



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
*The Liquor Control and Licensing Act RSBC c. 267***

Licensee:	The Chippy Winger Restaurant Inc., dba The Chippy Winger 1155 Ellis Street Kelowna, BC V1Y 6Z8
Case:	EH12-227
For the Licensee:	Jason Hatter
For the Branch:	Peter Mior
General Manager's Delegate:	George C.E. Fuller
Date of Hearing:	Written Submissions
Date of Decision:	June 25, 2013

INTRODUCTION

The Corporate Licensee, The Chippy Winger Restaurant Inc. (the "Licensee") owns and operates an establishment known as The Chippy Winger, at 1155 Ellis Street, Kelowna, BC. The Licensee holds Food Primary Licence number 304334 (the "Licence"). The authorized representative of the Licensee is Mr. Jason Hatter.

According to the terms of its Licence, the Licensee may sell liquor from 9:00 am 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").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated April 16, 2013.

The Branch alleges that on September 29, 2012, (business day of September 28, 2012) the Licensee contravened Section 44(1)(b) of the *Liquor Control and Licensing Regulation* (the "Regulation"), by failing to ensure that liquor was taken from patrons within one-half hour after the time stated on the Licence for the hours of liquor service. The proposed enforcement action outlined in the NOEA is a \$5,000 monetary penalty. This proposed monetary penalty falls within the penalty range set out in the Regulation.

The Licensee does not dispute that the contravention occurred. However, it disputes the proposed penalty. The Branch and the Licensee agreed that the hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Time

- 44(1) Unless otherwise authorized by the General Manager,
- (b) food primary licensees must ensure that liquor is taken from patrons within one-half hour of the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with Section 42(4)(a).

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

The following documents were submitted and considered:

Exhibit 1: The Branch's book of documents, Tabs 1 to 10 inclusive.

Exhibit 2: Letter dated May 7, 2013 to the Branch from Jason Hatter, the representative of the Licensee's establishment.

EVIDENCE – THE BRANCH

As previously noted, the Licensee does not dispute that the contravention occurred as alleged and, therefore, it is deemed to accept the facts as put forward by the Branch with respect to the issue of whether the contravention occurred. The Licensee has, however, made submissions in respect to the appropriateness and fairness of the penalty which the Branch has recommended. Accordingly, the evidence may be summarized as follows:

On Saturday, September 29, 2012 (business day of Friday, September 28, 2012) at 0047 hours, Liquor Inspectors 1 and 2 entered the Licensee's establishment. The front door was unlocked and five male patrons were seated at the bar. Four patrons were drinking beer from pint glasses. The fifth patron, a facilities manager, was drinking from a bottle of Miller Genuine Draft beer. A female staff member was behind the bar.

As the Liquor Inspectors entered, the staff member stated that the establishment was out of draft beer, but still had bottles and cans. The Inspectors identified themselves and inquired as to who was in charge of the establishment. The staff member indicated that she was in charge. The staff member was advised that the establishment closed at midnight and all liquor was to be cleared by 0030 hours. The facilities manager explained to the Inspectors that it was the staff member's first night of employment and that it was his responsibility for the contravention.

Contravention Notice B012438 was issued to the staff member with directions to have the Licensee, Jason Hatter, contact one of the Liquor Inspectors.

SUBMISSIONS – THE BRANCH

The Branch says that the elements of the contravention have been proven and that the recommended penalty is appropriate and necessary in order to ensure future voluntary compliance by this Licensee, with respect to Section 44(1)(b) of the Regulation.

The Branch further submits that when a food primary licensed establishment continues to serve liquor outside of its licensed liquor hours, it can result in the shifting of the primary purpose from food to liquor. This could have the potential to negatively impact the community by contributing to late night noise and disturbances. If a Licensee fails to take liquor from patrons in a food primary licensed establishment, patrons may continue to consume liquor while the restaurant remains open, even though the hours of liquor service have ended. In such situations, the food primary operator can gain a significant advantage over its liquor primary counter-part.

SUBMISSIONS – THE LICENSEE

The Licensee, in its brief note of May 7, 2013, requests the substitution of a short term suspension for the monetary penalty. If this request is not granted, the Licensee says that the establishment may have to close, as it is a small restaurant that struggles to get by.

ANALYSIS AND DECISION

The Licensee has admitted to the contravention. Having considered all of the evidence and the submissions filed in these proceedings, I find that on September 29, 2012 the Licensee contravened Section 44(1)(b) of the Regulation and the terms and conditions of the Licence by failing to ensure that liquor was taken from patrons within one-half hour after the time stated on the Licence for the hours of liquor service.

DUE DILIGENCE

The Licensee is entitled to a defence to 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 the existence of procedures to identify and deal with the problems, it must ensure that those procedures are consistently acted upon and problems are dealt with accordingly.

In the instant case, the Licensee has led no evidence concerning any efforts that it has made in order to prevent this type of contravention from occurring. Accordingly, I have concluded that the Licensee is not entitled to the benefit of the defence of due diligence.

PENALTY

Pursuant to Section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- Take no enforcement action
- 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 Regulation. 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.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the Act, the Regulation, and the terms and condition of the Licence. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to public safety and the well-being of the community.

Item 25 of Schedule 4 of the Regulation, sets out penalties for first contraventions of Section 44(1)(b) of the Regulation, a licence suspension of four to seven days and/or a monetary penalty of between \$5,000 and \$7,000. The Branch has recommended a monetary penalty of \$5,000, which is the minimum monetary penalty for this particular contravention.

As previously noted, the Licensee has requested that a short suspension be substituted for the monetary penalty, otherwise, the Licensee may have to close the business. The Licensee has not, however, provided any cogent evidence in support of this supposition. At the very least, the Licensee should have provided documentation in the form of financial statements demonstrating that the Licensee's establishment was in dire straits, thus corroborating that the Licensee's fears were realistic. In the absence of such evidence, I am not prepared to grant the Licensee's request.

ORDER

Pursuant to Section 20(2) of the Act, I order that the payment of \$5,000 (Five Thousand Dollars) by the Licensee to the General Manager of the Liquor Control and Licensing Branch on or before July 29, 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 policy officer.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: June 25, 2013

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

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