



**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: 0812152 BC Ltd., dba Social Night Club
155 176th Street
Surrey, BC V3S 5J9

Case: EH09-022

For the Licensee: Andre Bourque, Ryan Moreno

For the Branch: Olubode (Bode) Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Place of Hearing: Surrey, BC

Date of Hearing: April 16, 2009

Date of Decision: May 7, 2009

INTRODUCTION

The Social Club is a nightclub operating in Surrey under Liquor Primary Licence No. 044080. The licence stipulates that the hours of liquor sales are from 7:00 p.m. to 2 a.m. seven days per week and that the licensed capacity is 313 patrons. The licence is also subject to terms and conditions, including those contained in the *Guide for Liquor Licensees in British Columbia* (Guide).

ALLEGED CONTRAVENTION

By Notice of Enforcement Action (NOEA), dated March 4, 2009 the Liquor Control and Licensing Branch ("Branch") alleged that on January 1, 2009, at 12:30 AM, the licensee contravened section 12 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (*Act*) and the terms and conditions its licence by allowing more patrons in the establishment than the patron capacity set by the general manager and indicated on the face of the license.

The branch proposed a two (2) day suspension of the liquor license in accordance with item 46 of Schedule 4, of the *Liquor Control & Licensing Regulation* (*Regulation*).

RELEVANT STATUTORY PROVISIONS

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

Licenses

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(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 license is subject under the regulations, or
- (b) that are in addition to those referred to in paragraph (a).

ISSUE

1. Did the Licensee allow more patrons in the establishment than the capacity indicated on the licence?
2. If so, is a penalty appropriate, and what is the appropriate penalty?

EXHIBITS

Exhibit No. 1: Branch's book of documents

Exhibit No. 2: Treoscope Management Report (provided by the Licensee)

EVIDENCE

The liquor inspector testified. She identified all of the documents in Exhibit #1; the patron capacity of the Social Club, the terms of the license (tab 3) including the provisions of the Guide (tab 15), and the relevant sections of the *Act* and *Regulation* (tab 16). She also identified her notes, and described the administrative process leading up to the enforcement hearing.

The inspector also testified that the reason the Branch recommended enforcement action relating to this matter is that overcrowding presents safety issues, with respect not only to the patrons in attendance, but also to police and

emergency personnel who may find themselves working in the environment of the licensed establishment.

The inspector pointed out the provisions of the Guide that indicate that the Licensee is wholly responsible for complying with the *Act* and *Regulation* and the terms and conditions of the license whether the corporate representative of the Licensee is present or only management employees. She testified that the patron capacity indicated on the license is 313.

The inspector testified that on December 31/January 1, she was conducting routine inspections when she attended the establishment. She entered at 12:15 am on January 1 and noted two door staff. She did not observe a counting device at the time of entry, but later was advised that the one doorman had one in his possession. Her initial observation was that the establishment was crowded beyond what she had seen in previous visits. She accessed her mechanical counter, set the count to zero and began to count. She walked the room counter clockwise and obtained a count of 383 patrons, exclusive of the obvious employees, and exclusive of the patrons on the dance floor. She did not count the dance floor because it was very crowded and she had a count well in excess of the allowed capacity without counting the patrons on the dance floor. She felt that she would have a difficult time being precise with the dance floor count and chose to rely on the more certain pre-dance floor count.

Next, the inspector advised the manager of her count and asked if the doorman had an account. The door count was obtained by asking a doorman, who consulted his mechanical clicker and indicated a count of 346 patrons. The inspector asked the doorman if that was an "in and out" count, and he replied that he did not count patrons that had left.

She reviewed the licence with the manager and pointed out that the patron capacity was indicated to be 313, and she advised the manager that the doorperson's count was in excess of that. She advised the manager that she would do a second count and that he was welcome to accompany her or do his own. He did neither.

The inspector began a second count at 12:27 am. She started at the same point, counted the room counter clockwise, and did count the dance floor this time. As there were fewer people on the dance floor, she was able to obtain a count that satisfied her efforts at certainty. Her count was 425 patrons. She advised the manager of her second count and he indicated that he thought the capacity was 360 or 390 patrons and had advised his staff to hold the count steady at 350. The inspector again indicated that all of those figures were in excess of the limits specified on the licence and were in contravention of the *Act*.

The inspector left the premises and met with the Licensee's representative some weeks later. At that meeting the Licensee indicated that their Treoscope identification scanning system would indicate that 312 IDs were scanned on the night in question. Notwithstanding a comprehensive review of the facts and allegations relating to the evening in question, the Licensee's representatives said nothing of any count being made by the manager or a staff member during the inspector's visit on the date of the alleged contravention.

The principal of the licensee testified that the owners have tried to do a good job of complying with the regulatory provisions. They have three licensed establishments and are part of the Barwatch program intended to keep organized crime out of the bars and make them safe. He said the doorman's mechanical counter was an indication of how many people came in, and did not account for those leaving so was not a reliable count of the patrons in the establishment at any one time. He said the manager at the time was new and was confused

about the patron capacity and was probably quoting his knowledge of the occupant load.

He indicated that he believed a mechanical counter is not accurate and so they use the Treoscope numbers to indicate how many people were in the bar at any given time. He said that the Treoscope confirmed how many people's identification was scanned in at the front door.

The manager testified that the doorman's clicker showed 322 patrons when the inspector looked at it, and that it did represent "in and outs". He said that he advised one of the three doorman to keep the patron count below 350 for the night. He confirmed that the inspector told him the maximum number of patrons was 313 and he told her that he thought it was 350. He acknowledged that he made a mistake and that he had not looked at the license. The manager also indicated on examination in chief that he counted patrons on his own after the inspector's first count and then on cross examination, the manager testified that he counted after the inspector counted her second time and advised of her "dance floor in" total.

The manager also said that there is video surveillance of people having their ID swiped at the Treoscope machine, and that every person who entered was so processed. He also indicated that every Patron is scanned by the Treoscope if they enter through the main doors and that although there are at least two other doors that are not alarmed during operating hours, no patrons are allowed to access those doors. He testified that those doors are not staffed on a full-time basis during club hours. On cross examination, the manager contradicted his position on door staffing, and said there are four exits and one entry with doormen positioned at the exit points for a total of eight door staff. He said there is a manual for how to work as a doorman, but did not present it as an exhibit. He did present a management report from the Treoscope company, obtained well after the night in question. It shows a total of 312 IDs were swiped by the

machine between 8:30 pm and 4:30 am on the business night in issue (exhibit #2).

SUBMISSIONS

The Branch submits that the Licensee permitted more patrons entry to its licensed establishment than it should have. There were more patrons in the establishment at the time of the alleged contravention, and the licensee knew or ought to have known that the establishment was overcrowded.

The Branch cites *Ed Bulley Ventures Ltd. (c.o.b. as Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager)* [2001] B.C.L.I. No. 5 for the established definition of “permit 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, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.” (para 61).

The Branch submits that the evidence is clear that on the date in question, the establishment had well over the maximum patrons allowed under the terms of the licence.

The Branch submits that the Licensee did not exercise as high a degree of diligence as it should have as it did not articulate and enforce adequate policies for door control, and did not adequately train identifiable employees to supervise the implementation of those policies.

The Licensee submits that the establishment is relatively new, the staff are relatively new at their jobs, that the management of the establishment is diligent and knowledgeable and doing the best they can in an uncertain economic environment. They say the establishment has not historically been busy, it did

not anticipate the number of patrons it had on the date of the allegation, and the location on the highway to the US border supports this level of anticipation.

The Licensee submits that its manager provided adequate evidence that the inspector's count was flawed and that the best evidence is the number of patrons scanned by the Treoscope device as supported by exhibit #2.

ANALYSIS AND DECISION

By the manager's own testimony, he believed the patron capacity was 350 patrons, and had not looked at the licence. He indicated that he advised the doorman to keep the patron count at 350 and keep it steady at that count. I find this to be completely credible evidence. It confirms that the manager was ill-advised of facts of which it was critical for him to be informed. He did not do his due diligence, and neither did the representative of the Licensee who hired and trained him for the position that he was to hold. The manager was the representative of the licensee on site, or the operating mind at the critical time, and he was not diligent in discharging the obligations of the Licensee to be aware of and ensure compliance with the terms of the licence. Further, the manager testified that he had last obtained his Serving it Right certificate fifteen or twenty years prior to being hired to the position and was not provided with a copy of the Guide (he read it on line on his own) or provided with any written policies when starting his job as manager.

Further, I find the manager's testimony with respect to the doorman's count ("in and out") to be more believable than that of the principle in that regard, as to have a door count with a clicker of those entering but not leaving would be of little value to the purposes of the count. The manager then says, however that he did his own count on the insistence of the inspector and that his count totalled 320 persons, less his staff of sixteen, for a total of 304. I cannot imagine the manager would include his staff in a count designed to establish the lowest number of

patrons, and I find this evidence to be contrived. His result, just under the allowable capacity, is both completely at odds with two counts conducted by the inspector, and conveniently just below the allowable capacity. I note also that the inspector was quite confident that she invited the manager to either count with her or do his own after her first count and he either declined or simply did not do so. I prefer the evidence of the inspector, as it is consistent and reasonable under the circumstances, whereas the manager's seems contrived. It is also inconsistent with the testimony of the inspector and the principal, as well as some of his own testimony (such as when he conducted his count).

He said that three people stationed near the door were together responsible for taking money for cover charge, operating the Treoscope device, and checking ID. One of them had the mechanical counter at all times. The duties were shared equally among the three. I find that this arrangement is not conducive to an accurate patron count. It does not allow for accountability to rest with one individual responsible for ensuring that all patrons are counted. I also cannot understand on the evidence how one counter can allow for "ins and outs". My understanding is that these counters do not count backwards.

Adding to the uncertainty of patron control is that the evidence confirms there are multiple doors to the establishment, that are alarmed when the club is closed but not alarmed when it is open. The evidence is uncontroverted that these doors are not staffed on a permanent basis while the club is open, though the manager indicated that patrons are not allowed to use those other doors.

I note that although the manager confirmed that there is video surveillance that would confirm that every person in the establishment was processed with the Treoscope machine, the video data was not put into evidence. I note also that no doorman was called to testify, and no door-staff manual was put into evidence.

I find that the Treoscope device, though doubtless a useful tool for identifying those present at one time in the establishment, is not a tool suitable for keeping track of how many patrons is in an establishment at any given time and is only as accurate as the data put into it. It is not a replacement for a pair of "in and out" mechanical counters and is only credible evidence of how many IDs were swiped into it in a given time frame. It is, in this instance, far less weighty evidence of the number of patrons in an establishment than a repeated head count by an experienced individual with a mechanical counter. The next most credible evidence would be the difference between a diligently counted set of figures produced by a pair of mechanical counters - one for patrons entering the establishment and one for patrons leaving. Unfortunately in this case we do not have evidence of the latter.

I find the inspector provided professional and experienced counts in a diligent manner and credible evidence of the number of patrons in the establishment at the time of her visit. Her evidence was presented in an impartial and objective sounding fashion and she was open to the inherent weaknesses in her process. This provided by far the best evidence of the number of patrons in the establishment.

I find the establishment was well over its maximum patron capacity as indicated on its license and so was in contravention of the terms and conditions of its licence.

I further find that the operating mind of the Licensee, in the person of the manager on site on December 31, 2008 and January 1 2009, was not duly diligent in knowing the obligations of his position, having systems in place to satisfy those obligations, or enforcing adequate systems to ensure compliance with the *Act* and *Regulations*.

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 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 by the minimums set out in Schedule 4 of the *Regulations*. However, I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the NOEA.

The Branch submitted that a two day suspension was warranted for the contravention. In particular, the Branch submitted that the recommended penalty is reasonable in light of the circumstances. The overcrowding was about 20% beyond the license limits. The flow of people was significant, there was loud music, dim lighting, liquor consumption, and therefore a dangerous situation existed. The Licensee could have expected busy night as it was New Years Eve, and the manager in charge should be knowledgeable of the licence requirements generally and in particular the patron capacity. He was not.

The Licensee submitted that a two day closure would significantly affect business revenue and this hardship should be considered.

There is no record of prior contraventions, offences or enforcement action of the same type for this licensee or this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, Schedule 4, this is a first contravention and the recommended penalty is within the range for such.

Licensees that exceed their capacity are operating contrary to the public interest. Specifically, they are operating contrary to the principles of public safety, community standards, and the public's interest in having licensees abide by the conditions of their license. The maximum capacity established for a liquor-primary licence takes into account community input during the licensing process. The maximums are set out so as to reduce the risk of negative impacts on neighbourhoods and communities. These negative impacts include late night disturbances, parking problems and traffic flow problems. Allowing licensees to exceed their approved capacity effectively negates this community input and puts undue pressure on community resources.

I find that a license suspension of two (2) days is the appropriate penalty.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 044080 for a period of two (2) days, to commence as of the close of business on Tuesday, June 9, 2009, 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 Liquor Primary License No. 044080 is to be held by the branch or the local Police Department from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 7, 2009

cc: RCMP Surrey Detachment

Liquor Control and Licensing Branch, Surrey Office
Atten: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Office
Atten: Olubode Fagbamiye, Branch Advocate