



**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: EH14-126

For the Licensee: Kamel Abougoush

For the Branch: Hugh Trenchard

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: May 27, 2015

Place of Hearing: Kelowna, BC

Date of Decision: June 16, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensees, Christine and Kamel Abougoush hold Liquor Primary Licence Number 303467 for the operation of The Grateful Fed Pub in Kelowna BC with liquor sales from 10:00 a.m. to 1:00 a.m. The license is endorsed with several terms and conditions including:

- Family Foodservice term and condition permits minors accompanied by a parent or guardian in all licensed areas until 10 PM when meal service is available.
- Visible and adequate signage stating “accompanied minors permitted until 10 PM” and “no liquor beyond this point” MUST be in place at the entrance/exits to/from the outdoor patio at all times.

Additionally, 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”).

Kamel Abougoush appeared as the licensees’ representative (the licensee).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch’s allegations and proposed penalty are set out in the NOEA dated October 20, 2014. The branch alleges that on September 25, 2014 the licensee contravened section 12 of the *Liquor Control and Licensing Act* by contravening a licence term and condition (re: signage).

The proposed enforcement action outlined in the NOEA is a \$1,000 monetary penalty, which falls within the penalty range set out in item 46, Schedule 4 of the *Liquor Control and Licensing Regulation* for a first contravention of this type.

The licensee does not dispute that there was not a sign in place at the time of the alleged contravention.

For the purposes of this hearing, and in accordance with section 3 of the *Regulation*, the General Manager has delegated to me, the undersigned Hearing Delegate, the powers, duties and functions provided to the General Manager by section 20 of the *Act* and sections 65-69 of the *Regulation*.

RELEVANT STATUTORY PROVISIONS

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

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) to (j) [Repealed 2014-13-10(a).]
- (k) specify requirements for reporting and record keeping,
- (l) control signs used in or for an establishment,
- (m) specify where liquor may be stored, and
- (n) require a licensee to take reasonable measures to ensure that the operation of the establishment does not disturb persons in the vicinity of the establishment.

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 1-13.

Exhibit 2: Copy of a branch document outlining the processing of an application by the licensees for a change to the liquor license permitting minors in the establishment.

EVIDENCE—BRANCH

The branch called a liquor inspector as a witness.

The inspector testified that he is the liquor inspector responsible for the Kelowna area. The Grateful Fed Pub is within his area of responsibility, he is familiar with it. The pub has a licensed patio directly outside the front entrance to the pub. The patio was previously located across the sidewalk from the pub entrance. An application from the licensee was made to relocate the patio to its present location. On May 14, 2014 the inspector conducted an inspection of the relocated patio (exhibit 1, tab 9 with photos 1 – 3). The patio was properly separated from the public area however did not have

signage prohibiting the removal of liquor from the patio onto the public sidewalk. He advised Mr. Abougoush of this requirement and requested that he be provided with photographs of the signage once in place. He made a phone call to the licensee on September 5, 2014 reminding of the signage requirements and requesting a photograph of it in place.

A photograph of a sign was subsequently received from an associate of the licensee (exhibit 1, tab 9, photo 4). The sign appeared to be a sheet of paper attached to the patio railing. On September 10th the inspector sent an email to the licensee asking whether the sign was meant to be permanent (exhibit 1, tab 2). No response was received from the licensee. The inspector was concerned that while the sign may be adequate for the time being it may not be sufficient to stand up to the weather. He nonetheless approved the patio with the signage and forwarded the documentation to the licensing division in Victoria head office (exhibit 1, tab 9). On September 10, 2014 the licensing division sent a letter to the licensee giving approval to the relocated patio (exhibit 1, tab 8). The letter advised the licensee that a term and condition regarding the required signage was being added to the amended liquor licence. The term and condition read as follows: 'Visible and adequate signage stating "accompanied minors permitted until 10 PM" and "no liquor beyond this point" MUST be in place at the entrance/exists (sic) to/from the outdoor patio at all times.'

On September 25, 2014 the inspector conducted an inspection of the pub. He observed that there was no sign at patio exit stating "no liquor beyond this point" as required by the terms and conditions of the liquor licence. A contravention notice was issued to the licensee's son at 7:35 p.m. (exhibit 1, tab 3). On September 27, 2014 the inspector followed up with a letter to the licensee advising of his observations and advising the licensee that, "Visible and adequate signage, as outlined on your liquor license, must be posted immediately and remain posted ..." (exhibit 1, tab 4).

The inspector made further inspections of the patio on October 9th and December 16, 2014 during which time he observed that there was no sign posted at the patio exit as required by the terms and conditions of the liquor licence. On April 18, 2015 he observed that there was white lettering on the black vertical post of the railing at the exit consisting of the wording, "no alcohol beyond this point". He testified that that sign

was not adequate or suitable. The licensee had not contacted him about the sign. In his view adequate signage must be: clearly visible to persons exiting the patio; able to withstand the rigours of weather and patrons who might pull on it; and not be easily removed. Paper signs or those with vertical lettering would not be adequate.

On October 20, 2014 the inspector prepared a Notice of Enforcement Action (Exhibit 1, tab 1) with a recommendation for a \$1,000 monetary penalty. He testified that in recommending that enforcement action be taken he had run out of other options to bring the licensee in compliance. The minimum monetary penalty is considered necessary and sufficient for future compliance.

In his evidence the inspector referred to further documents contained within Exhibit 1:

- Tab 5, the liquor licence for the Grateful Fed Pub.
- Tab 6, floor plan for the Grateful Fed Pub.
- Tab 7, Liquor Primary License Terms and Conditions, a Guide for Liquor Licensees in British Columbia.
- Tabs 11 & 12, previous decisions of enforcement hearings held with this licensee.

Cross-examination

The inspector testified that he does not recall the licensee asking him where signs meeting the requirements could be obtained. He did not tell the licensee that it was not his responsibility to advise him where to obtain signs. He is unaware of the number of patios in downtown Kelowna which have signage. He knows that some of the establishments do. He could not recall which establishments have signs nor does he recall if other contravention notices have been issued regarding signage. Responding to a question about the Grateful Fed Pub having had more than one contravention, he responded that there were other establishments with more than one contravention as well. It is his responsibility to see that all meet the terms and conditions of their licence.

EVIDENCE—LICENSEE

The licensee provided evidence as a witness. He testified that he does not dispute the contravention for not having the patio signage. He tried to comply after being informed what was required. The inspector did not mention anything about the signage when he made his inspection of the patio. The inspector's comments on the inspection sheet (exhibit 1, tab 9 at p 2) state, "no issues, recommend approval". After receiving the contravention notice he asked the inspector about what type of sign was required. The inspector said that it was not up to him to tell him what type of sign, his job was enforcement.

They were left on their own and he tried to come up with a solution. An artist friend suggested white lettering on the post. They have since had white letters approximately 1 ½ inches high painted on the vertical black post at the exit, "no alcohol beyond this point". [I pause to note that the licensee presented an image on his cell phone of the said lettering. The lettering is as described. The letters are painted 90 degrees to the horizontal thus are most easily read by tilting one's head sideways at an angle.]

The pub employs a doorman at the patio gate from 8:00 p.m. to closing on those nights that they are open. The doorman checks identification, collects the cover charge and ensures proper behaviour on the patio. The doorman does not allow patrons to leave with alcohol and they have not had anyone leave carrying alcohol onto the sidewalk.

He went to all other establishments with patios in downtown Kelowna, took photos and spoke to their owners. None of the establishments had signs and none had received letters from the branch that signage was necessary.

The business is suffering financially and cannot afford a monetary penalty or a suspension. He would prefer a warning. They currently have reduced hours, closing at 2:00 p.m. Sunday thru Tuesday and 1:00 a.m. the remainder of the week. Business is slow in the winter season with eight employees. Summer business increases with 20 employees.

Cross-examination

He testified that if the inspector had told him that signage was necessary when he made his inspection of the patio on May 14, 2014 he would have asked what kind of sign. He first became aware that the inspector wanted a sign on the patio when he received the contravention notice of September 25th.

The sign depicted in photo 4 of exhibit 1, tab 9 was put up in early September and the photo sent to the inspector by a friend on September 9, 2014. The inspector said that the sign was not appropriate. He asked the inspector for advice but was told that it was not his business to tell him what type of sign. He didn't know what to do so just sat on it for a couple of months. The sign was laminated paper, taped to the patio enclosure on two sides. He agreed it could perhaps be blown off or removed by a patron but had no other idea of what to do. The sign remained in place for quite a while but was eventually taken down by someone.

The sign with the white lettering went up the first week in November after the inspector had called and said that he needed a sign, he told him that he had forgotten and would do so. He knew after receiving the contravention notice that he needed a sign but the inspector didn't say when.

SUBMISSIONS—BRANCH

The branch submitted that the evidence is that on September 25, 2014 there was a breach of sec. 12 of the Act. The licensee failed to post a visible and adequate sign as required by the terms and conditions of the license. Further, the sign that was eventually posted was not adequate in that it was affixed by tape. The sign painted on the post is not in issue as it came into being following the date of the contravention.

The licensee cannot be considered to be duly diligent. It was the licensee's responsibility to post the signs and it was the licensee who failed to post the signs.

The penalty proposed is warranted in the circumstances. The licensee had months to post the signs from the date of the inspection of the patio and failed to do so. This licensee has had previous contraventions as noted in the enforcement hearing decisions at exhibit 1, tabs 11 and 12.

SUBMISSIONS—LICENSEE

The previous contraventions are not relevant to this hearing. The licensee has held a liquor licence for 36 years. The contraventions have only come about since the current liquor inspector assumed his duties. All staff are trained that liquor cannot be taken beyond the patio. All have "Serving It Right" certificates and follow the Regulations. The signs took longer to be put up than the inspector said, but he never gave an end date nor specify the type of sign.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and the licensee representative.

The liquor licence for the Grateful Fed Pub has several terms and conditions including: 'Visible and adequate signage stating "accompanied minors permitted until 10 PM" and "no liquor beyond this point" MUST be in place at the entrance/exits to/from the outdoor patio at all times.' It is the latter signage that is in issue here, i.e. "no liquor beyond this point".

The evidence that the required signage, "no liquor beyond this point", was not in place at the time of the inspector's visit on September 25, 2014 is clear and uncontroverted. The evidence differs between the witnesses regarding communications between them regarding the required signage. There is little basis upon which to prefer the evidence of one over the other. What is clear is that some communication between the inspector and the licensee on or prior to September 9, 2014 lead to the posting of the sign found at photo 4, exhibit 1, tab 9 on or about that date. The inspector expressed concern about the adequacy of sign in that it may easily be obliterated by weather or removed by a patron. The sign was nonetheless accepted and the patio reconfiguration approved in a

letter dated September 10, 2014 from the branch licensing division (exhibit 1, tab 8). The terms and conditions regarding the signage were clearly laid out in the letter.

The inspection of September 25, 2014 next occurred. A contravention notice was issued by the inspector to the son of the licensees. It is reasonable to accept, and I do, that the problem with the lack of proper signage was made clear in discussion with the son acting on behalf of the licensees. This was followed up by a letter from the inspector to the licensee dated September 27, 2014 (exhibit 1, tab 4). The letter stated that the required signage "must be posted immediately and remain posted". The inspector in his testimony stated that he returned to the pub on October 9, 2014 and observed that the required signage was not posted. The inspector commenced enforcement proceedings on October 20, 2014 with the issuance of Notice of Enforcement Action (exhibit 1, tab 1).

The evidence of the licensee is essentially that he would have posted the signage as required if he had been able to receive information from the inspector outlining the specifics of the type of sign and how it was to be posted. The branch has not laid out any guidelines for proper signage. Further he believes that his establishment is not being treated equally to other establishments.

I, quite frankly, have difficulty with the licensee's assertions. He is an experienced licensee with, according to his own testimony, 36 years of experience. He is, from all accounts, a sophisticated businessman. He would have had occasion to deal with different areas of the branch during his many years of experience. He would, or should have known, that the branch is managed by senior government managers and that should problems arise at a local level they may be resolved through communication with senior management. He testified that following the disappearance of the sign leading to the contravention notice of September 25th, he "just sat on it". That is not the response expected of a responsible and experienced licensee.

Contravention

I find on a balance of probabilities that the evidence supports that on September 25, 2014 the licensees failed to have in place visible and adequate signage as required by the terms and condition of their liquor licence. That, on its face, is a contravention of section 12 of the *Liquor Control and Licensing Act*.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention, 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 Law

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. 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 direction or approval, thus negating wilful involvement of the accused, and whether the accused 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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, 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 (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether licensee had:
 - a. implemented 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 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 person responsible for the signage was the licensee representative. He is one of two persons to whom the licence has been issued. By his own testimony it is clear that he alone is responsible for the operation of the pub. He made, at best, minimal inquiry as to the nature of the signage required and failed to have any signage in place on the date of the contravention. In consequence I find that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on September 25, 2014, the licensees contravened section 12 of the *Act* by failing to comply with a term and condition of the liquor licence.

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 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 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, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving compliance. Among the factors that I considered in determining the appropriate penalty in this case are: whether there is 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 prior proven contraventions, offences or enforcement actions of the same type for this licensee for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Here we have an experienced and sophisticated licensee who has failed to comply with a rather straight forward term and condition of the liquor licence. This is not the first contravention by this licensee while operating the licensed establishment. The record

shows (exhibit 1, tabs 11 and 12) that there have been five previous contraventions found during the years 2009 and 2010.

The licensee has argued that business has been slow and a monetary or suspension penalty will place a financial hardship on the business. I am satisfied and so find that the summer months in the city of Kelowna bring about an increase in tourism and as such an increase in business for licensed establishments.

In consequence I find that a penalty is necessary to ensure future compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type. The branch has proposed the minimum monetary penalty suspension for a first contravention of this type. In the circumstances here I find that the minimum monetary penalty of \$1,000 is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$1,000 to the General Manager of the Liquor Control and Licensing Branch on or before Wednesday, July 15, 2015.

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

Edward W. Owsianski
General Manager's Delegate

Date: June 16, 2015

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Stephen Hitchcock, Regional Manager

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