



**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 RSBC c. 267

Licensee: J & B Investments Ltd.
dba Zodiac Karaoke Cabaret
155 – 8291 Alexandra Road
Richmond, BC

APPEARANCES

For the Licensee: David Houston, Counsel
Dennis Yip, Owner

For the Branch: Peter Jones, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

File No. EH03 - 066

Dates of Hearing: September 4, 5 & 18, 2003

Place of Hearing: Vancouver, B.C.

Date of Decision: November 6, 2003

Introduction

The licensee operates the Zodiac Karaoke Cabaret ("the cabaret") under a Liquor Primary Licence, #162535. The licence permits hours of operation from 7:00 P.M. until 2:00 P.M. Monday to Saturday and until Midnight on Sunday.

The cabaret has 11 small rooms and one large lounge area. The rooms are equipped with karaoke machines, connected to a disk jockey station from which music selections are forwarded. The rooms have tables and chairs. The total licenced capacity is 196 patrons. When patrons arrive, the receptionist directs them either to the lounge area or to individual rooms. Food and liquor service is provided in the rooms.

Alleged Contraventions and Recommended Enforcement Action

The branch's allegations are set out in a Notice of Enforcement Action (NOEA) dated May 20, 2003. The branch alleged that, on March 22, 2003 (business day of March 21, 2003),

- a) the licensee permitted consumption of liquor that was not purchased from or served by the licensee contrary to s. 42(2) of the Regulations
- b) an employee consumed liquor contrary to s. 42(3) of the Regulations; and
- c) the licensee permitted an intoxicated person to remain on the premises, contrary to section 43(2)(b) of the *Act*.

The branch recommended enforcement penalties, respectively, of

- a) \$5,000 monetary penalty;
- b) 1 day licence suspension; and
- c) 4 day licence suspension.

The licensee admitted contravention b), agreed with the recommended enforcement action, and signed a waiver.

Schedule 4 of the *Liquor Control and Licensing Regulations, BC Reg. 608/76, Enforcement Actions*, provides a range of licence suspensions and monetary penalties for each contravention. The ranges for a first contravention for these alleged contraventions, respectively, are:

- a) licence suspension of 4 to 7 days, or a monetary penalty of \$5,000 to \$7,000 (item 28 of Schedule 4);
- b) licence suspension of 1 to 3 days, or a monetary penalty of \$1,000 to \$3,000 (item 27 of Schedule 4);and
- c) licence suspension of 1 to 3 days, or a monetary penalty of \$1,000 to \$3,000 (item 11 of Schedule 4).

Compliance History

There is no record of proven similar contraventions, offences or enforcement actions (“compliance history”) for this licensee or this establishment within the year preceding this incident. Therefore, these contraventions, if proved, would be considered first contraventions for the purposes of the Penalty Schedule.

Issues

1. Does the evidence support the branch’s allegation that the licensee permitted an intoxicated person to remain?
2. Does the evidence support the branch’s allegation that the licensee permitted consumption of liquor not purchased from or served by the licensee?
3. If the licensee contravened as alleged, are the branch’s recommended penalties appropriate?

Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Sgt.s’ floor plan
Exhibit No. 3	Photocopy of BC Driver’s Licence

Applicable Statutory Provisions

Liquor Control and Licensing Act, RSBC 1996, Chap. 267

Drunkenness

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(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.

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

Consumption of liquor in licensed establishments

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.

(5) A licensee who seals an unfinished bottle of wine in accordance with subsection (4) (a) must inform the patron of the requirements of section 44 of the Act.

(6) This section does not apply to a U-Brew or U-Vin.

Evidence

The branch called as witnesses a City of Richmond By-law enforcement officer, 3 police officers, and a liquor inspector. The licensee called as witnesses the owner, the patron who is alleged to have been intoxicated, the cabaret receptionist, and the cabaret manager.

The inspection team entered the cabaret at approximately 2:00 A.M. on March 22, 2003. The sergeant, who was in charge of the inspection team, testified that he had formed the enforcement team to tackle some of the problem establishments in this area. He identified this cabaret as a problem establishment because there have been instances of violence and, in his view management has not always been forthright with him about the incidents. He testified that he has observed a number of occasions when patrons have been smoking in the cabaret, contrary to provincial and municipal legislation. Despite concerns about this cabaret, to his knowledge, the police had never issued a Licensed Premises Check (LPC) for this licensee. He testified that failure to issue LPCs was a general problem in Richmond and not just relative to this licensee.

By the time the enforcement team arrived on March 22, 2003, there were patrons in the rooms and in the open area of the cabaret. Patrons were still consuming liquor but there were no obvious signs of intoxication or other infractions occurring.

Intoxicated patron

The police officers testified that they located a male patron in the washroom, sitting on one of the toilets, leaning against the wall, and passed out. They tried to rouse him but he could not stand or walk on his own. The officers physically removed him from the washroom and placed him in the main area of the cabaret by the main bar. The officers took measures to ensure his safety. They testified that he had soiled his pants, was incoherent, had a strong odour of alcohol, was highly intoxicated, and vomited at least once.

The other witnesses for the branch confirmed the police evidence that the patron was intoxicated and testified to the police bringing him out of the washroom and placing him on the floor. They also testified to the man being ill.

The officers spoke with a friend who said that the man had 4 or 5 beers and that he could not hold his alcohol. The friend wanted the police to turn him over to his friends so they could take him home. A couple of the police witnesses were of the view that he could go home with his friends, but the sergeant in charge decided to arrest him and placed him in cells for the night.

The intoxicated patron testified. He testified he had broken up with his girlfriend earlier that day and his friends suggested they go to the cabaret to cheer him up. He recalled having 4 or 5 beers with his friends and then he left them to go to the washroom. He encountered some other people he knew who invited him to join them. He went into their Karaoke room and had a couple of shooters. He proceeded to the washroom and when he got there he started to feel unwell, which he thought was a result of mixing beer and shooters.

The patron testified that he went to washroom at approximately 1:20 A.M. and was there for 5 or 10 minutes before the police arrived. He testified that he was aware of the police coming into the washroom and he said he felt he would have been okay if they had left him for about 10 minutes so he could compose himself. In his view the police were unnecessarily rough in handling him, dragging him out of the washroom. In his opinion he vomited because of the motion of being moved by the police. He recalled speaking with the police, recalled his friends speaking with the police, and recalled asking to go home with his friends. Generally, in his view he was less intoxicated than the police suggested.

The cabaret manager testified through an interpreter. He recalled the patron coming in that night and remembered him from other nights. He testified that he was not drunk when he came in and there was nothing in his demeanour that caused the manager any concern. The manager testified that initially his group (7 patrons) was shown to a table in the lounge and at approximately 10:30 P.M. they were shown into one of the karaoke rooms. After that he did not see the patron again until he was removed from the washroom.

The manager testified that his duties include walking around the cabaret observing staff and patrons. On this evening there were 8 staff including himself, plus the disk jockey and the chef. Staff duties include checking washrooms regularly to keep them stocked and cleaned. The manager testified that the washrooms were checked at about 1:00 A.M., but was unable to say whether staff had inspected the men's washroom again before the police found the patron.

Consumption of liquor that was not purchased from or served by the licensee

This contravention involves the allegation that the licensee permitted the illegal activity by not having policies or procedures in place to screen out illicit liquor as it was coming into the premises, or that the licensee turned a blind eye to it.

The sergeant in charge was looking into the karaoke rooms. He observed a server coming out a room with a tray of empty glasses and bottles. He looked into that room and saw a patron with a plastic soft drink bottle with liquid in it. He saw the patron look across at another patron who put a similar bottle on the floor. The sergeant had the impression that they were trying to hide something. He testified that he smelled the contents of the first bottle, which did not smell of alcohol. The patron also had a liquor glass. The contents of the other bottle smelled like rum. The sergeant surmised that the alcohol had not been purchased from the cabaret. He questioned the two patrons who denied his suggestion. The sergeant told everyone in the room that he would not permit anyone to leave the room until he had searched them for the illicit alcohol. At that point, one of the patrons who had the soft drink bottles produced a 40 ounce bottle of Captain Morgan's Spiced Rum.

The sergeant observed that the bottle of Rum was approximately 1/3 full. He also observed that there were glasses and bottles on the table which had

obviously been purchased from the cabaret. There were 20 to 25 patrons in the room, none of whom appeared to be intoxicated.

The sergeant testified that the plastic bottles were obvious, they were indicators of something out of the ordinary, and the server should have been aware of a possible problem and taken action. Since the staff did not take action, the licensee effectively permitted patrons to consume illicit liquor.

The sergeant testified that the young man who admitted to bringing the liquor was dressed in baggy clothing and could easily have concealed the liquor.

The licensee's witnesses testified that it would be contrary to their business interests to permit patrons to bring in liquor. However, they are not able to search people as they come in through the door and they do not require people to leave their coats and jackets at the front door. There is a sign posted in the reception area saying patrons may not bring food or alcohol into the establishment. The witnesses testified that there have been occasions when people have brought their own liquor and they have been asked to remove it. For example, people sometimes have brought a bottle of champagne for a birthday celebration and the licensee has required them to remove it from the premises.

The licensee provided a copy of the bill and VISA receipt for the room where the bottle of rum had been discovered (Exhibit No. 1, Tab 7, 3rd page). It is apparent from the bill that considerable liquor was purchased from the cabaret. The bill totals \$686.40 (\$762.00 with tip) of which \$529.50 was for 3 cocktails and 102 local beers.

Submissions

Intoxicated Patron

The branch submitted that the patron's degree of intoxication would suggest there must have been some signs of intoxication prior to going into the washroom and these could have been observed by the staff.

The licensee submitted that the evidence does not support the allegation that the licensee permitted the person to remain because the person was not showing signs of intoxication prior to going into the washroom and once in the washroom the person secreted himself into a toilet stall where he would not have been obvious to a staff member going into the washroom.

Consumption of liquor that was not purchased from or served by the licensee

The licensee submitted that there is no evidence that licensees are required to, or that it is standard in the industry, to have a coat check. Even if there was a coat check, the baggy style of clothing allowed this patron to easily conceal the liquor. Short of searching people, the licensee testified that they monitor the rooms, watch the levels of alcohol being brought to each room, and if they see illicit liquor, they require the patron to remove it.

The branch submitted that in this type of licensed premises, with the amount of privacy offered patrons, the licensee has an obligation to provide a high degree of care and control. The bottle of liquor this patron smuggled in was large, suggesting that it could have been shared with a number of patrons and suggesting that the licensee must be quite lax not to see it coming through the front door.

Reasons and Decision

I find as fact that there was an intoxicated patron, who was too intoxicated to be permitted to remain, and that at least one patron was consuming liquor not provided by the licensee. However, those findings do not constitute the contraventions. Both of the alleged contraventions require findings that the licensee 'permitted' the activity or conduct to occur.

In the Liquor Appeal Board decision in *Ed Bulley Ventures Ltd. v. General Manager, Liquor Control and Licensing Branch*, L- 9905, June 28, 2001, the board reviewed a number of cases and settled on the following definition of "permitting", at page 7:

To allow behaviour by failing to reasonably inform oneself or take reasonable steps to prevent it, where one has a duty to act or prevent it.

Under this interpretation a duty to be vigilant is imposed and a standard of care for the fulfillment of that duty is created. According to this interpretation, the licensee permits a patron to become intoxicated where the licensee simply does not pay attention to the state of the patron. It requires only unreasonable ignorance as opposed to willful ignorance.

At page 8, the board summarized:

In summary, for the purposes of this appeal, the issue to be decided is whether the appellant "observed as high a degree of diligence as [it] should have done in the circumstances" or whether it can be said that it "had shut its eyes to the obvious, or had allowed something to go on, not caring whether an offence was committed."

In my view, there are two aspects to the 'permitting' and "due diligence" factors in this case. First, is whether the licensee was, or should have been, aware of the

contraventions but allowed them to continue. Second, is whether the licensee could have had additional policies or procedures in place to prevent the contraventions from occurring?

Intoxicated patron

The most cogent evidence on how the person became intoxicated and what might have been noticeable prior to discovery by the police was from the intoxicated patron himself. He testified, as his friends had said to the police, that he had 4 or 5 beers with his friends. He then had a couple of shooters and went to the washroom. When he was in the washroom he began feeling ill.

Based on the totality of the evidence, I agree with the licensee that there is no evidence that the patron was noticeably intoxicated before he went to the washroom. I accept the patron's evidence that it was mixing the liquors that caused him to become ill and that he probably was overcome by intoxication once he was in the washroom.

The question then shifts to whether the licensee had adequate policies and procedures in place to guard against this happening. The only factual dispute between the two versions of the evidence is how long the patron was in the washroom before the police located him. He testified that he went into the washroom around 1:20 A.M. and was there only 5 to 10 minutes before the police found him. The police testimony was that they found him at approximately 2:00 A.M. I accept the police testimony. The patron's testimony was credible but I have to weigh it in light of the fact that he was intoxicated. There is no reliable evidence of when he went to the washroom – it could be 1:20 A.M., or 1:50 A.M. as would fit with his sense of how long he was there when the police arrived.

The licensee testified that there are regular checks of the washrooms but wasn't able to say whether there had been a check after 1:00 A.M. on this night. If there

wasn't a washroom check after 1:00 A.M., is that reason to find that the licensee permitted an intoxicated patron to remain? I think not. In this instance, the way the patron comported himself and then effectively hid himself in the washroom, prevented the licensee from knowing that he was intoxicated. I find the licensee did not permit the intoxicated patron to remain.

During the hearing some of my comments and questions were directed to the licensee's policies and procedures of monitoring patrons' consumption. Allowing a patron to become intoxicated is a contravention, but it was not alleged here. It appears to me that the licensee should review its procedures with a view to ensuring that patrons don't become intoxicated in the first place. Monitoring patron consumption in private karaoke rooms may be more difficult than in a large open area, such as a lounge or bar. A licensee's obligations are the same, regardless of the layout of the establishment. When a server "drops a tray" of drinks – beer or shooters – the licensee has a legal obligation to observe patron consumption to the extent of ensuring that no patrons are over-consuming. One suggestion, noted below for other reasons, is that the licensee might benefit from more frequent, and random, karaoke room checks.

Consumption of liquor that was not purchased from or served by the licensee

This allegation is that the licensee either turned a blind eye to the illegal activity, or permitted the conduct by not having policies or procedures in place to screen out illicit liquor as it was coming into the premises.

Obviously, it is in the licensee interests not to allow people to bring their own liquor or their own soft drinks. Nonetheless, it does happen and licensees have a legal obligation to prevent it. When patrons bring their own liquor, licensees are not able to monitor how much the patrons are drinking. Then, the licensee is in

danger of losing control of patron conduct. That in turn can lead to unsafe conditions inside and outside the premises.

The officer uncovered the liquor only by threatening to search everyone. The officer became suspicious because he saw plastic soft drink bottles. The fact that those bottles were in view when the officer entered the room does not suggest it is probable they were visible when the server was in the room. It is probable that the patrons would have attempted to hide them from the server. I find that the evidence does not establish that the server would have known, or should have known, that the patrons had their own soft drink bottles or, on that basis, their own liquor.

So, it is not a case of the licensee turning a blind eye. The question then shifts to whether the licensee had adequate policies and procedures in place to guard against this happening. The licensee testified about the notices posted at the front door and the fact that the licensee cannot search patrons as they come in. I accept the police officer's testimony that the young man who smuggled the bottle of rum was dressed in baggy clothing that could easily hide the bottle. The licensee's witnesses testified to having required patrons to remove liquor on other occasions.

I find that the evidence before me does not establish that the licensee permitted directly, or through inadvertence, patrons to consume liquor not purchased in the cabaret.

Although I have found that the licensee did not 'permit' the patron to bring liquor into the cabaret, I observe that the licensee could take extra precautions. For example, the licensee could insist that patrons check their coats, thus reducing one layer of bulky clothing. The licensee could also institute a policy of more random checks on the karaoke rooms. Given that the licensee is now aware of

the problem of smuggled liquor, it may be that failure to implement additional safeguards could go to the level of 'due diligence' required in subsequent cases.

Order

For the alleged contraventions of permitting an intoxicated person to remain, and permitting consumption of liquor not purchased from or served by the licensee, I find that the licensee did not contravene the Act and Regulations as alleged.



G.M. Taylor
Enforcement Hearing Adjudicator

DATE: November 6, 2003

cc: R.C.M. Police Richmond Detachment

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Wendy Jones, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter Jones, Advocate
