



**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: Bastion Inn Ltd.
dba The Red Jacket Lounge and Cabaret
751 View Street
Victoria, BC V8W 1J9

Case: EH05-022; EH05-023

For the Licensee: Gregory N. Harney

For the Branch: Shahid Noorani

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: February 1 and 9, 2006

Place of Hearing: Victoria, BC

Date of Decision: May 2, 2006

INTRODUCTION

Bastion Inn Ltd. is licensed to operate The Red Jacket Lounge and Cabaret (the “establishment”) under Liquor Primary Licence No. 151099. The establishment is operated by 1972 Productions Incorporated as a third party operator.

The licensed hours of sale are 7:00 p.m. to 2:00 a.m. Monday to Saturday and 7:00 p.m. to midnight on Sunday. The licensed capacity is 340 persons in area 01 and 60 persons in area 02.

ALLEGED CONTRAVENTIONS AND RECOMMENDED PENALTIES

By Notice of Enforcement Action (NOEA) dated May 16, 2005, referencing file number EH05-023, the Liquor Control and Licensing Branch (“the Branch”) alleged that:

1. On December 4, 2004 (business date of December 3, 2004), the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* (the *Act*) by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The recommended enforcement action is a four (4) day suspension of the liquor licence (Item 11, Schedule 4, *Liquor Control and Licensing Regulation*); and
 2. On December 4, 2004 (business date of December 3, 2004), the licensee contravened Section 42 (3) of the *Liquor Control and Licensing Regulation* (the *Regulation*) when the licensee or the employees of the licensee consumed liquor while working in the licensed establishment. The recommended enforcement action is a one (1) day suspension of the liquor licence (Item 27, Schedule 4, *Liquor Control and Licensing Regulation*).
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By Notice of Enforcement Action (NOEA) dated May 16, 2005, referencing file number EH05-022, the Liquor Control and Licensing Branch (“the Branch”) alleged that:

3. On December 4, 2004 (business date of December 3, 2004), the licensee contravened Section 12 of the *Liquor Control and Licensing Act* by selling liquor outside the hours permitted by the terms and conditions of its licence. The recommended enforcement action is a \$1000 penalty (Item No. 46, Schedule 4, *Liquor Control and Licensing Regulation*);

RELEVANT STATUTORY PROVISIONS

(See Appendix A)

ISSUE(S)

1. Does the evidence substantiate the branch’s alleged contraventions?
2. If yes, what, is the appropriate penalty, if any, for each contravention?

EXHIBITS

- | | |
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| Exhibit No. 1 | Branch’s Book of Documents; Tabs 7, 8, 9, & 10 removed |
| Exhibit No. 2 | Red Jacket Policies and Procedures |
| Exhibit No. 3 | Nightclub Security |
| Exhibit No. 4 | Training for Red Jacket and Sugar Doormen |

PRELIMINARY OBJECTION

The licensee objected at the commencement of the hearing to documents contained in the branch’s Book of Documents. The branch advocate noted that

he had put the documents in the exhibit for the licensee's reference and agreed to remove them, as they were not relevant to these proceedings.

The licensee requested that I note that he objected to the branch's investigation and to the fact that the branch will not provide a recorder for this hearing. He stated that the evidence is shoddy, the officers did not properly investigate these alleged contraventions, and the licensee had not been provided with details, such as the names of the people involved in the alleged contraventions. The licensee did not ask for a particular remedy other than that I note the objections in the record of the hearing.

EVIDENCE

The branch's witnesses were three police officers ("officer #1, #2, and #3, in order of their appearance in the hearing) and one compliance and enforcement officer (C & E officer). The licensee's witness was the operator of the cabaret (the "manager").

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*.

On December 4, 2004, four officers attended the Red Jacket Lounge and Cabaret. Officer #1 and her partner were the operatives and officers #2 and #3 provided cover for them.

Police Officers' Testimony

Permitting an intoxicated person to remain

Officer #1 stated that she and her partner arrived at the Red Jacket Lounge at approximately 1:06 a.m. on December 4, 2004. When they entered, they went to the bar, got a drink, and then walked over to the main dance floor. Officer #1 was drinking club soda. She testified that, in an area adjacent to the dance floor, she observed a woman who was being supported by a man who had his arm around her. The woman had difficulty with balance and coordination, took some small steps and leaned in to the man who helped her remain upright. Initially, the man has his arm around her and then he put his arms under her arms to hold her up. The officer testified that she was approximately three feet away from them and observed her for about five minutes at this time. She testified that the woman's head would droop and fall, or nod, and her eyes were not fully open. She did not hear the woman speak and did not observe her consuming anything. The officer stated that these patrons were approximately 10 feet from the bar where the bartender was working. The officer did not see any staff approach the woman.

The officer testified that these observations occurred between 1:06 a.m. and 1:20 a.m. She saw the woman again at least 10 minutes later, at some point between 1:20 and 2:20 a.m. On this occasion, the officer was on the dance floor, approximately 25 feet away from the woman who was at the same area. She testified that the woman had difficulty standing up and her male partner was holding her.

In the lounge area, officer #1 observed a man who had a beer bottle in his hand and was swaying from side to side as he was talking with two women. She observed this man for about five minutes and saw him fall, face forward, onto a footstool. He had great difficulty getting up off the footstool. He had the beer bottle in his hand when he fell but she could not recall what happened to the

bottle when he fell or got up. The officer was approximately 10 to 15 feet away from him. She did not see any staff approach the patron. This occurred between 1:20 a.m. and 2:20 a.m.

The officer testified that she was walking through the hallway and a man who was coming from the opposite direction made exaggerated gestures to get by her, holding a beverage in his hand. He banged into the wall, slid along the wall and spilled some of his beverage. She estimated that the hall was approximately five feet wide. She testified that the man displayed poor coordination and that he appeared unable to focus on her as they were passing. This incident took approximately 30 seconds.

The officer observed another woman attempting to enter the washroom. She described her as having difficulty with coordination, walking and balance. The woman bypassed the door to the washroom, fell against the wall, turned around, fell against the door and then went into the washroom. The officer was approximately three to five feet behind this woman. She made this observation between 1:20 a.m. and 2:20 a.m. This observation took approximately 30 seconds.

The officer and her partner left the bar at approximately 2:20 a.m., returned to their hotel, and completed their notes. The officer started writing her notes at 2:50 a.m. The officer did not include in her notes the observations of the man in the hallway or the woman by the washroom. However, she testified that both of these individuals stood out in her mind as grossly intoxicated and were clear in her memory.

The officer acknowledged that she did not know whether the staff had seen the patrons or whether the patrons were required to leave the premises. She did not bring these patrons to the attention of any staff members.

The officer testified that the lounge and cabaret were busy that night although there was room to move without pushing against other patrons. There was typical bar lighting with lasers and other lights.

Officer #2 testified that he and his partner arrived sometime between 1:00 a.m. and 1:15 a.m. The other officers were already inside. Once the officers had located their colleagues, officer #2 stood in the line at the bar to get drinks (further discussion below). Then he joined his partner by the dance floor and watched their colleagues. He testified that over a period of approximately one hour, he observed six to eight patrons who he considered to be intoxicated. He stated that some of these people appeared to have difficulty maintaining their balance and some held on to the railing as they were walking. This officer's main testimony concerned the alleged contravention employee consuming liquor, set out below.

Officer #3 testified that when he and his partner entered the nightclub they went to the dance floor area to observe their colleagues. He stated that the club was fairly full, there were quite a few people on the dance floor, and the tables were mostly occupied. He observed three intoxicated men come off the dance floor approximately three to four feet away from him. He testified that one was severely intoxicated and had to use the railing for support. His friends grabbed him by each side and they all went towards the bar. He observed the particularly intoxicated man staggering, being loud and swearing. He did not see them again. He did not see any staff members approach them.

Officer #3 testified that he also observed two women on the dance floor who were absolutely drunk, slurring their speech, unable to dance, and falling over. The officer testified that he observed these women for 5 to 10 minutes. While they were dancing, the lights came on. He did not see any staff members approach the women and he did not bring them to the attention of any staff.

Employee consume liquor

Officer #2 testified that when he and his partner entered the establishment, he went to the bar to get drinks. There was a line up of two to three people deep in front of the bar. There were four bartenders spread out. The officer testified that he watched one bartender make a pyramid of glasses with three on the bottom and two on top, containing a dark liquid like cola. The bartender then poured an amber liquid into five shooter glasses, which were sitting on the bar beside the pyramid. He dropped two shooters into the top glasses and patrons took those. He dropped three shooters into the remaining three glasses, one patron took one, and he called to another bartender who came over and both bartenders took the remaining glasses and they all drank together. The officer stated that he was 10 to 15 feet from the bartender who mixed the drinks. He was not able to read the labels on the bottles and could not confirm whether the liquids were alcohol. He did not see nametags for the bartenders. He testified that they continued to work behind the bar. He was served by a different bartender and did not speak with the bartender who poured the drinks.

Selling liquor outside the hours permitted

Officer #3 testified that at approximately 2:25 a.m., after the lights had been turned on he observed a man walk into the lounge, converse with the bartender and receive a green coloured bottle that the bartender had taken from the refrigerator. The officer testified that the bottle looked like a beer bottle. He was not able to say whether the bottle was already open when the bartender picked it up. The man joined a few people at one of the lounge tables and drank from the bottle.

The officer acknowledged that in his notes, which he wrote on the same night, he indicated that this man handed the bottle to a female in his group rather than drink it himself, and that he did not identify it as a beer bottle.

The Compliance and Enforcement Officer (C & E officer)

The C & E officer testified to the branch's contact with the police department and the licensee and the process whereby this enforcement action was brought against the licensee. He reviewed the branch's file with this establishment.

Owner/operator of 1972 Productions Incorporated (Manager)

The manager testified that this is the second largest cabaret on Vancouver Island, with dozens of light fixtures, lasers, fog, lights in motion and candles on the bars. In order to provide a good light show, it is necessary to keep the establishment quite dark. The candles on the bar provide sufficient illumination for the bartenders to see what they are doing and observe the patrons. He testified that on a busy night there are three bartenders working.

The manager testified that the security systems used at this establishment are the best in the City of Victoria and that his company is a leader in developing and implementing systems. He testified about the security systems, staff training, and ratio of staff to patrons, policy on requiring intoxicated patrons to leave and how the staff are trained to handle those patrons, and the policy against staff consuming alcohol.

He testified that he first heard of this incident in mid-January, but it wasn't until mid-May that he found out the branch was intending to take enforcement action. He testified that the establishment has video recordings of each night, which he could have saved if he had known about the branch's concerns. By the time he found out, the video tapes had been reused. When he found out the allegation that a patron had been sold a beer after hours, he went through the cash tapes but found there were too many transactions to be helpful. Between 1:30 a.m. and 2:00 a.m., many patrons settle their bills and the bar staff rings through the spillage, promotional drinks, and miscellaneous items.

Concerning the description of the 'pyramid', the manager testified that the officer's evidence did not make sense to him. There is a drink the bartenders pour, which involves having a row of highball glasses containing cola. Then shot glasses of liqueur are balanced on top of them. The bartender knocks the first shot glass, which falls into the larger glass and sets off a domino effect of the other shot glasses falling in. Patrons drink both liquids together. He also testified that the shot glasses are poured on a rubber mat on the bar top. The bartenders have non-alcoholic shots that they keep under the bar or behind the fruit bowl. When a customer offers to buy a drink or a staff member wants a drink, the bartenders substitute those glasses. He testified that it is physically impossible for a patron to see what the bartender is doing behind a row of highball glasses, unless the patron is about seven feet tall.

SUBMISSIONS

The licensee submitted that the evidence was not conclusive of any contraventions and noted that, as the officers were mainly concentrating on a drug transaction, their observations of these alleged contraventions were limited to the last half hour before closing.

The licensee submitted that there was no evidence that the licensee permitted intoxicated patrons to remain. The officers did not identify the allegedly intoxicated patrons to staff members. There was no evidence that staff saw the allegedly intoxicated patrons and the officers did not see any incidents of intoxicated patrons after the lights were turned up. The licensee took issue with the officers' observations of intoxication noting that in each instance, although the officers were supposedly with their partners, only one officer reported seeing the particular individuals.

Concerning the allegation that employees consumed alcohol, the licensee submitted that officer #2 was not able to identify any alcohol, did not have the

names of the employees and did not speak with any patrons. The licensee took issue with the officer's testimony, saying that he could not have seen the bartender's actions as clearly as he testified given that he was behind three rows of patrons and at the end of the bar.

Concerning selling alcohol after hours, the licensee submitted there was no evidence it was a sale or that it was alcohol. He also noted the contradictions between the officer's notes and his recollection during the hearing. The officer could have moved closer to observe what the bottle was. However, even if it was alcohol, if it had been purchased earlier, there is no prohibition against it being consumed between 2:00 a.m. and 2:30 a.m.

The licensee also submitted that because of the delay by the branch in bringing these allegations to the licensee's attention, the licensee lost the opportunity to preserve evidence. The officers did not take staff names so the licensee did not have the ability to gather evidence from the staff involved.

The licensee submitted that the branch's evidence was insufficient to find the alleged contraventions. However, in the event that I find any contravention, the licensee submitted that the penalties should be at the minimum of the range.

ANALYSIS AND DECISION

I find that the branch has not substantiated the alleged contraventions. In each instance, I find that the police officers' testimony provides some suggestion of the unlawful activity alleged, but lacks specifics that a proper investigation may have disclosed. The officers were not in a position to investigate the alleged liquor violations because they were operating undercover and their attention was mainly directed to a drug transaction.

Concerning the allegation that the licensee sold liquor after hours, I find the officer's evidence does not establish on a balance of probabilities that the bottle the bartender handed to the patron contained liquor. The bottle could have been non-alcoholic beer or a different beverage, such as Perrier Water.

Concerning the allegation that the licensee permitted intoxicated patrons to remain, none of the officers testified to staff observing the patrons in question. The officers' observations were fairly short and could not preclude the possibility that the patrons had been asked to leave. When the lights were turned up the officers did not notice any patrons who were intoxicated. That would mean that shortly before closing, intoxicated patrons, assuming there were some, had left either on their own volition or at the request of the licensee.

Although the officers testified to the patrons showing signs that could be related to intoxication, without further evidence of the specifics of each patron, I am not able to conclude that they were in fact intoxicated. The symptoms the officers described could be attributed to other causes.

Concerning the allegation that the bartenders consumed alcohol, I find that the evidence falls short of establishing on a balance of probabilities that the drinks contained alcohol. I find that the officer was at least 10 feet from the bartender who mixed the drinks, was looking through or over a line up of other patrons, was looking over a bar that had other items on it and was observing a fairly complicated drink recipe. Without some evidence of the contents of the bottle or evidence of what the patrons ordered or thought they consumed, I cannot presume that the bartenders consumed alcohol.

ORDER

I find that the branch has not proved the alleged contraventions.

[Original Signed]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: May 2, 2006

cc: Victoria Police Department

Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Vancouver Island/Okanagan/Kootenay

Liquor Control and Licensing Branch
Attn: Shahid Noorani, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the "Act")

Licences

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

(c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,

(d) designate the areas within an establishment where minors are permitted,

(e) approve, prohibit or restrict games and entertainment in an establishment,

(f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,

(g) vary seating requirements in the dining area of an establishment,

(h) vary requirements with respect to the location of an establishment,

(i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,

(j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,

(k) specify requirements for reporting and record keeping, and

(l) control signs used in or for an establishment.

(4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.

(5) A licence expires on the date specified on it as the expiry date.

(6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.

(7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.

Drunkenness

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(2) A licensee or the licensee's employee must not permit

(a) a person to become intoxicated, or

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

Regulations

Consumption of liquor in licensed establishments

42 (1) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

- (2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.
 - (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.
 - (4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:
 - (a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;
 - (b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.
 - (5) A licensee who seals an unfinished bottle of wine in accordance with subsection (4) (a) must inform the patron of the requirements of section 44 of the Act.
 - (6) This section does not apply to a U-Brew or U-Vin.
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