



**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: 671643 B.C. Ltd.
dba Sauce Restaurant
1245 Wharf Street
Victoria, BC V8W 1T8

Case: EH06-009

For the Licensee: Gregory N. Harney
Paul F. Waller

For the Branch: Shahid Noorani

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: June 30, 2006

Place of Hearing: Victoria, BC

Date of Decision: August 31, 2006

INTRODUCTION

The licensee, 671643 B.C. Ltd., operates Sauce Restaurant (“Sauce”) under Food Primary Licence (“FPL”) No. 204889. Sauce is licensed to operate from 11:00 a.m. to 1:00 a.m. seven days per week and has a licensed capacity of 92 persons inside and 50 persons on the patios. It is a term of every FPL that it is subject to the terms and conditions contained in the publication ‘Guide for Liquor Licensees in British Columbia’ (the “Guide”).

The Victoria Police Department, the Liquor Control and Licensing Branch and the Victoria Bylaw Office initiated a project on the business days of September 30 and October 15, 2005, to determine if minors in the community were being served liquor in licensed establishments. The project consisted of the use of a 17-year-old female, a 20-year-old female auxiliary police officer, and a plain-clothes undercover police team. The 17-year-old and the 20-year-old attempted to gain entry to liquor primary and food primary establishments and sought to be served liquor, while the police team provided support.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated January 25, 2006, the Liquor Control and Licensing Branch (“the Branch”) alleged that on October 14, 2005, the licensee

1. contravened Section 33 of the *Liquor Control & Licensing Act* (“the Act”) by supplying liquor to minors;

The recommended enforcement action is a four (4) day suspension of the liquor licence (Item 2, Schedule 4, *Liquor Control and Licensing Regulation*).

2. contravened Section 45(2) of the *Liquor Control and Licensing Regulation* (the “*Regulation*”) by failing to request two pieces of identification from a person
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appearing to be under the age of 25 before allowing the person to enter the licensed establishment, or before selling or serving liquor to the person.

The recommended enforcement action is a \$1000 penalty (Item 4, Schedule 4, *Liquor Control and Licensing Regulation*).

RELEVANT STATUTORY PROVISIONS

See Addendum

ISSUES

The licensee did not dispute that the event occurred, but raised the defence of due diligence.

1. Did the licensee exercise due diligence in its activities such as to excuse it from a finding of contravention?
2. If the contravention is proven, is a penalty appropriate in the circumstances, and if so, what is the appropriate penalty?

EXHIBITS

Exhibit No. 1	Branch's Book of Documents
Exhibit No. 2	Agreed Statement of Evidence of Police Sergeant
Exhibit No. 3	Photocopies of identification
Exhibit No. 4	Photograph of minor taken on October 14, 2005
Exhibit No. 5	Licensee's Book of Documents
Exhibit No. 6	Licensee's Minutes of Staff Meeting October 1, 2005

PRELIMINARY MATTER

The branch requested that the identity of the minor not be disclosed publicly during these proceedings in the interest of her security and requested that she be referred to throughout the proceedings only as MK. The branch also requested that the copies of false identity documents be destroyed, except for the exhibit copy maintained for the hearing record. The licensee did not object to these applications.

I ruled that all reference to the minor would be by her initials only, both during the process and in all written documentation relating to the process and that all copies of the photographs of the minor and the false identity documents would be collected and destroyed at the end of hearing, with the exception of one copy maintained for the hearing record.

EVIDENCE

The branch presented evidence from a Victoria Police Department sergeant, the minor ("MK") and a compliance and enforcement officer (the "C & E officer"). The licensee presented evidence from the licensee and the server.

The branch and the licensee agreed to the following evidence of the sergeant being admitted in written form:

Victoria Police Sergeant: Exhibit No. 2 - Verbatim

- Experienced VPD [Victoria Police Department] sergeant
 - Became the officer responsible for licensed establishments within the VPD in or about 2004/2005
 - Spent approximately one year seeking out a minor to assist in compliance project
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- Selected MK eventually due to her maturity and her ability to deal with the requirements to approach the bars and respond to questions from the employees
- He sorted through many packages of identification in the possession of the police department looking for one that did not resemble MK in any way
- He found a package of ID that, in his opinion, described an individual physically very different from MK. The physical descriptors: hair colour, eye colour, size and weight, were completely different
- MK's role was to present the "false" ID and attempt to gain entrance to the establishment. Once inside, MK would attempt to be served liquor
- Prior to attending the establishments a briefing was held at the police station, and the package of ID was given to MK
- [Sergeant] did say that the other candidates he interviewed were too young and too young looking – conceded that height was a factor in gauging age
- MK's appearance at hearing and at date of contravention were similar
- MK's maturity related to ability to give evidence, needed to be able to convincingly answer questions asked of her at hearings
- Individual thing to gauge weight, MK wearing a jacket
- Discovered [the handler] who had spent a period of time doing compliance testing in other British Columbia cities
- *[Sergeant] not involved with the good neighbour agreement

*There was no evidence in this hearing relative to that program.

MK (the minor)

MK testified that she was 17 years old on October 14, 2005, was 5'11" and weighed 170 pounds. Her hair was brown with lighter streaks. She confirmed that the photograph in Exhibit No. 4 was taken on October 14, 2005, and that her appearance then was similar to her appearance at the hearing.

MK had a contract with the Victoria Police Department to attend bars and restaurants, with false identification, to attempt to be admitted and be served liquor. She attended Sauce on October 14, 2005, at approximately 8:50 p.m. with a "handler", a young woman who appeared to be 20 or 21 years old. MK could not recall the details of whether other police officers also attended on this occasion but testified they did attend at other establishments.

At the start of the evening, around 8:00 p.m., MK and the handler had a briefing session with the sergeant at the Victoria Police Department detachment. At that time, she was provided with four pieces of identification ("false identification") and her photograph was taken. She testified that she put the false ID in her wallet and that she did not have any other ID with her.

MK testified that she and the handler entered Sauce, were shown to a table, a server asked whether they wanted drinks and, when they both ordered liquor, the server asked for ID. MK testified that the handler showed one piece of ID, then MK showed the false driver's licence in a plastic pouch in her wallet. The server asked, "Is this even you guys?" MK replied that it was and that she had dyed her hair. MK testified that the server laughed and walked away. The server returned with their drinks and shortly after they left Sauce. MK testified that she did not tell the server she had been to Sauce many times. She noted the server's name in her notes and testified that she had been wearing a name tag.

Compliance and Enforcement Officer

The C & E officer testified that he received information from the Victoria Police Department, interviewed the sergeant and MK, wrote the contravention notice (CN) and served it to the licensee on November 10, 2005. On November 15 he met with the licensee and interviewed him based on a series of questions he prepared in advance (see Ex. No. 1, tab 7). The C & E officer noted that the licensee requires all servers, bartenders and front staff to have the Serving It Right (SIR) training, that

additional training materials were contained in the Front of House Manual, that management staff provided training based on the manual and the employees signed an acknowledgement of having read and understood the manual. The C & E officer noted the licensee's advice that the management trainer checks off the boxes on the training pages to indicate that the employee has been trained. The licensee gave the C & E officer a memo dated June 3, 2005, which he had developed after the officer had given a warning on June 2 about possible failure to check two pieces of ID for patrons who appear under 25 years old. The memo is a reminder to request two pieces of ID, describes the acceptable ID, and notes that the policy applies to friends and regulars. The memo warns staff that failure to comply will result in immediate termination. The licensee told the C & E officer that management monitors staff visually to ensure they are diligent and thorough in complying with the *Regulation* regarding ID requirements and minors. Additionally, recurrent training is provided through memos and staff meetings.

The C & E officer and the licensee met again on November 24, 2005, and the licensee provided additional documents including staff meeting attendance, incident log, Serving It Right log book and an internal summary of Food Primary Licence terms and conditions which was included in the Front of House Manual (Exhibit No. 5, tab 6, pages 7 and 8). This document is very similar to the information contained in the Guide. In his notes from the November 24 meeting, the C & E officer noted that the licensee had taken steps to develop more detailed training and had scheduled a staff meeting for November 26, 2005. The licensee provided the acknowledgement signed by the server identified in this incident, dated July 15, 2005. The licensee also provided the C & E officer with minutes from a staff meeting on October 1, 2005, which reiterated the requirement for two pieces of ID (Exhibit No. 6).

Licensee

The licensee is the majority owner and general manager of the corporate licensee. He testified that when they opened Sauce in July 2003, he developed the Front of House

Manual. He testified that he prepared the new section of the manual referred to by the C & E officer directly from the Food Primary Guide, in November 2005. All of the management staff and bartenders are required to take the Serving It Right, Licensees' program and the servers, bussers and hostesses are required to take the Serving It Right, Servers' program. There are approximately 20 servers on staff who have all taken the SIR. The SIR training includes written tests. He testified that a new employee goes through an orientation program of the physical layout and then goes through the Front of House Manual with a manager. The manager specifically goes through the requirements of ID with the new employee. After they go through the manual the employee signs the acknowledgement, the manager also signs, and it is placed in the employee's file.

The licensee testified that the branch's signage concerning two pieces of identification is posted at the bar so it is visible to patrons at the bar. He referred to the memo of June 3, 2005, and stated he developed that after the C & E officer had concerns on June 2, even though the concerns were not founded and that it is posted on the employee bulletin board. The licensee acknowledged that as of October 14, 2005, there was nothing in the written policies or manual that specified what ID was acceptable but it is noted in the June 3 memo. He testified that he relied on the employees SIR training and that issues were discussed at staff meetings.

Concerning this incident, the licensee stated that the server involved had been an excellent employee and he did not fire her over this incident because he believed she simply made a mistake.

The Server

The server is a university student. She testified that she took the Serving It Right, Servers' program on-line approximately two to four weeks before she started working at Sauce, in June 2005. She testified that she was required to have quite a few training sessions before she started serving. The night before her training session

with the manager she had been given the rules and regulations from the Front of House Manual to review. She was familiar with the requirements for two pieces of identification. The manager went through ID requirements and how to determine if a patron has had too much to drink. The server shadowed another server for two eight-hour shifts, watching her serve customers and helping her. In total, she recalled three eight-hour shifts of training before she started serving on her own. She testified that when she was hired she was given the licensing manual which she skimmed. She was familiar with the June 3, 2005, memo, which was posted on the bulletin board. She testified that she was well aware of the ID requirements and that she knew she would be fired if she did not follow them. She estimated that the servers at Sauce ask 75% of their customers for ID. She also stated that servers at Sauce do not wear name tags.

The server testified that the incident on October 14, 2005, was entirely her own mistake and that she apologized to everyone for having to go through this process. She recalled the staff meeting on October 1, 2005, that both the licensee and the manager were present, that they went over ID issues, and that they questioned employees about what they would do if the person was underage or if there was a problem. The servers were instructed to confer with a manager if there was a problem. She recalled that the discussion about ID was approximately 25 minutes.

The server testified that there are general staff meetings about every two to three months, or more often if there are changes. There are also smaller meetings of six to eight servers and a manager when they are required to come in on different days or stay longer. She recalled attending meetings during the summer of 2005 and in the fall. At the meetings, the management always gave them reminders about ID.

The server recalled the incident on October 14, 2005, although her description of the young woman who gave her the false ID was not accurate. She testified that the two women did not give her two pieces of ID and that she questioned the second woman saying, "This doesn't really look like you." The woman said it was her and that she

had been to Sauce many times. She questioned the woman about the colour of her hair and she responded that she had dyed it. The server testified that she became flustered and felt like the woman was saying she was a horrible person. She testified that she entirely forgot to ask for the second piece of ID. She thought that the person in the ID was about 20 pounds heavier than the patron and she did not want to ask her about that. She felt she had already offended her, that she was her customer and it would be worse if she got a manager involved.

The server testified that this was the first time she had a situation of the patron not resembling the ID. She stated that she has refused service when patrons have not produced two pieces. She also stated that she is aware that eyes, hair, height and weight details are listed on the back of BC Drivers' Licenses. She was adamant that the women had their ID out of their wallets. She was also clear that both women appeared under 25 years.

SUBMISSIONS

The licensee conceded that there is no doubt that the contravention occurred. However, he submitted that the facts show that the licensee had exercised due diligence. He submitted that there was no deficiency or flaw in the licensee's practices and procedures. Rather, the licensee had been warned in June 2005 and did everything possible to forewarn and forearm employees.

He noted that this server had just completed the SIR program, had extensive training with the licensee shadowing other servers and spending a day with a manager and she was provided with the licensee's manual. She attended staff meetings where issues of ID were discussed. She was familiar with the June 3, 2005, memo. Her uncontradicted evidence was that she knew what she was supposed to do, but she did not do that. She says it was no fault of management - it was entirely her own mistake.

ANALYSIS AND DECISION

This case is clear – a minor was served liquor in a restaurant without having been required to produce two pieces of identification and by producing false identification. For reasons that no one would refute, these are serious contraventions. The case was heard on the licensee's defence of 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 in relation to various contraventions, 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.

This server had been with the licensee for about four months at the time of this contravention. She testified to her extensive training in the orientation stage, notices posted in the restaurant about ID requirements, and staff meetings during which ID requirements were discussed at length. Her testimony of the licensee's policies and procedures was corroborated with other evidence presented through both branch and

licensee witnesses. She took full responsibility for her mistake. I accept her testimony that until this incident she had not encountered instances of ID that did not resemble the patron, that she knew the legal requirements and that she knew the licensee's policy was to refer difficult cases to management. I also accept her testimony that she became flustered and forgot what she had been trained to do.

There were conflicts in the testimony of both MK and the server. I find that both witnesses were sincere and credible, and provided their testimony in a forthright manner. The weaknesses in their recollections did not substantially undermine their evidence. It is to be expected that people will not remember every detail and that is particularly the case where there is emotion or conflict. I do not know the answer to how MK knew the server's name – albeit spelled incorrectly – but it does not affect the outcome.

There is no absolute liability in contraventions like this. Licensees are not liable for the contraventions of employees, if they can demonstrate due diligence. Ideally, there would not be any contraventions if licensees and employees were being diligent. However, there is the fact that people err and that employees who otherwise have received adequate training may make mistakes. I find that is what happened here.

The test that has been applied is whether the licensee could have done more in training, policies, and preventative measures. In this case, there is the suggestion that the licensee should not have been relying on the SIR program training and should have had some written tests for employees. That is an additional measure that licensees could take to determine the level of knowledge of their employees. However, it is not determinative of whether a licensee is being diligent to ensure that employees are trained, knowledgeable and abiding by the terms and conditions of the licence and the various *Regulations*. In this instance, given that the server had just recently completed the SIR program, I do not see that it would have advanced the cause. The server in this case had full knowledge and came before the hearing saying that she was fully trained by the licensee – to the point of a staff meeting only

two weeks before this instance in which ID issues were discussed and staff were told to take problems to the management – she knew what she was supposed to do.

I find that the licensee has established the defence of due diligence. That does not mean that the licensee's job is over. The licensee will have to continue to train staff generally, and to ensure that they are familiar with situations of false ID being presented and how to address those situations.

There is no prescription for licensees on how to develop due diligence or how to present it in a hearing before the branch. Being diligent is a licensee's responsibility and each case must be decided on its own merits. The branch's goal is to ensure voluntary compliance with the terms and conditions of the licence and with the *Regulations*. When contraventions occur it is the branch's mandate to investigate and to bring enforcement action. There is no requirement in law or policy for the branch to investigate a licensee's due diligence – that is within the licensee's purview and for the licensee to pursue at hearing if warranted. In this instance, the licensee was fortunate in having the server available to testify to the licensee's practices and policies.

I find that the branch has not established the contraventions as alleged.

[ORIGINAL SIGNED]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: August 31, 2006

cc: Victoria Police Department

Liquor Control and Licensing Branch, Victoria Office
Gary, Barker, Regional Manager
Vancouver Island/Okanagan/Kootenay

Liquor Control and Licensing Branch, Surrey Regional Office
Shahid Noorani, Branch Advocate

ADDENDUM

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the “Act”)

Supplying liquor to minors

33 (1) A person must not

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

...

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

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

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

Minors

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.
-