



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

In the matter of

The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

And in the matter of

A referral back from the British Columbia Supreme Court

Licensee: The Plaza Cabaret Ltd.
dba Plaza Cabaret
881 Granville Street
Vancouver, BC

Case Number EH02-005/019

Appearances:

For the Licensee J. Barry Carter

Enforcement Hearing Adjudicator Suzan Beattie

Date of Decision March 10, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

This is a referral back from the British Columbia Supreme Court (*The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248 (February 23, 2004)) of a decision I rendered on October 31, 2002. The court quashed the finding and resulting license suspension of a contravention of Section 4(7) of the Liquor control and Licensing Regulation on January 12, 2002. As well, the court remitted back for reconsideration the issue of whether the licensee had proven on a balance of probabilities the defense of due diligence regarding the contravention of permitting unlawful activities or conduct in a licensed establishment. This decision deals with the issue of the defense of due diligence.

LEGAL FRAMEWORK

Due Diligence

In the *Plaza Cabaret* (supra), the Supreme Court stated:

[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.

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The general Manager did not address the question whether the employee was the licensee's

directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining question, namely whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons. That inquiry requires, of course, consideration of who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.

On the first aspect, whether the employee who committed the contraventions was the directing mind, I agree with the licensee that the directing mind was the owner/manager. There was no evidence linking the employee in question, the bartender, to the supervision or the management of the licensee's operation.

Additionally, there was no evidence linking the impugned action of unlawful conduct or activities to the 'directing mind.'

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 contravention of Section 36(2)(b) of the *Liquor Control and Licensing Act* by permitting unlawful activities or conduct.

LICENSEE'S SUBMISSIONS

Due Diligence

The licensee submitted that the test it must meet is whether it took all reasonable care to establish a proper system to prevent unlawful activity occurring on its premises. It submitted that the mere fact that the bartender may have been involved peripherally in a drug transaction is not, in and of itself, determinative of a lack of due diligence on the part of the licensee. However, it may be an indication of the need to increase the supervision and/or "vigilance" of the licensee (see: *General Manager Liquor Control and Licensing Branch v Lonsdale Quay Hotel*, 2000 BCCA 383).

The licensee reviewed the evidence from the hearing in April, May and July, 2002, and in its submission outlined the following as supporting its position that it demonstrated due diligence.

- The owner/managers have a well-established zero tolerance drug policy that is well known to employees and incorporated into the Employees Handbook. This policy is reinforced at regular staff meetings.

 - The bartender was suspended from employment and the owner/managers conducted an investigation. As part of their
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investigation the bartender submitted to a polygraph test conducted by an expert in the field. The bartender was only reinstated after the owner /managers received the results of the polygraph test.

- The fact the owner/managers hired a security consultant with respect to security. As well, they hired a security firm to handle security within the establishment.
- On weekends (the contravention occurred on a Friday evening) the owner/managers have 6 or 7 security individuals on site.
- Concerns involving drug transactions in its establishment resulted in the owner/managers instructing its security contractor to institute covert attempts to test its employees.

In summary, the licensee argued that it had taken all reasonable steps to ensure the effective operation of their zero tolerance drug policies.

ANALYSIS

A recent decision, *Haney Hospitality Ltd.*, EH03-170, July 27, 2004, considered evidence of due diligence relating to an allegation that a licensee permitted a minor to be in the premises. In the *Haney Hospitality* case, the adjudicator referred to a list of preventive measures enumerated in court decisions involving minors purchasing cigarettes. The list of evidence to establish the defense of due diligence considered by the court in the *C.C. Eric James Management Ltd. R. v C.C. Eric James Management Ltd., 2000, B.C.P.C. 17* included:

- 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;
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- 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.

Another tobacco case included in *Haney Hospitality* was *R. v. 348095 B.C. Ltd.*, 2003 B.C.P.C. 58. In this case, 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.

Although the contravention before me of permitting unlawful activities or conduct in the licensed establishment differs from the tobacco cases, I agree with the adjudicator in *Haney Hospitality* that the list of factors considered by the courts in the tobacco cases is helpful in considering the evidence of due diligence in the case before me.

In this case, the licensee submits it has taken all reasonable steps to ensure the effective operation and enforcement of its zero tolerance policy on drugs.

In my view, the appropriate test is that stated by the court in *Eric James Management Ltd.*, *supra*, as follows:

[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 defense of due diligence would not protect the employer.

Referring to the licensee's specific submissions on the evidence, I note it has made two main submissions to establish its defense of due diligence: first, that it has established policies and procedures in place to enforce its zero tolerance drug policy and second, that it has an extensive security system to ensure there is no unlawful activity or conduct in its establishment.

I will review the evidence of each submission in turn.

Policies and Procedures of Licensee

Zero tolerance drug policy known to employees

The evidence was uncontradicted that the licensee has a commitment to operating a drug free environment. The emphasis on a zero tolerance policy was well-known to the staff, some of whom have been employed by the licensee for close to twenty years.

The bartender involved in the incident in question testified that he was aware of the licensee's zero tolerance policy. The bartender admitted to identifying the male patron the undercover constables had observed selling drugs. The undercover constables approached the male identified by the bartender, asked for ecstasy and made a drug purchase.

The bartender testified that he made a mistake in not "brushing off" the undercover police officers and in not following the zero tolerance policy by advising the security staff that the undercover officers acting as patrons were interested in a drug transaction.

An owner/manager testified that one of the reasons he and his family have lasted in business for thirty years is because they are known to have a zero tolerance drug policy. Their policy has also resulted in problems with a segment of society and threats and other actions which were reported to authorities. However, he and other family members who are owner/managers operate a "hands-on" management style and demonstrate to their staff by their words and their actions the importance of enforcing their policy.

Policy of zero tolerance of drugs incorporated into Employee Handbook

The owner/managers operate a number of licensed establishments in the downtown area. To do so successfully and consistently they have employee handbooks. The Plaza Club Employee Manual was entered into evidence. One of the owner/managers testified that when a new employee is hired they are trained "to the manual". An example in evidence was that of training a bar staff employee. The employee handbook stated the zero tolerance policy and explains that any involvement or possession in drugs will result in termination.

After training, the employee signs a form stating they have read and understand the policy and procedures manual. One owner/manager testified that the employee's keep a copy of their signed agreement.

As well, the security consultant hired by the owner/managers in 1996 testified of his on-going involvement in developing policies and procedures for the operation of the owner/managers licensed establishments.

Regular staff meetings reinforced zero tolerance drug policy

Evidence was given by two owner/managers and the bartender of staff meetings occurring at least twice a month. The bartender testified that he attended a staff

meeting during his period of suspension. At least one of the owner/managers is in attendance at these meetings.

The employee who did not comply with the zero tolerance policy was suspended.

As noted above, the bartender involved in the incident of November 9, 2001, was immediately suspended from employment. The owner/managers felt the bartender was a good employee. They subsequently contacted their security consultant who recommended hiring a polygraph expert to question the bartender about his involvement, if any, in the drug transaction witnessed by the undercover police officers.

One of the owner/managers testified that they keep employee files and are prepared to terminate employees for failure to follow the manual. They also stay on top of developments with their staff. An example was give of the staff meeting at 3:30 a.m. immediately following the bartender's questioning by police.

The suspended employee was subjected to a polygraph test.

The owner/managers' security consultant testified that his recommendation to hire a polygraph expert was based on his intention to demonstrate that the owner/managers were prepared to take action to determine, to the best of their ability, the truth of incident of November 9, 2001. They also wanted to treat the bartender fairly while attempting to determine if he was part of an illegal drug action. The security consultant testified that one of his concerns was that the police did not have a case against the bartender based on the fact the employee was not charged by the police. It was important to protect the owner/managers' standard of zero tolerance as well as the employment rights of the bartender.

As noted in the original decision, based on the pre-test and the polygraph examination, the experienced polygraph operator formed the opinion that the

bartender was truthful and that he had never sold or assisted in the sale of illegal drugs while employed at the establishment. The bartender was re-employed shortly thereafter.

Security Systems of Licensee

Hiring of consultant on security systems

The security consultant hired by the owner/managers in 1996, was a retired police officer experienced in liquor enforcement issues and security concerns of licensed premises. Commencing in 1996, the security consultant testified that he put together a plan working with the police, the owner/operators and a private security company.

Security firm retained to provide security within the establishment

As part of the security consultant's recommendations, a private security firm is retained to handle security inside the establishment. The bartender testified that, if he did see evidence of a drug transaction he knew he should tell security and they would deal with the situation. One of the owner/managers testified that the security firm trains its own employees to operate the door control for the establishment.

Increased security staff on weekends

Evidence was given by one of the owner/managers of the discussions with the security firm around increasing staff on weekends. The security firm has been employed by the owner/managers for approximately three years. There was evidence that the police as well as the owner/managers are satisfied with the weekend security staff.

Covert attempts to test employees and patrons

One of the owner/managers testified that, approximately two or three weeks prior to November 9, 2001, he was suspicious of the same male patron that the bartender pointed out to the undercover officers. The owner/manager along with his bar manager had three friends try and purchase drugs from the male patron. The male patron “passed” and the three friends were unsuccessful in their attempts to “set up” the male patron.

As well, there was additional evidence provided by an owner/manager that the security firm has done covert operations to determine if any staff or patrons have been involved in selling drugs within the establishment. These attempts by the security firm to find evidence of violations of the zero tolerance policy have been unsuccessful.

Summary

I have considered each of the licensee’s specific submissions on policies and procedures and its security system and find that these measures are sufficient to found a defence of due diligence.

I find that the licensee did have preventive measures in place, and did provide credible and compelling evidence respecting its staff meetings, policies, procedures and security. The preventive actions taken by the owner/managers were reasonable and meet the test set out in *Eric James Management Ltd.*, supra. On the totality of the evidence, the licensee has been duly diligent in its attempts to prevent unlawful conduct and has taken reasonable steps to supervise staff and patrons.

In summary, the licensee did have adequate security measures, policies or procedures in place to establish a defense of due diligence for the contravention

of permitting unlawful activities or conduct in a licensed establishment contrary to Section 36(2)(b) of the *Liquor control and Licensing Act*.

ORDER

Therefore, I vary my decision dated October 31, 2002, to read as follows:

Pursuant to Section 20(2) of the *Act*, concerning Primary Liquor Licence No. 188794,

I dismiss the contravention of Section 36(2)(b) of the *Liquor Control and Licensing Act* on November 9, 2001.

The contravention of Section 4(7) of the *Liquor Control and Licensing Regulation* on January 12, 2002, and resulting licence suspension, is quashed.

For the contravention of Section 38(3)(b) of the *Liquor Control and Licensing Act* on January 19, 2002, I order the licence suspended for one (1) day.

For the contravention of Section 12 of the *Liquor Control and Licensing Act* on January 12, 2002, I impose a monetary penalty of \$1,000.00 (one thousand dollars) to be paid no later than November 29, 2002.

The branch agreed to a temporary stay of the licence suspension pending resolution of these proceedings. As the licensee was successful in proving a defense of due diligence with respect to the contravention of Section 36(2)(b), the branch is removing the stay of the licence suspensions.

The licensee paid their monetary penalty on November 29, 2002.

I order the licence suspension of one (1) day to commence as of the close of business on Thursday, March 31, 2005, 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 67 of the *Regulation*). As I do not know what days will be "business days" for the licensee, I direct that the Primary Liquor Licence No. 188794 be held by the branch or the Vancouver Police Department from the close of business on Thursday March 31, 2005, until the licensee has demonstrated to the branch's satisfaction that it has been closed for one (1) business day.

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

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: March 10, 2005

cc: Vancouver Police Department

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

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