



**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: The Victoria Social Club Ltd.
dba The Social Club
#27-560 Johnson Street
Victoria, BC V8W 3C6

Case: EH10-024 & EH10-068

For the Licensee: Gregory N. Harney
Shields Harney, Barristers & Solicitors

Jeremy Petzing

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: May 25, 26 & 30, 2011

Place of Hearing: Victoria, BC

Date of Decision: July 25, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, The Victoria Social Club Ltd, operates the Social Club located in Victoria, BC. Jeremy Petzing (licensee principal) is a principal of the corporate licensee. The licensee holds Liquor Primary Licence No. 113467 for the operation of a liquor primary establishment with liquor sales from 3:00 p.m. to 2:00 a.m. seven days a week. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia.*"

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

By way of Notice of Enforcement Action EH10-024 (dated May 14, 2010) and Notice of Enforcement Action EH10-068 (dated June 24, 2010), the branch has alleged two contraventions of the *Liquor Control and Licensing Act* (the Act) and the *Liquor Control and Licensing Regulation* (the Regulation):

1. EH10-024 (overcrowding)

That on March 7, 2010, the licensee contravened Section 12 of the *Act* and section 71(2)(b) of the *Regulation* by permitting more patrons in the licensed establishment than the patron capacity set by the general manager, and the number of persons in the licensed establishment was more than the occupant load. The proposed penalty is a seven (7) day suspension of the liquor licence (item 15, 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 of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

2. **EH10-068** (fail to produce record)

That on May 11, 2010, the licensee contravened section 73(2)(a) of the *Act* by failing to promptly produce and submit a record, thing or sample. The proposed penalty is a \$7500 penalty (item 31, Schedule 4 of the *Regulation*).

Item 31 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 10 - 15 days and/or a monetary penalty of \$7500 - \$10,000.

The licensee disputes the contraventions.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act [RSBC 1996] chapter 267

Licences

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 licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

(c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,

(d) designate the areas within an establishment where minors are permitted,

- (e) approve, prohibit or restrict games and entertainment in an establishment,
 - (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
 - (g) vary seating requirements in the dining area of an establishment,
 - (h) vary requirements with respect to the location of an establishment,
 - (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
 - (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
 - (k) specify requirements for reporting and record keeping, and
 - (l) control signs used in or for an establishment.
- (4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.

Power to retain documents and inspect books and premises

73(2) Without limiting any other provision of this section, a licensee must

- (a) promptly produce and submit for inspection any record, thing or sample requested by a person acting under the authority of this section

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

71(2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:

- (a) the terms and conditions imposed on the licence by the general manager under section 12 and 12.1 of the Act in effect immediately before December 2, 2002;
- (b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002;

(c) endorsements on the licence in effect immediately before December 2, 2002, except an endorsement on a winery licence for a consumption area.

ISSUES

1. Did the contraventions occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

- Exhibit No. 1:** Branch's Book of Documents for EH10-024, tabs 1 - 13.
- Exhibit No. 2:** Floor plan of the Social Club submitted by the licensee.
- Exhibit No. 3:** Branch's Book of Documents for EH10-068, tabs 1 - 11.
- Exhibit No. 4:** Photographs A – D
- Exhibit No. 5:** Licensee's written submissions.

EVIDENCE – the Branch

Overcrowding (EH10-024)

The branch presented six witnesses; five police officers and a liquor inspector. The witnesses testified that they were working in their respective capacities the late night/early morning hours of March 6/7, 2010, as part of a late night task force deployed within the downtown core area of the city of Victoria. Their duties at the time included making inspections of liquor licensed establishments within the area. They were divided into two teams with an acting sergeant in charge (did not appear as a witness). The first team consisted of officers A, C and E, the second of officers B and D and the liquor inspector (the officers are identified in the order in which they presented their evidence. The police officers were dressed in standard street uniform.

Officers A, C and E of the first team testified that they attended at the Social Club at approximately 11:50 p.m. and made a walk-thru of the premises. None of the officers conducted a count of the number of persons in the establishment. All testified that the establishment was very crowded. Officers C and E testified that it appeared to be overcrowded with the number of persons inside exceeding that permitted by the liquor licence. Officer C spoke with the licensee principal, asking what the licensed capacity was for the establishment. She was told that it was approximately 300 persons and they were currently only permitting patrons in as others left on a one-to-one basis. She was surprised that an establishment with a relatively small floor space was permitted that high of a capacity. She believed that the capacity was being significantly exceeded and expressed her concerns to the licensee principal and the doorpersons on duty and advised them that they should not allow any more persons to enter until the establishment was down to its authorized capacity. The officers were in the establishment for approximately 10 - 15 minutes. They later met up with the second team during a coffee break and told them of their observations.

Officer B testified that he was part of the second team and attended at the establishment at approximately 1:20 a.m. There was no line-up at the front entrance. He and the liquor inspector went inside the establishment, a reserve constable, officer D, remained outside, and the acting sergeant went to the rear entry of the establishment in an area not accessible to the public. He is familiar with the establishment and observed it to be more crowded with patrons than ever seen previously. Patrons were shoulder to shoulder and it was difficult to move through the premises. He and the liquor inspector made their way clockwise through the premises taking a route which passed in front of the main bar area and not through the dance floor. Using a mechanical counter he counted 342 patrons on the first count and 378 on a second count. He agreed with counsel for the licensee that making an accurate count of the number of patrons in a crowded liquor licensed establishment was difficult with persons moving around and going on and off of the dance floor. Despite best efforts, some persons may have been counted twice. He agreed that there could be a margin of error

from 10 - 15 %. Upon leaving the establishment he proceeded immediately to the site of a street altercation occurring nearby.

Officer D testified he is a reserve constable and was part of the second team. They arrived at the establishment at approximately 1:20 a.m. He observed two doormen at the front entrance who were guiding persons wishing to enter into two lines outside the door. Officer D and the liquor inspector entered the premises while he waited outside to count the number of persons leaving. The assistant manager (witness F) at this point was allowing persons to enter while others left on a one to one basis. He requested that they hold off allowing persons to enter while the officer and inspector were inside. This was done as requested. Officer B and the inspector were inside for approximately 10 minutes. During the time he was at the front entrance he counted eight persons entering and 53 persons leaving the establishment. He then left to attend at an altercation occurring nearby.

A branch liquor inspector testified that he has been a liquor inspector in the Victoria area for approximately three and a half years conducting inspections of licensed establishments located within the area. During that time he has had extensive experience counting the number of persons within licensed establishments and has received related training. In his testimony he referred to copies of documents from the branch file for the Social Club:

- Exhibit 1, tab 1: Notice of Enforcement Action (NOEA) letter to the licensee dated May 14, 2010.
- Exhibit 1, tab 2: Contravention Notice (CN) issued to the licensee.
- Exhibit 1, tab 3: The liquor primary licence issued to the licensee and in effect at the time of the alleged contravention. The maximum capacity is 305 patrons. The licence is subject to the terms and conditions contained in the "Guide for Liquor Licensees" (the Guide).
- Exhibit 1, tab 6: Occupant load certificate for the Social Club. Maximum 305 persons.

- Exhibit 1, tab 7: A copy of the Liquor Primary Guide in effect at the time of the alleged contravention. The Guide outlines the statutory and regulatory requirements for the operation of the establishment and sets out the terms and conditions of the liquor licence. The guide deals specifically with “Occupant load” and “Patron capacity” at p. 6, and “Overcrowding” at p. 21.
- Exhibit 1, tab 8: Excerpts from the “Serving it Right”, responsible beverage service program manual.
- Exhibit 1, tab 9a: Notes made by the liquor inspector at the time of the inspection.

The inspector testified that he was working as a liquor inspector with members of the late night task force the late night/early morning hours of March 6/7, 2010. He was part of the second team and during a coffee break had been told by members of the first team that the Social Club appeared to be overcrowded. The second team proceeded to the Social Club, arriving outside the premises at approximately 1:15 a.m. He observed that there was no line-up of patrons at the front entrance. He thought this strange for the time of night. He spoke briefly with the doorman who said there were approximately 300 patrons in the establishment. He and officer B proceeded inside to count the number patrons while officer D remained outside to prevent more persons from entering and to count the number of persons leaving. Inside, he observed the premises to be extremely crowded, the most crowded he had ever seen it. He believed it to be over capacity.

To count the number of patrons he used a mechanical counter and proceeded clockwise through the premises taking a route through the dance floor. To avoid counting persons twice, he broke the room into different areas using fixed points of reference. There was very little movement of patrons as a result of the crowded conditions. He did not count the number of persons in the smoking area located outside the rear doors or those he identified as staff. On the first count he counted 397 patrons and proceeded to make a second count which tallied 408 patrons. He estimated that the first count took approximately five minutes, the second count approximately three to four minutes. He agreed with counsel for the licensee that counting the number of

persons in crowded conditions could not be done entirely accurately. He believed that because of his experience in making counts in licensed establishments he would have an error rate of 2 – 3 %.

Officer D advised him that eight persons had entered the establishment with 53 persons leaving, thus the total number of patrons inside far exceeded the maximum capacity. He advised the licensee principal of his and officer B's counts and advised him to reduce the number of patrons to the 305 permitted. The licensee disputed the number of persons counted.

He left the establishment with the officers when they went to deal with an altercation occurring nearby. Later, he completed the NOEA and recommended a seven day licence suspension, the maximum suspension for a first contravention. In this instance, the establishment was grossly overcrowded raising concerns for the safety of the persons inside should an emergency occur.

Fail to promptly produce records (EH10-068)

The liquor inspector testified that on April 14, 2010, he delivered a letter of that date (exhibit 3, tab 8) to the licensee principal requesting the following items related to the overcrowding incident of March 7, 2010, be submitted to the branch within 10 business days:

1. A list of employees working at the time.
2. Video surveillance during the time the establishment was in operation.
3. A copy of the incident log.

The letter advised that failure to provide the items requested would result in enforcement proceedings under section 73(2)(a) and (b) of the *Act*. The licensee principal advised him that the video surveillance recordings were no longer available because the system operates in a loop system recording over previous recordings.

The inspector testified that he expected to receive the items prior to April 28, 2010. They were not received and he completed a CN on May 11, 2010, for failing to produce the items and delivered it to the licensee principal on May 19, 2010 (exhibit 3, tab 2). Responding to a question from counsel for the licensee, he testified that he did not recall the licensee principal offering him the employee list or incident log at that time. In his opinion that would have been too late as the requested date had long since passed. He completed a NOEA on June 23, 2010, and recommended a \$7500 monetary penalty, the minimum for a first contravention (exhibit 3, tab 1). He felt a penalty was necessary as failure by a licensee to provide items requested impeded the ability of the branch to objectively investigate contraventions.

EVIDENCE – the Licensee

The licensee presented two witnesses, the licensee principal and the assistant manager who was at the front entrance working with the doorman on duty at the time of the alleged contravention.

Overcrowding (EH10-024)

The licensee principal testified that he is one of the owners of the corporate licensee. He has been involved within the hospitality industry for 18 years during which he has worked in, managed and been involved in the ownership of several licensed establishments. He purchased the Social Club out of receivership in March of 2007. It is not a seven day per week operation. In March 2010 it was operating on Fridays and Saturdays. Later in the spring and summer months it also opens on Wednesdays. It holds approximately six special events during the year, e.g. on Canada Day. The focus is on patrons dancing to recorded music. Clientele are primarily university and college students as well as persons working within the hospitality industry who attend after work. It employs 20 - 25 staff. It opens at 10 p.m. and accepts reservations until 11:30 p.m. Patrons are required to present two pieces of identification prior to entry. There are no gang or drug issues at the establishment. Staff meet after the

close of business on Saturday nights to discuss the night's events and full staff meetings are held every three to four weeks. He has a policy manual for staff which is similar in content to other night clubs. He maintains a good working relationship with city officials, police officers and most of the liquor inspectors, and is a member of Victoria Bar Watch. He and his staff hold SIR certificates.

He testified that the floor plan presented by the branch at exhibit 1, tab 4 is neither current nor accurate. After purchasing the establishment renovations were made which included enlarging the coat check area, extending the main and upstairs liquor service bars and relocating the DJ booth. This served to reduce the total floor area. The floor plan at exhibit 2 accurately depicts the premises. It was approved by municipal authorities and a copy was submitted to the branch. The occupant load certificate at exhibit 1, tab 6 was issued after the renovations were completed.

He is aware that overcrowding of licensed establishments in the downtown area of Victoria is a serious issue with police and local officials. There is no benefit in allowing the establishment to be overcrowded as it leads to decreased sales if patrons cannot get to the bar. He does not collect the cover charge from all patrons. Many are permitted in without paying the cover charge, only about one-third pay the charge. He has developed a system to stay within the maximum capacity of 305 patrons. There is only one public entrance to the establishment. Door staff use mechanical counters to count the number of patrons entering and leaving the establishment. Once the maximum capacity is reached, they only allow entry to patrons on an equal basis to patrons leaving.

He was present March 6/7, 2010, at the time of the inspections by the police officers and liquor inspector. It was a busy night and they were at capacity. Two line-ups had formed at the entrance, one for preferred patrons and one for others. He was at the entrance with the assistant manager (witness F) and the doorman on duty (did not appear as a witness). When the first group of officers attended the doorman

accompanied them through the establishment. He spoke with officer C afterwards and disagreed with her that they were overcrowded.

The second group with the liquor inspector arrived approximately one hour later. The inspector was on the offensive. He said that he wanted the smoke machine turned off inside. He did not say that he was going to be making patron counts or ask that he count with him. The smoke machine is on an automatic timer which was unplugged at the inspector's request. The inspector later said that he made counts of 397 and 408 patrons inside, which with the 45 patrons having left would mean there were 450 patrons in the establishment.

He requested the inspector and officer D count the patrons as they left the establishment, but they refused and went to the scene of an altercation nearby which was being handled by other officers. In his opinion, the only reason that they left was because they didn't want to count the patrons as they left the establishment. None of the officers or the liquor inspector advised him that there were safety concerns that night. He discussed the counts with the doorman after the attendance of both groups and was satisfied that the establishment was at capacity with about 300 patrons. He did not have staff count the number of patrons in the establishment at the time of the inspector's visit or afterwards.

He testified that it is impossible to have 450 persons in the small square footage of the premises. He has gone through the establishment area by area and the total number of persons who could fit within the premises is approximately that of the maximum capacity. He presented photos of the premises (exhibit 4, A – D). He testified that the photos depicted what the premises would be like on a busy Friday or Saturday night when it was operating at maximum or close to maximum capacity, patrons shoulder to shoulder with little space for more patrons. In his experience, the only accurate way to obtain an accurate count of the number of persons inside is to count them as they leave the establishment at closing time.

He disputed the establishment's enforcement history as presented by the branch at exhibit 1, tab 11.

- The CN alleging overcrowding on June 9, 2007, was subsequently cancelled by the branch (exhibit 1, tab 11d) as a result of a problem with the inspector issuing the CN.
- The CN alleging overcrowding on December 1, 2007, went to hearing and a five day suspension was ordered. The decision was judicially reviewed by the BC Supreme Court and subsequently appealed to the BC Court of Appeal with leave to the Supreme Court of Canada denied. Although the decision was upheld at each judicial level, he does not accept the evidence upon which the decision was made.

Fail to promptly produce records (EH10-068)

The licensee principal testified that he received the April 14, 2010, letter requesting the documents from the inspector, but did not discuss it with him at the time. The letter was given to him sometime after he had received the CN regarding the alleged overcrowding. A week or two after receiving the letter he bumped into the inspector at the harbour and advised him that the video records were not available as they had been recorded over. The inspector said, no problem just get me the other documents.

He later discussed the matter with another liquor inspector who told him that the inspector requesting the documents was on holidays and he should walk over to the office and give them to him when he returned. During a further discussion with another inspector he told him that he had the documents for the inspector. He was told that the inspector would be in the office the following week.

About a week to 10 days later he received a phone call from the original inspector requesting the documents and he met with him. He assumed that the inspector had called for the documents, so he had them available when they met. Instead, the inspector delivered the CN alleging the contravention of failing to produce the records requested (exhibit 3, tab 2). He told the inspector that he had spoken with the two inspectors and that he had the documents waiting for him. The inspector said that the documents were required to be produced within the 10 business day period. He offered them to the inspector who told him it was too late, he no longer needed them.

Witness F testified via teleconference. He has worked in door control at licensed establishments for approximately 16 years and has worked with the licensee principal for the past 11 years at different establishments. He knows that the maximum capacity for the Social Club is 305 patrons. When it is at capacity it is full. It would not be physically possible to have 450 patrons in the establishment. It would be impossible to move inside and he wouldn't put the staff or patrons in that position. He has a vague recollection of the night of March 6/7, 2010. He was at the front door managing patrons entering and controlling the cash received for the cover charge. The system in place to control capacity is to have the doorman use two mechanical counters and count the number of patrons entering and leaving. Once they reach capacity no further entry is allowed until patrons inside depart. He checks the numbers on the doorman's counters about every half hour and does the math to determine the number of patrons inside.

SUBMISSIONS – Branch

The branch's submission is summarized as follows:

Overcrowding (EH10-024)

The elements forming the contravention have been established. The evidence of officer D and the liquor inspector is that each made two counts of the number of patrons in the licensed areas of the establishment, all of which exceeded the maximum licence

capacity and the building occupancy load. There was no count by the licensee or staff of the number of patrons inside either at the time of the counts by officer D and the liquor inspector or immediately after. The licensee did not provide a witness having evidence of what the actual number of patrons was inside the establishment.

The licensee was not duly diligent. The licensee principal was advised by officer E (of the first team of police officers) that she believed that the establishment was overcrowded, yet the licensee principal failed to do anything about it. The licensee's system for keeping track of the number of patrons in the establishment was not adequate. The counts made by the doorman of the patrons entering and leaving the establishment were not recorded. The licensee has not presented any written policies regarding overcrowding or evidence that any such policies have been reviewed with staff. The licensee has not produced an incident report or evidence that the incident was reviewed with staff.

The seven day licence suspension penalty is necessary to bring about voluntary compliance. The licensee principal has been operating licensed establishments for many years. Overcrowding is a serious matter that can have serious consequences. There is a previous proven contravention for overcrowding.

Fail to promptly produce records (EH10-068)

The elements forming the contravention have been established. On April 14, 2010, the licensee was provided with a written request to produce the three records to the branch within 10 business days. Ten business days fits within the ordinary meaning of "promptly" as used within section 73(2)(a) of the *Act*. The records have not been produced as requested. The licensee has not been duly diligent. The licensee did not request an extension to the time or produce any reasons why the records could not be produced. The recommended \$7500 monetary penalty is warranted to bring about voluntary compliance.

SUBMISSIONS – Licensee

The licensee's submission is summarized as follows:

Overcrowding (EH10-024)

Counsel submitted that the evidence does not support the branch's allegations of the two contraventions. There is no *res ipsa loquitor*.

None of the first group of officers attending at the establishment counted the number of patrons inside. They believed that the establishment was overcrowded, yet took no action. They left for a coffee break during which they mentioned to the second group that they ought to take a look at the establishment. It was approximately one hour and 20 minutes before the second group proceeded to the establishment. This is inconsistent with the belief that it was overcrowded and that there was a serious safety concern.

Officer B and the liquor inspector both conducted counts of the number of patrons inside the establishment. Their evidence differed as to the route taken by them as they made their way through the crowd of patrons and differed as to the number of patrons inside. Officer B testified that his counts of 342 and 378 patrons could be subject to a possible 15 % error. The liquor inspector testified that he made counts of 397 and 408 and that his counts could be subject to a possible 2 to 3 % error. The inspector's first count took five minutes to complete, the second took three to four minutes to complete, short periods of time given his description that the establishment was grossly overcrowded. Despite testifying that overcrowding was a serious safety issue the inspector left the premises and the area. The inspector was mistaken in his testimony and his belief that there was no line-up of patrons outside waiting to enter the establishment at the time of his arrival. He did not consider the number of patrons provided by the doorman nor look at the numbers shown on the "in" and "out" counters. He formed the opinion at the

outset that the establishment was overcrowded and then just went through the motions. If one puts aside/disregards the inspector's evidence, and takes into account officer B's percentage of error, the establishment was at or near capacity.

The assistant manager has many years experience. He was on duty that night and was certain that there would have been line-ups at the door at the time of the alleged contravention. He checked the mechanical counters used by the doorman several times and confirmed that the establishment was not overcapacity. The system of using mechanical counters to count the number of patrons in and out is more reliable than counting patrons inside the establishment.

The licensee principal is a knowledgeable long-term operator of licensed establishments. He testified that he is aware of the maximum capacity for the establishment. The assistant manager and the doorman on duty at the entrance were experienced and reliable staff. A reliable system of counting patrons was in place and the establishment was not over capacity at the time of the alleged contravention. The branch is using an outdated floor plan despite the current floor plan having being provided to them. He has measured the square footage available to patrons within the licensed areas and it is impossible that there were as many patrons in the establishment as alleged by the inspector. There is no incentive for the licensee to overcrowd, the establishment could not operate at the alleged level of overcrowding.

The licensee principal has operated licensed establishments for many years with only one contravention for overcrowding, and that contravention is disputed. The recommended seven day suspension will result in a substantial revenue loss and loss of salary to staff.

Fail to promptly produce records (EH10-068)

The liquor inspector delivered a letter on April 14, 2010, requesting the documents and arbitrarily interpreting the wording of the legislation “promptly” to mean 10 business days. The inspector was on holidays for the first week in May and the CN drafted on May 11, 2010, was not delivered until May 19, 2010. The licensee principal believed that the inspector was coming to pick-up the documents on May 19, 2010, when they met, so he had them available. However, the inspector refused to take them. The recommended monetary penalty is disproportionate to the circumstances.

DECISION AND REASONS**Overcrowding (EH10-024)**

Having considered all of the evidence and the submissions, I find on a balance of probabilities; that the patron capacity for the licensed area of the establishment is 305 patrons and the occupant load for the establishment is 305 persons; that on March 7, 2010, the number of patrons in the licensed establishment exceeded the patron capacity set by the general manager, and the number of persons in the licensed establishment was more than the occupant load.

The best evidence as to the number of patrons in the establishment was that of the counts made by officer B and the liquor inspector. All of their counts exceeded both the maximum licensed capacity and the occupant load. I do not consider it critical to the numbers of patrons counted by the officer and the inspector that they each described the route taken while counting somewhat differently. I am satisfied that regardless of whether the officer and the inspector moved through the crowded premises by way of the area in front of the downstairs bar or through the dance floor, it would not significantly affect their ability to conduct a reasonably accurate count. While it may be virtually impossible to count the precise number of people in a busy and crowded establishment, I am satisfied that experienced police officers and liquor inspectors can

do so with sufficient accuracy to be relied upon as long as they take care not to double count people.

While there would be some margin of error, I am satisfied that with the evidence before me the margin of error would not be in the vicinity of 10 - 15 % as suggested by counsel for the licensee, but would be considerably lower.

I find that the evidence of the liquor inspector is particularly compelling. He is experienced in counting patrons/persons in busy licensed establishments and has received related training. He took care to knowingly avoid double counting. There is no evidence that he was not acting objectively in carrying out his duties. While the inspector may have been mistaken as to whether there was a line-up outside of the establishment upon his arrival, that does not detract from his evidence regarding the number of patrons inside.

The licensee did not provide direct evidence of the number of patrons/persons in the establishment at the time of the inspection by officer B and the liquor inspector. A doorman was ostensibly counting the number of patrons entering and leaving and maintaining a total of 300 patrons. The doorman did not testify and the only evidence of his counts was that he was asked on occasion how many patrons were inside and a calculation was made of the total from the numbers in/out on the mechanical counters. No evidence was provided that would serve to verify the information provided by the doorman. No count was made by the licensee principal or staff at the time of the inspector's visit or afterwards.

On a balance of probabilities, I find that on March 7, 2010, the number of patrons in the licensed establishment significantly exceeded the 305 patron capacity set by the general manager, and the number of persons in the licensed establishment was significantly more than the 305 person occupant load.

Due Diligence

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions 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.

Here, there is little evidence upon which I can find that the licensee was duly diligent. There is no evidence of what training the employees received or what policies and procedures were in place to guide staff in performing their duties. Theoretically the system put in place by the licensee to count the number of patrons/persons entering and exiting the establishment and to maintain the maximum capacity permitted should prevent overcrowding. The system relies upon the accuracy of the person keeping track of the counts and relies on that person to not allow the maximum numbers to be exceeded. Here there was no system in place to ensure that the doorman was accurately counting the persons entering and exiting, accurately recording the counts using the mechanical counters, and actually remaining within the maximum capacities. The assistant manager on duty and/or the licensee principal were simply asking the doorman for the number of patrons inside. The assistant manager was checking the numbers registered on the in/out mechanical counters from time to time. The licensee principal was present and was the person in charge of the operation of the establishment and was in the strict legal sense the directing mind of the licensee. He was present at the time of the inspection, yet had not taken sufficient steps to ensure that the establishment was not overcrowded.

In conclusion, I find that the licensee has not been duly diligent.

Having considered all of the evidence, I find that on March 7, 2010, the licensee contravened Section 12 of the *Liquor Control and Licensing Act* and Section 71(2)(b) of the *Liquor Control & Licensing Regulation* by permitting more patrons in the licensed establishment than the patron capacity set by the general manager, and the number of persons in the licensed establishment was more than the occupant load.

Fail to promptly produce records (EH10-068)

Section 73(2)(a) of the *Act* requires that a licensee must “promptly produce and submit” any record requested under the authority of the section. Here, on April 14, 2010, the liquor inspector made a written request to the licensee principal for three records to be submitted to the branch within 10 business days. The letter was clear that failure to provide the information requested would result in enforcement action. The letter contained the mailing address and the street address for the branch. When the records were not received by May 11, 2010, the inspector wrote out a CN which he delivered to the licensee principal on May 19, 2010. Counsel for the licensee submitted that the inspector arbitrarily interpreted “promptly” to mean “within 10 business days”.

“Promptly” is not defined within the *Act* or *Regulations*, consequently I am satisfied that it would have the normal usage of meaning, i.e. to be done directly, or without delay.

The request was made on April 14, 2010, for the records to be provided within 10 business days. The licensee had a later conversation with the inspector advising him that the video recordings were no longer available. The inspector requested that he deliver the other records as requested. The records had not been provided by May 11, 2010, the date of the CN, or by May 19, 2010, when the CN was delivered by the inspector.

Considering all of the evidence I am satisfied that the licensee failed to promptly produce and submit a record as requested by the branch.

Due Diligence

There is no evidence upon which I can find that the licensee has been duly diligent. The request was straightforward and clear. The licensee principal was at the time the directing mind of the licensee. He did not submit the records as requested nor provide any justifiable reasons why the records could not be submitted to the branch within the timeframe requested.

In conclusion, I find that the licensee has not been duly diligent.

Having considered all of the evidence, I find that on May 11, 2010, the licensee contravened section 73(2)(a) of the *Liquor Control & Licensing Act* by failing to promptly produce and submit a record, thing or sample.

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 to follow the minimums set out in Schedule 4 of the *Regulation*. 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 Notice of Enforcement Action.

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 the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this licence within the year preceding this incident. I therefore find these to be first contraventions for the purposes of Schedule 4 and calculating a penalty.

Overcrowding (EH10-024)

The licensee principal is a long term licensee, well experienced in the operation of licensed establishments. He is aware that overcrowding of licensed establishments is considered a serious matter within the city of Victoria. Prevention of overcrowding in a licensed establishment is a relatively easy matter to achieve. It simply requires good door control to ensure that the number of patrons/persons permitted inside the licensed establishment does not exceed the maximum capacity. The consequences of overcrowding can be severe. It can lead to control and safety problems inside the establishment and lead to disturbances and other problems within the community at closing.

Given these circumstances of a knowledgeable, experienced licensee well aware of local concerns regarding overcrowding and with a previous contravention for overcrowding, I am satisfied that a penalty is necessary to ensure future voluntary compliance. Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this type. Here for the aforementioned reasons and giving consideration to the significant amount of overcrowding, I find that the maximum suspension for a first contravention, a seven (7) day suspension, is necessary, appropriate and reasonable.

Fail to promptly produce record (EH10-068)

Section 6 of the *Act* requires the general manager of the branch to supervise the conduct and operation of licensed establishments. Section 73 of the *Act* authorizes the general manager to require a licensee to produce and submit any records necessary for the administration or enforcement of the *Act*. The general manager carries out her responsibilities and exercises her authority through officials employed by the branch. In this case a liquor inspector. Here we have a long term, experienced and knowledgeable licensee who has, for no justifiable reason, failed to provide the records as requested by the branch in a clearly worded and reasonably written request. I am satisfied that a penalty is necessary to achieve future voluntary compliance. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this type. The minimum monetary penalty as set by Schedule 4 of the *Regulations*, \$7500 is considerable. I find that it is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 113467 for a period of seven (7) days to commence as of the close of business Friday, August 26, 2011, 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*). Further, I order that the licensee pay the \$7500 monetary penalty to the general manager no later than the close of business Monday, August 29, 2011.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Victoria City Police from the close of business on Friday, August 26, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: July 25, 2011

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate