BRITISH COLUMBIA

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:	641486 B.C. Ltd. dba Johnnie Fox's Irish Snug c/o William Greer 1033 Granville Street, Vancouver
Case:	EH16-038
For the Licensee:	William Greer
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Nerys Poole
Date of Hearing:	Sept. 22, 2016
Date of Decision:	October 20, 2016

INTRODUCTION

The corporate licensee, 641486 B.C. Ltd., (the "licensee") owns and operates an establishment known as Johnnie Fox's Irish Snug ("the restaurant") at 1033 Granville Street, in the Granville Entertainment District of Vancouver. The licensee holds Food Primary Licence Number 301324 (the "licence"). The authorized representative of the licensee is William A. Greer.

According to the terms of its licence, the licensee may sell liquor from 9:00 am to 1:00 am, Sunday to Thursday and from 9:00 am to 2:00 am on Friday and Saturday. The person capacity on the licence is 59.

The licence is, as are all liquor licenses 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 27, 2016 (the "NOEA").

The Branch alleges that on March 12, 2016, the Licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation") by overcrowding beyond the licensed person capacity and more than the occupant load. On March 17, 2015, less than one year prior to this alleged contravention, a contravention for overcrowding beyond person capacity occurred and was proven, resulting in a $5000 monetary penalty. The penalty range for a second contravention of this type is set out in item 15, Schedule 4, of the Regulation: 10 to 14 days suspension. The NOEA recommends a ten (10) day suspension.

The licensee accepts the person counts recorded in the NOEA and makes a defence of due diligence.

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

1 Branch Book of Documents, tabs 1 to 13

2 Two Branch Posse System Entries dated March 19, 2015 & April 8, 2015 (double sided)

3 Licensee's Employee Contract/Manual

4 Three documents with employee signatures indicating "I understand . . . "

5 Daily Reminder – sign-in sheet dated Saturday, March 12, 2016

6 Serving It Right Numbers for all staff of the licensee

7 Copies of incident reports

8 Copies of doorman counts made every hour on weekends, starting with March 17, 2016

9 Copies of samples of doorman counts from weekends Jan. 22 to March 12, 2016

10 Supplemental doorman counts from red replacement book

11 Navigator "Sales by Time Comparison" – daily sales report

12 Copy of licensee's FOH Schedule - March 7 to March 13, 2016

WITNESSES

The branch called the two liquor inspectors who attended at the restaurant on March 12, 2016:

- liquor inspector 1
- liquor inspector 2

The licensee called two witnesses:

- the manager of the restaurant who was present on the evening of March 12, 2016 (the "manager")
- the operations manager of the restaurant (the "operations manager")

RULING ON ADMISSIBILITY OF BRANCH EVIDENCE

During the hearing and after the branch had finished with its witnesses and the licensee's witnesses were testifying, the branch advocate asked to introduce a piece of evidence about the March 4, 2016 inspection of the restaurant and, if necessary, call the police officer who attended at the restaurant that evening.

Because of the lateness of this evidence and lack of disclosure in a timely manner, I ruled this evidence inadmissible. Other than the evidence from liquor inspector 1 who testified that this visit occurred, and the evidence in the licensee's logbook about the police visit, I did not view or consider any additional evidence about this inspection.

EVIDENCE

Inspection on March 12, 2016

The two liquor inspectors testified about their inspection on the evening of Saturday, March 12, 2016. Liquor inspector 1 explained that they entered the restaurant at about 11:15 p.m. to perform a routine inspection. They exited the restaurant at about 11:23 pm. They observed that the restaurant was very crowded, something easily seen from the front, as the restaurant is located in a long narrow area. Liquor inspector 1 asked the person at the door how many persons were in the restaurant. According to the report in the NOEA, the person at the door answered 57. At the hearing, liquor inspector 1 testified that '57' was a typographical error and that the person actually said 59. '59' is the number in her notes taken on the evening of the inspection (Exhibit 1, tab 9). Liquor inspector 2 testified that the person answered '57'. Liquor inspector 2's notes show the person at the door said '57.' (Exhibit 1, tab 10)

Both liquor inspectors had mechanical counters, set them at zero and proceeded to conduct a count because they believed the restaurant appeared to be over its capacity of 59. Both liquor inspectors described the methodical way they would conduct a count in a restaurant of this size, starting from the front and proceeding to the back and clicking off the numbers as they go. Liquor inspector 1's count was 82 persons. Liquor inspector 2's count was 81 persons.

Liquor inspector 2 testified that his first impression was that the restaurant was "jam packed." He stated that the pathway to the back of the restaurant was full. Liquor inspector 2 agreed that there are often transitions in restaurants with people leaving, paying bills, etc. and new people entering.

After making the counts, liquor inspector 1 went to the bar to speak to the manager about the counts and overcrowding concerns. The manager conducted a count with his counter, which showed 66 persons. Liquor inspector 2 did a second count, which showed 70 persons. Liquor inspector 2 thought it was conceivable to have the difference in his two counts within the time frame they were in the restaurant. He noticed people outside smoking which may also have reduced the count within the period between the two counts. Liquor inspector 1 advised the manager to reduce the numbers to 59 and that she would be issuing a contravention notice. (Exhibit 1, tab 2)

Liquor inspector 1 referred to the occupancy load certificate, issued by the City of Vancouver Fire Department (Exhibit 1, tab 7). This certificate shows a total capacity of 48 patrons and 11 staff for the restaurant. Liquor inspector 1 testified that the branch does not differentiate between staff and patrons and monitors for the total capacity of 59.

Logbook Records of Doorman Counts

On July 24, 2016, liquor inspector 1 returned to the restaurant to take photos of the licensee's logbook. She testified that the logbook entries for weekend nights started on the weekend after March 12, 2016 (Exhibit 1, tab 11). The photos of the entries begin on March 18, 2016 and record counts for every weekend up to May 27, 2016 when the blank pages begin. Next entries are Friday, June 10, Friday, June 17, and Saturday, June 18. There are no entries for June 11 or 12, and only blank pages through rest of June and all of July.

The manager testified that there were blank pages in the logbook because it had been misplaced for a time. The operations manager stated he was unaware that the main logbook was missing.

The licensee submitted a copy of a small red notebook with entries for June 25, July 2 and July 9, 2016 (Exhibit 10), with the manager stating they used this red book when the main logbook went missing. The operations manager was unaware of the use of this red book. The licensee submitted copies of records of doorman counts made every hour on weekends, starting with March 17, 2016 (Exhibit 8) and copies of doorman counts, made prior to March 12, 2016, with samples from weekends Jan. 22 to March 12 (Exhibit 9). I review these records below under the due diligence evidence.

Other Inspections of the Restaurant

Liquor inspector 1 stated she attended at the restaurant on Friday, March 11, 2016, partly because of the information she received about the inspection by the police on March 4, 2016. As noted above, I ruled inadmissible any documentary evidence about the March 4 police inspection, because of the late nature of the application and failure to disclose in a timely way.

Liquor inspector 1 testified that she recorded in her notebook that the restaurant was at capacity at 11:45 p.m. on March 11, 2016.

The Absence of a Designated Doorman on March 12, 2016

The licensee's witnesses testified that the normal practice on weekend nights is to assign a doorman to stand at the door to maintain the numbers in the restaurant at 57, as stated in the restaurant's policy. (Exhibit 3)

On March 12, 2016, the FOH schedule for the restaurant (Exhibit 12) indicates a doorman was scheduled to be at the restaurant from 6:00 p.m. to 2:00 a.m. (the "doorman"). The doorman was on shift until about 9:00 p.m. and then left.

The licensee's two witnesses gave different explanations for the doorman's departure. The manager testified first and stated that he received a message saying the doorman had to go, as it was an emergency. The manager gave no explanation as to the nature of the emergency. The operations manager was working at the Bourbon on March 12, 2016. Because the Bourbon was short on doormen that night, he decided to call the manager at the restaurant at 9:00 pm and ask if their doorman could assist at the Bourbon. The Bourbon usually has 7 doormen on weekend nights as it has a capacity of 300. According to the operations manager, the manager agreed to send him the restaurant's doorman as the manager believed at the time that they would not be facing any great influx of people, and that the restaurant would be fine without the doorman. The manager did not mention this request in his testimony.

According to the manager, the restaurant was fairly quiet from about 9:00 p.m. to about 10:30 or 11:00. He estimated maybe 35 people. The logbook record for March 12, 2016 shows 53 people at 8:00 p.m. and 55 people at 9:00 p.m., with a note saying "the doorman had to leave on emergency," and no records of counts after 9:00 p.m. (Exhibit 9) Just after 11:00 p.m., the manager stated that a huge rush of people entered the restaurant. Both licensee's witnesses blamed the sudden rush at 11:00 on an event in town, the Rugby Sevens. They had not been aware of this event. At the time of the sudden influx of people, the manager assigned the other bartender to go and watch the door and to tell people who had already entered that they could not be served because they were over capacity. It was at this time that the liquor inspectors entered.

Licensee's Evidence of Due Diligence

As noted, the licensee accepts the counts as recorded in the NOEA and submits that its evidence of due diligence offers a full defence to the contravention of overcrowding.

Operations Manager

The operations manager testified about his role and the reasons for bringing him back to work for the licensee in August of 2015. From about 2004, he had worked in various capacities for the licensee, had left and worked elsewhere and then returned.

He was aware of the overcrowding contravention that occurred on March 17, 2015. He stated that the licensee brought him in to help to incorporate best practices in its policies, training and reminders to staff. He updated the employee contract and introduced some other policy documents. He trained the doormen who were on shift on the weekends at the restaurant. He would do walk-throughs of the restaurant, check on the doormen and ask them what their counts were.

When asked in cross-examination about the policy for when a doorman may have to leave early or is unavailable for a designated shift on Fridays or Saturdays, the operations manager testified that he or another supervisor would take the person's place. During less crowded week nights, the bartender was able to watch the door.

Policies and Manuals

The licensee submitted its employee contract (Exhibit 3). According to the testimony of the manager and operations manager, they require all employees to review this contract at the time of hiring. Management asks them to sign the "I understand" document (Exhibit 4). The operations manager updated the employee contract when he started in August 2015 and he introduced the "I understand" document at that time. Existing employees signed at that time.

The employee contract outlines the mission statement of the restaurant, its culture and core values and specific information about service to customers and liquor law requirements, as well as cautions about abiding by liquor laws at all times. Under the liquor laws introduction, there is a bold capitalized heading "Keep our Restaurant under Capacity" with the following instructions:

> Our capacity is 59 people. This includes all FOH and BOH staff. Keep it at 57 just to be safe. If there is no door person on, make sure you stop guests before they sit down or order.

The manual sets out further guidelines with respect to the importance of complying with the liquor laws relating to minors, overservice, etc.

The licensee entered "I Understand" documents signed by the manager, the bartender on duty on March 12, 2016, both of these dated August 1, 2015 and one signed by a server on duty on March 12, 2016, dated January 3, 2016. The document states:

> I Understand,
>
> After reading Johnnie Fox's handbook I, [employee's name], understand what is expected of me as a bartender and server. I will follow these rules without question including the procedures in cash handling and reviewing patrons ID's and understand the severity of punishment if these steps are not followed.
>
> I appreciate the do[sic] – diligence Johnnie Fox's management team have taken to ensure that we have all the tools and information needed to succeed as part of the bar team here at the Bourbon.

In their testimony, the licensee's witnesses stated these documents applied to the restaurant as well as being used for Bourbon employees.

In response to a request from liquor inspector 1 a few months after the incident, the licensee provided her with a list of their employees, the date they were hired, their Serving It Right numbers and their positions in the restaurant (Exhibit 6). The licensee noted on this document the guidelines from their training manual which are:

- Uphold and maintain Johnnie Fox's core values at all time
- Maintain a positive attitude
- Operate under and follow liquor laws of our Food Primary licence
- ID anyone under the age of 35
- Do not over serve the guest
- Serve within our operating hours
- Abide by all other general policies and procedures

The licensee submitted a sign-in sheet for Saturday, March 12th (Exhibit 5), which states at the top:

> I have been trained and understand the importance of the lessons taught to me through Serving It Right, Foodsafe and any other training pertaining to the Food and Beverage industry including, but not limited to:
>
> - Checking guests ID's to ensure they are of legal drinking age
> - Ensuring not to over serve a patron
> - Will not be under the influence of drugs or alcohol during my shift
> - Ringing drinks in as they go out with no exceptions.

This sign-in sheet lists the names of those who were working on that day, their start and finish times.

Training

The operations manager was responsible for training the staff after he returned to work for the licensee in August 2015. He explained that he would review the employee contract (Exhibit 3) with all new hires and then have them sign the 'I understand' document. He also took over training the doormen who were assigned to the restaurant on Fridays and Saturdays. He explained that the restaurant is small and the training for using the counters is comprised of having the doormen use the two counters, one for people going in and one for people going out. The doormen are required to record their counts in the logbook for that purpose.

Reminders

The Operations Manager testified that he would do walk throughs of the restaurant to check on the counts and he would make sure the logbook was being used**.** He stated that he would come to the restaurant about three times a week. The rest of the time he was at the Bourbon.

Incident Logbook

The licensee submitted some sheets from the incident logbook with entries dated Friday, March 4, Friday, March 11, and Saturday, March 12, 2016 (Exhibit 7). The first page has the following handwritten note:

> All incidents of note must be recorded in the log. Date, who was on shift, what happened and how the incident was resolved.
> If the liquor inspector came in, time and date of her visit and her name must be entered and any comments she made.
> If health inspector comes in, time and date, what he said must be recorded. If there is anything to clean, the date when clean must be entered under his visit!

Below this note is a circle with arrows on either side pointing up to above notes, with "Very Important" written in the circle.

The entries include a note about the inspection by the police on the evening of Friday, March 4, 2016. The manager wrote the following:

> I told them we are allowed 59 persons including staff on the premises. The officer counted and said we had 61, it was during a time of a party leaving the restaurant, by the time the officer finished counting we had approx. 7 people leave the restaurant. I assured her that if we were a couple over that it was a result of the cross over between parties. She informed me she would be contacting [liquor inspector 1] to inform her that she had come into the restaurant.

The operations manager stated that he would review the logbook about once a week. He was not aware of the entry for Friday, March 4, 2016. The manager had told him the police had been into the restaurant on that date but that there was no issue with capacity. He stated that the manager thought the restaurant was at capacity while police thought it was just over.

An entry for Friday, March 11, 2016, notes that two liquor inspectors came in and that the count was under capacity. The note states that a police officer from the previous Friday's visit had contacted liquor inspector 1. The manager noted in the logbook:

"Liquor inspector 1 told the manager to be careful of over serving but was happy with the numbers."

The entry for March 12, 2016, the night of the incident, notes:

> Liquor inspectors came in at approx. 12:00 a.m. on the night and they counted we had too many people in the restaurant. We initially had a door guy that night but he had to leave at 9:00 pm for an emergency. Was a very quiet night afterwards up until around 11:30 pm when we got a huge party who walked in. The other bartender at the time had to jump on the door but this was at the same time the inspectors came by. Once we realized that too many people had come in we quickly got a lot to leave, so by the time the liquor inspectors left we were under capacity.

Record of Doorman Counts

The licensee submitted copies from a logbook (Exhibit 9), showing counts every hour on the following dates:

- January 22/23/24, 2016
- January 29/30/31, 2016
- February 12/13/14, 2016
- February 26/27/28, 2016
- March 4/5/6, 2016
- March 11/12/13, 2016

There are a number of recorded '59' counts on many of these weekend nights. Under March 11, 2016, there is a handwritten note: "steady night, liquor inspector came in, under capacity!" Under March 12, 2016, there are only three counts recorded, 45 at 7:00, 53 at 8:00 and 55 at 9:00 pm**,** with another handwritten note: "Door guy had to leave on emergency, liquor inspector came in and done count, said we were over."

Entries of door counts every hour from a logbook (Exhibit 8) show the following dates, post-incident, again with a few '59' counts recorded:

- March 17, 18, 19, 20, 2016
- March 24, 25, 26 and 27, 2016
- April 1, 2 and 3, 2016

The manager testified that the restaurant was often very busy on weekend nights and that they definitely needed a door person on those nights. The records of the counts for weekend nights demonstrate that the restaurant was often at full capacity.

SUBMISSIONS – BRANCH

The licensee has accepted the counts as set out in the NOEA. The restaurant was over capacity on the night of March 12, 2016. Therefore, the contravention has been proven. With respect to due diligence, the branch submits that the defence has not been established. There does not seem to be adequate policy for the period when a doorman might have to leave and when a crowd might arrive. The licensee gave different explanations for the doorman's absence. There was no plan in place as to how to deal with situation if a crowd entered, as happened when the doorman had gone. With respect to the licensee's submission and testimony about the cross over time as parties pay bills, get up to leave, exit and others enter, the branch submits that this is not justification for over capacity. Overcrowding is a serious public safety issue and if the patrons wishing to enter are not stopped at the door, the restaurant is over capacity.

SUBMISSIONS – LICENSEE

The licensee agrees that there was a contravention of overcrowding on March 12, 2016. The licensee submits that it has been duly diligent. The licensee has established procedures to make sure these contraventions do not occur. With respect to the time when people are leaving and others entering, the licensee submits that every restaurant is over capacity when people enter in that transition period. The licensee says they have a system in place where the patrons entering are denied service. The licensee states that their employee, the manager, made a mistake on March 12, 2016 and that he admits he made a mistake in that he should have asked for help from one of his superiors. The licensee says they have implemented adequate training and systems and have taken steps to make sure these contraventions do not occur. The licensee is

confident that they are doing everything reasonable to prevent contraventions but mistakes can occur.

The licensee submits that they have made out a defence of due diligence and therefore I should not find a contravention.

REASONS AND DECISION

Contravention

As noted, the licensee agrees that the restaurant was over capacity on March 12, 2016 and accepts the counts as recorded in the NOEA.

I therefore find a contravention of section 6(4) of the Regulation on the night of March 12, 2016. I turn to the defence of due diligence.

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 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:

> 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, 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.

Directing Mind

I find that the operations manager was responsible for the design and supervision of the implementation of corporate policy. He testified that, when he returned to work for the licensee in August of 2015, he revised some policies, drafted others and implemented systems to prevent contraventions from occurring. He stated that one of his roles was to review the systems in place and improve on them in order to establish the necessary due diligence.

I find that the operations manager is a directing mind of the licensee because of his role in creating and implementing corporate policy for the licensee. I find further that the operations manager was not in the restaurant at the time of the contravention here. According to the test set out in *Beverly Corners*, this means that he was not responsible for the contravention and thus, I should move to the second step in the analysis.

However, the *Beverly Corners* case involved the sale of liquor to a minor. The sale of liquor to a minor is usually the result of the mistake of one person, i.e. the server or bartender who serves the liquor. Licensees have a defence to this mistake if they are able to establish they have the training, systems and policies in place and they ensure the effective operation of those systems to avoid such contraventions.

In the circumstances here, we have a different scenario from that of a one-time mistake by a server. The overcrowding here was the result of a combination of actions. I find that the manager's testimony about an emergency, although not the full story, could be interpreted to mean an emergency at the Bourbon. I can see no reason not to accept the operations manager's explanation, i.e. that the Bourbon was understaffed and he requested the doorman from the restaurant to come to the Bourbon. I conclude that the operations manager made the request and this is why there was no doorman after 9:00 p.m. at the restaurant. I find the testimony from the operations manager about his request for the doorman to be a significant factor in my conclusions about the availability of the due diligence defence.

Despite the stated policy of providing doormen at the restaurant on weekend nights, and the manager's assertion that doormen were definitely needed on weekend nights, the operations manager, who is the manager's supervisor, asked for the restaurant's doorman to leave the restaurant. I find that this action of the operations manager contributed to the overcrowding contravention. The manager stated that, if the doorman had been on duty at the door, the overcrowding would not have occurred. The manager further testified that, in hindsight, he should have asked for one of his superiors, including the operations manager, to come to the restaurant to provide the necessary support. These were his instructions from his superiors, i.e. to call if he needed the extra help.

In its submission, the licensee emphasized that the manager made a mistake that resulted in the contravention. I disagree with this characterization of who was responsible for the contravention. The problem here arose from his superior asking him to release the doorman.

Although he was not present in the restaurant, I nevertheless find that the operations manager contributed to the contravention here by his request for the doorman on a weekend night, without ensuring a substitute person was in place. This was contrary to their stated policies. As the directing mind was a contributor to the contravention, I

find that, under the two step analysis of *Beverly Corners*, I may stop the analysis here and rule that the defence of due diligence is not available.

If I am wrong on the directing mind issue, I turn to the second step in the due diligence analysis:

a. whether the licensee has implemented adequate training and other systems to prevent the overcrowding, and

b. taken reasonable steps to ensure effective application of that education and the operation of those systems.

Adequate Training and Other Systems

I find that the licensee has established adequate training and other systems to prevent the overcrowding. The operations manager's introduction of the "I understand" document and the requirement for signatures, ensures that all employees are aware of the employee contract and commit to the policies within, including the caution to all staff to keep the restaurant under capacity and to "keep it at 57 just to be safe."

The operations manager's testimony about conducting walk throughs of the restaurant and his evidence about training the doormen in operating the counters, all demonstrate a system designed to ensure the restaurant is not over capacity. The policy of providing doormen on the busy weekend nights, trained to stop people at the door, is intended to prevent any overcrowding.

Although I find the licensee has generally designed adequate policies and emphasized its policies to staff, I wish to note one weakness in the wording of the policy designed to prevent overcrowding. The employee contract (Exhibit 3), under the instructions for keeping the restaurant under capacity, states: "If there is no door person on, make sure you stop guests before they sit down or order." The licensee made much of the fact that there is a transition stage in a restaurant, with people coming and going, sitting down and paying bills. The food primary license has a capacity of 59 and the licensee is obligated to ensure they do not go over this number. This means always having someone at the door when the restaurant is clearly getting close to capacity, not merely refusing them service once they have entered.

The guidelines on overcrowding, from the branch Guide for food primary licences (Exhibit 1, tab 8) state:

> It is important for you to know the type of capacity for which your restaurant is licensed, and to make sure you stay within this limit. You must have controls at each entry point to your restaurant, and you must be able to count the number of people entering and leaving. (underlining added)

The more significant problem for the licensee here, in establishing a defence of due diligence, is in the second step of the analysis: whether the licensee has taken reasonable steps to ensure effective application of the education and the operation of its systems.

Effective application of the licensee's systems

I find there is considerable evidence of a failure to properly and effectively apply the policies and systems designed to prevent overcrowding. This evidence includes:

- Operations manager's request for the doorman on the night of March 12, 2016 without providing a substitute as required by their stated policy

- Manager's willingness to provide the doorman to the Bourbon on a Saturday night without a replacement, when the 9:00 p.m. count in the notebook for that night shows 55 and the restaurant's records of counts on weekend nights show restaurant often at full capacity

- Manager's statement that there were only 35 patrons at 9:00 p.m. on March 12, 2016, contrary to the written amount of 55 as stated above

- The answer given at the door to the liquor inspectors on March 12, 2016, whether 57 or 59, demonstrates the person at the door had no idea of the numbers and was totally ineffective as a replacement doorman

- The absence of counts in the logbook for numbers after 9:00 pm on the night of the contravention

- Inadequate record keeping of the numbers – not only the blank pages as shown in the branch's photos of the logbook but the licensee's records from other nights

- Record keeping showing a count of 59 on many weekend nights, despite the licensee's printed policy of keeping the count at 57

- The testimony of the operations manager that he knew nothing about the missing logbook and the replacement red book, despite his evidence about his regular weekly reviews of the logbook and his visits to the restaurant three times a week

The licensee's witnesses and the licensee's submission made much of the fact that there was an event in town, the Rugby Sevens, that contributed to the overcrowding in the restaurant and that they were unaware of this event happening. I find that the licensee is responsible for ensuring it complies with the liquor laws and part of that responsibility is preparing for and being aware of events like Rugby Sevens, so that they are not faced with a situation as occurred on March 12, 2016 – a busy night with no doorman in place. Further, the evidence clearly shows that weekend nights are busy and a doorman is therefore required. Thus, whatever event may have been in town that night, the licensee contravened its own procedures designed to prevent overcrowding on weekend nights.

I find that the licensee has not established the defence of due diligence. Therefore, I find a contravention of section 6(4) of the Regulation and will now consider 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 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 and whether a penalty is warranted 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.

The licensee's compliance history shows two contraventions for overcrowding, one on April 6, 2013, and one on March 17, 2015. The licensee received a $5000 monetary penalty for each of these as first contraventions.

The evidence in this hearing shows the licensee received at least two warnings about being careful to monitor the restaurant's capacity from both the police and the liquor inspector. Although I make no conclusions about the police officer's visit on March 4, 2016 with respect to the numbers, I find the police entered the restaurant and commented on the numbers. On March 11, 2016, liquor inspector 1 testified that she attended the restaurant as a result of the police visit the week before. The licensee's logbook (Exhibit 9) notes the liquor inspector's entrance: "liquor inspector entered, under capacity!" The logbook records the counts for Friday, March 11, 2106: 53 at 11:00 p.m., 59 at 11:30 p.m., 59 at 12:00 a.m., 59 at 1:00 a.m. and 40 at 1:30 a.m. Not only is 59 at capacity, it is above the stated policy of the licensee which is to stay at 57 "just to be safe."

Despite these inspections only one day and eight days before the contravention on March 12, 2016, the licensee chose not to follow its policy of having a doorman in the restaurant after 9:00 p.m. on a Saturday night, when the count was already at 55. By its own records and testimony, the licensee demonstrated that the restaurant is often at full capacity on weekend nights. The licensee instituted the policy of having doormen at the door on these nights to control the capacity issue. From the testimony of the licensee's own witnesses, the absence of the doorman resulted in the overcrowding.

Overcrowding is a very serious public safety issue and one not to be taken lightly, given the hazards with respect to fire and potential for injury. The risk of death or serious injury is greater when the building is overcrowded. As noted above, the licensee's

policy indicates that, if people enter when they are at capacity, they are not to be served and asked to leave. Refusing people service when the restaurant is over capacity is not good enough. I do not accept the excuse that the restaurant is in a transition time, with people paying bills and new ones coming in. This does not justify the overcrowding, however temporary, and the risks to public safety in that period. The licensee has an obligation to stop patrons at the door and to maintain at all times an adequate system to ensure the restaurant does not become overcrowded.

There is a record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Unfortunately for the licensee, the previous contravention occurred one year less 5 days before the current contravention. Having found that a penalty is warranted, I am bound to follow the minimums established in the Act. I find this to be a second contravention for the purposes of Schedule 4 and calculating a penalty. Item 15 in Schedule 4 provides a range of penalties for a second contravention of this type: a ten (10) to 14 day licence suspension. I accept the branch's recommendation of a ten day suspension.

Although the licensee indicated in the hearing that this suspension will be onerous for the licensee, I have found there are a number of reasons for imposing a penalty here, including the licensee's history with overcrowding and the risks to public safety of not complying with the person capacity as set by the licence and the occupant load. 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.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence #301324 for a period of ten (10) days to commence at the close of business on Friday, November 18, 2016, 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 Vancouver Police Department from the close of business on Friday, November 18, 2016, 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

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Nerys Poole Date: October 20, 2016

General Manager's Delegate

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

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