



**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 RSBC c. 267

Licensee:	The Roxy Cabaret Ltd. dba Roxy Cabaret
Case Number:	EH03-081
Appearances:	
For the Licensee	Blaine Culling, Brian Peers and Dennis P. Coates, Q.C.
For the Branch	Peter K. Jones
Enforcement Hearing Adjudicator	Suzan Beattie
Date of Hearing	October 16 and 17 2003
Place of Hearing	Vancouver, BC
Date of Decision	March 29, 2004

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, The Roxy Cabaret Ltd., doing business as Roxy Cabaret, is located at 932 Granville Street, Vancouver, BC. It holds Liquor Primary Licence No. 016089 with hours of operation in which liquor may be sold, purchased and consumed being 7:00 P.M. to 2:00 A.M. Monday to Saturday and 7:00 P.M. to Midnights on Sunday.

The licence permits 275 patrons.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Liquor Control and Licensing Branch alleges that on April 12, 2003, the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulations* by permitting overcrowding beyond person capacity greater than occupant load, contrary to the *Regulations*.

The Liquor Control and Licensing Branch further alleges that on April 12, 2003, the licensee contravened section 42(3) of the *Liquor Control and Licensing Regulations* by a licensee or employee of the licensee consuming liquor while working in the licensed establishment , contrary to the *Regulations*.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of section 6(4), the penalty range is a four (4) to seven (7) day licence suspension or five thousand (\$5,000) to seven thousand (\$7,000) dollar monetary penalty for the first contravention. In this case, the branch is recommending a licence suspension of four (4) days. For the contravention of section 42(3), the penalty range is a one (1) to three (3) day licence suspension or one thousand (\$1,000) to three thousand (\$3,000) dollar monetary penalty for the first contravention. In this case, the branch is recommending a licence suspension of three (3) days.

The relevant statutory provisions of the *Liquor Control and Licensing Act and Regulations* state:

6 Capacity

- (1) Before the general manager
 - (a) approves the issuance of a licence,
 - (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
 - (c) approves a transfer of a licence under section 21 (3) of the Act, or
 - (d) approves an application for an increase in the person capacity of a licensed establishment,

The general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

- (2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.
- (3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend, or transfer the license for that establishment after reducing the person capacity to equal the occupant load.
- (4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

42 Consumption of liquor in licensed establishments

- (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.
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OBJECTION

During the hearing it became apparent that the branch had proceeded under an incorrect section of the *Regulations*. The branch proceed under section 6(4) of the *Regulations* which states, that there must not be in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3) of the *Regulations*. In this case the license is for 275 patrons.

There are a number of options available when an incorrect section of the Act or Regulations is cited in a Notice of Enforcement Action. In the circumstances of this case this allegation was withdrawn. The hearing continued on the remaining allegation.

ISSUES

1. Whether the licensee contravened section 42(3) of the *Liquor Control and Licensing Regulations* by a licensee or employee consuming liquor in premises; and
2. If so, are the recommended penalties appropriate in the circumstances?

COMPLIANCE HISTORY

There is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident ("compliance history"). Therefore, this contravention, if proved, would be considered a first contravention for the purposes of the Penalty Schedule.

The branch's file indicates that on March 18, 2003, the branch issued a contravention notice for a staff member consuming a shooter, but the branch did not pursue enforcement action on this allegation.

Witnesses

The branch called a liquor inspector and a Vancouver City Police Constable as its witnesses. The witnesses for the licensee were Chief Financial Officer, its General Manager, and its bartender.

EXHIBITS

The branch and the licensee presented the following exhibits:

Exhibit 1	Book of Documents
Tab 1	Notice of Enforcement Action dated May 29, 2003
Tab 2	Contravention Notice No. B004534
Tab 3	Documentation referred to in the Notice of Enforcement Action
Tab 4	Notes taken at the time of the contraventions
Tab 5	Enforcement Action Recommended dated May 13, 2003.
Tab 6	Primary Liquor Licence No. 016809
Tab 7	Official floor plan of the establishment
Exhibit 2	Photographs of establishment
Exhibit 3	Floor Plan (returned to licensee)
Exhibit 4	Roxy Cabaret Door Report
Exhibit 5	Statement of Bartender
Exhibit 6	Roxy Rules and Regulations

EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS

Evidence

The Branch:

On the evening of April 12, 2003, a liquor inspection team consisting of representatives from the Vancouver City Police, Vancouver Fire Department, City of Vancouver Permits and Licensing Department and a liquor inspector, conducted an inspection of the establishment commencing at approximately 11:30 P.M. As explained earlier, there was alleged overcrowding, this allegation was withdrawn during the course of the hearing.

With respect to the allegation of an employee consuming liquor, the liquor inspector testified, that in the process of conducting his count of the establishment he was initially distracted by three patrons seated at the bar. These three patrons were each holding a shooter glass filled with brown liquid. The inspector noticed that the bartender was also holding a shooter class filled with brown liquid. While the inspector watched, the bartender and the three patrons consumed the liquid in their shooter glasses.

The inspector walked over to the bar and took one of the shooter glasses and identified himself to the bartender. The inspector asked if liquid was Jagemeister, and the bartender replied "Sorry man". The inspector told the bartender he was not supposed to drink on the job and the bartender again replied "Sorry".

The inspector held the shot glass in his hand and the brown liquid looked like and smelled like liquor and its colour was consistent with Jagemeister. The inspector walked with the shot glass back toward the entrance of the establishment looking for the Vancouver Police Constable and other members of the inspection team.

After completing a second count, the liquor inspector contacted a manager and told him about his counts and that he saw a staff member drinking. The manager said that his

staff has non-alcoholic beverages like coke available to participate with the patrons. The inspector replied that on this occasion it did not appear to be coke in the shot glass.

On cross examination, the inspector admitted, he does not drink Jagemeister. The inspector stated, he took the shooter glass back in to the establishment and did not seal it in any fashion or have the shot glass analyzed. The inspector did not go behind the bar to see if there were any non-alcoholic shooters kept there.

On re-examination the inspector said, the bartender did not offer an explanation that the liquid was non-alcoholic, nor did he offer any other explanation. He did offer an apology.

On a question for clarification, the inspector stated he could not say for sure exactly whose shooter glass he picked up. Specifically, he did not know for sure if it was the bartenders shot glass he examined.

The Vancouver Police Constable recalled the liquor inspector attempting to exit the establishment with the shot glass. A waitress attempted to prevent the inspector from leaving with the glass. The inspector explained; that he has caught an employee in the back of the establishment drinking and he was going to write a contravention notice.

On cross examination, the Constable stated he did not personally see an employee drinking.

The Licensee:

The general manager of the establishment testified, that on the afternoon of April 13, 2003, the bartender volunteered a written statement regarding the events of the evening of April 12, 2003. The general manager also explained; that the establishment has employees sign a statement outlining the rules and regulations for working at the establishment. He stated, that the bartender had signed such a statement.

In cross-examination, the general manager agreed, that the statement outlining the rules and regulations for employment at the establishment did not mention the consumption of liquor while on duty.

The bartender explained; that at the time he was approached by the liquor inspector, the establishment was starting "to cook" and there were many people around his sidebar. In particular he had a group of Croatian band members that drink Jagemeister. The sidebar has a dishwasher, and the bus boy and waitresses drop glasses off on the sidebar. As a result, he can have 30 – 40 shot glasses on the bar at any given time.

The bartender's evidence, as introduced in his written statement, is that he was drinking a "fake shooter" of coke in a shooter glass. His written statement acknowledges that the liquor inspector stated, "You are not allowed to drink while you are working". He said, he was "aware of that" and later, a bit confused, he left his station to find the manager. He denied to the manager that he had taken a shot of Jagemeister

In his direct evidence, the bartender explained that he and others consume non-alcoholic shooters because customers constantly want to buy employees shooters and that encourages a good time so the bar staff put water in beer bottles and make fake or fun shooters. He is aware that the house policy is no drinking is allowed and employees can be fired if they are caught drinking at work.

On cross-examination the bartender said, that when a group of patrons are excited they say "Pour one for yourself" and so the bar staff says okay and grabs a fake drink from behind the counter. Sometimes the bar staff explains they are not allowed to drink on the job, but if it is a regular customer who considers you a friend, they pretend to drink.

The bartender disagreed that the liquor inspector identified himself and said he observed him drinking. Rather, his explanation is that the liquor inspector asked what was in the glass and he said Jagemeister. The liquor inspector then told him he was

not to drink on duty and he replied, "I know that". The bartender agrees he did drink something from the shot glass.

The Chief Financial Officer testified; about the number of employees, their estimated wages, and the difficulty arising from penalizing a number of employees as well as the establishment for the alleged actions of one individual.

SUBMISSIONS

The licensee submits first that the branch must prove its allegations beyond a reasonable doubt and not merely on a balance of probabilities. Secondly, the licensee argues that, even on a balance of probabilities, there is no direct proof that an employee consumed liquor in the premises. In support of its position the licensee cited *The Pig and Whistle* (April 30, 2001) and *Sentinel Peak Holdings Ltd. dba No. 5 Orange Street Hotel* (June 16, 2003).

REASONS AND DECISION

For the reasons that follow, I find that the branch has not substantiated the alleged contravention.

In this case, the establishment was at a minimum at full capacity. I accept that the inspector saw the bartender drink brown liquid from a shooter. The difficult evidentiary issue arises over whether the brown liquid was Jagemeister, which is an alcoholic drink or, as the licensee maintains, a non-alcoholic drink such as coke. I accept that the shooter glass the inspector examined contained Jagemeister. However, there is no evidence before me that the shooter glass examined by the inspector was the shooter glass the bartender drank from. I am, therefore, left to conclude that the branch has not proven that alcoholic beverages were consumed by an employee on the premises.

What of the evidentiary difference between the statements the inspector alleges the bartender made, and those the bartender admits to making? In this case, there is a strong probability that the bartender's statements, made to his employer after the incident, were self-serving. Nonetheless, that is not sufficient to prove that the bartender consumed an alcoholic beverage.

Given my conclusion, it is not necessary for me to comment on the licensee's submission regarding the burden of proof.

ORDER

I find that the branch has not substantiated that an employees of the licensee consumed liquor while working in the licensed establishment.

Original signed by

Date March 29, 2004

Suzan Beattie
Enforcement Hearing Adjudicator

cc: Liquor Control and Licensing Branch, Vancouver Office
Attention: Wendy Jones, A/Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter K. Jones
