



**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: Departure Bay Holdings Ltd.  
dba Miller's Pub  
102 – 1840 Stewart Avenue  
Nanaimo, BC V9S 4E6

Case: EH16-044

For the Licensee: Michael Seargeant

For the Branch: Hugh Trenchard

General Manager's Delegate: Nerys Poole

Date of Hearing: November 23, 2016

Date of Decision: December 7, 2016

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**Liquor Control and  
Licensing Branch**

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## INTRODUCTION

The corporate licensee, Departure Bay Holdings Ltd. (the "licensee") owns an establishment known as Miller's Pub ("the pub") at 102, 1840 Stewart Avenue, in Nanaimo. The licensee holds Liquor Primary Licence Number 118732 (the "licence"). A third party operator, 1028359 B.C. Ltd., operates the pub. The authorized representative of the corporate licensee is Michael Seargeant ("MS").

According to the terms of its licence, the licensee may sell liquor from 11:00 a.m. to 1:00 a.m., Monday to Saturday and from 11:00 a.m. to midnight on Sunday (Exhibit 1, tab 3). The person capacity on the licence is 150. This capacity includes the 60 persons allowed on the patio. A condition on the licence notes "the interior occupant load also includes patio seating." The occupant load is 150 persons. The pub's floor plan has a note "Combined occupant load for pub and patio not to exceed 150 persons." (Exhibit 1, tab 4)

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 May 4, 2016 (the "NOEA").

The branch alleges that on Saturday, March 5, 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. The NOEA recommends a \$5000 monetary penalty. The penalty range for a first contravention of this type is set out in item 15, Schedule 4, of the Regulation: a \$5000 monetary penalty or a four to seven day suspension.

The licensee disputes the person counts recorded in the NOEA. If I find a contravention here and that a penalty is warranted, the licensee asks that I impose a suspension instead of the proposed monetary 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: Branch Book of Documents, tabs 1 to 15

## WITNESSES

A liquor inspector and two RCMP officers testified for the branch.

The licensee called two witnesses: the licensee's representative, MS and the representative of the third party operator who is the manager of the pub (the "manager").

## EVIDENCE – BRANCH

### Liquor Inspector

A liquor inspector reviewed the branch documents in Exhibit 1 and described how liquor inspectors generally perform counts in establishments. The liquor inspector was not involved with the inspection on March 5, 2016 nor with the preparation of the contravention notice or the NOEA. The liquor inspector stated that the penalty recommendation in the NOEA – whether a monetary penalty or a suspension - is often based on an assessment of the impact on the daily income of an establishment. In this case, the liquor inspector was unaware of what the liquor inspector who signed the NOEA took into account.

When questioned about the capacity noted on the licence as 60 for patio<sup>1</sup> and 150 for person<sup>1</sup>, he agreed this could be confusing. However, he noted the fifth bullet on the licence stating: “The interior occupant load also includes patio seating.” He pointed to the note on the floor plan, indicating that the combined occupant load for pub and patio is not to exceed 150 persons (Exhibit 1, tab 4).

### RCMP Officer 1

The branch called two of the four RCMP officers who attended at the pub on March 5, 2016. Officer 1 has been a member of the RCMP for eight years. He has performed about 1700 liquor inspections in his eight years on the force, which include conducting hundreds of person counts in establishments. On March 5, 2016, he and Officer 2 were performing regular bar watch inspections. As they approached the pub, the two officers noted how busy the parking lot area was. Officer 1 described it “as full as I have ever seen it.” They discovered that there was a UFC (Ultimate Fighting Championship) event scheduled at the pub. When they entered at 21:50, they immediately noticed how packed the pub was, with tables full and people standing shoulder to shoulder. He noted that there was no one at the door to monitor capacity. He commented to a server that it was busy and she responded, “yes, really busy.” As they moved through the pub, with some difficulty, he noted the seats were all taken and it was impossible to move through without bumping into or touching people who

were standing. Everyone was watching the fight on the TV screen. He said it was a rainy night in March and, as he looked through the windows to the patio, he could see maybe a smoker or two but no significant numbers outside.

He and Officer 2 conducted their first counts without a mechanical counter. Officer 1 explained that he counts clusters and moves on from one cluster to the next. Because of people watching the fight and because of the closeness of everyone, there was very little moving around when he was counting. He counted 230 persons on his first count. He stated that Officer 2's first count was 212.

Officer 1 wrote out his police statement at 3:54 a.m., after returning to the detachment (Exhibit 1, tab 7). He used his notes to refresh his memory about the events (Exhibit 1, tab 10). His statement notes that after he and Officer 2 conducted their first counts, they learned that the fight was about to start and once it was over, the majority of the crowd would leave. Officer 1 and 2 discussed the situation and decided to call for other officers with mechanical counters who could assist by standing at the door to count people leaving. He estimated they arrived within 5 or 10 minutes of his call.

Officers 3 and 4 arrived and stood at the front door while Officer 1 conducted a second count with the mechanical counter set at 0. He started this count at 22:01 and completed the count at 22:07. Officer 1 had no problem with his counter although he heard later that Officer 3 had some issues with his counter. Officer 1 worked his way from the front to back, counting groups in each section and noted that people were leaving the pub while he was counting. Officers 3 and 4 were counting those leaving at the door. Each of Officers 3 and 4 counted 75 people leaving while Officer 1 performed his count. His second count was 164. Officer 2 also performed a second count, using a mechanical counter, which showed 170. At 22:10, Officer 1 stayed at the door while Officers 3 and 4 performed a count. Officer 1 counted 20 leaving while he was at the door. He used hash marks in his notebook to note this count.

Officer 1 stated that overcrowding on a night with a UFC event can be more worrisome because of the potential for violence that can sometimes occur and the problems then of removing people safely. He agreed that this pub has no history of problems arising from their UFC events. He further agreed that, on the night in question, staff were

cooperative, the walk through was good and there were no other liquor infractions. He said the crowd was subdued, especially considering this was a UFC fight night, and that the crowd dissipated very quickly after the fight concluded.

On cross-examination, Officer 1 agreed the total time from their arrival to the final counts at the door was about 26 minutes.

Officer 1 attended with Officer 2 when he issued a Licensed Premises Check to the manager (Exhibit 1, tab 6).

### **RCMP Officer 2**

Officer 2 has been with the RCMP for ten years, currently working in the Nanaimo detachment. He attended the pub with Officer 1 on March 5, 2016. Officer 2 has performed well over a thousand liquor inspections in his career with the RCMP and a few hundred involving person counts.

When Officer 2 entered the pub, he noted that there was no one at the door to monitor capacity. He noticed immediately how crowded it was and said there was "a solid wall of people" that prevented him seeing straight through to the far windows as he usually could. On a quick scan, he noted that all seats were taken and there was very little standing room left. In the past, he has done several walk through inspections and capacity assessment in this pub, and was aware of the person capacity numbers. At first glance, he thought the pub was over capacity. He and Officer 1 walked to the bar, physically pushing people aside to get there. He proceeded to do his count starting with the upper section and moving through section by section to then join up with Officer 1. He said it was relatively easy to perform the count as few people were moving about. They were all watching the fight on the TV screens. He and Officer 1 exited at the main entrance and discussed their counts. Officer 2's count was 212. The two of them decided to call in the other officers to do a count with mechanical counters and to assist at the door.

Officer 2 did not see anyone on the patio. He did not see anyone leaving while doing his first count. He said there may have been a few going out for a smoke.

He and Officer 1 did a second count, using the mechanical counters. At that time, there were quite a few patrons leaving as the fight had ended. Officer 2 counted 170 on his second count while Officers 3 and 4 counted 75 leaving. Officer 2 stated it was possible he counted some people on his second count who were again counted at the door when they left. He acknowledged that this potential double counting – on his second count inside and Officers 3 and 4 counts at the door - would explain the total of 245 (75 plus 170) and was probably too high, especially given his first count.

Officers 1 and 2 then switched with Officers 3 and 4 who had been counting people leaving at the door. Officers 1 and 2 counted 20 leaving while Officers 3 and 4 performed their counts inside. Officers 3 and 4 started their counts at 22:10 and counted 116 and 125 respectively. Officer 2 recorded this in his handwritten notes and subsequent police statement (Exhibit 1, tabs 8 and 9).

In his police statement, Officer 2 recorded that the manager asked the officers how they could better control the capacity. The officers pointed out that having someone at the door, counting and stopping people from entering when at capacity was the best way to achieve this. Officer 2 served the manager with the Licensed Premises Check. His written notes indicate that the manager had told him he had counted 125, just before police came.

Officer 2 agreed that the pub was orderly and everyone appeared to be in a good mood and not causing any problems.

Officer 2 prepared his police statement at 3:34 a.m., after returning to the detachment from their inspections on the evening of March 5/6, 2016.

#### **Officers 3 and 4**

These officers did not testify. Their statements are included in the branch documents (Exhibit 1, tabs 11 and 12). The officers note their counts of 75 leaving at the door, as testified by Officer 1 and the count they each made noting 116 and 125. Officer 3 counted 116, starting at 22:06 and completing this count at 22:12. Officer 4 reported in his statement a count of 125, starting at 22:10. They added the 20 people counted by

Officer 1 at the door while they were counting and the 75 they had counted leaving while Officer 1 and 2 were conducting their second counts. Adding these two numbers to 116 and 125 gives a total of 211 and 220.

Officers 3 and 4 did not testify and thus were not available for cross-examination. I have accepted the record of the counts in their statements, as Officer 2 made handwritten notes of these counts at the pub. Officers 1 and 2 who testified verified these counts as recorded in the statements.

## **EVIDENCE – LICENSEE**

### **Manager**

The manager is the representative of the corporate third party operator noted on the licence. He was present in the pub on March 5, 2016 and testified about the capacity in the pub on that evening. He stated that he has worked at the pub in various capacities for almost 25 years.

He acknowledged that the pub was quite busy that evening as a result of the scheduled UFC event. He said they had full staff on and earlier in the evening a staff member was at the door to check the numbers. He said this staff person left the door when her final count was at 77, somewhere between 20:30 and 21:00. He explained that they needed extra help in the kitchen so this staff person went back to help out. He said he personally performed a count about 20 minutes before the police arrived and that his number at that time was 125.

When he saw the RCMP officers enter, he did not have any concerns as he was sure they were within their capacity, under 150. He stated that he and his staff provided full cooperation to the police. The manager emphasized that he and his staff are always courteous and respectful to the RCMP when they do walk throughs at the pub.

The manager explained that the pub has 102 seats in total, including 14 bar seats. He stated that the seating takes up about 70% of the available room space. He explained that when they have had fundraisers in the past for various events, they only allow 120



tickets to be printed as they feel that is a sufficient number to allow people to move around freely. Most of the time, he stated, they say 100 is their maximum.

The manager stated that he did not believe there were anywhere near 200 people as claimed by the RCMP officers. He has had a lot of experience in counting over the years, being careful to make sure they are within the allowed capacity. His last count that evening was 125, about 20 minutes to a half hour before the police arrived. He believed it was possible that a few more entered but not another 100 persons in that half hour period.

The manager made the point in his testimony that only 17 minutes elapsed between the original count conducted by Officers 1 and 2 and the counts at the door of 75 people leaving. He stated that it would have been impossible to provide the bill to these customers and to collect payment in that short a time. Because the pub has only two terminals and two hand held terminals for processing bills, the staff would not be able to accommodate this. He opined that it was impossible to process 75 people's bills in a 17 minute period. In response to a question in cross, he stated that there would be a lot of individual bills during UFC events, probably about 80%, with not many group bills.

The manager questioned the accuracy of all the counts based on Officer 3's statements in his police report (Exhibit 1, tab 11) that there were 13 people in the washroom. The manager stated it was physically impossible to have 13 people in their washroom. He tried it the other day with help from staff and the most they could fit in there, tightly packed, was ten.

The manager referred to the sales on the night of March 5 and compared the sales to a similar but less busy night recently on November 12, 2016. On November 12, 2016, the pub held another UFC event, the officers showed up this evening to do a check and everything was in order, according to the manager. The highest count for the evening of November 12 was 138. He said the sales for the evening of March 5 were only \$800 higher than the November 12 event. If they actually had over 200 on March 5, the sales would be considerably higher, almost double the November 12 sales. The manager did not provide any documentary evidence of the sales comparisons.

In cross-examination, the manager stated that it would be very unusual for patrons to be in the pub without eating or consuming something, even if just a soft drink. When asked if he was aware that the UFC event would draw a crowd he said he was and anticipated they would be at or near capacity that evening. He stated they staffed accordingly, expecting the night to be busy.

When questioned in cross about his count of 125, he said it was about 20 minutes or half an hour before the police arrived. He did not use a mechanical counter. He did not provide any written record of this count, or the earlier counts made by the person at the door, either in a logbook or elsewhere. He stated it was impossible for the numbers to go from 125 to 240 odd in half an hour. He knew it was no more than half an hour as he performed his count near the end of the UFC girls' fight and there is only about 20 minutes between this and the start of the men's fight event. He agreed that it was possible he missed a few people in his count if some people had gone out for a smoke.

Since the night of March 5, 2016, the manager has ensured there is always a door person to count people entering and leaving. He provides his door staff with mechanical counters now. He said they do not keep a logbook of counts. He said sometimes they will use a stamp to keep track of people coming and going. His instructions to his door staff are not to allow the maximum capacity of 150 and to stop people entering at 140.

When pressed about how he might account for the first counts done by the RCMP officers, he stated he believed they were inaccurate as it was physically impossible for another 70 or 80 people to arrive between the time he performed his count of 125 and the police officers conducted their counts of 212 and 230. When asked if his count might have been off, he stated only by 5 at the most, because of his experience in doing counts in the pub. He emphasized that the physical space just was not there to accommodate the numbers claimed by the officers.

## **The Licensee's Representative MS**

MS was not at the pub on the evening of March 5, 2016 and does not take an active role in the running of the establishment. He leaves that to the manager. His testimony was about the physical layout of the pub, the square footage needed for one standing patron and the impossibility of having the numbers in the pub claimed by the officers.

He stated that the red-lined area in the pub is only 2100 square feet in total. He claimed that the branch average for determining capacity of establishments is 12 ½ sq. ft. per patron. He did not provide any documented evidence of this figure being used by the branch. He referred to the ceiling tile above his head in the hearing room as 8 square feet and suggested that, a fair estimate might be 9 or 10 square feet as the minimum space required for one standing person.

He said that the addition of 100 people to those 102 who were seated would require the standing patrons to occupy 1000 sq. ft., which is half the pub space. He said that the seating patrons and table occupy about 70 to 80% of the floor space, leaving between 420 to 630 square feet for standing patrons. Assuming each standing patron requires ten square feet, this would mean an estimate of 42 to 63 people added on to the 102 seated, for a maximum possible of between 144 and 165.

He suggested that the counts performed by Officers 3 and 4 (116 and 125), without including any of the numbers of those who had left, probably reflected the actual numbers in the pub.

## **SUBMISSIONS – BRANCH**

The branch submits that the contravention of overcrowding occurred in the pub on March 5, 2016. Two officers provided an initial count of 212 and 230, without the mechanical counter. If one incorporates a margin of error to these two counts, they are still well over the capacity of 150. There were very few people, if any, who were outside at the front or on the patio during these two counts. Officers 1 and 2 performed second counts, using the mechanical counters. These counts of 164 and 170 were still over the 150 capacity, even if we ignore the counts at the door of 75 people leaving. By the

manager's admission, there was a period of at least 20 minutes or more after his count of 125. No one was at the door during this period. The manager admitted that there may have been people outside smoking during his count as the main event fight had not yet started. The branch submits that, given the counts made by the officers, the contravention has been proven on a balance of probabilities.

Although the licensee did not raise the defence of due diligence, there was evidence of some policies in place. There was not sufficient evidence to establish a system of policies in place that might have prevented this from occurring. There was evidence that there was often a staff person at the door to count those entering and leaving. However, at the time of the incident, this staff person was assigned to work in the kitchen so she left the door earlier in the evening. There appears to have been no policy in place to take care of this kind of a circumstance. There is some evidence of changes after the incident but these do not provide a defence of due diligence for the contravention.

## **SUBMISSIONS – LICENSEE**

The licensee's submission is that the multiple counts made by the RCMP officers are unreliable. The licensee says it is physically impossible for the pub to accommodate the number of persons claimed by the officers. The licensee also argued that it was impossible for the numbers to have increased so much from the count of 125 made by the manager only half an hour before the arrival of the officers. The licensee submitted that the manager's count of 125 is correct and that the officers' counts are wrong.

The licensee submits that I should find no contravention. If I do find a contravention and that a penalty is warranted, the licensee asks for a suspension instead of the proposed monetary penalty.

## REASONS AND DECISION

### Contravention

At the hearing, I heard two opposing views of the number of people in the pub on March 5, 2016 when the police entered. I have evidence from the licensee's one witness who was present on the evening, stating there were 125 persons in the pub only 20 minutes or half an hour before Officers 1 and 2 performed their counts. The licensee has submitted that it was impossible for the numbers to rise dramatically in the time between the manager's count and the officers' counts. MS gave evidence to support his contention that it was physically impossible for the pub to hold the numbers claimed by the officers. The manager gave evidence about his years of experience dealing with pub management and controlling the numbers.

On the other hand, I have the testimony of two RCMP officers, with years of experience in conducting liquor inspections and doing person counts. These two officers each conducted two counts in the pub. All four of these counts were over the capacity of 150. The two RCMP officers testified about the counts of Officers 3 and 4 and the branch submitted the police statements indicating the counts made by these officers. Officers 1 and 2 testified about their initial impressions when they entered the pub, finding it difficult to move through the pub because of the numbers and the people standing shoulder to shoulder. Officer 2 agreed that their second counts of 164 and 170, added to the count of 75 persons leaving, could have been high, as it was possible some were counted in the pub and then counted again as they left. The two officers were subject to cross-examination and maintained the pub was over capacity on the evening of March 5, 2016.

In the face of the counts made by the officers, the licensee is asking me to accept the manager's statement that his count of 125 was accurate and that, in the time between his count and the officers' arrival, it would be impossible for the numbers to reach the officers' counts. The manager admitted no one was at the door counting after 20:30 or 21:00 hours. The manager admitted that the UFC events often attract a crowd and that he was expecting the evening to be busy. Despite this, he removed the door person at 21:00 to work in the kitchen. The manager provided no logbook and no written record

of his count of 125 or of any counts made by the person at the door earlier in the evening.

The manager opined that it was impossible for the pub to process the bills of 75 people in the time period noted by Officers 3 and 4 when counting the people leaving. He stated that there would be many individual bills on a UFC event night. Without documentary evidence of the sale slips and the time noted on those slips, I am not prepared to draw any conclusions about the number count of 75 people leaving. The licensee provided no documentary evidence of bills or copies of sales slips processed that evening.

MS, who was not in the pub on March 5, 2016, gave his opinion about the number of persons who could physically stand in a ten square foot space and then, given the space required for table and chairs, he submitted that it was physically impossible for the pub to hold over 200 people. He stated he believed the counts of Officers 3 and 4 (116 and 125) probably reflected the actual numbers present. MS gave no explanation as to the counts of 75 and 20 of the numbers who had left the pub just prior and during these two counts.

The licensee is asking me to accept its opinion and conjecture as to what may be physically possible. The licensee is asking me to ignore the documented counts made by experienced police officers and their observations when they entered that the pub was overcrowded. I find that I prefer the evidence of the officers and their written records of counts to the opinion and conjecture of the licensee and undocumented counts made earlier in the evening. I note that MS thought the final counts of Officers 3 and 4 were accurate. However, I cannot ignore the counts made at the door as he asks me to do. Counting people leaving is a much easier task than counting people in a very crowded room and thus I find that the leaving counts were probably the most accurate of any of the counts. If I add the counts of those leaving to the final counts made by Officers 3 and 4, the total of persons present earlier in the evening would be 211 and 220. These numbers are very close to the first counts made by Officers 1 and 2 when they arrived (212 and 230). I accept the counts of the officers and, allowing for some margin of error, I find they all indicate the pub was over its capacity. The evidence is

sufficient to convince me that, on a balance of probabilities, the pub was over capacity on the evening of March 5, 2016.

I wish to address MS's opinion about the number of people who can stand in ten square feet of space. I do not accept that one person standing requires ten square feet of space. I am as able as MS to draw conclusions about the amount of space required by one standing person. MS's estimate of the amount of standing room available in the pub was about 30% of the total 2100 square foot red lined area. This equals about 630 square feet available for people to stand. The manager gave a figure of 102 seated. I find that 2 people can stand, especially shoulder to shoulder as described by the officers, in a ten square foot area. This would allow for 126 people standing in addition to the 102 seated, which would mean a total potential person count of 228. Even if I were to accept the licensee's opinion that one person requires ten square feet, and I do not, this would mean a total of 165 persons, still over capacity.

I make no finding as to how many people were present in the washroom as noted in the statement of Officer 3. I do not find it relevant to my decision as to whether the pub was over capacity.

I find the counts of the RCMP officers to be credible and well documented. I find that the pub was well over its capacity of 150 on the evening of March 5, 2016. I therefore find a contravention of section 6(4) of the Regulation on March 5, 2016.

### **Due Diligence**

The licensee did not raise a defence of due diligence. Nevertheless, I have considered any evidence of 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

As noted, the licensee did not raise the defence of due diligence and thus gave very little evidence about its management structure and the drafting of policies and training.

The manager testified that, as the third party operator, he is responsible for the drafting of any policies and the training and hiring of employees.

I find that the manager is a directing mind of the licensee. The manager was present on the evening of March 5, 2016, testified about his involvement in counting the persons in the pub prior to the entry of the officers and about the reasons for removing the person at the door earlier in the evening. As the directing mind was present, and was responsible for counting and in making the decision to remove the door person, I need not proceed further. The defence of due diligence is not available.

### **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 in the NOEA shows a contravention for section 43(2)(b), permitting an intoxicated person to remain, on December 18, 2015. The licensee received a \$5000 monetary penalty for this contravention. Although not a contravention of the same type, I consider this contravention in determining whether a penalty is warranted.

Overcrowding is a serious public safety issue. Getting out of a building safely during a fire or other threat is difficult in a place where liquor is served and where there is little room to move. Although the officers agreed the crowd at the pub on March 5, 2016 was not rowdy and was cooperative with police, the officers noted the difficulty they had in moving through the crowded pub. The officers also referred to incidents of fights breaking out in other establishments when UFC events are held. The manager knew the UFC event would attract a crowd, yet chose not to maintain a door person to count the numbers. I find there are real risks to the public when an establishment is overcrowded to the extent this one was.

Licenses 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.

I find that a penalty is warranted here, because of the seriousness of overcrowding and as a reminder to this licensee to follow through on its stated practice of having a door person on busy nights. The manager indicated in his evidence that they are now doing this. I encourage the management to continue to ensure their numbers are maintained below the capacity of 150.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

Item 15 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension or a \$5000 monetary penalty. I heard no evidence from the branch to support a monetary penalty over a suspension. I therefore accede to the request of the licensee that I impose a suspension.

## ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence #118732 for a period of four (4) days to commence at the close of business on **Friday, January 13, 2017** 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 Nanaimo RCMP detachment from the close of business on **Friday, January 13, 2017** 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

Date: December 7, 2016

General Manager's Delegate

cc: Liquor Control and Licensing Branch, Victoria Office  
Attn: Stephen Hitchcock, Regional Manager

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