



**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:	Barriere Motor Inn (1983) Ltd. dba Barriere Motor Inn PO Box 889 4347 Yellowhead Hwy Barriere, BC V0W 1E0
Case:	EH09-146
For the Licensee:	Rajdeep Mahal
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	George C.E. Fuller
Place of Hearing:	Written Submissions
Date of Decision	June 10, 2010

INTRODUCTION

The corporate licensee, Barriere Motor Inn (1983) Ltd., dba Barriere Motor Inn, (the licensee) holds Liquor Primary Licence Number 011269, which allows the service of liquor between 11:00 a.m. and 1:00 a.m., Monday through Thursday. On Fridays and Saturdays, the hours of service are 11:30 a.m. to 1:30 a.m. and on Sunday, the hours of service are 11:00 a.m. to 12:00 midnight. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "*A Guide for Liquor Licensees in British Columbia*".

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The branch's allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated March 31, 2010.

The branch alleges that on December 12, 2009, the licensee contravened section 44(3) of the *Liquor Control and Licensing Regulation*, by allowing consumption of liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service. The proposed penalty is a suspension of the liquor licence for a period of four days (Item 26 of Schedule 4, *Liquor Control and Licensing Regulation*).

Item 26 of Schedule 4 of the Regulation provides a range of penalties for a first contravention of this type of a licence suspension for four to seven days and/or a monetary penalty of \$5,000.00 - \$7,000.00.

If the above contravention is not found, the branch has asked the general manager to find the alternative contravention listed in the NOEA.

The licensee does not dispute that the contravention occurred. However, it does dispute the proposed penalty. The branch and the licensee agreed that the hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Regulation, B.C. Reg. 244/2002***

Section 44(3) of the *Liquor Control and Licensing Regulation* provides as follows:

Time

44 (3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

ISSUES

1. Did the contraventions occur?
2. If so, is a penalty warranted under the circumstances?
3. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted for consideration:

Exhibit 1: Branch's package of disclosure documents, with covering letter dated April 30, 2010.

Exhibit 2: The Licensee's submissions, dated June 1, 2010.

EVIDENCE AND SUBMISSIONS

As previously indicated, the licensee does not dispute that the contravention occurred as alleged by the branch. Accordingly, in view of the fact that the material facts alleged are unchallenged, the evidence can be summarized as set out below.

The Branch's Evidence and Submissions are summarized as follows:

At approximately 1:15 a.m. on December 12, 2009, the Liquor Inspector attended at the licensee's premises in order to surveil the licensee's closing procedures. Under the terms of the licensee's licence, liquor service had to be terminated at 1:30 a.m. with all liquor consumption ended and patrons cleared from the establishment by 2:00 a.m.

The Inspector entered the lobby of the Barriere Motor Inn and noted two employees talking at the front desk. One of those individuals identified himself as the Operations Manager and the Inspector requested to enter the bar at 2:16 a.m., as he could see the bartender take a drink from a Budweiser beer bottle at the bar. Also at the bar was an open and partially consumed bottle of Miller Genuine Draft beer. The other employee who had been in the lobby, then entered the bar and positioned herself in front of the bottle of beer. The Inspector asked the bartender who the beer belonged to and she advised that someone must have bought it for her. At this point, the Operations Manager demanded that the liquor be disposed of immediately.

The Operations Manager then invited the Inspector to come to his office to discuss the matter further. The Operations Manager inquired as to whether the situation could be rectified if he terminated the employment of the employee. The Inspector responded by pointing out that it was he, the Operations Manager, who was responsible for the actions of his employees. The Operations Manager insisted that he would fire the employee immediately. The Inspector indicated that he would return the following week to deal with the situation and left the establishment at 2:45 a.m.

At 2:30 p.m. on January 14, 2010, the Inspector returned to the establishment and met with the Operations Manager. At that time, the Operations Manager freely acknowledged that he knew what was going on when the Inspector asked for entry into the bar. He advised that he had attempted to get through the door before the Inspector in order to warn the bartender, thus giving her an opportunity to hide the two bottles of beer. The Inspector had effectively thwarted these efforts by quickly stepping through the door before the Operations Manager. On the basis of these clear, inculpatory

admissions, the Inspector issued contravention Notice B012478 to the Operations Manager, alleging breaches of Sections 44(3) and 42(3) of the *Regulations*.

The Licensee's Evidence and Submissions are summarized as follows:

In his e-mail communication to the branch of June 1, 2010, the owner of the establishment indicated that he was not in control of the operation of the establishment as he was visiting India at the time. He states, however, that he would take full responsibility for the contravention and acknowledged that the licensee had failed to explain the rules to its staff members. He stated that he had operated the business for the last two years and was strictly following the rules and, in particular, had not served anybody after hours. The licensee makes the distinction that it was an employee drinking and not a customer, and therefore for a first contravention the penalty recommended is unreasonable and that a two day suspension would be acceptable. The licensee further stated that if the minimum penalty is a four day suspension or a \$5,000 monetary penalty, then he would prefer the four day suspension. Furthermore, such a suspension should run from Thursday to Sunday, because it would be an economic hardship to have the suspension in place over a weekend.

Finally, in support of his plea for the suspension to be served during the week and not over a weekend, the licensee states that because the establishment was the only bar in town, people would be unhappy because the bar was closed.

DECISION AND REASONS

The licensee has admitted the contravention. Accordingly, having considered all of the evidence, I find that on December 12, 2009, the licensee contravened section 44(3) of the *Liquor Control and Licensing Regulation*, by allowing a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

In view of the fact that I have found that a contravention occurred in this case with respect to section 44(3) of the *Regulations*, it is not necessary for me to consider the branch's alleged alternative contravention concerning section 42(3) of the *Regulations*.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

The leading case is: **R v. Sault Ste. Marie** (1978) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of **Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch** (2004) BCSC 248 (CANL II), sets out the criteria a licensee must meet in order for it to be found not responsible for contravention under the Act:

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of Section 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 are, 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." (para. 25)

The court in **Plaza Cabaret** clarified that the directing mind need not be an officer or director of the licensee:

"It would be the individual or individuals, perhaps the general manager or shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee." (para. 27)

Here, I find that the directing mind of the licensee at the time of the contravention was the Operations Manager. He was onsite and in charge at the time of the contravention.

The licensee has failed to lead any evidence or documentation identifying procedures, policies, or staff training which were in existence at the time of the contravention. To the contrary, the evidence discloses that the Operations Manager had full knowledge of the contravention at the time of the inspection and, in fact, attempted, through subterfuge, to prevent the Inspector from carrying out his lawful duties.

Accordingly, I am left to conclude that the licensee had not developed adequate policies or procedures for the guidance of staff, nor had it provided staff with formal training on the liquor licence requirements.

As a result, I find that the licensee has not met the test for due diligence.

PENALTY

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, or both, is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is the achievement of 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 the public safety and the well being of the community. I have considered all of these factors in this case.

There is no record of prior proven contraventions, of the same type for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulations*, Schedule 4, Section 1(1)(b), the branch has treated this instance as a first contravention. The fact that this is a first contravention, and the licensee has no compliance history, however, is only one consideration in determining whether penalties are warranted. The range for a first contravention of this type is a licence suspension of four to seven days, and/or a monetary penalty of \$5,000 to \$7,000.

Although any breach of the *Act* or *Regulations* could be considered serious, I find that this particular contravention falls at the upper end of the seriousness scale. To begin with, the Operations Manager brazenly attempted to negotiate with the Inspector and offered to sacrifice the employment of one of the licensee's employees as resolution to the imposition of a contravention notice. This same individual, as noted above, also attempted to physically interfere with the efforts of the Inspector to witness the contravention.

Both of these actions, in my view, clearly demonstrate that the licensee, not only failed or refused to recognize its responsibility for compliance with the *Act* and *Regulations*, it, through its guiding hand, the Operations Manager, actively participated in undermining the Liquor Licensing legislation. Such an attitude must be discouraged through the application of an appropriate penalty.

Any penalty imposed must be sufficient to ensure compliance in the future. In the circumstances of this case, I find that the minimum suspension penalty is adequate in order to encourage future voluntary compliance. Accordingly, a four day suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 011269 for a period of four days, to commence on the close of business on Thursday, July 15, 2010, and to continue each succeeding business day until this 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*).

To ensure that this Order is effective, I direct that the Liquor Licence be held by the Branch or the Barriere R.C.M.P. detachment from the close of business on Thursday, July 15, 2010, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: June 10, 2010

cc: RCMP Barriere Detachment

Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate