



**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:	0966976 B.C. Ltd. dba The Drake Eatery 146 – 560 Johnson Street Victoria, BC
Case:	EH14-148
For the Licensee:	Michael Spence and Lee Spence
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Nerys Poole
Date of Hearing:	Written Submissions
Date of Decision:	March 11, 2015

**Liquor Control and
Licensing Branch**

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INTRODUCTION

0966976 B.C. Ltd. dba The Drake Eatery (the "licensee") operates a restaurant (the "restaurant") under Food Primary Licence number 306040 (the "licence"). The restaurant is located at 517 Pandora Street in Victoria.

The licence specifies hours of liquor service daily, from 9:00 a.m. to midnight, seven days per week. The licence person capacity is 96 inside the restaurant and 24 in the lounge interior, for a total person capacity of 120.

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").

The principals of the corporate licensee are Michael Spence and Lee-Anne Spence. Lee Spence signed the written submission on behalf of the corporate licensee.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated December 1, 2014 (the "NOEA") (Exhibit 1, tab 1).

The Branch alleges that, on October 24, 2014, the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation") by overcrowding beyond person capacity more than the 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 does not dispute that the contravention took place. The licensee agreed to a written submission hearing. In doing so, the licensee accepted that the contraventions occurred as alleged in the NOEA and that the licensee would not be pursuing a due diligence defence to the contravention. The licensee only disputes the proposed penalty.

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: The branch's book of documents, tabs 1 to 13.

Exhibit 2: Licensee's written submission and documents (42 pages, including a copy of all of Exhibit 1).

Exhibit 3: Email from branch advocate dated February 16, 2015 in response to licensee's submission (1 page).

FACTS

The following facts are undisputed and are set out in the NOEA.

On October 24, 2014, a multi-agency task force ("Task Force") was conducting inspections in the Victoria area. A liquor inspector was part of the Task Force, along with two Victoria Police Department constables, a fire inspector from the Victoria Fire Department and an inspector from the City of Victoria.

At approximately 10:00 p.m., the Task Force entered the restaurant. At that time, the liquor inspector noted that the restaurant felt extremely crowded. All seating areas appeared to be occupied. There were numerous patrons standing, drinking, and socializing throughout the restaurant.

The liquor inspector asked one of the Victoria Police constables to monitor the front door to count any patrons leaving the restaurant. The liquor inspector used a mechanical counter that he had calibrated for accuracy at the start of the shift. He re-set the counter to zero prior to initiating the count. The liquor inspector conducted his first count as he moved in a counter-clockwise pattern around the restaurant, starting and finishing at the front door. The liquor inspector's first count read 148. This count did not include any staff members, nor anyone outside of the red-lined area. The liquor inspector then went behind the bar to check the liquor licence and noted that the bartenders were so busy they did not even acknowledge his presence behind the bar.

Prior to conducting a second count, the liquor inspector checked with the constable at the front door who told him that three persons had just exited. The liquor inspector's second count read 137, again without counting any staff members nor anyone outside of the red-lined area.

The liquor inspector noted that the restaurant was heavily congested and that he had to push and squeeze his way through the crowd. At no time did the liquor inspector observe any staff members in the restaurant attempting to control the ingress of patrons. The Victoria Fire Department inspector informed the liquor inspector that he had spoken to the supervisor who indicated to him that she believed the restaurant was about ten persons over their occupancy.

After completing the two counts, the liquor inspector located the supervisor who was now by the front door. He advised her that the restaurant was over its occupant capacity and that they must start to remove patrons in order to reduce the numbers. The supervisor advised the liquor inspector that she and another staff member had mechanical counters but were too busy with other duties that night and not able to maintain a constant count of persons coming and going. She also stated that she believed there were only 130 persons, including staff, in the restaurant. The liquor

inspector advised her that he would be sending a Contravention Notice (Exhibit 1, tab 2) in the mail.

In response to a request issued by the Branch to the licensee to provide records, dated October 31, 2014, the licensee sent a number of documents including a shift change check list for the night of October 24, 2014. The checklist included notes by the supervisor stating that the shift was "Busy! Over Capacity", "We had a lot of people in here tonight. I counted 135."

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.

The Task Force attended at the restaurant and observed that it was overcrowded. The liquor inspector conducted two counts, one at 148 and the second at 137, without including staff members. With the inclusion of the ten staff on duty that night, the restaurant was well over its person capacity of 120.

The Branch notes that none of the staff took any steps to reduce the number of persons in the restaurant prior to the arrival of the Task Force members. The supervisor was aware that the restaurant was above its licensed capacity.

The licensee has no compliance history. The NOEA notes that the restaurant is new and that they received their liquor licence on July 30, 2014 and officially opened to the public in August 2014, three months prior to the overcrowding contravention.

As this was a first contravention within the last 12 months, the proposed four day suspension is appropriate. The Branch submits that this proposed penalty will instil the importance and significance of person capacities and will promote future compliance.

SUBMISSIONS – LICENSEE

As noted above, the licensee agrees that the contravention occurred as described in the NOEA. The licensee submits that a warning is sufficient for this first time contravention.

The licensee explains the circumstances on the evening of October 24, 2014. The congestion and overcrowding occurred that night as a result of a group of students who were concentrated inside the front door. They had made reservations earlier for about 50 persons and 80 persons showed up at the restaurant. As some patrons were intending to leave, the staff allowed additional patrons to enter before others had actually left the restaurant. The licensee admits that they should not have allowed in the extra patrons until the first group had left the restaurant. This resulted in the overcrowding. The licensee agreed that this large group and the crowding near the entry door were not conducive to sitting and eating a meal.

The licensee states that they have initiated a number of steps to prevent this contravention in the future. These steps include:

- Improved staff training re: importance of ensuring the numbers are below the allowable count and in knowing what is allowable in a restaurant with a Food Primary licence
- Emphasis to staff that all patrons must have a seat and, if none available, the patron must wait before being admitted
- The addition of more stools to allow all patrons a seat and to prevent any standing
- Explaining to patrons that this is a restaurant and patrons must be seated, not standing
- Instructing staff to take extra precautions when doing the counts to allow for 10 extra persons who may not be in sight, either in the washroom and outside smoking
- Maintaining two staff members, one of whom is a supervisor, at the door on weekends to ensure control at the door, and to know the count at all times by using a mechanical counter

- Writing names on a wait list
- Taking names and numbers for large groups and calling or texting them when their table is ready, instead of having them wait at the door
- Increased communication between door staff and other staff on weekend evenings

The licensee says it has operated two other establishments with liquor licenses over 16 years and has had no history of contraventions with these establishments. The licensee's intention is to attract a clientele that appreciates quality food and beverage in a comfortable and safe environment. They discourage patrons who may be looking for more of a 'bar' atmosphere. Since the incident on October 24, 2014, and with the introduction of some of the changes noted above, the restaurant has not had an overcrowding problem.

REASONS AND DECISION

Contravention

The licensee admits the contraventions occurred. I, therefore, find that the licensee has contravened section 6(4) of the Regulation.

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 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 are dealt with.

The licensee has not presented any evidence to demonstrate due diligence nor has it raised a defence of due diligence. By agreeing to a written submission hearing, the licensee agreed it would not be pursuing a due diligence defence to the contravention. I, therefore, find that the licensee has not established due diligence and I turn now to the question of penalty.

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.

On the facts of this incident, as set out in the NOEA and agreed to by the licensee, the restaurant was beyond its licensed person capacity on October 24, 2014. The first count conducted by the liquor inspector showed 148 patrons in the restaurant and the second count showed 137 patrons. Neither of these counts included the 10 staff members. With the addition of the staff members, the two counts showed 158 and 147 persons in the restaurant when the Task Force arrived and conducted the counts. I accept these counts as accurate. The restaurant was, therefore, initially 38 persons over its capacity and, on the second count, 27 persons over capacity. This is significant and can result in serious public safety issues.

The issue of public safety is most apparent when an establishment exceeds the occupant load as occurred here. The liquor inspector noted that he had great difficulty in moving around the restaurant. Getting out of a building safely during a fire or other threat is difficult where there is a crowd of people, with some standing and some seated.

The licensee has admitted to the overcrowding and has admitted that the supervisor was aware that the restaurant was over its person capacity but did nothing to remedy the situation until the Task Force arrived.

I find that a penalty is warranted for the contravention of section 6(4) — overcrowding beyond person capacity more than occupant load.

Having concluded that a penalty is warranted for the contravention of section 6(4) of the Regulation, I turn to consider the following factors to determine the appropriate penalty: 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. Once I have concluded that a penalty is warranted, as I have done here, I have no authority to impose a warning under the legislation. Even if I had such authority, I find that the circumstances here warrant more than a warning.

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.

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 penalty.

Having found that a penalty is warranted on the facts of this contravention, I am bound to follow the minimums as set out in the schedule. I find a four day suspension to be reasonable and appropriate given the effect of overcrowding on public safety and the numbers that were present in the restaurant on October 24, 2014. I note in the licensee's submission that it has a clean record and that it has made some significant changes to ensure future compliance with the legislation. I encourage the licensee to continue its efforts to ensure its staff complies with the legislation and to prevent any future contraventions.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence No. 306040 for a period of four days to commence at the close of business on Thursday, April 16, 2015, 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 Thursday, April 16, 2015, 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: March 11, 2015

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Jay Blackwell, A/Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate