



**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 R.S.B.C. 1996, c. 267

Licensee:	613952 B.C. Ltd. dba Atlantis Club 1320 Richards Street Vancouver, BC
Case:	EH05-013
For the Licensee:	Ty Van Truong Yung Truong
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	June 7, 2005
Place of Hearing:	Vancouver
Date of Decision:	June 20, 2005

INTRODUCTION

The licensee operates a night club on the edge of the entertainment district of downtown Vancouver. There has been much redevelopment of the neighbourhood over the past few years. This has resulted in considerable attention being focussed on the remaining nightclubs and bars in the area both by the new condominium residents and as a result, by the police.

In the early morning of December 18, 2004, a constable of the Vancouver Police Department did a routine Licensed Premise Check (LPC) and counted more patrons than the patron capacity noted on the establishment's licence.

The patron capacity for Primary Liquor Licence No. 146969 is 350 patrons.

ALLEGED CONTRAVENTIONS

On December 18, 2004, the licensee allegedly contravened Section 12(2) of the *Liquor Control and Licensing Act* (the *Act*), and Section 71(2)(b) of the *Liquor Control and Licensing Regulation* (the *Regulation*) by permitting more persons in the licensed establishment than the person capacity set by the general manager and less than or equal to the occupant load.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act

Section 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.

Liquor Control and Licensing Regulation

Section 71(2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:

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

The relevant effect of these provisions is to authorize the general manager to impose terms and conditions on a liquor licence, which may limit the person capacity allowed in the establishment.

ISSUES

1. The issue is whether the evidence supports a finding of overcrowding beyond patron capacity.

EXHIBITS

Exhibit No. 1 Book of Documents presented by the branch.

EVIDENCE

The constable responsible for the LPC was tendered as a witness. He testified that:

- He was familiar with the establishment.
 - He had considerable experience counting patrons in crowded rooms and licensed establishments.
 - He attended the establishment in the normal course of his duties on December 18, 2004.
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- The neighbourhood in which the establishment is situated, contains bars and nightclubs but has been subject to considerable residential redevelopment as of late. There is some conflict between the residents and the bars and nightclubs, regarding crowding and noise.
 - At 1:00 a.m. he and his patrol partner observed a large crowd lined up outside the establishment. He decided to do a LPC. Before entering the establishment, he called for back-up in the interest of officer safety. Two additional uniformed police constables attended before they all entered.
 - The constable advised the doorman that he wished to do a LPC. The doorman summoned the club manager. The doorman also advised that he had a count of 350 persons.
 - The constable did a visual rough count to see if the number of patrons was high enough to warrant a thorough count with a mechanical counter. He determined that it was.
 - The constable did a count from the floor, using a mechanical counter. He described in detail the technique he used to count the patrons in the room.
 - He was able to focus entirely on the count as he had backup officers watching him and themselves as he counted. He counted 472 patrons and noted that amount in ink on his arm, as is his custom.
 - He informed the club manager of the result of his count. The club manager asked for a recount and offered to accompany the officer, and provide access to a catwalk above the floor to better visualize the room.
 - The constable counted 515 patrons from the catwalk. The club manager counted contemporaneously with constable. The club manager counted 392.
 - The constable issued a Licensed Premise Check to the club manager identifying the results of all of the counts, including the one conducted by the club manager.
 - He testified that each count took approximately five minutes.
 - The constable testified that there have been ninety-one (91) calls for police service to the establishment between August 2004 and
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June 6, 2005. He agreed that the neighbours call often regarding fights and noise, but that every time he has attended the establishment on a call has resulted in an arrest or investigation of an offence. He has attended on approximately thirteen (13) occasions.

The liquor inspector responsible for the area was called as a witness. She introduced all of the documents in Exhibit No 1, and testified that:

- The neighbourhood in which the establishment is located, is changing to a high density residential one. The new residents do not like the night clubs and bars because of the noise and other implications.
 - The assignment of the licence was submitted to the branch and transferred to the licensee in March 2002.
 - The interview inspection was carried out in June 2002 and included reference to the maximum patron capacity and the need to keep attendance in the establishment below that.
 - The licence indicates a maximum of 350 patrons.
 - The "Guide for Liquor Licensees in British Columbia" (the Guide) sets out terms and conditions appended to the licence; and the Guide has sections specifying that the licensee must comply with the maximum patron capacity stated on the licence.
 - The inspector did not attend the establishment on December 18, 2004, but did see the Police General Occurrence Report. She issued a Contravention Notice on the strength of that report.
 - There were two Contravention Notices issues- the second replaced the first. The general manager recommended that as the first indicated that both the patron capacity and the occupant load was exceeded, and the occupant load was only slightly exceeded, it would be preferred to pursue the alleged contravention of *beyond patron capacity* only.
 - There was a Compliance Meeting held on June 30, 2003, with the licensee in which overcrowding was discussed and a commitment was
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obtained from the licensee to try harder to comply with the patron capacity limitation.

- There have been previous Contravention Notices issued for alleged offences including overcrowding beyond patron capacity and occupant load, and a previous contravention proven for overcrowding, as indicated in Appendix A of Tab 1 of Exhibit 1.

The doorman was called as a witness. He testified that:

- He is in charge of counting patrons.
 - He does the identification checks at the front door and counts every patron in and out. He never leaves his post during a given night.
 - He counted 350 patrons on December 18, 2005. Once he reaches capacity, he only allows patrons in as other patrons leave- thus the count remains static at 350 until the exit of patrons exceeds the line up to get in.
 - He has worked for this management for two and a half years and worked in the same club with the previous owners for two years before that.
 - For approximately three years, he has been the sole individual responsible for doing the patron count at the door.
 - There is one entrance door and one exit door and he can see both from his post. Nobody gets in or out without him knowing about it or counting them.
 - On December 18, 2004, he was working on the door and responsible for the count as on all other nights. The club was at capacity, but not more. There were people lined up outside, but he was not letting them in until there was a party of the same size leaving.
 - There are regular staff meetings. Management talks about everything to do with operation of the club. Nobody else does a count, but for the doorman.
 - He was the doorman and responsible for the count on the days that the establishment had alleged contraventions of overcrowding in the past, but
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the allegations were wrong. The counts were not the result of actual overcrowding. What he has on my counter is correct. It is difficult to count accurately from inside. The inside counts were wrong. He feels that the club is sometimes picked-on by the police, and that might contribute to the appearance of having a bad history.

The club manager was called as a witness. He testified that:

- December 18, 2004, was an average night in terms of patron attendance.
 - He did a count of 392 people.
 - He accompanied the officer when he did his count. He told the constable that he thought the officer's count was inaccurate and asked the officer to do it again.
 - He believes it is a waste of time to try to count from the floor. He offered that they could together count from the catwalk and they did. The line of sight is better from the catwalk, but there are still areas of impaired sightlines up there.
 - None of the other officers were counting. He did not know what they were doing.
 - The establishment was at capacity, but it was really an ordinary Friday night.
 - If the officers had waited outside at closing, they could have accurately counted how many people were in the night club.
 - He thought it took around ten minutes for him to do his count from the catwalk.
 - When the club has had contraventions of overcrowding in the past, they have taken action- *"have tightened it up quite a bit. It was an issue in that we didn't take the care that we should have. Since then the club has been taking better care- it is more tightly run."*
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- He does not typically do counts. He indicated that he knows the "ball park numbers. One gets to know the room". He testified that he trusts the doorman for the counts.

SUBMISSIONS

The licensee submitted that the police constable's counts were inaccurate. It submitted that the time allowed to make the counts was not sufficient to do an accurate count, and that the club manager's count was the result of superior knowledge of the establishment's space. The licensee also submitted that there was too much discrepancy between the counts to accept them as accurate, and that the fifty (50) or so staff members working that night were likely included in the counts. The history of police attention to the club is the result of unhappy neighbours making frivolous or vexatious calls to police rather than any direct fault of the establishment. Finally, the licensee says that if the police were interested in an accurate count, they could have waited outside the club when it closed down and counted as each individual left the establishment.

ANALYSIS AND DECISION

I find that the constable did a detailed and careful count. I find that his technique was appropriate and his counts were as close to accurate as can be expected. I accept the evidence of the constable in its entirety.

Having found that the counts were reasonably accurate, I find that the discrepancies between the officer's counts are explainable by the differing vantage points from which they were taken, and the passage of time between them.

I find that the estimated time of five minutes spent on counting was reasonable under the circumstances, and the constable was not rushed or forced to count too quickly to do a careful job of it.

I find the club manager's count to be consistent with a conclusion that the club was over its patron capacity. He testified that he counted 392 persons and I accept that he counted as such. That figure is clearly over the 350 patrons allowed. The remaining question is therefore, whether the club manager counted staff as well as patrons in doing his count. There was testimony that there were more than fifty (50) employees in the establishment at the time of the LPC, which was indicated to be a normal night. I do not accept this evidence. There was nothing in evidence to support a staff to patron ratio of 1.5. The evidence is that this was a normal night of operations for the establishment. Further, I do not accept that the club manager, who testified that he is experienced and has participated in LPCs in the past, was counting staff in his count. I find that he knew that the count was to exclude staff and include only patrons, and I find that his count of 392 persons was indeed a count of 392 patrons.

The doorman was confident that he could not be mistaken about the count. He repeated that nobody gets past the door without him counting. He takes no breaks. Yet he admitted to having been on duty in the past when allegations and findings of contraventions occurred. The club manager testified that the establishment has improved its procedures since those allegations and contraventions, yet the doorman remains adamant that he always did and does count correctly. It is also noteworthy that the club manager's count varies from the doorman's count by forty-two patrons. I find the doorman's evidence to be unreliable. I cannot, based upon the evidence of past and present allegations and contraventions, accept that his counts are accurate.

On the evidence, there is no back-up or secondary system for monitoring or controlling the number of patrons in the establishment, beyond the count of the

doorman. In absence of a reliable door count, there is no evidence whatsoever that the establishment was within its allowed person capacity.

Lastly, I find that the count was conducted in the normal and established method of so doing during a routine LPC. The suggestion that a more accurate count could be done by waiting outside the establishment at closing time may be correct, but does not take into consideration the practical realities of enforcement activities. The requirement to do so would dictate that LPCs only occur just prior to closing time, or that establishments routinely get shut down during business hours to conduct such counts. I find the current practice of hand counting by mechanical counter is sufficient for the purposes for which it was designed. The existing enforcement process allows adequate opportunity to address irregularities or inconsistencies in the documented counts.

There is no issue as to the propriety of the change of allegation as between the first and second NOEAs as the change is in favour of licensee, and the licensee had sufficient notice of it.

I find the contravention has been proven.

PENALTY

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 the 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
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- Impose a monetary penalty
- Order a licensee to transfer a licence

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 *Regulation*.

The compliance history of this licensee is not impressive, particularly as it applies to overcrowding issues. There was little evidence put forth by the licensee that any specific steps have been taken to address overcrowding issues, or that the licensee has responded to the branch's attempts to bring them in to compliance.

The branch has recommended a three (3) day suspension for a first contravention pursuant to item 14 of Schedule 4 of the *Regulation*. This is the maximum penalty for a first contravention of overcrowding beyond patron capacity but less than or equal to occupant load.

I find that this penalty is appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 146969 for a period of three (3) days to commence at the close of business on Thursday July 21, 2005, 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 *Regulation*). I direct that Primary Liquor Licence No. 146969 be held by the branch or the Vancouver Police Department, from the close of business on Thursday July 21, 2005, until the licensee has demonstrated to the branch's satisfaction that Atlantis Club has been closed for three (3) business days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 20, 2005

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: Sonja Okada, Branch Advocate
