



**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:	Old Spaghetti Factory (Victoria) Ltd. dba Old Spaghetti Factory (Victoria) 703 Douglas Street Victoria, BC V8W 2B4
Case:	EH13-111
For the Licensee:	Peter Buckley
For the Branch:	Peter Mior
General Manager's Delegate:	Nerys Poole
Date of Hearing:	Written Submissions
Date of Decision:	October 25, 2013

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

Old Spaghetti Factory (Victoria) Ltd. (the “licensee”) operates the Old Spaghetti Factory (Victoria) restaurant (the “restaurant”) under Food Primary Licence number 187518 (the “licence”). The restaurant is located at 703 Douglas Street in Victoria, B.C.

The licence specifies hours of liquor service daily, from 11:00 a.m. to 1:00 a.m. Monday to Saturday and from 11:00 a.m. to midnight on Sunday. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication “Guide for Liquor Licensees in British Columbia” (the “Guide”).

The President and CEO of Old Spaghetti Factory Canada Ltd., Peter Buckley, signed the written submission as the representative of the corporate licensee.

## 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 dated July 12, 2013 (the “NOEA”). The branch alleges that on May 8, 2013 the licensee contravened section 33(1)(a) of the *Liquor Control and Licensing Act* (the “Act”) by selling, giving, or otherwise supplying liquor to a minor.

The proposed enforcement action outlined in the NOEA is a \$7,500 monetary penalty. Item 2, Schedule 4 of the *Liquor Control and Licensing Regulation* (the “Regulation”) sets out a range of penalties for a first contravention of this type: a 10 to 15 day licence suspension and/or a \$7,500 to \$10,000 monetary penalty.

On July 17, 2013, the licensee's representative advised the branch that the licensee was admitting the contravention as alleged and not making a due diligence defence. The licensee is disputing the proposed penalty of \$7,500.

The branch and the licensee agreed that the hearing would take place by way of written submissions.

## RELEVANT STATUTORY PROVISIONS

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

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 the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

## EXHIBITS

**Exhibit No. 1:** Branch's book of documents, tabs 1 to 14

**Exhibit No. 2:** Licensee's written submission, dated August 28, 2013 (2 pages, with 3 attachments)

## EVIDENCE

The licensee does not dispute the contravention and therefore accepts the facts as laid out in the NOEA (Exhibit 1, tab 1). The following is a summary of the facts from the NOEA.

On May 8, 2013, two liquor inspectors and a minor agent conducted a Minors as Agents Program (MAP) inspection of the restaurant. MAP inspections are used to test compliance with the Act's prohibition against selling or supplying liquor to persons under the age of 19.

Prior to going to the restaurant, the minor agent was photographed and his identification was photocopied. The minor agent was 18 years old on the date of the contravention, May 8, 2013.

The two liquor inspectors and the minor agent entered the restaurant at approximately 3:00 p.m. The three waited near the front entrance to be seated. A female employee attended the hostess stand, obtained three menus and proceeded to show the three to a booth within sight of the main entrance, bar and patio. The restaurant appeared empty other than a table of patrons seated in a booth across from the inspection team and another table of patrons on the patio.

At approximately 3:05 p.m., a male server attended the table and took drink orders. Both inspectors ordered water and the minor agent requested a Kokanee beer. A few minutes later, the male server returned with the drinks and placed the bottle of Kokanee beer directly in front of the minor agent. At no time did the server or any other employee request any form of identification from the minor agent.

One of the inspectors and the minor agent then immediately departed the restaurant and proceeded to the inspection team vehicle. At that time, the minor agent completed an observation form to record his observations and make detailed notes of the inspection (Exhibit 1, tab 5).

The second inspector remained in the restaurant to take photos of the Kokanee beer for evidentiary purposes. He then moved to another table away from patrons. He identified himself to the manager and advised him of the MAP inspection which had just taken place. During this time, the first inspector returned. The first inspector paid for the beer and issued the contravention notice after reviewing the licence. Both inspectors reviewed the enforcement process with both the operations manager and the personnel manager and departed the restaurant at about 3:30 p.m.

### **SUBMISSIONS – BRANCH**

The branch has submitted the book of documents with the NOEA which outlines the elements of the contravention, as follows:

- The person in question is a minor
- The 18 year old minor entered the restaurant and purchased a bottle of Kokanee beer without being asked for any identification
- The licensee sold or supplied the liquor to the minor

The branch sets out its reasons for the proposed enforcement action, stating that a monetary penalty of \$7,500 is considered appropriate to reinforce the seriousness of selling liquor to minors.

### **SUBMISSIONS – LICENSEE**

The licensee admits the contravention occurred and is not making a due diligence defence. The licensee requests that the proposed monetary penalty be changed to a warning.

In its written submission, the licensee reviews the history of the Old Spaghetti Factory which opened its first location in 1970 in Gastown, Vancouver. They opened the Victoria location in 1999. The corporate entity, Old Spaghetti Factory Canada Ltd., currently has 14 locations across Canada.

The licensee emphasizes the family-oriented nature of the restaurant and states that the total average alcoholic drinks per meal served is less than 0.4 per customer.

The licensee explains that the restaurant employs roughly 85 staff during the peak month, the majority being local university and high school students. All wait staff are required to have completed the Serving It Right course. Materials are posted in the restaurant educating and warning staff of the requirement to request identification when beverages are ordered.

The licensee says that in the entire chain's 43 year history, including the 14 years in Victoria, the corporate licensee has never been charged or fined by the branch. The licensee submits that the NOEA does not refer to any reason as to why the restaurant was considered a threat to public safety.

The licensee says that the minor agent was only 4 months shy of the legal drinking age of 19, and was accompanied by two middle-aged inspectors. The licensee argues that the presence of the two middle-aged inspectors along with a minor who was very close to the legal age of 19, amounted to entrapment. The licensee says that the 20 year old server made a judgement call. A large number of government employees frequent the restaurant and he made the assumption that these three were co-workers and the server wanted to avoid an embarrassing situation for them. The licensee says, if the minor

agent had entered the restaurant on his own or with other minor agents, the waiter would have asked for identification.

In summary, the licensee submits that the restaurant and the chain of Old Spaghetti Factory restaurants across the country have an unblemished record. The licensee asks for a warning in place of the \$7,500 monetary penalty. The licensee submits that the MAP is a valuable program that must approach enforcement in a manner that does not induce staff to commit an offense.

## **REASONS AND DECISION**

### **Contravention**

The Licensee admits the contravention occurred. I therefore find that the licensee has contravened section 33(1)(a) of the Act.

### **Due Diligence**

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The licensee has not presented any evidence to demonstrate due diligence nor has it raised a defence of due diligence. I therefore find that the licensee has not established due diligence and I turn to the question of penalty.

## 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 NOEA. 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.

I find that a penalty is warranted here. The branch has consistently indicated that the sale of alcohol to minors is a significant public safety issue and a high priority for enforcement. The NOEA outlines why the branch considers this a significant public safety issue:

- 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; therefore, 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

The branch has provided licensees with notification of the MAP in a variety of ways, as noted in the NOEA:

- July 2012: a government press release announced changes to the Act allowing the use of minor as agents for the purposes of checking compliance with the Act
- February 25, 2011: the Publican, a periodical for all members of the Alliance of Beverage Licensees of British Columbia, published an article by the general manager describing the MAP and further advising of the program's implementation
- March 14, 2011: the branch issued its first edition of the branch Newsletter, which was mailed to all licensees in the Province of British Columbia, and contained an article titled "Hiring Minors to Monitor Retail Compliance"
- October 2012: the branch Liquor Line Newsletter included a letter from the General Manager regarding the Minors as Agents Program to monitor Food Primary Establishments

This last letter dated October 2012 from the General Manager to all licensees (Exhibit 1, tab 13) notes that "the results of inspections in restaurants so far have shown that the risk of sale to a minor is very high" and further that "hiring minors is the most effective way to monitor whether a licensee is selling alcohol to youth who are underage." The letter advises licensees to guard against selling liquor to minors by ensuring their staff

do “an initial assessment of **every patron** before selling or serving them liquor.”  
(emphasis added)

The senior vice president of the Old Spaghetti Factory Canada Ltd. sent an email to all its locations on February 27, 2013 noting the information about the branch’s MAP and advising servers to be aware of the potential for receiving a \$575 fine if found to be selling liquor to a minor.

I do not accept the licensee’s arguments for a reduced penalty or no penalty in this case. The licensee has admitted the contravention occurred and has not made a defence of due diligence. The licensee submits that the conduct of the inspectors here is suggestive of entrapment, a concept found in criminal law. I disagree.

The concept of entrapment does not generally apply to the enforcement and monitoring of licensees for compliance with liquor laws. Licensees agree, when they are issued a liquor licence, that they are responsible for ensuring that they and their staff understand and follow the Act, the Regulation, the terms and conditions in the Guide and any terms and conditions on the face of their licence (Inspection Interview Sheet, tab 12, Exhibit 1).

The branch has a legislated duty to enforce the Act and Regulation and to ensure that licensees comply. The branch introduced MAP to assist its inspectors to check for compliance with the prohibition on alcohol sales to minors and, as noted above, has given written notice to all Food Primary licensees about the expansion of the program to restaurants. This is not entrapment, but a tool used by a regulatory regime in order to uphold its legislated duty to the public.

The licensee submits that the presence of “two middle-aged inspectors” sitting with the minor agent led the server not to request identification in order not to embarrass anyone. Avoiding liquor service to minors is the law. Thus, requesting identification of anyone who appears underage is the best way to avoid contravening the law. As noted in the NOEA, it is reasonable to expect that even with minimal training, an individual working in the liquor service industry would be well versed in their responsibility to prevent the sale of alcohol to minors. Here, the server made no attempt to ask for any piece of identification. Any training provided to the licensee’s servers should include clear instructions that “avoiding embarrassment” is not an excuse for not asking for identification.

The licensee infers in its submission that the minor agent’s age—4 months shy of 19 years old—should be a factor in considering the appropriateness of a penalty. The licensee is responsible for ensuring that its staff are well trained in the importance of asking for identification of all patrons who may be underage. The Guide emphasizes to all licensees the importance of having effective systems in place to meet the obligation of not serving alcohol to any minors. The Guide recommends that servers do an initial assessment of every patron before selling or serving them liquor (Exhibit 1, tab 11, page 31). Enforcement action is intended to both redress the licensee’s non-compliance, and to encourage future compliance by way of deterrence. A penalty here is warranted to encourage the licensee to put the systems and training in place to ensure its staff avoid future contraventions.

Having found that a penalty is warranted here, I do not have the discretion to order a warning. I am bound to follow the minimum as set out in item 2 of Schedule 4 of the Regulation. There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident.

Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

The Branch has recommended a monetary penalty of \$7,500, the minimum monetary penalty for this particular contravention. I find this to be reasonable and appropriate given the importance of ensuring minors do not have easy access to liquor, to encourage future compliance from the licensee, and to ensure specific and general deterrence in society at large.

## **ORDER**

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before **November 30, 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*

Nerys Poole  
Enforcement Hearing Adjudicator

Date: October 25, 2013

cc: Liquor Control and Licensing Branch, Victoria Office  
Attention: Gary Barker, Regional Manager

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