



**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: Original Joe's Restaurant and Bar
Unit #110, 11080 No. 5 Road
Richmond, BC V7A 4E7

Case: EH15-078

For the Licensee: Robert Ewing & Sara R. Sutherland

For the Branch: Hugh Trenchard

General Manager's Delegate: Nerys Poole

Date of Hearing: Written Submissions

Date of Decision: January 7, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Original Joe's Franchise Group Inc. dba Original Joe's Restaurant & Bar (the "licensee") operates a restaurant (the "restaurant") under Food Primary Licence number 303766 (the "licence"). The restaurant is located at Unit #110, 11080 No. 5 Road in Richmond.

The licence specifies hours of liquor service daily, from 11:00 a.m. to 1:00 a.m., Sundays to Thursdays and 11:00 a.m. to 2:00 a.m. on Fridays and Saturdays.

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").

Robert Ewing, Area Manager of the licensee, signed the written submission dated November 27, 2015, on behalf of the corporate licensee. Sara R. Sutherland, Director of Business Development and Compliance for the Franworks Group of Companies, which includes the corporate licensee, signed the written response dated December 1, 2015, on behalf of the corporate licensee.

The branch alleges that on July 15, 2015 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.

On August 30, 2015, the licensee advised the branch that the licensee wished to proceed with a written submissions hearing. The licensee is disputing the proposed penalty of \$7,500.

A penalty-only written submissions hearing includes all of the following elements:

- The licensee admits that it contravened as alleged in the NOEA
- The licensee is not pursuing a due diligence defence to the contravention
- The licensee only disputes the proposed enforcement action (penalty)

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 August 9, 2015 (the "NOEA").

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.

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 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 three-page written submission, dated November 27, 2015 signed by Robert Ewing
- Exhibit No .3:** Branch's Response to Licensee's written submission, dated November 30, 2015
- Exhibit No. 4:** Licensee's final submission dated December 1, 2015, sent via email by Sara R. Sutherland

FACTS

The licensee acknowledges that the contravention occurred as detailed in the NOEA (Exhibit 1, tab 1). The following is a summary of the facts from the NOEA.

On July 15, 2015, 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 17 years old on the date of the contravention. (Exhibit 1, tab 8)

At approximately 9:28 p.m. on July 15, 2015, the minor agent entered the restaurant for the sole purpose of assessing the establishment for compliance with the Act. The minor agent sat in the first seat at the bar in the lounge area of the restaurant. Liquor inspector 1 entered about 15 seconds behind the minor agent and stood at the lobby dining area, where he had a clear view of the minor agent at the bar. Liquor inspector 1 observed a server speak to the minor agent. The server then went behind the bar area and returned with a bottle of Corona beer and placed it in front of the minor agent. Liquor Inspector 1 did not observe any evidence of the minor agent being asked for identification. When the server left the area, the minor agent departed the restaurant. The minor agent proceeded to the vehicle and completed his statement about the incident. (Exhibit 1, tab 7) This statement outlined what occurred in the restaurant including the fact that the server did not request identification.

Liquor inspector 1 took possession of the bottle of Corona beer. He then spoke with a female staff member who identified herself as the evening shift manager. Liquor inspector 1 informed the evening shift manager that one of the servers had just served a minor agent. The General Manager of the restaurant, who had finished his shift and was seated at the bar drinking a beer, then approached Liquor Inspector 1 and asked to speak to him in his office.

Liquor Inspector 2 took a picture of the seized Corona beer and the receipt (Exhibit 1, tab 10), paid for the beer and proceeded to complete the contravention notice. (Exhibit 1, tab 2)

Liquor Inspector 1 discussed the contravention and process with the General Manager in his office. The General Manager said he would contact the owner immediately and advise him of the contravention. The evening shift manager provided the name and Serving It Right number of the server. The evening shift manager signed the contravention notice acknowledging receipt and received a copy. Liquor Inspector 1 advised her that enforcement action would be undertaken regarding the contravention. The two liquor inspectors then left the restaurant about 10:05 p.m.

The branch sent a second Contravention Notice to the licensee on July 16, 2015, stating that Contravention notice B017242 was voided and reissued as Contravention notice B017246 to amend the notice to include sell/supply liquor to a minor pursuant to section 33(1)(a). (Exhibit 1, tab 2 and Exhibit 3)

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 17 year old minor entered the restaurant and purchased a bottle of Corona 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 and is not making a defence of due diligence. The licensee disputes the proposed penalty of \$7500.

The licensee requests that I reduce the recommended penalty of \$7500. The licensee states that the licensed establishment in this case has been in operation since December of 2009, and that this is the first penalty recommended against it. The licensee further says that a violation of this nature, i.e. service to minors, is unacceptable. The licensee and its staff are actively working to ensure that a contravention of this nature never again occurs at this restaurant or any of the other establishments owned by the corporate licensee. The licensee asks me to consider its operating history when determining the penalty in this case.

The licensee asks that the operating tenure of all the establishments owned by Franworks in British Columbia be considered. This contravention is the first in over a decade that has proceeded to this stage. The licensee says it has a history of compliance in the industry and that this should be considered when I determine the appropriate penalty in this case.

The Area Manager, who signed the licensee's submission dated November 27, 2015 (Exhibit 2), says he has over twenty years of operational history within the restaurant industry and has been in managerial positions for over nineteen years. He prides himself on being an experienced and knowledgeable operator who takes liquor compliance very seriously.

The Area Manager states further that he took swift action to address the issue when he was notified of the contravention. He met with management and staff to review the incident and to discuss the importance of why this can never be repeated. He has worked with Liquor Inspector 2 to ensure that they comply with all branch requirements related to this incident and will continue to address the topic of responsible liquor service with the restaurant staff to ensure such an incident is not repeated. He has also met with management at the other establishments owned by Franworks and has asked all to complete an on-line responsible liquor service exam for their corporate training portal The Works. He continues to raise the topic of responsible liquor service on weekly calls and in person store visits to ensure they remain in compliance with all liquor requirements.

In requesting the review of the penalty in this case, the Area Manager emphasizes that he does not intend to minimize the seriousness of the contravention. He says that management understands the significance of this issue and that they are all working to ensure that it never occurs in their establishments again. He asks that I recognize this as an isolated incident in their eleven years of operation and that I consider a reduction of the proposed penalty based on their history.

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 licensee, in its written submission, agrees that a penalty is warranted, but asks that I reduce the proposed amount of \$7500 based on their compliance history. 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

In this case, the minor agent was only 17 years old. The server made no attempt to ask for identification. The licensee requests that I consider a reduction in the penalty because of the compliance history of not only this restaurant but other establishments operated by the corporate licensee.

In response to this statement about the licensee's compliance history, the branch provided evidence of a proven contravention dated October 25, 2012 against this same licensed establishment for the same type of contravention in this case (Exhibit 1, tab 11 and Exhibit 3). In addition, the branch noted the reference to the corporate licensee's compliance meeting with the branch on June 2, 2015, with respect to another establishment operated by this corporate licensee.

The licensee responded on December 1, 2015 to the evidence above and stated that:

- The manager associated with the 2012 infraction was not the same as the one associated with the 2015 contravention;
- Both managers associated with the 2012 and 2015 infractions are no longer employed by the corporate licensee;
- The server related to the contravention in the present case was immediately terminated due to her actions that caused the contravention here;
- The Area Manager who signed the licensee's submission dated November 27, 2015 was not employed by the corporate licensee at the time of the 2012 contravention noted above.

In response to the above submission from the licensee, I wish to remind the licensee that liquor licences are issued to a specific licensee, not to its staff. The onus is on the licensee to ensure all its staff are properly trained and that they follow the requirements of the Act. The licensee has the responsibility to implement procedures and to make sure all staff are following them. Changes in staff or terminations may be a consequence of a finding of a contravention, but do not relieve the licensee of the penalty consequences of the particular contravention. In this case, the changes in personnel noted above do not affect my finding that a penalty is warranted.

Having found that a penalty is warranted here, I do not have the discretion to order a lesser penalty. I am bound to follow the minimum as set out in item 2 of Schedule 4 of the Regulation.

Even if I had the discretion to order a lesser penalty in this case, I would not do so. I acknowledge the efforts currently being made by the licensee to ensure that this establishment and others operated by the same corporate licensee are in compliance with the liquor laws, especially with respect to service to minors. According to the licensee, management is making changes to ensure such a contravention does not occur again. The branch expects such efforts to be taken as part of the licensee's duties as a licensee and as a result of a finding of a contravention. Licensees are obliged to comply with the legislation and the terms and conditions of their licenses. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

I note the discrepancy between the licensee's statements in its initial submission about the compliance history of this establishment and the actual compliance history as presented by the branch. A similar contravention was proven against this same establishment in 2012. Contraventions earlier than one year before a new contravention do not result in a penalty for a second contravention. The contravention here is a first contravention for the purposes of Schedule 4 and calculating a penalty. However, I have considered the previous contravention and the compliance meeting with respect to another establishment operated by this corporate licensee in making my determination that a penalty is warranted in this case.

I find the amount of \$7500 to be reasonable and appropriate in the circumstances of this case.

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 February 12, 2016.

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
General Manager's Delegate

Date: January 7, 2016

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Hugh Trenchard, Branch Advocate