



**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:** Sandman Hotel Langley, Inc.  
dba Sandman Hotel (Langley)  
aka the Shark Club  
8855 – 202<sup>nd</sup> Street  
Langley BC

**Case:** EH03-189 & 190

**Appearances:**

For the Licensee Dennis P. Coates, Q.C.

For the Branch Shahid Noorani & Peter Mior

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing May 11 & 27, 2004

Place of Hearing Vancouver, B.C.

Date of Decision June 24, 2004

**INTRODUCTION**

At the time of alleged contraventions the licensee, Sandman Hotel Langley Inc. operated the Sandman Hotel (Langley) at 8855 – 202<sup>nd</sup> Street, Langley, BC. The hotel contained a food and beverage establishment known as the Shark Club for which the licensee held a Liquor Primary and a Food Primary licence. Through an agreement with the licensee, the details of which were not presented during the hearing, the Shark Club was operated as a separate business entity by other persons. Although it was operated as one business entity the Shark Club is divided into two distinct licensed establishments for liquor licensing purposes by the Liquor Control and Licensing Branch (LCLB/the Branch), one a Liquor Primary Liquor Licence the other a Food Primary Liquor Licence.

**Liquor Primary Licence No. 178849:**

Effective Date: June 10, 2003  
Expiry Date: June 30, 2004  
Hours of Sale: 12:00 Noon – 2:00 A.M. Monday thru Saturday and  
11:00 A.M. – Midnight Sunday  
Capacity: Area 1 – 195 patrons, Patio – 32 patrons

**Terms and Conditions:**

- This licence is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensee in British Columbia'.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.
- Patio extension permitted as outlined in red on the official plan, patio capacity must be taken from inside capacity when patio in use.

**Food Primary Licence No. 179638:**

Effective Date: June 10, 2003;  
Expiry Date: June 30, 2004  
Hours of Sale: Noon – 2:00 A.M. seven (7) days a week  
Capacity: Area 1 - 70 patrons, Area 2 - 25 patrons, Patio – 76 patrons

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**Terms and Conditions:**

- This licence is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensee in British Columbia'.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.
- Patio extension permitted as outlined in red on the official plan.
- Patio must be staffed during times of operation.

**ALLEGED CONTRAVENTIONS AND RECOMMENDED ENFORCEMENT ACTION****EH03-189**

The Branch alleges that on December 13, 2003, the licensee contravened section 35 of the *Liquor Control and Licensing Act* by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale. The recommended enforcement action is a two (2) day suspension of the liquor license commencing on a Friday.

**EH03-190**

The Branch alleges that on October 12, 2003, the licensee contravened section 12(2) of the *Liquor Control and Licensing Act* and section 71(2)(b) of the *Liquor Control and Licensing Regulations* by permitting overcrowding beyond the patron capacity less than or equal to the occupant load. The recommended enforcement action is a one (1) day suspension of the liquor license to take place on a Saturday.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention.

For the contravention of permitting a minor to enter on or to be on premises where liquor is sold or kept for sale the penalty range is a one (1) to three (3) day licence suspension and/or a one thousand (\$1,000) to three thousand (\$3,000) monetary penalty for a first contravention.

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For the contravention of permitting more persons in the licensed establishment than the patron capacity set by the general manager, and the number of persons in the licensed establishment is less than the occupant load the penalty range is a one (1) to three (3) day licence suspension and/or a one thousand (\$1,000) to three thousand (\$3,000) monetary penalty for a first contravention.

For any breach of any provisions of the Act , the regulations or the terms and conditions of the licence not specifically referred to elsewhere in the schedule the penalty range is a one to three day licence suspension and/or a one thousand (\$1,000) to three thousand (\$3,000) 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).

**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

**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  
 Family private special occasion licence  
 Public special occasion 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.

**Section 35 of the Act states as follows:**

**35** A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances

**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) What is the Standard of Proof
- (4) Whether the licensee has contravened section 35 of the Act and/or 12(2) of the Act & 71(2)(b) of the Regulations?
  - (a) Minor on Licensed Premises
  - (b) Overcrowding of the patio
  - (c) Directing Mind; Due Diligence; Permit

**5) Whether a penalty is appropriate**

(a) Contemporaneous submissions

(b) Penalty

(i) Contravention of Section 35 of the Act

(ii) Contravention of Section 12(2) of the Act and 71(2)(b) of the Regulations

**EXHIBITS**

The following exhibits were presented:

<b>Exhibit 1</b>	Book of Documents
<b>Exhibit 2</b>	Scaled Floor Plans (2 pages) of the Shark Club
<b>Exhibit 3</b>	Two photographs of the main entrance of the Shark Club
<b>Exhibit 4</b>	Two photographs, front patio & back patio of the Shark Club
<b>Exhibit 5</b>	Two photographs of back patio of the Shark Club
<b>Exhibit 6</b>	Two photographs of back patio of the Shark Club
<b>Exhibit 7</b>	Undated correspondence from the General Manager of the Shark Club to one of the principals of the Club
<b>Exhibit 8</b>	Two photographs of interior northern entrance of the Shark Club
<b>Exhibit 9</b>	Excerpt from manual, "Alcoholic Beverage Service"

**EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH**

**Witness A** testified that on December 13, 2003, she was 15 years old. She went to the Shark Club with several friends, all of whom she believed to be between 20 and 21 years old. There was a line-up of about 10 people at the entrance having their identification checked by doormen. She and her friends knew that she wouldn't be allowed entry as she was underage so they hung around the front entrance for 10 – 15 minutes until the doormen were distracted. They knew that if they all tried to get in at once they would likely get caught so entered in groups of 2 – 3 at a time. She wasn't asked for identification. She saw others from her group also entering without presenting identification and believes that none were asked to do so. Once inside she gave her

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jacket to a friend to check at the coatcheck and she went into the upstairs area where she remained for approximately 10 -15 minutes before going downstairs to dance. She was not requested to produce identification going from upstairs to downstairs. She remained on the dance floor and had been in the premises for approximately 1 ½ hours when she was approached by a police officer and asked for identification. When she was unable to produce identification the police officer escorted her outside where her age and identity were determined. She was issued a Violation Ticket (Exhibit 1, tab 10) for 'minor in liquor establishment'. She testified that she did not consume any liquor in the establishment.

**An R.C.M. Police Constable** (the constable) testified that on December 13, 2003, she was dispatched to the Shark Club to assist a liquor inspector in an inspection of the premises. She and another police officer arrived at approximately 1:37 A.M. and met the liquor inspector outside. There were two doormen outside the front entrance, no line-up of patrons waiting to enter. Inside the entrance there was one employee on duty at the coatcheck area. She did not notice a hostess station inside the front entrance as depicted in the bottom photograph in Exhibit 3. She went into the upstairs area while the liquor inspector and other police officer went into the downstairs area. A few minutes later she was standing on the stairway between the two areas when the liquor inspector drew her attention to a young woman approximately 16 years of age. The constable approached the young woman and requested to see her identification. When the young woman wasn't able to produce any identification, she was escorted outside where her identity and age were determined. The young woman told the constable that she had consumed 3 drinks of liquor that night, but didn't say where. She was pointed out to the manager and the bar staff and given a Violation Ticket for being in a licensed establishment underage. The constable issued a Licensed Premises Check report (LPC) to the manager (Exhibit 1, tab 9) for 'minor in premises'. The constable testified that she is familiar with the Shark Club, having conducted walk-throughs there on several previous occasions. She has had no reason to issue an LPC or Violation Ticket on the previous occasions. The only previous incident that she was aware of was when a bouncer had found a minor trying to enter the establishment using false identification.

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**An R.C.M. Police Corporal** (the corporal) testified that he attended at the Shark Club shortly after 1:00 A.M. October 12, 2003, with two other police officers. He went there as a follow-up to an overcrowding incident that had occurred the previous week. On October 12, 2003, there were two door control staff outside of the front entrance and one at the exit to the patio. He does not recall a hostess station located inside the front entrance as depicted in the bottom photograph in Exhibit 3, nor does he recall a staff member present in this area. He is familiar with the layout of the establishment and is aware that it contains both liquor primary and food primary areas. There were no staff present in locations to prevent patrons from moving between the two areas. He is familiar with the patio area. The doorway from the main liquor primary area to the patio always has a staff member present and there was one present this night who appeared to be monitoring persons moving in and out of the patio. There is an emergency exit opposite the door, which leads onto the parking lot, it is always locked and cannot be used to enter the premises from the parking lot. On this night the patio was very crowded. All tables were full and many people were standing. He counted 65 patrons in the patio area. In his opinion there would be a safety hazard if it was necessary to evacuate the area in an emergency. He advised the manager of his observations and issued him an LPC (Exhibit 1, tab 6). A report (Exhibit 1, tab 7) was subsequently sent to the liquor inspector. The corporal testified that he has never written an LPC for minors in the Shark Club. Identification of persons entering the premises is checked by staff at the front entrance.

**The Liquor Inspector** (the inspector) responsible for the area in which the Shark Club is located, testified that she has been employed as a liquor inspector the past two years. She is familiar with the layout of the Shark Club and its licensing configuration (Exhibit 1, tab 14 and Exhibit 2). It operates as one business under a liquor primary licence and a food primary licence. There are unlicensed stairways and passage ways between the licensed areas. There are no controls inside the premises to control persons moving between food primary and liquor primary licensed areas or to prevent persons carrying liquor into the unlicensed areas. This has lead to problems in the past which she has brought to the attention of the managers present on the previous occasions. She

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believes that the staff do not fully understand the nature of the liquor licence requirements arising from the configuration.

Alleged contravention of minor in liquor primary licensed area

The inspector testified that on December 13, 2003, she attended at the establishment for the purpose of conducting an inspection. She overheard security personnel say that they were expecting some trouble so she requested a police officer to make the inspection with her. Two police officers attended within a few minutes and they commenced the inspection. There were two doormen at the outside of the front entrance and two uniformed security personnel to the right of the entrance. There was no line-up of patrons waiting to enter. There was one staff person inside the front entrance. She did not see a hostess station inside as depicted in the bottom photograph of Exhibit 3.

The inspector testified that she counted 239 patrons in the liquor primary area which was licensed for 195. She then noticed a young looking woman whom she estimated to be 14 – 15 years old on the dance floor in the liquor primary area. She brought her to the attention of one of the police officers. The inspector was later advised by the officer that the young woman was a minor, 15 years old. The inspector advised the manager of the overcrowding and of the minor found in the liquor primary licensed area. The manager told her that he had heard that the minor had entered the premises through the back patio gate to the parking lot. The inspector testified that the patio gate from the parking lot is kept locked and there is a staff member stationed at the doorway between the patio and the main liquor primary area. A Contravention Notice (CN) (Exhibit 1, tab 22) for overcrowding was issued to the manager that night [it is not a subject of this hearing]. A CN for permitting a minor on the premises and failing to request identification (Exhibit 1, tab 8) was issued a few days later. [The CN of fail to request identification was not a subject of this hearing.] She submitted an Enforcement Action Recommended report to her regional manager recommending that enforcement action be taken with a recommended one (1) day liquor licence suspension. The regional manager directed that in the circumstances a two (2) day suspension be recommended.

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Alleged contravention of overcrowding

The inspector testified that she was not present at the Shark Club during the early morning hours of October 12, 2003, when the overcrowding of the patio was alleged to have occurred. She received a copy of the LPC (Exhibit 1, tab 6) issued by the police officer (the corporal) to the establishment and a copy of his report (exhibit 1, tab 7). She subsequently issued a CN to the establishment (Exhibit 1, tab 5). She testified that the liquor primary licence (Exhibit 1, tab 12) which covers the patio and the main liquor primary area contains a term and condition that the patio capacity of 32 must be deducted from the inside capacity of 195 when the patio was in use. The licence does not allow for a combined capacity of 227 (195 & 32).

She referred to a Branch publication (Exhibit 1, tab13) "Liquor-Primary Licence, Terms and Conditions, A Guide for Liquor Licensees in British Columbia", updated March 2003, (The Guide) which was in effect on October 12, 2003. 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 and "overcrowding". An updated version of the Guide on November 7, 2003, was in effect on December 13, 2003. It advises licensees that minors are not allowed in liquor primary areas and provides instructions for checking identification.

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 corporate licensee since 1997 (Exhibit 1, tab16). [As an aside, I pause to note that counsel for the licensee advised that there was a Third Party Agreement between the corporate licensee and the principals of the Shark Club allowing the Shark Club to operate the licensed areas. The agreement was not presented at the hearing.] The inspector testified that when she forwards correspondence to the licensed establishment she addresses it to the principals of the corporate licensee, to the general manager or to the attention of the owner/manager.

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

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- October 24, 2003 - CN issued for alleged failure to post the current liquor licence (Exhibit 1, tab 18)
- October 4, 2003 – CN and LPC issued for alleged overcrowding (Exhibit 1, tab 19)
- Date unknown – CN issued for alleged liquor removed from establishment (Exhibit 1, tab 20)
- May 16, 2002 – CN and letter regarding complaints received concerning liquor pricing, providing free liquor and permitting gambling, compliance meeting requested. (Exhibit 1, tab 21) [ The inspector testified that no meeting was held as the licensee never responded to the letter.]
- December 13, 2001 – CN for alleged overcrowding (Exhibit 1, tab 22)
- July 28, 2001 – LPC issued for alleged permitting intoxication (Exhibit 1, tab 23)
- March 11, 2001 – CN issued for alleged supplying liquor to minors and permitting intoxication (Exhibit 1, tab 24)
- September 2, 2001 – CN for minor in premises and contravention of term & condition (Exhibit 1, tab 25)
- April 13, 1999 – Warning letter and documents regarding minor purchasing liquor in Licensee Retail Store (Exhibit 1, tab 26)
- October 27, 1998 – Warning letter for overcrowding (Exhibit 1, tab 28)

## **EVIDENCE - THE LICENSEE**

**Witness B** testified, that he commenced duties as the general manager of the Shark Club on December 15 or 16, 2003. He was not present at the time of either alleged contravention. He testified, that the licensed areas of the Shark Club are operated as a combination pub and restaurant during the day. The identification of persons coming in are checked by a hostess. At night the licensed areas are operated as a night club. The identification of persons coming in are checked by security personnel employed as doormen. Although there are not many minors as patrons during the day there are enough to make it difficult on occasion. At night minors are discouraged, but the establishment has been told by the Branch that they cannot refuse minors entry to the food primary areas. Consequently, minors were confined to the upper food primary area at night. The bartender and the doorman at the coat check kept watch to ensure

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that they did not enter the liquor primary area. Minors presenting false identification is a continuing problem. It is seized when discovered. Prior to the alleged contraventions there were two doormen outside the front entrance, one by the coat check, one at the door to the patio and one circulating. Changes as outlined in Exhibit 7 were made in January 2004 following the incident of the minor being located in the liquor primary area. The changes included a new security firm hired, a new night manager with strong night club experience hired. One of the assistant managers is stationed at the front door with the two doormen. The circulating doorman is now stationed on the stairs between the food primary and liquor primary areas. The doorman for the patio was re-positioned to provide better coverage.

The witness testified, that the liquor primary area, including the patio, is operated to a maximum capacity of 230 patrons. The patio is operated at a capacity of 30 – 35 patrons. He was unaware that the liquor primary licence required that the number of patrons on patio be deducted from the maximum number allowed in the main liquor primary area.

The witness testified, that the food primary patio is used as a smoking area at night. It can only be accessed from the liquor primary area and there is door control to check the number of persons entering and leaving. The gate to the parking lot is kept locked and used only as an emergency exit. The patio is popular as a smoking area. Following the alleged contravention of overcrowding on the patio they have turned off the patio heaters to keep patrons from remaining on the patio all night. This allows other patrons the opportunity to use the smoking area.

The witness testified that meetings are regularly held with staff. There is a general staff meeting every two months. Bar staff meet monthly, service staff every 6 weeks to 2 months. Managers meet every Thursday. Current staff consists of 6 doormen, 6-7 servers, 5 bartenders, 7 kitchen staff (reduced to 2 during late hours) and 2 managers.

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**Witness C**, one of the principals of the Shark Club in Langley testified that he has been involved in the hospitality industry since 1967, operating several licensed establishments and continues to do so, including other Shark Club locations. He is involved in the hiring of the management team for the Shark Club. While he is involved in the interview process for hiring assistant managers he leaves the decision to the general manager. He attends some of the management meetings, he tries to attend one each quarter. The operations manager participates in management meetings and staff meetings. Manuals provide written direction to management and staff. The witness referred to an excerpt titled, "Alcoholic Beverage Service" (Exhibit 9) taken from one of the Shark Club's manuals. The excerpt deals with the service of alcohol, acceptable identification and dealing with intoxicated patrons. The Shark Club rarely hires staff without prior experience. New servers and bartenders shadow a staff member for their first week on the job for training purposes.

The witness testified that since the alleged contraventions of October and December 2003 a new general manager, experienced in the industry and a new security firm were hired in January 2004, as well as an assistant manager to supervise the security personnel. To overcome the problems created by having adjoining liquor primary and food primary licensed areas, the Shark Club is applying to change the licensing to that of a food primary only. They had previously prohibited minors after 8:00 P.M. but were told by the general manager of the Branch that was not permitted. They changed their policy as a result of that advice. He testified that the Shark Club is not popular with minors and there is no financial benefit to allowing them into the establishment.

**Witness D**, a principal of the Shark Club testified that the provision of subtracting the number of patrons allowed on the patio from the main area capacity is no longer required by the Branch. Consequently, they assumed that it was a mistake on the licence. He agreed that they should have clarified the matter with the Branch. He testified that in a previous incident with a suspected minor, a police officer and a liquor inspector requested her identification and determined that she was 24 years old.

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## 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 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.

- Independence of the Adjudicator

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

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

- 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. Dealing with both issues at the same time may prejudice

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the licensee's case as the adjudicator hears evidence of previous alleged contraventions that have not been proven.

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

- The contravention, overcrowding of the patio, 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

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“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 area. Thus it refers to a single area, not several, as is the case here where the licence is issued for a patio, which is in addition to the primary licensed area. Thus there is no contravention as alleged.

Counsel submitted that this is similar to the facts in *Plaza* where the alleged contravention did not exist. He submitted that as in *Plaza* it is not open to the general manager to try and 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.

- No penalty provisions

Counsel submitted that Schedule 4 (14) of the Regulations, which outlines the penalties for the alleged overcrowding contravention, refers to “occupant load”. The Branch has not introduced evidence of an occupant load for the patio, consequently there are no penalty provisions which apply.

- Definition of Patio

Counsel submitted that a patio by definition is an outside area. If it is enclosed, it is not a patio but is part of the inside liquor primary area and not a separate area. Consequently, no contravention arises. If it is an open area, there are no safety concerns.

- Licensee exercised due diligence

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

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[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 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:

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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 licensee was duly diligent. The establishment has policies and procedures in place to prevent minors from entering the liquor primary area and to prevent overcrowding. Security personnel and staff from the establishment control access at the front entrance, checking identification and counting the number of persons allowed to enter. A staff member monitors persons going into the patio area. Staff inside watch for minors moving from the food primary to the liquor primary area. Bartenders and servers are instructed to check identification of persons who appear to be underage, consequently, the minor would not have been served liquor. Staff are provided with training and meetings are held on a regular basis. Signs have been placed in the establishment advising patrons where minors are not permitted. The configurations of the liquor licensing areas for the establishment are complicated, thus the establishment had a practice of not allowing minors in the establishment after 9:00 P.M. They were told by the Branch that this was not permitted. They discontinued the practice, following which the problem arose. The minor circumvented the establishment's procedures developed to control access and ignored signage that

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minors were not permitted in the dance floor area. There was a presumption by the staff that there were no minors in the establishment. The minor did not appear to be underage. The constable who dealt with her did not notice her on the dance floor, nor did staff members.

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 general manager. Principals of corporate licensees owning several licensed establishment are not on site on a daily basis. Here, policy and procedures were in place for security personnel and staff to check identification and to control the number of persons permitted into the establishment. Even if those persons responsible were negligent or not diligent it does not satisfy the test set out by the court in *Plaza*.

- 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 corporate licensee.

- 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. The hearing on penalty should be adjourned until after the decision was made on whether a contravention had occurred.

Counsel submitted that in the circumstances of this case a monetary fine is sufficient. There is no evidence of health and safety concerns as required by the Liquor Appeal Board in the *Lucky Bar* decision, May 23, 2002.

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Counsel referred to the decision of the general manager in *D'Arcy McGee's*, EH03-026 regarding monetary penalties:

"Concerning the recommended penalty, the licensee noted the reasons put forward by the branch in the NOEA and appendices. The branch suggested that imposing a monetary penalty would amount to the 'cost of doing business', that this licensee had an established pattern of overcrowding, and that overcrowding results in serious public safety issues and could result in injury or death. In reply to the NOEA, the licensee submitted there was no evidence of the 'cost of doing business' argument, of the licensee reaping "considerable income" from the excess number of patrons, or of a pattern of overcrowding. Concerning the safety issue, the licensee submitted that the BOL was 130 persons, the alleged capacity was not close to that and there was no evidence of any safety issues.

The licensee submitted that, if a penalty is imposed, a monetary penalty would be more appropriate than closure on Friday.

I have taken into consideration that these are the first proven contraventions since this establishment opened, that the staff was cooperative with the Liquor Inspector and that the overcrowding was not blatantly excessive. I have also considered the branch's numerous concerns with this licensee over enforcement issues, including overcrowding. In the circumstances, I find that either a licence suspension or monetary penalty is appropriate.

Although the branch has recommended a one day licence suspension, I find the licensee's submissions on monetary penalty to be persuasive. I have given weight to the compliance history only to the extent that it demonstrates the branch has told the licensee in the past of concerns about overcrowding. From July 2002 to January 2003, the branch raised concerns on 5 occasions, including the compliance meeting in October 2002. Given the circumstances, I am of the view that a mid-range monetary penalty is warranted, and I impose a penalty of \$2,000."

## **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.

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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.

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 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?

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 makes it clear that; "It also imposes further terms

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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.”

I do not accept counsel’s argument, that the definition of “patron capacity” nullifies the contravention because it refers to a singular area. One must look at the wording as a whole and not just focus on one word. The definition of patron capacity 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. I am satisfied that in the circumstances of this alleged contravention the patio as referred to in the Liquor Primary licence (exhibit 1, tab12) and depicted in the approved floor plans for the establishment (exhibit 1, tab 14) is the area designated by the general manager where liquor may be sold or served.

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

### **(3) What is the 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.

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**(4)** Whether the licensee has contravened section 35 of the Act and/or 12(2) of the Act & 71(2)(b) of the Regulations?

**(a)** Minor on Licensed Premises

The evidence presented by the Branch is that on December 13, 2003, a minor was found within the liquor primary licensed area. This was not contested or refuted by the licensee. I am satisfied that on December 13, 2003, a minor was on the premises where liquor is sold or kept for sale.

**(b)** Overcrowding of the patio

The evidence presented by the Branch is that on October, 2003, there were more patrons in the licensed patio area than that permitted by the terms and conditions of the liquor primary licence. This was not contested or refuted by the licensee. I am satisfied that on October 12, 2003, there were more patrons in the licensed patio area than that permitted by the terms and conditions of the liquor primary licence.

**(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 general manager.

I cannot agree with counsel that in this case it was the principals of the corporate licensee. They were not involved with the operation of the licensed establishment on a day to day basis. They set policies and hired a general manager to operate the business within the policy guidelines. I find that the manager employed at the time of the alleged contraventions was the directing mind of the licensee. It appears that he was in charge of the overall operation of the cabaret. He was responsible for the hiring and directing of the staff through regular staff and management meetings.

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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. The establishment has policies and procedures in place to prevent minors from entering the liquor primary area and to prevent overcrowding. 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. For the reasons following, I am satisfied that that has not occurred in this instance.

The licensee has configured the establishment with the liquor primary and food primary areas adjacent to each other. Each area has different regulatory requirements. While minors are permitted in the food primary area, they are not permitted in the liquor primary area. The liquor inspector was aware that security personnel and door control staff checked for identification and that staff inside generally kept watch for minors. She was concerned that there were no controls inside to prevent minors from moving from the food primary area into the liquor primary area and she addressed her concerns to previous managers on several occasions. Changes were not made to address those concerns until after the occurrence of the alleged contravention.

The establishment employed a staff person to monitor the patio area. There was no evidence of what purpose the monitoring was to accomplish, nor was there evidence of the instructions to the staff member. It may very well be that the staff person was responsible for monitoring for intoxication and inappropriate behaviour, but was less concerned about the number of patrons permitted on the patio as it is an outside area. Following the contravention the doorman has been re-positioned to provide better coverage.

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Counsel argued that the licensee was sufficiently diligent through its established policies and procedures, that it did not “permit” the contraventions. As I have stated above, I do not agree that the licensee has been duly diligent and thus may be said to have “permitted” the contraventions.

In conclusion I am satisfied that:

- on October 12, 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, and
- on December 13, 2003, the licensee contravened Section 35 of the Act by permitting a minor on the premises.

**(5) 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, and most recently in *Tonic Bar* 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

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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*.

Counsel submitted that if a penalty is to be imposed, a monetary fine is sufficient in the circumstances of this case.

In considering whether a suspension penalty is warranted, I note that there is no record of prior contraventions, offences or enforcement actions of these types for this licensee or this establishment within the year preceding these contraventions ("compliance

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history"). Therefore, the contraventions are considered as first contraventions for the purposes of the Penalty Schedule.

The evidence of the liquor inspector in reviewing the record for the licensee revealed several instances where concerns related to overcrowding were brought to the attention of the licensee. The week prior to the October 12, 2003, contravention for overcrowding the licensee received an LPC from the R.C.M. Police Corporal indicating his concern that the establishment was overcrowded on October 4, 2003. On December 13, 2001, and October 27, 1998, the Branch brought concerns of overcrowding to the attention of the licensee. The liquor inspector advised the manager on several occasions of her concern that there were insufficient controls to prevent minors from accessing the liquor primary area. The Branch notified the licensee in March, 2001, and April 13, 1999, of concerns with minors at the establishment. In light of the record for this licensee I am satisfied that a penalty is necessary to ensure future voluntary compliance.

i) Penalty for contravention of Section 35 of the Act.

The Branch has recommended a suspension of the liquor licence for two (2) days commencing on a Friday. Counsel for the licensee has submitted that a monetary penalty is sufficient. I am concerned that a monetary penalty in the circumstances of this case may not give recognition to the seriousness of the contravention. For this contravention to have occurred there was a lack of action and attentiveness on the part of management and staff at the establishment. Management failed to respond to the liquor inspector's concerns regarding insufficient measures to control minors moving between the food primary and liquor primary areas. Staff outside and inside of the establishment failed to identify the minor and prevent her from entering and remaining in the liquor primary area. A licence suspension will have the effect of bringing the contravention to the attention of all staff and the seriousness of the consequences. In the circumstances of the case, I am satisfied that the mid-range penalty of a two (2) day suspension is appropriate. During the course of the hearing I had the opportunity to observe the minor. She appeared no older than her 16 years.

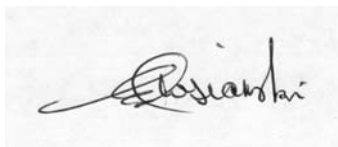
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A date will not be set for the imposition of the two (2) day suspension of the liquor licence for the contravention of Section 35 of the Act until such time as the issue on the penalty for the contravention of Section 12(2) of the Act and 71(2)(b) of the Regulations has been determined.

ii) Contravention of Section 12(2) of the Act and Section 71(2)(b) of the Regulations

Counsel has submitted that there are no penalty provisions under Schedule 4 (14) or (15) for this contravention as the Branch has not proven the occupant load for the licensed area. I agree with counsel that those provisions do not apply. There is however, a general penalty section at schedule 4 (46) for any breach of any provisions of the Act , the regulations or the terms and conditions of the licence not specifically referred to elsewhere in the schedule. The penalty range is a one (1) to (3) three day licence suspension and/or a one thousand (\$1,000) to three thousand dollar (\$3,000) monetary penalty for a first contravention.

This provision was not brought to the attention of counsel for the licensee and counsel was not given opportunity for submission on whether this penalty provision should apply to this contravention. It would be procedurally unfair to consider the provision without giving counsel an opportunity to address the issue of whether the provision should apply. Consequently, I will delay consideration of the appropriate penalty for this contravention until counsel has been given the opportunity to make written submission on the issue. To be considered the submission must be received by the Case Management Administrator of the Branch no later than 4:00 P.M. of July 23, 2004.



Edward W. Owsianski  
Enforcement Hearing Adjudicator

Date: June 24, 2004

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cc: R.C.M.Police, Langley Detachment

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Mike Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Shahid Noorani, & Peter Mior, Branch Advocates

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

(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.

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(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.

(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

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- (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.]

#### **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.

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- (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.

**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

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- (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:
- (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.

*Liquor Control and Licensing Act*

**LIQUOR CONTROL AND LICENSING REGULATION**

**"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;

(2) In the Act and in this regulation, **"compliance history"** means, in respect of a licensee, a record of

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- (a) the findings of contravention, within the meaning of section 63 of this regulation respecting the licensee,
- (b) the offences under the Act, and the offences prescribed under section 20 (3) of the Act, of which the licensee has been convicted,
- (c) any other matter referred to in section 20 (1) of the Act, and
- (d) the enforcement actions to which the licensee was subject as a result of those findings of contravention, offences or matters.

#### **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
- (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,

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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.

14	Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load	1-3	3-6	6-9	\$1 000 - \$3 000
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

46	Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specifically referred to in Items 1 to 45	1-3	3-6	6-9	\$1 000 - \$3 000
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