



**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:	Christine and Kamel Abougoush dba The Grateful Fed Pub 509 Bernard Avenue Kelowna, BC V1Y 6N9
Case:	EH09-116
For the Licensee:	Kamel Abougoush
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Place of Hearing:	Written Submissions
Date of Decision	May 7, 2010

INTRODUCTION

The Grateful Fed Pub is a Liquor Primary establishment operating in Kelowna under Liquor Primary Licence no. 303467. The licence stipulates that the hours of liquor sales are from 10:00 a.m. to 1:00 a.m. seven days per week. The licensed capacity is 41 persons for the interior of the establishment and 49 persons for the exterior patio. To access the patio, an employee or patron must cross a public sidewalk. The sidewalk is not included in the redlined area of the liquor licence floor plan.

The licence is subject to terms and conditions, including those contained in the *Guide for Liquor Licensees in British Columbia (Guide)*, and the following:

- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.
- Subject to terms and conditions specified in the restriction or approval letter(s).
A copy of restriction or approval letter(s) to be kept with current liquor licence.
- Patio extension permitted as outlined in red on the official plan.
- Minors, other than professional entertainers, are not permitted within the licensed area(s) unless otherwise endorsed or approved by the LCLB.
- Only servers are permitted to carry liquor across the unlicensed sidewalk.
- At least one (1) serving staff will be present at all times when the patio is in use.
- Patio must be closed and locked at 12 midnight, daily.

The pub is operated by the same licensee as previously operated the establishment under Food Primary Licence No. 158178 at the same address.

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

By Notice of Enforcement Action (NOEA), dated January 27, 2010, the Liquor Control and Licensing Branch ("Branch") alleged that on October 23, 2009, the licensee

1. Contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a four (4) day suspension of the liquor licence (item 11 of Schedule 4, *Liquor Control and Licensing Regulation*).
2. Contravened section 42(4) of *the Regulation* by allowing liquor to be taken from the licensed establishment. The recommended enforcement action is \$1000 (item 29, Schedule 4 of the *Regulation*).
3. Contravened section 36(2)(b) of the *Act* by authorizing or permitting in the licensed establishment unlawful activities or conduct. The proposed penalty is a ten (10) day suspension of the liquor licence (item 8, Schedule 4 of the *Regulation*).
4. Contravened section 12 of the *Act* and the terms and conditions of its licence by allowing patrons to carry liquor across the unlicensed sidewalk. The proposed penalty is \$1000 (item 46, Schedule 4 of the *Regulation*).

The licensee acknowledges that the contraventions occurred, but argues the appropriateness and extent of the penalties.

The licensee agrees to have the matter determined following written submissions.

RELEVANT STATUTORY PROVISIONS

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

Drunkenness

43(2) A licensee or the licensee's employee must not permit

- (a) a person to become intoxicated, or
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Prohibition against gambling

36 (2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment

- (a) gambling, drunkenness or violent, quarrelsome, riotous or disorderly conduct,
- (b) any unlawful activities or conduct, or

Licences

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).
- (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (a) limit the type of liquor to be offered for sale,
 - (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

- (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
- (d) designate the areas within an establishment where minors are permitted,
- (e) approve, prohibit or restrict games and entertainment in an establishment,
- (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
- (g) vary seating requirements in the dining area of an establishment,
- (h) vary requirements with respect to the location of an establishment,
- (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
- (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
- (k) specify requirements for reporting and record keeping, and
- (l) control signs used in or for an establishment.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

42 (1) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

(2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.

(3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

(4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

- (a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;
- (b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

ISSUES

1. Did the contraventions occur?
2. If so, are penalties warranted under the circumstances?
3. If penalties are warranted, what are the appropriate penalties?

EXHIBITS

Exhibit 1: Branch's disclosure documents with covering page dated March 17, 2010.

Exhibit 2: Licensee's submissions dated April 7, 2010.

Exhibit 3: Branch's reply dated April 8, 2010.

EVIDENCE AND SUBMISSIONS

As previously indicated, the licensee does not dispute that the contraventions occurred as alleged by the branch. Accordingly, in view of the fact that the material facts alleged are unchallenged, the evidence can be summarized as set out below.

The branch's evidence and submissions are summarized as follows:

The written evidence of the three liquor inspectors confirms that during their observations on October 23, 2009, in a period of 53 minutes, patrons carried liquor across the public sidewalk and outside the redlined area without supervision or assistance of staff members at least nine times (twice by liquor inspectors). At no time did any staff member prohibit this conduct, though the notes disclose at least two of those contraventions being observed by staff members.

The written evidence of the three liquor inspectors confirms conduct consistent with multiple patrons smoking marijuana within the redlined area of the patio. The inspectors indicated that they believed the substance to be marijuana, based on the conduct of the smokers (passing it around, and inhaling it), the visual nature of the cigarette (twisted at the end), and the smell (identified as marijuana by each of the inspectors).

All of the inspectors observed a male who they each thought to be intoxicated. The inspectors' notes indicate the male to have "droopy eyes", slurred speech, to be unsteady on his feet, and to have difficulty standing. He was carrying a full bottle of beer and was in plain sight of the door staff.

The inspectors also documented observing a patron standing on the sidewalk with a Kokanee beer for a significant period of time.

The branch submits that the recommended penalties are within those specified by the *Regulation* for first contraventions of each provision of the *Act* and *Regulation*, and are appropriate. The branch also submits that while the licensed establishment has no enforcement history for the purpose of the application of Schedule 4 of the *Regulation* and these are first contraventions of each type, the licensee has operated an establishment in the same location and with a similar name (The Grateful Fed Deli) with a food primary licence since 1993. The branch argues that because of its history, the licensee is aware of the issues relevant to these contraventions and has been for a considerable period of time. The branch submits that these contraventions are serious matters and carry potentially dire consequences to patrons and the community. The branch says that in light of the efforts to educate the licensee by way of compliance meetings and enforcement during its stewardship of both the current and previous licenses at the establishment's location, there is no excuse for its lack of compliance.

The licensee's evidence and submissions are summarized as follows:

The licensee submits that any penalty assessed will be a significant hardship on its business, which is not doing well, and on its staff. The licensee says that it is fully aware of establishment's shortcomings as demonstrated by the contraventions, and it has taken action to address those issues. In a meeting attended by all staff members and held several business days after the contraventions occurred, the Licensee addressed the deficiencies and made management changes to prevent such things from happening in the future. Specifically, the licensee submits that the person who was found intoxicated at the establishment is now permanently barred from the pub. The licensee argues that the patron was not served any liquor on October 23, 2009, and must have brought his own drink in. The licensee also says that it has recommitted itself to careful monitoring of the public sidewalk and to extra supervision and control over liquor to ensure it does not leave the redlined areas.

ANALYSIS AND DECISION

The evidence is clear that multiple patrons left the redlined areas and crossed over the public sidewalk with liquor and were seen by the licensee's staff doing so. The evidence is also clear that a patron was seen standing on the public sidewalk adjacent to the licensed area with a bottle of beer.

A patron was observed smoking what the inspectors concluded was marijuana. Although there is no absolute evidence that the substance being smoked was marijuana, I find, based on the inspectors' observations and the notable absence of argument to the contrary, that on the balance of probabilities, the patrons were smoking marijuana and this is an illegal activity. I note that the marijuana was passed between patrons and offered to a wide selection of those present, including the liquor inspectors, in plain view of anyone who chose to observe the activities on the patio at that time, and notably a staff member who watched a patron smoke the marijuana. This was not a clandestine activity.

The inspector's notes indicate that they observed a patron who demonstrated typical symptoms of intoxication. Although the licensee says that the patron was not served any liquor and probably brought his own beer into the establishment, I find that the staff was in a position to observe the intoxicated patron with liquor in his possession. I find that not only was this patron intoxicated and permitted to remain in the red lined area, but his possession of a full beer bottle in those circumstances exacerbates the licensee's culpability for the contravention.

I accept the uncontroverted evidence and find that the licensee contravened the aforesaid sections of the *Act* and *Regulation* on October 23, 2009.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions 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 dealt with.

The licensee has failed to lead evidence or produce documentation that satisfies me that such procedures, policies, or staff training, were in place at the time of the contraventions. The licensee's submission that it has, since the contraventions, made changes to address the insufficiencies is not evidence of diligence at the time of the contraventions. In conclusion, I find that the licensee has not been duly diligent.

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 have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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

There is no record of prior contraventions, offences or enforcement action of the same types for this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, the contraventions are first contraventions for the purpose of assessing penalty.

Schedule 4, Item 11, stipulates the range of penalties for a first contravention of s. 43(2)(b) of the *Act* is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000-\$7,000.

Schedule 4, Item 29, stipulates the range of penalties for a first contravention of s. 42(4) of the *Regulation* is a one (1) to three (3) day suspension and/or a monetary penalty of \$1,000-\$3,000.

Schedule 4, Item 8, stipulates the range of penalties for a first contravention of s. 36(2)(b) of the *Act* is a ten (10) to fifteen (15) day suspension and/or a monetary penalty of \$7,500-\$10,000.

Schedule 4, Item 46, stipulates the range of penalties for a first contravention of s. 12 of the *Act* is a one (1) to three (3) day suspension and/or a monetary penalty of \$1,000-\$3,000.

The branch recommends a licence suspension of fourteen (14) days and a monetary penalty of \$2,000 for the contraventions.

The licensee has provided insufficient evidence or argument to persuade me that it exercised due diligence with respect to the operation of the establishment at the time the contraventions occurred. Further, I find the licensee is familiar with the issues relevant to compliance with the aforementioned sections of the *Act* and *Regulation*, and it does not provide any reasonable explanation for the occurrence of the contraventions. The licensee's claims of upgrading systems to address the identified problems for the future does not persuade me that the proposed penalty is unreasonable, particularly in light of the licensee's history. Similarly, the hardship associated with the imposition of a penalty is something that the licensee should have considered when training or reducing staff prior to the contravention. The public interest in the enforcement of liquor licence rules is paramount to the economic hardship that an enforcement penalty might bring to the licensee.

I find the recommended penalties reasonable and appropriate.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 303467 for a period of fourteen (14) days, to commence as of the close of business on Thursday, May 27, 2010, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulation*).

I direct that Liquor Primary Licence No. 303467 is to be held by the branch or the Kelowna RCMP Detachment from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

I further order the licensee to pay a monetary penalty of Two Thousand Dollars (\$2,000) relating to Liquor Primary Licence No. 303467 in respect of action No. EH09-116. The monetary penalty must be paid to the branch no later than the close of business on Monday, June 7, 2010.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 7, 2010

cc: RCMP Kelowna Detachment

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

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