



**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:	Commodore Ventures Ltd., dba The Commodore 369 Victoria Street Kamloops, BC V2C 2A3
Case:	EH10-059
For the Licensee:	Dino Bernardo & Chris Monteleone
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	September 8, 2010
Place of Hearing:	Kamloops, BC
Date of Decision	September 27, 2010

INTRODUCTION

The licensee operates The Commodore in Kamloops, BC. The licensee holds Liquor Primary Licence No. 302593. The allowed hours of sale for liquor are 9:00 a.m. to 2:00 a.m. Monday through Saturday, and 9:00 a.m. to midnight Sunday. The person capacity is 74 inside the establishment, plus 12 on the patio. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the Guide).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated June 9, 2010. The branch alleges that in the early hours of April 11, 2010 (the business day of April 10, 2010), the licensee contravened section 6(4) of the *Liquor Control & Licensing Regulation* (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 exceeded the occupant load.

The proposed penalty is a four-day licence suspension in accordance with Schedule 4, of the *Regulation*. Item 15 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type; a licence suspension of four to seven days and/or a monetary penalty of \$5,000 - \$7,000.

The licensee admits that the contravention took place but disputes that the proposed penalty is necessary or appropriate.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Regulation, B.C. Reg. 244/2002*****Capacity****6 (1) Before the general manager**

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(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).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

ISSUES

1. Did the elements of the contravention occur?
2. In the event that the contravention is found to have occurred, can the licensee establish a defence of due diligence?
3. If the contravention is proven, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit No. 1: The Branch's Book of Documents

EVIDENCE

The Liquor Inspector

The inspector identified all of the tabbed documents in Exhibit No. 1, in particular, the liquor primary licence (tab 3) on which the person capacity is indicated, and the floor plan (tab 4) on which the occupant load is indicated. She said that the Guide (excerpts at Exhibit No. 1, tab 6) gives an outline of the *Regulation* for the licensee's benefit. The Guide spells out the licensee's obligations in language easier to understand than the *Act* and *Regulation*. It makes the law easily available for the licensee. She also said that the Guide is given to the licensee on the initial inspection and at compliance meetings. She pointed out that page 21 of the Guide includes the following passage, "Your liquor licence tells you the maximum number of patrons or the maximum number or persons (patrons and staff) that you may allow in your premises at one time... It is important for you to know the type of capacity for which your establishment is licensed, and to make sure you stay within this limit."

The inspector testified that she has been a full-time liquor inspector for one year and has conducted person counts in a large number of liquor primary establishments. She said that counting the number of people in an establishment is a significant aspect of her job. Prior to becoming a liquor inspector, she was a detective inspector in a police force and as such often had reason to count persons in public spaces. The inspector indicated that she has considerable experience using mechanical counters and she always checks them "for zero" before counting persons or patrons in an establishment. She confirmed that she did this on the occasion of inspecting The Commodore on April 11, 2010.

The inspector identified the Legal Entity Change Inspection Interview Sheet at Tab 5 of Exhibit No. 1 and described it as confirmation that certain topics were discussed with the proprietors [licensee] on their taking over control of the establishment. These topics included maximum allowed capacities and overcrowding. Page 3 of that document shows the signatures of the licensee and indicates that the two principles agreed to follow the requirements stated therein.

She then described her counting of the establishment as follows: She entered The Commodore at approximately 12:15 a.m. with a second liquor inspector. Her line of sight was good. She could see the service bar and service areas and people standing. It was busy and people were tightly packed together. It was busier than she expected it to be. When she asked, the doorman said there were 60 patrons, but there were clearly more than 60. The lighting was good. It was dim, but she could see clearly. She made observations for about five minutes and then began to count. She first approximated the number of persons present without the use of a counter (120). Then she used her mechanical counter for two counts. She counted 109 patrons in the first count, and then approximately ten minutes later she counted 89 patrons in her second count. Between the two counts, she advised one of the principles of the licensee (who was present) of the results of her first count. She did not count staff-members (doormen, barpersons, or servers) or persons in the washrooms. She did not count people in the patio. She advised the licensee that she would leave The Commodore and return shortly and that

he should reduce the number of persons in the establishment. She noted that more people were leaving than coming in to the establishment while she was present.

The inspector returned at 12:50 a.m. She did another count and this time recorded 69 patrons. She did not count patrons in the patio or in the washrooms or any staff members in the establishment.

As to the recommended penalty, the inspector said: "I think the situation was serious enough that the four day suspension would give the licensee an idea of the degree of seriousness when looking at overcrowding." When asked why she recommended a suspension rather than a monetary penalty, she answered simply that the branch considers a licence suspension to be appropriate.

The Licensee

The two principles describe the establishment as an eating place during the day and a neighbourhood bar in the evening. One of the principles of the licensee testified that he works at the establishment and was in attendance at the time of the inspection. He said he was behind the bar at all relevant times and was in charge of the club on that occasion. He said he is fully aware that the maximum capacity for the club is 74 persons plus the patio. He acknowledged that the establishment was over the stated capacity at the time of inspection.

The principle advised that the bouncer, whose job it was to control the number of patrons, admitted was suspended for two weeks as a result of his actions, and he learned his lesson. The bouncer is still employed with The Commodore. Of the enforcement action, he said, "We were told to reduce the number of people in the place. We got it down to where it should be and we were happy. We thought we had fixed it. We were very surprised to find out there was enforcement after that."

He said in his experience it is difficult to count patrons. He said that as everyone was on the dance floor at the time of the inspection, nobody was sitting down. Without people sitting, it looks pretty crowded. He said the licensee had a good relationship with the previous liquor inspector.

He testified that the licensee has an updated version of the Guide saved as a bookmark on the Commodore's computer and one in the licensee's office and one in the bouncer log book. Although the bouncers have to read the Guide and sign the back page there is no written test on it. He said that they also have a copy of the SIR (serving it right) course on hand, but apart from those documents there is no written house policy. They have no particular policies on overcrowding other than staff knowing the capacity and occupant load. There was an incident logbook available, but nothing was recorded about the inspection day. There was a staff meeting about the event but no minutes or record was made of it. They did not write anything down because they did not get a contravention notice at the time, so they did not think there was going to be any further action. He said, "We thought we fixed it. We didn't get [the contravention notice] for a month after the fact. So we didn't report all of this stuff. There are no minutes of meetings. We have some staff meetings regularly, but no records of them."

He said that his only previous warning was 12 years ago with another establishment. He was managing a club and a liquor inspector noticed it was overcrowded. The inspector told him to get the numbers down so he closed the doors and had people leave. There was no enforcement action for that, so he expected the same to occur on this occasion.

SUBMISSIONS

The Branch

The branch submits that each of the elements of the contravention has been established, and therefore the contravention has been established.

With respect to penalty, the branch says that there is no doubt that the licensee's cooperated with the Liquor Inspector, but that cooperation does not excuse the licensee from the consequences of non-compliance.

The branch submits that the contravention has been established and admitted to as has the occupant load (through exhibits and lack of evidence to the contrary). It submits that the proposed penalty is appropriate because the licensee had no written policy on overcrowding and door control and it is written policies that will allow the licensee to manage these issues. There is no evidence of any training of employees. The licensee failed to control the inflow of patrons. The doormen did not put available mechanical counters to good use. There was a significant variation between their counter entries and the number of patrons in the establishment.

The licensee admitted while giving evidence that it was overcrowded and that they know they have an obligation to remain within the capacity. The licensee failed to bring the numbers down to an acceptable level before the intervention by the inspector.

The Guide provides good directions about policies and serves to demonstrate who would enforce policy and to suggest processes. The Guide shows a good house policy is good business and states that writing down policies shows their seriousness and makes everyone's roll clear in administrating them. The recommendations in the Guide need to be acted upon in order to make policy that ensures effective administration. Notwithstanding the resources available to the licensee, it did not have any effective policies in place to ensure compliance with the *Act* and *Regulation*.

The licensee has experience running a liquor primary establishment and gave evidence of a previous incident of overcrowding with another licensee. He appears not to have learned from that experience.

The Licensee

The licensee submits that it feels it didn't deserve to get suspended. Its experience in the past 15 years is that when dealing with a liquor inspector, they will often get a warning and get a chance to correct a problem or deficiency. They have always been interested in compliance. They felt that they did everything possible to ensure that they were not overcrowded. The licensee said it counts on the doormen to ensure compliance with the person capacity. It was let down by the doorman. Now they try to have that doorman somewhere other than on the front door, "as he is not good with math." He had not taken the BST (basic security training) at that time. Now it is required. One of the principles said, "We don't like it to be packed. It takes away from the atmosphere.

The licensee submits that a warning is appropriate and a penalty is not. The principles acknowledge that they were wrong and admit that the situation occurred. They believe they should not be shut down for a first contravention:

The incident made us change our policies and take the situation a lot more seriously and not let this happen again. We don't want to shut down. We have staff that rely on work; paycheck to paycheck. For ourselves, we would rather have a fine than a suspension. That penalizes us as owners not the staff, and most of the staff have been turned over since then and were not even here when it occurred. We won't be overcrowded again.

With respect to the occupant load, the licensee says it contacted a drafter and engineer and decided to get new drawings. The new floor plan is going to be submitted to the city in an attempt to get a higher occupant load. The plan has been approved by engineers in consultation with the city for 108 persons, plus 12 for the patio. The licensee says that if this were to have been in place on April 11, 2010, the number of persons present would not have been over its limit. Therefore, they argue, this was not an egregious contravention.

DISCUSSION AND FINDINGS

I find that the person capacity and the occupant load of the establishment is 74 persons exclusive of the patio area. This was not contradicted in evidence.

The liquor inspector counted more people than were permitted in the establishment. She counted the room three times with a mechanical counter and once by visual estimate and the counts are close enough to each other to be corroborative. Any significant inconsistencies were explained by the inspector's evidence of people leaving the establishment over time. I found the inspector's evidence to be credible. The licensee appeared to be likewise impressed with the inspector and chose not to dispute the resulting person counts.

I find that the establishment was overcrowded beyond the person capacity set by the general manager and the number of persons in the licensed establishment was also more than the occupant load.

The branch has established that the information available to the licensee on the take-over and operation of the licensed establishment is considerable and should ensure its understanding and compliance.

The licensee provided drawings that propose a new person capacity and/or occupant load (Exhibit No.1, tab 11). The requirement, however, is that the establishment follow the limits in place at the time, not what the licensee thinks the capacity might be if a planned application for an increase in capacity is approved. The submission that the overcrowding was not an egregious one because of the proposed application for increased capacity is not something I can accept based on the evidence before me.

The licensee says the doorman on duty at the time, on whom the licensee relied to control entry to the establishment, had poor math skills and hadn't taken any security training at the time of the contravention. This cannot excuse the licensee from its responsibility. Control of the door, and ingress and egress to and from the establishment is a significant safety concern and a matter to be taken seriously. The licensee's evidence amounts to a demonstration of less than adequate concern over this critical component of the operation of The Commodore.

The licensee is entitled to a defence to the contravention, if it can be shown that it was duly diligent in taking all reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

There is insufficient evidence upon which I can find that the licensee was duly diligent. Although the licensee claimed to be using the branch materials and Guide, as in-house policy, it has not established adherence to or successful implementation of those policies by testing and demonstrating the effective operation of the establishment within those guidelines. At the time of the contravention at least one of the principles of the licensee was in charge of the establishment. He was the directing mind of the licensee. He knew the maximum licensed capacity and building occupant load for the establishment. The evidence describes that the licensee had nothing more than branch literature in the place of policy or procedures, and there was very little evidence of implementation of the content of that literature. There is little evidence of appropriate

staff training, or protocol for counting and monitoring the number of persons within the licensed establishment. The licensee had entrusted complete control of the door to a person known to be “bad at math” and without proper training. I find that the licensee has not been duly diligent.

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 license or rescind or amend existing terms and conditions, impose a monetary penalty, or 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 *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch’s primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

There is no previous proven contravention of the same type for the licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), I find that the allegation is a first contravention. The range for first contraventions of this type is a licence suspension for 4-7 days and/or a monetary penalty of \$5,000 - \$7,000.

The licensee pled that it should not be penalized for a first contravention. The Legislature has decided that penalties may be imposed for a first contravention and the *Regulation* specifically identifies a penalty range. I am not convinced that the licensee should escape the assessment of a penalty for this contravention. One of the principles of the licensee says that while managing a bar (not the Commodore) in the past, he was caught above capacity and given an opportunity to rectify the situation without penalty. The licensee submits that the same should occur now. The licensee has volunteered that it has previous experience and awareness of the issue of overcrowding outside of the history of this establishment, yet it is here allowing the establishment to be overcrowded. The liquor inspector testified that she thought the establishment was overcrowded by looking at it, even before counting. The licensee is more familiar with the establishment than is the liquor inspector, yet there is no evidence that the staff or management of the Commodore noticed or acted on the matter of overcrowding. I find that a penalty is appropriate in this circumstance.

The licensee argued that new staff should not be penalized by being laid off by a suspension of the licence as they were not involved in the contravention. The licensee added that it would rather have a fine than a suspension because it is of lesser impact and the importance of future compliance has already been driven home effectively. I am not moved by the licensee's plea for relief to its employees, as I feel that the licensee is solely responsible for dealing with the consequences of a suspension that result to its employees. Further there is some merit to the branch assisting the licensee by way of a suspension, to establish the importance of compliance among its employees. The branch witness was not able to provide any reason why a suspension is more appropriate than a monetary fine. Even when directly questioned on the relative merits of the alternative penalties specified by the *Regulation*, the inspector could only repeat that overcrowding is a serious public safety concern. The *Regulation* provides a choice of suspension and/or monetary penalty for the contravention of overcrowding beyond person capacity more than occupant load, so something more than an axiomatic statement relating to public safety is required to assess the appropriate choice of penalty. The inspector did not indicate that one or the other of the available

ranges of penalty was more likely to ensure future compliance or if more than the minimum penalty is warranted. The licensee, who's principle testified that a monetary penalty would be of lesser impact (and is therefore the minimum penalty), is preferable, testified that future compliance has already been assured. I have found that a penalty is warranted, but there is no evidence that anything more than a minimum penalty is required to bring about future compliance with the *Act* and *Regulation*. I find that a monetary penalty is in this circumstance the minimum penalty and that a monetary penalty of \$5,000 is warranted.

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. 302593 in respect of action No. EH10-059. The monetary penalty must be paid no later than the close of business on October 27, 2010.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: September 27, 2010

cc: RCMP Kamloops Detachment
Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate