



**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:	0869972 BC Ltd. dba Jimmy Flynn's 15065 Marine Drive White Rock, BC V4B 1C5
Case:	EH13-084
For the Licensee:	Paul McDonough
For the Branch:	Cristal Scheer
General Manager's Delegate:	Nerys Poole
Date of Hearing:	February 5, 2014
Date of Decision:	February 21, 2014

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

Jimmy Flynn's is located at 15065 Marine Drive, in the City of White Rock. 0869972 B.C. Ltd. operating as Jimmy Flynn's holds a valid Food Primary Licence #302440 (the "licence"), and is permitted to serve liquor from the hours of 9:00 a.m. to 12:00 midnight seven days per week. The licence shows a licensed capacity of 55 persons for the interior and 12 persons on the exterior patio.

Paul McDonough is the principal of 0869972 B.C. Ltd. and appeared as the licensee's representative during the course of the hearing. I refer to Mr. McDonough as the licensee in this decision.

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 penalty are set out in the Notice of Enforcement Action dated April 29, 2013 (the "NOEA") (Exhibit 1, tab 1).

The branch alleges that, on March 17, 2013, the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation") by overcrowding beyond person capacity more than occupant load. The proposed enforcement action outlined in the NOEA is a four day suspension. This proposed penalty falls within the penalty range set out in item 15, Schedule 4 of the Regulation, for a first contravention of this type.

The licensee admits that the restaurant was above its allowed person capacity, but he submits that the count was not as high as was recorded by the RCMP Officer who issued the Licensed Premises Check dated March 17, 2013. Further, the licensee disputes the proposed penalty, submitting that his restaurant has no compliance history and no history of problems with the police.

RELEVANT STATUTORY PROVISIONS

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

Capacity

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

ISSUES

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

EXHIBITS

Exhibit 1: Branch Book of Documents, tabs 1 to 10

WITNESSES

The branch called two witnesses: the Royal Canadian Mounted Police Officer (the "RCMP Officer") who conducted the inspection on March 17, 2013 and the Liquor Inspector who issued the Contravention Notice and the NOEA.

The licensee testified as his only witness.

FACTS

At 6:40 p.m., on March 17, 2013, the RCMP Officer attended Jimmy Flynn's. The RCMP Officer observed that the restaurant was very crowded with patrons. He had a clear unobstructed view of the inside of the restaurant to conduct his count. The RCMP Officer used a mechanical counter to count 80 patrons inside the premises, not including the 10 staff, four of whom were band members. He counted 14 on the patio, using his eye only. The RCMP Officer described the restaurant as grossly overcrowded with patrons standing shoulder to shoulder. The RCMP Officer spoke with the licensee,

asking him to conduct a count as well. The licensee used the mechanical counter to count 68 patrons inside the restaurant.

The RCMP officer returned to the restaurant on two occasions that same evening, once on an unrelated matter and the second time at 10:30 p.m. to issue the Police Licensed Premises Check (LPC) (Exhibit 1, tab 2) to the owner, citing overcrowding beyond license capacity, and overcrowding beyond occupant load, contrary to section 6(4) of the Regulation. On both of these later occasions, the restaurant was under its capacity.

The Liquor Inspector received the LPC, reviewed the RCMP report and advised the owner that enforcement action may be sought in relation to this contravention. She issued a Contravention Notice dated March 27, 2013 (Exhibit 1, tab 2) for overcrowding beyond person capacity greater than the occupant load, contrary to section 6(4) of the Regulation. She later prepared and issued the NOEA.

As noted above, the person capacity on the licence is 12 on the patio and 55 inside. The floor plan of the restaurant has a handwritten notation "approved as requested for 57 and 10 staff" with a White Rock Fire Department stamp beside it. Although the licensee has not applied to the branch to change the numbers on its licence, the branch accepts that the amount of 67 persons is the occupant load for the inside of the restaurant.

SUBMISSIONS – BRANCH

The branch submits that the contravention of overcrowding beyond person capacity more than the occupant load has been proven on a balance of probabilities, contrary to section 6(4) of the Regulation.

An experienced RCMP Officer attended the restaurant, observed that it was grossly overcrowded and, with a clear unobstructed view of the establishment, conducted a count with a mechanical counter. His count indicated 80 patrons, a total of 90 persons with the addition of the staff and band members.

The Liquor Inspector exercised her discretion to bring the matter forward, stating the public safety concerns with respect to overcrowding. The licensee was aware of the terms of his liquor licence, including the sections of the Guide dealing with overcrowding. This was a busy celebratory day and a prudent licensee should have tasked one of his staff to pay special attention to the numbers entering the restaurant.

The branch acknowledges the licensee has no compliance history with respect to overcrowding but submits that overcrowding is a serious public safety issue and this contravention warrants the recommended minimum penalty.

SUBMISSIONS – LICENSEE

The licensee submits that the overcrowding was not as high as described by the count of the RCMP Officer. He only counted 68 patrons when he used the mechanical counter. He admits there was some overcrowding but that this was a one-time incident and, as such, he should not be penalized with a significant suspension. In the three years he has operated this restaurant, there have been no contraventions. For a brief period of time on March 17, 2013, maybe no more than 15 minutes, the restaurant was overcrowded. When the RCMP Officer returned twice later in the evening, the restaurant was in compliance.

He submits that he was the one who was checking the door that evening as people came in. However, at the time the RCMP Officer entered, he was busy handling the bills of about 20 patrons who wanted to pay and leave the restaurant. In addition, there were some people lined up waiting to use the washroom before leaving.

The licensee stated that he knows the liquor regulations and that he values his liquor licence very much. He is concerned as much about having this on his record as with the four day suspension.

REASONS AND DECISION

Contravention

The licensee does not dispute that the restaurant was over its occupant load on March 17, 2013. However, the licensee says he does not accept the RCMP Officer's count of 80 patrons. The RCMP Officer in his testimony stated that he asked the licensee if he disputed his count of 80 and that the licensee's response was that he did not. The licensee says he responded that he did not dispute that he was over capacity, but he did dispute the RCMP Officer's count of 80. When questioned about this in cross-examination, the RCMP Officer said, if the licensee had stated he was disputing his count of 80, the RCMP Officer would have conducted another count.

The RCMP Officer is very experienced in conducting counts. He conducted inspections of establishments in Whistler during his seven years working there before coming to White Rock, often responding to overcrowding issues. He stated he had an unobstructed view of the restaurant while conducting his count. The licensee admitted that his first count showed 47 persons. He said he realized his first count was incorrect so he did a second count with 68 as the result.

I find that the count conducted by the RCMP Officer is more reliable because of his experience with counting persons in establishments. I find that the count conducted by the licensee was more likely to be in error than the count conducted by the RCMP Officer. The licensee made an erroneous count on his first effort and then conducted a second one. I conclude that there was an error in his second count as well and that there were 80 patrons and 10 band and staff, for a total of 90 persons in the restaurant. I also find that there were 14 persons on the patio, with a person capacity of 12.

I find that, on the evening of March 17, 2013, the licensee was significantly over its occupant load of 67 persons and over its licensed person capacity of 55 for the interior of the restaurant, and over its licensed person capacity of 12 persons on the patio.

Due Diligence

The licensee is entitled to a defence if it can be shown that he 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, he must ensure that those procedures are consistently acted upon and problems are dealt with.

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had:

- a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors); and,
- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Here, the licensee and directing mind was in the restaurant and was responsible, by his own admission, for watching the door and controlling the number of patrons. The defence of due diligence is thus not available to the licensee.

Even if the licensee were not the directing mind here, I find that the licensee has not implemented policies and procedures to prevent such contraventions. On a busy St. Patrick's evening, with a band in the restaurant, the licensee had no one monitoring the door to ensure the numbers entering were within capacity. The licensee stated in his testimony that he was busy at the till with a party of about 20 who were in the process of paying their bills and thus leaving the restaurant shortly after. In addition, the licensee said there was a lineup of people at the one washroom facility in the restaurant and that he has no control over this. I accept that there were people about to leave the restaurant as stated by the licensee and that there were people waiting in the washroom lineup. This however does not refute the fact that the 80 patrons were permitted entry at some point and that no one was keeping track of those numbers.

The licensee referred to a few things he has implemented since the contravention. I address these under the Penalty section.

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 NOEA. 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 factors that I have considered in determining the appropriate penalty in this case 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

The consequences of overcrowding in a licensed establishment can be serious. It can lead to control and safety problems inside the establishment and to disturbances and other problems within the community at closing. Overcrowding also makes it difficult for a licensee to ensure compliance with other laws, such as preventing minors from consuming and removing intoxicated patrons. Overcrowding beyond the occupant load is a serious public safety issue, which can result in injury and death to customers.

Licensees are responsible for knowing their licence capacity and occupant load and for complying with the capacity numbers. In the present case, the licensee submits that, in its three year history of operations, it has no compliance history and that, as this was a one-time incident, I should impose no penalty.

I find that a penalty is warranted here because of the numbers in the restaurant, the seriousness of overcrowding above occupant load, and the need to send a message to this licensee, other licensees and the community at large. In the circumstances of this contravention, a penalty is warranted to remind the licensee of its responsibilities to prevent overcrowding and to encourage future voluntary compliance.

The licensee referred to some steps taken since the contravention. They have incorporated reminders about overcrowding in their training of new staff. The licensee pointed out that overcrowding is very rare in his restaurant. It may be a rare event for this restaurant to be overcrowded but it occurred on a night that one might have expected it to occur. The licensee needs to ensure the proper door control when this happens.

The branch in this hearing accepted the occupant load capacity of 67 persons inside the restaurant (Fire Department note on floor plan at Exhibit 1, tab 6). The person capacity of 55 is noted on the licence. I remind the licensee of the requirement in the Guide to apply for approval from the General Manager if a licensee wishes to increase the person capacity on its licence to match the occupant load (Exhibit 1, tab 7, Appendix 3).

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 \$5,000 to \$7,000 monetary penalty

Having found that a penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I find that the minimum penalty of a four day suspension is reasonable and appropriate for this contravention.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence #302440 for a period of four (4) days to commence at the close of business on Saturday, March 22, 2014, and to continue each succeeding business day until the suspension is completed. The restaurant may remain open for business but is not allowed to sell liquor during the period of suspension.

To ensure this order is effective, I direct that the liquor licence be held by the branch or the White Rock RCMP detachment from the close of business on Saturday, March 22, 2014 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

Nerys Poole
General Manager's Delegate

Date: February 21, 2014

cc: Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Cristal Scheer, Branch Advocate