



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 & J Enterprises Ltd. dba Generator Cabaret
c/o Helen Van Oord
1232 3rd Avenue
Prince George, BC V2L 3E7

Case: EH15-016

For the Licensee: David E.M. Jenkins, Jr., Barrister & Solicitor,
Heather Sadler Jenkins LLP,
Barristers & Solicitors

For the Branch: Hugh Trenchard

General Manager's Delegate: R. John Rogers

Date of Hearing: Written Submissions

Date of Decision: July 3, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

C & J Enterprises Ltd. (the "Licensee") has retained ACMR Enterprises Ltd. as Third Party Operator to operate the Generator Cabaret (the "Establishment") under Liquor Primary Licence No. 004885 (the "Licence"). The Establishment is located at 1232 – 3rd Avenue, Prince George, British Columbia.

The Licence specifies hours of liquor service daily to be seven days a week from 9:00 a.m. to 3:00 a.m. However the evidence before me is that at the time of the contravention, the Establishment was opened only 4 days per week from Wednesday to Saturday. The Licence also specifies that the maximum capacity for the Establishment is 209 persons in Area 1 and 72 persons in Area 2, for a total maximum capacity of 281 persons for the entire Establishment.

The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia* (the "Guide").

Mr. David E. M. Jenkins, Jr. represented the Licensee as counsel for the purposes of this hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated March 10, 2015 (the "NOEA"). The Branch alleges that on February 7, 2015 the Licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") by permitting an intoxicated person to remain in that part of the Establishment where liquor was sold, served or otherwise supplied.

The proposed sanction is a six day suspension of the Licence. This proposed penalty falls within the penalty range set out in item 11, schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The range of penalties for a first contravention of this type is a 4 to 7 day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

The Licensee advised the Branch that the Licensee wished to proceed by way of a written submission. In its written submission, the Licensee admitted the contravention as alleged in the NOEA and advised that it was choosing not to make out a due diligence defence. The Licensee, however, although acknowledging a penalty for the contravention was absolutely warranted given the seriousness of the situation and similar situations which could arise in the future, submitted that the penalty proposed by the NOEA was unduly harsh and would have the effect of punishing the Licensee and the greater Prince George community as a whole.

For the purposes of this hearing, and in accordance with section 3 of the Regulation, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by section 20 of the Act and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, Section 43(2)(b)

Section 43(2) of the Act states:

- (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. 244/2002

Schedule 4 Enforcement Actions

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
11	A breach of section 43 (2) (b) of the Act by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold or served	4-7	10-14	18-20	\$5,000- \$7,000

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: The Branch's book of documents, tabs 1 to 15 inclusive.
- Exhibit 2: The Licensee's three page written submission.
- Exhibit 3: A copy of a two page email from the Branch advocate in response to Exhibit 2.
- Exhibit 4: A copy of one page email from counsel for the Licensee in response to Exhibit 3.

FACTS

The Licensee does not dispute the contravention and therefore accepts the facts as laid out in the NOEA (Exhibit 1, tab 1). The following is a summary of the facts from the NOEA as supported by the typed notes of Liquor Inspector A ("Inspector A") (Exhibit 1, tab 8).

On February 7, 2015 at 12:55 a.m., RCMP Officer A, ("Officer A") together with two other RCMP officers conducted a Licensed Premise Check on the Establishment. The Establishment was not busy with approximately 50 to 75 patrons present with a staff of approximately 12 people available to serve these patrons.

Within two minutes of entering the Establishment, Officer A noted:

- a female patron ("Female Patron") of the Establishment seated on a couch in the area of the Establishment designated as Area 1 in the Licence;
- the Female Patron was sleeping and did not respond to verbal direction to wake up;
- the staff of the Licensee did not appear to be aware of the Female Patron;

- there was a direct line of sight from the bar in Area 1 to where the Female Patron was sitting;
- the Female Patron's companion had to shake her to wake her up;
- the Female Patron was visibly intoxicated;
- the Female Patron's speech was slurred, her breath smelled strongly of liquor, and she was only able to stand with assistance.

A friend of the Female Patron had to escort her from the Establishment.

While Officer A stood outside the Establishment with the Female Patron waiting for a taxi, the Female Patron told Officer A that she was "super drunk", that she had consumed more than 10 drinks while she was in the Establishment, and that she had not had anything to drink prior to coming into the Establishment.

Officer A then re-entered the Establishment and, as a result of this perceived breach of section 43(2)(b) of the Act, issued License Premise Check B173224 (Exhibit 1, tab 6) ("LPC") to the manager of the Establishment. As a result of the issuance of the LPC, Inspector A subsequently issued Contravention Notice B011791 (Exhibit 1, tab 2) by registered mail to the Licensee.

The NOEA notes that in October 2012 the Licensee had served a 6 day suspension of the Licence as a result of a breach of section 43 of the Act when an intoxicated patron was found passed out in the Establishment. The NOEA also notes that on April 8, 2014 as a result of a complaint from the RCMP, Inspector A together with a representative of the Licensee attended a compliance meeting at the Prince George RCMP Detachment Office. At this compliance meeting the issue of intoxication was discussed together with other matters about the operation of the Establishment which were of concern to the RCMP (Exhibit 1, tab 11).

Attached to the NOEA is a list of fifteen previous enforcement actions against the Licensee dating from September 2002 up to and including the contravention which occurred on October 28, 2012. Of these enforcement actions, 5 involved contraventions of section 43 of the Act. Of these 5 contraventions of section 43 of the Act, the contravention on June 23, 2007 resulted in a penalty of a 4 day suspension of the Licence

and the contravention on October 28, 2012 resulted in a penalty of a 6 day suspension of the Licence.

INITIAL SUBMISSIONS – BRANCH

The Branch's position, as reflected in the NOEA, is that the recommended penalty of a suspension of the Licence for a period of 6 days starting on a Friday and continuing on successive business days until completed is an appropriate penalty and is necessary to encourage the Licensee to commit to ensuring that intoxicated patrons are immediately removed in a safe manner from the Establishment.

SUBMISSIONS – LICENSEE

As noted above, in its written submission (Exhibit 2), the Licensee through its counsel did not dispute the contravention which occurred on February 7, 2015, nor did it offer a due diligence defence.

However, the Licensee did offer submissions on the proposed penalty. These submissions were phrased in the alternative:

1. The proposed penalty of a 6 day suspension is unduly harsh and would have the effect of punishing both the Licensee and the greater Prince George community as a whole. A monetary fine of \$5,000-\$7,000 would be more appropriate.
2. In the alternative, a 4 day suspension would be a reasonable penalty with such suspension being deferred to a date when business has historically been slower for the Licensee, such as the July or August long weekends, when university and college students are absent from Prince George.

6 Days Unduly Harsh

In its submissions, the Licensee noted:

1. It would appear that the current recommended penalty of a 6 day suspension of the Licence is based upon the fact that a previous penalty of a 6 day suspension of the Licence was imposed as a result of the contravention on October 28, 2012 by the Licensee. The Licensee submitted that with respect to this previous contravention:

- The penalty of a 6 day suspension was issued as a result of a breach of section 43(1) of the Act (serving liquor to an intoxicated person) and not for a breach of section 43(2)(b) of the Act as with the present contravention; and
 - There were no facts presented by the Branch about the nature of the October 28, 2012 contravention other than the unsupported hearsay statement of Inspector A.
2. Certain facts from the contravention on February 7, 2015 suggest that the recommended penalty is too harsh, namely:
- Officer A noted that the staff of the Establishment did not appear to be aware of the Female Patron. The fact that these staff were not aware of the Female Patron, the Licensee submitted, suggests that the Licensee's staff were not, in fact, actively permitting an intoxicated person to remain in the Establishment;
 - It is not known:
 - at what point the Female Patron started to exhibit signs of intoxication, and
 - whether these signs of intoxication were noted by the staff of the Establishment;
 - The Female Patron was with a group of individuals who were looking out for her and propping her up; and
 - The only evidence of how much liquor the Female Patron had consumed comes from her evidence which she gave while in a state of advanced intoxication.
3. After the contravention was brought to the attention of the Licensee, the server who was responsible for serving the Female Patron and her friends on February 7, 2015 was dismissed on the spot.
4. Since the date of the contravention on February 7, 2015, the Licensee has sought to reinforce the importance of the rules contained in the Act, the Regulation and the Guide to all its employees through staff meetings and has informed employees that there will be zero tolerance for future breaches.

A Monetary Penalty More Applicable

The Licensee submitted that there is a strong public interest which supports not imposing a penalty in the form of a suspension of the Licence. The Licensee noted that Prince George has a very limited bar industry consisting of a very small number of venues other than the Establishment. These other venues open sporadically and do not have the capacity to meet the demands of patrons seeking to socialize and dance in a licenced, supervised environment. The Establishment is the only venue in Prince George which operates regularly and has a sufficient capacity to house and entertain larger numbers of patrons who are not seeking "exotic" entertainment.

The Licensee submitted that a suspension of the Licence will cause many people to seek entertainment at private residences, bush parties, and other unsupervised venues. Such activity could then lead to unsupervised drinking that could create many more situations of the type which section 43 of the Act is designed to prevent.

This possibility of having a greater number of people drinking liquor at a greater number of private locations, the Licensee submitted, will create an increased burden on the Prince George RCMP who will be forced to attend more call-outs associated with liquor related incidents such as impaired driving, noise complaints, fights, property crimes, and other disturbances.

RESPONSE SUBMISSIONS – BRANCH

The Branch was given an opportunity to respond to the Licensee's submissions (Exhibit 2) and did so in an email dated June 2, 2015 (Exhibit 3).

Section 43

The Branch in its response submitted that although the contravention for which the Licence was suspended for 6 days in October 2012 was in relation to section 43(1) of the Act and not section 43(2)(b), as for the contravention on February 7, 2015, these two contraventions are sufficiently related in that they demonstrate that the Licensee did not improve its practices with respect to its staff dealing with intoxicated persons in the Establishment following the contravention on October 28, 2012. That these related contraventions have occurred in a period of less than 3 years increases the seriousness

of the contravention being presently considered. That is why the recommended 6 day suspension is warranted in the comparatively egregious circumstances of the present matter as this penalty is near the maximum of the range permitted by the Regulation.

Staff Awareness

The Branch submitted that the fact that the staffs of the Establishment were unaware of the intoxicated state of the Female Patron does not ameliorate the situation for the Licensee, but rather makes it more egregious. The Branch submitted that under the circumstances, the Licensee's staff clearly should have been aware of the condition of the Female Patron.

The Branch noted that the evidence of the Female Patron was that she had consumed in excess of 10 alcoholic drinks. The Branch suggested in its submission that for every such drink the Female Patron was served over a threshold of intoxication, surely reached at a number considerably less than 10 drinks, the Licensee's staff should have monitored the condition of the Female Patron and should have taken the appropriate measures to stop serving her liquor and to assist her in safely leaving the Establishment.

Limited Market

The Branch submitted that the Licensee had not provided any evidence to support its submission that Prince George has a limited number of venues such as the Establishment.

RESPONSE SUBMISSIONS – LICENSEE

The Licensee was given an opportunity to respond to the Branch's response submissions (Exhibit 3) and did so in an email dated June 3, 2015 (Exhibit 4).

Staff Awareness

The Licensee in its response submitted that there is no evidence as to when the Female Patron fell asleep prior to Officer A observing her. Therefore, it submitted, it is not possible to find the Licensee's staff responsible for not observing her, as the Female Patron might have fallen asleep as Officer A was entering the Establishment.

In addition, the Licensee noted, the evidence is that the Female Patron consumed approximately 10 drinks; the evidence is not that the Female Patron was served these drinks by the Licensee's staff.

Limited Market

The Licensee in its response submitted that the Branch better than the Licensee is aware of the number and format of licensees in the Prince George area. However, it advised that it is only aware of two other nightclubs in Prince George other than the Establishment, both with capacity less than that of the Establishment.

REASONS AND DECISION

Contravention

The Licensee admits the contravention.

That admission, along with the evidence and submissions filed in these proceedings, demonstrates that on the balance of probabilities contrary to section 43(2)(b) of the Act on February 7, 2015 the Licensee permitted an intoxicated person to remain in the Establishment.

Accordingly, I find that on February 7, 2015 the Licensee contravened section 43(2)(b) of the Act.

Due Diligence

The Licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention 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 are dealt with.

In requesting the hearing by written submission, the Licensee has agreed that the contravention occurred and that the Licensee is not pursuing a due diligence defence.

I, therefore, find that the Licensee has not established a defence of due diligence.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the Licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the Licensee
- Suspend all or any part of the Licence
- Cancel all or any part of the Licence
- Order the Licensee to transfer the Licence

The factors that I have considered in this case in determining the appropriate penalty include: consideration of whether there is a proven compliance history, a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to the public safety, and the well-being of the community.

There is no record of a proven contravention of the same type for the Licensee at the Establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 of the Regulation in calculating a penalty.

Although there has not been a contravention of section 43 of the Act by the Licensee within the 12 months preceding February 7, 2015, the Licensee has a definite history of contraventions. The NOEA lists 16 enforcement actions against the Licensee dating from September 2002 up to and including the contravention which occurred on February 7, 2015. What is especially troubling is that of these enforcement actions, six, including the contravention on February 7, 2015, involved contraventions of section

43 of the Act. One would have thought, especially following the contravention on October 28, 2012 resulting in a penalty of a six day suspension of the Licence, that the Licensee would have been particularly sensitive to the treatment by its staff of intoxicated patrons in the Establishment. If such had been the case, it is unlikely that the contravention on February 7, 2015 would have occurred.

In its submissions on penalty mitigation, the Licensee suggested that in considering an appropriate penalty, I should not give weight to the contravention which occurred on October 28, 2012 as that contravention dealt with section 43(1) rather than section 43(2)(b) of the Act. I reject this approach as not an applicable difference as both contraventions deal with an intoxicated person in the Establishment and the treatment of this intoxicated person by Licensee's staff.

The Licensee also suggested that the fact that:

1. the staff of the Licensee appeared to be unaware of the Female Patron,
2. it is not known when the Female Patron fell asleep,
3. the Female Patron was supported by her friends, and
4. the only evidence as to how many drinks the Female Patron had consumed was evidence given by her in her state of advanced intoxication, should lend credence to leniency.

Unfortunately, I again must disagree with the Licensee. It is clear that one of the primary obligations of a licensee under the Act, the Regulation and the Guide is to ensure that patrons do not consume liquor to the extent that they become intoxicated, and that if such an event does occur, that the licensee through its staff has an obligation to immediately cease serving liquor to that patron and to act reasonably in ensuring that the intoxicated patron departs the premises in a manner sensitive to this patron's safety.

It is not sufficient to claim that the Licensee's staff were unaware of the Female Patron. It is part of the staff's responsibility to be aware of all of the patrons in the Establishment in order to meet the Licensee's obligation to ensure that none of these patrons become intoxicated. Similarly, it does not assist the Licensee to assert that there is no evidence as to when the Female Patron fell asleep or to proffer the evidence that

her friends were there to support her. Again, it is the Licensee's responsibility to ensure that there is not an intoxicated patron asleep in the Establishment.

The Licence permits a capacity of 209 patrons in the area of the Establishment designated in the Licence as "Area 1". The evidence before me is that the Establishment on the night of February 7, 2015 was not busy, with 50 to 75 patrons present and with a staff of approximately 12 staff members available to serve these patrons. In addition, the evidence before me is that there was an unimpeded line of sight between the bar in Area 1 and the location where the Female Patron was sitting.

Similarly, it does not assist the Licensee to claim that the only evidence as to the number of drinks consumed by the Female Patron was the number she reported to Officer A in her intoxicated state. The evidence before me is clear and unrefuted, the Female Patron was intoxicated in the Establishment resulting in her falling asleep. It took the intervention of Officer A to ensure that she left the Establishment and got into a taxi.

Nor does it assist the Licensee to report that the female staff member who served the Female Patron was fired. From the evidence before me, it appears that there were 12 staff members of the Licensee working in the Establishment at the time of the contravention on February 7, 2015, any one of whom could have intervened and assisted the Female Patron.

The Licensee in its submissions advised that following the contravention on February 7, 2015, the Licensee has held staff meetings and has imposed a zero tolerance policy for breach by a staff member of the Act, the Regulation and the Guide. Such activity on the part of the Licensee is to be commended as it is the Branch's policy and primary goal to secure compliance by licensees and their employees with the Act, the Regulation and the Guide. It is hoped that this new effort by the Licensee bears fruit and that the Licensee's compliance history becomes a blank slate into the future. The imposition of penalties on the Licensee is meant to both address the Licensee's past non-compliance, but, as importantly, seeks to achieve the full compliance of the Licensee and its employees in the future.

However, this positive activity by the Licensee following the contravention on February 7, 2015, no matter how well intentioned, should have been instituted at least following the contravention on October 28, 2012. The fact that an additional contravention involving an intoxicated person was found to have occurred within a period of less than 3 years certainly leads me to the conclusion that if such a program was effected in October 2012, it was at best ineffective.

Finally, the Licensee makes reference to a public policy argument as a reason for not imposing a penalty involving a suspension of the Licence. I find great difficulty in understanding how the suspension of the Licence for a period of six days will inflict on the City of Prince George the drunken debauchery as the Licensee in its submissions envisions. However, if in the unlikely event the Licensee is correct in its dire warnings, I would hope that the Prince George RCMP detachment will be adequately prepared for this occurrence.

Therefore, not only do I reject the Licensee's submissions on mitigation as encouraging me in that direction, I wonder, given the Licensee's past compliance history, at the recommendation of the Branch as not being the maximum penalty of a seven day suspension as permitted by Schedule 4.

As above noted, notwithstanding the Branch's recommendation, I am permitted by section 20 (2) of the Act to impose both a suspension of the Licence *and* a monetary penalty for a first offence. And the term of the suspension of the Licence may exceed that recommended by the Branch.

In the matter at hand, I am sorely tempted to exercise this power and to impose both a seven day suspension and a monetary penalty to encourage future compliance by the Licensee and its employees.

However, in that the Branch has recommended a penalty of a six day licence suspension, and in that the Licensee has consented to dealing with this matter by written submissions and has admitted the contravention, saving all parties both time and expense, I will accept the Branch's recommendation.

I therefore find the proposed penalty of a six day Licence suspension to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific deterrence and future compliance by the Licensee with the Act, Regulation, Guide and the Licence.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Licence for a period of six (6) days to commence at the close of business on Friday, August 7, 2015 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the local police from the close of business on Friday, August 7, 2015 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the Establishment by a Branch inspector or police officer, and must remain in place during the period of suspension.

Original signed by

R. John Rogers
General Manager's Delegate

Date: July 3, 2015

cc: Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Rupi Gill, Regional Manager

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Hugh A. Trenchard, Branch Advocate