



**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:	Silver Dollar Cabaret Ltd. dba Cactus Jack's Saloon 120 Fifth Avenue Kamloops, BC V2C 3P8
Case:	EH10-067
For the Licensee:	Dennis Coates
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	December 8, 2010
Place of Hearing:	Vancouver
Date of Decision:	January 14, 2011

INTRODUCTION

Cactus Jack's Saloon is a liquor primary establishment operating in Kamloops, B.C. under liquor primary licence 111831. The licence stipulates that the hours of liquor sales are from 7:00 p.m. to 2:00 a.m. Monday through Saturday and 7:00 p.m. to midnight Sunday. The licensed capacity is 495 persons. The licence is subject to terms and conditions, including those contained in the *Guide for Liquor Licensees in British Columbia (Guide)*.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

By way of Notice of Enforcement Action (NOEA), dated June 30, 2010, the Liquor Control and Licensing Branch ("Branch") alleged that on April 10, 2010 (business day of Friday, April 9, 2010) at 12:55 a.m. the Licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act (Act)* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a four (4) day suspension of the liquor licence in accordance with item 11 of Schedule 4, of the *Liquor Control and Licensing Regulation (Regulation)*.

The Licensee acknowledges that the contravention occurred but argues that a penalty is not appropriate but if a penalty is determined to be warranted, that a four-day suspension is not appropriate.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Drunkenness

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.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty warranted under the circumstances?
3. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

Exhibit 1- Branch's Book of Documents

Exhibit 2 – Package of 12 photographs submitted by Licensee.

EVIDENCE AND SUBMISSIONS

A liquor inspector testified that he attended the establishment on the business day of April 9, 2010 and observed a patron who displayed multiple signs of intoxication. He described those indicia of intoxication. He watched the patron for ten to fifteen minutes, during which time the patron moved throughout the establishment. The inspector said that the patron would have been visible to any employee who chose to observe him. No employee of the establishment approached the patron during the period that the inspector was present. The inspector sought out the security manager and pointed out the intoxicated patron. The inspector said the security manager made an independent assessment that the patron was intoxicated and proceeded to escort the patron from the establishment.

The inspector testified that he commenced enforcement action, issued a contravention notice and a NOEA, and recommended a four day suspension. He also noted that during the enforcement process he contacted the Licensee on numerous occasions, requested documentary evidence, and had discussions about the Licensee's policies and procedures. He said the Licensee and its management cooperated with the Branch, forwarded documents as requested in a timely fashion, and showed a willingness to work with the establishment staff on a continuing basis in order to minimize the likelihood of future contraventions.

With respect to the recommended penalty, the inspector said that the Licensee has made policy changes in order to better address the potential for identification of intoxicated patrons. He noted that those changes were welcome but were not in effect at the time the contravention occurred. As a result of the Licensee's cooperation and modifications to its policies, the inspector felt that a minimum penalty would bring about voluntary compliance in the future. He said: "It was not worth recommending anything more than a minimum penalty."

The Branch submits that the Licensee has an obligation to monitor and supervise all patrons in the red lined area. On the business night of April 9/10, 2010, the staff did not do anything about the intoxicated patron before the inspector brought the issue to the staff's attention. The Branch submits that the Licensee either failed to act on the presence of an intoxicated patron or failed to recognize the patron was intoxicated.

The Branch submits the recommended penalty is within the range specified by the *Regulation* for a first contravention of s. 43(2)(b) of the *Act*, and is appropriate. The Branch also submits that this contravention is a serious matter the repetition of which carries with it potentially dire consequences to patrons and the community.

A director and manager of the corporate licensee (Licensee) testified that the establishment is typically open Wednesday through Saturday evenings. He described the efforts that management takes to comply with the *Act* and *Regulation* and the terms of the licence including using a Treoscope scanning mechanism at the front door, having well trained door staff, requesting ID from all patrons, using a metal detecting wand, controlling all entrances and exits at all times, and using inside and outside security personnel.

The Licensee said he has implemented changes to the establishment's policies and procedures as a result of discussions with the liquor inspector following the April 10, 2010 allegation. These changes include additional meetings of all staff, dedicated security staff meetings, and additional training. The Licensee has also formalized day-

to-day procedures for staff members and made a physical change to the establishment to help address the complication that led to the contravention.

The Licensee testified that he debriefed the staff following the contravention. He learned that the security personnel that should have seen the intoxicated patron were located in an area where patrons obstructed the view toward the bar. The Licensee added a 16" riser in that area on which the staff could stand so there is a clear view over the heads of the patrons toward the bar.

The Licensee testified that the establishment annually applies for a special permit to extend its Sunday hours on long weekends from 12:00 a.m. to 2:00 a.m. He said that when he applied this year, he was advised that as this enforcement action was pending, no licence amendments or special permits would be available. The Licensee said that he was advised that it was a Branch policy that no such changes were available while an enforcement action was pending. The Licensee testified that one long weekend's extended hours was already lost due to the timing of this enforcement action.

The Licensee submits that there should not be a penalty. He says that if a penalty is assessed it should be a monetary penalty as the Licensee has demonstrated that it operates a "pretty good place" and the establishment has a good track record. The Licensee says management of the establishment pays attention to the recommendations of the Branch and is using its best efforts to comply with all of the rules of operation of a liquor primary establishment. The Licensee also submits that the Branch has already penalized the Licensee by refusing their usual request for long weekend late hours.

The Licensee submits that a suspension would be a significant penalty, far in excess of that which would be required to obtain voluntary compliance. In light of the size and economic realities of the business, he says, a suspension represents significantly more of a penalty than would a monetary penalty in the range provided by the *Regulation*.

DECISION

I find that the patron was intoxicated and was demonstrating indicia of intoxication at the relevant time. The intoxicated patron could be observed by anyone who cared to inform himself of the presence of an intoxicated patron. The Licensee has a positive obligation to ensure that an intoxicated patron is not allowed to remain in the red lined area of a licensed establishment. I find that through the failure of its management and staff to see that which was there to be seen, the Licensee permitted an intoxicated person to remain in the establishment contrary to s. 43(2)(b) of the *Act*. I find that the Licensee contravened the aforesaid section of the *Act* on April 10, 2010.

DUE DILIGENCE

The Licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The 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.

The Licensee, did not lead evidence or produce documentation that satisfies me that such procedures, policies, or staff training were in place at the time of the contravention. The Licensee's submission, that it has since the contravention made changes to address the insufficiencies, is not evidence of diligence at the time of the contraventions. In conclusion 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
- 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 by 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. I am not bound to order the penalty proposed in the NOEA.

There is no record of prior contraventions, offences or enforcement action of the same type for this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, the contravention is a first contravention for the purpose of assessing penalty.

Schedule 4, Item 11, of the Regulation stipulates the range of penalties for a first contravention of s. 43(2)(b) of the *Act* is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000-\$7,000.

The Licensee argued that while this enforcement process was pending, the Branch refused to consider its application for extended hours on long weekends. Accordingly, the Licensee says, it has already been penalized by this process, and that penalty is sufficient. The Branch is entitled to have policy guidelines with respect to enforcement actions and consideration of applications to extend the hours of a licensed establishment. I find the policy that no applications will be considered from an establishment that has an outstanding enforcement action, to be reasonable. The Licensee may or may not have suffered the loss it describes as a result of the timing of this enforcement action. There is little evidence that the acceptance of that application was a foregone conclusion. Further, the consequences of that Branch policy were brought about as a result of the Licensee's non-compliance with the *Act*. In the event

that an enforcement action is undertaken, the inherent consequences of the enforcement process cannot be seen as a penalty assessed against the Licensee. Accordingly, I find there is no relief available for any negative consequences occasioned by the timing of an enforcement process, and no credit can be attributed to the Licensee for having already suffered an unintended penalty.

To the credit of the Licensee, it appears as though the Branch is satisfied with the changes that the Licensee made to its operating systems and procedures in order to minimize the likelihood of future contraventions. Also to the credit of the Licensee, the inspector testified that the Licensee was cooperative and provided the documents and information requested of it in a timely fashion. Although the primary function of imposing a penalty for a contravention of the *Act* is to secure future compliance, that function must be considered in a broad as well as a licensee-specific manner. If every Licensee were to be able to escape penalty for contravening a provision of the *Act*, *Regulation*, or licence conditions, by cooperating with the Branch and making appropriate changes to its operating policy after a contravention, each licensee would effectively be entitled to one contravention without consequences for each provision of the regulatory scheme. This would clearly not be in the public interest and would likely put the public at considerable risk of harm. The Licensee did not have an adequate system in place on April 10, 2010 to ensure that an intoxicated patron would be seen, evaluated, and removed. I find that a penalty is warranted for this failure.

The Licensee testified that a suspension in accordance with the range provide in the *Regulation* (schedule 4) would cost the Licensee more than a monetary penalty in accordance with the range provided in the *Regulation*. The liquor inspector testified that a minimum penalty would be likely to bring about voluntary compliance. I find that the evidence confirms the minimum penalty in this instance is the bottom of the range of monetary penalties for a first contravention, or \$5,000. The evidence that the minimum penalty would likely bring about voluntary compliance is uncontroverted. I find that a monetary penalty of \$5,000 is appropriate.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the Licensee to pay a monetary penalty of five thousand dollars dollars (\$5,000) relating to liquor primary licence 111831 in respect of action EH10-067. The monetary penalty must be paid to the Branch no later than the close of business on February 14, 2011.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: January 14, 2011

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

Liquor Control and Licensing Branch, Victoria Office
Attn: Peter Mior, Branch Advocate