



**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: Irish Times Pub Co. Ltd.
dba Irish Times Pub & Oyster Bar
1200 Government Street
Victoria, BC V8W 1Y3

Case: EH12-058

For the Licensee: Matt MacNeil

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Dianne Flood

Place of Hearing: Written Submissions

Date of Decision: September 24, 2012

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, Irish Times Pub Co. Ltd., operates licensed premises under the name of Irish Times Pub & Oyster Bar, at 1200 Government Street, Victoria, BC under Liquor Primary Licence 301113. Under the licence, liquor sales are permitted from 11:00 a.m. to 1:00 a.m., seven days a week. The establishment has a licensed capacity of 250 persons in the main area and patios. The occupant load is also 250 persons.

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* (the "Guide").

Matt MacNeil made a written submission on behalf of the Licensee.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated April 26, 2012. The Branch alleges that on March 17, 2012, the Licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation"), overcrowded beyond the person capacity more than the occupant load. The proposed penalty is a four day suspension (item 15, Schedule 4, of the Regulation).

The Licensee does not dispute the contravention but does dispute the penalty and asks for a monetary penalty instead.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

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

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).

ISSUES

1. Did the contravention occur?
2. If so, has Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

Exhibit 1: The Branch's Book of Documents

Exhibit 2: The Licensee's email submission, sent June 4, 2012

Evidence

The Branch says that on Saturday March 17, 2012, two liquor Inspectors attended at the premises at about 18:30. It was St. Patrick's Day, and a warm sunny day, and there was a long line up of about 80 – 100 persons waiting to get into the premises. Tents were erected over the patios and over the entry for the line up. Two male staff were attending the door, using mechanical counters, and when asked by the Inspectors about their numbers, the staff made a quick calculation and advised that they were "at capacity – 248".

The Inspectors entered the premises and noted it was very crowded. All seats were taken and people were standing in the aisles so that moving about was very difficult. The Inspectors decided to make their own counts. They checked and calibrated their counters ensuring they worked and then zeroed the counters and began the counts independently of each other. They each conducted two counts and those counts were 337 (patrons only) 364 (patrons and staff), 371 (patrons and staff) and 363 (patrons and staff). The Licensee's records showed 16 staff on duty that night.

Mr. MacNeil was present, and the Inspectors told him about their counts and that the premises were over capacity. He asked the Inspectors to make a count with him. They declined but waited for him to make his count which indicated 269 persons, including staff but not the approximately 40 patrons on the patio. Mr. MacNeil was asked to correct the situation within one hour and was advised that the Inspectors would be back to ensure compliance. Presumably the requested reduction in patrons was achieved as the Branch documents do not indicate any follow up was required.

The Branch's documents also note that at approximately 2 hours prior to the Inspectors' attendance, two city of Victoria police officers had attended the premises and noted overcrowding at a rough count of 250 – 260, and advised staff to correct the situation. The police officers re-attended the premises at 18:30 and conducted their own count of 308 persons, but then determined the Inspectors were present and in discussions with Mr. MacNeil. The Branch's documents indicate the police officers' count did not include the patio area.

Additionally, the Branch's documents include the Licensee's daily log for that date which indicates: "Busy night!!! Cops and Fire were in a few times. Liquor inspector came in at 7:30 and counted us over capacity by 70 ppl". The log then describes that the door was held for ½ an hour and capacity kept at 240.

SUBMISSIONS

The Branch says that overcrowding beyond licence capacity is contrary to public safety and patron well being. Fire or other threats can have even greater consequences where liquor is served, loud music is playing and the lights are dim. Risk of death or serious injury is even greater when occupant load is exceeded.

St. Patrick's Day, is one of the busiest for downtown pubs like the licensed premises. While the Licensee recognized this by hiring two door staff and erecting a tent for the anticipated line up outside and for its patios, it did not notice or take action in relation to the significant overcrowding beyond the licence capacity. This is especially concerning given the warning earlier in the day by the police officers.

The Licensee does not dispute the overcrowding, or that a penalty ought to be imposed. Mr. MacNeil says there are no excuses that can be offered, but says that the overcrowding was not intentional and that is not how he operates his business. He points to his record in that regard and that of his other establishments.

He submits that the responsibility for overcrowding is that of management, not staff. He says that to impose a suspension will have a very negative impact on staff who rely on their wages. Of the 62 staff, only 6 are salaried, and the rest are full and part time hourly staff, many of whom live paycheque to paycheque and can have difficulty making ends meet. In the Licensee's submission, a suspension would have a devastating impact on them, when it should be the management who bears the consequences. For this reason, he submits that a monetary penalty would be more appropriate.

REASONS AND DECISION

The Licensee does not dispute that on March 17, 2012, the premises were overcrowded beyond the licensed capacity and the occupant load of 250 and I find that the Licensee contravened the terms of its licence.

I find that, after considering if the 16 staff were included in the various counts, the Inspectors' four counts to be reasonably consistent at 337 (without staff) and 364, 371 and 363 (including staff). These counts are also consistent with the police officers' count at 308 without the 40 or so patrons on the patio. I find these counts, conducted independently and with reasonably consistent results, to be more reliable than the count

of 269 (pus 40) undertaken by Mr. MacNeil. Therefore, I accept the best evidence of the number of persons on the premises to be that of the Inspectors.

I find that the premises were overcrowded by at least 80 patrons and possibly as many as 100 patrons, which is a significant number in terms of the licensed capacity and the permitted occupancy load.

Due Diligence

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking 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 are dealt with. Here, the Licensee admits that the overcrowding occurred without intent but also without offering any evidence of the steps taken to avoid it on St. Patrick's Day, one of the very busiest days of the year for downtown pubs and especially for one bearing the name that this one does. The hiring of two door persons, who clearly did not have a good grasp on how many people were in the premises was not enough. Mr. MacNeil was present and is an experienced and knowledgeable owner with many years experience with this establishment. He should have had a good sense of the capacity of the establishment, and he ought to have known it was overcrowded. Two police officers had already given a warning, yet nothing was done to make sure that the Licence terms were being complied with.

I find the defence of due diligence is not available to the Licensee.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a 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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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 a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item #15 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4-7 day licence suspension and/or a \$5,000 to \$7,000 penalty.

In determining the penalty I am mindful of the date in question being St. Patrick's Day, which should have raised the potential for overcrowding to the forefront of the Licensee's management who ought to have taken serious steps to avoid it. I am also mindful of the extent of the overcrowding – perhaps as many 100 persons, and that this was early in the evening. Management should have realized that the premises were overcapacity and over occupancy load. In addition, a warning was given by the Victoria police at least 2 hours earlier, and either ignored or not taken seriously.

Overcrowding is serious and over occupancy load is even more serious. The threat of death or serious injury if there should be a fire or other mishap is significant. In addition, with overcrowding, staff are less able to monitor patrons for issues like intoxication or the potential for fights or other patron misbehaviour. These matters can impose unnecessary demands on the police resources. Occupancy and capacity limits are set with these issues in mind. The potential for harm increases with the number of persons over the limit so that it is more serious with each person over the limit.

The issue here is whether the penalty should be a suspension or a monetary penalty. What message needs to be given to achieve compliance by this Licensee and other Licensees with such a serious term of a licence? Monetary penalties may simply be seen as a cost of doing business, and the impact on a business can be difficult to determine, with a higher or lower penalty impacting on different licensees differently. A suspension is a more public notice to the Licensee, the community, the public at large and to other licensees the seriousness with which these matters are taken by the general manager.

I have considered the Licensee's submission about the very negative impacts of a suspension on its staff, and the submission that a monetary penalty is sufficient and more appropriate to achieve voluntary compliance. I find that the impact on staff is a truly difficult issue, but is one that will arise whenever a suspension is considered. I find that licensees need to be mindful that non-compliance with the terms of their licence will

impact not only their business but also their staff, and that it is the Licensee who is primarily responsible for the consequences.

I find that in this case, the Licensee, an experienced and knowledgeable owner, anticipated a full crowd but did little to prevent or address overcrowding, creating potentially dangerous situation and a serious contravention of the terms of the licence. The Licensee disregarded the earlier warnings of the Victoria police, when it would have been easy to address the issue. The decision to ignore the warning and to permit overcrowding was a business decision for which the Licensee is responsible, and as such the Licensee is responsible to his staff for the consequences to them, however regretful the Licensee may now be.

Given the seriousness of the contravention and all the circumstances surrounding it, I find that a suspension is the most appropriate penalty and order a 4 day suspension.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 301113 for a period of four (4) days to commence at the close of business on Friday, November 2, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the Victoria Police Department from the close of business on Friday, November 2, 2012, until the Licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager 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

Dianne Flood
Enforcement Hearing Adjudicator

Date: September 24, 2012

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate