



**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: 600428 B. C. Ltd.
dba Tonic Bar
919 Granville Street
Vancouver, BC

APPEARANCES

For the Licensee: David Houston, Counsel
Murray Kryski, Managing Partner

For the Branch: Laurie Soloway, Counsel

Enforcement Hearing Adjudicator: M. G. Taylor

File No. EH03-21/28/29/44/45/50

Dates of Hearing: August 12 & September 17, 2003

Place of Hearing: Vancouver, B.C.

Date of Decision: March 2, 2004

Introduction

The licensee, 600428 B. C. Ltd., operates the Tonic Bar night club (the “club”) at 919 Granville Street, Vancouver, under Liquor Primary Licence No. 300028. The club opened on December 18, 2002. The liquor licence permits hours of sale from 7:00 P.M. to 2:00 A.M. Monday through Saturday and until Midnight on Sunday.

The first liquor licence the branch issued had four designated red lined areas with patron capacities of:

Main area 1	108 patrons
Area 2, mezzanine	10 patrons
Area 3, mezzanine	12 patrons
Designated smoking room (DSR)	<u>8 patrons</u>
Total	138 patrons

The occupant load (OL) established by the City of Vancouver has varied over time. There was no certificate in evidence in the hearing for the initial OL and the witnesses varied in their understandings and recollections, from 192 to 200. There is no issue about the existence of an OL. For reasons set out below, I have found that the OL at all relevant times was 200 persons.

The liquor licence was amended on February 9, 2003, to total capacity of 200 persons in the red lined areas, but it came out during the hearing that this licence was never delivered to the licensee. On February 20, 2003, the licence was further amended to show one area only with a total allowable capacity of 200 persons; this licence was delivered to the licensee. On May 12, 2003, the licensee applied to the City of Vancouver for an increase in the OL to 253 patrons.

The incidents giving rise to this hearing occurred between December 18, 2002, and April 26, 2003, and all involved admitted overcrowding of the licensed premises. For some incidents the branch has alleged overcrowding greater than the OL and for one, overcrowding less than or equal to the OL.

As a result of ongoing concerns about overcrowding, by notice dated May 23, 2003, the branch imposed the following terms and conditions on the licence:

1. The licensee must conduct a count of all persons in the establishment each business day using a mechanical counter. The count must occur each hour on the hour from 9 P.M. until 2 A.M. A copy of the results of the counts (by hour) must be faxed to the Liquor Control and Licensing Branch's Vancouver office at (604) 775-0044 no later than 3 P.M. the following business day. The daily document describing the counts must be signed by the licensee or the designated representative of the licensee;
2. The licensee must submit to the General Manager on a weekly basis a statutory declaration containing a statement of all of the daily person counts (as required in paragraph 1) conducted by the licensee during a 7 day period;
3. The licensee must increase from 3 to 5 the number of door staff on Wednesday, Thursday, Friday and Saturday each week; and
4. The licensee must eliminate all VIP admissions.

Alleged Contraventions

The notification of the branch's allegations was initially given to the licensee in the Contravention Notices (CN) which were served contemporaneously with the incidents (Exhibit No. 1, tabs 16 – 23). The branch then issued various Notices of Enforcement Action (NOEA) (tabs 8 – 15) which were subsequently

amalgamated in one NOEA dated June 19, 2003, and amended July 11, 2003, as follows:

No	Contravention Name	Section of Act/regulation and term and condition of the licence	Date of alleged contravention
1.	Overcrowding beyond patron capacity greater than occupant load.	LCLA, s. 12 & Reg. s. 71(2)(b)	December 18, 2002
2.	Overcrowding beyond patron capacity less than or equal to occupant load.	LCLA, s. 12 & Reg. s. 71(2)(b)	January 25, 2003
3.	Overcrowding beyond patron capacity greater than occupant load	LCLA, s. 12 & Reg. s. 71(2)(b)	February 09, 2003
4.	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	March 01, 2003
5.	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	March 08, 2003
6.	Licensee or employee consume liquor in premises	Reg. s. 42(3)	March 16, 2003
7.	Overcrowding beyond occupant load	Reg. s. 6(4)	April 26, 2003

Recommended Enforcement Action

The prescribed penalties for these overcrowding contraventions are contained in *Liquor Control and Licensing Regulation*, Schedule 4, items 14 and 15. For contraventions under item 14:

'permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load,'

the range of penalty for a first contravention is 1 to 3 days licence suspension or \$1,000 to \$3,000 monetary penalty.

For contraventions under item 15, 'greater than' the occupant load, the range of penalty for a first contravention is 4 to 7 days licence suspension or \$5,000 to \$7,000 monetary penalty.

There are higher penalties for second and subsequent contraventions of the same type which occur within twelve (12) months of the preceding contravention. Pursuant to sections 66(2) and 68(2) of the *Regulations*, the general manager may impose penalties in excess of those established under Schedule 4.

All of the recommended penalties, except for No. 7, are within the ranges for first contraventions. The branch's recommended enforcement actions are, respectively:

Contravention No. 1:	4 day suspension
Contravention No. 2:	3 day suspension
Contravention No. 3:	7 day suspension.
Contravention No. 4:	7 day suspension.
Contravention No. 5:	7 day suspension.
Contravention No. 6:	\$1,000.00 penalty
Contravention No. 7:	15 day suspension.

Total recommended enforcement actions: 43 day suspension
and \$1,000 monetary penalty.

In accordance with Sec.12 of the *Act*, the branch also recommended adding terms and conditions to the licensee's liquor licence, in the same wording as previously imposed, set out above. The branch proposed the terms would remain in effect until the liquor licence expiry date, November 30, 2003, at which

time the General Manager would consider the renewal application and terms and conditions.

Licensee Admissions

The licensee signed a waiver for the contravention of licensee or employee consuming liquor, agreeing to pay the recommended penalty of \$1,000.

The licensee admitted that the licensee was over capacity on each occasion specified in the alleged contraventions, but took issue with the proposed enforcement action.

Compliance History and Enforcement History

There is no record of prior contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, section 1(1)(b), the branch has treated the allegations as first contraventions.

This establishment opened on December 18, 2002, and that is the date of the first overcrowding contravention. The branch issued Contravention Notices, which are the subject of this hearing, and imposed the licence terms and conditions on May 23, 2003, set out above. The branch issued 4 Contravention Notices on June 11, 2003, for failure to comply with the terms and conditions.

Issues

Are the branch's recommended enforcement actions appropriate?

Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Book of Documents & Authorities
Exhibit No. 3	Liquor Licence 300028, January 23, 2003, and February 20, 2003
Exhibit No. 4	Four Contravention Notices issued June 4, 2003
Exhibit No. 5	Letter May 23, 2003, DGM Tatchell to licensee
Exhibit No. 6	Letter August 12, 2003, D. Houston to DGM Tatchell
Exhibit No. 7	Maximum Occupant Load certificates dated September 11, 2003

Evidence

The branch's witnesses were a Liquor Inspector and the Deputy Fire Chief. The licensee's witnesses were an Architect and a Building Code Fire Protection Consultant.

Liquor Inspector

The liquor inspector testified that she met with the licensee's managing partner, the manager and the acting manager on December 12, 2002, and completed the Liquor primary Inspection Interview Sheet (Ex. #1, tab 2). She testified that she discussed all of the terms and conditions and the allowable capacities (total 138 patrons) with the licensee. The document is signed by the managing partner acknowledging the terms and conditions.

On December 18, 2002, opening night, the Vancouver City Police issued a Licensed Premises Check (LPC) indicating a count of 300 persons at 11:30 P.M. On January 9, 2003, the inspector issued a Contravention Notice to the manager for that alleged contravention. She testified the manager explained that opening night was busier than had been anticipated.

On January 25, 2003, the inspector attended the premises with two (2) police officers. They conducted patron counts using mechanical counters. The

inspector testified that her count was 228 patrons, with 185 in the main area and 43 in the mezzanine (12 in the smoking room). This is also indicated in the Notice of Enforcement Action (NOEA) at Ex. #1, tab 9, p. 7. She testified that she shut down the front doors and instructed the general manager to start reducing the numbers.

On February 9, 2003, the inspector attended the premises with an inspection team which included police officers, a city inspector, and a fire inspector. She testified that it was extremely crowded even at the front door, and that her count was upwards of 343 patrons. She said it was the most severe overcrowding she had experience since she started as a liquor inspector in September 2001. She spoke with the fire inspector about the possibility of shutting down the nightclub and doing a count as patrons left. However, they felt did not have sufficient police back up to turn that many patrons onto the street. They instructed the manager to shut down the front doors and she issued a Contravention Notice.

The inspector testified that the manager was respectful, as he always has been, and took corrective measures. However, she indicated her exasperation with him for continuing to allow the overcrowding to occur.

On March 8, 2003, the inspector returned with the inspection team, including an additional liquor inspector. She testified that their lowest patron count was 251 total, not including the staff. The liquor inspectors directed the licensee to close the front doors and they issued a Contravention Notice. The inspector said that she understood by this time that the liquor licence had been amended to allow 200 persons, in line with the OL.

On March 16, 2003, the inspector attended with another liquor inspector. Although it appeared very crowded and they directed the licensee to shut the doors, the inspectors did not issue a contravention notice for overcrowding. They issued a contravention notice for licensee or employee consuming liquor.

On April 26, 2003, a multi-agency inspection team, including two liquor inspectors, attended the Tonic at approximately 11:25 P.M. The branch did not call witnesses, but relied on the statement of the details contained at Ex. No. 1, tab 8, page 10 – 11 and the inspectors' notes, tabs 29 and 30. The liquor inspector's counts were 290 and 304 persons on the first count, and 300 and 287 persons on the second count. The manager informed one of the inspectors that the staff count was 279, not counting staff. At the hearing, the licensee acknowledged that the inspectors' counts were within the range of 287 to 304 persons.

The branch treated this as a first contravention, but recommended a penalty of 15 day licence suspension.

Deputy Fire Chief

The Deputy Fire Chief ("Deputy Chief") testified for the branch. At the time of these contraventions, his position was Captain, in charge of this area of downtown Vancouver

The Deputy Chief testified that he was part of the inspection team that visited the Tonic on March 1, 2003. He testified that the door security told him the count was 256. The Deputy Chief went to the mezzanine level and, looking down, did a grid count. His count was 255 patrons, total, not broken down between areas.

The Deputy Chief testified that on March 1, 2003, the fire OL was 200 persons without a dance floor and 164 persons with a dance floor. The numbers have changed since and, at the time of the hearing; he believed the new fire OL to be 192 persons.

At Ex. 1, tab 6, there is letter dated June 6, 2003, from the then Deputy Fire Chief to the licensee revoking the OL Permit for 192 persons issued on December 31, 2003, (*sic* - 2002), because of a false statement or misrepresentation. The letter also confirms that a new certificate will be issued showing a dance floor and OL of 164 occupants.

At the hearing, the Deputy Chief testified that he did not know what the false statement was. However, in June 2003, he had a meeting with the Fire Commissioner and determined that it was no longer required to remove dance floor space in calculating the OL and the load reverted to 192 patrons. He testified, that the Vancouver Charter did not have a provision relating to dance floors, but he assumed the previous practice regarding dance floor calculations was based on the liquor licence or business licence and whether dancing was permitted.

The Deputy Chief testified that under the Vancouver Fire Bylaw, the calculation for OL is 1.2 m² of floor space for each person. He understood that other municipalities have lower ratios. He acknowledged that the Fire Commissioner's standard is .95 m². He offered his opinion that applying 1.2 m² is a fair ratio but that it is not the only criteria. The department also considers 'exiting' criteria, and applies whichever is the most restrictive. He acknowledged that Vancouver's requirement for exiting is double that of other municipalities.

The Deputy Chief testified that the OL was 192 patrons. The OL based on exits would have been 173 persons, but the department granted 192. He testified that the recent OL review and determination of 192 was a result of the licensee's application dated May 12, 2003, for an increase to 253 patrons. He did not know the rationale for choosing 192 instead of 173.

(For clarification at this point, I note that Exhibit No. 1, tab 3, contains a Maximum OL certificate for 192 persons, dated December 31, 2002. Exhibit No. 7 establishes that the OL is 227 total, as of September 11, 2003. There was

general confusion as to the OL figures, as is evident from the Deputy Chief's testimony.)

The Deputy Chief testified that the fire department practices are within the Vancouver Charter requirements. Those requirements were enacted by City Council, on advice from the building and fire departments and, presumably, based on safety recommendations and concern for public safety. He testified that because people don't respond as responsibly when drinking, the Vancouver requirements provide room for a "stumble factor", giving more room for people to move around. He acknowledged that the more relaxed requirements in other municipalities are probably considered to be safe, but obviously not as safe as the requirements in the City of Vancouver. He was not aware of whether there had been studies conducted to arrive at the Bylaw requirements.

The Deputy Chief testified that the Tonic has a sprinkler fire alarm system, which in his view, for commercial buildings, is designed more to protect the building more than the occupants. He acknowledged that the City does not grant any bonus density for the OL calculation for having a sprinkler system.

Architect

The licensee called as a witness a Registered Architect (the "architect") who has been in practice since 1973 with various firms (see Ex. No. 1, Tab 19, CV). In the last three to four years, he has been retained by a number of licensees of clubs and cabarets (including the Tonic), to assist them with submissions to the municipal fire department. He testified that he has worked with the B.C. Building Code (BCBC), the Vancouver Building Bylaw and the national code. I accepted this witness as qualified to give expert opinion evidence.

Exhibit No. 2, Tab 18, is a memorandum dated August 6, 2003, that the architect provided to the licensee's counsel reviewing methods for calculating OLs under

the Vancouver Building Bylaw (VBB), Vancouver Fire and Rescue Service (Fire Department) and the BC Building Code (BCBC).

The architect explained that BC municipalities, with the exception of Vancouver, have adopted building codes that incorporate the BCBC which governs calculation of OL. The BCBC is based on the national code which is written by a national research council. The City of Vancouver has its own Charter with its own building and fire Bylaws, both of which have definitions of OL. Due to recent amendments, the VBB now resembles the BCBC. In his experience, the personnel at the City of Vancouver have considered themselves to be more knowledgeable than others in the municipal field.

In his report, he outlines the requirements of the VBB before and after November 2002 amendments, the Vancouver Fire Bylaw and Guidelines for Occupant Load Calculations, and the 1998 BCBC. He addresses some other building code issues and includes a commentary and a conclusion.

The VBB requirement for the maximum OL is the lesser of the calculation based on the assembly use (floor space per person) and the calculation of the exit capacity. Both before and after the 2002 amendments, the OL calculation is 1.2 m² floor space per person for licensed beverage establishments. The Bylaw also sets out calculations for determining the required exit capacity. The November 2002 amendments doubled the exit capacity factors for licensed beverage establishments, bringing these requirements in line with the Vancouver Fire Bylaw.

The architect testified that Fire Department personnel advised him that the reason for doubling the exit requirements was based on conditions in the Downtown Eastside hotels. Patrons in that area are frequently incapacitated from inebriation and exits are often blocked. The VBB requires new buildings to be equipped with sprinkler systems and provides some benefits for having them,

but no credit is applied in the OL calculations. To his knowledge, there have not been any disastrous fires in buildings with sprinkler systems.

The architect's calculation for the Tonic OL is based on floor space per person, and taking exit capacity into consideration, is 265 persons. This was not affected by the November 2002 amendments because there is adequate exit capacity. The OL based on exit capacity would be approximately 450 persons, under the new Bylaw.

The Vancouver Fire Bylaw, under which Occupant Load Certificates (OLC) are issued, provides a different definition of net floor area that excludes certain floor space, such as kitchens, washrooms, service rooms, etc. The same factor of 1.2 m² is applied under this Bylaw, to the lesser floor space, with the result that the OLC calculation is lower. The exit capacity consideration is the same under both Bylaws.

The 1998 BCBC contains the same provisions as the pre-November 2002 VBB.

The architect testified that there have been a number of issues arise over OL calculations in Vancouver, particularly with new establishments. He notes in his report that the City's floor space calculations have been varied and arbitrary, dance floor areas have been included in some and excluded in others, bar areas have been included in some and excluded in others, and some licensees have had a factor of .95 m² accepted. He also notes in the report, that although the City's current interpretation of the Bylaw requires staff to be included in the OLC capacity count, traditionally the staff-only floor area has been deducted.

The architect's conclusion is that this establishment has been "caught in a changing system which is currently suffering from many varied arbitrary interpretations. In the seven months since opening, the OL has varied from 135 to 250, creating uncertainty as to what number will finally be allowed."

Building code and fire protection consultant

A building code and fire protection consultant (“the consultant”) testified for the licensee. He testified that he provides consulting services to municipalities, developers and others. In the past 1 ½ years he has worked with 40 – 50 licensed premises, of which approximately half were located in Vancouver. He was also retained by Bar Watch (an affiliation of licensees, police, liquor inspectors, etc., who meet to discuss issues) to consider some OL issues for a submission to Vancouver City Council. The consultant’s firm was retained to prepare an OL calculation for the Tonic Bar for submission to the City of Vancouver Fire Prevention Office. The initial report (Exhibit No. 2, Tab 15) was submitted to the City on May 12, 2003. A subsequent report (Exhibit No. 2, Tab 16) was prepared for the purposes of this hearing.

I accepted the consultant as capable of giving expert opinion evidence in the field of fire protection and prevention.

The consultant confirmed that the City of Vancouver determines OL for licensed premises based on the lesser calculation of the floor space per person and exit capacity. He stated that Vancouver requires twice the exit requirements of other municipalities throughout Canada and BC and limits the floor space density to 1.2 m². Other municipalities in BC apply a floor space factor of .75 m², to areas used for standing or dancing and the higher factor, 1.2 m², to areas used for seating.

The consultant testified that a former fire prevention captain recognized that the City’s requirements were overly restrictive and had permitted calculations based on .95 m². Therefore, although Vancouver requires the higher factor, it will consider an application based on a lower factor. In the report at Tab 15, the

consultant calculated an OL for the Tonic at 253 persons based on applying a factor of 1.2 m² to the seating area and .95 m² to the standing areas.

The consultant explained that the branch's calculation of licensed capacity has always differed from the fire department calculation because it was based on different floor space measurements and restricted the number of *patrons* rather than *persons*. When the branch recently moved to harmonize the capacities to one figure, the community assumed that would lead to an increase in OL capacity. However, in Vancouver, the City responded by lowering the OL, reverting to the 1.2 m² factor.

The consultant testified that the recent Legislative amendments have resulted in many questions over what floor space was to be included in the calculation. The consultant and a number of licensees met with the new Deputy Fire Chief (witness in this hearing) and came to some agreements on what would be included. As examples, the areas occupied by pool tables and half of the bar areas are now included, but washrooms are not. On September 11, 2003, the City of Vancouver, Office of the Fire Chief, issued new OL certificates for the Tonic for 175 persons on the main floor, including 24 persons in the west mezzanine, and 52 persons in the east mezzanine, for a total of 227 persons. The consultant testified that in Coquitlam, for example, where the capacity would be calculated on factors for seating and non-seating areas, this establishment would qualify for an OL of 400 persons.

The consultant described the safety features of the Tonic Bar – it is constructed with non-combustible materials, has a new fire alarm system that shuts down the music when activated and has a new sprinkler system. He testified that these life/safety systems are not considered in the factors the City applies in determining OLs and that was why the previous fire captain allowed calculations at .95 m². Now, the City only applies 1.2 m², although it will consider an application for a lower factor.

Submissions

Branch's submissions

At Ex. No. 1, tab 8, page 12, which is the amended July 11, 2003, Notice of Enforcement Action, the branch set out the following reasons for the proposed penalties:

The recommended suspensions for Contravention 1 – 6 all fall within the guidelines as set out in the Liquor Control and Licensing Act/Regulations Schedule 4. The recommended suspension for contravention 7 exceeds the recommended suspension because the premise was severely overcrowded, the licensee admitted to exceeding the building occupancy load and the licensee had received several warning (*sic*) not to overcrowd.

This premise has continued to operate contrary to the person capacity on a regular basis in clear violation and disregard for the Liquor Control and Licensing Act/Regulations and public safety. Overcrowding is a serious public safety issue which puts patrons, employees, fire fighters, police and local residents at risk of serious harm. Fires, riots, fighting and other catastrophes in overcrowded spaces can result in deaths and/or serious injuries. Public safety is at serious risk when the number of persons exceeds the building occupant load, because getting out of a building safely in a fire or other threats is difficult when liquor is served, lighting is dim, music is loud and space is in short supply in response to (*sic*).

Counsel for the branch submitted that the branch provided the licensee with complete information about the capacity requirements prior to the establishment opening and continued to notify the licensee about those requirements during these incidents. Nonetheless, the licensee accumulated seven (7) infractions within the first four (4) months of operation.

Further, in the branch's guide – *Liquor-Primary Licence Terms and Conditions* – at page 12 (Exhibit No. 1, tab 31), the branch tells licensees of the importance of understanding whether their licence refers to 'patron' or 'person' capacity. The liquor inspector and the Deputy Fire Chief expressed concerns about safety because of the overcrowding at the Tonic Bar.

Counsel for the branch submitted that the evidence from the licensee's experts is irrelevant to these contraventions. Their evidence suggests that if different factors were applied, the OL for the Tonic could be higher. But, the point of this hearing is that the OL for the Tonic had been set and the licensee exceeded the capacity. The suggestion is that the Vancouver Fire Bylaw is unreasonable and, therefore, the licensee should be free to ignore it.

Counsel referred to a number of decided cases in which enforcement penalties of a similar magnitude were imposed for blatant contraventions. She submitted that a licensee has an obligation to know what the licensed and OL capacities are and to ensure that neither is exceeded. If the OL changes over time, that does not change the legal duty. The fact that the City of Vancouver decided to set higher standards of health and safety than other municipalities is not an excuse for not following them. And, if a licensee chooses to operate with the City of Vancouver, the licensee must know the limits and be prepared to face consequences for ignoring them.

Concerning the terms and conditions, counsel submitted that those would remain in effect until the liquor licence expired, November 20, 2003, regardless of the outcome of this hearing.

Licensee's Submissions

The licensee admitted being over capacity, but submitted that there was never any threat to safety and that the branch's recommended penalties are too severe. The licensee acknowledged that the branch views overcapacity beyond the OL as a particularly serious contravention because of public safety and community standards issues. However, he submitted that in this hearing there is uncontradicted expert evidence that there is ample exit capacity at the Tonic Bar.

The licensee submitted that the City of Vancouver has decided to double the exit capacity requirements of any other jurisdiction and if this establishment been located anywhere else, there would not be alleged contraventions. The licensee noted that the Deputy Fire Chief testified there was no testing before enacting the Bylaw requirements. Although he testified he thought the Vancouver requirements would be safer than other municipalities that would not mean that everything else is unsafe.

The licensee stressed that although the Tonic Bar was overcapacity there was no evidence of public safety issues and no suggestion of any problems - no late night noise, no intoxicated patrons, no difficulty in controlling the room, and no outside problems. The facts of this case do not give rise to the concerns the branch and the legislature directed attention to – there was no risk to public safety and no other difficulties associated with overcrowding.

The licensee submitted that when the branch brings a prosecution for overcrowding beyond the OL, the OL certificates are prima facie proof of what the OL is, but that does not rule out the licensee adducing evidence of what the OL *should be* (*Greater Vancouver Professional Drivers Association (“GPDA”), April 29, 2002, EH01-35/36*). For the Tonic Bar, in the first nine (9) months of operation, the City’s determination of the OL was 164, 188, 192, 200, and 227, without alteration to the premises. The licensee submitted that in light of that inconsistency, the operative number for the all of the alleged contraventions should be 227 persons.

The licensee submitted that the City does not give credit for installing additional fire suppression systems and does not factor such safety systems in the calculations of OL.

The licensee also submitted that consideration should be given to the already imposed terms and conditions, which are themselves a form of penalty. Since they were imposed, there have been no problems. Additionally, the licensee

pointed to there not having been any progressive discipline, such as a warning letter prior to enforcement action being taken. Instead, the branch is proposing maximum enforcement actions, and one penalty that exceeds the maximum even for a second contravention. Given that these are first contraventions, without any progressive discipline, consideration should be given to the general manager's discretion to impose no penalties.

The licensee stressed that the proposed penalties are harsh in the facts of these incidents. The branch automatically says there is a safety issue and recommends a significant penalty. However, this is only posed as a safety issue because it occurred with the boundaries of the City of Vancouver. In fact, these are contraventions of a City Fire Bylaw, with no evidence of harm to the Community, and the proposed penalties are unreasonable and grossly excessive. The proposed penalties do not fit the crime.

The licensee submitted that the imposition of the terms and conditions should be seen as sufficient penalty for the first two contraventions and that licence suspensions at the low end of the range are sufficient penalties for the remainder.

Findings and Decision

Licence capacity

The evidence is clear that the licensee began operation on December 18, 2002. The final inspection interview (Exhibit No. 1, tab 2) occurred on December 12, 2002. Although the first paper copy of the liquor licence is dated January 23, 2003, it is apparent the licence was issued at some point after the December 12, 2002, meeting, and before the establishment opened. In the police report from December 18, 2002, (Exhibit No. 1, tab 24), the officer noted that the licensee did not have a paper copy to produce.

From the evidence at the hearing, I find that as of opening day, the branch had granted a Liquor Primary Licence, No. 300028, which permitted a maximum capacity of 138 patrons, over 4 areas. Further, I find that this was amended on February 20, 2003, to permit a maximum capacity of 200 persons with no reference to the 4 areas.

Occupant Load

At Exhibit No. 1, tab 4, there is a copy of the floor plan which is part of the branch's record for the Tonic. On one of the stamps, there is a notation that the maximum OL was 200 persons. During the hearing, there was evidence that the OL was 192, and other evidence of the OL changing from time to time or, at least, of a confused understanding of the OL by the licensee and others. The licensee's counsel indicated there was confusion about whether it was 164, 188, 192, or 200. It is unfortunate that these records are not more straightforward. However, there was evidence that the OL under the VBB might be different than the OL under the Fire Bylaw, and it is the latter that forms the basis for the OL certificate.

In any event, based on the evidence, and giving the benefit of the doubt to the licensee, I find that the Fire Bylaw OL, at all relevant times, was 200 persons. On September 11, 2003, the City of Vancouver, Office of the Fire Chief, issued new Maximum Occupant Load certificates for 175 persons on the main floor, including 24 persons in the west mezzanine, and 52 persons in the east mezzanine, for a total of 227 persons (Exhibit No. 7).

The contraventions

The applicable legislative provisions are contained in Appendix A.

The branch has alleged three (3) instances of overcrowding beyond 'patron' capacity and three (3) of overcrowding beyond 'person' capacity. Of the former, one (1) allegation is 'less than or equal to occupant load.' All of the remaining five (5) allegations are 'greater than occupant load.'

Section 1 of the *Regulation* contains definitions for 'patron', 'person' and 'occupant load' (see App. A).

For the first three (3) allegations, the branch has cited s. 12 of the *Act* (breach of terms and conditions) and s. 71(2)(b) of the *Regulations*, which is a transitional section to give prospective effect to terms and conditions of a licence which existed prior to the enactment of the new Legislation on December 2, 2002, until rescinded or amended by the general manager. For the latter 3 allegations, the branch has cited s. 6(4) of the *Regulations*.

Integrating the new Legislation with the former Legislation and practice has been a difficult exercise, particularly as it relates to capacity issues. It seems clear that an intention with the new Legislation is to meld the licence capacity and the OL capacity, at some time. Section 6(4) of the *Regulations* speaks to the general manager setting 'person' capacity, whereas in the past, the general manager always set terms and conditions for 'patron' capacity. Section 71(2)(b) is designed to act as the transitional piece while the old licences refer to 'patron' capacity.

In this case, it is apparent that the branch personnel treated the first three (3) contraventions as though a licence had been issued under the old Legislation, covering 'patron' capacity. In fact, that is not the case. This licence was issued for the first time under the new Legislation, and section 71 of the *Regulations* does not apply.

The licence was issued under the new Legislation, but set 'patron' capacity, according to four (4) red lined areas. From my reading of s. 12, the general manager may impose any terms and conditions in the public interest, which could include setting patron capacity. However, under section 6(4) of the *Regulations*, the general manager is required to set a person capacity before issuing a licence. It is apparent that was not done in this case, until February 20, 2003. Even though the licensee admitted these contraventions, I find that the Legislative basis is lacking and, in my view, it would be inappropriate for the general manager to continue to allege contraventions prior to February 20, 2003. Accordingly, I withdraw the first three (3) alleged contraventions, for December 18, 2002, January 25, 2003, and February 9, 2003.

Once the licence was amended, February 20, 2003, the Legislative provision is section 6(4) – “there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).” The Penalty *Regulation* schedule, items 14 and 15, distinguish between “more persons in the licensed establishment than the patron or person capacity set by the general manager **and** ‘the number of persons ... is less than or equal to the occupant load’ (#14), or ‘the number of persons ... is more than the occupant load’(#15).”

Based on my findings for the licensed capacity and the OL, both were 200 as of February 20, 2003. The branch's allegations are that, on each occasion, the overcrowding was greater than the OL. Contravention No. 7 is worded slightly differently than the previous ones and, although not raised in argument, I have

considered that and find that the wording does not affect the substance of the allegation, nor would the wording lead to confusion or prejudice over what was alleged.

Based on the licensee's admissions and the evidence in the hearing, I find that the licensee contravened as alleged by exceeding the licensed capacity and OL capacity of maximum 200 persons. Specifically, I find that the branch has established contraventions on the following dates and that the number of patrons in the premises on each dates is as follows:

on March 1, 2003, 255 patrons (Deputy Fire Chief),
on March 8, 2003, 251 patrons as the lowest count (Liquor Inspector), and
on April 26, 2003, between 287 – 304 persons (Ex. No. 1, tab 8, page 11).

For each of these the branch has recommended licence suspension penalties of, respectively, seven (7) days, seven (7) days and fifteen (15) days.

The Issues

The licensee admits the overcrowding but argues that the proposed penalties are too severe. The licensee's case rests on evidence directed to whether the overcrowding created any threats to safety. Thus, the licensee directly raises the issue of whether the branch needs evidence of endangerment to impose penalties, or how the imposition of penalties is to be weighted based on the relative threat to public safety or community standards.

In effect, the licensee says that because the City of Vancouver has such stringent OL requirements, unless the premises are vastly over capacity there is no safety issue; if the premises were located in another municipality the OL would be much higher; there was no threat to safety on any of these occasions;

and these are first contraventions, without the benefit of progressive discipline and, therefore, no penalty or the minimum penalties should be imposed.

The statement contained above in the quotation from the NOEA is a fair statement of the branch's policy on safety issues, generally. It also indicates the branch's continuing attempts to bring this licensee into compliance and notes that on April 26, 2003, the premises was severely overcrowded. Concerning the safety issues, the licensee responded by bringing evidence to demonstrate that safety was not threatened, by showing that under other municipal, provincial and federal building code standards the OL could have been much higher.

It is trite to say, but I find that it is not the branch's function to second guess the OL capacities set by various municipalities. That is municipal responsibility. A licensee has choices it can make within the parameters of the municipal Bylaws. The Provincial Legislation has defined contraventions and the range of penalty for each contravention. Clearly, municipalities impose requirements based on their standards for safety, etc. Although the licensee contends that the facts of this case do not give rise to any safety concerns, I find that the fact of overcrowding does give rise to safety concerns. Safety is one of the primary purposes of imposing capacity requirements. The branch's stated policy is directed to those overall, primary concerns and I find it is a legitimate statement.

The Deputy Fire Chief acknowledged that the Vancouver OL requirements are more stringent than other municipalities but that just means that other municipalities, while probably safe, are not as safe as Vancouver. He also acknowledged that the Tonic has safety systems and that the City does not allow additional OL capacity because of those systems.

The licensee referred to *Greater Vancouver Professional Drivers Association* ("GPDA") case for the proposition that although OL certificates are prima facie proof of what the OL is, that does not rule out adducing evidence of what the OL

should be. I find that case is distinguishable, because there the licensee challenged the OL certificate and the municipality would not certify the document. So, the document and the number were in dispute. In this Tonic Bar case, there is confusion over the OL from time to time, but there was agreement that the maximum, prior to September 2003, was 200 persons and I have given the licensee the benefit of the doubt on that.

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 follow the minimums set out in Schedule 4 of the *Regulations*.

The branch's duty is to apply the penalty schedule in a fair and reasonable manner to achieve the objectives of ensuring compliance with the Legislation in order to safeguard public safety and community standards. The branch's decision on what level of penalty to recommend will depend on the branch's perception of the gravity of the situation – meaning both the specifics of the contraventions and licensee's demonstrated attempts at compliance. That is, the branch will have to determine, without benefit of the hearing process, what appears most likely to achieve voluntary compliance. If the licensee disagrees

with either the alleged contravention or the proposed penalty, the branch provides a hearing.

The branch's primary goal in determining the appropriate penalty from the range in the Schedule is achieving voluntary compliance. The branch considers whether there is a past history of warnings by the branch and/or the Police, the seriousness of the contravention, the threat to public safety and the well being of the community.

The licensee admitted contraventions for December 18, 2002 – opening night, January 25, 2003, and February 9, 2003, but the branch will not be proceeding with them. They are not proved contraventions. However, the fact of the incidents indicates that the branch had been communicating with the licensee in an attempt to achieve voluntary compliance. After the sixth (6) contravention notice for overcrowding, the branch took more immediate steps to bring the licensee into compliance by imposing terms and conditions that required the licensee to file documents with the branch on a regular basis, reporting on the capacity. The licensee argues that the terms and conditions are a penalty and should have the effect of reducing the penalties for the earlier contraventions.

I do not accept the licensee's contention, to the limited extent that it was argued, that the expert evidence demonstrates that there are no safety issues and, therefore, the branch should not impose penalties. The branch will not look behind the municipal OLS to determine whether they are overly strict. In my view, comparing one municipality with another is not of assistance. There are many factors for a municipality to consider including density within the municipal borders, so it is not helpful to compare them as the licensee suggests. As noted at the hearing, the licensee made a decision to open a licensed establishment within the City of Vancouver borders and must comply with the City requirements. The *Liquor Control and Licensing Act* recognizes municipal safety

requirements and provides a penalty schedule for contraventions of the OL capacities.

I find that the branch's imposition of the terms and conditions, under s. 20(2) of the *Act*, acted to bring this licensee into compliance. That occurred well after the fact of most of the admitted contraventions. Until those terms and conditions were imposed, the evidence shows that the licensee was continuing to overcrowd without regard for the terms of the liquor licence or the OL. I find that the imposition of the terms and conditions was a forward looking attempt to achieve compliance, rather than a penalty for the past contraventions.

The licensee was blatant in its continuing contravention despite the contravention notices and meetings with the branch personnel. This has to be recognized in a penalty in order for the branch to fulfill its duty of ensuring that licensees comply with the statutory requirements. The branch has to ensure that the industry appreciates that penalties will be meted and will be weighted according to the circumstances. I believe it is fair to suggest that blatant, continuing contraventions will attract greater penalties. It is equally fair to say that the greater the overcrowding, the greater the corresponding penalty.

The Tonic Bar licensee is benefiting from a branch error for the first three (3) contraventions. The remaining three (3) contraventions are first contraventions. I find that the evidence supports imposition of penalties within the range for first contraventions. Given that three (3) Contravention Notices had already been written up by the time of the first occurrence, March 1, 2003, I find that imposing the minimum is not warranted. However, I also find that the levels of overcrowding do not require imposing the maximum in each instance. I find that the last contravention warrants imposing the maximum for both continuing contravention and level of overcrowding.

For the March 1, 2003, contravention, I find that the appropriate penalty is a five (5) day licence suspension; for the March 8, 2003, contravention, I find that the appropriate penalty is a six (6) day licence suspension; and, for the April 26, 2003, contravention, I find the appropriate penalty is a seven (7) day licence suspension. The total penalty is eighteen (18) days of licence suspension, which by operation of sections 66 and 67 of the *Regulations*, are cumulative and must served on “succeeding business days.” The first contravention occurred on a Saturday. Accordingly, I order the suspension to commence on a Saturday, as specified below.

The general manager ordered the licensee to comply with terms and conditions, set out above and the licensee has been continuing to submit documentation to the branch. The branch recommended that those terms and conditions be continued by way of this decision. I am of the view that the licensee should be released from those terms and conditions and, accordingly, I order that the terms and conditions be withdrawn. As of the date of this decision, the licensee is no longer obligated by the terms and conditions.

ORDER

The terms and conditions imposed by the branch on May 23, 2003, are hereby withdrawn.

In the event that the licensee has not signed the waiver or paid the monetary penalty of one thousand dollars (\$1000), I hereby order that the licensee pay the monetary penalty of one thousand dollars (\$1,000) on or before Friday, April 16, 2004.

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Licence No. 300028 for a period of eighteen (18) days to commence as of the close of business on Friday, April 16, 2004, 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 (s. 54(1) of the *Regulations*).

Since I do not know whether the Tonic Bar would normally be open 7 days per week as of April 16, 2004, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the Primary Liquor Licence No. 300028 for the Tonic Bar be held by the branch or the Vancouver Police Department from the close of business on Friday, April 16, 2004, until the licensee has demonstrated to the branch's satisfaction that the Tonic Bar has been closed for eighteen (18) business days.



M. G. Taylor
Enforcement Hearing Adjudicator

DATE: March 2, 2004

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Wendy Jones, A/Regional Manager

Legal Services Branch, Victoria Office
Attention: Laurie Soloway, Counsel

Liquor Control and Licensing Branch, Victoria Office
Attention: Shahid Noorani, Advocate

APPENDIX A

LIQUOR CONTROL AND LICENSING ACT [RSBC 1996] CHAPTER 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 or category 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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**LIQUOR CONTROL AND LICENSING REGULATION,
B.C. Reg. 244/2002**

Definitions

1 (1) In this regulation:

"occupant load" means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

"patron capacity", in relation to an establishment, means the maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12 (3) (b) of the Act as the area where liquor may be sold or served;

"person capacity", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment;

Capacity

6 (1) Before the general manager

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

Licence categories, terms and conditions and endorsements

71 (1) A category of licence referred to in Column A of the following table and held by a licensee immediately before December 2, 2002

(a) is converted on December 2, 2002 to the category of licence set out opposite that licence in Column B, and

(b) subject to subsection (2), is on December 2, 2002 subject to the terms and conditions of the category of licence set out opposite in Column B:

Column A

A licence, other than for a club
 C, D, E, F or I licence
 A licence for a club
 B licence
 B licence with a designated food optional area
 Winery licence
 Winery licence with an endorsement for a consumption area
 Winery licence with a picnicking endorsement
 G or H licence
 Agent's licence
 Distiller's licence
 Brewer's licence
 U-Brew licence
 U-Vin licence
 Private special occasion licence
 Family private special occasion licence
 Public special occasion licence

Column B

Liquor primary licence
 Liquor primary licence
 Liquor primary club licence
 Food primary licence
 Food primary licence with a lounge endorsement
 Winery licence
 Winery licence with a winery lounge endorsement
 Winery licence with a picnicking endorsement
 Licensee retail store licence
 Agent's licence
 Distiller's licence
 Brewer's licence
 U-Brew licence
 U-Vin licence
 Private special occasion licence
 Private special occasion licence
 Public special occasion licence

(2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:

(a) the terms and conditions imposed on the licence by the general manager under section 12 and 12.1 of the Act in effect immediately before December 2, 2002;

(b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002;

(c) endorsements on the licence in effect immediately before December 2, 2002, except an endorsement on a winery licence for a consumption area.