



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

In the matter of

The Liquor Control and Licensing Act, R.S.B.C. c. 267

And in the matter of

A referral back from the British Columbia Supreme Court

Licensee: New World Entertainment
Investments Ltd.
dba Richard's on Richards
1036 Richards Street
Vancouver, BC

Case Number: EH02-026

APPEARANCES

For the Licensee: J. Barry Carter, Counsel

For the Branch Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Decision: September 1, 2004

**Ministry of Public
Safety and Solicitor
General**

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INTRODUCTION

[1] This is a referral back from the British Columbia Supreme Court (BCSC) (Kamloops Registry No. 34055, April 23, 2004) of a decision I rendered on December 19, 2002. The Court remitted the matter back for consideration of the defence of due diligence for three (3) contraventions of employees consuming liquor on November 9, 10 and 16, 2001. In my decision, I relied on section 78 of the *Act* to find that the licensee was a party to the contraventions committed by the employees. The Judge accepted counsels' submission that section 78 does not apply to proceedings under section 20 and concluded that, because of my reliance on section 78, I had not considered the defence of due diligence.

LEGAL FRAMEWORK

[2] It is well accepted that the defence of due diligence applies to contraventions under the *Act*. The B.C. Supreme Court addressed due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248, a case involving alleged illegal conduct:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

[3] On the first aspect, whether the employees who committed the contraventions were directing minds, I agree with the licensee that they were not. On each

occasion, the employees were bartenders and servers and there was no evidence that linked them to supervision or management of that part of the licensee's operation.

[4] The second aspect, which is the sole issue for this reconsideration, is whether there is evidence that the licensee was duly diligent in attempting to prevent the unlawful conduct of the employees.

LICENSEE'S SUBMISSIONS

[5] For the licensee, Mr. Carter referred to the Supreme Court of Canada decision in *R. v. Sault Ste Marie*, [1978] 2 S.C.R. 1299 and posed this issue as whether "the licensee exercised all reasonable care in establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of that system". Mr. Carter submitted that the fact that an employee may have consumed alcohol on the premises is not determinative of a lack of due diligence on the part of the licensee. Rather that may be indicative of a need for the licensee to increase the level of supervision or vigilance.

[6] Mr. Carter reviewed the evidence from the August 2002 hearing and noted the following as supporting the submission that the licensee demonstrated due diligence.

- The employee manual, Exhibit No. 1, tab 21, at page 5 provides that employees working "while in the possession of, using, or under the influence of any alcoholic beverage or an un-prescribed substance on cabaret property will be suspended for one week". At page 7, there is a discussion about progressive discipline that indicates employees may be terminated without warning for "possessing, consuming, or
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being under the influence of alcoholic beverages or drugs on company time or premises”.

- In the job descriptions following the manual, there is a capitalized, bolded notice that “the law prohibits staff from consuming any alcohol while working”. Mr. Carter also noted that there is an employee agreement executed by employees agreeing to follow the procedures and rules set out. Included in the manual is an employee progressive discipline form.
 - Mr. Carter stated in his written submission that there was evidence the staff meet regularly to discuss and reaffirm the policies and procedures.
 - A new manager took over and fired the existing general manager because, among other things, he had not been controlling activity in and around Richard's. The manager hired a new general manager who began enforcing house policies. According to the manager's testimony, the policies were being enforced and adhered to.
 - The general manager testified that staff are supposed to tell patrons that they may not drink with them, unless it is non-alcoholic, such as 'juice shooters'. As part of establishing a rapport with patrons, the licensee permits bartenders to buy drinks for customers, which they pay for at the end of the shift.
 - The licensee noted that the cabaret was busy on November 9, 10 and 16, 2001, as evidenced by the findings that it was over capacity on November 9 and 10, 2001. On weekends there are seven door security employees on duty; those employees train weekly with the manager.
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- Concerning the November 9, 2001, incident, the police observed the bartender and two servers drinking from shot glasses which were filled from a shaker, as opposed to a bottle of liquor. Given the evidence about 'juice shooters', there would have been nothing in this conduct that would have suggested to the licensee that the employees were consuming liquor. Given the evidence, the licensee acted with all reasonable care.

- On November 10, 2001, the officers were focused on a specific bartender, Bartender A. The general manager testified that he also was watching Bartender A and saw him drink from a bottle of beer. The general manager watched him for about twenty minutes, confronted him, and immediately suspended him. The licensee submitted that this demonstrates that the licensee was taking all reasonable care.

- Generally on the issue of due diligence, the licensee referred to Exhibit No. 10 as evidence that the licensee had, prior to these incidents, disciplined employees for consuming alcohol on the premises.

- Also, in May and June 2001, the licensee had hired a private investigation company which resulted in two bartenders being fired for consuming alcohol. The general manager testified that he had 'written up' employees for drinking on the job and that he had done everything in his power to ensure that the policy was followed.

In summary, the licensee submitted that

- a) There was no direct involvement of the licensee;
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- b) The licensee had a reasonable, well articulated and well communicated policy in place that specifically identified the contraventions;
- c) The licensee took reasonable steps to ensure that employees complied with policies by:
 - i) reaffirming their policy through known discipline of employees for breach of the policy;
 - ii) by having adequate supervision including use of management and security personnel;
 - iii) on a previous occasion, by replacing management when policies were not being followed; and
 - iv) by hiring independent, third party investigators to assist in ensuring policies were complied with.

[7] In the alternative, the licensee submitted that if it is found that the licensee acted with due diligence on some but not all occasions, the imposition of the monetary penalty would have to be reconsidered in light of the 'progressive discipline' approach in the Regulations.

ANALYSIS

[8] In my view of this case, two key submissions of the licensee to establish the defence of due diligence are, that the licensee had a reasonable, well articulated and well communicated policy in place and that staff meet regularly to discuss and reaffirm the policies and procedures. I do not share the licensee's confidence that the evidence discloses either of these key ingredients. Counsel did not provide me with any transcript references or indicate which witness addressed these aspects.

[9] The licensee referred to Exhibit No. 10 which is a chronology of management investigations and employee firings from March 2001 to July 2002 which the

general manager prepared just prior to this hearing to show how management is conducted at Richard's. The licensee also referred to the private investigation firm. At page 46 of my decision, specifically addressing the alleged contraventions of employees consuming liquor on November 9, 10 and 16, 2001, I reviewed the licensee's evidence:

The licensee submitted evidence to document the house policies, the licensee's attempts to improve the conduct of employees and the licensee's actions on progressive discipline. The Classified Investigative Services Inc. report was in May-June 2001, 4 to 5 months prior to these incidents. The licensee hired the company only the one time. In my view, this evidence does not assist the licensee. Clearly, the conduct of the staff was improper in many respects on these three nights, - the door control announced free shooters, many staff consumed liquor, staff gave patrons free liquor, the capacity was at or beyond the BOL.

The progressive discipline documents for Bartender A admittedly had been rewritten prior to the hearing. The facts that the forms were not signed by the employees and that one hand written form was dated 2002 instead of 2001, lead me to conclude that I could place no reliance or credibility, whatsoever, on these documents. I find that this portion of the evidence coupled with the general manager's lack of understanding of liquor regulation concerning free liquor, treating patrons, manufacturer's tastings, undermined his credibility. I also note that, generally, he did not provide any documentation to show ongoing training, updating of policy manuals, reports and directions to staff following the January 2002 meeting with the police. Overall, I found his evidence to be self serving and lack credibility.

[10] It is obvious from those comments that I found employees to be in breach of a number of legal requirements and found some of the licensee's evidence at the hearing to be self serving and lacking in credibility. Of particular concern in considering the defence of due diligence is the evidence that the general manager was not aware of liquor regulations. Overall, the evidence at the August 2002 hearing suggested that there was minimal supervision and control by management over the employees.

[11] In a recent decision, *Haney Hospitality Ltd.*, EH03-170, July 27, 2004, I considered evidence of due diligence relating to an allegation that the licensee permitted a minor to be in the premises. The licensee, represented by the same law firm as in this case, submitted cases under the *Tobacco Sales Act* involving minors purchasing cigarettes. The licensee's submissions in that case begin at page 15:

In *R. v. C.C. Eric James Management Ltd.*, 2000, B.C.P.C. 178, the court held that failure by an employee to require identification is not conclusive, but that one must look at the actions by the employer, the directing mind of the corporation, to determine whether the employer has a defence of due diligence. The Court stated, at paragraph 6:

A useful question to keep in mind, and perhaps another way of expressing the test when reviewing the actions of an employer in a case such as this, is what else might the employer have done to prevent the commission of this offence. If it is possible to identify and articulate preventive actions which are reasonable, and which common sense demands in the circumstances faced by the employer, and which were not undertaken, then the defence of due diligence would not protect the employer.

The Court provided a list of evidence of preventive measures in that case including

- oral training and written materials for new employees;
- an automatic computer prompt reminding employees of the age issue;
- posting of signs about the legal age;
- posting of communications from the Health Board;
- using decoy purchasers;
- posting an earlier violation notice;
- verbal reminders to employees;
- isolating one till run by an experience employee for cigarette purchases; and
- instruction to employees to request identification from anyone appearing to be under 25 years old.

The Court found that this evidence established the defence of due diligence.

In *R. v. 348095 B.C. Ltd.*, 2003 B.C.P.C. 58, the Court found that due diligence had been made out based on the following factors:

- New employees were given oral instructions about the law;
- New employees were required to sign acknowledgements of the employer's instructions;
- The employer used "Shop Watch" to check whether employees were following instructions;
- Employees who did not comply were disciplined;
- Signs required by legislation were prominently posted in the store.

12] Although the contraventions are different, the list of factors considered by the Courts in the tobacco cases is helpful in considering the evidence in this case.

13] In the decision in the *Haney* case, I noted that it is not enough to point to policy documents. Rather, it is necessary to go the further step of showing that the licensee has been conscientious in ensuring that staff follow the policies and understand the importance of enforcing the laws. In this case, I found that the licensee's evidence did not include documentation of ongoing training or updating of policy manuals.

14] Referring to Mr. Carter's specific submissions on the evidence, I note the following:

- The new manager took over approximately the same time as the current owners, which was in 1997. The fact that he replaced the general manager at that time is not germane to the conduct of the establishment as of these 2001 contraventions.
 - I accept the licensee's submission that staff had been told they were not permitted to drink with the patrons. I do not accept the submission that staff were directed to tell patrons they were not permitted to drink with them. The former owner "testified that it is common in the industry for bar staff to have non alcoholic drinks when patrons buy them a
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drink. He said appearing to drink with customers is a way of building relationships and, since most employees are being paid minimum wages, they need to build relationships to increase gratuities” (December 19, 2002 decision, page 24). I noted the manager’s evidence on this at page 19:

- Concerning the juice shooters, the manager said it was a common practice when a customer buys a drink for the bartender, for the bartender to pour a non-alcoholic drink and pocket the money. Because the police were concerned about the practice, Richard’s eliminated it.
- The practice was eliminated following a meeting with the police in January 2002. I find that the practice in place at the time of these contraventions was that the licensee condoned staff giving the appearance of drinking with patrons.
- Given that practice, it is not surprising that the licensee submitted that there would have been nothing in the employees’ conduct to suggest that they were consuming liquor. However, in my view, if the police were able to observe that bartenders poured the drinks from the same bottles as they used for customers, the licensee’s personnel could also have observed that. I do not accept the submission that the licensee would have no reason to suspect the bartenders were drinking from the same bottles as patrons. I reiterate what I said at page 46 of the decision:
- The licensee argued that the officers could not say with certainty that staff were drinking liquor. I accept that bartenders may use empty liquor bottles to hold an assortment of beverages. I also accept that there may have been a practice in the industry to substitute juice shooters. However, on the evidence from the officers from these three nights, I find on a balance of probabilities that staff were consuming alcohol on each occasion. It defies credibility to
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suggest that drinks poured from the same bottle and served to patrons were juice shooters or other non alcoholic beverages.

- I accept the licensee's submission that there are seven (7) door security employees on duty on busy nights and that these employees train weekly. That provides some evidence of the licensee's diligence on security but I find it does not assist the licensee in demonstrating due diligence in other aspects of the operation.

- The evidence about the November 10, 2001, incident with Bartender A shows that the general manager was aware that he had taken a drink from a bottle of beer, that he observed him for about twenty minutes and that he suspended him. The conduct of this bartender was blatantly improper and illegal by all descriptions. The general manager's response demonstrates that there was some supervision. However, as I noted earlier, the progressive discipline documents for Bartender A admittedly had been rewritten prior to the hearing and that undermined the credibility of the licensee's evidence.

15] Referring to Mr. Carter's summary, I find that the evidence does not support the contention that there were well articulated and well communicated policies in place. I find that the evidence suggests there were policy manuals but I do not have compelling evidence that employees in fact read and signed these documents at the commencement of their employment. Although the licensee referred to staff meetings, the evidence does not demonstrate regular meetings or regular education about legal responsibilities.

[16] There was testimony that the licensee hired a private investigation firm, two (2) employees were dismissed for consuming liquor, following the private investigation, and Bartender A was suspended on the evening he was found drinking. I find these actions, without some further evidence of ongoing,

weekly or daily guidance to staff, are not sufficient to found a defence of due diligence.

[17] I find that there was not adequate supervision. The submission that the licensee would not have been able to discern that employees were drinking liquor suggests either that there was no supervision or that the licensee was turning a blind eye to the practice.

[18] One of the tests from the tobacco cases is whether the licensee could have done more by having other preventive measures in place. In this case, the licensee hired a private investigation firm in May and June 2001, but there was no credible or compelling evidence that the licensee continued surveillance. There was also no specific evidence about staff meetings or communication about procedures when patrons buy a drink. I think ongoing surveillance, supervision and staff meetings would have assisted the licensee.

[19] The bar manager had not read the 'Guide to Liquor Licensee's' in six (6) years although he said his employer would assume he kept current. The licensee could have had procedures in place, such as regular management meetings or evaluations, to ensure the management employees were current with the legislative requirements. The inference I take from the evidence is that the licensee did not regularly review the legislative requirements or provide management employees with a copy of the Guide each year.

[20] At page 53 of my decision, in the context of penalties, I stated:

The licensee argues against imposing penalties on the grounds that it took due diligence to ensure its employees did not consume liquor while working. In my view, the licensee's evidence on this was self-serving, and as I said above, it was neither compelling nor credible. I prefer the evidence of the police officers who testified that there was no apparent management presence.

The licensee did not leave me feeling reassured that it placed a priority on ensuring the staff were familiar with or followed the liquor regulations, which are conveniently set out in the Guide to Liquor Licensees. The staff who testified at the hearing were remarkably unfamiliar, particularly considering they were coming to give evidence at a branch hearing, with some of the requirements.

[21] Having again reviewed the evidence for this reconsideration, I find that my view has not changed. The preponderance of the evidence suggests that the licensee did not have adequate policies or procedures in place to ensure staff were acting within the legal parameters.

[22] I find that the licensee has not established the defence of due diligence for any of the contraventions.

ORDER

Monetary Penalties

[23] I confirm the Orders made in my decision dated December 19, 2002, as follows:

2. For the contravention on November 9, 2001, employee consuming liquor while working, section 10(2) of the Regulations, I impose a monetary penalty of \$1,000 (one thousand dollars).

5. For the contravention on November 10, 2001, employee consuming liquor while working, section 10(2) of the *Regulation*, I impose a monetary penalty of \$2,000 (two thousand dollars).

10. For the contravention on November 16, 2001, employee consuming liquor while working, section 10(2) of the *Regulation*, I impose a monetary penalty of \$3,000 (three thousand dollars).

[24] The licensee remitted payment of the total monetary penalties \$28,000, under protest, and they were deposited by the branch in January 2003. Accordingly, there are no additional monies owing to the branch or refundable to the licensee.

Licence Suspension

[25] The other part of the December 19, 2002, Order was for licence suspensions totaling six (6) days. The branch agreed to a temporary stay of the licence suspensions pending resolution of the *Judicial Review Procedure Act* proceedings. As the licensee was not successful in challenging the Orders for the licence suspensions, the branch is removing the stay of the licence suspensions.

[26] I order the licence suspension of six (6) days to commence as of the close of business on Thursday, October 14, 2004, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 54(1) of the *Regulation*).

[27] During the hearing, evidence from the licensee's witnesses indicated that Richard's does not necessarily open on the same days each week. Therefore, I do not know what days will be "business days" for Richard's in October 2004. In order to ensure that this Order is effective, I direct that the liquor licence for Richard's on Richards be held by the branch or the Vancouver Police Department from the close of business on Thursday, October 14, 2004, until the licensee has demonstrated to the branch's satisfaction that Richard's has been closed for six (6) business days.

[28] The suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or police officer. A member of the Vancouver

Police Department or the branch will attend the premises, take possession of the liquor licence and hold it in safekeeping during the term of the suspension.



M. G. Taylor
Enforcement Hearing Adjudicator

Date: September 1, 2004

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Lee Murphy, Vancouver Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Shahid Noorani, Branch Advocate
