



**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:	Merlin's Cabaret Ltd. dba Boom Boom Room 1208 Wharf Street Victoria, BC V8W 3B9
Case:	EH05-019
For the Licensee:	Peter K. Jones Jeffrey Wilson
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	November 22, 2005
Place of Hearing:	Victoria, BC
Date of Decision:	January 18, 2006

INTRODUCTION

The licensee, Merlin's Cabaret Ltd., operates the Boom Boom Room ("the cabaret") under Liquor Primary Licence No. 050182. The hours of operation are 7:00 p.m. to 2:00 a.m. Monday through Saturday and to midnight on Sunday. The licensed capacity is 334 patrons. The licence is subject to the terms and conditions set out in the publication "Guide to Liquor Licensees in British Columbia" which was updated effective August 2004.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated May 16, 2005, the Liquor Control and Licensing Branch ("the Branch") alleged that on December 3, 2004, the licensee contravened Section 42 (3) of the *Liquor Control and Licensing Regulation*, which provides:

42 (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

The recommended enforcement action is a one (1) day suspension of the liquor licence (Item 27 of Schedule 4, *Regulation*).

ISSUE(S)

1. Does the evidence support the branch's allegation that on December 3, 2004, a bartender and a server at the Boom Boom Room consumed liquor?
 2. If yes, what, if any, is the appropriate penalty?
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PRELIMINARY ISSUES

The licensee made three preliminary applications. The first was an application requesting that I, as a delegate of the general manager of the branch, withdraw the Notice of Enforcement Action. The reason for the application was that, given the licensee's exemplary record with the branch during the nine years of operation, enforcement action was not necessary to ensure voluntary compliance. The licensee had requested that the branch withdraw the action prior to the commencement of the hearing, and asked that I convene a preliminary hearing, but the branch declined both applications.

I advised at the hearing that my authority as the delegate of the general manager is limited. In my view, it does not extend to deciding to withdraw Notices of Enforcement Action. Rather, my authority is limited to conducting the hearing and making decisions on whether a contravention has occurred and what, if any, is the appropriate penalty.

The second application was to dismiss the enforcement action because of delay by the branch in bringing the alleged contravention to the attention of the licensee. The alleged contravention occurred on December 3, 2004, the Contravention Notice was issued on January 13, 2005, the Notice of Enforcement Action was issued on May 16, 2005, and the hearing was commenced on November 22, 2005. The licensee submitted that the licensee has numerous video monitors throughout the establishment and that the tapes are saved for seven days. If the branch had notified the licensee at the time of the contravention, these tapes would have provided valuable evidence. Additionally, the licensee submitted that due to delay witness recollections fade with time, witnesses leave employment and move and, generally, evidence disappears.

I ruled that it was not possible to know whether the licensee was prejudiced in its ability to respond to the branch's allegations or present evidence until the evidence was tested in hearing. Accordingly, I reserved my decision on the delay application.

The licensee's third application concerned admissibility of unproven alleged contraventions contained in the NOEA. I ruled that the NOEA was a proper document and that the licensee would be at liberty to make submissions concerning the weight, if any, to be given to specific information contained in the document.

EXHIBITS

Exhibit No. 1	The branch's Book of Documents, Tabs 1 – 15
Exhibit No. 2	Licensee's Authorization of Agent
Exhibit No. 3	DENCITY Police Undercover Operators' Observations
Exhibit No. 4	Wilson Brothers Entertainment Corp. Employee Conduct and Information Manual, October 2000
Exhibit No. 5	Staff Discussion Report
Exhibit No. 6	Employee statement dated July 5, 2005
Exhibit No. 7	Employee statement dated January 19, 2005
Exhibit No. 8	Employee statement dated November 21, 2005
Exhibit No. 9	Employee Acknowledgment Sheet
Exhibit No. 10	'Mocktails' menu

EVIDENCE

The branch's witnesses were two police officers and a Compliance and Enforcement officer (C&E officer). The licensee's witnesses were the general manager, night manager, bar manager, and a server.

During November and December 2004 Victoria Police Department carried out an initiative called Operation Dencity. This operation involved the use of undercover police officers from Vancouver and the Lower Mainland, who were deployed in various licensed establishments over a period of two weeks. The primary focus of these officers was to purchase drugs and to gather evidence of drug trafficking; their secondary objective was to gather evidence of contraventions of the *Liquor Control and Licensing Act*.

The police officers testified that on December 3, 2004, they attended the Boom Boom Room as part of the Dencity operation. At some point between 1:00 and 2:00 a.m., they observed a man approach the bar and speak with the bartender who then poured

contents from at least two bottles, which were in a well in front of the bartender, into a shaker and then pour the contents into two clear shot glasses. The bartender and the patron consumed the drinks.

The licensee's evidence was that the bottles in the well frequently are non-alcoholic mixers. The licensee was not able to identify the bartender from the material provided by the branch prior to the hearing.

The police officers testified that one server was carrying a tray with pre-poured shooters. The plastic shot glasses contained a red liquid and all the glasses appeared to have the same liquid. The police officers testified that they did not see any particular groupings of glasses on the tray and they did not recall seeing a larger glass with money or any other cash caddy. The police officers ordered one shooter each and the server consumed one with them. The police officers testified that the glasses were in the middle of the tray and that the server appeared to take her glass from the same area they took theirs. One police officer testified that he paid \$6.00 to the server and did not observe what she did with the cash. He did not discuss the price with her but recalled from other occasions at the Boom Boom Room that the shooters cost \$2.00 each.

The main concern of the police officers this night was observations of possible drug transactions.

Based on the notes of another police officer who was present this night but did not testify at the hearing, the licensee identified a particular server who they had attend the hearing and who testified. It became obvious during the hearing that she was not the same server the two officers referred to. The server and the general manager testified that the usual practice at this time was that the bartender or the server set up the shot glasses on the tray with non-alcoholic glasses grouped around the cash caddy, which was a larger glass. When patrons offered to buy a drink for the server, the server would take a non-alcoholic shooter. The licensee's practice was to allow

patrons to think that the server was having an alcoholic drink with them, to appear to be joining in the fun and participating with the patrons.

ANALYSIS AND DECISION

I have concluded that the branch has not proven on a balance of probabilities that either staff member consumed alcohol as alleged for the reasons that follow.

Concerning the incident with the bartender, the police officers' evidence did not confirm whether the man was a patron or a staff member, whether the bottles contained liquor, whether the bartender received any payment for the drinks or where the man went after consuming the drink. The licensee's theory was that the man might have been a member of staff who wanted a juice shooter, or a patron who was not drinking alcohol. Given the lack of detail from the officers' testimony, I find that this allegation has not been established.

Concerning the server, there was conflicting testimony and suppositions. The main evidentiary point was whether it was likely that the server had non-alcoholic shooters on the tray in a grouping that separated them from the alcohol shooters. The licensee's theory was that those shooters would have been grouped around the glass money caddy. The police officers did not recall seeing a money caddy.

Since the server was not identified and not present at the hearing, I can only draw probable conclusions based on the licensee's practice as testified to by the server and the manager. Clearly, the server would have had some method of storing cash. I accept the licensee's evidence that the usual practice would have been to use a glass or tumbler. I find it more likely than not based on the evidence I heard that a server would have had some form of cash caddy on the serving tray.

The licensee's evidence about the placement of non-alcoholic shooters is plausible, as is the licensee's evidence about the practice of consuming non-alcoholic shooters.

The police officers did not discuss the drinks nor the price with the server. I appreciate that the police officers were more intent on the other aspect of their surveillance. I find that the police officers' testimony is insufficient for me to draw a conclusion that the server consumed liquor.

ORDER

I find that the branch has not demonstrated on a balance of probabilities that the licensee contravened Section 42(3) of the *Regulation* as alleged and I dismiss the alleged contravention.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

January 18, 2006

cc: Victoria Police Department

Liquor Control and Licensing Branch
Attn: Ron Rodrigue, A/Regional Manager
Vancouver Island/Okanagan/Kootenay

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