



**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 & Cabaret
751 View Street
Victoria, BC V8W 1J9

Case: EH08-010

For the Licensee: Gregory N. Harney

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: July 24, 2008

Place of Hearing: Victoria, BC

Date of Decision: August 15, 2008

**Ministry of Housing
and Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Bastion Inn Ltd. (dba The Red Jacket Lounge & Cabaret) holds Liquor Primary Licence No. 151099. The licensed establishment is operated by a third party operator, 1972 Productions Incorporated. The hours for the sale of liquor are 7 p.m. to 2:00 a.m. Monday to Saturday and 7 p.m. to Midnight on Sunday. The capacity is 340 persons in area 1 and 60 persons in area 2. It is located in the downtown area of the City of Victoria. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia.'

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated January 24, 2008. The branch alleges that on December 1, 2007, the licensee contravened section 42(3) of the *Liquor Control & Licensing Regulation* when its employee consumed liquor while working in the licensed establishment. The proposed penalty is a one (1) day suspension of the liquor licence (item 27, Schedule 4 of the *Regulation*).

Item 27 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 - \$3000.

The licensee disputes the contravention.

RELEVANT STATUTORY and/or REGULATORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Consumption of liquor in licensed establishments

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

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- | | |
|-------------------|--|
| Exhibit 1: | Branch Book of Documents #1, tabs 1 – 13. |
| Exhibit 2: | Photographs, 1(a – c), 2 – 6. |
| Exhibit 3: | Booklet titled “Red Jacket Policies & Procedures. |
| Exhibit 4: | Red Jacket Cabaret employee sign-off sheet. |
| Exhibit 5: | Red Jacket Cabaret employee information Sheet. |
| Exhibit 6: | Red Jacket Cabaret employee time sheet for November 29 – December 2, 2007. |
| Exhibit 7: | Red Jacket Cabaret business tally sheet for December 1, 2007. |
| Exhibit 8: | Document titled “Bartender Policies and Procedures Update January 2007”. |
| Exhibit 9: | Photographs, 1 & 2. |

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two City of Victoria Police officers testified that during the evening hours of December 1, 2007, they were working in plainclothes assigned to make covert observations of liquor licensed establishments in the downtown area to monitor compliance with the *Liquor Control and Licensing Act and Regulations*. After standing in line for approximately ½ hour they entered the Red Jacket at approximately 11:30 p.m. taking a seat in the main area where they remained until approximately midnight when they moved into the small lounge area. They took a seat at the bar beside a female patron who appeared to be intoxicated. [One constable recalled they sat to the left of the patron while the other recalled sitting to her right.] They ordered drinks and sat observing activities within the lounge area.

A short time later the officers observed two or three male patrons come up to the bar. [The testimony of the two officers differed on the number of patrons.] The bar tender set out three or four shot glasses and placed a bottle of Jaggermeister liquor onto the bar. One of the patrons took the bottle and poured a shot into each glass. The patrons and the bartender then each took one of the shot glasses and consumed its contents.

Later the officers observed two patrons at the bar with glasses of what appeared to be beer. The bartender set out two shot glasses and passed the bottle of Jaggermeister to one of the patrons who poured a shot into each glass. The patrons dropped the shot glasses into the beer glass and consumed the contents. The officers left the establishment at approximately 1 a.m.. The officers prepared a report prior to going off duty in which each outlined their individual observations (Exhibit 1, tab 6).

Both officers testified that they were familiar with Jaggermeister and recognized the bottle and its label. The liquid poured from the bottle appeared to be the same colour and consistency as Jaggermeister. They did not inquire about the nature of the liquid poured from the bottle nor make any examination of it.

EVIDENCE - THE LICENSEE

Licensee witness A testified that he is the principal of the third party operator and has operated the Red Jacket since its inception approximately five years ago. He has considerable previous experience in the hospitality industry in both liquor primary and food primary establishments. He is a member of the Victoria Bar and Cabaret Association which meets once a month and liaises regularly with police and city officials.

The establishment has a Policies and Procedures Manual. It is used in the training of new employees and they sign-off that they have received and read it (Exhibit 5). The manual outlines employee conduct including the provision that employees are prohibited from consuming liquor before or during their shifts. Employees sign-off that they understand that consuming liquor or drugs while working is immediate grounds for termination (Exhibit 4). Regular staff meetings are held during which employees are reminded of their responsibilities. All employees hold "Serving It Right" (S.I.R.) certificates. The establishment has a security camera system set up to deal with both security and internal theft problems. Management on duty monitors staff behaviour. It also employs "secret shoppers" to make covert observations of the operation of the establishment and report any problems noted.

He believes that he was working the night of December 1, 2007. He was unaware of the officers' visit to the establishment and did not receive a copy of the Contravention Notice until 54 days later. This prevented him from viewing the security camera system as it loops over the previous recordings within a maximum period of two weeks. The door receipts indicate that it was a busy night with the establishment operating at capacity (Exhibit 7). When he became aware of the allegation staff was advised and a copy of the Contravention Notice was posted on the bulletin board reminding them their activities were being monitored (Exhibit 9).

The bartender on duty in the lounge area on the date of the officers' visit has been employed at the establishment for approximately four years and had considerable previous experience when hired. He is considered to be an excellent employee. He is familiar with the Policies and Procedures Manual and is aware that consuming liquor on duty is grounds for immediate dismissal. He has signed-off on both these matters (Exhibits 4 & 5).

He testified that Jaggermeister liquor is sold at the bar in the lounge. It is always served cold and consequently is kept on ice in the well (bar sink) below the bar. It is common within the industry to use a non-alcoholic "placebo" or "phantom" drink in instances where a customer should not be served further liquor or where a customer wishes to buy a drink for the bartender. A mixture of diet cola and lime juice in a Jaggermeister bottle is often used for this purpose. A bartender may keep the two bottles side by side in the well, knowing which is real and which is fake by their location and a small mark on the label of the placebo/phantom bottle (Exhibit 2, photo 5). Sometimes the drinks are pre-poured and kept at the side of the well for future use (Exhibit 2, photo 6). In a late night bar environment the practice invariably goes unnoticed by customers.

He acknowledged attending a compliance meeting with liquor inspectors on July 17, 2007, during which time the issue of employee drinking while on duty was discussed and it was agreed that it was a public safety issue (Exhibit 1, tab 7).

Licensee witness B testified that he has worked as a bartender for approximately nine years, the past four years at the Red Jacket. He holds a S.I.R. certificate. When he first commenced employment at the Red Jacket he received on the job training from the head bar tender even though he had previous experience. He has read the Policy and Procedures Manual and signed off to that effect (Exhibit 5). He is well aware that employees are not permitted to drink on duty and has signed off acknowledgement that it is immediate grounds for dismissal (Exhibit 4). He does not consume liquor while working, as it would mean a loss of his livelihood.

He testified that he was working as a bartender in the lounge the night of December 1, 2007. He does not recall the two officers sitting as customers at the bar nor the patrons served Jaggermeister liquor by him at the bar. He does engage in the practice of consuming non-alcoholic fake shots with customers at the bar. A good bartender has to appear to be part of the party atmosphere with his customers. Customers often, it can be several times a night, wish to purchase a drink for the bartender. Fake shots are used to avoid offending a customer and to avoid breaking the law. Non-alcoholic shooter type drinks are often pre-poured for this purpose and kept below the bar. Fake, non-alcoholic beverages made to appear as Jaggermeister liquor are poured into empty authentic bottles and kept on ice in the well to the left of the genuine bottle (Exhibit 2, photo 5). The label may be marked to distinguish the bottle from the one containing the genuine product. The fake non-alcoholic beverages may be used to replicate an alcoholic drink purchased by the customer for the bartender, to decrease alcohol consumption by a customer, or on occasion where the bartender provides the bottle to a customer to pour their own drinks. Real liquor is never used in those circumstances. Providing a bottle of liquor to a customer would result in termination. Customers are not charged for fake drinks.

SUBMISSIONS - LICENSEE

Counsel submitted that the evidence of the two police officers was inconsistent. They were consuming liquor during their visit to the establishment and that may have affected their observations. The witnesses for the licensee gave plausible explanations for what was alleged to have occurred. There is no evidence that the drink consumed by the bartender contained alcohol. Simply because it was poured from a Jaggermeister bottle is not sufficient proof and it is not proper to make an assumption that the drink contained alcohol, there must be evidence to support that conclusion. He drew our attention to previous decisions of the general manager in support of this argument: Merlin's Cabaret Ltd., January 18, 2006 (EH05-019); Bastion Inn Ltd, May 2, 2006 (EH05-022 & 023); Skybar, April 27, 2005 (EH04-064, 081,088, and-095-097).

Counsel submitted that the licensee has effective strategies to prevent contraventions. Policy and Procedure Manuals are used for staff training and direction. The bartender on duty at the time of the alleged contravention signed-off on his understanding of the requirements outlined in the manual. A staff meeting was held following receipt of the contravention notice to discuss the issue. An in-house video surveillance system and secret shoppers are employed to monitor staff conduct. Staff is aware that there is a zero tolerance policy on employees consuming liquor while working.

Counsel submitted that if a contravention was found and a penalty was to be imposed a \$1,000.00 monetary penalty would be sufficient.

REASONS AND DECISION

The evidence here is that two police officers observed the bartender pass a bottle of a well known brand of liquor to a patron who then poured drinks from the bottle which were consumed by the bartender and patrons. Because of the covert nature of the investigation the officers did not inquire or make any tests of the contents of the bottle. They made the assumption that the bottle contained the liquor normally found in it. Because of the covert nature of the police investigation, the witnesses for the licensee had no knowledge of the incident until some weeks later when it was brought to their attention. They thus had no recollection of the incident. They testified that the establishment allows and bartenders regularly engage in the practice of filling empty bottles of the liquor with non-alcoholic beverages to use as placebo/phantom drinks. It allows bartenders to accept hospitality from patrons without actually consuming liquor and thus contravening the law and house policies. Counsel for the licensee argues that that is what has occurred here. I find that it is a plausible explanation and there is no evidence to the contrary.

I find that on the whole of the evidence presented by both the branch and the licensee, the evidentiary burden that an employee consumed liquor while working in the licensed establishment not been satisfied.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 15, 2008

cc: Victoria Police Department - Sgt. Jim Simpson

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

Liquor Control and Licensing Branch, Surrey Office
Attention: Olubode Fagbamiye, Branch Advocate