



**DECISION OF THE**  
**GENERAL MANAGER**  
**LIQUOR CONTROL AND LICENCING BRANCH**  
**IN THE MATTER OF**  
**A hearing pursuant to Section 20 of**  
**The Liquor Control and Licensing Act RSBC c. 267**

**Licensee:** The Roxy Cabaret Ltd.  
dba Roxy Cabaret  
932 Granville Street  
Vancouver BC

**Case:** EH03-163

**Appearances:**

For the Licensee Dennis Coates, Q.C.

For the Branch Shahid Noorani

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing May 4<sup>th</sup> & 20<sup>th</sup>, 2004

Place of Hearing Vancouver, B.C.

Date of Decision June 22, 2004

## **INTRODUCTION**

At the time of the alleged contravention, the licensee, The Roxy Cabaret Ltd. operated the Roxy Cabaret under "C" Cabaret Liquor Licence number 16089, located at 932 Granville Street in the City of Vancouver. The cabaret is located in what is known as the entertainment district of the downtown area of the City. It is an area in which liquor licensed establishments have been encouraged to locate. The licence permits the sale and consumption of all types of liquor. The licensed hours for the sale of liquor are 7:00 P.M. – 2:00 A.M. on Monday through Saturday and 7:00 P.M. – Midnight on Sunday. The licence permits a maximum capacity of 275 patrons in the licensed area. The maximum occupant load as set by the City of Vancouver, Office of the Fire Chief, is 300 persons

## **ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION**

The Liquor Control and Licensing Branch in a Notice of Enforcement Action (NOEA) dated December 10, 2003, has alleged that on September 13, 2003, the establishment was overcrowded beyond the patron capacity, more than the occupant load, contrary to Section 12(2) of the *Liquor Control and Licensing Act* (the Act) and Section 71(2)(b) of the *Regulations to the Act* for which a five (5) suspension commencing on a Saturday is recommended.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention. For this contravention the penalty range is a four (4) to seven (7) day licence suspension and a five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty for a first contravention.

### **Section 12(2) of the Act states as follows:**

#### **Licences**

**12.(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).

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**Section 71 of the Regulations to the Act states as follows:**

**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.

**ISSUES**

- (1) Whether the branch breached the principles of procedural fairness?
- (2) Whether the contravention, overcrowding of the patio, contrary to section 12(2) of the Act and section 71(2)(b) of the Regulations, as alleged, is valid in law?
- (3) Whether the definition of “occupant load “ in the Regulations is flawed?
- (4) Whether the occupant load certificate is valid?
- (5) Whether the licensee contravened section 12(2) of the Act and 71(2)(b) of the Regulations?
  - (a) Standard of Proof
  - (b) Has the standard been met
  - (c) Directing Mind; Due Diligence; Permit
- (6) Whether a penalty is appropriate?
  - (a) Contemporaneous submissions
  - (b) Penalty

**EXHIBITS**

The following exhibits were presented:

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| <b>Exhibit 1</b> | Book of Documents   |
| <b>Exhibit 2</b> | Occupant Load Drawings for the Roxy Cabaret, “Based on VBBL [Vancouver Building By-law]1999 & VFBL [Vancouver Fire By-law] 2000 (Current Calculations)” |
| <b>Exhibit 3</b> | Occupant Load Drawings for the Roxy Cabaret, “Based on BCBC 1998 & BCFC 1998 (Outside Vancouver)”   |
| <b>Exhibit 4</b> | The Roxy Cabaret Ltd. Door Report, Saturday, September 13/03.   |
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**EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH**

A **Captain of the City of Vancouver Fire Department (the Captain)** testified that for the past two years he has been responsible for reviewing building plans and calculating maximum occupancy loads within the City of Vancouver. He referred to the Maximum Occupancy Load certificate at exhibit 1, tab 9, which sets the maximum occupancy load for the Roxy Cabaret at 300 persons. The certificate was issued on June 18, 1997, prior to his time in the position. The licensee has not made an application for an increase to its occupant load.

The Captain referred to an internal City of Vancouver report at exhibit 1, tab 10, dated June 10, 1997. The report reads:

“Net floor area = 355 m<sup>2</sup> @ 1.2 m<sup>2</sup>/person = 296 persons

Exit width = 6.86 m @ 18.4 mm/person = 372 persons

Floor area governs. Issued maximum occupant load certificate for 300”

He advised that he is unaware why the occupant load certificate was issued for 300 and not 296 persons. He suggested that the 296 may have been “rounded-up” to 300.

The Captain testified that the maximum occupant load certificate applies only to the area depicted in exhibit 1, tab 8. It does not apply to a basement area of the cabaret. The basement would have its own occupancy load certificate

The Captain testified that if he were required to calculate the occupant load now he would examine the floor plans at exhibit 1, tab 8, to determine the assembly space, i.e. the area in which the public gathers. To determine the net floor area he would measure the floor area and deduct the washrooms, the space behind the bars, the stage and the support columns. The formula of 1.2 sq m/p which is consistently used for licensed establishments and restaurants would be applied to the net floor area to determine the number of persons permitted in the area. To this is added the number of employees working on the premises to arrive at the maximum number of persons permitted in the

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whole of the area, i.e. the public area and the area accessed only by employees, behind the bars. The exiting capacity of the premises is also calculated.

The maximum occupant load is the lesser of either the number of persons permitted by the square footage calculations or the exiting capacity. The City of Vancouver requires double the exiting capacity for liquor licensed establishments. This takes into account that persons who have consumed liquor may have impaired judgement and be slow to react to emergency situations.

The Captain testified that in his opinion identical licensed establishments located in the City of Vancouver and the neighbouring municipality of Burnaby would not have different occupant loads as both would use the capacities obtained through net floor area calculations which would be less than the exiting capacities for either jurisdiction.

The **Liquor Inspector (Inspector A)** responsible for the area in which the Roxy Cabaret is located testified that she has been employed as a liquor inspector since September 2001 during which time she has conducted hundreds of inspections of licensed establishments and counted the number of persons therein. She is familiar with the Roxy Cabaret having visited it on thirty-some occasions and is aware that it has a liquor licence capacity of 275 patrons (exhibit 1, tab 6) and a maximum occupant load of 300 (exhibit 1, tab 9). She testified, that during the evening/early morning hours of September 13/14, 2003, she was part of a multi-agency inspection team consisting of a City of Vancouver fire inspector, City licensing officials, liquor inspectors and police officers. The teams attended at the Roxy Cabaret as a result of concerns of the City licensing official regarding line-up and overcrowding issues. They arrived at approximately 11:55 P.M. There was a large line-up of approximately 80 persons outside the establishment. There were two or more doormen outside. The doormen were using mechanical counters to keep track of the number of patrons inside. She requested to see their counters and was told that there were 301 patrons counted "in". The number of patrons "out" were not recorded on the mechanical counters.

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The inspection team entered the cabaret and she and several other members of the team conducted counts of the number of persons inside. She and another liquor inspector went together through the cabaret, starting at the rear and working towards the front, each making independent counts. She counted 367 persons in the cabaret. The other liquor inspector advised her that he had counted 386 persons. She was advised that separate counts were also conducted by the City of Vancouver licensing official, 395 persons and the fire inspector, 358 persons. She stated that she sometimes will get onto a raised stage area if possible as it is easier to count the persons from a raised area. She did not climb onto a raised area on this occasion. She described the cabaret as being very congested with the exception of the right rear area. It was difficult to move around and there was no flow of persons within the cabaret giving rise to a concern for the persons inside should there be a need to evacuate the premises in an emergency. The count took approximately ten (10) minutes to complete following which she met with the manager and issued him a Contravention Notice (CN), subsequently amended (exhibit 1, tab 3). She later completed an Enforcement Action Recommended report in which she recommended a liquor licence suspension of five (5) days. In her opinion, a monetary penalty or the minimum suspension of four (4) days were not sufficient given the record of this licensee.

The Liquor Inspector testified that she is responsible for maintaining the Branch records for this licensed establishment. The liquor licence has been issued to the same principals of the corporate licensee since 1989 (exhibit 1, tab13). [As an aside, I pause to note that this was contested by counsel for the licensee, who stated that there had been a change in principals amongst the members of the family who own the establishment and that Branch files were not accurate in that regard. He did not present evidence on the point and the exhibit remains as part of the record.]

The liquor inspector testified that she is aware of previous problems of overcrowding and other issues occurring at the establishment and referred to copies of documents from Branch files:

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- April 12, 2003 - CN issued for alleged overcrowding [subsequently withdrawn] and employee consuming liquor [no contravention found] (exhibit 1, tab 14)
  - March 13, 2003 – CN issued for alleged employee consuming liquor (exhibit 1, tab 15)
  - January 9, 2003 – CN issued for alleged failure to comply with Responsible Beverage Service requirements; failure to request identification; and failure to present official floor plans (exhibit 1, tab 17)
  - January 22, 2003 – Compliance meeting held between liquor inspector and cabaret management resulting from CN of January 9, 2003, and for the purpose of discussing door procedures of cabaret staff
  - August 7, 2002 – Waiver signed by cabaret management acknowledging overcrowding contravention occurring on February 23, 2002 and accepting a monetary penalty of \$3000 (exhibit 1, tabs 18, 19, 20 and tab 1 pg 9)
  - June 16, 2002 – CN issued for alleged overcrowding (exhibit 1, tab 21)
  - August 7, 2001 – CN issued for alleged overcrowding (exhibit 1, tab 22)
  - January 18, 1997 – Licensed Premises Check report issued for alleged overcrowding, warning letter directed to cabaret on January 29, 1997, (exhibit 1, tab 23)
  - January 15, 1994 – Licensed Premises Check report issued for alleged overcrowding, warning letter directed to cabaret on March 8, 1994, (exhibit 1, tab 24)
  - August 5, 1993 – Notice of Suspension of liquor licence for three days resulting from overcrowding (exhibit 1, tab 25)
  - April 28, 1993 – Licensed Premises Check report issued for alleged overcrowding, warning letter directed to cabaret on May 20, 1993, (exhibit 1, tab 26)
  - February 10, 1993 – Decision letter following hearing suspending liquor licence three days for overcrowding) exhibit 1, tab 27)
  - December 31, 1992 - Notice of Suspension of liquor licence for three days resulting from overcrowding (exhibit 1, tab 28)
  - November 11, 1992 – Licensed Premises Check Report issued for alleged overcrowding (exhibit 1, tab 29)
  - January 31, 1992 - Decision letter following hearing suspending liquor licence two days for overcrowding) exhibit 1, tab 30)
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The liquor inspector referred to a Branch publication (exhibit 1, tab7) "Liquor-Primary Licence, Terms and Conditions, A Guide for Liquor Licensees in British Columbia, updated March 2003" (The Guide) which was in effect on September 13/14, 2003, and which had been provided to all licensees. The Guide "imposes further terms and conditions, in addition to those found in the Liquor Control and Licensing Act and Regulations. It provides a definition for "patron" capacity, discusses the "role of the licensee" and "overcrowding".

The inspector responding to the question of what areas are included within the definition of "establishment" in the Act testified that it includes the washrooms, areas accessible to the public and non-public areas including basement areas which are inspected during illicit liquor inspections. Normal inspections such as that carried out at the Roxy on September 13/14, 2003, are confined to the public areas.

**Liquor Inspector B** testified that he has been employed as a liquor inspector for almost five years and during that time has carried out hundreds of inspections of licensed establishments and counted the number of persons inside on hundreds of occasions. On September 13, 2003, he was working with another liquor inspector as part of a multi-agency team carrying out inspections of licensed establishments in the City of Vancouver. The team arrived at the Roxy Cabaret at approximately 11:55 P.M. He noted a line-up outside of approximately 80 persons with two or three doormen present. Upon entering the cabaret it appeared to be extremely busy. Counts were made of the number of persons inside the Cabaret independently by himself, the other liquor inspector and the city and fire inspectors. They compared their counts. He counted 386 persons, the other liquor inspector 367 persons, the City inspector 395 persons and the fire inspector 358 persons. In his opinion the Cabaret was crowded to the extent that there would have been mayhem leading to injuries if the premises had to be evacuated in an emergency. He believed that overcrowding presented safety issues and led to large numbers of persons congregating on the street upon exiting. He agreed that the larger the crowd the more difficult it was to conduct a count. He will

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sometimes try to get on a stage or stairs. If that is not possible he will 'cluster count' the number of persons as he moves through the establishment.

## **EVIDENCE - THE LICENSEE**

**Witness A**, an Applied Science Technologist with many years experience in dealing with building and fire codes testified as an expert witness on behalf of the licensee. He referred to exhibit 3, Occupant Load Drawings for the Roxy Cabaret, "Based on BCBC 1998 & BCFC 1998 (Outside Vancouver)". He testified that other municipalities use differing formulas to calculate occupant loads for different use areas. For example a formula of 1.2 sq m/p is used for fixed seating areas, .9 sq m/p for non-fixed seating areas and .75 sq m/p for standing areas. Exhibit 3 applies these differing formulas to the Roxy Cabaret arriving at a total occupant load, including staff, of 418 persons. Exit capacity outside Vancouver would allow for 1139 persons. Thus the fire and safety thresholds for the Roxy Cabaret would be 418 persons if it were located outside of the City of Vancouver.

The witness referred to exhibit 2, Occupant Load Drawings for the Roxy Cabaret, "Based on VBBL 1999 & VFBL 2000 (Current Calculations)" He testified that the occupant load set by the City of Vancouver using the formula of 1.2 sq m/p for both standing and seating areas and using their current procedures of subtracting non-public areas when calculating net floor space but including the dance floor area, would be 292 persons. Exit capacity using the double exiting requirements for the City of Vancouver is 569 persons.

He testified that in his opinion the fire and safety threshold of the Roxy Cabaret is that arrived at by using the standards set outside the City of Vancouver, 418 persons. He stated that the City of Vancouver used a .95 sq m/p for a period of time to take into consideration other safety features, however, this was discontinued following the retirement of a City official responsible for setting occupant loads.

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**Witness B**, testified that he has been employed at the Roxy Cabaret for ten years, nine of which have been spent overseeing the operation of the cabaret at the front door. He is currently the assistant manager and spends the majority of his time at the door assisted by two doormen. They maintain two line-ups of persons waiting to enter the Cabaret, one for regular patrons and one for VIPs. A cover charge of \$5 - \$10 (dependent upon the night) is collected from regular patrons. The Cabaret does not have a designated smoking room inside, patrons wishing to smoke are allowed to exit the Cabaret and are directed to a nearby public street area. They are allowed to re-enter upon their return as are patrons who leave for a short period of time for such things as getting a pizza or paying for parking. The two doormen and himself each maintain a mechanical counter recording the number of persons "in" the Cabaret. There are no separate counters maintained of those persons "out" i.e. leaving the Cabaret. If there is a discrepancy in the number of persons recorded "in" the lowest number is chosen. One of the doormen is assigned to count the number of persons inside the Cabaret approximately every 15 minutes using the established routine procedure. [see below] A second count is conducted if there is a discrepancy with the previous count. These counts are recorded in the "Door Report". Exhibit 4 provides the counts for September 13/14, 2003. [Counts of 271 and 284 are recorded for 11:30 P.M. and 12:00 Midnight respectively.]

He testified that the Cabaret is a difficult room to count. In the past police officers have conducted a second count at the request of the cabaret and ended up with 100 persons less than the original count. As a result the cabaret has established a routine procedure; wait for a song to start which stabilizes the number of persons on the dance floor, start the count at the back where the room is less crowded and work towards the front. In the middle of the room step into the DJ booth as it is elevated, move over to the dance floor and step up onto the stage which is elevated, finish the count by counting those persons up to the front door.

The witness testified that in his opinion it is impossible to get an accurate count of persons on the dance floor without getting onto an elevated area. A count can be

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completed within a couple of minutes if there are no interruptions. He testified that he is aware that the liquor licensed capacity is 275 and the occupant load 300. His instructions are to keep within the 275-300 range as the room is capable of holding more than 275. He agreed that there may sometimes be a blip where the capacity goes beyond 300 for a short period of time owing to such things as a large number of persons leaving and entering at one time or the arrival of VIPs.

The witness testified that he was present when the inspection team entered the cabaret at approximately 11:55 P.M. September 13<sup>th</sup> and recalls them arriving. The capacity as shown on the "in" counter was 301 although there may have been persons leaving as he spoke with the liquor inspector. He spoke with the manager of the cabaret following the inspection and although he didn't agree he reduced the number of persons in the cabaret as requested.

He testified that he attended the compliance meeting of January 22, 2003. The procedures followed by the cabaret remain the same now as then. Following the overcrowding incident in February 2002 for which a monetary penalty was paid by the Cabaret he was told to be more careful with the numbers. The incident did not lead to a review of policy and procedures. The Cabaret does not have a policy and procedures manual for door staff. It is his responsibility to ensure that door staff know their job. They are given verbal instructions and do as they are told.

**Witness C** testified that he is the founding Chair and current Vice President of Barwatch, an organization consisting of owners of licensed premises and officials of regulatory and enforcement agencies formed to protect the safety of patrons in downtown Vancouver licensed establishments. He managed the Roxy Cabaret from 1986 to 2000, operating at a capacity between 275 (the liquor licence maximum) and 300 (the maximum occupant load) persons. Separate line-ups were maintained for regular and VIP patrons. Smokers were allowed to exit and re-enter without having to line-up again as they had already paid their cover-charge. Their numbers ranged between a handful and 30 to 40 persons at a time. The doormen could see the number

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of smokers on the street and they would be added to the number of persons counted inside.

The witness testified that to keep track of the number of persons inside the cabaret counts were made every 15 minutes and recorded every half hour. He personally checked the numbers at least once an hour taking approximately five minutes to perform a count. To take an accurate count he would wait for a new song to commence which would stabilize the number of persons on the dance floor, he would then begin counting from the rear of the cabaret, proceeding to the front. He would climb up onto the raised stage area to count the number of persons on the dance floor. He testified that his count could be at a variance of up to 100 persons with the numbers counted by police officers and liquor inspectors.

At the request of the owner he returned to manage the Cabaret for the period of January 15<sup>th</sup> – April 2<sup>nd</sup> of this year. The previous manager had been let go as he was failing to pass on concerns raised by the liquor inspector. The witness testified that during this recent period he operated the cabaret within the liquor licence maximum capacity of 275 patrons owing to his current position with Barwatch. He was not associated with the Cabaret on the date of the alleged contravention, September 13, 2003.

## **SUBMISSIONS**

[The applicable legislative provisions are contained in the Appendix.]

### **The Licensee**

Counsel made three **preliminary submissions** at the outset of the hearing:

- Burden of proof

Counsel submitted that the decision of the Supreme Court of British Columbia in *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch (2004 BCSC 248)* February 23, 2004, was binding. In that decision the court held that for a finding of

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a contravention there must be proof by the Branch of the *actus reus* beyond a reasonable doubt and proof by the licensee of due diligence on the balance of probabilities.

- Definition of Occupant Load

Counsel submitted that the decision of the General Manager in *Atlantis Club*, November 24, 2003, EH03-086 & 096 on this issue was wrong and is subject of a petition for Judicial Review. In *Atlantis Club* counsel had submitted that the alleged contravention is based on a flawed definition of “occupant load” in section 1 of the *Regulations* and as such there is no authority for the penalty provision found in Schedule 4 (15) of the *Regulations* upon which the recommended penalty is based. Counsel had argued that a literal interpretation of the wording in the definition of “occupant load” would create an absurd result. The “least” number of persons would mean the smallest number possible, which, if literally applied would be either one or zero thus creating an absurd result. Consequently, the definition of “occupant load” is flawed and as such there is no authority to impose a penalty.

- Independence of the Adjudicator

Counsel submitted that adjudicators are generally not independent enough to produce independent decisions. He tabled three questions:

- 1) Are decisions of an adjudicator reviewed by the Branch before issued?
- 2) Are adjudicators given training or instructions regarding hearings?
- 3) Are adjudicators directed on how to handle certain offences or treat certain evidence?

Counsel made several **further submissions** following the presentation of evidence for the Branch and the licensee.

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- The contravention, as alleged, does not exist

Counsel referred to the aforementioned *Plaza* decision of the BCSC:

[39] While some deference should be afforded the General Manager's determination that a licensee has or has not complied with the statutes, bylaws or regulations enumerated in s. 4(7), the General Manager is not empowered to interpret s. 4(7) in a manner that amends the section to add to the list a statute, bylaw or regulation to which no reference is made. By doing so, the General Manager is not interpreting the governing legislation but amending it. That is not her prerogative. The General Manager's conclusion that s. 4(7) requires compliance with the BOL is not correct.

[45] Schedule 4 makes it clear that the contravention in respect of which the General Manager must proceed in relation to capacity arises in respect of licensed capacity. To the extent the excess carries the licensee beyond the BOL, a greater penalty is specified. Be that as it may, the *Act* and *Regulation* make it clear that exceeding licensed capacity is the offence under the *Act* and *Regulation*. The offence is not exceeding building occupancy load.

[46] In my opinion, it is not open to the General Manager to rely on s. 4(7) in an attempt to create a regulatory offence that the legislature and governor-in-council have not created by statute or regulation. The General Manager must restrict her enforcement action to contraventions specified by the *Act* or the *Regulation*.

[47] As the Court of Appeal stated in *Whistler Mountain Ski Resort v. General Manager, Liquor Control and Licensing Branch*, [2002] B.C.J. No. 1604, 2002 BCCA 426, the nature of the sanctions to be imposed in the regulatory context is potentially severe. In my opinion, it is incumbent upon the General Manager to ensure that administrative action is identified and determined to be appropriate in relation to offences specified by the *Act* and the *Regulation*. That was not done in this case. The determination that The Plaza had committed an offence by permitting patrons in excess of the BOL when such an offence did not exist was not only unreasonable, but patently unreasonable. The determinations of contravention and licence suspension with respect to exceeding BOL on January 12, 2002, must be quashed.

Counsel submitted that following the changes made to the Regulations on December 2, 2002, sections 12(2) of the Act and 71(2) of the Regulations do not give rise to a contravention as contended by the Branch in the NOEA. The Regulations at section 6(4) provide a term and condition regarding the "person" capacity, but not for "patron" capacity as is alleged here where the contravention is for exceeding the "patron" capacity.

Further, the definition of "patron capacity" in the Regulations refers to the maximum number of patrons allowed in the licensed red-lined area of the "establishment". The definition of "establishment" in the Act refers to the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area. Thus, there is no contravention as alleged.

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Additionally, Schedule 4 (15) of the Regulations which outlines the penalties for contraventions refers to "occupant load" which by definition refers to the number of persons allowed in an "establishment" which is defined as the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area. Thus, there are no penalty provisions which apply.

Counsel submitted that this is similar to the facts in the *Plaza* where the alleged contravention did not exist. He submitted, that as in the *Plaza* it is not open to the general manager to try to fix the shortcomings in the Act and Regulations through interpretations amounting to amendments. What is needed is changes to the Regulations to correct the problems.

- Maximum Occupant Load Certificate invalid

Counsel submitted that the maximum occupant load certificate (exhibit 1, tab 9) is fatally flawed as it does not have a floor plan attached to identify the area it covers.

- Licensee exercised due diligence

Counsel referred to the aforementioned *Plaza* decision of the BCSC:

[20] The remaining questions in relation to this contravention are whether the employee permitted the unlawful conduct and, if so, whether that conduct can be imputed or attributed to the licensee itself or, if not, whether the licensee has made out a due diligence defence on a balance of probabilities.

[23] That said, in finding against the licensee the General Manager focused principally on the employee's conduct and attributed the same to the licensee without stating the basis for doing so.

[24] Section 36(2)(b) makes it an offence for a "person holding a licence or the person's employee" to permit unlawful conduct in the establishment. I do not construe the section to mean that the licensee is the guarantor of its employee's conduct. The word "or" is disjunctive. An employee may permit unlawful conduct. For that, he or she may be prosecuted under s. 48 of the *Act*. Section 20 of the *Act* does not contemplate regulatory enforcement against the employee.

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is

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provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities. In this regard, the reasons of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, are relevant at p. 1331:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Natras*, [1979] A.C. 153.

[26] Later, in *Canadian Dredge and Dock Company Ltd. v. The Queen*, [1985] 1 S.C.R. 662, (S.C.C.), Estey J. said the following at para.

21:

The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. ...The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing.

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

Counsel submitted that the evidence of witness C provided details of his management of the Cabaret and the procedures established to control the number of persons allowed to enter and for making accurate counts of the number of persons inside. The owners of the Cabaret brought him back in early 2004, following the alleged contravention, to take steps to ensure that it did not occur again. Counsel submitted that the licensee is not the guarantor of its employees conduct. The "directing mind" of the Cabaret at the time of the alleged contravention would have been either the principals of the corporate licensee or perhaps the manager on duty at the time. It was not witness B, the assistant

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manager. He was told to carry out the process and procedures previously established. The licensee was duly diligent, policy and procedures were in place to prevent overcrowding beyond the capacity permitted by the maximum occupant load. These policies and procedures were discussed with the liquor inspector at a compliance meeting held prior to the date of the alleged contravention and accepted by her.

- Evidentiary Burden Not Met

Counsel submitted, that the evidence of witnesses B and C established that errors of up to 100 persons could result from using counting procedures which did not follow the procedures established by the cabaret and allow the person doing the counting to be elevated above the crowd. He submitted, that the evidence of the two liquor inspectors did not establish that the methodology employed by them resulted in an accurate count.

- Licensee did not “permit”

Counsel referred to the decision of the Liquor Appeal Board in Ed Bulley Ventures, June 28, 2001 at paragraph 61; “a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances”. Here the evidence is of due diligence by the licensee through the policies and procedures, put into place by the previous manager (witness C) and followed by the current assistant manager (witness B).

- Penalty Submissions

Counsel submitted that it was not appropriate to require the licensee to address both the substantive allegation and submissions on penalty at the same time, that the hearing on penalty should be adjourned until after the decision was made on whether a contravention had occurred.

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Counsel submitted that in the circumstances of this case a monetary fine is sufficient. When a suspension is imposed all parties suffer, with a loss of tax revenues and salaries. It creates a greater penalty as the closure has a lasting effect beyond the suspension period itself as it takes time to regain patronage. Counsel submitted, that there is no evidence of health and safety concerns as required by the Liquor Appeal Board in the *Lucky Bar* decision, May 23, 2002. Counsel submitted, that the evidence of the expert witness (witness A) was that the fire and safety threshold for the Cabaret was 418 persons. Further, that the exiting capacity was greater than the number of persons counted inside the Cabaret.

## **REASONS AND DECISION**

[The applicable legislative provisions are contained in Appendix A.]

### **(1) Whether the branch breached the principles of procedural fairness?**

Counsel for the licensee argued that the adjudicative system employed by the Branch compromised the independence of the adjudicators. In effect, his submission amounts to an allegation that the Branch is breaching his client's rights to procedural fairness. He tabled three questions. Counsel did not provide any authorities on the independence of quasi-judicial or administrative decision makers, nor did he outline specific practices of the adjudicators prejudicial to their independence.

Section 20 of the Act provides the authority to the general manager of the Branch to take action against a licensee, with or without a hearing, for, amongst other things, the licensee's contravention of the Act or Regulations or the failure to comply with a term or condition of the licence. Section 3 of the Regulations allows the general manager to delegate her powers, duties and functions to one or more persons. The general manager has delegated her powers, duties and functions in sections 20, 70 and 73 of the Act to several persons known as adjudicators.

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I am satisfied that the practices within the Branch adjudicative system do not compromise the independent decision making of the adjudicators. The Branch's processes respect the maxim that "he/she who hears must decide" and adheres to the safeguards discussed by the Supreme Court of Canada in *Consolidated Bathurst*.

**(2)** Whether the contravention, overcrowding, contrary to section 12(2) of the Act and section 71(2)(b) of the Regulations, as alleged, is valid in law?

Counsel has argued that there is no contravention for exceeding the "patron" capacity. I do not agree. For the following reasons I am satisfied that the patron capacity is a term and condition of the licence and that section 20 of the Act allows the general manager to take action against a licensee for the licensee's contravention of the Act, Regulations or a term or condition of the licence.

Section 12(2) of the Act allows the general manager to impose terms and conditions to the licence. Section 71 of the Regulations 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. Section 6(1) of the *Regulations* requires the general manager to set the "person" capacity when issuing a licence after the Regulation came into effect on December 2002, whereas in the past, the general manager always set terms and conditions for "patron" capacity. Section 6(4) creates a term and condition of the licence for "person" capacity. Section 71(2)(b) is designed to act as the transitional piece while the old licences refer to "patron" capacity. The "Guide" (exhibit 1, tab 7) at page one states:

"It also imposes further terms and conditions in addition to those found in the Act and Regulations. Like the requirement contained in the Act and Regulations, these additional terms and conditions – and any further terms and conditions that might be printed on the face of your licence or contained in letters issued to you by the general manager of the LCLB – must be followed at all times."

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I do not accept counsel's argument that the definition of "establishment" in "patron capacity" nullifies the contravention because it refers to the whole of the place or premises and not just the licensed area. One must look at the wording as a whole and not just focus on one word. The definition of patron capacity in the Regulations refers to 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" (my emphasis underlined), i.e. the licensed area and not all areas.

The same consideration should be applied to counsel's argument regarding the use of "establishment" in the definition of "occupant load" when considering the provisions of Section 15 of Schedule 4 to the Regulations. The wording of section 15 refers to "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". (my emphasis underlined) Licensed establishment refers to the licensed areas of an establishment not the whole of the establishment.

In the result I am satisfied that the NOEA of December 10, 2003, sets out the alleged contravention, the recommended penalty, and the legislative provisions upon which they are founded.

**(3) Whether the definition of "occupant load" in the Regulations is flawed?**

Counsel submitted that the decision of the General Manager in *Atlantis Club*, November 24, 2003, EH03-086 & 096 on the definition of "occupant load" was wrong and is subject of a petition for Judicial Review. In *Atlantis Club* counsel had submitted that the alleged contravention is based on a flawed definition of "occupant load" in section 1 of the *Regulations* and as such there is no authority for the penalty provision found in Schedule 4 (15) of the *Regulations* upon which the recommended penalty is based. Counsel had argued that a literal interpretation of the wording in the definition of "occupant load" would create an absurd result. The "least" number of persons would mean the smallest number possible, which, if literally applied would be either one or

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zero thus creating an absurd result. Consequently, the definition of “occupant load” is flawed and as such there is no authority to impose a penalty.

I did not agree with counsel’s argument in *Atlantis Club* and counsel has not provided compelling reasons for a change to my finding, which is as follows:

“I do not agree with counsel’s assertion that the “least” number of persons, means the smallest number possible thus leading to an absurdity. The principles of statutory interpretation require that the words be given meaning in keeping with the intent of the statute and that they not bring about absurd consequences. In my view, the “least” number of persons should be interpreted as meaning the lowest number of persons that can be in the establishment in keeping within the limits of the provisions in paragraphs a, b or c of the definition. For example, if the Provincial Building Regulations as referred to in paragraph (a) in the definition, allowed a maximum of 350 persons in an establishment, and *The Fire Services Act* and British Columbia Fire Code Regulation as referred to in paragraph (b) of the definition, allowed a maximum of 375 persons in the establishment, and local government safety requirements as referred to in paragraph (c) of the definition, allowed a maximum of 400 persons in the establishment, the occupant load would be the “least” number of persons, i.e. the lowest number of persons, which in this example is 350, not one or zero, as submitted by counsel. In conclusion, I am satisfied that the penalty provisions at Schedule 4 (15) apply.”

**(4) Whether the occupant load certificate is valid?**

Counsel has argued that the Maximum Load Certificate (exhibit 1, tab 9) is invalid because it is not attached to a floor plan outlining the area covered by the certificate. I cannot agree with counsel for several reasons.

Firstly, the certificate states on its face: “Maximum Occupant Load, premises located at 932 Granville St. known as The Roxy Cabaret, Licensed Beverage Establishment 300 persons”. Secondly, the witness from the Vancouver Fire Department testified that the certificate referred to the area in exhibit 1, tab 8, and not to other areas of the cabaret. Finally, a close examination of the floor plan at exhibit 1, tab 8, reveals a stamp stating: “Maximum Occupant Load, Licensed Beverage Establishment 300 persons”.

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In the result I am satisfied that it is clear that the maximum occupant load of the area of the Roxy Cabaret as depicted in the floor plan found at exhibit 1, tab 8, is 300 persons.

**(5) Whether the licensee contravened section 12(2) of the Act**

**a) Standard of Proof**

The BCSC in recent decisions has divided on this decision. In the most recent case heard and decided by the court, *New World Investments Ltd., dba Richard's on Richards vs. General Manager LCLB*, Madam Justice Gill in her Oral Reasons for Judgement, April 28, 2004, outlined the reasoning and findings in the previous cases and on this issue and held that: "In summary, I follow and concur with the decision in *Zodiac* and conclude that the standard of proof is a balance of probabilities."

I am satisfied that this represents the current expression of the law in British Columbia.

**(b) Has the standard been met**

The evidence presented by the Branch is that on September 13, 2003, at approximately 11:55 P.M. two experienced liquor inspectors (A and B) counted 367 and 386 persons respectively in the cabaret. At the same time two additional counts were made by a City of Vancouver licensing official and a fire inspector of 395 and 358 persons respectively. Evidence introduced by the licensee was that a doorman, hired and instructed by the licensee completed a "door report" indicating that he conducted a count of 271 persons in the Cabaret at 11:30 P.M. and 284 at 12:00 Midnight. Witnesses A and B for the licensee provided evidence of the system put in place to maintain the maximum capacity of the Cabaret between 275 and 300 persons. The system involved a set pattern of counting, commencing with the beginning of a song to "freeze" the movement on the dance floor and using elevated vantage points to count patrons in the congested areas. Both witnesses testified that counts conducted not using these two procedures were not accurate. Hence the counts of the four regulatory inspectors could not be

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relied upon. Both witnesses provided an anecdotal example of inaccuracies by police and regulatory official in the past of approximately 100 persons.

I have closely considered the evidence. I am not satisfied that the counts of the number of persons in the cabaret on a half-hourly basis as recorded in exhibit 4, represent an accurate reflection of the numbers of persons in the cabaret at the time of the inspection. We do not know how the counts were conducted. We know only how they were supposed to be conducted. Although there is room for comments in the report, none are made despite the attendance of several regulatory officials on that date who conducted counts far in excess of those recorded. My impression is that the counts were recorded in the report without a particular concern for accuracy and as such are neither credible nor trustworthy.

I am satisfied that the methods used by the two liquor inspectors experienced in counting persons in crowded licensed establishments may be relied upon to produce reasonably accurate results. There are vagaries involved in the counting of large number of persons in crowded licensed establishments making it impossible to achieve complete accuracy. That is reflected by the range in the numbers of persons counted by the four members of the multi-agency inspection team from a low of 358 to a high of 395 persons in the cabaret. On the whole of the evidence I am satisfied that on September 13, 2003, at approximately 11:55 A.M. there were more persons in the licensed establishment than the patron capacity of 275 set by the general manager and the number of persons in the licensed establishment was more than the occupant load of 300.

**( c ) Directing Mind; Due Diligence; Permit**

Counsel has argued that the directing mind in this case would be either the principals of the corporate licensee or the manager of the cabaret at the time of the alleged contravention. He argued that it was not the assistant manager, witness B, who was

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told to carry out the procedures which had been established by witness C during his tenure as manager.

I cannot agree with counsel that in this case it was the principals of the corporate licensee. We know nothing of their role in the operation of the Cabaret and in fact their identity is disputed. I do agree that the manager employed at the time of the alleged contravention and since dismissed was the directing mind of the licensee. It appears that he was in charge of the overall operation of the cabaret. At the time of the compliance meeting held at Branch offices on January 22, 2003, he indicated that he was the "general manager" and he signed the document on behalf of the licensee (exhibit 1, tab 16). As the court in *Plaza* stated:

Such person need not be an officer or director of the licensee. It would be the individual ...who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

Counsel has argued that the licensee was duly diligent by having policy and procedures in place to prevent overcrowding beyond the capacity permitted by the maximum occupant load. These policies and procedures were discussed with the liquor inspector at a compliance meeting held prior to the date of the alleged contravention and accepted by her. I agree that there is no question that the licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. I am satisfied that that has not occurred in this instance. A contravention for overcrowding occurred on February 23, 2002, (exhibit 1, tab 19) which resulted in a monetary penalty imposed on the licensee (exhibit 1, tab 18). This did not result in a review of the Cabaret's door control procedures or a greater degree of supervision by the manager. He simply told the assistant manager, witness B, to be more careful with the numbers. There were no inquiries as to what went wrong, was the problem with the procedures or with staff not following them. No corrective measures were made nor

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discipline taken. At the time of this alleged contravention (September 13, 2003) there is no evidence that the manager or the assistant manager took any measures to ensure that the counts, recorded by the doormen in exhibit 4, were properly conducted according to the established procedures. The counts were taken as given. There is no evidence that the manager or assistant manager took the hands-on approach of the previous manager, witness C who made his own counts on a regular basis.

In the result I am satisfied that the defence of due diligence has not been made out by the licensee.

Counsel argued that the licensee was sufficiently diligent through its established policies and procedures that it did not "permit" the overcrowding constituting the contravention. As I have stated above, I do not agree that the licensee has been duly diligent. Thus, I find that the licensee "permitted" the overcrowding constituting the alleged contravention.

In conclusion, I am satisfied that on September 13, 2003, the licensee contravened Section 12 (2) of the Act and 71(2)(b) of the Regulations by failing to comply with a term and condition of the licence by permitting overcrowding beyond patron capacity, more than the occupant load.

**(6)** Whether a penalty is appropriate?

**(a)** Contemporaneous submissions

Counsel has objected to making submissions on penalty, prior to a determination that a contravention has been found. Counsel has taken this position in several hearings. It has consistently been held that the hearing process allows for penalty submissions to be made during the course of the hearing prior to a determination on the alleged contravention and that that process does not prejudice the licensee. The adjudicator in *Greater Vancouver Professional Driver's Association*, EH01-035/036, April 29, 2002,

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and most recently in *Haney Hospitality Ltd.*, EH03-116, May 13, 2004, provided her reasoning for this position, which I accept:

“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. 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.”

**(b) Penalty**

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a 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*.

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The branch has recommended a five (5) day suspension penalty commencing on a Saturday. This is within the lower mid-range of penalties for a contravention of this type, schedule 4 provides for a suspension penalty of 4 to 7 days and/or monetary penalty of five thousand to seven thousand dollars. The branch rationale for recommending this penalty is found in appendix A to the Notice of Enforcement Action dated December 10, 2003, (exhibit 1, tab 1):

“Reasons for Proposed Penalty:

A suspension rather than a monetary penalty was recommended as a monetary penalty would only amount to the cost of doing business. The licensee has made a considerable income from the overcrowding of the establishment. The mid range level suspension for overcrowding is recommended due to the severity of the overcrowding. The licensee has been to a hearing for a previous overcrowding infraction and still has not taken the appropriate steps to prevent overcrowding. This licensee is well aware of the requirements of the Liquor Control and Licensing Act and Regulations. This licensee has attended compliance meetings, has had previous Contravention Notices on overcrowding and has had an enforcement decision, which imposed a monetary penalty on the licensee for overcrowding.”

Counsel submitted that in the circumstances of this case a monetary fine is sufficient, a licence suspension creates a greater penalty as the closure has a lasting effect beyond the suspension period itself and that there was no evidence of health and safety concerns.

In considering whether a suspension penalty is warranted, in this case I note that there is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident ("compliance history"). Therefore, this contravention is considered as a first contravention for the purposes of the Penalty Schedule.

There is however, a previous contravention for overcrowding occurring on February 23, 2002, for which a monetary penalty of three thousand dollars (\$3000) was

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imposed (exhibit 1, tabs 19 & 20). Additionally, the evidence of liquor inspector A in reviewing the record for the licensee revealed several instances where the Branch brought overcrowding issues to the attention of the licensee and several previous instances of enforcement action taken by the Branch by way of warning letters and licence suspensions extending back to 1992. In light of the record for this licensee, I am satisfied that a suspension penalty is necessary to ensure future voluntary compliance. A monetary penalty may be seen as the cost of doing business, particularly as overcrowding leads to increased revenue and profits through door cover charges and liquor sales. A licence suspension penalty brings the seriousness of the contravention and its consequences to the attention of all persons associated with the operation of the establishment.

Overcrowding can have a serious affect on public safety and community standards. Exceeding the maximum licence capacity can have a negative impact on neighbourhoods and communities including late night disturbances, parking and traffic flow problems. Exceeding the occupant load capacity can affect the safety of the patrons and employees of the establishment in the event of an emergency. On September 13, 2003, the evidence is that the occupant load was exceeded by approximately 58 to 95 persons, it was difficult to move inside the establishment, and there was a safety concern in the event of an emergency occurring. In the circumstances a penalty greater than the minimum four (4) day suspension is warranted. I am satisfied that a five (5) day suspension penalty is appropriate.


## **ORDER**

Pursuant to section 20(2) of the *Act*, concerning Liquor Licence number 16089, I suspend the liquor licence for a total of five (5) days starting as of the close of business Friday, July 30, 2004, and continuing on successive business days 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 to the Liquor Control and Licensing Act.)

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Since I do not know whether the establishment would normally be open seven 7 days per week as of July 31, 2004, I do not know what the "business days" will be. To ensure that this order is effective, I direct that the liquor licence be held by the Branch or the Vancouver Police Department from the close of business Friday, July 30, 2004, until the licensee has demonstrated to the Branch's satisfaction that the licensed establishment has been closed for five (5) business days. A suspension sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer.

A liquor inspector or a member of the Vancouver Police Department will be requested to attend the premises, take possession of the liquor license and hold it in safekeeping during the term of the suspension.



Edward W. Owsianski  
Enforcement Hearing Adjudicator

Date: June 22, 2004

cc: Vancouver Police Department

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

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

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**APPENDIX****LIQUOR CONTROL AND LICENSING ACT  
[RSBC 1996] CHAPTER 267**

**"establishment"** means a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served;

**"licensed establishment"** means an establishment licensed under this Act;

**Action against a licensee**

**20** (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

- (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;
- (b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;
- (c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;
- (c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;
- (d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;
- (e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

- (a) [Repealed 1999-36-13.]
  - (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;
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- (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
  - (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
  - (e) cancel all or any part of the licensee's licence;
  - (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.
- (2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,
- (a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or
  - (b) suspend a licensee's licence under subsection (2) (d) for a period longer than that provided for in the prescribed schedule of suspensions.
- (2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account
- (a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and
  - (b) the particular circumstances giving rise to the taking of action by the general manager.
- (2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1) (a) that is greater than the following amounts:
- (a) \$50 000 for a contravention of section 38 (1), and
  - (b) \$25 000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.
- (2.4) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.
- (2.5) A person on whom a monetary penalty has been imposed under this section must pay the penalty whether or not the person
- (a) has been convicted of an offence under this Act or the regulations, or
  - (b) is also liable to a fine for an offence under this Act or the regulations.
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(2.6) A monetary penalty imposed under this section must be paid within 30 days after the date on which the notice referred to in subsection (4) (a) is provided to the licensee or within any longer period specified by the general manager.

(2.7) All monetary penalties received by the general manager under this section must be paid into the consolidated revenue fund.

(3) Despite subsection (2) (d), (e) and (f), the general manager must suspend, cancel or order the transfer of a licence held by a person who has been convicted of a prescribed number of prescribed offences under the laws of Canada or British Columbia.

(4) On taking action against a licensee under subsection (2), the general manager must

(a) provide the licensee with written notice of the action in accordance with the regulations,

(b) set out in the notice the reasons for taking the action,

(c) set out in the notice the details of the action including

(i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and

(ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served, and

(d) [Repealed 2002-48-37.]

(4.1) For the purposes of any hearing referred to in subsection (2), the general manager, by summons, may require a person

(a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and

(b) to bring and produce before the general manager all documents, writings, books, deeds and papers in the person's possession, custody or power touching, or in any way relating to, the subject matter of the hearing.

(4.2) A person named in and served with a summons referred to in subsection (4.1) must attend before the general manager and answer on oath, unless the general manager directs otherwise, all questions touching the subject matter of the hearing, and produce all documents, writings, books, deeds and papers in accordance with the summons.

(4.3) When the general manager exercises a power under subsection (4.1), a person who fails or refuses to comply with subsection (4.2) is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(5) [Repealed 1999-36-14.]

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**Seizure of liquor kept in quantity**

**70** (1) If liquor is found by an officer or peace officer under circumstances that satisfy the officer or peace officer that it is being possessed or kept contrary to this Act or the regulations, the officer or peace officer may immediately seize and remove the liquor and packages containing it and

(a) may retain the liquor and packages to be dealt with under this Act, or

(b) may immediately destroy the liquor and packages.

(2) If liquor is seized under subsection (1) but is not destroyed under subsection (1) (b), and no person by notice in writing filed with the general manager within 30 days of the date of the seizure claims to be the owner of the liquor, the liquor and the packages containing it are forfeited to the government.

(3) The liquor and packages forfeited under subsection (2) must be

(a) destroyed or otherwise disposed of as the minister may direct, or

(b) delivered without delay to the general manager of the Liquor Distribution Branch.

(4) Only if within 30 days of the date of the seizure of liquor under subsection (1) a person applies to the general manager claiming to be the owner of the liquor, the general manager may, as soon as practicable after receiving notice of the claim, on being satisfied of the person's claim,

(a) in respect of liquor that is still in the custody of an officer or a peace officer, order that the liquor be returned to the owner,

(b) in respect of liquor that has been destroyed by a peace officer under subsection (1) (b), require the police force of which the peace officer who seized the liquor is a member to provide compensation to the owner, or

(c) in respect of liquor that has been destroyed by an officer under subsection (1) (b), provide for compensation to the owner by the branch.

(5) For the purposes of subsection (4) (b) and (c) compensation is limited

(a) if the liquor is or was listed for sale under the *Liquor Distribution Act*, to the retail price under that Act of the destroyed liquor, or

(b) if the liquor has never been listed for sale under the *Liquor Distribution Act*, to the replacement value of the liquor as determined as if the liquor were available for purchase through the Liquor Distribution Branch.

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**Power to retain documents and inspect books and premises**

**73** (1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager or a person designated by the general manager may

(a) require the licensee to produce any prescribed document relating to the operation of the business licensed under this Act, and

(b) inspect any of the following:

(i) records in the possession of any person that may contain information relating to goods shipped, carried or consigned or received for shipment or carriage in British Columbia,

(ii) premises of any person set apart or used as a warehouse for the storage of liquor, and

(iii) establishments licensed under this Act and records, liquor and other things associated with the operation of the establishment.

(1.1) A person requiring the production of documents or carrying out an inspection under subsection (1) may

(a) retain the documents produced or remove records or things relevant to the inspection for the purpose of making copies or extracts, and

(b) take reasonable samples of liquor for testing and analysis.

(1.2) A person who retains the documents produced, removes records or things or takes a sample must

(a) give a receipt for the documents retained, records or things removed or the sample taken, and

(b) make any copy or extract, and return the documents, records or things retained or removed, within a reasonable time.

(1.3) A copy made or extract taken under this section, certified by the person carrying out the inspection as a true copy of or extract from the original, is admissible in evidence to the same extent as, and has the same evidentiary value as, the record of which it is a copy or from which it is an extract.

(1.4) When acting under the authority of this section, a person shall carry identification in a form authorized by the general manager and present it on request to the owner or occupant of the premises referred to in subsection (1).

(1.5) A person when acting under the authority of this section may request and receive the assistance of a peace officer.

(2) A person commits an offence if the person neglects or refuses to do any of the following under this section:

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- (a) produce a document required to be produced;
- (b) produce and submit a record or thing for inspection or a sample of liquor;
- (c) allow premises to be inspected.

## Regulations

**"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;

## Delegation by general manager

**3** (1) The general manager may delegate any of his or her powers, duties and functions under the Act and this regulation to one or more officers or persons or to the Liquor Licensing Committee appointed under section 2.

(2) If the general manager delegates a power, duty or function to the Liquor Licensing Committee under subsection (1), that power, duty or function must be exercised or performed by a panel of the committee consisting of the general manager as chair of the committee or another member whom the general manager designates as chair and 2 other members of the committee.

## 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
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(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.

#### **Schedule 4**

[am. B.C. Reg. 437/2003, s. 3.]

#### **Enforcement Actions**

15	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 more than the occupant load	4-7	10-14	18-20	\$5 000 - \$7 000
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