



**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:	578097 B.C. Ltd. dba Fernie Hotel (Baja Cantina) 691 – 1 Avenue Fernie, BC V0B 1M0
Case:	EH05-152
For the Licensee:	Simon D. Howse
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	Written Submissions
Place of Hearing	Victoria, B.C.
Date of Decision:	March 9, 2006

INTRODUCTION

This hearing was conducted by way of written submissions by agreement of the licensee and the general manager.

The licensee acknowledged that on October 30, 2005, the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation* (the *Regulation*).

The recommended enforcement action is a five thousand dollar (\$5,000) monetary penalty. The only issue is as to what penalty, if any is appropriate.

ALLEGED CONTRAVENTIONS

The licensee has contravened Section 6(4) of the *Regulation* - Overcrowding beyond person capacity greater than occupant load.

The contravention occurred on October 30, 2005, just past midnight on the business day of Saturday, October 29, 2005.

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...

Section 66 (1) If, in relation to a contravention, the enforcement actions specified under s 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 issue therefore, is whether a penalty is required under the circumstances of this case, and if so, what penalty is appropriate.

EXHIBITS

The licensee provided the following:

- Correspondence from Leblond Partners, re: occupant load calculation
- Correspondence from Spitula and Associates, Architects, re: occupant load calculation
- Correspondence to the branch

The branch provided the following:

- Liquor Primary Licence No. 015641
 - Red line floor plan of establishment
 - Pages 3, 12, from 'Guide for Liquor Licensees', Liquor Primary
 - Licensee's compliance history
 - Final Inspection Interview Sheet signed March 10/99
 - CN A000906 dated February 24/01; Licensed Premises Check A105477; letter dated February 26/01
 - CNA000940 dated February 14/03; LPC A105387
 - Compliance Meeting report C000284 dated April 16/03
 - Documents regarding Occupant Load change, stamped November 10/03
 - Compliance Meeting report C001041 dated November 20/03
 - Compliance Meeting report C001036 dated February 2/04
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- Compliance Meeting report C001027 dated February 17/04
- CN B003763 dated July 4/04
- Compliance Meeting report C001049 dated August 18/04
- Contravention Notice B002024 issued October 31/05
- Enforcement Action Recommended Report dated November 2/05
- Notice of Enforcement Action, dated November 8, 2005- with list of alleged contraventions and Compliance Meetings (Appendix A)
- Compliance and enforcement officer's notes
- Correspondence to the licensee

SUBMISSIONS

The licensee submitted the following:

The occupant load indicated provided for the premises operated under this licence is not consistent with the maximum occupant load that would be allowed under municipal requirements.

The number of patrons in the establishment was greater than the maximum person capacity and the established occupant load, but was less than the maximum that would be allowed under municipal fire and building codes.

The occupant load as granted is incorrect.

At approximately 10:25 p.m. on October 29, 2005, there was "an unexpected surge of people into the bar that resulted in there being more [than] the licensed amount."

The licensee has not applied for an increase in capacity "simply because our present building inspector has no [intention] of approving it."

"\$5,000 is too high a penalty to pay for having a temporary increase in patrons and NOT putting anyone's life at risk."

"We intend to apply for an increase in capacity in the spring when the building inspector ^[1]..."

The branch submitted:

The licensee is fully aware that the occupant load for the premises is 160 persons, as set out in the NOEA and supporting branch documents.

The licensee has had the issue of overcrowding brought to its attention by the branch in two Compliance Meetings; February 2, 2004, and February 17, 2004.

The branch registrar has explained to the licensee that the branch does not have the authority to set occupant loads.

The published occupant loads must be complied with or enforcement action may be taken.

ANALYSIS AND DECISION

The licensee has admitted that the licensed establishment was over patron capacity on the night in question. It argued however, that the maximum occupant load permitted by the fire and building codes should be 347 persons.

The representative of the licensee submitted that the occupant load on October 29/30 2005 was 347, being the maximum allowed under by-law, rather than 160 as approved for the establishment.

I find that the owners did know what the occupancy load was on the date of the contravention. This figure is easily confirmed and the licensee had an obligation to know the figure and to comply with that figure. Further, the representative of

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

the licensee submitted that he had considered applying for an increase in occupant load but had decided against doing so because of his belief that the application would be denied. I find that his submission is inconsistent with a belief that the higher occupant load was in effect.

I also find that the evidence of management's action, or lack thereof, after being advised of the extent of the overcrowding is indicative of the licensee's acquiescence of the overcrowding. While the licensee's representative submitted that management tried to reduce the numbers in the bar after being advised of the overage, I accept the evidence of the compliance and enforcement officer that patrons continued to be admitted to the bar after management was informed of being overcrowded.

The number of patrons counted by the compliance and enforcement officer was 212, 231, and 185, respectively, over a documented period of time. The owner/operator of the licence counted 185 at one point, and the doorman indicated that he was "running around 175 all night." I find that a reasonable interpretation of this evidence confirms in excess of the permitted 160 patrons at all relevant times to this contravention.

With respect to the appropriateness of the published occupant load relating to the liquor primary licence, safety, and control of the door, I agree on all points with the reasoning of the general manager in Snowshoe Sam's (EH05-041):

Occupant load [at page 11]

The published occupant load is not open for discussion. The licensee is free to apply for a different occupant load, but the current and effective one is known and irrefutable. The fact that the licensee was not happy with the published occupant load is not relevant to compliance with that number.

Safety [at page 11]

The licensee argued that the overcrowding was not a safety issue.... The licensee is not at liberty to evaluate occupant loads for the purpose of establishing public safety. This is a task reserved to municipalities and their assigns. The licensee has neither the expertise nor the authority to make decisions regarding occupant load. I therefore disregard all evidence so related as produced by the licensee as it is not relevant.

Control [at page 11]

The licensee's manager testified that ... patrons come in the door and cannot be controlled. Controlling the door is a paramount obligation of the licensee. If they cannot do it, they cannot maintain the conditions of their licence. There is no answer to failure to control the door. Failure to do so is no answer to allegations of overcrowding.

Accordingly, I find the contravention in this case 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
- 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 \$5,000-\$7,000.

I find a penalty is warranted by the actions of the licensee.

The recommended penalty is a monetary penalty of \$5,000. I find that penalty to be appropriate and within the stipulations of schedule 4 of the *Regulation*.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of five thousand dollars (\$5,000) relating to Liquor Primary Licence No. 015641 for this contravention. The monetary penalty must be paid no later than the close of business April 7, 2006.



Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 9, 2006

cc: R.C.M. Police Fernie Detachment

Liquor Control and Licensing Branch
Attn: Russell Boucher, A/Regional Manager
Vancouver Island/Okanagan/Kootenay

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