



**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:	Milestone's Restaurant Inc. dba Milestone's Restaurant and Palomino Bar 2745 Barnet Highway Coquitlam, BC
Case:	EH05-055
For the Licensee	Ian Tostenson John Gillis
For the Branch	Sonja Okada
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	June 16, 2005
Place of Hearing	Vancouver, BC
Date of Decision	July 14, 2005

INTRODUCTION

Over the past 12 years, the licensee has opened 16 restaurants across British Columbia, operating with Food Primary Licenses (FPLs). The Coquitlam operation is one of two Milestone's that has both a restaurant and a lounge which operates under a Liquor Primary Licence (LPL). The FPL No. 189866 permits liquor service from 11:00 a.m. to midnight seven days a week and contains usual terms and conditions.

ALLEGED CONTRAVENTIONS, RECOMMENDED ENFORCEMENT ACTION AND RELEVANT STATUTORY PROVISIONS

The Liquor Control and Licensing Branch's (the branch) allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated April 29, 2005. The branch alleged that on February 17, 2005, the licensee contravened Section 38.1 of the *Liquor Control and Licensing Act* which states

38.1 (1) A licensee must not dilute or adulterate liquor purchased from the Liquor Distribution Branch or keep for sale, sell or in consideration of the purchase or transfer of property or for other consideration give to another person liquor that has been diluted or adulterated after its purchase from the Liquor Distribution Branch.

(2) Subsection (1) does not prevent a licensee from diluting or adulterating liquor in a drink at the request of a customer ordering that drink.

(3) A licensee must not refill a bottle or container or add to the contents of a bottle or container purchased from the Liquor Distribution Branch.

Schedule 4 of the *Regulation* provides a range of licence suspensions and monetary penalties for contraventions. For the first contravention of Section 38.1 of the *Act*, Item 17 of the Schedule, the penalty range is a four (4) to seven (7) day licence suspension or a five thousand dollar (\$5,000.00) to seven thousand dollar (\$7,000.00) monetary penalty.

The branch recommended a monetary penalty of \$5000.

ISSUES(S)

The licensee acknowledged that the contravention took place but disputed the recommended penalty.

EXHIBITS

Exhibit No. 1 Book of Documents of the Branch

EVIDENCE

The branch provided evidence from the branch investigator and the licensee provided evidence from one of the corporate partners. Most of the evidence was not in dispute.

During the course of a routine Trade Practices investigation and inspection, branch personnel found evidence that the licensee was pre-mixing "Sangria" and pouring it into bottles that previously contained other liquor purchased from the Liquor Distribution Branch. The licensee used the Sangria in "Bellinis", a drink that is proprietary to Milestone's. The licensee has been making Sangria as a mix of wine, lime juice and 7-Up for six years, and using it to top off Bellinis to add colour and flavour. The licensee's witness described it as a 'garnish.' Previously, the licensee had made a different recipe of Sangria as a specific drink but it did not sell and they took it off the menu.

When the branch's investigative team completed their inspection and reported their findings to the licensee's staff, the licensee immediately directed all of the Milestone's locations to cease using the pre-mix. They changed over to a system of mixing wine and lime juice at the time the drink is ordered. The

licensee's witness testified that this correction occurred within hours. He also testified that the additional cost each year for the new procedure will be approximately \$30,000 because of the change from using a 16 litre keg of wine for pre-mix purposes, to using individual bottles of wine at the bar.

The licensee's witness also testified that there was another pre-mix drink they used until this inspection. That was for fruit martinis. The licensee has voluntarily stopped that pre-mix also. The branch investigator testified that they did not pursue enforcement action on that product because there was a suggestion that the licensee had an agreement, years ago, with the general manager, to permit the pre-mix.

The licensee has reprinted the table tent cards that describe beverages at a cost of \$9,000.

The branch accepted the licensee's evidence as accurate. The investigator acknowledged that the licensee's staff had been cooperative during and after the inspection.

SUBMISSIONS

The licensee submitted that the branch's primary goals in enforcement are education and voluntary compliance. If the branch had informed the licensee that the practice was not permitted, the licensee would have stopped it immediately, as it did following the inspection. The licensee submitted this was a technical error. There is nothing in the facts that raises a concern about illicit liquor or other serious liquor contraventions.

The monetary penalty is not a large factor for Milestone's. It was integrity, not money, that motivated the licensee to make immediate changes. Although this is a relatively minor penalty, the ripples go much further. The Restaurant

Association is concerned that it has many members who have used similar recipes, thinking there was no problem. Now, the Association and the licensee want time to work with the government to correct the problems.

The licensee submitted that the monetary penalty would be almost meaningless and that what the licensee would find valuable is an outcome that would recognize the spirit of what the branch is trying to do, through education and voluntary compliance. The licensee recommended that, instead of a monetary penalty, I craft a condition for the licensee to work with government to pursue fixing this problem.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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 minimums set out in Schedule 4 of the *Regulation*.

The branch's primary goal in pursuing enforcement action and determining the appropriate penalty is achieving voluntary compliance. As the licensee correctly noted, that is done in conjunction with education about the legal obligations. One of the branch's education tools is the 'Guide for Liquor Licensees in British

Columbia' ("the Guide") in which the licensee's obligations and responsibilities are spelled out.

There have been occasions when adjudicators have not imposed a penalty, despite a finding of contravention. That has occurred when the licensee has demonstrated extraordinary circumstances or that the licensee was genuinely mistaken about the legal requirements and was trying to do everything legally. See, for example, *Funky Planet Cabaret*, May 4, 2001, in which I declined to issue a penalty in circumstances of the licensee having acted on a mistaken belief that operating hours had been extended. In part, I was influenced by the fact that the branch had notice, through a competitor complaint, that the licensee was intending to operate later than the licence permitted and the branch did not contact the licensee in advance. I accepted the licensee's evidence that they were trying to do everything legally although I found that their mistake was founded on insufficient inquiry about the legal situation.

I see some similarities with this case. Although the onus is on the licensee to know the legislative requirements attached to the liquor licence, there is no suggestion that the licensee was knowingly operating outside the law or that this was a flagrant violation. In the usual course of enforcement actions, the branch might have alerted the licensee to the problem and given time to rectify, prior to taking enforcement action. This investigation came about through the Trade Practices illicit liquor initiative and the practices were slightly different. That is not to say that the branch is required to give licensees an opportunity to rectify a breach prior to taking enforcement action. A breach is a breach. Licensees are responsible for reading the Guide, knowing the legislative requirements, and ensuring compliance.

I am influenced by the fact that the pre-mix was used only as a topping for another drink, not sold as a specific drink. Additionally, I am influenced by the fact that this pre-mix practice was not unique to this location. Rather it was

common throughout the 16 Milestone's operations and, it appears, in other establishments. This is a contravention that needs to be addressed in a larger context than a \$5,000 monetary penalty for this licensee.

I find that the circumstances are extraordinary given the number of other establishments involved in the illegal practice. I find that the licensee demonstrated a willingness to comply, and immediately did comply, once having been advised of the problem. Further, the licensee mitigated by immediately taking action and incurring expense to correct, and took corrective action on another pre-mix. The licensee accepted that the breach occurred and will have this contravention on its compliance record.

Given all of these circumstances and considerations, I find that there is no need to impose a penalty.

I appreciate the licensee's offer to work with government. However, I am not going to impose that as a condition. The general manager will know the licensee's willingness to be consulted and can take the initiative if that is seen to be appropriate.

In the result, I decline to impose enforcement action.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: July 14, 2005

cc: R.C.M. Police Coquitlam Detachment

Liquor Control and Licensing Branch Surrey Regional Office
Attention: Mike Clark, Regional Manager

Liquor Control and Licensing Branch Vancouver Regional Office
Attention: Sonja Okada, Advocate
