



**DECISION OF THE
GENERAL MANAGER
LIQUOR AND CANNABIS REGULATION BRANCH
IN THE MATTER OF
A hearing pursuant to Section 51 of
*The Liquor Control and Licensing Act, S.B.C. 2015, c. 19***

Licensee:	0835501 BC Ltd. dba Fortune Sound Club 300-147 East Pender Street Vancouver, BC V6A 1T6
Case:	EH19-009
For the Licensee:	Bill Kerasiotis and Chris Kerasiotis
For the Branch:	Hugh Trenchard
General Manager's Delegate:	R. John Rogers
Date of Hearing:	Written Submissions
Date of Decision:	September 10, 2019

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

0835501 BC Ltd. (the "Licensee") holds Liquor Primary Licence No. 014783 (the "Licence"), pursuant to which it operates an establishment called "Fortune Sound Club" located at #300 - 147 East Pender Street, Vancouver, B.C. (the "Establishment").

According to the terms of the Licence, the Licensee may sell liquor from 9:00 a.m. to 2:00 a.m. Monday through Saturday and from 9:00 a.m. to 1:00 a.m. on Sunday. The person capacity under the Licence is set at 294.

The Licence is, as are all liquor primary licences issued in the Province, subject to the terms and conditions contained in the publication "Liquor Primary, Terms and Conditions" (the "Liquor Primary Terms and Conditions Handbook").

A telephone pre-hearing conference was held on May 22, 2019, the participants of which were:

- The Acting Registrar, Enforcement Hearings;
- The Branch Advocate;
- A Regional Inspector of the Liquor and Cannabis Regulation Branch ("Inspector A"), and
- Two representatives of the Licensee

During the pre-hearing conference, the Licensee confirmed that it was not disputing the alleged contravention contained in the Notice of Enforcement Action dated March 25, 2019 (the "NOEA") issued by the Liquor and Cannabis Regulation Branch (the "Branch"), and requested that this matter proceed without a formal hearing and in the form of written submissions related strictly to the penalty recommended by the Branch in the NOEA.

To this end, it was agreed that the Branch would disclose to the Licensee the Branch's position and supporting materials by July 5, 2019, and the Licensee would have two weeks to submit a response thereto.

The agreements reached at the pre-hearing conference were confirmed in a letter dated May 23, 2019 from the Acting Registrar, Enforcement Hearings to the Licensee.

The Branch's materials were emailed to the Licensee on June 26, 2019 (the "Branch's Exhibits") and the Licensee's response thereto was dated July 19, 2019 (the "Licensee's First Response") and filed with the Branch. Following receipt of the Licensee's First Response, the Branch responded (the "Branch's Response") on July 22, 2019. The Licensee responded to the Branch's Response by way of submission dated July 30, 2019 (the "Licensee's Second Response").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The NOEA

In the NOEA the Branch alleges that on December 31, 2018, the Licensee contravened Section 78(1) of the *Liquor Control and Licensing Regulation*, BC Reg 241/2016 (the "Regulation"). As a result of this contravention, the Branch is recommending a penalty of a 10-day suspension of the Licence to start on a Monday and to be served on successive business days.

The Licensee is not disputing the contravention alleged in the NOEA. However, the Licensee in its submissions has requested that if a penalty is warranted, that a monetary penalty be substituted for the suspension of the Licence penalty recommended by the Branch.

For the purposes of this hearing by way of written submissions and in accordance with Section 5 of the *Liquor Control and Licensing Act*, S.B.C. 2015 c. 19 (the "Act"), the General Manager has delegated to me the powers, duties and functions provided to the General Manager by Section 51 of the Act.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Regulation, B.C. Reg. 241/2016*****Capacity requirements**

78 (1) If the general manager has established a person capacity for the service area under a licence or endorsement, it is a requirement of the licence that the number of people in the service area at one time must not exceed the following:

- (a) the person capacity;
- (b) if there is an occupant load for the service area, the occupant load.

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016**Schedule 2****Monetary Penalties and Licence Suspensions****Overcrowding**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
13	Contravention of section 78(1) or (2) of this regulation [<i>person or patron capacity and occupancy load in service area exceeded</i>]	4 - 7	10 - 14	18 - 20	\$5 000 - \$7 000

ISSUES

As the Licensee has admitted to the offence, the only matter to determine is an appropriate penalty.

EXHIBITS

- Exhibit 1: The Branch's Exhibits, tabs 1 to 14.
- Exhibit 2: The Licensee's First Response dated July 19, 2019.
- Exhibit 3: The Branch's Response dated July 22, 2019.
- Exhibit 4: The Licensee's Second Response dated July 30, 2019.

SUBMISSIONS – BRANCH

The NOEA

The Contravention Admitted to by the Licensee

The NOEA contains a narrative that might be summarized as follows:

- At approximately 11:26 p.m. on the evening of December 31, 2018, Inspector A together with Inspector B and 7 members of the Vancouver Police Department attended the Establishment for a public safety inspection;
- At the time of this inspection, the maximum occupant load for the Establishment as determined under the B.C. Fire Service Act and the Vancouver Fire By-Law was 294 persons;
- Upon his arrival at the inspection station staffed by a member of the Licensee's security personnel, Inspector A was advised by this staff member that there were 284 patrons in the Establishment;
- Inspectors A and B then proceeded to the third floor of the Establishment which constituted the Licensee's service area under the Licence and, together with the Licensee's employee who was head of security (the "Security Head"), conducted a count of the people in the service area;
- Inspector A's count was 340 people, including staff but excluding security personnel and bartenders, while Inspector B's count was 337 people, including staff, and the Security Head's count was 266 of patrons only;
- The Security Head advised the inspectors that 24 members of the Licensee's staff were working in the Establishment at the time the counts were being conducted;
- Inspectors A and B then conducted a second count, with Inspector A's second count totaling 314 people excluding the Licensee's security personnel and bartenders, and Inspector B's second count totaling 328 people including staff.
- In conducting these counts, Inspector A was only able to move inches at a time when he reached the dance floor due to the close proximity of the patrons and was "placing his hands on the back of patrons informing them he was behind them and asking them to move, so he could continue his count";
- The line-ups at the bar were anywhere from 4 to 7 people deep making it difficult to determine where the dance floor started and the heat and sweat due to the close proximity of the patrons could be felt by the inspectors as they moved through the crowd;

- On December 19, 2018, Inspector A had spoken on the telephone with the representative of the Licensee notifying him that on the forthcoming New Year's Eve there would be liquor inspectors of the Branch visiting licensed premises in Vancouver and conducting public safety inspections;
- On the evening of December 31, 2018, it appeared to Inspectors A and B that the Licensee's staff were unable to monitor and control the capacity of the Establishment to ensure that the maximum occupant load for the service area of the Establishment was not exceeded;
- The compliance history of the Licensee included:
 - On January 18, 2014, the Licensee paid a monetary penalty of \$5,000 for having exceeded the Establishment's occupancy load; and
 - On March 4, 2018 the Licensee signed a waiver and paid a monetary penalty of \$7,000 for having again exceeded the Establishment's occupancy load with a person count of 442.

The Branch's Response

In the Branch's Response, it noted that:

- The contravention was a second contravention of its kind within a 12-month period;
- The counts of the inspectors ranged from 314 to 340 persons with an average count of 36 people over the maximum occupancy load. While this overage for an establishment of this size is not egregious, it is substantial. It is apparent from the comments of Inspector A in the NOEA that public safety was potentially compromised by the crowded conditions of the Establishment;
- The count of 442 in the contravention dated March 4, 2018 was considerably higher than the average of 330 occurring on December 31, 2018 suggesting that the Licensee had taken some steps to ameliorate the overcrowding situation in the Establishment. However, it was evident that the Licensee had not taken measures sufficient to ensure compliance with the required person capacity and occupant load.

SUBMISSIONS – LICENSEE

The Licensee's First Response

In the Licensee's First Response, it submitted:

- It acknowledged that the contravention alleged in the NOEA had occurred;
- It noted that the overage in the person count was between 6% and 13% which it submitted was a modest overage;
- A closure for a full pay period as contemplated by the NOEA would result in:
 - the departure of experienced, trained staff who would be difficult to replace and thus maintain the efficiencies and service levels on which the Licensee's customers depended; and
 - a short-term impact on existing events and reservations already confirmed leading to real and significant financial losses; and
- As the Establishment is a cultural touchstone for the community with an audience that demands continual relevance, availability and innovation, the recommended suspension would have a longer-term impact on business sustainability in an increasingly challenging marketplace which, in turn, would lead to the undoing of years of nurturing this unique cultural venue.

The Licensee's Second Response

In the Licensee's Second Response, it stated that it had in good faith taken immediate measures to review its approach to capacity management.

To the Licensee's Second Response it attached the statements of 31 persons, each of whom provided confirmation of how adversely their wellbeing would be impacted by the imposition of a penalty in the form of a suspension of the Licence for the 10-day period as recommended in the NOEA.

In addition, the Licensee noted that the contravention that occurred on January 18, 2014 and for which the Licensee paid a monetary penalty of \$5,000 was prior to the current majority ownership and functional management of the Licensee changing to the current arrangement.

REASONS AND DECISION

Contravention

The Licensee has admitted that on December 31, 2018, as alleged in the NOEA, the Licensee in contravention of section 78(1) of the Regulation exceeded the 294-person capacity and occupant load for the service area of the Establishment as set by the Licence and as determined under the B.C. Fire Service Act and the Vancouver Fire By-Law.

Due Diligence

The Licensee has not submitted a defence of due diligence to the admitted contravention.

The Licensee having admitted to the contravention alleged in the NOEA, I find that on December 31, 2018 the Licensee contravened section 78(1) of the Regulation by exceeding the person capacity and occupant load as established by the Licence for the service area in the Establishment.

PENALTY

Pursuant to section 51(2) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the Licence by exceeding the 294-person capacity and occupant load for the service area of the Establishment on December 31, 2018, 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 suspension of the Licence or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 2 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.

As there is a record of a proven contravention of the same type as dealt with here for the Licensee within the preceding 12 months of this incident, I find this to be a second contravention for the purposes of Schedule 2 of the Regulation and calculating a penalty.

Since the occurrence of the contravention on December 31, 2018, the Regulation has been amended and as of June 5, 2019 a new penalty schedule has come into effect. However, for the purpose of the matter at hand, as the admitted contravention occurred prior to June 5, 2019, the relevant basis for calculating a penalty is the provisions of Schedule 2 as above set out. Item 13 of this Schedule 2 provides for a range of days for second contravention of this type to be a 10 to 14-day suspension of the Licence. It is to be noted that there is not a similar range provided for a second contravention of this type for monetary penalties. The amended provisions of Section 2 of the Regulation which came into effect on June 5, 2019 do provide such a range.

The Branch in the NOEA has recommended a 10-day suspension of the Licence. The Licensee has requested that if a penalty is to be imposed that it be a monetary penalty.

The factors that I have considered in determining the appropriate penalty in this matter include:

- whether there is a proven compliance history;
- a past history of warnings by the Branch;
- the seriousness of the contravention;
- the threat to the public safety; and
- the well-being of the community.

Compliance History

With respect to the Licensee's compliance history, although I acknowledge that the overcrowding contravention on January 18, 2014 occurred under the previous management of the Licensee, it still occurred at the same premises currently occupied by the Licensee. Notwithstanding this history, under the present management of the Licensee, the overcrowding contravention occurred again on March 4, 2018, less than 12 months before the contravention under consideration. One would have thought that given the protestations of professional management from the current Licensee that it would have learned from these previous contraventions and taken the steps necessary to ensure that the contravention on December 31, 2018 did not occur.

This observation becomes even more germane when the evidence before me is to the effect that Inspector A called the Licensee's representative on December 19, 2018 to advise that on December 31, 2018 there would be liquor inspectors of the Branch visiting licensed premises in Vancouver and conducting public safety inspections.

The Threat to Public Safety

If the person counts of 340, 337, 314 and 328 recorded by Inspectors A and B on the evening of December 31, 2018 in the service area of the Establishment are averaged, it comes to a count of 330 persons, which number would result in the Establishment being 36 people over the licensed person capacity of 294.

When Inspectors A and B during the conduct of their inspection on December 31, 2018 came to the inspection station of the Establishment and asked of the Licensee's security staff member stationed there how many people were located in the Establishment, the inspectors were advised by the Licensee's staff member that there were 284 people not including the Licensee's staff of 24. In other words, according to the member of the Licensee's security there was a total of 308 people present in the Establishment at the time of the Inspectors' entry.

The Licensee has submitted that the overage of people in the person count being between 6% and 13% constituted a modest overage.

However, this contravention is not strictly about numbers of people. It is about the threat to public safety that the facts before me disclose. The Establishment is on the third floor of a building. During the visit by the Branch's inspectors, it was obvious that the floor space of the Establishment was extremely crowded, with the inspectors having a great deal of difficulty moving through the crowd of staff and patrons to conduct a body count.

This is not a situation of a more technical breach of a licence where a licensee exceeds an occupancy load, such as in the case of a service area located in an outdoor ground floor patio. In an emergency in such a venue, patrons and staff, if necessary, could exit the patio by moving outside the licensed area. Where liquor is served, loud music is playing and lighting is dim in a venue situated on the third floor of a building, the risk in the case of emergency is that much greater.

In this contravention, the numbers of people exceeded not only the person capacity and occupancy load under the Licence, but also that established under the Vancouver Fire By-Law. Person capacity and occupancy loads are established for a purpose, the most significant of which is public safety.

The Well-Being of the Community

In most instances in considering this factor, the "community" is the geographic location in which the licensed premises are located and the effect the contravention under consideration might have on this community. Permitting licensees to exceed their approved capacity negatively impacts the community in which a licensee is situated due to late night disturbances and parking and parking capacities.

However, in the matter at hand, another "community" has been brought to my attention. This is the community of folks who work for the Licensee and whose 31 statements made extremely compelling reading. From these statements, it was obvious of the deleterious effect a suspension of the Licence as recommended by the Branch would have on this community.

Decision

As has been made abundantly clear by the Branch in its actions and communications with the parties it regulates, its purpose is to secure compliance with licensees to the Act, the Regulation and their licenses. It is not to punish them. This approach applies, as well, to any parties associated with these licensees.

In the matter at hand, it is obvious that the Licensee, even under its new management, is having difficulty properly dealing with the number of patrons it permits in the service area of the Establishment. The challenge is how to encourage the Licensee to come into compliance with its capacity limit under the Licence.

The Branch has recommended a 10-day suspension of the Licence. The Licensee has requested that if a penalty is justified that it be in the form of a monetary penalty. To support its position, the Licensee has submitted 31 very compelling statements of parties who would be very adversely affected if the recommended suspension were implemented.

I find that a penalty is definitely in order to encourage the Licensee to change its ways. However, I find the position of the employees in this particular situation particularly compelling. I have therefore determined that if I am authorized to do so instead of a suspension of the License, I will impose a monetary penalty.

As observed above, the relevant portion of Schedule 2 of the Regulation does not set out a range of monetary penalties for a second contravention of the type of contravention I have found in this matter. The issue then becomes whether or not in light of this lack of a reference I have the authority to impose a monetary penalty rather than a licence suspension. If I have such authority, the follow up question becomes one of determining the appropriate amount of this monetary penalty.

Section 51 of the Act provides as follows:

Liquor Control and Licensing Act S.B.C. 2015 c. 19

51 (4) The general manager may, if the general manager is satisfied that it is in the public interest to do so,

(a) subject to subsection (5), impose a monetary penalty under subsection (2) (b) that is greater than the amount provided for in the prescribed schedule of monetary penalties, or

(b) suspend a licensee's licence under subsection (2) (c) for a period longer than that provided for in the prescribed schedule of licence suspensions.

(5) The general manager may not impose a monetary penalty that is greater than the following amounts:

(a) \$50 000 for a contravention of section 8 (2) (a), (b), (c) or (d) or (3);

(b) \$25 000 for another reason referred to in subsection (1) of this section for which the general manager may take action against the licensee.

Therefore, under these provisions of the Act on first reading it would appear that where I have found a contravention, such as in the matter in hand, if I am satisfied that it is in the public interest to do so, I am able to impose a monetary penalty that is greater than that provided in the relevant portion of Schedule 2, provided that such monetary penalty does not exceed \$25,000.

However, it is to be noted that subsection 51(4)(a) uses the wording "that is greater than the amount provided for in the prescribed schedule of monetary penalties". An emphasis on this wording suggests that my discretion might be more limited than what it appears to be on first reading. The position being that if there is no reference to a monetary penalty in Schedule 2 for a particular contravention, that I lack the authority to impose any monetary penalty whatsoever. In other words, that for a second contravention as in the matter at hand, if I find a penalty to be appropriate, I am restricted to imposing a licence suspension.

However, rather than attempting to closely parse the wording of section 51(4) of the Act, I would rather rely on the following provision included in sub section 4(4) of Schedule 2:

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016
Schedule 2

4 (4) If the general manager is satisfied that imposing the period of suspension for a second contravention or subsequent contravention set out in the table to this Schedule would create undue hardship on a licensee, the general manager may impose a period of suspension that falls within the range of suspension for a first contravention.

By employing the provisions of this section, if I am satisfied that imposing a 10-day suspension would create an undue hardship on the Licensee, I am able to impose a period of suspension based upon that set out for a first contravention rather than for a second contravention. As above set out, this range would be 4-7 days.

The evidence before me is that the Licensee under its new management has, within the last 12 months, paid a monetary penalty of \$7,000. It would appear that this monetary penalty has had an impact in that the overage in the count for the matter before me is not as great as the overage for the previous contravention on March 4, 2018. However, it is still over the limit and this overage occurred despite the telephone call from Inspector A advising the Licensee of the Branch's intention to do public safety inspections on December 31, 2018. If the current provisions of Schedule 2 were to apply to this contravention, the range of a possible monetary penalty would be between \$7,000 and \$11,000 and I would impose a monetary penalty of \$11,000.

Instead, I will invoke the provisions of section 4(4) of Section 2 and find that a 10-day suspension would have an undue hardship, not only on the Licensee, but, more importantly, on the Licensee's employees. It is my hope that to ameliorate this impact on its employees, the Licensee will make provision to assist them financially during the period of suspension.

Therefore, to encourage the Licensee to come into complete compliance with the person capacity and occupant load for its Licence, I find that the appropriate penalty is a seven day suspension of the Licence.

ORDER

Pursuant to section 51(2)(c) of the Act, I order a suspension of the Licence for a period of seven (7) days to commence at the close of business on Sunday, October 20, 2019 and to continue each succeeding business day until the suspension is completed.

To ensure that the order is effective, I direct that the Licence be held by the Branch or the Vancouver Police Department from the close of business on Sunday, October 20, 2019 until the Licensee has demonstrated to the Branch's satisfaction that this suspension has been served.

Original signed by

R. John Rogers
General Manager's Delegate

Date: September 10, 2019

cc: Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Peter Mior, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate