



**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 RSBC c. 267**

Licensee: New World Entertainment Investments Ltd,  
dba Richard's on Richards  
1036 Richards Street, Vancouver, BC

Case Number: EH02-26

**APPEARANCES**

For the Licensee: Dennis Coates, Counsel  
Bob Burrows, for the licensee  
R.C. Hawley, for the licensee

For the Branch: Shahid Noorani, Project Manager  
Lisa Field, Branch Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: August 13 – 16 & 20, 2002  
On-site Inspection: August 20, 2002

Place of Hearing: Vancouver, B.C.

Date of Decision: December 19, 2002

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**Introduction**

New World Entertainment Investments Ltd., operates a cabaret known as Richard's on Richards (referred to in this decision as "Richard's" or "the cabaret"), with a Class "C" Cabaret liquor licence #18285. The cabaret is located in Yaletown in downtown Vancouver, an area that is developing residential neighbourhoods. The current owners took over in 1997. The licence permits hours of operation from 7:00 P.M. to 2:00 A.M. Monday through Saturday and from 7:00 P.M. to 12:00 Midnight on Sundays.

The cabaret is on two levels. The main floor, referred to in the plans as Area 01, is the largest area and has tables and chairs, washrooms, kitchen, 2 bars, elevated stage and dance floor. The upper level, Area 02, is a "horseshoe" shaped balcony overlooking the main floor; there are tables and chairs, 2 bars and washrooms. In this decision the bars are described as the main bar, which connotes the central bar on the lower level, the main floor back bar, the upper level shooter bar and the upper level back bar. These descriptions do not necessarily accord with the licensee's usual references, but reflect the witnesses' descriptions.

The licence permits a maximum capacity of 231 people in Area 01 and 118 in Area 02, combined total of 349 people. The building occupancy load ("BOL") capacity is 436 people.

**Alleged Contraventions and Recommended Enforcement Action**

The branch served Contravention Notices to the licensee on December 14, 2001, for the November 9 and 10, 2001, allegations, and on December 20, 2001, for the November 16, 2001, allegations. The branch served the initial Notice of Enforcement Action (NOEA) on February 25, 2002. In the Contravention Notices and the NOEA, the branch alleged that the capacity on November 10, 2001, exceeded the Building Occupancy Load (BOL); this was amended on July 26, 2002, to capacity exceeding the liquor licence.

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By Notice of Enforcement Action dated February 25, 2002, and amended on July 26, 2002, the branch alleged the following:

1. On November 9, 2001, the number of patrons in the cabaret exceeded the licensed capacity, contrary to sections 12 and 38(3)(b) of the *Act*.
2. On November 9, 2001, an employee consumed liquor while working, contrary to section 10(2) of the Regulations.
3. On November 9, 2001, the licensee provided free liquor, contrary to section 12 of the Regulations.
4. On November 10, 2001, the number of patrons in the cabaret exceeded the licensed capacity, contrary to sections 12 and 38(3)(b) of the *Act*.
5. On November 10, 2001, an employee consumed liquor while working, contrary to section 10(2) of the Regulations.
6. On November 10, 2001, the licensee provided free liquor, contrary to section 12 of the Regulations.
7. On November 10, 2001, the licensee permitted a person to become intoxicated, contrary to section 43(2)(a) of the *Act*.
8. On November 10, 2001, the licensee permitted an intoxicated person to remain, contrary to section 43(2)(b) of the *Act*.
9. On November 10, 2001, the licensee sold liquor after the licensed hours, contrary to section 17(3) of the Regulations and sections 12(3)(c) and 38(3)(b) of the *Act*.
10. On November 16, 2001, an employee consumed liquor while working, contrary to section 10(2) of the Regulations.
11. On November 16, 2001, the licensee provided free liquor, contrary to section 12 of the Regulations.

Schedule 4 of the Liquor Control and Licensing Regulations, BC Reg. 608/76, Enforcement Actions, ("the Penalty Schedule") provides a range of licence suspensions and monetary penalties for each contravention. In the amended Notice of Enforcement Action, the branch recommended the following enforcement actions:

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1. license suspension of two (2) days, to be served starting on a Friday (see amended recommendation below);
2. monetary penalty of \$1,000;
3. monetary penalty of \$5,000;
4. monetary penalty of \$3,000 (see amended recommendation below);
5. monetary penalty of \$2,000;
6. monetary penalty of \$6,000;
7. license suspension of four (4) days, to be served starting on a Saturday;
8. license suspension of four (4) days, to be served starting on a Saturday;
9. monetary penalty of \$1,000;
10. monetary penalty of \$3,000; and
11. monetary penalty of \$7,000.

These recommended penalties totaled ten (10) days licence suspension and monetary penalties of \$28,000.

By letter dated August 9, 2002, the branch advised the licensee that it would be increasing the recommended penalties for #1 and #4. The reason given is that the licensee has a proven contravention of overcrowding beyond the licensed capacity which occurred on July 27, 2001. Therefore, the alleged contraventions #1 and #4, if proven, would be second contraventions and would attract the higher penalty within the penalty schedule. The branch amended the recommended penalties as follows:

#1 – from 2 days to 3 days licence suspension; and

#4 – from \$3,000 monetary penalty to 4 days licence suspension.

In total, the branch recommended a fifteen (15) day licence suspension and monetary penalties of \$25,000.

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## Compliance History

This licensee has one proven contravention, *within one year of these incident dates*, for overcrowding which occurred on July 27, 2001. The branch conducted a hearing in February and March 2002, and issued a decision on May 9, 2002. As a result of that decision, the liquor licence was suspended for one (1) day, on June 20, 2002.

There are no records of other prior proven contraventions, offences or enforcement actions ("compliance history") for the other contraventions alleged in this proceeding, for this licensee or this establishment *within the year preceding these incidents*. Therefore, the contraventions, other than overcrowding, if proved, would be considered first contraventions for the purposes of the Penalty Schedule.

The branch served this licensee with warning letters and Contravention Notices as follows:

- February 10, 1998, warning letter for overcrowding;
- July 18, 1998, police Licensed Premises Check for overcrowding and intoxicated patrons;
- April 12, 1999, warning letter for overcrowding, intoxicated patrons;
- October 22, 1999, warning letter for overcrowding,
- December 6, 1999, cancellation of temporary increase because of alleged overcrowding, minors;
- December 11, 1999, police Licensed Premises Check for overcrowding, minor;
- January 2-10, 2000, voluntary closure in exchange for reinstatement of temporary capacity increase for December 31, 1999.
- May 24, 2000, police licensed premises check for overcrowding and intoxication;
- July 27, 2001, Contravention Notice, overcrowding;
- August 8, 2001, cancellation of temporary capacity increases because of overcrowding;

## Issues

1. The branch has alleged contraventions against the licensee for employees consuming liquor. Does that contravention apply to the licensee, or only to an employee?
  2. Does the evidence support a finding that the licensee contravened the above mentioned contraventions on November 9, 10 and 16, 2001? Included in this general issue are some sub-issues:
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a) Is it permissible for a disk jockey to purchase drink tickets in advance, at a reduced price, and give them to patrons? Does that constitute "free liquor" for the purposes of s. 12(1) of the Regulations?

b) Does the evidence support the licensee's contention that there was a manufacturer's sampling on November 10, 2001?

3. If the evidence supports the allegations, what penalties are appropriate?

4. Should the penalty phase of the hearing be deferred until the decision is rendered on the substantive allegations.

### Exhibits

Exhibit No. 01	Book of Documents #1 Tabs 1 to 24,
Exhibit No. 02	Book of Documents #2, Tabs 1 to 14.
Exhibit No. 03	Book of Documents #3
Exhibit No. 04	Guide to Liquor Manufacturer's and their Representatives in BC
Exhibit No. 05	Large Scale Floor Plan
Exhibit No. 06	Constable [ ]'s Floor Plan, Balcony over lower level
Exhibit No. 07A	Enforcement Action Recommended Form - Contravention Notice #A00070
Exhibit No. 07B	Enforcement Action Recommended Form - Contravention Notice #A00071
Exhibit No. 07C	Enforcement Action Recommended Form - Contravention Notice #A00075
Exhibit No. 07D	Enforcement Action Recommended Form - Contravention Notice #A00070-2
Exhibit No. 07E	Enforcement Action Recommended Form - Contravention Notice #A000422
Exhibit No. 07F	Enforcement Action Recommended Form - Contravention Notice #A00071-2
Exhibit No. 08	Letter dated January 18, 2002
Exhibit No. 09	Classified Investigative Services Inc., Employee Evaluation- Integrity Analysis
Exhibit No. 10	Management Investigational Findings
Exhibit No. 11	Resume of Mr [ ]
Exhibit No. 12	Inventory Report
Exhibit No. 13	Employee progressive discipline, dated April 20, 2002
Exhibit No. 14	Employee record, November 11, 2001
Exhibit No. 15	Letter & attachments dated August 14, 2002
Exhibit No. 16	4 photographs of the back stairwell

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Exhibit No. 17	Current floor plan upper and lower levels
Exhibit No. 18	Liquor Tickets
Exhibit No. 19	Letter dated November 28, 2001 from the licensee to the Vancouver Police Department
Exhibit No. 20	Employee Progressive Discipline Form
Exhibit No. 21	Employee Progressive Discipline Form
Exhibit No. 22	Serving it Right booklets for servers and licensees
Exhibit No. 23	Surich Report Summary
Exhibit No. 24	Transcript of Jo Surich testimony

### **Applicable Statutory Provisions**

See Appendix A

### **Evidence**

The branch presented 2 police witnesses for the November 9, 2001, allegations, 3 police witnesses for the November 10, 2001, allegations, and 4 police witnesses for the November 16 2001, allegations.

The licensee's witnesses were a Director of the company that manages Richard's, (referred to in the decision as the "manager"), the general manager, the bar manager, a consultant who was formerly a Vancouver City police officer, and a former owner.

#### *Licensee's application to compel Liquor Inspector to testify*

The licensee applied to compel the liquor inspector who prepared the initial Enforcement Action Recommended forms to give testimony because some of her recommended penalties were changed. The inspector was not involved in the incident and, accordingly, was not scheduled to testify for the branch. Mr. Coates argued that the inspector would have reviewed all the available evidence and come to a recommendation based on her assessment of the evidence. He also argued that adjudicators give considerable significance to the recommended penalty.

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Therefore, particularly when the initial recommended penalty is changed, the licensee should be at liberty to examine the rationale for the initial recommendation to ensure that evidence is before the adjudicator.

I declined the licensee's application on the grounds that the inspector's testimony is not relevant to my determinations of whether an infraction had occurred or what would be an appropriate penalty. Once the Notice of Enforcement Action is presented to the licensee, with the reasons for the recommended penalties, if the licensee does not sign a waiver, a hearing is conducted. At the hearing, all of the relevant evidence can be presented so the adjudicator can determine the facts and, where required, impose a penalty. The licensee has a full opportunity to present evidence and submissions on both the substantive allegations and on penalty. I noted that there have been a number of cases in which I did not follow the branch's recommended penalty.

At the time of considering what penalty to recommend, the inspector does not know all of the licensee's evidence and arguments. At hearing, the adjudicator has the benefit of all of the evidence and submissions from the branch and the licensee and is, obviously, in a far better position to determine the appropriate penalty. At the risk of sounding trite, I iterate that once a case proceeds to hearing, the determination of the appropriate penalty is solely within the discretion of the adjudicator.

Although I declined the application to compel the inspector to testify, I entered the Enforcement Action Recommended forms as Exhibits 7A – 7F.

#### *Physical tour of the establishment*

On August 20, 2002, the licensee gave the hearing participants a tour of Richard's. We did not have the benefit of all the lighting on that would be on during business hours and we were not able to see the closing lights. During the tour, the licensee confirmed that, since the dates in issue, the back stairwell had been closed in.

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The renovation included raising what had been a half wall to full height. That would have affected the lighting in the seating area between the upper level back bar and the stairwell.

### *General Evidence*

On each night, November 9, 10 and 16, 2001, police officers were in Richard's as undercover operatives, on a project called Autopilot. They were in Richard's from approximately 9:30 or 10:00 P.M. until closing time, 2:00 A.M. Their assignment required them to make observations inside Richard's and report back to a road boss by cellular phone. On each occasion there was one telephone and the officers took turns phoning in their joint and individual observations. The road boss recorded the information. At the end of each night, one officer had responsibility for accumulating the road boss notes and the officers' notes and writing a report, which was then circulated to the others for addition and correction. For the most part, the officers did not make notes inside Richard's. They testified that it would have been too obvious and that the system was for the road boss to record their observations. Exhibit No. 1 contains notes of the road boss for November 9 and 16, 2001. The police could not locate the notes for November 10, 2001, although the Constable who wrote the occurrence report testified that she had seen them in preparing her report.

During the tour, I observed that the upper level partially extends over the main bar. From the railing in front of the upper level shooter bar, I looked directly over the main bar. There are two round chandeliers with large round light bulbs above the main bar which could partially obstruct a view from above, but only if the bartender was standing beneath the chandeliers. If the bartender was to the side of the chandeliers, there would not be an obstruction. I noted that if the bartender was positioned, for example, to set up a round of shooters, that area is between the chandeliers and, therefore, there would not be an obstruction of view from above.

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***The Branch's Evidence***

*November 9, 2001*

1. *Overcrowding*

Two police officers testified that at approximately 1:00 A.M., their patron counts were 400 and 420, respectively, not including staff or patrons in the washrooms or on the stairs. They did not use mechanical counters. One officer testified that she found it difficult to move, had to move people out of her way, servers were carrying trays above their heads, there was considerable congestion around the bar, and servers had to manoeuvre between patrons and boxes of empty bottles to go behind the bar. She estimated that it took about 5 minutes to do a count.

2. *Employee consuming liquor*

Both officers testified that shortly after arriving they observed the disk jockey, a bartender and two servers having drinks from shot glasses. The officers were on the upper level looking down to the main bar. They could not identify the content of the drinks but observed the drinks being poured from a liquor shaker.

3. *Free liquor*

Both officers testified that from the upper balcony they observed a female patron climb up and dance on the main bar. When she finished dancing, she and the bartender consumed two shooters each - shot glass drinks – for which the patron did not pay. The bartender poured the first round from a bottle and the second from a shaker.

The officers testified that around 11:20 P.M. and again at 1:00 A.M., they observed a disk jockey announce that if patrons came to the dance floor and danced, he would give them free drink tickets.

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The officers estimated he gave out 30 tickets on the first occasion and 40 tickets on the second occasion. They observed patrons redeeming tickets at the bar for drinks, without payment.

*November 10, 2001:*

*General evidence*

Four police officers were working as undercover operatives, on project Autopilot. Their joint report is at Exhibit No. 1, tab 10. Three officers testified at the hearing. In the report, the officers noted, generally, that the cabaret filled up quickly after 11:00 P.M and that it became increasingly difficult to move on the main floor. They observed that servers had to physically move patrons out of the way, and that the crowded, elbow to elbow congestion, on the main level blocked access to the emergency exits at the back of the room. Staff permitted patrons to congregate on the stairwells which made passage slow and difficult. The upper level was also consistently crowded and movement from front to back and to the washrooms was slow and difficult. The officers conducted patron counts at approximately 1:05 a.m. and reported between 500 and 575 patrons (see below).

In the report, the officers made chronological notes about their observations and incidents, including being served free Baja Rosa shooters, bartenders consuming liquor, patrons buying drinks for bartenders, the smell of marijuana smoke, instances of intoxicated patrons, the officers' patron counts, and after-hours sale of liquor. The report also mentioned that hanging from the 'cage' over the upper level shooter bar are numerous women's g-string underwear and that the officers observed female patrons handing staff underwear which then were also hung up. The hanging underwear was observed during the inspection on August 20, 2002. In the report the officers observed that there was no obvious management or leadership presence and it appeared that staff were not under any pressure to conform to house rules or policies for liquor regulations.

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The licensee agreed that free Baja Rosa shooters were being given out this night, in shot glasses or shooter glasses. However, the licensee maintained that it was a manufacturer's theme night. The licensee also acknowledged that one bartender, nicknamed [ ], had been consuming liquor and said he was sent home before 12:30 A.M. Both of these assertions were factual issues in the hearing. The licensee's evidence is elaborated on later in this decision.

#### 4. *Overcrowding*

At 1:05 A.M., the officers conducted patron counts. One officer testified that her count was not less than 520 patrons, not including staff. She did not recall where she started her count but testified that she does it systematically, moving from one side to the other, from one area to another. She recalled that the dance floor, the seats around the bars, and the areas around the washrooms were packed and that staff had difficulty moving through with their trays. She said it was difficult to move on the stairs. She recalled standing on the stairs to count the dance floor and then making her way through the seating areas and bars. She testified it was very crowded and took her 5 to 8 minutes for the count.

Another officer testified that he counted not less than 500 patrons. The third officer testified that he counted 575 people. He acknowledged this was higher than his colleagues. He testified that it was extremely crowded and "tight", that he counted upstairs first then the other sections, that he would have tried not to include staff in the count, and that it took him 5 to 10 minutes.

#### 5. *Employee consuming liquor*

One officer testified that he observed 2 bartenders, [ ] and [ ], consume three shooters each, one of which was consumed with a patron. At another bar, he observed a bartender consume a shooter with a server.

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He saw a bartender set up a round of glasses for a patron, pour the shooter into all the glasses, and the patron pass one back for the bartender, which the bartender consumed with the patrons. He testified that he saw other similar incidents of 4 or 5 patrons at the bar having a drink with the bartender. The bartender was drinking from the same bottles as the customers. This officer testified that he observed not less than 7 incidents of more than one employee consuming liquor.

This officer testified that at approximately 12:45 A.M., he observed that the bartender [ ] looked and acted intoxicated. He observed [ ] drink the foam off the top of a beer bottle, offer the bottle to one of his colleagues who declined to accept it, and then keep the bottle and drink from it later. The officer also testified that he observed [ ] pick up a straw in his mouth and put it in a patron's drink. The officer testified that he did not see any management or other staff attempting to deal with this bartender's behaviour. He also testified that he did not see any staff member who was apparently the manager or person in charge.

Another officer testified that shortly after she arrived, she saw the three bartenders at the upper level shooter bar drinking shooters. During the night, she observed patrons buying drinks for themselves and for the bartenders. The officer ordered a beer from [ ] and when the beer foamed over the top of the bottle, [ ] drank the foam off the top and passed the beer bottle to her; she declined to accept that bottle so he placed it in the ice well and gave her another one. She saw him consuming the beer later. The officer recalled seeing the three bartenders drink a round of shooters just before closing time. She testified that [ ] became noticeably intoxicated during the evening and changed from having a professional demeanour to being sloppy, banging drinks on the counter, his speech and actions became sloppy; at one time he used his mouth to get a straw for a patron.

The third officer testified that around 11:00 P.M., when it was still pretty slow, he observed two bar staff, one of whom was [ ], drinking with patrons on a few occasions.

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At about 1:40 A.M., he observed all three of the upper level shooter bar staff, including [ ], consuming a shooter each. He could not identify the beverage, but testified that the bartenders were drinking from the same bottles used to pour patron drinks. He thought that [ ] was intoxicated - he was slurring his words, talking loudly and 'wobbling' behind the bar.

6. *Free liquor*

The officers testified that they arrived at Richard's at approximately 9:30 P.M. and were greeted by the door staff who told them they were in for a good night and would be getting free shooters.

Three officers testified that within 5 minutes of arriving they were offered shooters of Baja Rosa by a staff member who was circulating with a tray of drinks. Two of them testified that the server did not tell them it was part of a Baja Rosa manufacturer's sampling. All of the officers said they did not see a table or booth set up with samples and promotional material.

7. & 8 . *Permitting person to become intoxicated & Permitting intoxicated person to remain*

All of the officers described the bartender [ ] as having become intoxicated, although his level of intoxication would not have been a concern if he had been a patron instead of working. Their concern was that as a staff member, his state of intoxication stood out. The officers also described instances of intoxicated patrons who they considered to be beyond the point of being allowed to remain in the premises.

Two officers testified that they observed a man near the upper level shooter bar slumped over his table, with a drink in front of him. One of the staff spoke with him and the man tried to collect himself but didn't do well. The employee walked away and the man basically fell back down, as though passed out. The officers were about 10 feet from the man and observed him for approximately 15 minutes.

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They described the man as having a dazed and glassy look, gross motor impairment, trouble maintaining his balance on the stool, and balancing his head on his hand while dealing with the staff. One officer described his level of impairment as 'eye catching' in a milieu where everyone was consuming alcohol. The officers testified that during the time they observed the patron, the staff member did not return and no other staff member approached him.

One officer testified that he saw another male patron who he considered to be grossly impaired, vomit and have to be helped out Richard's by his friends.

9. *After hours service*

Two officers testified that after the lights had been turned on, patrons were lined up at the lower back bar. One officer he went down to the bar and, at 2:15 A.M., bought a Crown Royal with cola. He testified that three people in the line in front of him had all been served liquor. He reported that the bartender had said something to the effect of 'I may be hammered but I can still spin these glasses'. The other officer testified that he had been standing close to his colleague when he purchased this drink and that he also observed other patrons being served. Both officers said they consulted their watches to confirm it was after 2:00 A.M.

*November 16, 2001*

Four police officers arrived at Richard's at approximately 10:00 P.M. One of the officers left Richard's at approximately 1:30 A.M. and the others stayed until closing time. Their report is at Exhibit No. 1, tab 11. All four officers testified at this hearing. They testified that a fight broke out in front of Richard's just before 1:00 A.M.; the officers did not get involved in that incident.

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#### 10. Employee consuming liquor

All of the officers testified that, at approximately 10:40 P.M., they observed a female patron buy drinks for herself, a friend and the bartender. They watched the bartender prepare shooters in a shaker container, pour the drinks and drink one with patrons. They testified that all the drinks were poured from the same bottle. Later, two of the officers purchased a drink for the bartender, which he poured from the same shaker as their drinks, and they consumed them together. Another officer testified to having seen a bartender and another staff member have a drink together. That officer also observed a patron buy a drink for a bartender. At approximately 2:00 A.M., the bartender motioned three of the officers to the bar and poured a round of shooters which the bartender consumed with them.

#### 11. *Free liquor*

All of the officers testified that they observed a person who appeared to be a disk jockey or an announcer, announce that if patrons came to the dance floor and danced, he would give them free shooter tickets.

As also described above, three officers testified that at approximately 2:00 A.M., the bartender motioned them to the bar and poured them 2 rounds of shooters, free of charge. The first round was 4 glasses of Baja Rosas which the bartender consumed with them. The second round was 3 glasses of Golf Carts which the bartender did not consume. The officers testified that they did not see the bartender ring in sales for these drinks.

### **The Licensee's Evidence**

#### **The Manager**

The licensee presented evidence from a Director of the company that manages Richard's. He has been involved in the liquor industry since 1968 and at Richard's since 1993 when

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he was the entertainment coordinator for the previous owner. Under the current owner, he has been involved in the day to day operations. I refer to him as the "manager."

The manager testified that when he took over as manager he fired the existing general manager because he was not doing a good job and, mildly speaking, had not been controlling activity in and around Richard's. The police and the liquor branch had raised concerns about Richard's, and there were incidents of gang violence. He said that a number of problems diminished immediately with the hiring of the current general manager who began enforcing the house policies on things like employees consuming liquor, free liquor, capacity issues and intoxicated patrons. In his view, the policies are now enforced and adhered to.

The manager was not at Richard's on the nights that are in issue. He said he became aware of the branch's concerns when the Contravention Notices were delivered. He testified that the general manager had told him about the fight on November 16, 2001, and a confrontation that night between his staff and a police sergeant. Following the November 16, 2001, incident, the licensee contacted the Chief Inspector for the area, to set up a meeting, which eventually occurred in January 2002. At that meeting, the licensee's representatives and the police reviewed the reports from police undercover operations and talked generally about how Richard's was doing. After the meeting, the manager and the general manager sent a letter to the Inspector outlining the changes they had effected:

- updated and re-enforced employee policies
  - eliminated staff juice shooters
  - eliminated dancing on the bar
  - re-enforced door staff duties of exact door counts
  - will continue to investigate and regulate staff on a regular basis
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Concerning the juice shooters, the manager said it was a common practice when a customer buys a drink for the bartender, for the bartender to pour a non-alcoholic drink and pocket the money. Because the police were concerned about the practice, Richard's eliminated it.

The manager testified that he is a member of Bar Watch and regularly attends meetings with numerous people, including the police and the branch. One of the suggestions from Bar Watch was video surveillance. He said Richard's installed cameras and operates 4 to 6 cameras to record activity. There are television screens mounted at the entrance showing the dance floor, bars and other areas. In the office there is monitor showing the outside of the club.

The manager testified that in May 2001, Richard's hired an outside security firm, Classified Investigative Services Inc., to investigate employee compliance to see if staff were drinking or stealing. He testified that they fired some staff based on the report.

### **Consultant**

The licensee called as a witness a former Vancouver City Police Inspector who now operates his own consulting firm (the "consultant"). He was hired by Richards in 2001 because of alleged deficiencies noted by the Vancouver police. He attended the January 18, 2002 meeting to provide a communication link between the licensee and the police.

The consultant gave some background on his involvement in the Vancouver downtown area and the development of the Bar Watch program. In 1994, there was a concern about the Hell's Angels moving into the downtown core. There had been a firebombing, the police were in discussion with licensees about overcrowding issues, the flow of patrons onto the streets at closing time, traffic, noise, fights, stabbings, drive-by incidents, guns in bars, etc. There was a particular concern in areas that were developing residential neighbourhoods.

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The consultant had been instrumental in calling a meeting of licensees and forming Bar Watch, similar to Block Watch, to operate on the basis of peer pressure. He recommended installing pager systems and video surveillance cameras within the establishments. The consultant reported that he had particular concerns about Richard's but by 1997 there had been an improvement.

The consultant spoke from his experience as an undercover police operative, the importance of note taking at the time an incident is happening, the frailty of memory if notes are not made contemporaneously, the importance of debriefing afterwards, writing reports separate from other officers, and the importance of safety backup.

### **Bar Manager**

The bar manager has been a bartender at Richard's for approximately 9 years; for the past 4 years he has been the bar manager. His duties include ordering supplies, staffing, cost control, and hiring and firing although the final decision on the latter rests with the general manager.

The bar manager described the "Squirrel" cash register system and inventory reports. The staff do a manual inventory at each bar station once per week. He explained the inventory system by reference to some printed reports. If a patron sends back a drink, or the bartender spills a drink or chips a beer bottle, the bartender enters that drink on a 'spillage' tab and has to give an explanation, show the chipped bottle, etc. If drinks are not being rung in, that would show up in variance checks. He did not bring to the hearing the variance reports for the nights of the alleged contraventions.

The bar manager was aware of the publication, Guide to Liquor Licensees, but had not read it for 5 or 6 years, until reading it for this hearing. He testified that he would have been required to read the Guide when he was hired as bar manager and that his employer would assume he keeps current each year.

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The bar manager testified about the events April 2002, that lead to the termination of employment of the bartender [ ]. [ ] had asked the bar manager if he could take a bottle of alcohol home because he was having friends over. The bar manager initially said no, because it was against policy to take liquor out of the establishment. Later, he relented on the condition that [ ] replace the bottle the following day, with a bottle from the Liquor Distribution Branch. Then it was discovered that [ ] sold the bottle to a patron for a fraction of the price it would have sold for through bar sales. [ ] was fired. The bar manager thought it was legal to take the liquor and replace it the following day.

The bar manager testified about policies and practices relating, generally, to the alleged contraventions, as outline below.

*#2, 5, 10: Employee Consuming*

The bar manager testified that Richard's' policy is that employees are not permitted to drink liquor. The consequences for doing so depend on the employee's employment history, and the requirements set by Employment Standards. He recalled being present on the night the bartender [ ] was suspended for drinking and inappropriate behaviour.

*#3, 6, 11: Free Liquor*

The bar manager testified that the disk jockey's contract provided for the disk jockey to purchase tickets, at a reduced price, that he could give to patrons who could redeem them for Golf Cart shooters. If the disk jockey ran out of tickets, he could purchase more from the bar at regular price. The disk jockey purchased tickets every Friday night for at least 4 or 5 months. The bar manger compared this to a corporate party where the company pays for the drinks for the employees, although for a corporate party the bar is closed to the public.

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Concerning manufacturer's tastings, the bar manager said that he is approached at least a couple of times per week by a manufacturer wanting to promote a new product. If Richard's agrees to a promotional night, the manufacturer hires a promotional company who brings in staff to give out samples. In the past, the manufacturers brought their own liquor, rather than purchase it from the licensee. The bar manager said he assumed the manufacturers knew what was required and acted legally. The samples typically are served in plastic ¼ ounce shot glasses. He described the sampling as similar to samplings that are frequently set up in Liquor Distribution stores. The bar manager had a slight recollection of a Baja Rosa manufacturer's tasting on December 10, 2001, did not recall if the agent was present but said usually there is a person supervising and others serving. He did not inquire whether they were licensed for the tasting.

*#7, 8: Intoxicated Patrons*

The bar manager testified that it is the policy not to serve anyone who is intoxicated. The server will alert a door staff who may try to find the intoxicated patron's friends to take the patron home. While looking for the friends, it is policy to take the intoxicated person to the lobby or front door, away from the other patrons.

*#9: After hours service*

The bar manager described the usual closing procedure at Richard's. Patrons are given ½ hour notice of closing time. At 1:50 A.M. warning lights are turned on and bartenders are required to finish outstanding orders. At 2:00 A.M. the lights are turned on and no liquor is served after that. If bartenders are found serving after 2:00 A.M., they are disciplined. He referred to the house rules and acknowledged that the closing time was not indicated there. However, he testified that there is a written policy somewhere and employees are told about 2:00 A.M. closing.

The bar manager explained that the 'Squirrel' cash register system keeps an itemized list of every drink sale during the night, until the computer is shut down.

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After that, it is not possible to obtain information on individual items. So, as an example, while the computer is still running for a night, it would be possible to determine whether sales had been made at 2:15 A.M., but it would not be possible to determine that once the cash register had been closed off for the night.

### **Former Owner**

A former owner, who has been in the liquor industry since 1967, testified for the licensee. He designed Richard's, ran it for about 17 years and sold it to the current owner in 1997/98. He still owns a number of bars in British Columbia. He is the chairperson of Bar Watch. When he opened Richard's the licensed capacity was 275 patrons. He said if there were 300 to 325 patrons, that was busy. The culture then was that patrons wanted personal space. The culture now is that patrons want crowded conditions. He testified that now it is necessary to fill an establishment to the fire marshall capacity or patrons think "it isn't happening."

He testified that he designed the room for flow – to keep people moving in order to make the club successful. Because there is constant movement, counting the number of patrons is difficult. In his experience, the best way to count was to have 4 people counting, with 1 person on the upper level counting the dance floor. When he tried counting with just one other person it took approximately 10 to 15 minutes. When he counted on his own, it took about 20 minutes. He said it is necessary to use a mechanical counter because of distractions.

He testified that it is now common, big business, to rent an establishment to a promoter for a night. The promoters take responsibility for the advertising, ticket sales, entertainment; the licensee retains liquor sales. However, the promoter may pre-buy drink tickets to give out to patrons.

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The former owner discussed his perceptions of patron capacities, changes in entertainment, the prominent role that disk jockeys now have, the change in business brought about by turning a club over to a promoter for a night, a general reduction in alcohol consumption, changes in policies due to smoking regulations, and other related issues. To his knowledge, most nightclubs in downtown Vancouver have been operating at the building occupancy capacity, rather than liquor licence capacity, since the Surich Report (see Exhibit No. 23) on the understanding that the liquor branch was not going to take enforcement action.

He testified to his personal experience attempting to terminate employees for just cause for drinking. He referred to two examples. One was settled after a Small Claims Settlement hearing. The other was outstanding but his counsel had advised him that the former employee would probably be successful, despite having been caught drinking on the job.

He testified that it is common in the industry for bar staff to have non alcoholic drinks when patrons buy them a drink. He said appearing to drink with customers is a way of building relationships and, since most employees are being paid minimum wages, they need to build relationships to increase gratuities.

Concerning manufacturers' tastings, the former owner indicated it was usual for the manufacturer to bring their own liquor rather than buy it from the licensee. He testified that he had never had discussions with the branch about this practice.

### **General Manager**

The general manager has been in his current position for 2 years and prior to that worked as the security manager for 3 years. He was at Richard's on each of the nights at issue in this hearing. As general manager he has responsibility for overseeing all aspects of the operation including hiring and firing staff. He testified that he keeps notes each night but he does not keep them.

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He stated that he does not record the capacity levels in his notes.

The general manager testified about policies and practices relating, generally, to the alleged contraventions, as outline below.

*#1, 4: Overcrowding*

He testified that, as a former US Marine, he is strong on security measures and trains his own security staff on a weekly basis. He also teaches marshall arts to police departments, rape crisis centres, and community groups. He has a degree in Acupuncture and Chinese Medicine. He described the security including metal detectors at the front door and security people at the top and bottom of each stairwell plus roaming security. He described the security cameras at the front door that capture a full picture of everyone's face as they walk in and another camera that captures a full body shot and profile. He described the placement of other cameras throughout the club. The tapes are kept on average 2 months. The front door tape for November 16, 2001, was given to the police.

He testified that door staff do mechanical counts of the number of people coming in and going out. Richard's does not allow out-and-in privileges for smokers. Concerning head counts, he testified that every half hour he or the security manager check with the door staff for counts. Because it is so dark in Richard's, it is not possible to see across the room and there could be 50 to 100 people travelling the stairwells. He has done test counts on his own, and with staff. He has found it takes at least 10 minutes to do a circular, sweeping count and the results will be 10 to 15% inaccurate. He disagreed with the former owner's method of counting the dance floor from above, saying there are too many obstacles. He counts the dance floor from the stage. There could be as many 150 people standing on the dance floor.

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The general manager disputed the police officers' counts and referred to 'Record of Events' for November 9, 10 and 16, 2001, (Exhibit No. 1, tabs 15, 16, & 17) which show that the total number of patrons admitted to the club those evenings was 432, 439 and 421, respectively.

#2, 5, 10: *Employee consumption*

The general manager went through the policy manual (Exhibit No. 1, tab 21) highlighting procedures. He testified that staff are absolutely not permitted to drink liquor but they may treat a patron providing they pay for the drink themselves. He allows the staff to run a tab and settle it at the end of the night.

The general manager disputed the police allegations that employees were consuming liquor because the officers did not see the label, could not say what the staff were consuming and could not say for sure it was liquor. In order for management to take action against staff for drinking, they have to have proof.

Concerning the conduct of the bartender [ ] on November 10, 2001, the general manager concurred with the police officers' observations although he did not recall him being intoxicated. He testified that it was common for this bartender to act up, dance around, perform, etc. He testified that he had observed him, made some notes and at 12:26 A.M. he talked to [ ] and told him to leave. He testified that [ ] was out of Richard's within 10 minutes. The bartender was suspended for 2 weeks. Subsequently, he was fired because of an incident of selling a bottle of liquor to a patron.

The general manager referred to Exhibit No. 10 which is a chronology of management investigations and employee firings from March 2001 to July 2002 which he prepared just prior to this hearing to show how management is conducted at Richard's. He also referred to Exhibit No. 14 which concerns both incidents with [ ]. It contains a typed statement and an Employee Progressive Discipline form for each incident.

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For the November 10/11, 2001, incident the general manager acknowledged that he did not have the employee sign the form because he understood from the Employment Standards Commission that wasn't necessary if he had a witness. He could not explain why the date by his signature on the form was November 11 and 12, 2002, rather than 2001. He testified that sometimes he updates files if they are not legible and that he recalled rewriting his statement but not the form. He also said that he wrote notes that night but did not keep them.

*#3, 6, and 11: Free Liquor*

The general manager testified that he books disk jockeys just as he does a band – the disk jockey is the entertainment - and he hires different disk jockeys throughout the week. He confirmed that the contract permits the disk jockey to purchase 20 tickets in advance for \$4.00 per ticket, which is reduced from the regular price of \$4.50. He provided a statement from a disk jockey which confirmed this arrangement and stressed that he, the disk jockey, purchases the drinks and does not give “free drinks”, rather he buys patrons drinks. (see Exhibit No. 1, tab 19)

He also described a private corporate party when the company took over the upper level of Richard's. The lower level was operated as usual. The corporation brought in a band and purchased drink tickets for the whole evening. He also described the routine with Christmas parties when the employer buys a roll of tickets and if employees want different drinks, they buy them from the bar.

The general manager testified that manufacturers come to Richard's every week wanting to promote their products. Richard's' staff leave it to the professional agents to take care of the legalities. He testified that the agents set up a table with posters and other advertising. The agents' staff wear identifying t-shirts and hand out small shooter glasses of product. The general manager usually arrives at Richard's around 10:00 P.M.

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He said he did not recall whether the agent was set up on November 10, 2001, but recalled that the bar manager had spoken with the agent and allowed the manufacturer to set up a sampling night for Baja Rosa.

Exhibit No. 1, tabs 22, 23, & 24 contain correspondence from agents. Tabs 22 and 23 are from the Baja Rosa agent concerning the November 10, 2001, sampling. In the exhibits, the agent notes that he supplied Richard's with 3 bottles of Baja Luna and a server, in response to a request from Richard's' bar manager. The agent notes that he was not present and was represented by another company that is not licensed. Tab 24 is from the representative of another product, Alize, confirming that they did a sampling at Richard's on November 10, 2001. No witnesses were able to confirm this sampling.

*#7, 8: Intoxicated Patrons*

The general manager testified that he did not think [ ] was intoxicated but that he sent him home because his behaviour was unacceptable.

The general manager testified that Richard's policy on intoxicated patrons is to act immediately to deal with the person, recognizing that the licensee has a legal responsibility. The staff may let the patron remain seated while they find family or friends. If the patron is not causing a problem, the staff will not stay with the patron. Sometimes staff will get the patron a drink of water or juice. If the patron seems to be drunk and disorderly, the staff will remove the patron to the front of the club. If necessary, the general manager will pay for a taxi to take a patron home and in the past he has telephoned the patron's residence to ensure someone is there.

There are no written instructions to staff on how to handle intoxicated patrons.

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#9: After hours service

The general manager described last call, the 10 minute lights and 2:00 A.M. lights. The lights are not on a timer. He disputed the police testimony about after hours sale saying there would have been a security person next to the bar and that what the officers described would have occurred within the 10 minute warning. He noted that the officer could have asked for a receipt and that would have shown the time. He also noted that the bar sells non alcoholic beverages after closing and that juice shooters cost the same price as regular shooters.

### ***Licensee's Applications***

1. *To defer penalty submissions until decision rendered on the substantive allegations*

The licensee applied to adjourn the penalty portion of submissions until after the decision on the substantive allegations. Mr. Coates submitted that the licensee is in an uncomfortable position of saying that it did not commit the contraventions but, in the alternative, making submissions on appropriate penalties. He submitted that whether it is criminal, environmental or other regulatory areas, submissions on penalties are sometimes dependent on the finding of facts.

I ruled that the penalty submissions would not be deferred, for the same reasons I applied in *Greater Vancouver Professional Drivers Association ("GVPDA")*, EH01-35/36, April 29, 2002. In that case, the licensee referred to *Watson v. the B.C. Securities Commission* (1999), 131 B.C.A.C. 30 to support his application for a separate hearing on penalty. After quoting from that case, I gave the following reasons for denying the application:

I declined the application on the grounds that the branch's procedure does not prejudice the licensee. In this venue it is not necessary to obtain the decision on the substantive allegations first for reasons that follow. The branch provides ample advance notice of both the substantive allegations and the recommended penalty.

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The licensee knows "what offences he is answerable for at the time he is making his submission on the question of penalty."

The range of penalty is set by *Regulation*. The licensee is able to lead evidence on, and speak to, penalty factors including the degree of culpability, the nature of the contraventions and mitigating circumstances or conduct.

Further, it is open to the licensee to make alternative submissions on penalty. For example, the licensee can argue there should be no penalty and give reasons. And the licensee can argue, in the alternative, if the adjudicator finds a penalty is appropriate, it should be other than what the branch has proposed – this is not affected by the branch's practice of proceeding directly to penalty submissions following the substantive case.

*2. To accept the branch's initial recommendations for allegations #1 and #4*

The licensee submitted that it had appealed the previous decision concerning the contraventions from July 27, 2001. However, the appeal was filed to the Liquor Appeal Board on the very day that board ceased to exist and, therefore, the appeal was returned. The licensee had not filed a judicial review because the penalty levied, 1 day, did not warrant the cost of an application to the Supreme Court. However, if the adjudicator upholds the alleged contraventions #1 and #4, the licensee intends to file a judicial review and would be asking, among other things, for a direction that the maximum recommended penalty could be based only on the schedule for first contraventions.

I found that this case is unique because of events and timing:

- the abolition of the Liquor Appeal Board at the end of May 2002;
- the branch's amended Notice of Enforcement Action, dated July 26, 2002;
- the branch's notification of seeking higher penalty, dated August 9, 2002;
- and
- the start date of this hearing, August 13, 2002.

I found that because of the limited time between the branch's notice of August 9, 2002, and the start of the hearing, the licensee had not been given adequate notice of the higher penalty. Accordingly, I found it was appropriate to limit the branch's maximum recommended penalty for these two contraventions, if proven, to that set out in the amended NOEA. Accordingly, the recommended penalties that I shall be considering are, respectively, 2 days licence suspension and \$3,000 monetary penalty.

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However, I note that under section 52 of the Regulations, I am not bound to the recommended penalty.

### ***Final Submissions***

#### ***1. Delay***

Mr. Coates submitted that the nature of covert operations makes it impossible to defend many of the allegations in this hearing, such as patron counts and employee breaches. He submitted that there was nothing in the evidence to suggest that there was reason for secrecy beyond November 16, 2001, and, therefore, the officers could have disclosed the issues and allegations at that time.

Mr. Coates referred to the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307, for the proposition that if significant prejudice results from state-caused delay, an appropriate remedy is a stay of proceedings. Issues to be considered include:

- has the fairness of the hearing has been compromised,
- whether the delay amounts to an abuse of process,
- was the conduct was oppressive,
- would continuing the proceedings bring the system into disrepute, and
- are the proceedings are contrary to the interests of justice.

The Court noted (reading from the headnote at p. 4) that

whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay.

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Mr. Coates also referred the branch's decision, *Mint Corner Holdings Ltd.*, December 18, 2001, at pages 10 – 11, in which I stated that the difficulty with undue delay is evidence disappears, memories fade, people move. In that case I found all of that had occurred and that it would be a breach of the tenets of administrative fairness to found a contravention on the evidence.

## 2. *Burden of Proof*

As a result of eliminating the Liquor Appeal Board (LAB), the branch is the court of last resort. There is an addition burden of proof on the branch to be detailed and correct in producing evidence.

## 3. *Terms and Conditions of the Licence*

Regarding alleged contraventions #2, 3, 5, 6, 10, and 11, Mr. Coates submitted that the Guide to Liquor Licensees ("the Guide"), Exhibit No. 3 Tab 7, does not automatically become a term and condition of a licence. He submitted that it is only a Guide which is generic to all licensees. The statutory authority for imposing terms and conditions is section 12 of the Act. If the branch intends to impose terms and conditions, there is an obligation to incorporate those on the face of the licence. He submitted that the Guide is an abbreviation of the branch's Policy and Procedure Manual and he likened the Guide to "Coles notes for licensees."

## 4. *Section 51 of the Regulations: "specified contravention"*

Section 51(1) of the Regulations provides:

If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

[Note: the wording of the alleged contraventions in the NOEA is briefer than the descriptions set out above.]

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Mr. Coates submitted that the branch was not precise in alleging contravention sections and referred to the LAB case of *Small House Ventures Inc., doing business as Lucky Bar*, May 23, 2002, L-0111. In that case the LAB discussed the importance of the branch giving the licensee notice of the allegation to be met.

Mr. Coates submitted that three of the alleged contraventions should be withdrawn, or stayed, on the grounds that they disclosed no offence against a licensee. He argued that contraventions committed by an employee consuming liquor cannot be attributed to the licensee. The contravention is founded on Regulation s.10(2). Other contraventions, such as s. 11(1) and (2) and 8(2) and (2.1), make a clear distinction between the contravention committed by "a person" and that committed by a licensee. Section 36 of the Act refers to "a person holding a licence or the person's employee." Section 34 specifically refers to a 'minor' and s. 35 refers to "a person ... or the person's employee." Since s. 10(2) only refers to the "employee", it follows that it was not intended that the licensee be held responsible.

During the hearing when Mr. Coates raised this argument, I directed him to section 78 of the Act as a possible answer, that licensees are responsible for the acts of their employees. During final submissions, Mr. Coates stated that if s.78 is the basis of these alleged contraventions, then it is incumbent on branch to specify that section, and those allegations fail for not doing that. He submitted that the use of the word "occupant" in that section is not clear. He further submitted that there would have to be clear legislative intent before that interpretation could be applied to section 78. He referred to the Guide, page 13, and submitted that the Guide cannot by itself create the offence.

#### *5. Free Liquor*

Mr. Coates again submitted that the branch had not been precise in setting out the alleged contravention. If s. 12(1)(a) is the intended regulation "No **licensee** shall provide **free** liquor ... to **customers**", that would not apply to the disk jockey or the manufacturer's tasting.

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Generally, on the issue of whether the branch's evidence supports the allegation of 'free liquor' through the disk jockey, Mr. Coates acknowledged the decision of the LAB in *Wasteland – Urban Cabaret v. British Columbia (Liquor Control and Licensing Branch)* [1995] B.C.L.I. No.10, Appeal No. L-9502. The LAB determined that the licensee contravened s. 12(1) by allowing a promoter to take over the premises and dispense tickets for free liquor when the establishment was open to the public. The LAB found that the employment status of the promoter was not relevant.

Mr. Coates distinguished this case on the facts. In that case, the licensee had a letter from the branch concerning handing out tickets to 'group members'. The promoter had taken over the whole room and handed out tickets at the door. In this case, the disk jockey was an active entertainer, under contract, not an employee, who gave out drink tickets that he paid for, to get people up to dance. The emphasis is entirely different. He referred to the branch's policy on employees consuming, Exhibit No. 3, tab 6, paragraph 1(c) as authority for saying that contract entertainers such as the disk jockey are not employees.

Mr. Coates also referred to adjudicator Beattie's decision in *Uppal Holdings Ltd. dba Champagne's Cabaret, February 22, 2002*, which involved a similar incident with the same promoter as in the *Wasteland* case. Adjudicator Beattie ruled that the promoter's employment status was not relevant. The contravention occurred because the licensee allowed the promotion to occur on licensed premises when it was open to the public.

Concerning the Manufacturer's tasting, Mr. Coates submitted that it is not fair to lay this at the feet of this licensee. The evidence demonstrated the practice in industry is the process followed at Richard's. If the manufacturer made an error, it is not fair for the licensee to bear the fine.

On the evidence, Mr. Coates submitted the officers could not tell whether payment for the allegedly 'free' drinks had been rung into the cash registers, and he noted the general manager's comments that bartenders are not permitted to give free drinks.

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## 6. *Overcrowding*

Mr. Coates submitted that the branch has been too general in setting out the alleged contraventions. The branch has to be specific about what term and condition under s. 12 is alleged to have been contravened. He noted that in the NOEA, alleged contravention #1 refers to s. 38(3)(b) and 12 whereas #4 refers only s. 12.

Generally, on the overcrowding issue, Mr. Coates referred to Exhibits 23 and 24, from the Surich Commission and the branch's policy on overcrowding, particularly paragraph 6 (Exhibit No. 3, tab 2):

6. No enforcement action recommended – overcrowding more than ten per cent of licence capacity – patron capacity increase applicants.

- (a) If the inspector finds that the percentage of patrons or persons over the licence capacity is more than ten percent, and the number does not exceed the building occupancy load in any given red-lined area, the inspector will not recommend enforcement action if:
- No other contravention was identified at the time of the incident of overcrowding
  - The establishment has not been designated as a problem establishment at the time the contravention was identified
  - The licensee has applied for a patron capacity increase and the local government staff have advised that the application is likely to be approved, and
  - The percentage of overcrowding does not exceed the patron capacity increase that is likely to be approved.

He noted that the branch does not take enforcement action if the overcrowding is less than 10%. If it is over 10%, an inspector will not recommend enforcement action if the licensee has applied for a patron increase.

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The ability to apply for a patron increase was effective December 15, 2000, and the new enforcement regime was effective January 15, 2001. The City of Vancouver was handling the applications in bulk.

Mr. Coates referred to materials that are relevant to the capacity increase process, Exhibit No. 3, tabs 8, 9, 10, & 11. At time of these incidents in November 2001, there had been no decisions by City Council within the bulk process.

According to Mr. Coates, the intention was that the branch would begin enforcing the new capacity increases [that is, **not** enforcing existing licence capacities] prior to them being approved by the municipalities. Thus, for a transitional time, the philosophy was that licensees could operate in excess, with the blessing of the branch.

Mr. Coates took issue with my previous decision, *Richard's on Richards*, May 9, 2002. In his submission, if the building occupancy load capacity (BOL) is higher than the licensed capacity, the licensee has an application in to the City, and there are no structural problems that would block approval, the branch should accept the higher capacity. He acknowledged the policy requirement in paragraph 6 that "the local government staff have advised that the application is likely to be approved". He submitted that since staff cannot speak for council this policy cannot be achieved unless it is interpreted to mean that "likely" means there are no physical constraints.

Mr. Coates submitted that his interpretation is in keeping with the expectations of the Surich Commission and Jo Surich's testimony in a previous case, Exhibit 24. Although the City eventually did not approve Richard's in the bulk process, that did not occur until July 2002, much later than these incidents. Further, new regulations just announced alleviate the capacity issues.

On other issues related to overcrowding, Mr. Coates noted that the officers did not comply with the branch's policy on counting, as set out on page 6 of the policy (Exhibit No. 3, tab 2, p. 6).

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Further, he took issue on their ability to conduct proper counts without mechanical counters. The fact that they observed servers carrying trays over their heads is not determinative, since that occurs in all cabarets.

#### 7. *Employee consuming*

Mr. Coates referred to Employment Standards Branch requirements and cases, including the materials in Exhibit No. 15, to illustrate that disciplining an employee for drinking on the job is not a straightforward task. He noted that a licensee cannot necessarily terminate the employee. To that extent, the Employment Standards rules and the union contract are in conflict with an absolute interpretation of s.10(2). It follows that because a licensee does not have the right to terminate unless there is a pattern of behaviour documented, the licensee does not have the ability to fire for offending s. 10(2) and, accordingly has limited ability to react under the Employment Standards Act, to employees drinking.

#### 8. *Intoxicated patron*

Mr. Coates submitted there was insufficient and imprecise evidence to say that any person was permitted to become intoxicated within the premises. The officers did not apply a process that fits within the branch's policy (Exhibit No. 3, tab 1) for determining intoxication.

#### 9. General Considerations

Mr. Coates submitted that it is now clear that the defence of due diligence applies to proceedings under s. 20 (*Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)* [2002] B.C.J. No. 1604, 2002 BCCA 426).

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Mr. Coates submitted that the licensee's dealings with the police, as shown in Exhibit 8, confirm a cooperative attitude with police and a desire on part of Richard's to resolve some issues. Richard's hired the consulting firm for ongoing efforts to monitor activities within the club and correct them. Following the January 14, 2002, meeting, Richard's eliminated some practices even though they were not required. Other evidence points to ongoing staff discipline and tight inventory control.

Mr. Coates drew attention to Exhibit 14 concerning the discipline of the bartender [ ] and submitted that the general manager had done a commendable job documenting the incident and the disciplinary measures. He referred to the Serving it Right Manual and noted that the licensee's policy on handling intoxicated patrons corresponds to the manual.

Mr. Coates submitted that none of the police witnesses were able to identify the contents of the beverages. Although not wanting to cast criticism on the officers, Mr. Coates noted that there was evidence they consumed between 3 to 6 drinks which could have had an effect on their ability to assess the evidence.

### ***Reasons and Decision - Legal Arguments***

#### 1. *Delay*

I do not accept Mr. Coates' invitation to stay proceedings on some allegations because of the combined effect of the covert operations and delay in delivering Contravention Notices. The evidence does not demonstrate that the licensee was unduly prejudiced in defending against the allegations or in presenting evidence due to factors of evidence having disappeared, memories faded, witnesses unavailable, etc.

I appreciate that if the officers had identified themselves the staff might have been able to run receipts to use as some evidence. I also appreciate that staff might have made notes of the incidents if they had known of the officers' concerns.

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However, I find that those considerations do not amount to sufficient prejudice to support withdrawing allegations. To find otherwise, would suggest that the results of covert operations are not enforceable and that is not a tenable proposition. Further, I find that the delay from the time of the incidents to the delivery of the Contravention Notices did not significantly impair the licensee's ability to gather evidence and prepare for hearing. There was no evidence, nor submissions, that evidence was lost as a result of the delay. I have considered the factors outlined in the *Blencoe* case and find they are not factors here.

2. *Burden of Proof*

The burden remains proof on a balance of probabilities.

3. *Terms and Conditions of the Licence*

It is not apparent to me what Mr. Coates was applying for under this discussion. However, I have considered his points and comment as follows.

I have carefully reviewed all the alleged contraventions and Mr. Coates' submission on this point and I find:

- a) All of the alleged contraventions refer to sections of the Act or the Regulations separate from, or in addition to, the catch-all s. 12 of the Act under which the general manager can impose terms and conditions.
  - b) The exceptions to a) are the overcrowding allegations, #1 and #4, which fall under s. 12 of the Act, but are noted on the face of the licence.
  - c) Section 12 gives the General Manager authority to impose terms and conditions. The title of the Guide provides notice that it contains terms and conditions and the letter at the front of the Guide clearly tells licensees that the guide "imposes terms and conditions on your licence that are in addition
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to those found in the *Liquor Control and Licensing Act* and Regulations.”

The Branch provides a copy of the Guide to every licensee.

4. *Section 51 of the Regulations: “specified contravention”*

I have considered Mr. Coates’ general submissions about specificity and have reviewed the individual Contravention Notices (CN) and the Notice of Enforcement Action (NOEA) dated February 25, 2002, amended July 26, 2002. I find that the branch gave a brief summary of the impugned conduct in the CNs, a more specific statement of the allegation on page 1 of the NOEA and specific details of the officers’ observations in the narrative portion of the NOEA, under headings specific to each alleged contravention. I find that the branch provided sufficient description in the CNs to alert the licensee to the specific alleged contravention as required by s. 51 of the Regulations. Additional details were provided in the NOEA. I am not persuaded that the licensee was prejudiced in knowing the case to be met by the branch’s wording, reference to section numbers, or the addition of s. 38(3)(b) in some but not others.

5. *Concerning the allegations under s. 10(2) of the Regulations, I find that the contravention is properly brought against the licensee for the following reasons:*

- a) I find that s. 78 of the Act is clear in placing responsibility on the occupant for contraventions committed by the occupant’s employee. There is no reason to suggest that ‘occupant’ should be accorded other than its normal usage, and that would include a licensee. I do not accept Mr. Coates’ argument that the branch is required to specify that section when setting out an alleged contravention and I note that he did not cite authority for that proposition.
  - b) I distinguish s. 11 and 8 of the Regulations from s. 10 because they relate to ‘persons’ not employees. They would not be caught by s. 78 of the Act and, therefore, it was necessary for the legislature to pass provisions to cover both the ‘persons’ and the ‘licensee’.
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- c) I distinguish sections 35 and 36 of the Act because they set out prohibitions against the licensee but include the licensee's employee, which is the opposite of what s. 78 accomplishes.
- d) Section 34 of the Act is an entirely different enforcement issue because it sets out the prohibition against a minor, and the licensee is not implicated at all. The corresponding section for the licensee is s. 35 and, in its effect, is similar to s. 11 and 8 of the Regulations.

## 5. *Free Liquor*

Under s. 12 of the Regulations, a licensee is prohibited from providing free liquor or liquor at a reduced price to customers. In the *Wasteland* case, the LAB found that allowing a promoter to provide free liquor was a contravention of this section. In the *Uppal* case, adjudicator Beattie found that employment status was not relevant and the contravention was founded because the licensee allowed the promoter to give out drink tickets, when the establishment was open to the public.

Mr. Coates attempted to distinguish those cases on the basis that the disk jockey in this case was an entertainer, not an employee, who had paid for the tickets. Therefore, he says, this was not 'free liquor'. I do not accept his submissions. The result is that the licensee's customers were being given free liquor, with the knowledge and consent of the licensee. In my view, it is implicit in the section that the licensee is prohibited from directly or indirectly providing free liquor to customers.

This is not similar to the case of a corporate party where the employees are the guests of the corporation. In the case of a disk jockey, or other entertainer, the customers are still the customers of the licensee. In this case the facts are that the licensee entered into a contract which anticipated, and created a structure for, customers receiving free liquor. It is similar to the *Wasteland* case in which the licensee allowed the premises to be used by the disk jockey to promote his venture and to dispense free liquor tickets.

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Further, the licensee was permitting the disk jockey to purchase tickets at a reduced price, which is not permitted.

Concerning the Manufacturer's tasting, I do not accept Mr. Coates' submissions that the licensee should not be held responsible for the manufacturer's error. Regardless of whether the procedures followed at Richard's are industry practice, licensees are responsible for ensuring that their establishments are run within the statutory and licence requirements.

The police testified that they did not see bartenders ringing the price of free drinks into the cash registers. The licensee disputed this point but I find the officers' testimony to be reliable and credible. There was no evidence from the bartenders who worked those nights or from staff to indicate what their general procedure is. Further, even if the staff had been paying for the drinks themselves, that would still constitute a contravention of s. 12(1), which is clearly set out on p. 13 of the Guide.

#### 6. *Overcrowding*

Exhibit Nos. 23 and 24 were presented in evidence but I was not directed to any particular passages in Exhibit No. 24. Mr. Coates made submissions on the intent of the Surich Commission. I have fully reviewed both documents, and the other exhibits touching on capacity increases, and make the following findings of fact.

The Surich Commission recommendations concerning this issue are at Exhibit No. 23, paragraphs 1(r) and 13 (e) and (v). Clearly, the recommendations supported a major role for local governments' consideration and recommendation to the branch in all matters concerning liquor licensing.

In the transcript of evidence, Exhibit No. 24, Mr. Surich noted that once an application for increased capacity was submitted, it went through a fairly complex process that involved municipal government.

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Some of the issues municipalities had to consider included whether the particular building was adequate, whether it needed changes, e.g. in number of doors, the ability to police increased numbers leaving licensed establishments at closing time, the number of licensed establishments in an area including new establishments being approved, the hours of closing and the impact on neighbourhoods.

Mr. Surich acknowledged the importance for municipalities to complete their reviews and, for example, to use this process to update their building plans and ensure building code compliance. At the same time, he acknowledged how long that process could take. He offered his view that the intention behind the branch's policy, as stated in paragraph 6, was that there should be no enforcement of the existing licence capacity if the application for increase had been submitted, the capacity on the given night did not exceed the "public safety limit" and there were no other serious contraventions such as drinking by minors, over-service, or generally public safety or significant social policy concerns.

Adjudicator Beattie and I have had argued before us in a number of hearings that it is unfair for the branch to be proceeding with, and finding contraventions for, overcapacity during the municipalities' review of applications for capacity increases. We have heard from witnesses who were part of the Surich review, and now we have heard from Mr. Surich.

Mr. Surich suggests the intention was there would be no enforcement of the current licence capacities providing the other conditions were met. However, the fact is that the Surich recommendations, and reality, require municipalities to give careful consideration to issues of such potential impact. Those processes take time. There was nothing brought to my attention in the Surich recommendations that suggested enforcement should be curtailed pending the municipal reviews. There was nothing brought to my attention in the branch's dealings with licensees that suggested the branch would not enforce existing capacities, pending municipal reviews. And, there was nothing brought to my attention to suggest how the branch would gauge whether the capacity on a given night exceeded the "public safety limit."

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Until the municipalities completed their reviews, no one could say what the public safety limit would be. I bear in mind that public safety concerns are not limited just to the building or structural problems as suggested by Mr. Coates. As Mr. Surich noted, there are other matters such as policing that affect public safety and social policy.

The facts of what occurred in this case belie the licensee's arguments, in any event because when the City completed the review process, it found that it would not approve Richard's as part of the bulk process. Mr. Coates appeared to suggest that I give weight to this evidence because it shows how long it took the City (from December 2000 to July 2002) to process the applications. I understand the suggestion to be that during this time, the branch should not have been taking enforcement action for overcrowding beyond licence capacity, if the establishment was within the applied for capacity. I do not accept that submissions, for the reasons elaborated here. I also note that I do not find this evidence to be helpful in coming to my determination. Regardless of the eventual outcome, the branch was required to enforce the existing regulations and terms and conditions of the licence.

Another factor that argues against the licensee's submission on this point is that paragraph 6 includes the provision that an inspector will not take enforcement action if: "No other contravention was identified at the time of the incident of overcrowding." In this case, other contraventions were identified to the branch, by the police, on both November 9 and 10, 2001.

At all relevant times, the licensed capacity for Richard's remained at 349 patrons. The BOL was 436 people.

#### *8. Employee Consuming*

I do not accept Mr. Coates' argument that licensees cannot comply with s. 10(2) because the employment standards regulations do not permit them to terminate the employment.

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Regardless of whether I accept that proposition, licensees are responsible to ensure employees are acting within the requirements of the liquor regulations. Termination is not the only remedy available to a licensee.

***Reasons and Decision - The Substantive Allegations***

*#1 and 4 Overcrowding, November 9 and 10, 2001*

I find the officers' testimony was credible and reliable and I find there were approximately 400 to 420 patrons at Richard's on November 9, 2001, and approximately 500 to 520 patrons on November 10, 2001. Because of the considerable discrepancy in the count of the third officer on November 10, 2001, I find his count to lack reliability.

In accepting the counts for both nights, I observe that all officers described very crowded, tight, body to body congestion. This would be in keeping with the former owner's description of what patrons find comfortable and desirable. It is also consistent with the evidence that licensees in downtown Vancouver were, generally, operating as though they had been granted increased capacities. I have taken into consideration the licensee's testimony about counting, noted that the general manager did not accept the former owner's method, and find that the officers' reported methods of counting to be as reliable as possible.

I prefer the officers' direct testimony about the patron counts and the general congestion over the licensee's records of events which indicated the numbers supposedly counted at the door. The officers were there specifically to observe the conditions and I find their evidence reliable, with the exception of the one count. On the other hand, the licensee did not produce door control staff to speak to numbers or the documents.

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*#2, 5 and 10 Employee Consuming, November 9, 10 and 16, 2001*

There are numerous reported incidents of bartenders, servers and the disk jockey consuming liquor. The police observations included staff drinking together, with patrons, or by themselves, for example in the case of [ ] and the beer in the ice well. The police reported incidents of the officers and other patrons purchasing drinks for a bartender who consumed the drinks at the same time as the patrons. There was also an incident of a bartender calling the officers over, setting up some shooters and drinking a round with them.

I have no reason to doubt the police testimony. The testimony among the officers was consistent and clear. I am satisfied that they ensured their line of vision was clear. I am also satisfied from my viewing of the establishment, that they could see the bartender at the main bar from the upper level.

The licensee argued that the officers could not say with certainty that staff were drinking liquor. I accept that bartenders may use empty liquor bottles to hold an assortment of beverages. I also accept that there may have been a practice in the industry to substitute juice shooters. However, on the evidence from the officers from these three nights, I find on a balance of probabilities that staff were consuming alcohol on each occasion. It defies credibility to suggest that drinks poured from the same bottle and served to patrons were juice shooters or other non alcoholic beverages.

The licensee submitted evidence to document the house policies, the licensee's attempts to improve the conduct of employees and the licensee's actions on progressive discipline. The Classified Investigative Services Inc. report was in May-June 2001, 4 to 5 months prior to these incidents. The licensee hired the company only the one time. In my view, this evidence does not assist the licensee. Clearly, the conduct of the staff was improper in many respects on these three nights, - the door control announced free shooters, many staff consumed liquor, staff gave patrons free liquor, the capacity was at or beyond the BOL.

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The progressive discipline documents for [ ] admittedly had been rewritten prior to the hearing. The facts that the forms were not signed by the employees and that one hand written form was dated 2002 instead of 2001, lead me to conclude that I could place no reliance or credibility, whatsoever, on these documents. I find that this portion of the evidence coupled with the general manager's lack of understanding of liquor regulations concerning free liquor, treating patrons, manufacturer's tastings, undermined his credibility. I also note that, generally, he did not provide any documentation to show ongoing training, updating of policy manuals, reports and directions to staff following the January 2002 meeting with the police. Overall, I found his evidence to be self serving and lack credibility.

*#3, 6 and 11 Free Liquor, November 9, 10 and 16, 2001*

The evidence is clear that on November 9 and 16, 2001, the disk jockey was providing patrons with tickets to redeem liquor for which patrons did not have to pay. It is also clear that this was done with the approval and permission of the licensee and was anticipated in the disk jockey's contract. And on the facts, and for the reasons stated in paragraph 6. above, I find that this is a contravention of s. 12 of the Regulations.

I find as fact that on November 16, 2001, at approximately 2:00 a.m., a bartender motioned three police officers to the bar and provided them with 2 rounds of free shooters. I find that the licensee served free liquor in contravention of s. 12(1) of the Regulations.

From the totality of evidence for November 10, 2001, I find that there was no manufacturer's tasting. I find there were no manufacturer's tables, displays, promotional material, licensed agent or staff. If there had been an intention to have a manufacturer's tasting, the evidence of the licensee's staff indicates that they did not know how to conduct a legal tasting. So even though they might have called it that, legally it was not. I find as fact that the server handing out free shooters was employed by the licensee. I find that the licensee served free liquor in contravention of s. 12(1) of the Regulations.

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#7 *Permitting Person to become Intoxicated, November 10, 2001*

The evidence of permitting a person to become intoxicated relates to the bartender [ ]. I find that he was consuming liquor and that his behaviour was unacceptable but that he was not intoxicated for the purposes of s. 43(2)(a) of the *Act*. I accept the officers' testimony that he was not showing the signs of intoxication that would normally alert them to a problem patron. I find that this contravention is not founded on the evidence.

#8 *Permitting Intoxicated Person to Remain, November 10, 2001*

I accept the police officers' testimony of their observations over a 15 minute period - that a patron was slumped over a table, an employee checked on him but no further action was taken by the licensee. On the basis of the officers' description of the patron being unable to sit up, holding his head in his hand, his inability to focus, etc., I find that the patron was intoxicated.

I have considered the licensee's evidence from various witnesses on policies and procedures for handling intoxicated patrons. I appreciate that there is some subjective judgment used in deciding whether to remove the patron immediately to the front doors and the sensitivity in trying to find friends or family. However, I think it is improper and lacks proper diligence to leave an intoxicated patron alone, particularly for 15 minutes.

I find that the licensee did not act reasonable or diligently. Accordingly, I find that the licensee allowed an intoxicated patron to remain in the establishment, contrary to s. 43(2)(b) of the *Act*.

#9: *After hours service, November 10, 2001*

I have considered the licensee's evidence that, on balance, the officer probably was sold a drink after the warning lights came on. The licensee said there would have been a

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security person next to the bar. The licensee also challenged the officer's testimony on the grounds that he could have asked for a receipt to prove the time.

I prefer the testimony of the officers. I have no reason to believe the officers would not be truthful. There were two of them, and both said they consulted their watches. There is a notebook entry by one officer at 0210 hours and the road boss' notes indicate there was a line up to purchase, after 2:00 a.m. The licensee admitted that the lights are not on a timer system, so there could have been an error about when the lights were turned on.

I find that the licensee sold liquor after closing hours, contrary to the terms of the liquor licence.

## **Penalty Submissions**

### ***Licensee's Submissions on Penalty***

As noted earlier, Mr. Coates objected to making submissions on penalty in advance of hearing my decisions on the substantive allegations. I appreciate that the submissions that follow are all predicated on his submission that either the contraventions are not technically correct or the branch has not proven the contraventions. They are also predicated on his submission that the defence of due of diligence is available to a licensee, generally for alleged contraventions, and in considerations of appropriate penalties.

Mr. Coates summarized that, globally, the branch is asking for very harsh penalties of \$28,000 and 10 days suspension. To translate the license suspensions into dollars, could mean a total penalty in excess of \$100,000. Mr. Coates submitted that no enforcement actions are warranted for any of these alleged contraventions.

For alleged contraventions #1 and 4, for overcrowding, the branch is recommending 2 days suspension and \$3,000. He submitted that these contraventions do not warrant enforcement action because the capacities are supported by new regulations.

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For alleged contraventions #2, 5, and 10, for employee consuming, the branch is recommending \$1,000, \$2,000, and \$3,000. In his submission, these do not warrant enforcement action because the licensee demonstrated it took due diligence to ensure the conduct did not occur.

For alleged contraventions #3, 6, and 11, for free liquor, the branch is recommending penalties of \$5,000, \$6,000, \$7,000, for a total of \$18,000. Mr. Coates submitted that if these had not been covert operations, if a liquor inspector had attended in the normal way, and identified problems to the licensee on November 9<sup>th</sup>, it is reasonable to predict that the incidents on the 10<sup>th</sup> and 16<sup>th</sup> would not have occurred. Therefore, to penalize for technical offences such as the disk jockey and the manufacturer's tasting, is improper. For the other allegations of free liquor involving employees, he submitted that the licensee's documentation shows that the licensee was diligent in establishing policies.

For alleged contraventions #7 and 8, for intoxication, the branch is recommending licence suspensions of 4 days each. Mr. Coates submitted that the due diligence defence is clear and that the licensee's actions, processes, door staff, etc. satisfy the due diligence criteria. The witnesses attested to the policy and their understanding that the licensee cannot put someone out on the street. They demonstrated an understanding of the need to protect the person by finding friends or putting the person in a taxi. There was no evidence collected in accordance with the branch's policies, such as how much the individual had consumed in Richard's. Additionally, there was no evidence of public danger. One officer described the individual as a quiet drunk.

Concerning alleged contraventions #9, after hours sale of liquor, for which the branch is recommending \$1,000, Mr. Coates submitted that the licensee has no way of rebutting. However, that conduct is refuted by all the written policies of Richard's. He submitted there should be no penalty.

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**Reasons and Decision - Penalty**

Pursuant to ss. 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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to impose at least the minimums set out in the Penalty Schedule. With the exception of the one proven contravention for overcrowding, I have given weight to the compliance history to the extent that it demonstrates the branch has told the licensee in the past of concerns about overcrowding and intoxication, not as evidence of proven allegations.

In the Surich Commission Recommendations, Exhibit No. 23, which is dated May 20, 1999, it is stated, at paragraph 11 Enforcement:

All parties recognize the need for consistent and vigorous enforcement of rules related to liquor licenses and public safety. The new licensing regime will include clearly stated penalties for infractions, laid out in the regulation, and specific plans for vigorous enforcement. There will be a clear schedule of graduated penalties, with fines and/or suspensions leading to licence cancellation for serious infractions (such as service to minors and over-service). Regulation content will be subject to consultation with significant stakeholders.

As Mr. Coates noted in his submissions, the graduated scale of penalties came into effect on January 15, 2001, with the new enforcement regime. The branch has been applying the new penalty regulation schedule to contraventions that arise after January 15, 2001. There are new regulations coming into force and Mr. Coates has submitted that I should take those into consideration in considering penalties in this proceeding. The Surich report noted the concern for consistent and vigorous enforcement.

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In my view, enforcement should not be swept to one side because changes to regulations might occur sometime in the future. I am considering these contraventions in light of the statutory and licence requirements as of November 2001.

*#1 and 4      Overcrowding, November 9 and 10, 2001*

The branch's policy manual, containing the paragraph 6 referred to in evidence, has been available and has been the subject of arguments in other hearings. As Mr. Surich stated in his testimony, Exhibit No. 24, there are a number of factors municipalities have to consider that affect the public safety and public policy concerns. There is nothing in the evidence before me to support a contention that licensees should have been at liberty to assume that the branch was waiving the requirement to wait for municipal approval. Rather, it has been common knowledge to licensees in downtown Vancouver and elsewhere that the branch intended to enforce existing licence capacities until the municipalities reviewed patron increase applications and made recommendations to the branch.

There is nothing in the evidence before me to support a contention that licensees should have been at liberty to assume the patron increases would be granted. Indeed, just the contrary is evident given the municipality turned down Richard's' application.

I find that this licensee had no reason to believe the branch or the municipality had granted leniency in patron capacities. Nonetheless, this licensee blatantly permitted the establishment to be over capacity. The branch has a documented history that this licensee has been warned a number of times about operating beyond the licence capacity and that the branch has consistently warned the licensee that failure to comply with the licensed capacity could result in enforcement action (See Exhibit No. 2).

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I agree with the branch's recommendations that penalties in excess of the minimum are warranted for these contraventions. I find that an appropriate penalty for contravention #1 is a two (2) day licence suspension and for contravention #4 is a monetary penalty of \$3,000.

*#2, 5 and 10 Employee Consuming, November 9, 10 and 16, 2001*

The licensee argues against imposing penalties on the grounds that it took due diligence to ensure its employees did not consume liquor while working. In my view, the licensee's evidence on this was self-serving, and as I said above, it was neither compelling nor credible. I prefer the evidence of the police officers who testified that there was no apparent management presence.

The licensee did not leave me feeling reassured that it placed a priority on ensuring the staff were familiar with or followed the liquor regulations, which are conveniently set out in the Guide to Liquor Licensees. The staff who testified at the hearing were remarkably unfamiliar, particularly considering they were coming to give evidence at a branch hearing, with some of the requirements.

In my view, to achieve voluntary compliance with this licensee, a strong message is required and the medium for that message is enforcement penalties. The branch recommended a graduated penalty for each night, staying within the range for first contraventions. In my view that is appropriate given the blatant and continual contraventions and the number of employees who were observed consuming liquor.

I find that an appropriate penalty for contravention #2 is a monetary penalty of \$1,000, for #5 is a monetary penalty of \$2,000 and for #10 is a monetary penalty of \$3,000.

*#3, 6 and 11 Free liquor, November 9, 10 and 16, 2001*

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In my view, these contraventions are either deliberate or they arise from unpardonable ignorance of the liquor regulations. I have found that there was no manufacturer's tasting on November 10, so I have rejected the licensee's contention that this might have arisen from a mistaken view of the procedures, or that it should be attributed to the manufacturer. In my view, the licensee was handing out free shooters in a global way, not just to one or two choice patrons.

Concerning the disk jockey, I do not find that there was any due diligence applied by the licensee to ensuring this was a legal procedure. I also do not accept that this is a "technical" contravention.

For the instances of the employees giving patrons free drinks, I also do not find evidence of due diligence by the licensee. I accept the officers' observations that there was no indication of a management presence during these nights. I find the licensee's evidence of due diligence, i.e. references to the house policies, the investigative agency, enforcement of rules, etc., is not compelling.

According to the penalty schedule, Item 27, the range of penalties for a first contravention is 4 to 7 day licence suspension or \$5,000 to \$7,000 monetary penalty. The seriousness with which handing out free liquor is viewed, is apparent from the penalty schedule. In the past history documents, the branch and the police have warned the licensee on a number of occasions about the seriousness of intoxication. In my view, handing out free liquor is indicative that the licensee has not heeded those cautions.

The branch has again proposed a graduated penalty, staying within the range for first contraventions. I again note that a strong message is required to impress upon this licensee the importance of complying with the liquor regulations. In my view the branch's graduated penalty proposal is appropriate in these circumstances. Accordingly, I order that the licensee pay a monetary penalty of \$5,000 for contravention #3, \$6,000 for contravention #6 and \$7,000 for contravention #11, for a total of \$18,000.

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*#8 Allowing Intoxicated Patron to Remain, November 10, 2001*

According to the penalty schedule, Item 10, the range of penalties for a first contravention is 4 to 7 day licence suspension or \$5,000 to \$7,000 monetary penalty. The branch has recommended a 4 day licence suspension. As I stated above, I find that the licensee did not apply standards of due diligence in dealing with the intoxicated patron and did allow an intoxicated patron to remain. The licensee has no written policies or staff training manual concerning this issue.

In the past history documents, the branch and the police have warned the licensee on a number of occasions about the seriousness of intoxication. The licensee did not satisfy me that there were any compelling circumstances or submissions to mitigate against imposing a penalty. I find that imposing a license suspension is appropriate and that given this is a first proven contravention, I am satisfied that the minimum 4 day suspension is appropriate.

*#9 Service After Hours, November 10, 2001*

The licensee's main argument against imposing a penalty is that the licensee has demonstrated due diligence through management's action concerning the house policies, the investigative agency, enforcement of rules, etc. For reasons already mentioned, I do not find those submissions compelling. In my view, the licensee could demonstrate some due diligence in this area by putting the closing lights on a timer so it would not be left to human error.

In the past history documents, the branch and the police have warned the licensee on a number of occasions about the seriousness of intoxication. In my view, continuing to serve after hours is indicative that the licensee has not taken these cautions seriously.

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I find that imposing a penalty is warranted. According to the penalty schedule, Item 44, the range of penalties for a first contravention is 1 to 3 day licence suspension or \$1,000 to \$3,000 monetary penalty. I accept as reasonable the branch's recommended monetary penalty of \$1,000.

### *Summary*

The result of my determinations is monetary penalties of \$28,000 and licence suspensions of six (6) days. I have looked at the result globally and am satisfied that it is an appropriate mix of financial and suspension, and that it is fair enforcement action for the conduct that comprises the contraventions.

The licensee brought considerable evidence about the police presence and conduct on November 16, 2001, around the fight that erupted. In some sense, I think the licensee was attempting to impugn police conduct and perhaps indicate that there was some push to 'get' this particular licensee. To the extent that might have been insinuated, I find the evidence does not support it. The evidence generally established that there have been ongoing problems in this area some of which stems from Richard's and that the police were making observations at other establishments as well.

The licensee suggested there was something improper with the police using undercover operations and that the licensee might have improved the conduct in the establishment if the police or branch had told them of the concerns. In my view, the evidence in this case demonstrates the importance of covert operations to reveal conduct that needs to be addressed through enforcement action. The licensee is being hit hard with penalties. The licensee might think that globally these are oppressive. However, each of the contraventions occurred, despite previous warnings. The general tone of the evidence suggests that this licensee has a lot of work to do educating employees and enforcing the liquor laws.

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**Order**

Pursuant to section 20(2) of the *Act*, concerning Class "C" Cabaret Licence #18285:

- a) I impose a monetary penalty of \$28,000.00 (twenty-eight thousand dollars) to be paid no later than January 19, 2003, and
  - b) I suspend the liquor licence for a total of six (6) days (on the dates set out below), as follows:
    1. For the contravention on November 9, 2001, number of patrons exceeding the licensed capacity, sections 12 and 38(3)(b) of the *Act*, I impose a licence suspension of two (2) days.
    2. For the contravention on November 9, 2001, employee consuming liquor while working, section 10(2) of the Regulations, I impose a monetary penalty of \$1,000 (one thousand dollars).
    3. For the contravention on November 9, 2001, providing free liquor, section 12 of the Regulations, I impose a monetary penalty of \$5,000 (five thousand dollars).
    4. For the contravention on November 10, 2001, number of patrons exceeding the licensed capacity, sections 12 and 38(3)(b) of the *Act*, I impose a monetary penalty of \$3,000 (three thousand dollars).
    5. For the contravention on November 10, 2001, employee consuming liquor while working, section 10(2) of the Regulations, I impose a monetary penalty of \$2,000 (two thousand dollars).
    6. For the contravention on November 10, 2001, providing free liquor, section 12 of the Regulations, I impose a monetary penalty of \$6,000 (six thousand dollars).
    8. For the contravention on November 10, 2001, permitting intoxicated person to remain, section 43(2)(b) of the *Act*, I impose a licence suspension of four (4) days.
    9. For the contravention on November 10, 2001, sale of liquor after licensed hours, section 17(3) of the Regulations and sections 12(3)(c) and 38(3)(b) of the *Act*, I impose a monetary penalty of \$1,000 (one thousand dollars).
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10. For the contravention on November 16, 2001, employee consuming liquor while working, section 10(2) of the Regulations, I impose a monetary penalty of \$3,000 (three thousand dollars).
11. For the contravention on November 16, 2001, providing free liquor, section 12 of the Regulations, I impose a monetary penalty of \$7,000 (seven thousand dollars).

I order the licence suspension of six (6) days to commence as of the close of business on Thursday, January 16, 2003, 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 54(1) of the Regulations).

During the hearing, evidence from the licensee's witnesses indicated that Richards's does not necessarily open on the same days each week. Therefore, I do not know what days will be "business days" for Richard's in January 2003. In order to ensure that this Order is effective, I direct that the liquor licence for Richards' on Richards be held by the branch or the Vancouver City Police from the close of business on Thursday, January 16, 2003, until the licensee has demonstrated to the branch's satisfaction that Richard's has been closed for six (6) business days.

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The suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or police officer. A member of the Vancouver Police Department or the branch will attend the premises, take possession of the liquor licence and hold it in safekeeping during the term of the suspension.



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M. G. Taylor  
Enforcement Hearing Adjudicator

Date: December 19, 2002

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office  
Attention: Lee Murphy, Vancouver Regional Manager  
Shahid Noorani, Project Manager

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Lisa Field, Branch Advocate

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## Appendix A

### Richard's on Richards Decision

*Liquor Control and Licensing Act, R.S. Chap. 267*

#### Licences

- 12** (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
  - (b) that are in addition to those referred to in paragraph (a).
- (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (a) limit the type of liquor to be offered for sale,
  - (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,
  - (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
  - (d) designate the areas within an establishment where minors are permitted,
  - (e) approve, prohibit or restrict games and entertainment in an establishment,
  - (f) exempt a class of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
  - (g) vary seating requirements in the dining area of an establishment,
  - (h) vary requirements with respect to the location of an establishment,
  - (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
  - (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
  - (k) specify requirements for reporting and record keeping, and
  - (l) control signs used in or for an establishment.
- (4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.
- (5) A licence expires on the date specified on it as the expiry date.
- (6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.
- (7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.
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**Unlawful sale of liquor**

- 38** (1) Except as provided in this Act, the *Liquor Distribution Act* or the regulations made under those Acts, a person must not, personally or by his or her clerk, employee or agent, keep for sale, sell or, in consideration of the purchase or transfer of property or for other consideration, give liquor to another person.
- (2) Despite subsection (1), a delivery service may purchase liquor on behalf of a customer during the days and hours for sale of liquor prescribed in that area and deliver the liquor to the customer, if the charge for the liquor is no more than the liquor store price plus the delivery service charge.
- (3) A licensee must not sell liquor except
- (a) liquor purchased from the Liquor Distribution Branch, and
  - (b) in accordance with this Act, the regulations and the terms and conditions of the licence.

**Drunkness**

- 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.

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**Employees**

- 10** (1) An employee engaged in the service of food and liquor in licensed establishments shall be attired in accordance with the directions of the general manager or a person designated by the general manager.
- (2) No employee of a licensee shall consume liquor while working on the licensed premises.
- (3) If requested by the general manager, the licensee shall forthwith furnish a complete list of the names of all employees employed on the licensed premises.

**Treating and extension of credit**

- 12** (1) No licensee shall provide
- (a) free liquor or liquor at a reduced price to customers,
  - (b) liquor through the custom commonly known as "treating".
- (1.1) Subsection (1) (a) does not apply if the liquor is offered as a sample in a sampling room designated by the general manager under section 53 (1) of the Act.
- (2) No licensee shall sell or otherwise supply any liquor on credit to customers, and no such licensee nor his employees shall give, lend or otherwise advance any money to customers for the purchase of liquor from the licensee, but this subsection does not apply to billing privileges extended by hotels, clubs, resorts and military messes to registered and bona fide guests or members, or to credit purchases made in that
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part of an establishment for which a dining-room or dining-lounge licence has been issued, or in a licensed railway dining-car, railway station or international airport.  
[am. B.C. Regs 56/95, s. 7; 186/ 2000, Sch. A, s. 14.]