to deference in this respect.

[39] With respect to the second point, Mr. Carter submitted that it is a complete defence to enforcement proceedings taken under s. 20 of the *Act* if it is established that the licensee took all reasonable care to avoid contraventions of the *Act*.

Mr. Carter referred to *Twilight Zone Cabaret v. British Columbia (Liquor Control and Licensing Branch)* (1995), 5 B.C.L.R. (3d) 280, 57 B.C.A.C. 67, and to *British Columbia (Liquor Control and Licensing Branch) v. Lonsdale Hotel Inc.*, 2002 BCCA 436, 171 B.C.A.C. 258.

[40] He argued that while the defence of due diligence together with the statutory defence set out in s. 33(5) of the *Act* must be considered before any determination is made that a contravention has occurred, the Adjudicator seems to have determined there was a contravention before proceeding to consider the defences.

[41] Further, Mr. Carter argued, the Adjudicator adopted an erroneous interpretation of the *Act* in finding that the licensee was required to authenticate the minors' identification and in proceeding on the basis of a definition of "authentic" not present in the statute. He submitted that these errors not only affected her interpretation of s. 33(5), but also her consideration of the common law defence of due diligence. Mr. Carter argued that these are errors of law going to the Adjudicator's jurisdiction and attracting the standard of review of correctness.

[42] In the alternative, he said that the Adjudicator's determination regarding authentication was unreasonable.

[43] With respect to the common law due diligence defence, Miller's counsel pointed to this passage at 26 of the Adjudicator's Reasons:

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

He argued that such reasoning is inconsistent with the availability of the defence.

[44] Finally, Mr. Carter submitted that the Adjudicator erred in the evidence she considered and failed to consider, before reaching her conclusion that Miller's had

failed to take all reasonable steps to avoid the service of liquor to minors on its premises.

Respondent

[45] With respect to the petitioner's first point, Ms. Brown for the respondent submitted that the Adjudicator was entitled to prefer the evidence tendered by the Branch over that of the petitioner, and that is what she did. She argued that there is no basis for interfering with the Adjudicator's decision.

[46] With respect to the second point, Ms. Brown argued that the Adjudicator's interpretation of her enabling statute deserves deference and therefore the standard of review of reasonableness should apply, referring to *Bastion Inn Ltd* at para. 30. She submitted that the Adjudicator's interpretation was reasonable.

[47] In any event, Ms. Brown submitted, the Adjudicator's understanding of the defence of due diligence was legally correct. She argued that all of the factors the Adjudicator considered were relevant, according to the jurisprudence, when dealing with the defence of due diligence. She urged that the Adjudicator considered the evidence and the submissions made by the petitioner, that there was evidence to support her decision and that she must be given deference; accordingly, that there is no basis for this Court to intervene.

ANALYSIS

Did the Adjudicator's treatment of the evidence regarding service of the minors fail to meet the required standard?

[48] I can deal with this argument briefly.

[49] The Adjudicator was entitled to reach conclusions about the credibility of the witnesses and to weigh the evidence. She by and large accepted the evidence of the minors and of the police officers, despite some inconsistencies between the initial police reports and the police officers' testimony, and despite some issues with the demeanour of Minor #2 as a witness. She preferred the minors' evidence over

that of Miller's employees. She declined to place the weight that counsel for Miller's submitted she should have on the evidence that there had been significant prior police involvement at the pub, thereby implicitly rejecting Miller's position that the extent of previous police involvement meant that the pub's management and staff would have been scrupulously careful about checking the identification of minors. I find that it was open to the Adjudicator to decline to make that inference.

[50] Having assessed and weighed the evidence, the Adjudicator made findings of fact including findings that neither of the two minors was asked for identification in the pub until the police came, although one had been asked to produce identification in the restaurant before she moved over into the pub. Those findings were supported by the evidence before her, reasonably viewed. Since there is evidence which, viewed reasonably, can rationally support the Adjudicator's findings of fact, this Court cannot intervene (*Publik Restaurant PG Ltd.* at para. 34) and there is no basis for judicial review of the decision on this ground.

Defences

[51] The second point concerns the Adjudicator's understanding of the legal parameters of the defences available to the petitioner, and her application of those legal standards to the facts before her.

[52] It is useful here to set out some extracts from the Reasons of the Adjudicator, at 18-27, beginning with the Adjudicator's Reasons regarding the alleged contravention of s. 33 and the statutory defence under s. 33(5). I have emphasized with underlining portions of the Reasons to which the petitioner particularly objected.

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 1/2 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. [At 18.]

[53] Although the wording above is somewhat infelicitous and may suggest that the Adjudicator had, without more, reached a conclusion about a contravention, she proceeded to assess the evidence supporting the statutory and common law defences before reaching a final conclusion:

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 person's 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. [At 18.]

[54] The Adjudicator then stated her findings of fact, already quoted, and continued:

As I have found the minors 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. [At 22.]

[55] Next proceeding to discuss the common law due diligence defence, the Adjudicator wrote:

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. [At 22.]

[56] The Adjudicator referred to the test for due diligence in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1331, 85 D.L.R. (3d) 161, where Dickson J. (as he then was) wrote:

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. Nattras* [1972] A.C. 153].

[57] The Adjudicator then referred to *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 BCSC 248, 129 A.C.W.S. (3d) 145, a case which arose under s. 36(2)(b) of the *Act* (permitting unlawful conduct on the premises of a licensed establishment) but which similarly involved a defence of due diligence. Mr. Justice Pitfield, applying the *Sault Ste. Marie* test, set out at para. 25 the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*: 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".

[58] The Adjudicator noted that the Court in *Plaza Cabaret* clarified (at para. 27) that the directing mind need not be an officer or director of the licensee but could 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."

[59] The Adjudicator found that the manager was the directing mind of the petitioner at the time of the incident and, as the manager was involved in the incident by serving minor #2, the defence of due diligence must fail.

[60] In context, it is evident that the Adjudicator intended to reach a conclusion only with respect to the charge relating to minor #2.

[61] The Adjudicator went on to find that the due diligence defence could not succeed for other reasons. She noted that the licensees appeared dedicated and hard working, but found that their system for identifying minors and authenticating patrons' identification was not reasonably effective. She pointed to the following shortcomings in the licensees' system: no reasonably consistent method or procedure in place to test employee knowledge and performance on an ongoing basis; the in-house manual did not adequately deal with minors and the evidence suggested that the licensee was using an out-of-date "Serving It Right" manual; the screening system at the door was inadequate; and the system for monitoring minors travelling from the restaurant to the pub was not reasonably effective. The Adjudicator concluded at 26:

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 11 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.

[62] Thus, the Adjudicator found that Miller's had failed to establish either the statutory defence, under s. 33(5) of the *Act*, or the common law defence of due diligence.

[63] In assessing whether the defences had been made out the Adjudicator was determining questions of fact or of mixed fact and law. She was applying the *Act*, a statute closely connected to the tribunal's function, and with which the tribunal would have expertise. The question of law was not of central importance to the legal system or outside the tribunal's expertise. The appropriate standard of review is reasonableness in these circumstances.

[64] I begin with the statutory defence under s. 33(5), which I will set out again for convenience:

33(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.

[65] I note that, since the Adjudicator found that Minor #2 was never required to produce identification, the defence under s. 33(5) of the *Act* was not available with respect to that matter.

[66] However, the defence was available with respect to Minor #1 since she was asked to show her identification when she was in the restaurant.

[67] Section 33(5) of the *Act* requires the licensee to have "examined and acted on the authenticity of the identification". The petitioner took particular issue with this passage in the Adjudicator's decision:

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. [At 18.]

[68] The petitioner's position, as I understand it, is that s. 33(5) simply requires that the licensee examine the identification and, so long as it appears to have been issued by the appropriate agency, the licensee has complied with the statute.

Mr. Carter suggested that it cannot be the case that a licensee is expected to know whether or not a piece of identification has been validly issued, or remains valid or unchanged.

[69] The respondent, on the other hand, argues that clearly s. 33(5) imposes an additional obligation on the licensee to do something more than "examine" the identification.

[70] Further, Ms. Brown for the respondent submitted, a Court must consider the totality of a tribunal's reasons when reviewing its decision and should not conduct a minute dissection of a particular passage.

[71] There is no clear authority directly on point. However, in the *Lonsdale* case, the Court of Appeal referred with approval to a definition consistent with the one advanced by the respondent here.

[72] The issue in *Lonsdale* arose on an appeal by the General Manager from a decision of the Liquor Appeal Board setting aside the General Manager's finding that the Licensee had contravened s. 35 of the *Act* (allowing minors on the premises).

[73] The issue before the Court of Appeal was whether the Liquor Appeal Board committed an error of law with regard to the interpretation and application of s. 33(5) of the *Act*. Mr. Justice Esson stated at para. 6:

The General Manager, in a decision issued on December 17, 1998, found that the licensee had contravened s. 35 by authorizing or permitting the two young women to be in the premises. The licensee appealed to the Board from that and a number of other findings of contraventions. None of the others are involved in this appeal. The appeal under s. 31(3) of the *Act* provides for a hearing de novo before the Board which is empowered to confirm, vary, or reverse the action. The new hearing was conducted on September 28, 1999. The Board issued its decision, which dealt with a number of issues other than the presence of the two minors, on March 6, 2000. In setting aside the General Manager's finding of a s. 35 violation, the Board said:

The B.C. Court of Appeal sets out one of the questions to be asked by a tribunal in determining whether a licensee has a lawful excuse for allowing minors to remain on the premises under s. 35 of the Act in *Twilight Zone Cabaret*. The Court decided in *Twilight* that the defence contained in s. 33(5) of the Act could equally provide a lawful excuse to the prohibition contained in s. 35. Thus, where the circumstances suggest its applicability, the tribunal should ask whether it is satisfied that the licensee has required that a person produce identification and that the licensee has examined and acted on the authenticity of the identification. The court also says that the tribunal just be satisfied that the process of examining and evaluating the identification is as full and complete as the Act requires. This means that the process must be fully and carefully carried out. The degree of care that is required by the Act may be affected by the circumstances, including the nature of the licensed premises and its clientele. We agree with the statement of the deputy general manager that where an establishment makes a practice of appealing to young persons, its identification procedures must be alive to the increased likelihood that minors will attempt to gain entrance.

...

The decision referred to by the Board is *Twilight Zone Cabaret v. British Columbia (Liquor Control and Licensing Branch)* (1995), 5 B.C.L.R. (3d) 280 (B.C.C.A.).

[Emphasis added.]

[74] I find the Adjudicator's interpretation of the term "authentic" reasonable when viewed in the context of her entire decision, although the language she used may have been imperfect. Reading her Reasons as a whole, she was not imposing a requirement that the licensee determine with certainty whether or not the identification was valid or unchanged, and belonged to the person who tendered it. Rather, she was imposing a requirement that the licensee take reasonable steps to determine that the identification was genuine in the sense that it had been validly issued, and genuine in the sense that it belonged to the person proffering it.

[75] The Adjudicator's interpretation that s. 33(5) required her to take into account the type of examination and evaluation the licensee has performed on the identification, was reasonable and consistent with the language of the section. It was also consistent with the public safety objectives of the Act. I find that she

applied that interpretation to the facts as she had found them and that her decision meets the standard of reasonableness.

[76] I turn to the common law defence of due diligence. The petitioner can establish the defence of due diligence by demonstrating on a balance of probabilities that it took all reasonable steps to prevent the service of liquor to minors.

[77] The Adjudicator's decision on the defence of due diligence is again a question of fact or mixed fact and law, reviewable on a standard of reasonableness. It attracts deference with respect to the Adjudicator's assessment of the evidence that was before her.

[78] As I have described above, the Adjudicator referred to the decision of this Court (*per* Pitfield J.) in *Plaza Cabaret*, and to the fundamental principles governing the availability of the defence of due diligence in *R. v. Sault Ste. Marie*.

[79] The authorities show that it is not sufficient to have policies in place; the licensee must demonstrate that the policies were being implemented at the time of the contravention. In *Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2005 BCSC 1465, 143 A.C.W.S. (3d) 533 at para. 18-19, the Court stated:

An establishment may well have a general policy, but if the directing mind on site at the relevant time ignores it, or makes no effort to see that it is enforced, it can hardly be said that the mere existence of a policy is sufficient to demonstrate due diligence.

[80] Miller's position is that the Adjudicator erred by commenting on the adequacy of the petitioner's in-house manual. However, it appears that Miller's itself put the in-house manual into evidence in connection with its due diligence defence, and it was appropriate for the Adjudicator to refer to it. Similarly, the Adjudicator properly took the "*Serving it Right*" manual, and the evidence that Miller's employees were using a discontinued version of it, into account in evaluating the due diligence defence.

[81] I also find that it was reasonable for the Adjudicator to consider Miller's system for monitoring the movement of minors between the restaurant and the pub.

[82] Here, the Adjudicator correctly understood and interpreted the defence of due diligence and accepted that the petitioner was entitled to that defence. However, after a careful and detailed review of the petitioner's policies and procedures, she held that the petitioner had failed to establish that defence. On the evidence before her, it was open to her to reach the conclusion that she did, which was that the licensee had not taken all reasonable steps to prevent the contravention.

[83] In conclusion, I find no basis to interfere with the Adjudicator's decision in rejecting either the statutory defence under s. 33(5) of the *Act* or the common law defence of due diligence.

CONCLUSION

[84] The standard of reasonableness was described by the majority in *Dunsmuir* at para. 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[85] I find that the Adjudicator's decision meets that standard.

[86] The petition is dismissed. The respondent will have its costs at Scale B unless counsel wish to speak to the matter.