



**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:	Kelgary Holdings Ltd. dba Rose's Waterfront Pub 1352 Water Street Kelowna, BC
Case:	EH04-124
For the Licensee:	Rose M. Sexsmith
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	January 7, 2005
Place of Hearing:	Kelowna, BC
Date of Decision:	February 1, 2005

INTRODUCTION

The licensee operates an establishment, which has two distinct areas governed by Liquor Primary Licence No. 156977; the patio, and the interior. The maximum number of persons allowed in the patio area is 102. The maximum number of persons allowed in the interior of the establishment is 195. The maximums allowed by the general manager in this case, are the same as the Occupant Load prescribed under the *Liquor Control and Licensing Regulation (Regulation)*.

On July 31, 2004, during a routine inspection, two Inspectors counted considerably more than the maximum number of persons occupying the patio. They advised the manager of the need to immediately reduce the number of persons occupying the patio. Though the manager took steps in that regard, when the inspectors returned some hours later, the patio was still beyond the maximum person capacity.

The licensee does not deny that the maximum person capacity was exceeded on this occasion. The licensee's only position is that the penalty is not required as safety was not an issue and the licensee was diligent in the operation of the establishment. Further, the licensee says that best efforts are undertaken to attempt compliance with the *Regulation*.

ALLEGED CONTRAVENTIONS

On July 31, 2004, 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.

RELEVANT STATUTORY PROVISIONS

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

- s. 1(1) "**person capacity**", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment.
- s. 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).
- s. 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.
- s. 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...
- s. 66 (1) If, in relation to a contravention, the enforcement actions specified under section 64(2)(a) or referred to in section 65(1) include a suspension, the period of the suspension must, [at minimum] fall within the range established for the contravention under Schedule 4.

ISSUE

The licensee has accepted that the establishment was overcrowded beyond the stipulations of the *Regulation*. The only issue therefore, is whether a penalty is required under the circumstances.

EXHIBITS

Exhibit No.1 The Branch's Book of Documents

- Notice of Enforcement Action Letter
- Contravention Notice B00363
- Contravention Notice B00364
- Handwritten Notes of Inspector ^[1]

^[1] Personal Information severed pursuant to the Freedom of Information and Protection of Privacy Act

- Handwritten Notes of Inspector ^[2]
- Liquor Primary Licence No.156977
- Excerpt from Liquor Primary Licence Terms and Conditions Guide (Guide)
- Floor Plan of Rose's Waterfront Pub
- Final Inspection Report dated July 21, 1993
- Notice of Suspension dated December 14, 1994
- Notice of Suspension dated February 2, 1994
- Notice of Suspension dated November 15, 1994
- Warning Letter dated May 31, 1999
- Contravention Notice A000883 dated June 29, 2001
- Compliance Meeting Form C000259 dated August 30, 2001
- Contravention Notice B003580 dated June 20, 2003
- Compliance Meeting Form C001251 dated June 26, 2003
- Contravention Notice B003585 dated July 9, 2003
- Liquor Primary of Food Primary Inspection Interview Sheet

Exhibit No. 2 The Licensee's Policies and Procedures Document

EVIDENCE

The branch provided a liquor inspector. He testified as follows:

He and his co-inspector were both familiar with the licensee and had attended at the establishment many times.

The representative of the licensee is the beneficial owner of the corporate licensee and has been in control of the establishment for many years. Even before she was the nominal owner of the pub, she was known to be the beneficial owner of the establishment and has been in control of the pub since it first opened.

The inspectors attended at Rose's Waterfront Pub at 11:20 P.M. on July 31, 2004. It was the BC Day long weekend and a busy time in Kelowna licensed establishments.

^[2] Personal Information severed pursuant to the Freedom of Information and Protection of Privacy Act

Both of the inspectors were aware of the licensed person capacity of the pub. It was immediately apparent to the inspectors that the patio had more than the allowed number of 102 persons.

They entered, identified themselves to the staff at the door, and conducted a count using mechanical hand counters. The counts produced 162 and 167 persons. Although it was busy, it was not "jammed elbow to elbow" and the inspectors were able to pass through the crowd without difficulty.

The inspectors spoke to the manger of the pub. The manager responded that it was difficult to keep the numbers down on the patio because it was "such a nice night". The manager indicated that he would use his best efforts to comply immediately.

The inspector issued a Contravention Notice and served it upon the manager.

The inspectors left and returned two hours later. The patio still seemed overcrowded. They entered again, and did a second count. The results were 136, and 144 persons. The second inspector conducted a second count resulting in a person count of 154.

A second Contravention Notice was delivered by mail.

He has familiarity with or is the author of each of the notices and warning letters contained in Exhibit No. 1. He is the author of the Inspection Interview Sheet, Compliance Meeting Form, and the Final Inspection Report contained in the Exhibit. A number of these issues deal with overcrowding issues relating to the patio.

The licensee is aware of the issue of overcrowding on the patio. They have discussed it a number of times before. The licensee does make an effort to

comply. The layout of the establishment and in particular the entrance way to the patio—described as a garage door—make it difficult to control persons migrating between the two areas.

The patio is large, and there has been an historical issue with the number of persons allowed in that space. It has been increased in stages from as few as 45 persons, to the current 102.

The inspector has recommended a four (4) day suspension of the licence. It is the minimum penalty. No enforcement action was commenced with respect to the second Contravention Notice of July 31, 2004.

The licensee is always willing to make an effort to comply. She has been accountable for her actions and has worked very hard to get her staff to do their jobs.

The Licensee testified as follows:

When she first opened the pub, the patio only allowed 45 persons. It is the same physical dimensions now as it was then.

It was hard to keep patrons out of the patio when the weather was nice. There were three contraventions for overcrowding.

The licence was changed to reflect some new legislation several times and now it allows 102 persons, which is still too few for the physical space.

She had five to seven people working the doors. She is a responsible licensee and tries to keep to the licence requirements.

Exhibit No. 2 is a Policy and Procedures Guide which was put in place after the contravention in issue, in order to consistently control the overcrowding issue.

The doormen were obviously wrong in allowing that many people onto the patio. She is sorry. It is still difficult to control the number of people on the patio.

The outside wall of the patio is a short "stub wall" and is only two feet high. Anyone could step over it to the lawn and the lake if they were so inclined. There are also several wide exits from the patio. There is no danger to persons on the patio in an emergency. They could all get out easily.

She would not put anyone's safety on the line. She is a conscientious licensee.

The licensee called the manager as a witness. He testified as follows:

He has been in the bar business since the 1980s. He is familiar with the *Regulation*.

He had five doormen on that night. They all knew the capacity of the patio.

He remembers speaking to the inspector and being advised to "get the numbers down" on the patio. He undertook to do so by limiting new patrons to the inside of the pub and having the doormen move any patrons on the "fringe" between the two spaces to the inside.

He left his shift at 1:00 A.M., before the appropriate person capacity was restored. He left the head bartender in charge.

He knew it was going to be busy on that night because of the holiday weekend. There were no extra doormen on duty beyond what would have been expected on a normal Saturday night.

SUBMISSIONS

The branch advocate submitted that the evidence of the licensee does not excuse her from the penalty. She admitted the contravention occurred. She was aware of the crowds that were expected that night and prepared for them. She did not have a written policy in place, as her evidence was that Exhibit No. 2 came into effect as a result of the July 31, 2004, Contravention Notice. There were no extenuating circumstances. The manager of the pub did not reduce the persons on the patio to maximum capacity and indeed left control of the establishment in the hands of the head bartender while there were still too many persons on the patio. The numbers continued to be excessive, resulting in a second Contravention Notice, and were never restored to capacity before the pub closed that night.

The licensee apologized for her non-compliance. She said she does the best she can. She emphasized that the person capacity is not high enough for the particular space, and that the public was not endangered because the area is completely open to escape in the case of an emergency.

ANALYSIS AND DECISION

I find that the contravention has been proven. The licensee has the ultimate responsibility to ensure compliance with the *Regulation*. The patio was considerably over the person capacity specified in the licence when the first inspection was done at 11:20 P.M. The manager did not reduce the number of persons on the patio as he had an obligation to do. He indicated that he advised the doormen to move people from the threshold areas inside, and he refused to allow further patrons into the patio. This was not enough. I find that there was more that he could have done to reduce the number of persons on the patio. When the inspector returned more than two hours later, there were still

considerably more persons on the patio than allowed by the licence. The numbers had not been reduced significantly.

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
- 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* is four (4) to seven (7) days suspension and/or a monetary penalty of \$4,000-\$7,000.

I find that a penalty is in order. The licensee is aware of the person capacity for the patio. Indeed she is alert to overcrowding being a problem. She has been served with Compliance Notices and indeed suffered a suspension for this in the past. She argues that the earlier offences occurred when the person capacity was particularly unreasonable and that this contravention is essentially the first of its kind since the permitted change.

Complying with the allowable person capacity is a condition of the licence. Compliance in this regard is a safety requirement, which cannot be discretionary in the licensee's hands. It is not for the licensee to determine the reasonableness of the licence requirements. Her arguments regarding the physical nature of the patio and her opinion that the people in the area were not in danger, are not relevant. The general manager must determine person capacity. Person capacity, by the operation of Section 6 of the *Regulation* must effectively match or be lower than occupant load. Occupant load is defined in the *Regulation* as being the least number of persons allowed under Building Regulations, Fire Regulations, or other local safety enactments. I have no jurisdiction to consider whether or not the occupant load is reasonable under the circumstances.

The branch has recommended a four (4) day licence suspension. This is the minimum suspension penalty for a first contravention. I find that the branch's recommendation of a four (4) day licence suspension is an appropriate penalty.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 156977 for a period of four (4) days to commence at the close of business on Friday, March 4, 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 the Liquor Licence No. 156977 be held by the branch or the Kelowna R.C.M. Police from the close of business on Friday, March 4, 2005, until the licensee has demonstrated to the branch's satisfaction that Rose's Waterfront Pub has been closed for four (4) business days.

Original signed by

Sheldon M. Seigel,
Enforcement Hearing Adjudicator

Date: February 1, 2005

cc: R.C.M.Police Kelowna Detachment

Liquor Control and Licensing Branch, Vancouver Island & the Interior Region
Attention: Gary Barker, Regional Manager

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