



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: 513954 B.C. Ltd.
dba Zig E's Restaurant
2960 Main Street
Vancouver, BC

Case Number: EH03-135

Appearances:

For the Licensee Rick J. Erdman

For the Branch Peter K. Jones

Enforcement Hearing Adjudicator Suzan Beattie

Date of Hearing February 19, 2004

Place of Hearing Teleconference

Date of Decision February 26, 2004

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, 513954 B.C. Ltd., doing business as Zig E's Restaurant, is located at 2960 Main Street, Vancouver, B.C. It holds Food Primary Licence No. 184538 with hours of operation in which liquor may be sold, purchased and consumed being 11:00 A.M. to 1:00 A.M. on Monday through Saturday and from 11:00 A.M. to Midnight on Sunday. The establishment has a capacity of 30 patrons in area 1, 6 patrons in area 2 and 8 patrons on the patio.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Branch alleges that on August 16, 2003, the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing Regulations* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of section 44(1) (b), the penalty range is a four (4) to seven (7) day licence suspension or a five thousand dollar (\$5,000) to seven thousand dollar (\$7,000) monetary penalty for the first contravention. In this case, the branch is recommending the minimum five thousand dollar (\$5,000) monetary penalty.

The relevant statutory provisions of the *Liquor Control and Licensing Act and Regulations* state:

44 Time

(1) Unless otherwise authorized by the general manager,

(a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within 1/2 hour after the time stated on the licence for the hours of liquor service, and

(b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after 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).

ISSUE

The licensee conceded that the contravention occurred but disputed the proposed monetary penalty of five thousand dollars (\$5,000).

COMPLIANCE HISTORY

There is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident ("compliance history"). Therefore, this contravention, if proved, would be considered a first contravention for the purposes of Schedule 4 of the *Regulations*.

On May 16, 2003, the branch issued Contravention Notice No. B004558, alleging violations of 44(1) (b) and 44(3) for failure to clear liquor within ½ hour after liquor service hours and for allowing to consume liquor beyond ½ hour after liquor service hours. The branch did not pursue enforcement action on these allegations. However, the branch did hold a compliance meeting on May 23, 2003, with the licensee and its manager. Documentation detailing that compliance meeting indicates that the inspector discussed hours of sale, restaurant operating hours and the penalties pursuant to Schedule 4 of the *Regulations*.

I pause to note that, as described later in this decision, the ownership of the shares of the licensee changed in October 2003.

Exhibits

The branch presented the following exhibit:

Exhibit 1	Book of Documents
Tab 1	Notice of Enforcement Action Letter dated December 15, 2003
Tab 2	Contravention Notice B00188
Tab 3	Disclosure documents forwarded to the agent for the licensee on January 26, 2004
Tab 4	Food Primary License 184538
Tab 5	Official Floor Plan for Establishment

EVIDENCE, PENALTY SUBMISSIONS AND DECISION

Evidence

The branch's evidence is contained in the narrative to the Notice of Enforcement Action. On August 16, 2003, (business day of Friday, August 15, 2003) two liquor inspectors attended at the establishment at 1:45 A.M. Upon entering the establishment, they observed 20 patrons drinking various drinks including draft beer and mixed drinks.

Before the inspectors identified themselves, the bartender greeted them by saying “we are closed, please!” The inspectors identified themselves and asked the bartender why the patrons were still drinking. The bartender replied “I can’t get these people to leave” and then yelled “OK people its time to go right NOW!” All but two patrons finished their drink and left.

This bartender was also on duty on May 16, 2003, when a contravention notice was written for allowing patrons to consume liquor beyond ½ hours after liquor service hours as well as for failing to clear liquor within ½ hour after liquor service hours. As noted, a compliance meeting was held on May 23, 2003.

Submission

The licensee argues that I should utilize my discretion and not order any penalty for the contravention of failing to clear liquor within ½ hour after liquor service hours. It referred to the following decisions of both the branch and the Liquor Appeal Board (LAB) in which either no penalty was imposed or a warning was issued: Yaletown Brewing Company (LAB November 21, 1996), Bar None Cabaret (March 25, 1997), Century Grill (LAB June 5, 1998), Funky Planet Cabaret (May 4, 2001) and Section 3 Restaurant (January 16, 2002).

The licensee acknowledged that, under the current legislation, a warning is not an option. It is therefore requesting an exercise of discretion in a finding of no penalty in the circumstances of this case.

The licensee based its submission for an exercise of discretion in finding no penalty by outlining the history of the license. At the time of the contravention in May 2003 the license and holding company was held 100% by a previous operator. In October 2003 the current operator purchased a 49% interest in the holding company and the previous operator resigned as a director. The current operator subsequently obtained a partner and, between them, these two individuals now own 100% of the holding company. They have made the appropriate applications to the branch for a permanent change to the liquor license.

The licensee argues that, under its management, there are new menus, new staff have been hired, the previous bartender that was on duty both in May 2003 and August 2003 is no longer an employee, and they have instituted rules of employment. As a result, the licensee says their customer base and profile has changed. In essence the licensee submits that, since its acquisition of shares in the company, there has been no repeat of the conduct they agree occurred on August 16, 2003.

The licensee also argues that, for reasons it explained in the hearing, it has alleged financial mismanagement against the previous operator and instituted legal action. It has accepted that the contravention occurred but submits that it occurred under the management of the previous operator. It submits that it should not be punished for the conduct of previous employees and the previous operator. It says that the imposition of the recommended monetary penalty will result in a financial burden. The licensee also explained that, in the alternative, the minimum suspension penalty of four (4) days would be equally as harsh as the recommended monetary penalty.

The licensee says that, by accepting that the contravention occurred, it has incurred a 'penalty' on its record. No other penalty is warranted given its current commitment to voluntary compliance. To impose a penalty would have no effect on the previous operator and its employees who committed the contravention.

Decision

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 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 minimum set out in Schedule 4 of the *Regulations*.

The *Regulations* provide for a graduated scale of penalties for contraventions of the *Act*. The graduated nature of the penalties is necessary for the consistent and vigorous enforcement of the provisions in the *Act* and *Regulations*.

The branch's primary goal in determining the appropriate penalty along the scale is achieving voluntary compliance. 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.

Turning to the licensee's submission, I will deal first with its reference to earlier decisions of the branch and the LAB. As the licensee acknowledged, the majority of the cases dealt with overcrowding (Yaletown Brewing Company, Century Grill and Bar None Cabaret). In the Section 3 Restaurant case, a warning was considered appropriate considering the fact that the branch's delay prejudiced the licensees' opportunity to respond to the allegation of the service of food without liquor. As well, the branch considered the length of time the licensee had been in business, the lack of enforcement history and the immediate changes the licensee made to its operation.

A warning was also considered appropriate in the Bar None Cabaret decision. In that case the branch's delay occurred between the hearing date of December 8, 1995, and the decision date some 15 months later on March 25, 1997. The length of time in finalizing the decision resulted in a warning being placed on the file of the licensed establishment.

The Funky Planet Cabaret case dealt with the failure of a cabaret to clear patrons within ½ hour after closure. The contravention occurred on January 22, 2001. In that case the branch found a penalty was not warranted in part because of the misunderstanding of the new legislative changes of January 2001. As well, the branch considered the clean record of the licensee, its cooperation and the fact there was no apparent disturbance in the neighbourhood.

I accept the licensee's statement that it has made a number of changes in the management of the establishment, has a commitment to voluntary compliance and enforcing community standards and is changing the customer base and profile. I also accept that the licensee has a clean five month track record. However, on their own, these facts are not persuasive in convincing me to exercise my discretion. In the Section 3 Restaurant case similar facts were coupled with the fact that the branch's delay prejudiced the licensee. In the Funky Planet Case, similar facts were found along with a persuasive argument that the legislative changes had resulted in a misunderstanding of the new legislation. Neither prejudice due to delay nor misunderstanding of the legislation is a factor in this case.

I turn now to the licensee's submission. The licensee first submits that no penalty should be imposed on it for contraventions that occurred while under the management and control of the previous operator. The licensee continues this submission by arguing that any penalty imposed on it would be a harsh imposition. It says it had no interest in the license at the time the contravention occurred and it is therefore being punished for conduct that was committed by an employee of the previous operator.

In this case, I find that the licensee before me is the same legal entity as the previous operator. I acknowledge that the licensee has applied for approval of the general manager for a share transfer. However, I find that a licensee is responsible for all matters, including a contravention committed by an employee of the previous operator, respecting the liquor license.

Secondly, the licensee submits that the imposition of either a monetary or suspension penalty would cause it undue financial hardship. This submission is based in part of the current legal actions between the previous operator and the current operator and in part on the general financial severity of the monetary penalty. The licensee submits that imposition of the momentary penalty may result it being unable to continue in business while the imposition of a suspension penalty may result in the permanent loss of business.

No evidence of specific financial hardship was entered in this case. I am not persuaded to exercise my discretion based simply on the licensee's verbal statements. As well, the current legal actions between the previous operator and the current operator cannot form the basis of my decision in this case.

Determining a monetary penalty or suspension penalty starts in Schedule 4 of the *Regulations*. Schedule 4 provides penalty ranges for all contraventions. There are four categories of contraventions. Each category reflects the impact on the public interest. The greater the impact on public interest, the higher the penalty range required in the *Regulations* for deterrence or voluntary compliance.

In this case, the licensee is a food primary licence who failed to ensure that liquor was taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. This is a category two contravention according to the *Regulations* because of the greater impact it is deemed by the legislation to have on the public interest.

In the circumstances of this case, there was a previous contravention notice issued on May 16, 2003. The branch did not recommend enforcement action with respect to that contravention, but did hold a compliance meeting to educate the licensee. As noted, the licensee in May 2003 is not the same operator as before me today but, for the purpose of the enforcement of the *Act* and *Regulations*, it is the same legal entity. The same contravention occurred again in August 2003.

Having considered all of the circumstances of this case, I find no reason to exercise my discretion. I find that the recommended minimum monetary penalty of five thousand dollars (\$5,000) is appropriate.

ORDER

Pursuant to section 20(2) of the *Act*, concerning the Food Primary Licence No. 184538, I order as follows:

For the contravention of Section 44 (1) (b) of the *Liquor Control and Licensing Regulation* on August 16, 2003, I order the licensee, Zig E's Restaurant, to pay a monetary penalty of five thousand dollars (\$5,000) dollars to be paid no later than March 31, 2004.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: February 26, 2004

cc:

Vancouver Police

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

Liquor Control and Licensing Branch,
Attention: Peter K. Jones, Advocate
