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:	685946 B.C. Ltd. dba Chieftain Hotel 38005 Cleveland Ave Squamish B.C.
Case:	EH10-078
For the Licensee:	Bob Nijjar Rajinder Nijjar
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon Seigel
Date of Hearing:	October 5, 2010
Place of Hearing:	Squamish, B.C.
Date of Decision	November 3, 2010

INTRODUCTION

The corporate Licensee operates the Chieftain Hotel located in Squamish, B.C. The Licensee holds liquor primary licence number 139161. The hours of sale are 11:00 a.m. to 1:00 a.m. Monday through Saturday and 11:00 a.m. to midnight Sunday. The patron capacity is 150, divided between two areas. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (*Guide*).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated July 7, 2010. The branch alleges that on May 7, 2010 the Licensee contravened section 42(3) of the *Liquor Control & Licensing Regulation* (*Regulation)* when an employee consumed liquor while working.

The proposed penalty is a two day suspension in accordance with 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: a licence suspension of one to three days and/or a monetary penalty of $1,000 to $3,000.

RELEVANT STATUTORY 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. In the event that the contravention is found to have occurred, can the Licensee establish a defence of due diligence?

3. If the contravention is proven, 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.

EVIDENCE

The Liquor Inspector

The inspector identified all of the tabbed documents in exhibit #1, and made particular reference to the terms of the licence at tab 3, the Primary Inspection Interview Sheet at tab 5, the record of a compliance meeting on March 20, 2008 at tab 6, the past contravention notice B006035 at tab 11, and the documents provided by the Licensee at tab 10.

The inspector said that the *Guide* (excerpts at exhibit #1 tab 7) gives an outline of the *Regulation* for the Licensee's benefit. The *Guide* spells out the Licensee's obligations in language easier to understand than the *Act* and *Regulation*. It makes the law easily available for the Licensee. She also said that the *Guide* is given to the Licensee on the initial inspection and at compliance meetings. She said that the Licensee was also made aware of its obligations under the licence and *Regulation* during a previous compliance meeting held on March 20, 2008 (exhibit 1, tab 6). She said the Licensee was also provided with a copy of the *Guide* on the initial inspection when the Licensee became the owner of the establishment (see tab 5). The inspector identified excerpts from the Serving it Right Program Manual (exhibit 1, tab 8), which is the responsible liquor serving guide required for servers and bartenders in all liquor primary establishments.

The inspector testified that she attended the establishment in the course of her duties at approximately 9:38 p.m. on May 7, 2010. She observed six to eight patrons in the bar

area and a male employee standing behind the bar, whom she recognized as JR the bar manager from previous encounters. JR had a glass of amber coloured liquid in his hand. It had foam on it and appeared from her experience to be beer. She observed JR drink from the glass twice in the span of a couple of minutes of observation. She noted that he was in clear sight of all of the patrons in the bar and made no effort to conceal his drinking from the patrons. The inspector observed another employee behind the same bar. That employee, whom she later identified as M, appeared to be doing something with the cash register, and JR appeared to be assisting him. M could see that JR had a glass of beer in his hand, and JR consumed liquid from the glass while assisting M.

JR asked if he could assist the inspector. He did not seem to recognize her from previous meetings. The inspector told him she did not need any help and that he should "just continue what [he] was doing." Shortly thereafter, the inspector asked JR: "Are you in charge?" JR replied that he was in charge of everything. The inspector identified herself and advised JR that he could not consume liquor while working. JR first denied drinking anything but then when the inspector told him that she had observed him drinking beer, he "shrugged his shoulders." The inspector testified that JR did not then deny that he was drinking, that the substance was beer, or that he was working.

The inspector said that she recommended a two day suspension because a significant suspension was felt necessary as the employee who was drinking was the person in charge, and the Licensee needs to know that the Branch takes these issues very seriously. She said that only a month before the incident, the Licensee signed a waiver accepting responsibility for a bartender who, while working in the establishment, was determined to be so drunk that she could not function. JR had to take charge and shut the bar down as a result (CN006035, exhibit 1, tab 11). The inspector added that employees of a licensed establishment have to be able to observe and control their patrons at all times and maintain order. Drinking with the patrons or while on duty interferes with the ability of an employee to perform those duties and cannot be condoned.

SW

SW testified that she is an employee of the Licensee and has worked in the establishment for six years. She was not working on May 7, 2010 and has no knowledge of the events of that night. She was aware of the events of April 10, 2010, however, when the bartender on duty was drinking during work and the bar was forced to shut down as a result of the bartender being intoxicated. SW said that as a result of that event, the bartender was fired and SW became the new manager. She said her promotion occurred on April 16, 2010. She also said that when she was promoted to manager, M was to act as assistant manager.

She referred to exhibit 1, tab 10, document b as the letter of termination of the bartender, and document d1 as the April 10, 2010 letter appointing her manager effective April 16, 2010. SW also identified exhibit 1, tab 10, document e as a list of employees, and those who were working on May 7, 2010. She pointed out that document lists her as “pub” manager and M as “pub” assistant to manager, and shows that only M and another employee (not JR) were working that night.

SW also testified that she has never seen the *Guide* before, though she knows it is available online, and that the establishment has a procedures binder that is kept behind the bar.

JR

JR said that he was behind the bar on May 7, 2010 when the inspector came in. He said:

> I was behind the cash doing readouts and getting the cash from [M] because he was closed. I’m always early. I’m known for that. I’m supposed to start at 11:00 pm. I do not have a car. I live a block and a half from the hotel. I was standing at the end of the bar, and a customer bought me a beer. I could do a read-out at any time, and I was there, so I did it. Mike had closed the till at the time. Cash was there and his envelope was done and he was closed. Mike had just finished doing his cash out. He went to clean his tables. I could have done that all night long, but I decided to do it at that time. Then I do the paperwork. [The liquor inspector] asked if I was in charge and I said I was in charge. I thought she wanted a room. She did not mention the bar, just said “who’s

> in charge" and I said I am. I did not recognize her, I've only met her a couple of times before.

On further examination, JR said when the inspector was talking to him, he was drinking a beer that a patron bought for him, and M poured for him, and he was standing behind the bar doing read-outs from M's cash-out. He then took the cash receipts from the bar while he still had his beer. He said that he told the inspector that he was drinking beer and that he was scheduled to work that night but had not started his scheduled shift yet. He said he was helping M but he was not scheduled to start until later.

Of his conversation with the liquor inspector he said,

> I confirmed to the liquor inspector that I was in charge. She asked me and I said yes. I did not at any time tell her that I was not working. I did not tell her that I was not in charge even after she said she was going to write a contravention notice for drinking beer while on the job.

Of the results of the alleged contravention of May 7, 2010 he said:

> There is an incident logbook. I did not put any entry in it. I had disciplinary measures. [SW] took over and I was put in charge of maintenance. I got heck for it in writing. I got a letter. I was reprimanded. I admitted to the owners that I was consuming on duty.

He also said that since May 7, 2010 his job is "to be on the front desk" of the hotel and to go into the pub to get the cash readouts, do the night audit and clean the pub.

He also said that there is an incident logbook somewhere in the pub and another binder by the Keno machine that might have some pub rules in it, but he has never opened it.

JR testified that the bartender who got caught drinking the previous time was fired immediately after the incident on March 27, 2010. He said he was there and had the close the bar down because the bartender was so drunk.

The Licensee

BN and RN testified that they are the principles and shareholders of the corporate licensee. They each provided evidence.

BN testified that there was no liquor service available at the time that the inspector attended the pub. He said that the bar had closed and liquor service was over. He said that generally it is not unusual for bar employees to drink on the job, "In downtown bars, people are buying shooters for employees and the employees are drinking the shooters while on duty in every bar every night. Everyone is doing it."

With respect to policies and procedures, RN testified that she did not know the documents had to be produced for the hearing, but they exist. BN said he made the manuals himself and that every bartender has to read the manuals when they begin employment with the pub. He said the binders he prepared are clear and concise and the contents were taken from the Branch materials. He said, "I go over it with them. If I give them reading material they don't read it, so I go over it with them. There are logbooks in front of the bar. They don't write things in the logbooks because they call and tell me instead."

SUBMISSIONS

The Branch submits that each of the elements of the contravention has been established: JR was an employee, was working and was consuming liquor in the establishment. Therefore the contravention has been proven.

The Licensee submits that it neither lied nor hid any information. With respect to the earlier contravention involving the drunk bartender, the Licensee submits that there was no evidence that the bartender drank while in the establishment. They had evidence that she was drinking outside before her shift. The Licensee simply accepted the police version of things in order to avoid drawing the matter out. The Licensee says that previous event is not relevant evidence of anything with respect to this matter.

The Licensee also says when an employee is on his time-off, he is a regular patron and can drink in the pub. The Licensee says nothing in the manuals say an employee cannot drink on his days off or when he is "taking a read-out from behind the bar after the bar is closed and the cash is done."

With respect to JR drinking at the relevant time, the Licensee says:

> [JR] thought he'd get his job done early and be over with it. He was not an employee at that time and not being paid for it. It was his own prerogative. I have told them now they cannot do that. Why he did it, I don't know. It's stupid.

DISCUSSION AND FINDINGS

The liquor primary licence 139161 has on its face stated terms and conditions which specifically include the contents of the *Guide* by reference (exhibit 1, tab 3). The Guide states that all licence terms and conditions must be followed or enforcement action may result (exhibit 1, tab 7, p.6). The *Guide* also states:

> Employee Conduct
>
> Liquor consumption - You and your employees may not consume liquor in your establishment during working hours. This includes breaks, meal periods and between shifts on the same day. (exhibit 1, tab 7, p.24)

The Serving it Right Program Manual indicates that "Licensees and employees must not consume liquor while working in the licensed establishment" (Exhibit 1, tab 8, p.30).

There is considerable evidence that the Licensee was or should have been well aware of the prohibition of employees consuming liquor while working as a result of the text of the *Regulation* (s 42(3)), the Final Inspection Interview Sheet, the compliance meeting of Mar 20, 2008, the previous contravention and acknowledgement of the contravention of the same section of the regulation that occurred on March 27, 2010, the Licensee's own documentation to the previous bartender (exhibit 1, tab 10, document b), and the succinct prohibitions set out in the *Guide* and the Serving it Right Program Manual.

The employee JR admits to consuming liquor when the inspector was present. He says that he was not working, but that his shift was to start later in the evening. He says he was "early." JR also described the duties he was carrying out at the relevant time in terms consistent with those of the Licensee. He was collecting cash register receipts from the bartender, and assisting the bartender to close out the cash for the night. The evidence is uncontroverted that JR was behind the bar while performing these duties, and concurrent with drinking a beer poured by the bartender M who was also behind the bar. The inspector says that there were six to eight patrons in the pub at the relevant time. I find that an employee who is behind a bar and performing duties associated with his employment for the benefit of the Licensee, while patrons occupy the pub, is an employee whether or not he is officially on duty or being paid by the Licensee at that moment.

JR was known by the inspector to be the manager of the pub. He advised the inspector that he was "in charge of everything" and did not deny that he was the manager on May 7, 2010. The Licensee testified that JR was not the manager at that time. In support, the Licensee provided a document (exhibit 1, tab 10 document e) that names SW as the manager at the relevant time. That document, however, also indicates that JR was not working at all on May 7, 2010, the day that he was by all accounts behind the bar retrieving the day's receipts. JR testified that he was relieved of his position as manager of the pub following the allegation he was drinking while on duty on May 7, 2010. He also provided inconsistent testimony that as a result, he was put "in charge of maintenance" and "on the front desk. SW testified that she was made manager by correspondence dated April 10, 2010 effective April 16, 2010. No witness testified as to the provenance of these documents.

I find the conflicting oral evidence of JR, SW and the Licensee, and the documentary evidence provided by the Licensee with respect to the identity of the manager of the establishment on May 7, 2010 to be contrived. I accept the inspector's evidence that JR was the manager on May 7, 2010. I accept JR's evidence that he told the inspector that he was in charge and his consistent evidence that he was demoted from manager for the allegations of the contravention as true. I find that JR was the manager of the

establishment during the inspector's visit on May 7, 2010. I find that the liquor was served to the manager JR by the bartender M, behind the bar while the pub was open for business and occupied by six to eight patrons.

I find that on May 7, 2010 while the liquor inspector was in attendance at the licensed establishment, JR was an employee of the Licensee, was working for the Licensee, and was consuming liquor. Accordingly, I find the contravention occurred as alleged.

Due Diligence

A Licensee is entitled to a defence to allegations of contraventions of the *Act* or *Regulation*, if the Licensee can show that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. A licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

Here, there is little evidence upon which I can find that the Licensee was duly diligent. At the time of the contravention JR was in charge of the licensed establishment. He was the directing mind of the Licensee. He knew or should have known that he was not permitted to consume liquor while working. The bartender M served him liquor, notwithstanding that M, also an employee, knew or should have known that JR was not permitted to consume liquor while working. JR and M were the only employees on duty at the time and they both were or should have been aware that there were six to eight patrons in the establishment for whom they were responsible. The evidence is inconsistent as to the nature and extent of any written or established policy or procedures that might be in place, and no tangible evidence of a manual containing that information was presented to me. There is little evidence on which I could find appropriate staff training, or protocol with respect to the prohibition on employees consuming liquor while working, or any other prohibitions or requirements described under the *Act* or *Regulations*. I find that the Licensee has not been duly diligent.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have 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, or 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 *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

There is no previous proven contravention of the same section of the *Regulation* for this Licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegation as a first contravention. The range for first contraventions of this type is a licence suspension for one to three days and/or a monetary penalty of $1,000 - $3,000.

The establishment has faced allegations of employees consuming in the past and the Licensee has been required to attend a compliance meeting with the Branch at which this issue was discussed. Notwithstanding these events, the Licensee did not put sufficient measures in place to prevent the contravention.

The evidence discloses some controversy over who was in charge in the bar and an overlapping of obligations of employees working within the licensed establishment and in other areas of the hotel premises. The Licensee and its witnesses attest to what amounts to a blurring of the line between staff and patrons. The Licensee has a responsibility to manage and control the behaviour of patrons and to ensure the safety of staff, patrons, and the community. When employees consume liquor while working, their judgement and ability to manage and control the establishment may be impaired. When patrons observe employees consuming liquor their confidence in the judgement and control of those employees may be compromised. An employee known to be the manager was observed working and consuming liquor while behind the bar when patrons were in the licensed establishment. This creates both the reality and appearance of a lack of control and may result in an unsafe environment for the public.

The Licensee provided documents and witnesses that promoted incompatible scenarios regarding the identity of the manager on duty at the establishment on May 7, 2010. I find this evidence to be contrived and in conjunction with the Licensee's history as set out at exhibit 1, tabs 5, 6, and 11, I conclude that the Licensee is not committed to complying with the applicable rules of operation of the establishment. I am not satisfied that the recommended penalty of a two day suspension will ensure voluntary compliance in the future. Accordingly, I impose a three-day suspension in the hope that the Licensee will interpret this larger penalty as an indication that the Branch takes compliance with the *Act* and *Regulation* very seriously when public safety is involved, and is prepared to act in the face of evidence that the Licensee does not.

The finding that the manager was consuming liquor should indicate a higher level of culpability than if the consumption was by another employee as it speaks directly to control of the establishment. The past history of this manager observing the consequences of a bartender intoxicated while on duty exacerbates the issue by demonstrating beyond question that the manager had actual knowledge of the impact of this type of contravention. The repetition of a s. 42(3) allegation speaks to the Licensee's ineffectual remediation of that issue. The Licensee's statement that

"everyone is doing it" does not bode well for the expectation that the Licensee will do its best to ensure future compliance.

In the circumstances of this case, I am satisfied that the Licensee has not successfully or sufficiently stressed to its employees the need to fully and conscientiously carry out their duties, and a three day suspension is necessary to inspire the Licensee toward future compliance.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of liquor primary licence 139161 for a period of three (3) days, to commence as of the close of business on Thursday December 2, 2010, 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 Regulation).

I direct that liquor primary licence 139161 is to be held by the Branch or the Squamish detachment of the RCMP from the first day of the suspension until the Licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Sheldon M. Seigel Date: November 3, 2010
Enforcement Hearing Adjudicator

cc: RCMP, Squamish Detachment
Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate