



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: Mission Creek Golf Inc.
dba Duffers Restaurant & Lounge
c/o John Welder
4830 Canyon Ridge Cr
Kelowna, BC V1W 4A1

Case: EH16-112

For the Licensee: John Welder

For the Branch: Hugh Trenchard

General Manager's Delegate: Nerys Poole

Date of Hearing: Written Submission

Date of Decision: January 31, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Mission Creek Golf Inc. dba Duffers Restaurant & Lounge (the "licensee") holds Food Primary Licence number 306544 (the "licence"). Duffers Restaurant & Lounge (the "restaurant") is located at 1959 K.L.O. Road in Kelowna, B.C.

The licence specifies hours of liquor service daily, from 9:00 a.m. to midnight seven days a week. 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").

John Bradley Welder, the sole shareholder of the corporate entity holding the licence, signed the written submission as the representative of the 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 September 26, 2016 (the "NOEA"). The branch alleges that, on August 22, 2016, 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 November 29, 2016, the licensee's representative advised the branch that the licensee was not disputing the contravention as alleged and not making a due diligence defence. The licensee asked to make a written submission on the issue of the proposed penalty.

The branch and the licensee agreed that the 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. What penalty, if any, is appropriate?

EXHIBITS

Exhibit No. 1: Branch's book of documents, tabs 1 to 15

Exhibit No. 2: Licensee's one page written submission, dated January 4, 2017

THE CONTRAVENTION

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 August 22, 2016, a liquor inspector and a minor agent conducted a Minors as Agents Program (MAP) inspection of the restaurant. The minor agent was 16 years old on August 22, 2016. MAP inspections are used to test compliance with the Act's prohibition against selling or supplying liquor to persons under the age of 19.

The liquor inspector and the minor agent entered the restaurant at approximately 3:06 p.m. There were no patrons. A female bartender was present. The bartender asked what the minor agent and the liquor inspector would like. The minor agent asked for a Corona while the liquor inspector asked to see a menu. The bartender returned to the

table with a Corona and placed it in front of the minor agent. At no time did the bartender request identification from the minor agent.

The liquor inspector photographed the Corona. The minor agent informed the bartender that they had to leave. The minor agent paid the bill for the Corona and received change. At 3:09 p.m. the minor agent and the liquor inspector left the restaurant and returned to the government vehicle. The minor agent completed the minor agent observation form and the minor agent statement form. (Exhibit 1, tab 9)

At 4:55 p.m. on August 22, 2016, a second liquor inspector called the licensee's representative and advised him of the contravention. He told the licensee's representative that he would be sending the contravention notice the following day. On August 23, 2016, the second liquor inspector sent the contravention notice and a demand letter requesting employees' information, by registered mail to the licensee. The branch Kelowna regional office received the requested documents on August 30, 2016 which established that the bartender had an active serving it right certificate at the time of the contravention.

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 16 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 occurred and is not making a due diligence defence. The licensee states that the restaurant under this licence has never had a

contravention. He states further that the previous licensee who operated the restaurant for 25 years never had a contravention.

He explains that, at the time of the contravention, the bartender was under severe stress due to some personal family problems. As they were short-staffed at the time, despite the personal difficulties of the bartender as noted in the submission, management asked her to help out to allow them to remain open.

The licensee asks for no penalty or, in the alternative, that the proposed enforcement action of a monetary penalty be replaced with a suspension.

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 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.

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. The NOEA outlines the many ways the branch has notified licensees of this program and the importance of asking for identification:

- July 2010: 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
- Summer 2014: The branch Liquor Line Newsletter included Minors as Agents Program Update. In the update it indicated that licensees should expect their establishments to be inspected.

This last newsletter dated Summer 2014 (Exhibit 1, tab 12) sets out the compliance rates for various licensed establishments and notes a non-compliance rate of 44% for food primary licences. The message to licensees is "Please, where there is any doubt for any reason, ask for their ID."

The factors that I have considered in determining the appropriate penalty in this case 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

I find this licensee has no compliance history, but note that this licensee has operated this restaurant since July of 2015, just over a year prior to the contravention. I encourage the licensee to ensure its employees are reminded regularly of the importance of checking all persons who may appear to be minors. I have noted the seriousness of serving liquor to minors and the reasons for pursuing enforcement here.

The licensee has stated its preference for a suspension to a monetary penalty. Given the lack of compliance history and the objective of encouraging future compliance, I impose a ten day suspension in lieu of the proposed monetary penalty. I encourage the licensee to discuss this decision with his staff, to work with them to understand the importance of asking for identification and to introduce reminders on a regular basis, either through verbal reminders and through signage at the till or elsewhere.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence #306544 for a period of ten (10) days to commence at the close of business on Sunday, March 5, 2017 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Kelowna RCMP detachment from the close of business on Sunday, March 5, 2017 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Nerys Poole
General Manager's Delegate

Date: January 31, 2017

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

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