



**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:	C.P. White Holdings Inc. dba Plan B Nightclub 1318 Broad Street Victoria, BC V8W 2A9
Case Number:	EH08-009
For the Licensee:	Gregory N. Harney
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	K. McIsaac
Date of Hearing:	July 21, 2008
Place of Hearing:	Victoria, BC
Date of Decision:	August 19, 2008

INTRODUCTION

The licensee, C.P. White Holdings Inc., operates the Plan B Nightclub (nightclub) under Liquor Primary Licence No. 113949. The hours of operation are 7:00 p.m. to 2:00 a.m. seven days a week. The licence is subject to terms and conditions including the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTION

By Notice of Enforcement Action (NOEA) dated January 24, 2008, the Liquor Control and Licensing Branch (branch) alleges that on December 2, 2007, the bartender consumed liquor while working in the establishment thus contravening the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (Regulation), section 42(3). The branch recommends that the licence be suspended for one (1) day.

RELEVANT STATUTORY PROVISIONS

Section 42(3) of the Regulation reads:

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

ISSUES

1. Did an employee of the licensee, on December 2, 2007, consume liquor while working, contrary to section 42(3) of the *Regulation*?
2. If so, will the defence of due diligence excuse the licensee from a finding of a contravention under section 42(3)?
3. If the licensee contravened section 42(3), what penalty, if any, is appropriate in the circumstances?

EXHIBITS

Exhibit No. 1: Branch's book of documents

Exhibit No. 2: Five photographs marked 2(a) to 2(e)

PRELIMINARY MATTERS

Counsel for the licensee submitted that information regarding the licensee's unproven, alleged contraventions should not be included in the NOEA and should not be considered by the adjudicator when determining a penalty if a contravention is found. He submitted that this evidence is an irrelevant consideration and prejudicial to the licensee.

Counsel asked that as this issue is currently before the Supreme Court of BC and the decision is due in the next few days, I wait for the outcome of that decision before considering this information.

I agreed to this request however, given my decision, it was not necessary to consider penalty.

EVIDENCE

I heard from the two constables who observed the alleged contravention, the principle of the corporate licensee (licensee) and the bartender involved in the incident.

These are the facts as I have determined:

At approximately 1:00 a.m. on December 2, 2007, two constables, dressed in plain clothes, arrived at the Plan B Nightclub. The constables were involved in an undercover operation and their objective was to observe and monitor liquor establishments' compliance with the liquor legislation. The nightclub was their final destination.

When the constables entered the nightclub they observed that it was not crowded and appeared under capacity. They walked through the establishment, checking for liquor noncompliance such as the presence of minors and intoxicated patrons. Finding none, the constables eventually settled at a table in the main bar area. One constable remembers that they stood at a high shelf area at the back, opposite the bar, for approximately half an hour before moving to the table. The lighting, although subdued, was brighter in this area than in other sections of the establishment.

The table was located at the side of a large rectangular-shaped bar and was slightly elevated so they could look slightly down toward the bar area. It was approximately 25 feet from where the bartender was working behind the bar. One of the constables said she could see the bar top and a second counter approximately 6-10" below the bar top. On this lower level she could observe glasses and the well (a hole on the lower counter). The constables ordered

drinks and observed patrons and staff going to and from the bar. They sat opposite each other but facing outward.

The constables testified that their view was not obstructed. Although the licensee testified that the constables' view would have been obstructed because the bar would have been crowded at that time of night and because of the equipment on top of the bar, I prefer the constables' evidence in this respect. They were both confident that they had a clear view of the bartender and on that particular night the nightclub was not crowded and appeared to be under capacity.

The constables observed the bartender pour liquor from a Jaggermeister bottle into three shot glasses and observed two patrons consuming two of the shots and the bartender consuming the third. I accept that the liquor was Jaggermeister as both constables were familiar with the bottle's unique rectangular shape and green colour.

After the last call at 2 a.m. one of the constables observed the bartender pour Jaggermeister and another unknown substance into 3 shot glasses. She observed that two shots were consumed by two male patrons and one consumed by the bartender.

The constables left the nightclub at approximately 2:30 a.m. They noted that the bartender and staff did a good job of closing. The last call was promptly at 2 a.m. and patrons were removed from the establishment at 2:30 a.m. As the constables were operating undercover they did not speak to any staff regarding the incident or seize the empty glasses.

The constables returned to the station immediately to write their report. They did not take notes while they were inside the nightclub as they wanted to blend in and not appear to be different from other patrons. They later notified the liquor inspector.

There is no dispute as to the identity of the bartender. One of the constables returned to the bar the following week on a separate undercover assignment. She provided a description of the bartender to uniformed officers who then entered the establishment and confirmed his identification.

The bartender has been trained as a bartender for 12 years and has been employed at the nightclub for the past two and a half years. He works at the nightclub three nights each weekend and attends school five days a week.

As head bartender he routinely arrives at the nightclub at approximately 9 p.m. to set up the bar and to set up the music and lighting levels. At the end of the night, from 2 - 2:30 a.m., he organizes and counts the bar receipts and provides water to the patrons.

The licensee testified that he trusts the bartender and considers him one of the best bartenders and good with customers. He said that when he arrives at the nightclub the following morning he finds the accounting of the bar receipts is usually accurate.

The licensee also testified that if an employee is found to be consuming alcohol while working, they are suspended or terminated. For example, he said that he suspended a coat check girl when she accepted a drink from a customer. He said employees that have been drinking before coming to work are sent home. The licensee said he has never had to discipline the bartender for consuming alcohol while working.

The licensee testified that the patrons often want to give the bartender a drink and join their party. He said the bartender could either decline or, by slight of hand, switch the shot for a phantom or fake shot. The phantom shot is usually filled with flat coke or pepsi and is kept under the bar. After pouring the drinks the bartender will quickly switch the alcoholic shot with the phantom shot in a way that is undetected by the patrons. At the hearing, when counsel for the licensee presented both constables with two shot glasses, one containing flat

coke and the other containing Jaggermeister, both acknowledged they could not detect a difference in colour.

The bartender testified that every other customer tries to buy him a shot. As his relationship with customers is important to him, he must hide the fact that he is not drinking alcohol. When he switches the alcoholic shot for the phantom shot, the switch must be quick and undetected because if the customers see the switch he would lose that relationship. He said that another technique he uses is to cover his hand over the alcoholic shot and pretend to drink it then quickly dispose of it in the well of ice.

The bartender testified that he does not drink while working in the establishment and did not consume alcohol on the night of the incident. He said it was also not possible that he would be drinking in December because he stopped drinking alcohol in October because of a painful medical condition that became even more painful when he consumed alcohol.

The bartender testified that he has been suffering from his medical condition for the past two years. In the fall of 2007 his condition became increasingly painful and in October he decided to abstain from consuming alcohol because it exacerbated the pain. The licensee said he has sent the bartender home a few times because of the pain.

LICENSEES SUBMISSION

The licensee's counsel submits that in undercover police operations licensees find it difficult to defend alleged contraventions because the licensee has had no opportunity to respond or to test the allegations. He submits that after an incident involving a covert operation, some action should be taken such as seizing the glass or detecting for alcohol consumption.

Counsel submits that the constables may have observed the bartender consuming, but he may not have been consuming from the glass on the counter. There is no evidence that the bartender consumed the substance; the constables just believe they saw him drink it. He said one constable acknowledged the bartender could have switched glasses if he had quick hands. He said there is also no evidence that liquor was consumed and no corroborating evidence that the substance was alcohol.

Counsel also submits the bartender is a seasoned bartender and has no interest in or reason to consume alcohol. He is asked by every second patron to join in the drinking. It is also inconceivable the bartender would jeopardize his job, schooling and health. He said the bartender knew he was not allowed to drink while working, had never been suspended for drinking and the evidence is that he was not even mildly intoxicated. Counsel also submits that the bartender's medical condition was painful and alcohol would have exacerbated his condition.

ANALYSIS AND DECISION

I find the evidence of the two constables credible. The constables are experienced officers and their testimonies were straightforward and believable. Despite some minor inconsistencies in their evidence such as, whether they stood or sat at the table after entering the premises, their evidence regarding the details of the incident was consistent.

Notwithstanding the constables' observations, which I accept, I find on a balance of probabilities, the bartender did not consume alcohol.

I found the bartender to be a credible witness and his testimony straightforward and consistent. He impressed me as a bright and personable young man and I found his explanation regarding his use of phantom shots and other techniques, appearing to join in with customers, believable. I accept that, as an experienced bartender, he uses these techniques and has honed them sufficiently so that he can switch drinks or fake his consumption without detection.

Did the bartender use these techniques on December 2nd when the constables observed him to be consuming alcohol? I find on a balance of probabilities, he did.

One constable, although confident in her observations, was not aware of phantom shots or fake shots and would not have been alert to this as a possibility. In fact, there was no evidence the constables considered that the bartender might be using these techniques. For example, the constables did not say whether or not they observed the bartender covering the glass with his hand. One of the constables acknowledged that it was possible the bartender could have switched glasses if he was very fast and, although she did not see him retrieve anything from underneath the counter, she could not be sure. When one constable was asked if the bartender could have poured a phantom shot she said she could not say one way or another, only that she observed him drink one of three shots from the bar. I find that when the bartender poured the Jaggermeister into three shot glasses and appeared to consume the shot, he was likely employing one of these techniques and deceived the customers into believing he was drinking along with them. By successfully deceiving the customers sitting near him, I find it even more likely he was able to deceive the constables sitting approximately 25 feet away.

I find there is also no clear evidence that the bartender consumed alcohol, for example, an empty glass containing alcohol or evidence of intoxication such as alcohol on the bartender's breath. The constables testified the bartender did not even appear to be mildly intoxicated.

I also find the bartender's reasons for not consuming alcohol believable. He knew that drinking was not allowed and if caught he would be suspended or terminated. The bartender was also responsible for the accounting of the bar receipts at the end of the night and the licensee testified that he is usually accurate. He also had stopped consuming alcohol since October 2007 because alcohol exacerbated the pain he was experiencing due to a medical condition.

Given the evidence I find on a balance of probabilities, that the bartender did not consume alcohol while working at the establishment and accordingly, I find the licensee did not contravene section 42(3) of the *Regulation*.

Original signed by

K. Mclsaac
Enforcement Hearing Adjudicator

Date: August 19, 2008

cc: Victoria Police Department - Sgt. Jim Simpson

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

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