



**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:	0885172 B.C. Ltd. dba O.K. Corral Cabaret 1978 Kirschner Road Kelowna, BC V1Y 4N6
Case:	EH12-226
For the Licensee:	David Crown
For the Branch:	Peter Mior
General Manager's Delegate:	Nerys Poole
Date of Hearing:	Written Submissions
Date of Decision:	April 12, 2013

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, 0885172 BC Ltd. dba O.K. Corral Cabaret, is located in Kelowna, B.C. David Crown is a principal of the corporate licensee and represented the licensee for the purposes of this hearing. The licensee holds a Liquor Primary Licence No. 029983. The hours of operation are Monday to Sunday, 7:00 p.m. to 2:00 a.m. The liquor licence for the establishment shows that the person capacity in area 01 is 196, in area 02 is 60, and in area 03 is 35, for a total person capacity of 291.

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")."

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 dated January 3, 2013 (the "NOEA"). The Branch alleges that on Friday, September 28, 2012 (business day of Thursday, September 27, 2012), the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation"), section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act") and section 41(2)(b) of the *Regulation*.

The branch alleges that on September 28, 2012, the licensee contravened section 6(4) of the *Regulation* by overcrowding beyond person capacity more than the occupant load. The proposed enforcement action for this alleged contravention is a 6 day suspension, which falls within the penalty range set out in item 15, Schedule 4 of the *Regulation* for a first contravention of this type. 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 to \$7,000.

The branch alleges that on September 28, 2012, the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain. The proposed enforcement action for this alleged contravention is a 4 day suspension, which falls within the penalty range set out in Item 11, Schedule 4 of the Regulation for a first contravention of this type. Item 11 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 to \$7,000.

The branch alleges that on September 28, 2012, the licensee contravened section 41(2)(b) of the *Regulation* by having a sales strategy likely to encourage intoxication. The proposed enforcement action for this alleged contravention is a \$5,000 monetary penalty, which falls within the penalty range set out in item 30, Schedule 4 of the *Regulation* for a first contravention of this type. Item 30 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 to \$7,000.

The licensee does not dispute the contraventions but disputes the proposed penalties. In particular, the licensee requests that the proposed penalty for the contravention of section 43(2)(b) of the *Act* be changed from a 4 day suspension to a monetary fine.

RELEVANT STATUTORY PROVISIONS

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

Drunkenness

43(2) A licensee or the licensee's employee must not permit

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

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

- 6 (4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

Liquor prices

- 41 (2) A licensee must not
- (b) use a sales strategy that is likely to promote or encourage intoxication,

ISSUES

1. Did the contraventions occur?
2. If so, has the Licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

EXHIBITS

Exhibit No. 1: Branch book of documents, tabs 1 to 11.

Exhibit No. 2: Licensee's submission (undated), received by Branch on February 27, 2013

EVIDENCE AND SUBMISSIONS

The Branch

The Branch's book of documents includes the NOEA, which describes the events of September 28, 2012.

On Friday, September 28, 2012 at approximately 12:22 a.m. (business day of Thursday, September 27, 2012), four branch liquor inspectors attended the O.K. Corral Cabaret to conduct an inspection. Inspectors 1 and 2 entered the cabaret in plain clothes without identifying themselves as liquor inspectors. Inspectors 3 and 4 later entered after identifying themselves as liquor inspectors.

Overcrowding

Inspectors 1 and 2 entered the cabaret by paying a security staff member \$10.00 each to by-pass the lineup at the front entrance. The two liquor inspectors noted that the security staff at the "by-pass" entrance did not have mechanical counters and therefore did not include them in the count for the establishment. As both inspectors thought the cabaret was overcrowded, they asked inspectors 3 and 4 to enter and conduct head counts.

At 12:25 a.m., liquor inspectors 3 and 4 went to the front entrance of the cabaret and spoke to security staff. There was a line-up of approximately 20 to 30 patrons waiting to enter. The door staff monitoring the line-up had two mechanical counters in his hands: one to count patrons entering and one to count patrons leaving. In response to a question from liquor inspector 3, the door staff person responded that the count was "around 150."

Inspectors 3 and 4 entered the cabaret at 12:27 a.m. and began counts using zeroed mechanical counters. At 12:34 a.m., inspector 4 recorded a count of 402. Inspector 3 recorded a count of 375. Inspector 3 asked the security staff member who had admitted inspectors 1 and 2, to conduct a count. Inspector 3 gave the staff member his mechanical counter. The staff member showed the liquor inspector his count of 355 on the mechanical counter. Inspector 3 then advised that a contravention notice for overcrowding would be issued. The staff member advised inspector 3 to notify the general manager of the cabaret of the notice.

Permitting intoxicated person to remain and sales strategy likely to encourage intoxication

At 12:30 a.m., inspector 2 observed a female bartender at the rear shooter bar of the cabaret pouring ten shots into shot glasses. Five shots were from a Long Island Iced Tea bottle and five were shots of Tequila. Five patrons placed their heads simultaneously on the bar and the bartender poured the shots into the patrons' mouths.

Inspector 2 then observed a male patron (patron 1) walking up the stairs toward the shooter bar. Patron 1 was unsteady on his feet and had glassy eyes. While he stood in the line-up to the shooter bar, patron 1 swayed back and forth, bumping into other patrons. Patron 1 laid his head backwards on the bar and the female bartender poured two shots of liquor directly into patron 1's mouth. Patron 1 got up, wiped his mouth and attempted to focus his eyes and steady himself. Patron 1 made his way, unsteadily to the entrance to the dance floor. He used the railing surrounding the dance floor for support. At 12:54 a.m., patron 1 walked directly in front of a female security staff member. The staff member watched patron 1 but took no action to remove him from the premises.

At 1:11 a.m., inspector 2 watched patron 2 stagger up and bump into her. Patron 2's eyes were unfocused and bloodshot. His eyes closed intermittently. Patron 2 sat on a stool next to inspector 2. Patron 2 swayed back and forth with his head bobbing. Patron 2 drooled as he sat on the stool.

At 1:16 a.m., patron 2 was having difficulty keeping his eyes open. His friends were attempting to rouse him. At 1:17 a.m., patron 2 fell asleep and bumped into inspector 2. When patron 2 awoke after bumping into inspector 2 he got off the stool, walked down the stairs and fell into the railing, grabbed a bottle of beer from the railing and fell to the floor. Patron 2 fell to the floor directly in front of a male staff member standing approximately five feet away. The staff member watched patron 2 fall but did nothing to assist him or remove him from the cabaret.

The male staff member then watched as patron 2 got up from the floor and made his way to the dance floor. Patron 2 continued to bump into people on the dance floor. At 1:26 a.m., patron 2 came off the dance floor and held onto the end of the railing for support before falling down again. After picking himself back up, patron 2 returned to the dance floor where he continued to have difficulty maintaining his balance. He also appeared to be having difficulty focusing his eyes. At 1:30 a.m., patron 2 was leaning on the railing and having difficulty standing. Inspector 2 observed patron 2 and the staff member and noted that the signs and symptoms of intoxication were evident, yet the staff member took no action to remove patron 2 from the cabaret.

At 1:32 a.m., inspectors 1 and 2 left the cabaret. As they were leaving, they observed patron 1 heading toward the shooter bar.

Compliance Meeting held on March 8, 2012

On March 8, 2012, inspector 4 issued a contravention notice to the cabaret for overcrowding beyond person capacity more than the occupant load and for contravening a term and condition (giving free drinks to mechanical bull riders). On March 12, 2012, inspector 4 held a compliance meeting and discussed the contraventions with the cabaret's general manager. The cabaret's general manager agreed to have staff walk through the cabaret periodically throughout the night to count patrons. No further action was taken at that time, as the branch believed the compliance meeting would achieve immediate and continuous voluntary compliance.

Proposed Penalties

Overcrowding

The branch proposes a 6 day suspension for the overcrowding contravention, stating that licensees who exceed their capacity by overcrowding are operating contrary to the public interest. Specifically, they are operating contrary to the principles of public safety and community standards.

In the present case, despite having door staff, using mechanical counters, monitoring the number of patrons entering and exiting the establishment, the licensee did not have an accurate count of patrons. Patrons were being permitted entry via a VIP area and were not added to the overall count. The staff member with the mechanical counter had a count of a minimum of 200 patrons below what his co-worker counted.

The branch refers to the compliance meeting with the cabaret's general manager seven months prior to this alleged contravention to discuss strategies to deal with overcrowding issues. The branch states that the strategies discussed at the compliance meeting were not being used or were ineffective in maintaining control of the establishment.

Permitting intoxicated person to remain

The branch proposes a 4 day suspension for the contravention of section 43(2)(b) of the *Act* by permitting an intoxicated person to remain. On the facts that are not disputed, the liquor inspectors observed several patrons who were exhibiting signs and symptoms of intoxication. The liquor inspectors further observed staff members watching these intoxicated patrons but doing nothing. The branch emphasizes the safety concerns related to intoxication, both for the individuals themselves as well as for the general public. When patrons are observed to be intoxicated, staff must promptly remove them from the red-lined area of the establishment.

Sales strategy likely to encourage intoxication

The branch proposes a \$5,000 monetary penalty for the contravention of section 41(2)(b) of the *Regulation* by having a sales strategy likely to encourage intoxication. On the undisputed facts, the liquor inspectors observed no less than six patrons having liquor poured directly into their mouths by staff members. One patron was exhibiting signs of intoxication prior to having the liquor poured directly into his mouth by the bartender. The branch notes that the cabaret's general manager has had ample opportunity to read the branch issued Guide and to discuss serving strategies with the local liquor inspectors. The branch notes that these opportunities have not produced voluntary compliance.

The Licensee

As noted above, the licensee does not dispute that the contraventions occurred. The licensee's principal and representative on this hearing attended a telephone pre-hearing conference held by the enforcement hearings registrar. At that meeting and as noted in the summary letter of that meeting, dated February 8, 2013, the registrar reviewed the three options available to the licensee:

1. Waiver – the licensee admits that the contravention occurred as alleged in the NOEA and accepts the proposed penalty. Please see NOEA for more information on this option.
2. Written Submission – the licensee admits that it contravened as alleged in the NOEA and is not making a due diligence defence. However, the licensee disputes the proposed penalty only. If the licensee chooses option #2, a hearing to address what penalty, if any, is warranted will take place by way of written submissions.
3. Oral Hearing – the licensee disputes that it contravened as alleged in the NOEA and/or the licensee is making a due diligence defence. If the licensee chooses option #3, I [registrar] will organize an in-person hearing at which both parties can present evidence, call witnesses, etc.

In its undated letter (received by branch on February 27, 2013), the licensee's representative opted for option 2 above and provided its written submission in the same letter.

The licensee's main point in its submission for no penalty or a reduced penalty is that the licensee has achieved self-compliance. The licensee cites the following actions it has taken since the alleged contraventions:

- hired a person for door people to report to who is not part of the security team and whose sole job is to patrol the floor continuously keeping an accurate occupant count, continually monitoring the crowd, watching for any signs of intoxicated people and directing security to deal with any incidents that need attention.
- set its maximum occupant load at 250 persons, which is 41 persons below the allowable level to provide for a sufficient buffer to make sure they are never over capacity.

- eliminated the VIP line. Security personnel have been notified that there are to be no exceptions and that any further indication of this conduct is grounds for immediate dismissal.

Further, the licensee states that it is in the process of obtaining the necessary approvals to increase their capacity, and have been advised that they have sufficient square footage and exit capacity to allow for 426 people (except for a requirement for 3 additional cubicles for the ladies washroom).

The licensee attaches a note from the bartender who was serving the liquor shots on the night of the alleged contraventions. The bartender states that she always refuses service to anyone who appears drunk. On the night in question, she says that she prepared a drink with 2 shot glasses: one was lime juice and the other was tequila. She poured this directly into the mouths of patrons. She never pours liquor directly from bottles.

Since receiving the NOEA, the licensee has discontinued the practice of pouring liquor directly into the mouths of patrons.

The licensee notes that they are only busy on Thursday nights, but are now open 7 days a week commencing February 11, 2013.

The licensee takes full responsibility for its operation and emphasizes that self-compliance has now been achieved. Thus, the licensee asks that the proposed 4 day suspension for permitting an intoxicated person to remain be changed to a monetary fine. The licensee says nothing in its submission about changing the proposed penalties for the other two contraventions.

REASONS AND DECISION

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.

The licensee presented no evidence to demonstrate due diligence. The licensee has stated that it accepts the facts as stated in the NOEA by the liquor inspectors. The licensee has chosen to dispute the penalty only in its written submission and thus is not making a due diligence defence. I find there is no evidence of due diligence and that the licensee was not duly diligent.

I find that the three contraventions occurred as stated in the NOEA and I turn now to the issue of what penalty, if any, is reasonable.

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.

Overcrowding – section 6(4) of the Regulation

Overcrowding is a serious public safety issue. All licensees are responsible for operating their establishments so that it complies with the law and with the terms and conditions of their licence. Licensees are responsible for ensuring their staff understand the contents of the Guide and for ensuring they comply with all terms and conditions as well as with the requirements of the Act and regulations. The Guide specifically states that the licensee “must have controls at each entry point and . . . must be able to count the number of people entering and leaving.” (page 24, tab 8, exhibit 1)

As noted in the NOEA, the issue of public safety is most apparent when the overcrowding exceeds the occupant load. There are significant public safety concerns arising from overcrowding in the event of a fire and the need to exit a building safely and efficiently. In addition, the public interest is a factor here when overcrowding ignores the community standards that may have been set for a given establishment when a licence is issued. Maximums are often established to reduce any negative impacts on neighbourhoods and communities.

This was not a situation where a few people managed to enter licensed premises covertly and unknown to staff, and thus increased the numbers above the allowable amount. The separate VIP lineup caused the overcrowding as the security staff controlling the line did not have counters and did not report the numbers to the staff with counters. The staff here encouraged the overcrowding by holding a separate lineup and by failing to keep tabs on who was entering. The door staff at the main entrance who had counters reported a count below the licensed capacity and well below the actual number of persons inside the establishment. According to the counts reported by the inspectors, the number of people inside ranged from 84 to 111 persons over the permitted capacity on the licence. The staff member who was asked to perform a count by the inspectors recorded 64 persons over the capacity of 291.

The licensee argues that they have introduced changes to ensure this does not happen again and have listed those changes in its submission. After the fact changes are exactly what the branch hopes and expects to occur when a licensee receives a contravention notice. However, these changes do not relieve the licensee of a penalty for proven contraventions.

The licensee submits that they are in the process of applying for approvals to increase their capacity. At this point, they have no evidence to show that such approvals will be given. If the approvals are given to increase the capacity, this does not relieve the licensee of the existing contravention of overcrowding pursuant to the current allowable person capacity set out on its licence.

I find a penalty is warranted because of the extent of the overcrowding, the existence of the staff-sanctioned VIP lineup that encouraged the overcrowding and the serious public safety issues resulting from this overcrowding. A penalty is warranted to ensure voluntary compliance in the future.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 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 four to seven day licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

The branch recommends a suspension of 6 days for the contravention of section 6(4) of the Regulations. This is towards the higher end of the penalty range for a first contravention in Schedule 4. The branch notes in the NOEA that the general manager of the cabaret had met with the liquor inspector only seven months prior to the present incident to discuss strategies to deal with overcrowding issues. Not only were there not strategies or policies in place to deal with overcrowding, the formation of the VIP lineup was a significant factor in contributing to the overcrowding.

I therefore find that the recommended suspension of 6 days is reasonable and appropriate to reflect the very serious nature of this contravention and to remind the licensee to ensure the staff are well trained to prevent any such future occurrences.

Permitting intoxicated person to remain – section 43(2)(b) of the Act

The liquor inspectors observed several patrons with clear symptoms of intoxication: stumbling, falling down, bumping into people, unfocused eyes, etc. The liquor inspectors also observed staff close by to these patrons who did not react in any way or to make any attempts to remove the patrons.

Intoxicated patrons can be a danger to themselves as well as to the public. In permitting intoxicated persons to remain on the premises, the licensee and its staff failed in their responsibilities.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 11 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

The branch recommends the minimum suspension of 4 days. The licensee requests a monetary penalty instead of a suspension. The licensee provides no basis for its request to change the suspension to a monetary fine. I find that the minimum 4 day suspension is warranted and will send a message to the licensee, its staff and the public of the importance that the branch places on ensuring intoxicated patrons are not allowed to remain in an establishment.

Sales strategy likely to encourage intoxication – section 41(2)(b) of the *Regulation*

I find that the practice of pouring shooters into the mouths of patrons with their heads laid back on the bar to be a sales strategy likely to encourage intoxication. The liquor inspectors observed no fewer than six patrons receiving shooters from the bartender in this fashion. The licensee notes in its submission that they have discontinued this practice since receiving the NOEA.

The Guide (page 26, tab 8, exhibit 1) states:

The general manager [of the branch] has also expressly prohibited the practice of pouring drinks into the mouths of customers laying or leaning over a bar. Establishments that permit such activities to occur can expect enforcement action.

I emphasize again the responsibility of the licensee to be familiar with the terms and conditions of its licence which, as noted on the face of its licence (tab 6, exhibit 1), include the terms and conditions contained in the Guide. The bartender, in her note attached to the licensee's submission, infers that the practice of pouring shooters into the mouths of patrons is allowable, as she insists she never pours liquor directly from the bottles. The Guide is clear: pouring from shooters or from bottles "into the mouths of customers laying or leaning over a bar" is prohibited. The licensee has failed in its responsibility to adhere to the terms and conditions of its licence and to train its staff in the requirements of responsible liquor service.

I therefore find that a penalty is warranted for the contravention of section 41(2)(b) of the Regulation.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 30 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

I find that the recommended monetary penalty of \$5,000 is reasonable and appropriate for this contravention.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 029983 for a period of ten (10) days to commence at the close of business on **Wednesday, May 15, 2013** 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 Kelowna police from the close of business on **Wednesday, May 15, 2013** 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.

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$5,000 to the general manager of the Liquor Control and Licensing Branch on or before **May 15, 2013**.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Nerys Poole
Enforcement Hearing Adjudicator

Date: April 12, 2013

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate