



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

A hearing pursuant to Section 20 of

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

Licensee: Irish Times Pub Co. Ltd.
dba Irish Times Pub & Oyster Bar
1200 Government Street
Victoria, BC V8W 1Y2

Case: EH05-112

For the Licensee: Peter K. Jones

For the Branch: Sonja Okada

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: December 8, 2005

Place of Hearing: Victoria

Date of Decision: December 20, 2005

INTRODUCTION

The licensee owns and operates a pub in the downtown tourist district of Victoria. It built and opened the establishment in September of 2004 and this was its first operating season. The pub holds Liquor Primary Licence No. 301113 and consists of a licensed room and two patios, each with an identified person capacity. The patio areas only provide liquor service to 11:00 p.m., while the main liquor service area provides service until 1:00 a.m. The person capacity for the main liquor service area is 195, and for the two patios: 44 and 36 persons respectively.

A Compliance and Enforcement officer (C&E officer) attended at the pub on June 17, 2005, after 11:00 p.m. and allegedly counted more persons than the person capacity. This event led to the enforcement action and the allegations of contravention.

The branch issued a Notice of Enforcement Action (NOEA) alleging overcrowding beyond person capacity *greater than occupant load* on the basis of information that the occupant load for the premises was 195 persons. During the enforcement action process, the branch discovered that the occupant load was 250 persons. The branch then issued a further NOEA repeating the first allegation and adding a "lesser but included contravention(s)" of overcrowding beyond person capacity *less than occupant load*.

PRELIMINARY MATTERS

At the commencement of the hearing the licensee indicated, that he had been advised that the branch's Book of Documents due to be introduced as an Exhibit, contained objectionable material. The proposed record of enforcement action included information relating to events that took place after the allegations in issue. The licensee argued that these are not relevant to the issue at hand and should not be considered.

The branch submitted that as the adjudicator sits as general manager, this information is technically (if not in reality) already known to me. Further, the branch submitted that the history of contraventions is relevant to establishing a penalty, and an allegation that takes place after the allegation in issue must be considered.

I find that an allegation relating to an event that post-dates the issue in contention is not proper information for the record to be put before an adjudicator. The object of the adjudication is to consider the allegations relating to the issue before it. Due to the unique nature of this adjudication process as set out in the enabling legislation, the adjudicator, sitting as general manager, may take into account the history of compliance- including unproven contraventions- in establishing the appropriateness of awarding a penalty. I find, however, that allegations relating to events that occur after the events in issue do not constitute "history" with respect to the allegations in issue. These allegations are therefore, not relevant to the allegations before the adjudicator. The adjudicator, if he has actual knowledge of such matters due to his position of general manager delegate, must disabuse himself of that knowledge. All information relating to allegations of contravention post issue will be struck from the branch's Book of Documents.

ALLEGED CONTRAVENTIONS

On June 17, 2005. the licensee allegedly contravened Section 6(4) of the *Regulation* by permitting more persons in the licensed establishment than the person capacity set by the general manager and the number of persons in the licensed establishment was *more than* the occupant load.

In the alternative, the branch alleges that the licensee contravened Section 6(4) of the *Regulation* by permitting more persons in the licensed establishment than

the person capacity set by the general manager and the number of persons in the licensed establishment was *less than* the occupant load.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Section 1(1) "**person capacity**", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment.

Section 6(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).

Section 63 In this part, "finding of contravention" means in respect of an alleged contravention of a licensee,

(b) a determination made by the general manager under section 65, that the contravention occurred.

Section 64(3) The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result...

ISSUES

The issues are:

1. Did the licensee exceed the person capacity?
 2. If the licensee did exceed the person capacity, was the overcrowding less than, equal to, or greater than the occupant load?
 3. If the licensee did exceed its person capacity or occupant load, is the defence of due diligence available to the licensee?
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4. Is the allegation of "less than occupant load" an included offence in the allegation of "greater than occupant load" and was the alternative allegation pursued in a procedurally fair manner?
5. Is a penalty appropriate in the circumstances and if so what is the appropriate penalty?

EXHIBITS

Exhibit No. 1: Branch's Book of Documents- excised as indicated in Preliminary order.

Exhibit No. 2: Letter of December 7, 2005, from doorman

EVIDENCE

The branch called the C&E officer, who testified as follows:

- He attended at the pub to do a routine inspection at 11:00 p.m. on June 17, 2005.
 - He observed a large crowd of people near the entrance.
 - He observed people on the patios.
 - On entering, he found the pub to be very crowded and had difficulty moving about.
 - He took out his mechanical counter and began to make his way through the pub, counting patrons.
 - He found the lighting and vantage points easily facilitated an accurate count.
 - He counted three hundred and two (302) patrons, exclusive of occupants of the patio and of staff.
 - The count was concluded shortly after 11:10 p.m.
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- He then went to the bar area and requested an audience with the manager.
 - He noted that the band had stopped playing and people began to leave.
 - He reset his counter and began to make his way through the pub to do a second count.
 - The second count indicated two hundred and sixty five (265) patrons, again exclusive of people on the patios and staff.
 - The second count concluded shortly after 11:20 p.m.
 - During the second count, the acting floor manager joined him while he walked.
 - He requested that she do a count, and reminded her to avoid counting staff or people on the patios.
 - They looked over the floor plans and licence and he encouraged her to get a count from the doorman.
 - The floor manager advised that she counted two hundred two (202) people and the doorman's count was two hundred fifty-eight (258).
 - The floor manager advised him that there were ten staff members on shift at that time.
 - The C&E officer testified that there had never been an allegation or a warning relating to overcrowding at this establishment in the past.
 - He also testified that prior to the decision to pursue enforcement action, the branch erroneously believed the occupant load to be 195 persons. When it was confirmed to the branch's satisfaction that the actual number was 250, the amended NOEA with the included offence was issued.
 - He recommended enforcement action in large part due to the implications of safety issues arising from exceeding the occupant load- which he then believed to be 195 persons.
 - He is not the usual C&E officer for the area, though he sometimes works there. The usual C& E officer was not consulted with respect to prior inspection issues.
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The licensee called his general manager, who testified as follows:

- The pub first opened on September 13, 2004.
- The licensee carefully adheres to all branch and licence requirements.
- He left just before the C&E officer arrived on June 17, 2005.
- When he left, the main liquor service room and the patios were all at capacity.
- When the band finishes its second to last set, at around 11:00 p.m., there is typically a mass exodus of people from the pub and 15-20 people leave immediately. About 15 people leave every 15 minutes after that. Also the people from the patios usually come in to the main liquor service area at that time.
- Following the allegation relating to June 17, 2005, there was a Compliance Meeting held with the branch. As a result of that meeting, the licensee has made policy changes and doubled up the hostesses and doormen and provided all of the new staff with counters.

The licensee called the floor manager, who testified as follows:

- She was on duty on June 17, 2005.
 - She met with the C&E officer at about 11:10 p.m.
 - He advised her that he had counted 302 and 265 in two counts and asked her to count also.
 - She counted two hundred and two (202) people at approximately 11:25 p.m.
 - She advised that any overage from capacities is a result of patrons moving through the main liquor service area from the patios, to pay, to leave, or to go to the washrooms.
 - There is no exit from either patio without walking through the main liquor service area.
 - Between 11:00 and 11:30 a.m., a lot of people left the pub.
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- Any congestion is usually a result of people emptying out of the patios or wanting to leave the pub after paying. They gather around the computer terminal by the bar.
- The patios must be cleared by 11:30 p.m. in accordance with our licence. It is sometimes difficult to find room for those people inside the main area.

The licensee called the principal shareholder and operator of the licensee. He testified as follows:

- He built the pub and it opened in September of 2004.
- He also owns ^[1].
- He has owned and operated ^[2-3].
- During the twelve years he has been in business in B.C. he has never received a Contravention Notice nor been warned by the branch about overcrowding.
- Overcrowding actually hurts his business. The type of business does not do well when the room is too crowded or the servers cannot efficiently get to the patrons.
- The congestion problems associated with people leaving the patios did not arise until the "patio season". The allegation occurred in the first patio season.
- Patrons cannot get to the washrooms from the patio without walking through the main liquor service area.
- People begin leaving the pub after 11:00 p.m. to get in line for night-clubs.
- Following the issuance of the Contravention Notice, he attended at a Compliance Meeting with the branch and following that he instituted changes to our policy to address this issue.

^[1-2-3] Personal information severed pursuant to the Freedom of Information and Protection of Privacy Act.

SUBMISSIONS

Branch

The branch submitted that the evidence shows the pub was overcrowded beyond its person capacity and greater than occupant load. In the alternative, the pub was overcrowded beyond person capacity and "equal to or less than occupant load.

The branch submitted that the alternative argument is an included contravention and as such proper notice was served with the original NOEA.

The branch also submitted that whether or not patrons did come from the patios, more than 250 persons occupied the main liquor service area.

Any defence of due diligence should not be accepted because the licensee did not take adequate steps to control the number of patrons in the establishment at the relevant time.

Licensee

The licensee submitted that I have discretion to impose no penalty even if I find the contravention has occurred. Further, he submitted that I should exercise that discretion.

The licensee also submitted that the C&E officer did not consult the usual C&E officer, who had more knowledge of the pub, when he decided to pursue enforcement action. If he had done so, and known the correct occupant load, the enforcement action would not have been taken.

The licensee argued that the alternative argument is procedurally unfair as its agent had prepared for the first NOEA, and had only minimal time to prepare for the alternative argument.

The licensee argued that it used due diligence to resolve the design problem with the patios. When it was brought to their attention in the Compliance Meeting that changes were required to address the issue, suitable changes were made.

The licensee also argued that the C&E officer had no more experience counting than did the floor manager or the doorman, and therefore his evidence should not be accepted over theirs.

ANALYSIS AND DECISION

I accept the submissions of both the branch and the licensee that notwithstanding some earlier confusion, the occupant load of the establishment was 250 at all relevant times.

I find that more than 250 patrons occupied the pub at one point during the evening of June 17, 2005. The evidence is consistent with the pub being overcrowded and then emptying out as described by the witnesses.

I find that there were 302 patrons at approximately 11:10 p.m., 265 patrons at approximately 11:20 p.m., and 202 patrons at approximately 11:40 p.m. I find the evidence of each of the witnesses in this regard to be credible. When the band stopped playing, the pub emptied out as it usually does at such time, and the numbers declined in accordance with the evidence.

As I have found that that the count of 302 was accurate, both the person capacity and the occupant load were exceeded.

I find that the establishment was overcrowded beyond occupant load, and therefore that the initial contravention has been proven.

In light of the above it is unnecessary to decide the issues related to the included contravention.

Due diligence:

There is insufficient evidence for a finding of due diligence. The licensee could have contained the number of patrons in the establishment simply by letting fewer in. There was no indication of the occurrence of an event out of the control of the doorman, or of a staff member neglecting his or her duties. If the occupancy of the patios and the movement of patrons from there to the main liquor service area was a critical factor in the overcrowding, the licensee could simply have counted those patrons in the capacity figures for the main area in the hour or more prior to the patios closing. They could then have held the door accordingly. Due diligence is reserved for situations where the licensee simply has no control over the contravention, notwithstanding the implementation of all reasonable measures to control the event. This would include such situations as patrons "storming the door" or a properly trained employee without warning suddenly abandoning his or her responsibilities. I find that in this matter, the defence of due diligence must fail.

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
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- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

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 range of penalty for a first contravention of Section 6(4) of the *Act* in accordance with item 15 of Schedule 4 of the *Regulation* ("more than occupant load") is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000. The branch has recommended the minimum monetary penalty of \$5,000.

The branch has the ability to determine whether or not to pursue enforcement action after alleging a contravention. In cases of overcrowding, that decision is often dependent upon the licensee's compliance history and safety issues related to overcrowding beyond occupancy load.

I accept the evidence of the C&E officer that when this enforcement action was determined to be necessary, the branch's information was that the occupant load was 195 persons. The pub was apparently occupied by considerably in excess of what the Municipality had determined to be a safe number. It was reasonable therefore for the branch to consider enforcement action appropriate. Only days before the hearing, the branch acknowledged that the occupant load information was erroneous and the figure of 250 patrons, put forth by the licensee was correct.

The branch therefore made its decision to pursue enforcement action with, in hand, the inaccurate information that it had obtained from the municipality.

The branch has the authority to determine whether or not to pursue enforcement action for any alleged contravention. I have no jurisdiction to challenge the propriety of that authority, and indeed there is no indication that the branch's discretion was exercised inappropriately in this case. The branch acted on the best information available to it at the relevant time.

The licensee has a clean history of compliance. The principal of the licensee has been [4] establishments. In that time, there has never been an allegation of overcrowding of any description directed to any of his establishments. Nor has there been a single warning related to an overcrowding issue related to those establishments.

Two days following the issuance of the Contravention Notice, the branch held a Compliance Meeting for the licensee. The licensee attended with its principal and management. The licensee cooperated fully, and accepted the advice of the branch.

Immediately thereafter, the licensee doubled the door staff and number of hostesses on shift at the pub.

I find that although the contravention did occur, enforcement action was pursued due to inaccurate information in the hands of the branch. I find that but for that irregularity, enforcement action might not have been pursued. I find that the licensee responded immediately and with commitment to the recommendations the branch put forth at the Compliance Meeting.

[4] Personal information severed pursuant to the Freedom of Information and Protection of Privacy Act.

I find further, that the licensee has implemented timely changes to address any reasonable likelihood of overcrowding in the future.

The branch has obtained voluntary compliance in accordance with its policy and mandate. I find that a penalty is not required to ensure compliance with the patron capacities stated on the face of the licence and therefore, I find that a penalty is not warranted with respect to this contravention.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 20, 2005

cc: Victoria Police Department

Liquor Control and Licensing Branch,
Attn: Ron Rodrigue, A/Regional Manager
Vancouver Island/Okanagan/Kootenay Region

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate
