



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act RSBC c. 267

| | |
|----------------------------------|--|
| Licensee: | Jacobsen Enterprises Ltd. dba Lakewood Inn/ Jake's Pub 365 S Cariboo Hwy 100 Mile House, BC V0K 2E0 |
| Case: | EH07-085 |
| For the Licensee: | Larry Jacobsen Andy Jacobsen |
| For the Branch: | Sonja Okada, Advocate |
| Enforcement Hearing Adjudicator: | Sheldon M. Seigel |
| Date of Hearing: | November 7, 2007 |
| Place of Hearing: | Williams Lake, BC |
| Date of Decision: | December 14, 2007 |

INTRODUCTION

The licensee owns an establishment in 100 Mile House. The establishment holds Liquor Primary Licence No. 120281 and is known as Jake's Pub. Jakes Pub is in the Lakewood Inn, which holds multiple liquor licenses. The liquor primary licence for Jake's Pub permits liquor to be served from 11:00 a.m. to 1:00 a.m. Monday through Saturday, and 11:00 a.m. to midnight Sunday.

In the late evening of May 25, 2007, a team of four liquor inspectors in two shifts, conducted a licensed premise check of the establishment. The inspection revealed three allegedly intoxicated patrons, and an employee who was allegedly drinking liquor.

As a result of the inspection, the branch issued a Notice of Enforcement Action dated July 4, 2007.

The licensee claims that the identified patrons were not intoxicated and that the employee was not working at the time of the allegation.

ALLEGED CONTRAVENTIONS

The branch alleged that on the business day of Friday, May 25/26, 2007, the licensee contravened s. 43(2)(b) of the *Liquor Control & Licensing Act* by permitting an intoxicated person to remain in the premises, and s. 42(3) of the *Liquor Control & Licensing Regulation* when one of its employees consumed liquor in the premises.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, [RSBC 1996] Chapter 267

- 43 (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. 213/2007

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

ISSUES

1. Did the licensee contravene section 43(2)(b) of the *Act*?
2. Did the licensee contravene section 42(3) of the *Regulation*?
3. Is a penalty warranted, and if so, what is the appropriate penalty to be imposed?

EXHIBITS

- Exhibit No. 1: Branch's book of documents.
- Exhibit No. 2: Licensee's letters from staff of Jake's Pub.

EVIDENCE

The branch called three liquor inspectors.

Two of the inspectors testified that they attended Jake's Pub at 11:30 p.m. on May 25 as part of the inspection team. They went into the smoking area, where a female sat beside one of them. She identified herself as B (actual name substituted). Both

of the inspectors noted that B had a bottle of beer with her and demonstrated symptoms of intoxication including bloodshot eyes, slurred speech, and inability to co-ordinate the motion of her cigarette to the ashtray. One of the inspectors engaged B in conversation. He did not indicate about what they spoke. Each of the inspectors concluded that B was intoxicated.

The two inspectors also testified that a male sat opposite B. That male also had symptoms of intoxication including bloodshot and glassy eyes, a flushed face and slow and deliberate movements. One of the inspectors used his own beer bottle to conduct a Nystigmus Test of the male patron's level of intoxication, by observing the movement of the patron's eyes as the inspector slowly passed the bottle across the patron's line of sight. As a results of their observations and testing, each of the inspectors concluded that this male was intoxicated.

The two inspectors testified that they observed a second male in the smoking room that appeared intoxicated. The male attracted their attention with loud and derogatory comments about the woman with whom he was seated. The inspectors described this patron as having rotting teeth and a scraggly appearance. They watched as that male knocked over his drink. A waitress appeared and presented the patron with a bar towel. He attempted to clean up the beer while talking about drug dealing, and wondered aloud if the two liquor inspectors were bounty hunters.

The inspectors did not question any of the three patrons with respect to medical histories or their food intakes on the evening in question.

The inspectors described their past experience with intoxicated persons. Their experience was extensive and included formal courses on alcohol and identifying levels of intoxication, previous careers with police departments (more than 25 years each), and training with and exposure to mentally disabled individuals. They each claimed to have considerable experience distinguishing between the symptoms

displayed by an intoxicated person and the observable qualities of a person with a disability.

Although the inspectors believed each of the three patrons were intoxicated, they did not believe that these patrons were an immediate danger to themselves or others.

One of the inspectors testified that the bar staff served patrons in the smoking room on three occasions during their short stay and that on no occasion did the staff member seem to have any difficulty with the identified patrons or request that they leave the establishment.

The branch called a third inspector. She testified that she was part of the larger inspection team and one of two inspectors who entered the establishment at approximately 12:30 a.m. that same evening, just shortly after the first two inspectors left.

She testified that she also sat in the smoking room. There she observed B. The inspector observed B to be slouched in her seat, with red eyes, and "really loose facial muscles." B was slurring her words and was inappropriately loud.

The inspector also observed a male patron who was seated near the window with a woman. He was very loud, and attempted to leave the smoking room and exit the bar through a door that was locked. The inspector described him bouncing off the locked door and the bartender remarking that the same thing happens every Friday.

This inspector observed a server drinking from a bottle labelled Smirnoff Ice. The inspector identified Smirnoff Ice as liquor. The server cleaned up some tables in the area and then took another drink from the bottle. Then she served the inspector and her partner. The inspector testified that the server asked these inspectors to call her if they wanted anything else in the next five minutes. The server then sat down and drank from her bottle.

The owner/operator of the licensee testified that he knows B and that she has a medical condition that causes her to act and look as though she is intoxicated. He testified that she is a regular patron, that he saw her on May 25, 2007, and that he believes that she was not intoxicated.

He also testified that the male patron who was initially described as sitting with a female by the window of the smoking room and later walked into the locked door from the bar was a resident of the hotel and a "crack-head". He testified that the patron is customarily loud and obnoxious but that his behaviour is not caused by alcohol, but by drugs. He testified that he saw this patron on the occasion of the allegations and that it was his opinion that the patron was not intoxicated.

The owner tendered exhibit 2 as written evidence of the bouncer, the bartender, the doorman, and the server who was observed drinking a Smirnoff Ice. The exhibit consists of four handwritten letters, each of which appears to be signed by a staff member. One of the letters is dated October 19, 2007.

The letters indicate that B has a medical condition which affects her behaviour and appearance, the third male is known to be a "crack-head", and confirm that staff members are not allowed to drink on the job. The letter from the doorman indicates that he did not "see anyone over intoxicated." The letters also confirm that the licensee's procedure in the event of intoxicated patrons is to arrange for safe removal from the premises.

The server wrote that she signed out at 12:30 a.m. on that night and "decided to have a cooler Smirnoff Ice" while waiting for an employee with whom she carools. She indicated that she "did how ever go around and wipe up some tables and put stuff away, this was done on my own time." She denied serving anyone after her shift.

SUBMISSIONS

The licensee submitted that there was no evidence of how much the patrons drank in the establishment and no evidence of what they might have consumed before attending the establishment

The licensee submitted that as the inspectors did not contact the police, they clearly did not believe that the patrons were intoxicated. Had the inspectors believed the patrons were intoxicated, they would have had an obligation to ensure the patrons got to their homes safely and did not cause any harm to people around them.

The licensee submitted that B has a head injury and is known to the staff. She is a regular and was not intoxicated. The symptoms observed were her usual traits as a result of her motor vehicle injury.

The licensee submitted that the patron who bounced off the closed door was living in the hotel portion of the establishment at the time. The patron was known to be "a crack-head" and did not recognize that the door to the rooms was locked after 11:00 every night to reduce noise intrusion into the rooms.

The licensee submitted that the server was not on duty as she had signed off of her shift and handed in her tray. She may have been helping out in the bar while she waited for a ride home from another employee who was not yet off shift. Therefore, the licensee said, she was not employed at the time she was drinking the Smirnoff Ice because she was not working.

ANALYSIS AND DECISION

Intoxication s. 43(2)(b)

There is evidence of several patrons being intoxicated in the establishment.

I find that the female identified as B was intoxicated. I accept the evidence of three liquor inspectors in that regard. I find that the evidence discloses that they each have considerable experience identifying symptoms of intoxication. Indeed, I find that two of the inspectors have considerable experience distinguishing between symptoms of intoxication and symptoms of mental disability. The licensee provided evidence that B demonstrates symptoms as a result of an acquired brain injury, which symptoms may be mistaken for those of intoxication. I am unable to make a determination based on the evidence before me that B has a medical condition that produces symptoms consistent with those of intoxication. I find, however that such a determination is not required in this instance. I find that B was drinking and that she is a regular patron at Jake's Pub. The existence or non-existence of an acquired brain injury does not prohibit the possibility of intoxication. I find that the evidence on the whole is persuasive that this patron was intoxicated, notwithstanding any pre-existing symptomology.

I find that the male patron who was seated across from B was intoxicated. I accept the evidence of the two liquor inspectors on the first team with respect to this patron. The inspectors observed a significant number of symptoms associated with intoxication. I have already determined these inspectors have considerable experience in that regard.

I cannot determine on a balance of probabilities that the second male (who was seated with the female by the window) was intoxicated. Although the inspectors indicated that he showed a considerable number of symptoms consistent with intoxication, the licensee provided corroborating evidence that this patron is known

to be “a crack-head”. The licensee submitted that this patron is known to be a drug user and his behaviour is consistent with drug use as well as intoxication. I find the evidence of his consuming alcohol is limited and accordingly his demonstrated symptoms may be as likely relating to drug use as intoxication. I find that the licensee’s evidence provided enough doubt as to the source of his symptoms to prohibit a finding of intoxication on the balance of probabilities.

The licensee submitted that the inspectors were not experts in determining intoxication, nor did they investigate the medical history of the patrons who they alleged were intoxicated.

The witnesses were not qualified as experts, nor need they be for an adjudicator to find that the patrons were intoxicated. The witnesses are eyewitnesses. Their testimony is designed to inform the adjudicator as to the symptoms observed. An inspector’s training and experience qualifies her observations, and supports her allegation of intoxication.

The licensee submitted that there was no evidence of how much the patrons consumed in the establishment or before attending the establishment. I find that this submission is not relevant to the issue, as the alleged contravention does not require proof of consumption in the licensed area, or details of how the persons became intoxicated.

The inspectors did not have the primary responsibility to ensure that intoxicated patrons would get home safely, as the licensee has suggested. The licensee carries that responsibility. The inspectors testified that they did not believe that these intoxicated patrons presented any immediate threat to themselves or others. I find that it was reasonable for the inspectors to rely upon the licensee to take care to ensure that any patrons who attempt to leave the establishment in a condition such that they might present a danger to themselves or others, gets appropriate help or supervision.

Finally, I find the letters of the licensee's employees deserving of little weight. They are in many cases, unspecific, they are all undated but for one, they were not made under any oath or affirmation, and the authors were not available for cross examination to test the veracity of the contents of the letters. To the extent that the contents of exhibit 2 are contrary to the inspectors' evidence, I prefer the inspector's evidence.

I find, therefore, that two patrons were intoxicated and permitted to remain in the establishment as prohibited by s. 43(2)(b) of the *Act*.

Employee consuming liquor while working s. 42(3)

I accept the evidence of the liquor inspector from the second group, that she observed a server drinking liquor. The licensee did not deny that the server was drinking liquor, and neither did the server in her letter. The licensee argued that the server had completed her shift and was helping out while waiting for a ride home while she drank a Smirnoff Ice. The server noted in her letter (in exhibit 2) that she completed her shift, and then drank the Smirnoff Ice, "and wipe[ed] up some tables and put stuff away."

The facts of this allegation are not contested. The issue is whether or not those facts constitute a contravention of the *Regulation*.

I find that these facts do constitute a contravention of s. 42(3) of the *Regulation*. The server was by all accounts an employee, and by all accounts she was removing glasses from tables, and cleaning tables. This was described by the inspectors as working and by the licensee as helping out. The inspectors or the patrons would have no way of knowing that the server had completed her shift, because she was doing the work they would expect to see her doing. I find that the server was doing part of her usual job, in the usual way, and at the usual place. I am not persuaded by the submission that her actions do not constitute work, simply because she had

previously turned in her tray and formally ended her shift. I find it would be nonsensical in this setting and with the clear objectives of the *Act* and *Regulation* to find s. 42(3) inapplicable because the employee was not being currently paid for her services. I find that the employee was working when she cleared tables and put things away and while doing this she consumed alcohol.

This contravention has been proven.

Delay in notifying the licensee of the allegations

The licensee submitted that the branch unreasonably delayed conveying information about the allegations to the licensee, and this delay prejudiced the licensee's ability to prepare a defence.

The evidence confirms that the liquor inspectors made observations between 11:30 p.m. on May 25, 2007 and 1:00 a.m. on May 26, 2007 (the business day of May 25, 2007). The allegations were brought to the attention of an employee of the licensee on the business day of May 26, 2007.

The licensee submitted that if the inspectors had notified the licensee while the allegations were in progress, the licensee would be able to respond to the allegations better and be able to "deal with" the situation, if one existed.

The inspectors testified that they did not notify the licensee while they were in the premises because their presence was part of an undercover operation. They were not local inspectors, but from elsewhere in the province and had gathered in order to do a covert sweep of the region. They further testified that to identify themselves at the time they observed the alleged contraventions would be to expose their cover. They indicated that to disclose to one licensee that a non-local inspector was undercover in the area would result in advance notice to many of the licensed establishments in the area and nullify the objectives of the program.

I find that the licensee was not prejudiced by notification within 24 hours of the inspectors observing the alleged contraventions. I accept that the collection of relevant data might be easier for the licensee if it were notified of the allegations as they were occurring, but I find it a reasonable delay to notify the licensee the next day. The licensee would certainly still have information available as to the identities of its staff and be able to obtain much of the relevant information by questioning that staff. As to the identities of the patrons and the circumstances affecting them, that information might be more difficult to obtain, but the licensee is required to be diligent with respect to service of patrons and any unusual circumstances should be noted and remembered by staff one day after the events.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* and/or the terms and conditions of the licence, I have the 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 is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

Intoxication s. 43(2)(b)

For the contravention of s. 43(2)(b) relating to May 25, 2007, the branch recommended a five (5) day suspension.

The range of penalty for a first contravention of section 43(2)(b) of the *Act* in accordance with item 11 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

Over-service is a serious social and public safety concern. I have heard no evidence or submission that would indicate that a penalty for this contravention is unnecessary under the circumstances.

To avoid the possibility of further liquor consumption and avoid any harm to other patrons or staff, a licensee must not permit a person who is intoxicated to remain in that part of the establishment where liquor is served. To ensure their safety, intoxicated persons may remain in unlicensed areas of an establishment while waiting for assistance or a ride home. In this case, two patrons were observed to be intoxicated and openly demonstrating clear symptoms of intoxication in plain view of the licensee's staff. The employees failed to request that these intoxicated patrons leave the establishment notwithstanding that the evidence discloses that the employees saw, ought to have seen, or spoke to each of the intoxicated patrons during the evening.

Accordingly, I find that something more than the minimum penalty provided in the *Regulation* for a first offence is appropriate. I find the branch recommendation of a five (5) day suspension is reasonable.

Employee consuming liquor while working s. 42(3)

For the contravention of s. 42(3) of the *Regulation* relating to May 25, 2007, the branch recommended a one (1) day suspension.

The range of penalty for a first contravention of section 42(3) of the *Regulation* in accordance with item 11 of Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000 - \$3,000.

The licensee must manage and control the behaviour of patrons to ensure the safety of staff, patrons and the community. When the licensee and staff drink liquor while working, their judgement and ability to manage and control the establishment may be impaired. This may create a public safety risk for other staff, patron, and the community.

This is the first contravention of this kind for the licensee. In light of the evidence that the server did not consider herself to be working while she drank liquor, I find that this contravention merits only the minimum penalty. I note that it still warrants a penalty in order to re-enforce the importance of the staff not consuming liquor while working or on duty.

I find the branch recommendation to be reasonable.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 120281 for a total period of six (6) days to commence at the close of business on Thursday, January 17, 2008 and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulations*).

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 14, 2007

cc: RCMP 100 Mile House

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate

APPENDIX "A"***Liquor Control and Licensing Act, RSBC 1996 Chapter 267*****Supplying liquor to minors**

- 33** (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,
 - (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
 - (c) in or at a place under his or her control, permit a minor to consume liquor.
- (2) Subsection (1) does not apply if liquor is
- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
 - (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or
 - (c) given or otherwise supplied to a minor in accordance with the regulations.
- (3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly
- (a) has it in the actual possession or custody of another person, or
 - (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.
- (4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.

- (5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant
- (a) required that the person produce identification, and
 - (b) examined and acted on the authenticity of the identification.
- (6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

Minors on licensed premises

- 35** A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except
- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
 - (b) with lawful excuse, or
 - (c) in prescribed circumstances.

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.