



**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: Green Eyes Entertainment Inc.
dba Coppertank Grill
3135 West Broadway
Vancouver, BC V6K 2H2

Case: EH12-206

For the Licensee: Ben Wyllie, Owner

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: Written Submissions

Date of Decision: January 30, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Green Eyes Entertainment Inc. dba Coppertank Grill, is located in Vancouver, B.C. The licensee holds Food Primary Licence No. 159831. The hours of liquor service are Sunday to Thursday, 9:00 a.m. to 1:00 a.m. and Friday and Saturday, 9:00 a.m. to 2:00 a.m. Minors are permitted into the lounge area of the restaurant when accompanied by an adult but cannot be sold, served or consume liquor. Ben Wyllie is the principal and owner/operator of the licensee and provided the written submission on behalf of the licensee.

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")."

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "branch") allegation and proposed penalty are set out in the Notice of Enforcement Action dated September 19, 2012 (the "NOEA"). The branch alleges that on September 8, 2012, 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 penalty is a \$7,500 monetary penalty.

For a first contravention of this type, Item 2 of Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"), provides a range of penalties: a licence suspension for ten to fifteen days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee does not dispute that an employee contravened section 33(1)(a) of the Act. The licensee submits that a warning and a year of probation are sufficient to meet the branch's goal of voluntary compliance. It was agreed that a penalty only hearing would take place by way of written submissions.

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 1: Branch's book of Documents, tabs 1 to 15

Exhibit 2: Licensee's Submission dated November 14, 2012

EVIDENCE

The licensee does not dispute the contravention and admits that the contravention happened exactly as set out in the NOEA. I will briefly summarize the facts.

On September 8, 2012, two liquor inspectors and a 17 year old agent (the "minor agent") conducted a Minors as Agents Program (MAP) inspection. MAP inspections are used to test compliance with the Act's prohibition against selling or supplying liquor to persons under the age of 19 (minors). The branch hires minors to carry out these covert inspections. Prior to attending the establishment, the minor agent was photographed and identification was viewed confirming that the minor agent was 17 year old (redacted copy of photograph of minor's identification is at tab 7 of exhibit 1).

The minor agent entered the Coppertank Grill restaurant at approximately 8:41 p.m. for the sole purpose of assessing the establishment for compliance with section 33(1)(a) of the Act. The minor agent walked into the lounge area and seated himself at a high top table. Two liquor inspectors walked in about 15 seconds after the minor agent and seated themselves in a booth positioned next to the lounge. Both inspectors had a clear and unobstructed view of the minor and subsequent sale and delivery of liquor to the minor.

The minor agent remained seated at the high top table for about two minutes. As no staff approached him, he moved to the bar where he attempted to get the server's attention by saying "excuse me." The female server turned towards him and he asked if he could have a Molson Canadian while waiting for his buddy. The server gave him a pint of beer. At no time did the female server or any other staff member request identification from the minor agent. Liquor inspector B escorted the minor agent to their vehicle.

Liquor inspector A took possession of the beer and confirmed that the smell was consistent with beer. Liquor Inspector A took pictures of the purchased beer for evidentiary purposes (tab 6 of exhibit 1 showing photograph of pint of beer and receipt of sale for the beer). Liquor inspector A spoke with the manager about the contravention and served her with a contravention notice. The manager signed the contravention notice.

Liquor inspector A contacted the owner, Mr. Ben Wyllie, by phone on September 10, 2012 to advise him of the incident and the contravention notice.

SUBMISSIONS

The branch submits that this contravention is a significant public safety issue 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, 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 of age. The minor agent made no attempt to deceive or mislead when making the purchase. Even with minimal training, it is reasonable to expect that an individual working in the liquor service industry would be well versed in his/her responsibility to ask for identification of young persons. In this case, the female server completely failed in her duty.

The branch proposes a monetary penalty of \$7,500 to reinforce the seriousness of selling liquor to minors.

The licensee admits the contravention and adds further that he was well informed about the branch's use of minor agents to test licensees' compliance. He had received information from liquor inspector A about the MAP prior to this incident and as well he had read the mailout about the program.

The licensee argues for a warning and a year of probation and presents several objections to the branch's proposed \$7,500 penalty.

The licensee maintains this incident was an "outlier" in that it does not represent how he does business. On the evening in question, he says that business was very slow, in fact so slow his manager/bartender had decided to leave her post behind the bar and start a cleaning process in the back. When the minor agent came up to the bar, one of his servers, who was in the middle of doing her cashout and was no longer being paid, decided to assist the manager and made "a horrible mistake" in not requesting identification from the minor. The licensee maintains that the server's mind was not focused because she was essentially off work and things were slow.

The licensee raises several objections to the imposition of the monetary penalty of \$7,500. Firstly, he knows this is the minimum for a first contravention, but it represents enough to potentially put his family into bankruptcy and his 19 employees out of work. He states his restaurant is a small business with a huge rent. As a struggling private business owner/operator and, with other negative impacts on his business, like the recession, drinking and driving rules changes, lack of hockey, he has been losing a lot of money and is near the breaking point.

Secondly, although he has only owned the Coppertank Grill for 30 months he calculates that he has served approximately 240,000 drinks. He considers that this one mistake out of a service of 240,000 drinks does not warrant such a large penalty. He maintains he is "one of the good ones out there" and that he and the liquor inspector have a great working relationship.

Thirdly, he feels it is the minors who are the problem and that they have absolutely no consequences for entering his establishment and trying to obtain alcohol. His business and his whole livelihood are put at risk by one minor and one incident by a server who made a mistake. He submits contraventions like this are caused by the minors and paid for by the licensees, which is completely backwards.

Finally, he points out that the whole point of enforcement action is to gain compliance from the licensee. He says he is the kind of person who takes responsibility for his actions and has admitted the contravention for that reason. However, with his clean record and his history of working well with the liquor inspector, he believes a warning and a year of probation is sufficient to achieve the branch's goal of voluntary compliance. He has used this experience to improve his system of identifying minors. He called a staff meeting right away to discuss the incident and to "ramp up" his systems.

He completes his submission by saying "there is nothing more important to me than serving alcohol responsibly to people who are of age." And he asks for the penalty to be waived and to be put on probation for a year.

REASONS AND DECISION

The licensee accepts the facts of the contravention as set out in the NOEA.

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 provided no evidence to support a defence of due diligence.

I find therefore that the licensee contravened section 33(1)(a) of the Act.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulation 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.

In addition to the goal of voluntary compliance, the branch lists four other program goals in its Compliance and Enforcement Reference Manual:

- Focus enforcement on public safety issues
- Speedy application of consequences for non-compliance
- Effective penalties consistently applied
- Fair and equitable decision making

The branch has developed the MAP inspections and introduced the use of minor agents to try and address service of liquor to minors in all licensed establishments. This program is aimed at determining whether the sale of liquor to minors is occurring and to address these incidents with enforcement action. Service of liquor to minors is one of the significant public safety contraventions under the Act. The branch has taken measures to advise licensees of the seriousness of the problem and to educate them on their responsibilities.

Despite those initiatives and the licensee's admitted awareness of MAP and the consequences of a contravention, the licensee's employee served liquor to a 17 year old minor, without asking for any proof of age. As noted above in the branch submission, permitting minors access to liquor can result in very serious consequences.

I have considered the points made by the licensee and will respond to each one. The licensee first submits that his server was not being paid, her guard was down and mistakes happen when things are slow. I do not accept that the situation as described excuses the failure of the server to request identification of this minor. As things were slow, there was no reason for her, if properly trained and aware of the importance of this basic issue in selling liquor, to stop and ask for identification before serving the minor agent with a beer. The Guide stresses the importance of a licensee's responsibility for its employees and for ensuring they are following the law even when the licensee is not on site (page 11 of Guide, tab 11, exhibit 1). The licensee is obligated to properly train

his employees and in this case there was no evidence before me to demonstrate that this was done.

Secondly, the licensee objects to a penalty because of his clean record and because of the size of the monetary penalty. He has owned the place for 30 months and points out the number of alcoholic drinks he has served over that time. He says the liquor inspectors have only checked on him once. He argues that one inspection resulting in one contravention over the space of 30 months is a very small sample size given the amount of liquor he has served. He uses the analogy of getting a speeding ticket – which might be a result of the police checking the one time a person may speed in years of driving. In the case of a speeding ticket, however, he says the fine is only a few hundred dollars while a ticket for serving a minor a drink financially cripples him. He points out that he has been losing a lot of money lately and his business has not done well. He says a penalty of this magnitude will virtually ruin him and will likely put him out of business.

With respect to the licensee's statement that the \$7,500 penalty may cause him financial ruin, I have no evidence before me, in the form of financial statements or otherwise, to support this submission. The economic consequences to a licensee may be a factor in the consideration of the appropriate penalty but submissions on this must be supported by evidence in the form of affidavit or otherwise for me to consider this in determining whether a penalty is warranted. Further, I do not find support for a lesser penalty from the speeding ticket analogy. In the case of contraventions of the Act, Schedule 4 of the Regulation sets out specific parameters for penalties once a contravention has been found and a penalty is warranted. The selling of liquor to minors is a serious public safety issue and one that the branch takes very seriously. The branch has notified licensees of the MAP program and of the consequences of a contravention. The licensee was aware of this program and of the law.

Thirdly, the licensee argues that it is the minors who are causing the problem and they receive absolutely no consequences for entering any establishment and trying to obtain alcohol. The licensee submits that the minors suffer no consequences while, through one inadvertent mistake, his whole business and livelihood are put at risk.

The branch is responsible for the administration of the Act and the supervision of licensees. Under the Act, minors may receive violation tickets. In the present case, the minor was hired as an agent of the branch to test compliance with the law. The enforcement process that is undertaken by the branch is a separate administrative process from any violation tickets issued to minors. Even if a minor is ticketed, this does not remove the licensee's responsibility for adhering to the law.

I do not accept the licensee's contention that "contraventions like this are caused by minors and paid for by licensees and this is completely backwards." When a licensee applies for and receives a liquor licence, the licensee takes on the responsibility of complying with the Act and Regulation. When applying for the licence, the licensee signed the branch's Inspection Interview Sheet indicating he had received a copy of the Guide and that he is responsible for ensuring that he and his staff understand and follow the Act, Regulation and the Guide as well as any terms and conditions printed on the licence (tab 12, exhibit 1).

Finally, the licensee argues that he has demonstrated voluntary compliance. He points out that he called a staff meeting right away to discuss the contravention and to improve his systems. He is now paying an extra server every night so the sections in his restaurant are not too big; he has a doorman on busy nights who is asking for identification and making servers aware of underage patrons. He has posted information at the servers' stations to show what various identification looks like internationally and how to identify if something is a fake. He has placed signs in the server areas to remind them of the seriousness of the situation and what will be the result of further enforcement actions.

The post-contravention actions taken by a licensee to prevent further contraventions are what the branch expects when enforcement action is taken. Such post-contravention actions may achieve the branch's goal of voluntary compliance but do not absolve a licensee of the contravention nor of the imposition of a branch penalty.

Further, voluntary compliance is one of the key goals in taking enforcement action, as mentioned above, but not the only goal. In addition, I must consider the fact that this is a serious public safety issue and that the branch also strives to ensure consistent application of penalties and fair and equitable decision making.

I therefore find that a penalty is warranted to reinforce the seriousness of the contravention to this licensee and its staff. It is expected that the licensee will use this opportunity to further enhance his existing policies and procedures to ensure future voluntary compliance and to protect the public interest in preventing service of liquor to minors.

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 recommends the minimum monetary penalty of \$7,500. The licensee asks for a year of probation and/or a warning. Having found a penalty is warranted for the reasons noted above; I have no discretion to order less than the minimum penalty which is, pursuant to Item 2 in Schedule 4, for a first contravention of this type: a 10 to 15 day licence suspension and/or a monetary penalty of \$7,500 to \$10,000. I find that the minimum monetary penalty of \$7,500 is consistent with penalties ordered for other licensees for contraventions of section 33(1)(a) of the Act and is also consistent with the messaging from the branch as to the type of penalty that the branch will propose for these contraventions.

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 March 4, 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: January 30, 2013

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

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