

REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of

Hearing: March 5, 2015

Panel: Lionel Miskin, Chair; Moira Calderwood and David Peacock, Members

Re: Always Fresh Restaurant Inc., o/a always Fresh Restaurant
Paul Augustus Barrow, President (PAB)
Applicant for Eating Establishment Licence (Application No. B419229)

Counsel for Municipal Licensing and Standards: Ms. Brennagh Smith

Counsel for Applicant: Mr. J. Randall Barrs

INTRODUCTION

The applicant corporation, through its President, PAB, applied for an Eating Establishment Licence. On October 21, 2003, an Eating Establishment Licence had issued to PAB for a business operating as *Town Talk Corner* at 2641 Eglinton Avenue West in Toronto. That licence remained extant until November 7, 2012, when it expired, not having been renewed. PAB was President of 2032030 Ontario Inc. when it received an Eating Establishment Licence in January of 2004. That licence too was not renewed and was cancelled on April 2, 2005.

When the current application was filed, Municipal Licensing And Standards (MLS) refused the licence because of various charges and convictions registered against PAB under the Criminal Code and the Liquor Licence Act.

After hearing the evidence adduced by both parties and the submissions made by respective counsel, the Toronto Licensing Tribunal (TLT) ordered that the licence be issued on probation and with conditions.

CITY'S EVIDENCE

The City presented its evidence through two witnesses, Mr. Terry Van Elswyk, MLS supervisor, and Mr. David Kugelman, MLS Acting Supervisor. The first witness identified report number 6223 dated January 21, 2015, as an MLS document which he had reviewed and which MLS staff had prepared under his direction. The report consisted of 251 pages, to which was added another ten pages proffered by City counsel with the concurrence of the applicant's counsel. At the request of City counsel, the total document was made exhibit number one, again with the concurrence of applicant's counsel.

Page 6 of exhibit one, a Toronto Police Service Record of Conviction dated March 3, 2008, disclosed charges and convictions against PAB, specifically, a conviction for assault in 2003, and convictions for uttering threats, failure to comply with a recognizance, and another assault, the latter three convictions apparently originating

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from the same incident. Page 17 of the exhibit is a chart prepared by MLS staff showing three convictions against PAB for having open liquor in a vehicle (all three apparently originating from the same incident) as well as a conviction under the Liquor Licence Act (LLA) Regulation 354/07 with an outstanding fine totaling \$439.00. Two other charges under the LLA had been withdrawn as had 3 charges relating to proscribed drugs.

PAB had been a manager of *Town Talk Restaurant & Bar Inc.* (TTRB), a company for which his brother, DB, had been President. Page 49 and following consisted of another chart prepared by MLS staff, showing ten charges against TTRB, which resulted in two bylaw convictions for noise and overcrowding. It also showed the withdrawal of two other non-criminal charges. The chart showed three further non-criminal charges which PAB testified had been withdrawn, as well as three narcotic-related charges which, according to PAB's testimony, were also withdrawn. This chart also listed a number of charges against the aforementioned DB, some of which resulted in convictions and some withdrawn. The same chart then lists 32 charges laid against PAB. Three of those related to the Highway Traffic Act (HTA); twelve resulted in convictions (including the three HTA charges). The oral testimony, and the advice of Mr. Barrs as an officer of the court, revealed that the majority were withdrawn. Aside from the charges referred to above, the most serious conviction against PAB was for the offence of "uttering" threats (S. 810 Criminal Code) committed in August of 2007.

Mr. Kugelman attended at 620 Vaughan Road on April 7, 2014, at 1:01 p.m. He testified that he found it operating with patrons inside, fresh food on display in cases and arcade style games on the premises. He said an Eating Establishment Licence would require an endorsement for video if the number of games exceeded a certain limit. He was uncertain about the exact number, but noted that the licence application did not refer to video games. He approached PAB on the premises and asked to see an Eating Establishment Licence which, of course, could not be produced. PAB referred to his application for the licence, which was posted on a wall along with a Master Business Licence, a provincial document. Mr. Kugelman then asked PAB and the only employee on the premises to show their food handler's licence, but neither was able to produce one. Furthermore there was no inspection sign from public health authorities. Mr. Kugelman issued summonses for operating a "victualling house" without a licence, operating a place of amusement without a licence and operating an eating establishment without a certified food handler.

APPLICANT'S EVIDENCE

PAB testified that he had operated under the restaurant licence issued to him in 2003 without any problems. He said that a food handler's certificate was not required when he started that business in 2003. He closed the restaurant in 2012 because it was no longer profitable. The restaurant in the name of 2032030 Ontario Inc. was not a financial success, and accordingly he did not renew its licence. He opened *Always Fresh Restaurant* on April 7, 2014, the day Mr. Kugelman came to inspect. He said that he had not yet received the refusal letter which was dated April 3, 2014. He added that the health inspection is made after the restaurant begins operating because the health authorities want to see the restaurant in operation.

When he applied in person for the licence, he paid a \$200.00 application fee and a \$400.00 licence fee, as directed, and was told that the licence would be mailed to him.

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In response to her question, he informed the counter clerk that he intended to open on March 10. He inquired about the video games, an inquiry which involved the counter clerk, a manager, and one other MLS employee. They were uncertain as to how many games could be installed without having to obtain an amusement or entertainment licence, and told him to go ahead, and they would check it later. The clerk told him he could post the licence application and the Ontario business licence. He expected that the licence would arrive in due course in the mail, and did not anticipate any difficulties. Ultimately he had to delay the opening because of a fire which damaged the front of the building. He closed the restaurant on the same day he opened, April 7, 2014, the day Mr. Kugelman attended, and has not yet re-opened it.

He acknowledged that he had been a manager at the business operating as *Town Talk Restaurant & Bar*, but the licence for that business was held by his brother, DB, who shared managerial responsibilities with him. DB failed to attend the Toronto Licensing Tribunal (TLT) hearing at which that licence was revoked, and he, PAB, knew nothing about the hearing. The convictions registered against him in 2003 and 2004 resulted from domestic problems unrelated to the business. He knew nothing of the threatening conviction in 2008. (It is to be noted that City counsel acknowledged that this entry could have been in error as her witness had no recollection of it either.) The charges relating to open liquor in vehicle resulted from a coffee cup with liquor in it in the hands of a passenger, and that he, PAB, was unaware. He was also unaware of the charge under Section 5 (1) of the LLA. Charges relating to noise and disorderly conduct resulted from complaints, and he professed to have little control over events occurring outside the premises. He recollected the search of the premises when police knocked down the door of his bedroom on the second floor at 616 Vaughan Road. He said that the allegations of running a “booze can” were not directed to him but toward his brother, DB. He denied knowledge of any wrongdoing on the premises and said he was not there when an alleged stabbing occurred. He ceased to manage that business after the police search.

He readily agreed to reduce the number of video games to meet the bylaw requirements and stated that it was always his intention to comply with all regulations.

SUBMISSIONS

City counsel expressed concern with PAB’s criminal record notwithstanding that it arose from a domestic situation with no apparent relationship to PAB’s business. She highlighted the breach of recognizance as evidence of failure to comply with legal strictures. She said that the LLA conviction of March 2013 was particularly relevant and pointed out that the TLT had revoked the licence of TTRB where PAB was a manager.

She argued that the TLT should give weight to those various charges against PAB which were ultimately withdrawn. Her position was that a charge could be laid only after a police officer had sworn an Information that there were reasonable grounds to believe that an offence had occurred. Thus even if there were not sufficient evidence to convict, the TLT has to be concerned with the conduct of the licensee and its officers, and the existence of the Information would be sufficient for this purpose. She also argued that PAB opened the restaurant AFRI prior to having the necessary licence, and he should have known that the issuance of it would be in question. In addition he operated without a person certified as a qualified handler. She argued that the Alcohol and Gaming

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Commission (ACGC) refused PAB a liquor licence, and that the LLA convictions were relevant as indicative that he will not comply with the law in future.

Applicant's counsel argued that the licence refusal had dire consequences for the applicant as the applicant was bound to a lease and paying rent on a premises which it was prevented from using for almost a year. He stressed that the criminal convictions were not only old, but had been available to MLS on prior applications. PAB was not before the ACGC in the proceedings indicated at page 203 of the report, but rather it was DB who was in issue, and that the ACGC had not continued that proceeding, probably because the business had already closed.

In prior applications which PAB had filed for an Eating Establishment Licence, more than a month elapsed before the licences arrived in the mail. He had no reason to expect problems with the application or with the video games.

PAB had carried on a restaurant business for nine years without infractions, and had now suffered enough because of the delay.

DECISION

The TLT did not find the City's evidence sufficiently compelling as to justify refusal of the licence. The criminal convictions were old and unrelated to any business operation. PAB had operated a restaurant for a lengthy period of time without any record of infractions. PAB's evidence as to his belief that a licence would be forthcoming in the mail in due course, and his evidence as to the discussion with MLS staff relating to video games, all seemed reasonable and credible. His willingness, as expressed in his testimony, to reduce the number of video games to come into compliance with the bylaw and to comply with all other regulations appeared to be earnest. The City brought no evidence to the contrary and PAB's testimony remained unshaken on cross-examination.

The TLT did not conclude that it should give significant weight to the withdrawn charges of various sorts. There is of course the presumption of innocence. While counsel was quite correct that the TLT has to consider conduct of an applicant, regardless of convictions, the City did not really present any evidence of PAB's conduct in relation to the charges. In the absence of information as to why charges are withdrawn, one can only speculate. Reasons can be many, including an absence of evidence to support a conviction, a plea bargain, or errors in laying the charges, just to name a few. The TLT did not consider that the mere swearing of an Information justified negative inferences.

Nevertheless the TLT did have sufficient concern, particularly in relation to PAB's former association with TTRB, to conclude that a period of probation would be advisable to enable MLS to monitor the conduct of the business. Accordingly the TLT order is as follows.

A Eating Establishment Licence be issued to the applicant subject to the following conditions:

The licence shall be placed on probation for a period of two years;

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The applicant, at his own expense, shall provide an up-to-date record of his criminal convictions on each of the next two renewals;

The applicant shall provide evidence to Municipal Licensing and Standards that any fines outstanding and due against PAB are paid;

DB shall not be permitted to be on the business premises or otherwise involved in the business.

The applicant shall notify Municipal Licensing and Standards in writing within three business days of any new criminal charges or convictions or of any new charges or convictions under a City of Toronto by-law, under the Liquor License Act, or under any food safety or public health legislation relating to PAB or AFR. Such notice may be given in any of the following ways:

- delivery in person to the licensing office at 850 Coxwell Ave., Toronto, Ontario M4C 5R1
- by ordinary or registered mail to the above address;
- by electronic mail to mlsconditionreporting@toronto.ca; or
- by fax at (416) 392-3102.

If there are any new charges or convictions during the probationary period which raise a concern to Municipal Licensing and Standards staff, then this matter, including this report and any updating material, may be brought back before the Toronto Licensing Tribunal for a full hearing.

Original Signed
Lionel Miskin, Chair
Panel Members, Moira Calderwood and David Peacock concurring

[Reference: Minute No. 20/15]

Date Signed: March 19, 2015