



**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: OJ's Richmond Restaurant Inc.
dba Original Joe's Restaurant & Bar
Unit 110, 11080 No. 5 Road
Richmond, BC V7A 4E7

Case: EH12-242

For the Licensee: Kenneth Grant

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Dianne Flood

Place of Hearing: Vancouver, BC

Date of Hearing: February 12, 2013

Date of Decision: March 21, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee operates Original Joe's Restaurant & Bar in Richmond, BC under Food Primary Licence 303766. Under the licence, liquor sales are permitted from 11:00 a.m. to 1:00 a.m. from Sunday to Thursday and from 11:00 a.m. to 2:00 a.m. on Friday and Saturday. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated November 6, 2012. The Branch alleges that on October 25, 2012, the Licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act"), sell, give or otherwise supply liquor to a minor. The proposed penalty is a monetary penalty of \$7500 (Item 2, Schedule 4, of the *Liquor Control and Licensing Regulation*).

The Licensee does not dispute the contravention but makes a defence of due diligence.

RELEVANT STATUTORY PROVISIONS

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

Supplying liquor to minors

- 33** (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,

ISSUES

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

EXHIBITS

Exhibit 1: Branch's Book of Documents

Exhibit 2: Photograph and Identification of the Minor (sealed exhibit, only to be opened by the adjudicator or court)

Exhibit 3: One page excerpt titled Responsible Service, from the Licensee's Employee Handbook

Exhibit 4: Licensee's Staff Serving It Right List

Exhibit 5: Series of statements made by 11 Employees of the Licensee's

Exhibit 6: Licensee's Employee Handbook

Evidence

The Branch's evidence

A liquor inspector ("Inspector A") gave evidence about the "Minors as Agents" Program (MAP). Under the MAP, persons under the age of 19 years are hired by the Branch and then attend at licensed premises and, supervised by liquor inspectors, attempt to buy liquor. No attempt is made to hide the Minor's age or otherwise deceive licensees. The MAP is intended to test and ensure that licensees do not sell liquor to minors.

Inspector A testified that on October 25, 2012, he and another inspector ("Inspector B") were conducting inspections with a minor hired as an agent (the "Minor"). Earlier that day, Inspector A photographed the Minor and confirmed her age of 17 years by reviewing her identification. A copy of that photograph and the Minor's identification were marked as Exhibit 2 and, at the request of the Branch and with the consent of the Licensee, that Exhibit has been sealed to protect the identity of the Minor.

Inspector A described the licence as a food primary that permits the service of liquor and requires that a kitchen be in operation. The licence also has a lounge endorsement which permits an area within the restaurant that is distinctly different from the rest of the restaurant where the Licensee is entitled to serve liquor without food to persons 19 years of age and older. Persons under the age of 19 years old are allowed in the lounge, but only if accompanied by a parent or guardian.

Inspector A said that at about 8:00 p.m. on October 25th, the two Inspectors and the Minor attended at the premises. The Minor entered the premises and Inspector A followed about 15 seconds later. A staff person greeted the Minor. The Minor later told Inspector A that the staff person told the Minor that she could be seated where she wished. The Minor proceeded to the bar in the lounge and sat down. Inspector A said he sat at a table behind the Minor where he had a clear and unobstructed view of what might happen. He indicated where he and the Minor were seated using the floor plan, Tab 10 of Exhibit 1.

Inspector A said the lounge was not busy with only 2 other patrons seated at the far end of the bar. The Bartender immediately approached the Minor and they had about a 10 second conversation. In accordance with the MAP, the Minor ordered an alcoholic drink. The Bartender did not ask the Minor for identification, brought her the drink and then left that end of the bar. The Minor then left the premises and told Inspector B about the sale of liquor to her. The Minor then completed an Observation Form and made notes of the event, which are included in Exhibit 1.

Inspector A testified that Inspector B then entered the premises and a Contravention Notice was issued to the Licensee.

Inspector B was also called as a witness. He testified that after the Minor exited the premises and advised him she had been served liquor, he entered the premises. He joined Inspector A in the lounge and said the premises were not overly busy. He knew Mr. Grant, the Licensee, from prior inspections and when the Licensee entered the lounge area, Inspector B advised him about the contravention.

Inspector B also gave evidence about the Guide (Tab 11 of Exhibit 1), saying it sets out licensees' responsibilities under the Act using laymen's terms. He specifically referred to the provisions addressing minors in a food primary licensed premise and the signage required about restrictions on minors in lounge areas (pages 24 and 16 of Tab 11). Inspector B also testified about efforts to ensure licensees are aware of their obligations in relation to minors when a licence is issued.

Inspector B testified about the seriousness of the offence and the consequences of selling liquor to minors and the negative effects of alcohol on young bodies and minds.

The Licensee's evidence

The Licensee does not dispute that liquor was sold to the Minor as alleged but says a defence of due diligence applies. Mr. Kenneth Grant and the Area Manager for the restaurant chain gave evidence on behalf of the Licensee.

Mr. Grant's evidence

Mr. Grant is the Licensee and General Manager of this establishment. The premises is one of a chain of restaurants with various other locations in BC and elsewhere. Mr. Grant says the Licensee and the restaurant chain have effective training and systems in place to prevent the sale of liquor to minors. He says that the Bartender was given proper training, support and direction about the sale of liquor to minors, but the Bartender acted contrary to that training, support and direction.

Mr. Grant referred to the Responsible Service Policy (Exhibit 3) that is an excerpt from Employee Handbook (Exhibit 6). That policy sets out the reasons for it - to protect guests, staff and the restaurants - and the respective obligations of staff and management. In relation to minors, staff are directed not to serve alcohol to anyone who is under the legal age "in your province" (as noted above, the chain has restaurants located in various provinces) and to ask all guests who appear to be under the age of 30 for ID. Other directions are given about not serving intoxicated persons. Accountability for violating any of the policies is stated to be serious and to result in immediate disciplinary action. Suggestions are given about how to avoid serving to avoid intoxication and what to do if someone has become intoxicated. Employees are required to sign off that they have understood the policy and will follow it and to acknowledge that failure to comply with it will result in termination.

Mr. Grant's oral evidence was that the Licensee's policy is to "ID" anyone who appears younger than 30 years old. With regard to assessing age, the employees are told that if the patron looks younger than Mr. Grant, to ID them. Mr. Grant is confident his staff members are clear about what the age of 19 looks like.

He said he or another manager is always on the floor and monitors staff for checking for identification and coaching them about their responsibilities. He said that the bartenders also monitor the servers and if a server hasn't asked for ID, then the bartender requires them to do that. Mr. Grant says that having to return to a table and ask for identification is embarrassing for the server and usually only happens once. Mr. Grant said he has maybe once or twice issued a written warning to a staff person about failure to ask for ID, but only after some direct coaching and if it happens a second time.

Mr. Grant said the Licensee ensures all employees either have or get their Serving It Right Certificate, which outlines the roles and responsibilities, and presented a list showing that that was done (Exhibit 4). He also presented a series of individual statements made by 11 different employees about the Licensee's policy about checking for identification that also included some general statements about the training, direction and support provided to them to do that. He acknowledged that for the most part the statements are virtually identical but says the employees gave the statements freely and willingly. He acknowledged that some statements referred to the corporate policy of ID'ing anyone under 30, while others only referred to a need to ID anyone appearing under the age of 19.

Mr. Grant testified that he had a staff meeting about one month prior to the contravention where he spoke to staff about responsible alcohol service and the MAP, and about how two other restaurants in the area had failed when tested by the MAP. The Bartender attended that meeting. Mr. Grant believed that the Licensee's employees had a clear understanding of their roles and responsibilities with respect to service of liquor and what the repercussions would be if they did not to comply.

Mr. Grant said that the Bartender was about 21 years old, and had worked at the premises for about eight months prior to the contravention. Ordinarily reference checks are done, but another staff person had recommended the Bartender and Mr. Grant did not believe the Bartender had prior experience so no reference check was done. Mr. Grant says that the Bartender did understand his responsibilities, he simply chose not to comply, and there was nothing more the Licensee could have done to avoid the sale of the liquor to the Minor. Like the Branch, the Licensee has zero tolerance for non-compliance, and the Bartender was fired.

Area Manager's evidence

The Area Manager for the restaurant chain testified about the staff training given when a new restaurant is opened, which is comprised of five full days covering all aspects of the restaurant, including: how to look after customers, food tastings and food safety, how to avoid and look for signs of intoxication. The Employee Handbook (Exhibit 6) sets out the various things that are covered. As of December 2012, the chain also provides on-line training.

The Area Manager said the restaurant chain does test to ensure new employees' understandings of the policies and procedures. He said the Bartender would have been tested and would have had to pass the test.

For new hires after a restaurant has opened, the training consists of one day of an overview orientation and how to do the job and where the things are, the second day is shadowing another employee to see how things are done, without any hands on activity. For the Bartender, his training would have included what tools he would need, his responsibilities regarding service, how to make drinks, the computer system and the food service available. It would also have included 1 to 2 hours about serving minors, covering the items listed on Exhibit 3. The Bartender also had his Serving It Right Certificate.

The Area Manager also testified that bartenders are responsible for keeping an eye on servers and if there is any question if the patron is 19 years to question the server and to deny service. This responsibility is one of the first things done in the behind the bar training.

The Area Manager attended the staff meeting described by Mr. Grant, to add weight to the discussions about the MAP and preventing sales of liquor to minors, which the restaurant chain takes seriously.

Since the contravention, the Area Manager had staff from another location who were in their early 20's attend at the premises to test if they would be asked for ID, and they were. He also mentioned the sticker on the door to the premises that sets out their policy to ID anyone who appears under the age of 30.

He said that if an employee fails to ask for ID and the person is under 19, then the employee is fired. If the employee fails to ask for ID and the person is under 30, then there is a written warning and direct coaching on the proper action the staff should have taken.

The Area Manager testified that the chain does not use hostess staff. Instead all staff are trained to greet customers. This is because the chain's focus is on food service and they don't want any appearance or suggestion that the restaurant is a nightclub. It was likely a server who greeted the Minor and she, like all staff, would have been trained to welcome guests.

SUBMISSIONS

The Branch says that the Licensee served liquor to a minor contrary to the Act. The Minor was clearly not of legal age, and that there was no attempt to deceive or trick anyone. Additionally, the Minor should not have even been allowed in the lounge without a parent or guardian.

The Branch says that because the Licensee has admitted the contravention the only issue is whether due diligence applies. The Branch says the test for due diligence is whether there is (i) adequate training provided and (ii) reasonable systems that effectively monitor the application of that training to ensure compliance. The Branch says the Licensee's training is not adequate and its systems to monitor it are not effective.

The Branch also notes that the employees' statements on the Licensee's policy are inconsistent about what that policy is, indicating that staff were unclear about the policy.

The Branch says that selling liquor to a minor is a serious contravention with serious consequences for the minors and the public generally.

The Licensee says that the defence of due diligence should apply. It points to the training and monitoring it does to prevent service of liquor to minors. Even with that training and the constant oversight by the general manager, nothing more could have been done to prevent this sale. The Bartender acted contrary to the Licensee's policy and contrary to his training.

The Licensee says it is unfair the Licensee bears the consequences of an employee's actions contrary to policy. The employee gets fired but just goes to another restaurant or bar and gets another job.

The Licensee's compliance history shows that it is conscientious and their systems to prevent service to minors works well and achieves the Branch's policy objective of not selling to minors. As such, the Licensee could have done nothing more to prevent the sale and has met the test for due diligence.

REASONS AND DECISION

I accept Inspector A's evidence about the facts surrounding the sale of liquor to the Minor. I find that the Minor was youthful in appearance, a reasonable person would have asked her to produce identification, and she should not have been served liquor. The Licensee does not dispute that on October 25, 2012 a minor was served liquor in the Licensee's lounge, and as such I find that the Licensee contravened section 33(1)(a) of the Act and the terms of its licence.

Defence of Due Diligence

The Licensee is entitled to the defence of due diligence if it shows that it was diligent in taking reasonable steps to prevent the contravention from occurring.

The law:

The Supreme Court of Canada set the legal test for the defence of due diligence in the case of *R v. Sault Ste. Marie* (1979) 2 SCR 1299. That case still stands as the applicable law. The test is stated (at page 1331 of the decision) as:

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 [the employer's] direction or approval, thus negating wilful involvement of the accused, and whether the accused [the employer] 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.

In the circumstances of a sale of liquor to a minor contrary to the Act, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee, then the questions to be considered and answered are whether the licensee had:
 - a. adequate training and other systems to prevent the contravention (the sale of liquor to minors), and
 - b. taken reasonable steps to ensure the effective application of that training and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Findings of fact and applying the law to the facts:

I find that the Bartender who made the sale of liquor to the Minor was not the directing mind of the Licensee, so the next step is to determine:

- a. whether the Licensee had adequate training and other systems in place to prevent the sale of liquor to minors, and
- b. whether the Licensee took reasonable steps to ensure the effective application of that training and those systems.

The evidence presented by the Licensee of its training and monitoring must be weighed and considered in the context of what a reasonable person would expect to be in place to prevent such sales, having consideration for the seriousness of the consequences on young minds and bodies, both for the minor and society in general. Selling liquor to minors is a significant public safety issue and it needs to be prevented because of:

- the effects of alcohol on growing bodies and developing minds
- the effects on individuals and society of irresponsible drinking behaviour learned at an early age
- a minor's lack of capacity to metabolize alcohol in the same manner as an adult, so that liquor has a more intoxicating effect on minors, and
- liquor is a significant factor in many crimes committed by youth, including serious driving offences, assault, sexual assault and theft

I accept the evidence of the Licensee's witnesses about: the Licensee's policies, the training given to staff generally and to the Bartender specifically, the recent staff meeting addressing the MAP and the need to prevent service of liquor to minors, and the onsite monitoring by management that staff ask for ID. However, the question remains whether this evidence meets the onus of establishing the defence of due diligence.

Having considered and weighed all of the evidence, I find the Licensee's training to be deficient for the following reasons:

1. On opening a restaurant, staff are to be given five days of classroom training. For new staff hired after a restaurant has opened, the training is more informal.

Here, the Bartender's training was comprised of 2 shifts, despite his absolute lack of prior experience working in any licensed premise. A list of the things he was expected to learn included: how to make drinks, how to operate the cash register, the food on offer, and the legal requirements for the sale of liquor. I find that, given all of the things that he was expected to learn in those 2 shifts, it would have been impossible within that time frame to adequately address the need for identification, how to assess age and how to verify identification, and the underlying rationale for these—the serious consequences to youth and society. I find that for a person without any prior liquor service experience, his training would have been insufficient.

I also note that the Licensee intended that the Bartender was to be the second line of defence to ensure servers asked for ID, so effective training of the Bartenders on these responsibilities was especially critical and deserving of significant attention.

2. The Licensee's policy on "Responsible Service" comprises only 3 pages of the 84 page Employee Handbook distributed to employees (Exhibit 6), and that policy is somewhat buried in the second half of the Handbook. This is not sufficient detail or focus to this very critical information. This information should not only be more comprehensive, it should be given greater prominence in the Employee Handbook or by some other additional means to reinforce its importance to staff.

The Guide provides examples and other valuable information to licensees about their responsibilities and how to meet them. For example, the forms of ID acceptable in British Columbia and how to verify that ID are set out in the Guide. This critical information on identification needs to be made clearer to staff in their training. The content of the Licensee's written ID policy does not include all of that critical information and, as such, the written policy is deficient.

A comprehensive written policy that sets out the ID requirements in British Columbia and some suggestions on how to test ID for validity provide more effective training material for staff would also provide a better on-going reference for the staff.

3. The staff training on how to assess age is deficient – simply being told if the person looks younger than Mr. Grant, then to ask for ID is not enough. Young staff, who may lack life experience, need more specific guidance.
4. The various employees' statements about the Licensee's ID policy (Exhibit 5) are inconsistent about what that policy is. This would suggest that there is confusion among the employees, which indicates the training about the policy is deficient.

5. While the oral evidence was that tests were administered to staff to ensure their understanding of the Licensee's policies, neither a copy of nor the contents of the test was presented as evidence. As such, the weight I give to that oral evidence is slight. Without reviewing a copy of the test it is impossible to assess what was tested and how much of that testing addressed the sale of liquor to minors. Nor was there any evidence of the Bartender's test and how well he did in those areas, if tested.

While there is a manager on premises at all times, the manager can't be everywhere and the staff needs to be given additional on-going supports to ensure compliance. I find the Licensee's systems in place to ensure effective application of its policies to prevent sales to minors to be deficient for the following reasons:

1. The evidence was that on occasion there was a need to remind staff to ask for ID. However, the only consequence of failing to ask was the possible embarrassment to the server of having to return to a table to do what should have been done in the first place. Only 1 or 2 written warnings were ever given to staff about the consequences of not asking for ID, despite the potential serious consequences of the failure to do so.
2. The only evidence of non-verbal prompts to staff about preventing the sale of liquor to minors was the one sign posted in the premises. No reminders to check ID were included on server's order forms or at the computer system, for example. There was no evidence presented of any documents available to on-duty staff to assist in determining age (for example, the current date for those turning 19 years of age, examples of the various forms of valid ID, what to look for in fake ID).

3. The Licensee's program to test for compliance by using other staff is sporadic, and whether any particular employee is tested is entirely by chance. The evidence is that the program, such as it is, was instituted after the contravention. To support the claim of due diligence, the program needed to be in place at the time of the contravention, be organized to effectively test employees, and to record and follow up that testing.

Considering all of the evidence and the case law, and applying the standard of what a reasonable person would expect given the significant public safety issues related to the sale of liquor to minors, I find the Licensee failed to have adequate training on preventing the sale of liquor to minors. I also find that the Licensee failed to have in place adequate systems to track and monitor effective training and operations. Given the serious consequences of a sale to a minor, a reasonable person would expect something more fulsome and structured to be in place. I find the Licensee failed to meet the standards and the defence of due diligence is not available to it.

In addition, while the Licensee suggested that the Branch ought to pursue action against staff personally so that staff will experience negative impacts for failure to ask for identification, I find that the Licensee is best placed to take steps to require compliance by staff.

PENALTY

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

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence

- Cancel all or any part of the licence
- Order the licensee to transfer the licence

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

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

There is no record of a proven contravention of the same type for this Licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 2 in Schedule 4 of the Regulation provides a range of penalties for a first contravention of this type: a 10-15 day licence suspension and/or a \$7,500 to \$10,000 penalty.

Selling liquor to a minor is a serious public safety issue. The threat of serious consequences to the youth and to the public in general is significant. In this case, I find a monetary penalty will be sufficient to bring the Licensee into voluntary compliance.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7500.00 to the general manager of the Liquor Control and Licensing Branch on or before April 23, 2013.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Dianne Flood
Enforcement Hearing Adjudicator

Date: March 21, 2013

cc: Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate