



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of

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

Licensee:	Aztec Properties Company Ltd. dba Bimini Neighbourhood Pub 2018 West 4 Avenue Vancouver, BC
Case Number:	EH03-169
Appearances:	
For the Licensee	Dennis Coates
For the Branch	Peter Jones
Enforcement Hearing Adjudicator	Suzan Beattie
Date of Hearing	March 11, 2004
Place of Hearing	Vancouver, BC
Date of Decision	October 5, 2004

INTRODUCTION

1] The licensee, Aztec Properties Company Ltd. doing business as Bimini Neighbourhood Pub, is located on West 4 Avenue in Vancouver, BC. The licensee holds Liquor Primary Licence No. 033214 issued effective June 18, 2003. The hours of operation in which liquor may be sold, purchased and consumed are from 10:00 A.M. to Midnight Sunday to Thursday and 11:00 A.M. to 1:00 A.M. on Friday and Saturday. The maximum person capacity is 185 persons, which is the same as the occupant load approved on April 9, 2003, by the Vancouver City Fire and Rescue Services Department.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

- 2] The Liquor Control and Licensing Branch alleges that on September 27, 2003, the licensee contravened regulation 6(4) of the *Liquor Control and Licensing Regulation* by permitting overcrowding beyond the person capacity greater than occupant load.
- 3] Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for each contravention. For this contravention, the penalty range is four (4) to seven (7) days or five thousand (\$5,000.00) to seven thousand (\$7,000.00) dollars for a first contravention. In this case, the branch is recommending the maximum suspension penalty of seven (7) days.
- 4] The relevant statutory provisions of the *Liquor Control and Licensing Regulation* state, in part:

1 Definitions

“Occupant load” means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
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- (b) the *Fire Services Act* and British Columbia Fire Code Regulations, 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.

6 Capacity

- (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 license 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).

The relevant statutory provisions of the *Liquor Control and Licensing Act* state, in part:

1 Definitions

“establishment” means a place or premises that may comply with the requirements of the 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.

ISSUES

1. What is the Burden of Proof?
2. What is the relationship between an overcrowding contravention in Section 6 of the *Regulation* and the overcrowding penalties outlined in Schedule 4 of the *Regulation*?
3. Whether the licensee contravened section 6 of the *Regulation*.
4. If so, is the recommended penalty appropriate in the circumstances?

EXHIBITS

The branch and the licensee presented the following exhibits:

Exhibit 1	Book of Documents
Tab 1	Notice of Enforcement Action dated December 9, 2003
Tab 2	Contravention Notice No. B000986
Tab 3	Enforcement Action Recommended dated Nov. 13, 2003
Tab 4	Hand written notes from the Liquor Control and Licensing Branch Inspectors
Tab 5	Liquor Primary Licence Number 033214
Tab 6	Official floor plan of the establishment
Tab 7	Disclosure documents received from the licensee
Exhibit 2	Bimini's Tap House Memo
Exhibit 3	CFT Engineering Inc. Report dated March 5, 2004 (<i>Revised March 10, 2004</i>)

WITNESSES

- 5] The branch called two (2) liquor inspectors as its witnesses. The three (3) witnesses for the licensee were its managing partner, doorman and manager.
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EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS**Evidence of the Branch**

- 6] The branch's evidence, as outlined in the narrative to the Notice of Enforcement Action in Exhibit 1, and in the testimony of its witnesses, is summarized as follows. At approximately 12:20 A.M. on the business day of Friday, September 26, 2003, three (3) liquor inspectors entered the establishment. The lead inspector spoke to the doorman. The lead inspector commented that the establishment appeared busy and asked the doorman what his count was. The doorman said "197" and showed his mechanical counter indicating 197. The lead inspector asked if his count of 197 included staff. The doorman appeared to the lead inspector to be puzzled by the question. The lead inspector did not recall seeing a second mechanical counter.
- 7] The lead inspector then spoke to the manager. He advised the manager that the establishment was already overcrowded given the doorman's count of 197 on his mechanical counter. He also stated that there were a large number of people in the main area, and said he and the second inspector would be performing counts. The third inspector, who did not testify, was asked by the lead inspector to look for other potential contraventions.
- 8] The lead inspector's first count, which concluded at approximately 12:31 A.M., was 199 persons and the second inspectors count was 217 persons. The two inspectors had taken different routes in their first count of the establishment. After confirming their first count they went together on the same route through the establishment for their second count which was completed at approximately 12:38 A.M. On their second count the lead inspector had 206 persons and the second inspector counted 228 persons.
- 9] The manager advised the lead inspector there were fifteen (15) staff on duty. The staff was easily identified as they wore black shirts and name tags. The staff was
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not included by either inspector in their counts. Neither did the inspectors include the individuals in the smoking area outside the premises. As the establishment closes at 1:00 A.M. the lead inspector saw no need to ask persons to leave the premises.

Evidence of the Licensee

Managing Partner

10]The managing partner explained that he is on the premises, at various times during the operating hours, seven (7) days a week. He estimated he has between seven (7) and nine (9) staff on duty. On Friday and Saturday evenings the establishment has three (3) door staff, one at the front entrance, one positioned near the rear exit and a third acting as a floater. Door staff are trained by himself, the manager, and the bar manager. The door staff start at 9:00 P.M., and alternate positions after approximately two (2) hours. The managing partner stated his belief that the “front door runs the room” and therefore he spends a majority of his time working alongside his front door staff.

11]The managing partner confirmed the establishment’s policy of ensuring the establishment is not over the licensed limit of 185 persons. This policy is also outlined in an undated memo to door staff (Exhibit #2). The door staff operate two (2) counters – one for persons entering and the other for those leaving. Persons wishing to smoke are stamped before leaving the premises and are clicked out on the counter. There are between eight (8) and ten (10) parking areas in the back of the establishment. As persons leave out the back exit, the second doorperson advises the front doorperson, who adjusts the counter accordingly.

12]On the evening of September 27, 2003, the managing partner arrived at the end of the evening. He saw the liquor inspectors leave the premises but had no conversation with them. He stated the doorperson and the manager were visibly upset and advised him of the contravention notice. The managing partner did not do

a count himself because the establishment was emptying as it was close to closing time.

Manager on Duty

13]The manager on duty the evening of September 27, 2003, testified that he has been employed at the establishment for three (3) years. He estimated there are at most nine (9) staff working. Prior to the door staff arriving at 9:00 P.M., he does a count of the staff and persons in the premises with a mechanical counter. He then gives his counter to the front doorperson on duty at 9:00 P.M. From 9:00 P.M. onward the doorperson operates both counters. His instructions to the doorperson are that they can never exceed 185 persons, including staff.

14]The manager recalled meeting two (2) of the liquor inspectors when they entered the premises. He knew that the inspectors did two (2) counts before asking to meet with him and showing him their numbers. He did not believe the establishment was overcapacity at it was close to 12:30 A.M. and patrons were leaving to go downtown. He refused to sign the contravention notice as he did not believe he had the authority. He stated the lead inspector told him that “nothing would come of this” and that “this is just a warning” and not to worry about any monetary fine. It was approximately one week later that the lead inspector called him and advised the branch was proceeding with an enforcement action.

Doorperson

15]The doorperson on duty the evening of September 27, 2003, testified that he has a Masters Degree in Mathematics and six (6) years experience in the hospitality industry. His main function is to maintain control of the establishment by ensuring it operates under capacity. He is also responsible for requesting identification, understanding who is in the establishment, what they are doing, and being able to anticipate and contain any problems that may occur in the establishment.

16] At 11:00 P.M. on the evening of September 27, 2003, he took over the front door duties and received the two (2) clickers from the previous doorman. He explained that it is his practise to not exceed 180 persons as this allows a margin of comfort if the managing partner and his brother, or other important persons, arrive.

17] He recalled that the liquor inspectors arrived at the establishment's busiest time at approximately 12:15 A.M. He remembered the lead inspector asking him "what we are at". He explained that he keeps the clickers in his pockets and he pulled out a clicker that showed the lead inspector 197. He expected the inspectors to engage him in a conversation about how the clickers worked or what the night was like from his perspective.

18] The liquor inspectors entered the establishment and the manager on duty made him aware the inspectors were doing a count. He shut the door even though there were approximately 12 – 16 people in a line up and four (4) people outside smoking. There were also 8 – 10 people waiting outside for friends who were going downtown.

19] The doorperson explained that the first clicker he showed the lead inspector indicated 197 persons out. His second clicker showed 382 people in, making the count inside 185 persons. His typewritten notes of the event states, in part:

...I just showed the inspector what he asked. I did not think to show both clickers as I knew Biminis was not over capacity. The Inspector asked me if the clicker included staff members working. I answered no as I did not know that every evening the manager does the first count of people at 9pm and give the clickers over to the doorman. I only work the door from 11pm to close every night.

20] The doorperson stated in the hearing that he could not recall if he clarified with the inspectors that he had two clickers. Nor did he remember being asked whether his count included staff.

CFT Engineering Inc.

21]The licensee entered into evidence Exhibit #3, a letter dated March 5, 2004, (revised March 10, 2004) from CFT Engineering Inc. with respect to the occupant load calculation for the premises. In its letter, CFT Engineering Inc. provided a table comparing the occupant load calculations for the premises. The letter also explained that “the difference between the occupant load calculations in Vancouver and British Columbia outside Vancouver is caused by (1) exit capacity based on the exit capacity factor and (2) occupant load based on the net floor area at the floor area density factor.”

22]In summary, if the premises were located in BC, but outside of the Vancouver jurisdiction, the calculation of the premises exiting capacity under the B.C. Building and Fire Codes would support an occupant load of 546 persons. Under the Vancouver Building and Fire By-laws the exit capacity calculation would support an occupant load of 273 persons. The calculations for the net floor area result in 195 persons under both the B.C. Building & Fire Codes and the Vancouver Building & Fire By-Laws.

Submissions***Burden of Proof***

23]The licensee’s first submission is that the burden of proof is “beyond a reasonable doubt” and not the civil standard of “balance of probabilities”. (*The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 at [12]; *The Urban Well v. General Manager Liquor Control and Licensing Branch*, 2004 BCSC 127 at [70]).

Occupant Load

24]The licensee next submits that the definition of “occupant load” in the *Regulation* results in an absurdity and is therefore unenforceable. In the licensee’s submission, the term “occupant load” which is defined in the *Regulation* as “the least number of persons allowed in an establishment” should more properly read “the lesser of the maximum number of persons allowed in an establishment”. The licensee distinguishes the decision of the General Manager in *Atlantis Club* (EH03-086 & EH03-096, March 3, 2004) by arguing that the General Manager in *Atlantis Club* amended the definition of “occupant load” rather than interpreting the definition. The licensee maintains that the General Manager can only interpret the definition of “occupant load” in the Regulations. (see: *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 at [31] to [39]).

25]The licensee argues that the occupant load is only calculated under the *Fire Services Act* and British Columbia Fire Code Regulations or the Vancouver Fire Bylaw and not from either the Provincial Building Regulations or “any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located” as suggested by the definition of “occupant load” in the *Regulation*.

26]The licensee further suggests that the calculation of the occupant load under the *Act* and *Regulation* is different than the calculation of the occupant load under the *Fire Services Act* and the British Columbia Fire Code Regulations. It bases this submission on its interpretation of “occupant load” in the *Regulation* and the definition of “establishment” in the *Act*. The licensee maintains that the *Fire Services Act* excludes areas that would be included in the definition of “establishment” in the *Act*. The result, in the licensees’ submission, is conflicting definitions of “occupant load.”

Contravention

27]The licensee also submits that the contravention under the *Regulation* is “permitting more persons in the licensed establishment than the patron or person capacity” and is not related to the occupant load. The licensee relies on *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 at [45] to [47].

Analysis and Finding on Contravention

Burden of Proof

28]This issue has been thoroughly argued in previous decisions of the general manager and it has been consistently held that the burden of proof on the branch is that of the civil standard of ‘on a balance of probabilities’. I find that the burden of proof on the branch is ‘on a balance of probabilities’.

Findings of Fact

29]On the facts of this case, I find that the licensee had in its licensed establishment more persons than the person capacity of 185 as set pursuant to *Regulation 6*.

30]While I accept the doorman’s education, knowledge and experience in the industry as well as his stated intention to ensure the establishment operates at least five (5) persons below the license capacity, I prefer the evidence of the liquor inspectors. I am unable to accept the doorman’s evidence for the following reasons.

31]When approached by the liquor inspectors, the doorman only showed one mechanical counter, indicating 197 persons. I am unable to accept his rationale for the events of the evening of September 27, 2003. I find it is not credible for an

experienced doorman to show the license inspectors' only one of two mechanical counters

32]Nor is it likely a doorman would remain quiet when his manager on duty told him the inspectors were conducting a count of the establishment. A reasonably prudent doorman would ensure the situation was clarified by advising his manager on duty that he only showed the inspectors one mechanical clicker.

33]The doorman testified that he shut the door during the inspectors count. Even after taking this action the doorman still did not attempt to advise either his manager on duty or the liquor inspectors that he had a second mechanical counter.

34]In the end I find that the evidence of the doorman is unreliable. I accept the evidence of the liquor inspectors and find that, at a minimum, the licensee had in its licensed establishment at least 199 persons which is more persons than the person capacity of 185 as set pursuant to *Regulation 6*.

35]In *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 the court set out criteria for a licensee to meet in demonstrating due diligence. Initially the licensee must show 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". In this case, the individual responsible for the licensee's operation would be the managing partner.

36]The next question posed in the *Plaza Cabaret (supra)* case is whether "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." I find the evidence of the managing partner falls short of establishing a sufficient degree of due diligence. His nightly supervision and undated memo to the door staff are not sufficient to demonstrate the defence of due diligence in these circumstances.

37]I find that the branch has proven that the licensee had in its licensed establishment on September 27, 2004, more persons than the person capacity of 185 as set pursuant to *Regulation 6* and that the licensee has not made out a defence of due diligence.

Occupant Load

38]I start my analysis by noting that, on April 9, 2003, the establishment was issued a maximum occupant load of 185 persons by the City of Vancouver, Office of the Fire Chief. Effective June 18, 2003, the licensee was issued a liquor primary licence with a capacity of 185 persons.

39]As noted above, the licensee provided a table prepared for it by CFT Engineering Inc. comparing the occupant load calculations for the premises. The calculation of the premises exiting capacity under the B.C. Building and Fire Codes would support an occupant load of 546 persons if the premises were located in BC, but outside of the Vancouver jurisdiction. Under the Vancouver Building and Fire By-laws the exit capacity calculation would support an occupant load of 273 persons.

40]CFT Engineering Inc. explained in its letter that, “in Vancouver, exit capacity for each exit in a LBE [Licensed Beverage Establishment] is calculated to be half the exit capacity permitted in British Columbia except Vancouver.” The calculations for the net floor area result in 195 persons under both the B.C. Building & Fire Codes and the Vancouver Building & Fire By-Laws.

41]I turn next to the definition of “occupant load” in the *Regulation*:

1 Definitions

“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 Regulations, and
-

any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located.

42]The licensee argues that the definition of “occupant load” in the *Regulation* should more properly read “the lesser of the maximum number of persons allowed in an establishment”. I disagree. I find that, following the analysis in *Atlantis Club*, the occupant load for this establishment is 185 which is the “least” number of persons allowed in the establishment under any of the enumerated legislative or safety provisions in the definition. The licensee’s evidence supports this conclusion.

43]The licensee argues that the calculation of occupant load under the *Fire Services Act* and the British Columbia Fire Code is different that the calculation of the occupant load under the *Act* and *Regulation*. The answer to the licensee’s argument is that there is no formula for the calculation of occupant load in either the *Act* or *Regulation*.

44]The only calculation of occupant load is that mandated under separate legislation as set out in the definition of “occupant load”. The branch accepts the occupant load as given under this Legislation and sets the person capacity of the establishment equal to the occupant load.

Contravention

45]The licensee submits that there is a regulatory deficiency between the contravention of overcrowding beyond person capacity and the penalty of overcrowding beyond building occupant load.

46]The enforcement actions are outlined in schedule 4 of the *Regulation*. Items 14 and 15 of Schedule 4 state the penalties for a contravention of *Regulation* 6. The penalties for a contravention of this regulation differentiate between the penalties for overcrowding that is “less than or equal to the occupant load” (item 14) and overcrowding that is “more than the occupant load” (item 15).

47] In this case the Notice of Enforcement Action clearly alleged the contravention is for overcrowding beyond the person capacity greater than occupant load. I do not find it a regulatory deficiency that a contravention can result in two (2) different penalties depending on whether the overcrowding is less than or equal to the occupant load or more than the occupant load. (see also: *Plaza Cabaret, supra*).

Finding

48] In summary, I find that the branch has established that the licensee overcrowded beyond its licence capacity of 185 persons and that the overcrowding exceeded the licensee's occupant load of 185 persons.

Penalty submissions and Decision

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

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

50] 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 minimum set out in Schedule 4 of the *Regulation*.

51] Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of regulation 6(4) the penalty range is four (4) to seven (7) days or five

thousand (\$5,000.00) to seven thousand (\$7,000.00) dollars for the first contravention. In this case, the branch is recommending the maximum suspension penalty of seven (7) days.

52]The *Regulation* provide for a graduated scale of penalties for contraventions of the *Act*. The graduated nature of the penalties is necessary for the consistent and vigorous enforcement of the provisions in the *Act* and *Regulation*.

53]The branch's primary goal in determining the appropriate penalty along the scale is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

Compliance History

54]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 a first contravention for the purposes of the Penalty Schedule.

55]The Notice of Enforcement Action, Appendix B indicted the following:

Date	Finding of Contravention	Enforcement Action
November 24, 2001	Licence Capacity	\$3,000.00 Monetary Penalty
March 08, 2002	Licence Capacity	\$3,000.00 Monetary Penalty

Submission and Decision

56]The licensee submits that there are no fire and safety issues arising in this case as a result of overcrowding. In its' submission the licensee quotes from the evidence and arguments outlined in *6003428 B.C. Ltd. dba Tonic Bar v the General Manager*,

Liquor Control and Licensing Branch EH03-21/28/29/44/45/50 March 2, 2004. As well, the licensee takes issue with the recommended maximum penalty for a first contravention.

57] Turning first to the licensee's argument that there were no safety issues arising as a result of overcrowding in this case. I follow the comments made in *Tonic Bar, supra*, in holding that "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" (page 24). I find it is not necessary for there to be specific safety infractions to activate these policy concerns. Rather it is simply necessary for there to be overcrowding to trigger the branch's policy.

58] In this case, I accept the managing partner's evidence with respect to his extensive presence at the establishment, his nightly supervisions and attendance with the doorperson and the undated memo of instructions for doorpersons. Notwithstanding the actions of the managing partner, I have found that, on September 27, 2003, the establishment was overcrowded beyond its licence capacity and that the overcrowding exceeded its occupant load.

59] The licensee has not demonstrated through policies, procedures or the actions of its staff on September 27, 2003, a defence of due diligence.

60] The range of penalties for a first contravention is a four (4) to seven (7) day licence suspension. The next issue is whether, on the basis of its compliance history, the licensee should receive the recommended maximum seven (7) day licence suspension penalty for a first contravention. I first examine the licensee's demonstrated attempts at compliance. In 2001 and again in 2002, the licensee contravened its licence capacity and received the maximum monetary penalty of three thousand (\$3,000.00) dollars on each occasion. It is apparent based on its compliance history that the maximum monetary penalty was not able to achieve the licensee's voluntary compliance with the overcrowding provisions of the legislation.

61]As this is also a case of non-compliance with the overcrowding provisions of the legislation, I find that the maximum seven (7) day suspension penalty is reasonable given the objective of voluntary compliance with the *Liquor Control and Licensing Act and Regulation* in order to safeguard the public safety and the well being of the community.

ORDER

62]Pursuant to section 20(2) of the *Act*, I order a suspension of the Primary Liquor Licence No. 033214, for a period of seven (7) days to commence as of the close of business on Saturday, November 6, 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 (section 67 of the Regulations).

63]Since I do not know whether the establishment would normally be open seven (7) days per week as of November 6, 2004, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that Primary Liquor Licence No. 033214 be held by the branch or the Vancouver Police Department from the close of business on Saturday November 6, 2004, until the licensee has demonstrated to the branch's satisfaction that it has been closed for seven (7) business days.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: October 5, 2004

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Peter Mior, Branch Advocate
