



**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: Hyde Entertainment Ltd.
dba Cabana
1163 Granville Street
Vancouver, BC V6Z 0B4

Case: EH19-013

For the Licensee: David Kershaw

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: July 17, 2019

Date of Decision: August 22, 2019

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

Hyde Entertainment Ltd. (the "Licensee") operates the establishment known as Cabana at 1163 Granville Street, Vancouver BC. The Licensee holds Liquor Primary Licence No. 303935 (the "Licence").

According to the terms of the Licence, the Licensee may sell liquor from 9:00 a.m. to 2:00 a.m. from Sunday to Thursday and from 9:00 a.m. to 3:00 a.m., Friday and Saturday.

The Licence provides for a capacity of 108 in area Person 01 and 130 in area Person 02. According to the terms of the Licence, the maximum combined capacity for both areas cannot exceed 200 persons including staff.

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

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch's allegations and proposed penalty are set out in the Notice of Enforcement Action dated March 28, 2019 (the "NOEA") (Exhibit 1, tab 1).

The allegation is that the Licensee contravened its Licence by exceeding the person capacity and occupant load for the service area, contrary to Section 78(1) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 241/2016.

As at the date of the contravention, the range of penalties for a second contravention of section 78(1) was a 10 to 14-day suspension (item 13, of the then Schedule 2 of the Regulation). The Branch proposes a suspension of 10 days.

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

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.

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's Book of Documents, tabs 1 - 16
- Exhibit 2: Architect's drawings (4 pages)
- Exhibit 3: City of Nanaimo Bulletin: Occupant Load Calculation
- Exhibit 4: Barwatch Vancouver letter, dated July 14, 2019
- Exhibit 5: Liquor and Cannabis Regulation Branch Mission Statement excerpt
- Exhibit 6: Print out of an email from Vancouver Fire and Rescue Services, dated December 7, 2000.

EVIDENCE – BRANCH

Because the Licensee admitted the premises were over the permitted capacity and occupant load, the Branch called only one witness, Inspector 1.

Inspector 1 testified that he has been an inspector for about six months, joining the Branch in January 2019. He stated that his responsibilities as an inspector were to ensure public safety and compliance with and enforcement of licences. As an inspector, he has inspected a variety of premises including food primary, liquor primary, and catering and special events. On an inspection, he will look for administrative issues, which includes checking for paperwork such as the liquor registry, the posting of the licence and the SIR certificates of employees. The other type of inspection he undertakes is for public safety. On these inspections, he will look for intoxicated patrons, if minors have access to alcohol, overcrowding, and other public safety issues. He has conducted over 150 inspections.

As part of his training, Inspector 1 was trained how to conduct person counts. He was trained how to calibrate and use a mechanical counter. He also had on-the-ground training, shadowing senior inspectors.

Inspector 1 testified about the events of February 9, 2019, referring to his notes and the attached floor plan on which the Inspector had indicated the directional route he took when conducting his person counts (Exhibit 1, tab 6). Inspector 1 also identified the inspection notes and attached directional route plans for the two other inspectors who attended that evening (Exhibit 1, tabs 8 and 9).

He testified that he and two other inspectors attended at the premises. When they arrived outside, the senior inspector, Inspector 2, had a conversation with the doorman and asked for the person count. The doorman estimated there were 177 patrons inside. Inspector 2 related this conversation to Inspectors 1 and 3.

Inspector 1 said the Inspectors then entered the premises and noted it was very busy. Inspector 2 suggested they conduct a count and so he approached the doorman and instructed him to hold the door. Holding the door meant to stop any persons entering or exiting so the Inspectors could get an accurate count. The Inspectors then each proceeded to conduct a count using a mechanical counter.

According to Inspector 1, each Inspector chose their own route and conducted their counts separately. Inspector 1 described the route he took. He noted that a bottleneck at the center of the premises hindered his count and as he was stalled, he stopped halfway in his count because he was not confident it was accurate. On his second attempt he was able to make his way through the bottleneck and conclude his count. His count was 261 persons, not including staff. He excluded those persons that he could clearly identify as staff.

Inspector 1 testified that, at the beginning of his shift, he had physically checked his counter to ensure that it was properly calibrated, and he was satisfied that his counter was accurate on that evening.

After the three Inspectors had done their counts, they reviewed their counts together. On count one, Inspector 2 reported 301 persons including staff, and Inspector 3 reported 284 persons excluding staff. On count two, Inspector 2 reported 283 persons including staff and Inspector 3 reported 262 excluding staff. Inspector 1's second count was 261 persons, not including staff.

Inspector 1 testified he thought that the discrepancy between the Inspectors in the number of persons could be accounted for by staff being included or excluded by the Inspectors. His count and Inspector 3's count, both of which excluded staff, were very close. Inspector 1 felt very accurate in his account. He thought the time lapse between the two counts was approximately 5 to 10 minutes.

Inspector 1 did not know how many staff were on duty. He later learned that 26 staff were on duty that night, according to Exhibit 1, tab 16.

Inspector 1 testified that the On-duty Manager approached the Inspectors and discussed the counts with Inspector 2. Inspector 2 reported to Inspector 1 and 3 that the On-duty Manager acknowledged that the premises were overcrowded and that had been overcrowded on a previous occasion, for which the Licensee had been reprimanded. Inspector 2 also reported that he asked the On-duty Manager if he would like to conduct a count but the Manager declined, acknowledging the premises were overcapacity.

In his testimony, Inspector 1 confirmed the facts and the narrative set out in the NOEA (Exhibit 1, tab1) is an accurate reflection of the facts and the nature of the allegation. He reviewed the Contravention Notice (Exhibit 1, tab 2) and the Liquor Primary Licence (Exhibit 1, tab 3).

In reviewing the Liquor Primary Licence, the Inspector noted that the allowable capacity in Person Area 01 is 108 persons and in Person Area 02 is 130 persons, with a maximum combined capacity for both areas not to exceed 200 persons including staff. Inspector 1 also testified about the floor plan for the premises (Exhibit 1, tab 4). He noted that there are two areas, each with their own separate capacity, but with a maximum combined capacity for both areas, which included staff. Inspector 1 also referred to the Maximum Occupant Load Permit issued to the Licensee by the City of Vancouver Office of the Fire Chief, indicating the individual occupant loads for each person area, with the combined maximum of 200 people (Exhibit 1, tab 5).

Inspector 1 indicated that the redlined area on the floor plan indicates only the allowable liquor service area, but the occupant load applies to the entire establishment and not just the redlined area. If counting patron capacity an inspector would only count the redlined area, but if counting occupant load the count would include the entire area. The differences between patron capacity, person capacity and occupant load are set out in the Terms and Conditions for Liquor Primary Licenses (Exhibit 1, tab 13)

Inspector 1 referred to the Terms and Conditions and testified that all licensees should be familiar with that document, which outlines what a licensee can and cannot do. Inspector 1 noted that the rules regarding overcrowding are set out at page 9 of the Terms and Conditions.

Inspector 1 reviewed the Liquor Primary Inspection Interview Sheet (Exhibit 1, tab 9) and noted that, at page 2 on January 28, 2014, the licensee's representative signed off that he was familiar with the Terms and Conditions.

Inspector 1 outlined the reasons for pursuing the enforcement action, as set out at page 6 in the NOEA. Those reasons are to address public safety and community standards. He noted the maximum number of persons is based on public safety expectations and also to reduce any negative impacts on the community. Here, he said, the movement inside the premises was limited, raising concerns about the safety for staff patrons and emergency personnel if required.

He testified that the proposed penalty reflected that this was the second contravention for the same offense within 12 months and referred to the Waiver (Exhibit 1, tab 12) where the Licensee accepted a penalty for a contravention for overcrowding that occurred on June 24, 2018.

Inspector 1 reviewed the Licensee's compliance history, which showed that the Licensee had proven Contravention Notices for overcrowding on March 19, 2011 and on October 30, 2016. On May 5, 2018, a Contravention Notice was issued for exceeding the person capacity and occupant load, but no enforcement action was recommended and a compliance meeting was held on May 17, 2018. On June 24, 2018, a Contravention Notice was issued for exceeding the person capacity and occupant load for which the Licensee accepted a Waiver (Exhibit 1, tab 12) and paid a monetary penalty of \$5,000. On June 29, 2018, a Contravention Notice was issued for exceeding the person capacity and occupant load but was withdrawn. The Inspector had no knowledge why that Contravention Notice was withdrawn.

Inspector 1 referred to the compliance meeting notes from May 17, 2018 (Exhibit 1, tab 11). In those notes, the Licensee signed off that it was an opportunity for the Licensee to understand the severity of the public safety contravention and to reiterate his understanding of the Terms and Conditions of the Licence, with the stated intent that the Licensee would come into voluntary compliance and that any further noncompliance would result in enforcement action.

Inspector 1 referred to the Waiver for the June 24, 2018 contravention (Exhibit 1, tab 12) in which the Licensee acknowledges and accepts the contravention as alleged. Attached to that Waiver is the notice of enforcement action for that contravention, indicating a count by the two inspectors at that time put the establishment at an average of 71 persons overcapacity.

Inspector 1 testified that because this is the second allegation within 12 months, the proposed penalty is a 10-day suspension, based on the compliance history and the lack of voluntary compliance. He said monetary penalties did not seem to be working with this Licensee and the suspension was intended to achieve voluntary compliance.

On cross-examination, Inspector 1 acknowledged that both he and Inspector 3 were relatively new inspectors when they attended at the premises in February 2019. He acknowledged that persons could have been double counted but said that the steps taken by the Inspectors minimize the chance that that will happen.

With respect to whether there is any acceptable allowable margin for error in their counts, Inspector 1 said he tried to get it as accurate as possible and that is why they use the counters. He said, during the count, the inspectors only count the red-lined areas and not washrooms. He said that he and Inspector 3 excluded staff in their count if they were clearly identifiable as staff, for example, those persons working behind the bar and those persons who they could identify as security. He noted the reason for the request for a staff list, made subsequent to the inspection, was to ensure the accuracy of the count. He acknowledged that it was possible he may have included wait staff and bussing staff in his count if they were not clearly identified as such. He also agreed that bar staff, the DJ, coat check staff and security staff would not have been within the red-lined area. He thought that there were approximately 10 or 11 such persons that were not included by him in his count. He said that, as set out at page 5 in the NOEA (Exhibit 1, tab 1), the average of the three Inspectors' counts indicate that the premises were overcrowded by an average of 70 persons.

The Inspector testified that he was not familiar with how the occupancy load was set as a term of a licence. He said his responsibility was enforcement, not issuance of licenses. Inspector 1 said he had no knowledge how different municipalities may set different occupancy loads or person capacities.

Inspector 1 agreed that part of the responsibility for inspectors was to help licensees achieve compliance with the terms of their licence. Inspector 1 said licensees wishing to make changes to their licence need to make inquiries through the proper channels and he would assist them or guide them if he could.

Inspector 1 said he had no knowledge of the conversations or relationship between the Licensee and another inspector, responsible for the Vancouver area. Inspector 1 usually works out of another geographic area.

EVIDENCE – LICENSEE

The Licensee called three witnesses: an architect, the On-duty Manager and the Licensee's representative.

The Architect

The Architect testified that he had been registered since 1994 and was certified as a professional with respect to building permits and plans for municipalities. He said he had calculated building occupant loads more than 100 times. His firm prepared the drawings (Exhibit 2) and he was directly involved in their preparation.

The Architect testified that, in the City of Vancouver, occupancy load is calculated on the basis of 12.9 ft.² per person. On this basis, a 200-person occupancy would require 2,580 ft.², assuming other factors like exiting and washrooms were met.

The Architect confirmed that Cabana's red-lined area is 3,368 ft.² and using the 12.9 ft.² per person as a basis, that space would allow for 261 people, assuming no restrictions on exits or washrooms.

With respect to the washrooms, he testified that as Cabana currently stood, the washrooms would support an occupancy of 300 persons. He said that 350 persons would be supported if one of the current staff washrooms was re-designated for a women's washroom.

With respect to exits, he testified that Cabana would permit the exiting of 865 persons. He thinks that exiting is the most important part of setting load requirements. He noted that Cabana's exit width is double and the distance is half that required, and three of four exits open directly to a public area. He said a new facility would have fewer exits and where the Cabana has four, only two would be required now. He said that having

more than required was not unusual, due to the age of the building. He said, under the old Building Code, a higher degree of exiting was required.

In the Architect's professional opinion, Cabana has the floor space, washrooms and exiting for additional persons. He also noted that Cabana had fire suppression sprinklers. He said that with sprinklers there is a 95 to 96% success rate, so confidence level in the ability of sprinklers in fire suppression is high.

The Architect testified that the Vancouver Building Code set a requirement of 12.9 ft.² per person for dining rooms, beverage establishments, and cafeterias. The Architect said Vancouver is the only municipality that requires additional square footage per person, above what is set by the BC Building Code.

The Architect testified that the BC Building Code applied in other municipal jurisdictions. He noted the BC Building Code does not have a specific standard for licensed premises but uses .95 square meters per person, or 10.2 ft.² per person for determining occupancy in areas where fixed seats are not used. He noted that other factors like washrooms and exits also applied in those other jurisdictions. The Architect confirmed that in other jurisdictions, given the floor space in Cabana and all other factors of washrooms and exits being met, 330 people would be the permitted occupancy load.

The Architect referred to the City of Nanaimo as unique in having a Bulletin (Exhibit 3) that clearly sets out the occupancy load calculation for beverage establishments.

The Architect said he is not aware of any reason why Vancouver has more restrictive standards. Given his knowledge that Vancouver previously had even more restrictive requirements, he thought old style beer parlours had something to do with that. He thought those beer parlours were different from the current style of licensed establishments.

The Architect thought that even though the Cabana space allowed for more persons, the City of Vancouver would not process an application for that. The Architect believes that the standard of 200 persons has been applied by the City of Vancouver to other establishments but he could not say how many. The Architect acknowledged that the Granville Street Entertainment Area, where Cabana is located, is high density. To his knowledge, the City of Vancouver has treated Cabana the same as other licensees in the Granville Entertainment Area with respect to occupancy limits. He did not know if the City had taken into consideration the high density of establishments on the same street when setting the occupancy load. He did not know if the exiting of a number of patrons from a number of establishments into the same area could be a problem.

The Architect understood that Vancouver Fire Department is the department most involved in setting occupancy loads with the Building Department looking at exits and other factors. Once the occupancy load is set, he said, the City issues a certificate. He understood that the Fire Department would want to review an application for a substantial change in occupancy.

The On-duty Manager

The On-duty Manager testified that he had about 10 years of experience in nightclubs and bars and had worked for the Licensee for almost three years.

With respect to the evening in question, the On-duty Manager admitted that it was overcrowded. He said the room count was 177, not including the 26 staff on duty that night. He thought it was possible that there were 204 people inside.

He testified the two doormen on duty that night had clickers, with one doorman counting persons coming in, the other doorman counting the persons leaving. One of those doormen was the Head of Security, who had five to six years experience. Between them, he said, the doormen calculated the occupant load to ensure it was not overcrowded. He said the new policies also included the Head of Security doing routine counts within the premises every 15 to 20 minutes.

In the On-duty Manager's opinion, there was no danger to public safety. He said you could navigate throughout the premises no problem. He said some areas of the premises were empty. He testified that overcrowding is not an issue of endangerment, it is a question of mentality. He said no incidents were recorded that night.

The On-duty Manager had never met with any of the three Inspectors before that night. His other experiences were with a different inspector. He was not at the front door but was notified after the Inspectors arrived. The On-duty Manager said he communicated with the Inspectors, acknowledging that the premises were over in their numbers, but he said he did not admit that they knew they were over. He said they had new policies to prevent overcrowding, having been cited for overcapacity previously.

The On-duty Manager recalled being shown the clickers by Inspector 2, but he could not recall the exact number. He did recall being told that they were over by 60 or so persons. He said the premises were loud and he only saw a quick view of the clicker.

The On-duty Manager noted that the Inspectors' counts were done at approximately 1:00 a.m. He said there is usually an influx of patrons between 11:00 and 12:00 p.m. and by 1:00 a.m., the majority of patrons have already arrived and there is not too much in or out at the door. The On-duty Manager testified that if requested to hold the door, they will allow patrons out because they do not have the right to refuse to allow them to leave, but they would not allow any new persons in.

The On-duty Manager said that Inspector 2 never advised him that he should conduct his own count. He reiterated that he did not say he was aware they were overcapacity, but what he did say was there was an earlier contravention and that they were taking steps to address it.

The On-duty Manager said the daily counts were recorded by the Head of Security on his phone but were not given to the On-duty Manager on a regular basis, nor were they recorded anywhere.

The On-duty Manager testified that the front door staff are all aware that 200 persons is the occupancy load. He was unable to give any reason why the Inspectors' counts were substantially different from the door staff count. He did agree that based on the count of 177 and 26 staff working that night, they were over their permitted occupancy load, but he disagreed with the Inspectors' numbers of how much they were over the permitted capacity.

The On-duty Manager said that, on the night in question, it was the Licensee's representative's birthday, but he denied directing any relaxation of the number of patrons that could be admitted.

With respect to training of the security staff, the On-duty Manager understood that it was based on a manual from 2017. The On-duty Manager also understood that all security staff had to take the basic security training, but he was not sure what would be included in that. He assumed it would include how to maintain and manage large crowds. He said any training of the security staff is the responsibility of the Director of Operations. He also testified that the security staff had monthly meetings and refreshers on the security manuals, but he did not have any paperwork with him to show any meeting agendas or minutes.

The On-duty Manager said he was present at the May 17, 2018 compliance meeting but couldn't recall the discussion. He was the manager on-duty on the June 24, 2018 contravention. He said that as a result of that incident, the Licensee implemented more consistent door counts to ensure they were not overcapacity. This included counts inside the premises every 20 to 25 minutes. Previously, interior counts were not done that often. He said the 20 to 25 minutes is only a guide, but they may be done more frequently. He said this requirement is stated in a policy, but he did not have any documents with him to show that.

The On-duty Manager testified that he did not have input into the setting of the Licensee's policies. The setting of policies is entirely up to the Director of Operations. The On-duty Manager reports to the Director of Operations, with the Director of Operations reporting to the Licensee's Representative.

The On-duty Manager also testified that the Head of Security is no longer with the Licensee and that the Licensee has just started recording the door counts and has hired an independent contractor to go over the security procedures.

The On-duty Manager had no explanation for why the Inspectors' count differed so substantially from the count of the doorman. He said he trusted the count made by the Head of Security.

With respect to the June 29, 2018 contravention withdrawn by the Branch, the On-duty Manager said he was shocked that there was an allegation they were overcrowded. He said during the five hours they had been open, the ID login showed barely over 200 scans at that time. He initially said one half of the room was closed off but then said that area was only darker, with the bar not being open and only handful of people in the area.

The On-duty Manager also testified that he and all staff wear nametags. Serving staff do not wear uniforms; they are only required to wear black attire. Security staff carry radios and earpieces. Two or three security staff would be on the door with the rest stationed inside. Only two staff members click in and out the patrons and call out the numbers to each other to ensure that the numbers don't go over the 200 allowed. With staff typically consistent at 26, the number of the door, give or take, is 175.

The Licensee's Representative

The Licensee's Representative testified that he has operated this establishment since 2010. He said that he originally applied for an occupancy of 290 persons, calculating that he needed a minimum 261 persons in order to operate at a financially viable level. He testified that the City of Vancouver only allowed an occupancy of 200 persons, with no explanation why. He got the impression it was a take or leave it, and he felt he had to accept the 200-seat limit because of the investment he had already made to the premises in anticipation of getting a licence and he wanted to be open for the Olympics. For these reasons, he said he accepted that occupancy limit, with the intention of getting an increase in occupancy later. The Licensee's Representative testified that the limited occupancy presents on-going financial challenges that make operations very difficult.

The Licensee's Representative said that since 2010 he has been an active participant in Barwatch, a program where the owners of licensed premises and the police work together to reduce violence and gang activity to keep the City of Vancouver safer. He referred to a letter issued by Barwatch (Exhibit 4). The letter suggests that the Barwatch program has addressed the public safety issues of violent criminals and gang members in the Granville and other entertainment districts. That letter also says the City of Vancouver's limits on occupancy are different than other B.C. municipalities, and suggests this creates problems in enforcement. It also claims that those requirements make the operation of the bars in Vancouver difficult from a financial perspective. The writer of the letter questions why the activities of the Barwatch members to address public safety are not sufficient to require a change in the City of Vancouver's occupancy requirements.

The Licensee's Representative testified that he has been working with the City of Vancouver to change the occupancy permit for the premises. He said a number of other bar owners and Barwatch participants are also involved in working with City council to change the City's requirements. The Licensee's Representative testified that it is his understanding that the City's occupancy numbers are not based on anything or on safety concerns. He said it is not clear what, if any, basis the City's numbers were arrived at, just that they have been applied since before 2010.

The Licensee's Representative also submitted an excerpt from the Branch's mission statement (Exhibit 5). He noted the Branch's mission includes public safety and the public interest and sets out its commitment to work collaboratively and transparently with colleagues and stakeholders. He noted the stated public interest includes enabling a vibrant liquor industry. The Licensee's Representative said despite requests for help made to various liquor inspectors, no help has been offered with respect to his issue of limited occupancy load. He claims Vancouver licensees are in financial jeopardy with respect their viability due to the limited permitted occupancy load.

The Licensee's Representative also submitted a copy of a print out of an email from Vancouver Fire and Rescue Services, dated December 7, 2000 (Exhibit 6). He noted the email refers to the Vancouver Fire and Rescue Services inspectors policy of a 10% leeway on their occupancy checks.

The Licensee's Representative testified he and the Licensee's general manager set the policies for the establishment, with on-duty managers executing them in the daily operations. The Licensee's Representative said their policy is for two persons to do the count: one to count persons coming in, the other to count persons going out. The Head of Security who does the count was to be in constant communication with the other person doing it. He said an additional count is then done every 20 to 25 minutes, to verify the door count. The Licensee's Representative testified the second, inside count policy was instituted after the overcrowding contravention in June 2018.

He said that the Licensee has now contracted with an independent company to provide security. He expects that company will bring its own training program and expertise for a more professional and better door control.

The Licensee's Representative testified that the Director of Operations is responsible for staff training, and all employees get a manual they are required to sign off on, with one manual for each category staff. He did not have copies of any manuals with him. He said the security staff are required by law to take a security training course and have a certificate.

He said the Director of Operations holds monthly staff meetings about issues and general policies that would include public safety, and the Director of Operations then updates him. He did not produce any agendas or minutes of meetings.

When asked about how the Inspectors' counts could be so different from the doorman's count, the Licensee's Representative suggested that two of the Inspectors were new, with little experience. He also suggested that the liquor inspectors' counts always tended to be high. The Licensee's Representative said that a few persons over the occupancy should not be a problem. He pointed to the Fire Department's email about a 10% leeway on counts but said he had not communicated that leeway in the count to the staff.

With respect to the Licensee's compliance history, the Licensee's Representative said that the 2011 contravention occurred on Halloween and the 2016 contravention occurred when there was a major televised fighting event. With respect to June 29, 2018 contravention, he believes it was withdrawn because the numbers alleged could not be substantiated and so should not be considered when determining the penalty. He acknowledged that with the June 24, 2018 contravention they were over 40 or 50 people.

He submitted that a 10-day suspension would be incredibly damaging to the business. The Licensee's Representative re-iterated that the limited occupancy presents on-going financial challenges that make operations very difficult.

The Licensee's Representative testified that he was aware of many liquor licenses with occupancy of over 200 persons. He said the establishment across the street from his has an occupancy load of 350 persons and others have occupancies over 300. He said these establishments are all located in the Granville Entertainment Area.

The Licensee's Representative acknowledged that when the licence is being applied for the Branch sends the application to the City for its input. He says he is not asking for any greater occupancy than what would be permitted in other municipalities.

SUBMISSIONS – BRANCH

The Branch advocate submitted that as the Licensee admitted exceeding the permitted person capacity and occupant load, the contravention was not in dispute. He also submitted that sufficient evidence was presented to prove the contravention in any event. With respect to any dispute about the number of persons, the Branch advocate said the Inspector's evidence supports and shows that over 261 persons were in the premises.

The Branch advocate noted that the number of persons permitted to be in the premises is based on the City of Vancouver's requirements. He suggested that, on the face of it, this means any persons over that number is a public safety issue. He suggested that there is no scope to second-guess the City's safety requirements. While the Architect's opinion maybe of interest, only the terms of the licence may be looked at. The Branch

advocate said even if the Licensee is frustrated in dealing with the City that is no excuse and is not a defense to the contravention.

The Branch advocate submitted that the Licensee has not established a defense of due diligence and has willingly allowed overcrowding. He said any steps that are now being taken to train staff and to change the culture are not sufficient to establish a defense.

The Branch advocate said the compliance history should be taken into consideration in determining the penalty for this contravention. He noted that in October 2018 the Licensee signed a waiver and paid a \$5,000 monetary penalty for a contravention of this term of the Licence that occurred in June 2018. That means this contravention is a second contravention of that term of the Licence within 12 months. The Branch advocate said it is reasonable to expect that if a licensee has short-comings in its practices, the first contravention will provide notice and an opportunity to remedy any errors. A reoccurrence of the same contravention, especially within a short time after, seems simply to be a choice to ignore the terms of the Licence. For this reason, the Licensee should be prepared to expect an increase in the penalty and a higher penalty is warranted. In this case because the prior monetary penalties did not seem to achieve compliance, a suspension is recommended.

SUBMISSIONS – LICENSEE

The Licensee relied on the architect's evidence to say a higher number of persons could be safely accommodated in the premises. He suggested that using the City of Vancouver's own calculations, there is space for at least 261 people. He said other municipalities would have granted a higher number of persons within the same size premises and 330 people would be permitted. The Licensee also said the Barwatch program has been highly effective and this, combined with the evidence of what other municipalities would permit, shows that public safety is not at issue.

He said it is unfair for the City of Vancouver to maintain lower occupancy numbers, which affects the sustainability and financial viability of liquor establishments. He said that the nightclub industry has lobbied to have the City's standards changed, but no action has been made on that, despite no public safety issues.

The Licensee's representative submitted there is a major disconnect between the province and the City of Vancouver and other municipal governments on how the law is applied to determine the occupancy load of licensed establishments.

The Licensee's representative suggested that counting patrons is not an exact science and submitted there could be errors in counting by both the Inspectors and the Licensee's staff. He suggested it is possible that the number of persons present that night was in the middle of the Licensee's staff's count and the Inspectors' counts. He said there is no evidence that he allowed or directed staff to allow more than the permitted number of persons in the premises.

The Licensee's representative submitted that he has a constitutional right to be given a licence that allows him to operate a viable and sustainable business. He said with the current economic conditions and skyrocketing costs in rent, insurance and wages the City's limits on occupancy makes a viable and sustainable business difficult, if not impossible. He said a 10-day suspension will in all likelihood result in the closing of the business and the loss of jobs for the 30+ people that work directly and indirectly for the Licensee.

He suggested that this contravention hearing is an opportunity to address changes that need to be made with respect to the licensing process in the City of Vancouver, that is, in setting higher occupancy limits. He said the Branch, in its mission statement, states it wants to ensure a vibrant liquor industry and help places succeed. He said without help to licensees to address the occupancy numbers in Vancouver, that mission statement is not being met. He asked that the Branch and the Branch's inspectors work with the Licensee and other licensees to address the City of Vancouver occupancy standards.

REASONS AND DECISION

Contravention

The alleged contravention is exceeding the permitted person capacity and occupant load for the service area, contrary to section 78 (1) of the Regulation. The Licence sets a person capacity for each of two areas in the premises (108 and 130 respectively) and a maximum combined capacity for both areas of 200 persons including staff. This means if both areas are open, the maximum number permitted is 200 persons.

The Licensee admits that there were approximately 203 persons in the premises, but submits a margin of error may be applied, so a contravention ought not be found. The Licensee also submits the number of persons in the premises that night was not a threat to public safety and, on this basis, a contravention ought not be found.

I find that neither submission is sustainable and for the reasons set out below, I find a contravention has been proven.

Firstly, with respect to the number of persons in the service area, I prefer the evidence of the Branch over the evidence of the Licensee and find as a fact that at least 261 persons were in the premises. The reasons why I prefer the Branch's evidence include:

- Inspector 1 gave in-person evidence that he conducted a count of persons that showed 261 persons (excluding staff) in the premises. He gave evidence of how he used a clicker to do that count, the direction he took in doing the count, and what his count showed. His in-person evidence was supported by his notes. His evidence was tested on cross-examination and did not change.
- While Inspector 1 was relatively new to the job, he also gave evidence about the training he had received and about the two counts conducted by each of Inspector 2 and Inspector 3. This evidence was also supported by the notes of all of the Inspectors and tested by cross-examination. And while Inspector 3 was also relatively new, Inspector 2 was an experienced inspector.
- The Inspectors' five independent counts were remarkably similar: the first counts being 284 (excluding staff) and 301 (including staff), with the second counts being 261 and 262 (excluding staff) and 283 (including staff). This similarity in numbers supports the accuracy of the Inspectors' counts.

- The Licensee confirmed 26 staff were on duty. Some of the staff would have been clearly identifiable as such, others were not so easily identifiable. This supports the slight differences in the Inspectors' differential counts.
- While the door was being held during the counts and persons were not allowed to enter, persons would have been allowed to leave. This supports the differences between Inspectors 2 and 3's initial and second counts.
- When told about the contravention by the Inspectors, the On-duty Manager did not conduct a count of his own. While he disputes whether he was asked to undertake his own count as an experienced nightclub manager he would have, or should have, known that he could do so. While a licensee is not obliged to undertake an independent count, such a count could have provided a good basis to dispute the accuracy of the Inspectors' counts at the time and, if necessary, at a subsequent hearing.
- The Licensee's evidence about the door staff's count was second-hand and could not be tested by asking that person or persons how they actually conducted the counts and any possibility of error.
- The evidence was that in the past the Licensee's door staff allowed in more than the permitted number of persons, but there was no opportunity to determine how or what they are now doing differently.
- While the Licensee's evidence was that room counts were undertaken every 20 or 25 minutes, there was no evidence when or if any room counts were actually made on the night in question and the numbers that those counts showed.

For all of these reasons, I prefer the Branch's evidence on the number of persons and find as a fact that at least 261 persons were present in the premises on February 9, 2019. As the Licence only permits a maximum of 200 persons in the premises, I find on the facts that the contravention has been proven.

With respect to the Licensee's submission that there is or ought to be a 10% permissible "margin of error", I disagree. The Licensee relies on Exhibit 6, an email from Vancouver Fire and Rescue Services, dated December 7, 2000 that indicates their administrative policy is for a 10% leeway on occupancy counts. I do not find that email to be helpful. The email is from 2000 and as such may be out-dated. No one was called from the Fire Department to testify if the policy is still in place or how it is applied. Further, the email

addresses a particular licence, not the Licence under consideration here. And most importantly, the email addresses the administrative policies of the Vancouver Fire Department, not the inspection practises of the Branch. Under the legislation, the Branch is to enforce the terms of the Licence, so it is the Branch's policies that apply. There is no evidence of any such Branch policy. And in any event, even if there was an acceptable leeway of 10%, that would be an occupancy of 220 people. Given my finding that there were at least 261 persons in the premises, that occupant load was exceeded.

With respect to the Licensee's submission that the number of persons in the premises was not a threat to public safety so that a contravention ought not be found, I disagree. Firstly, I find that a licensee is not entitled to disregard any of the stated terms of a licence, including the terms for permitted person capacity and occupant load, simply because they disagree with the term or condition. The Act, the Regulation and the Liquor Primary Terms and Conditions are all clear that their provisions and the terms of a particular licence must all be complied with. A licensee may not simply disregard any of those terms based on their own interpretation of what the term ought to be.

While the Licensee takes issue with the City of Vancouver and how it sets occupancy loads, until changed, that occupancy load is a term of the Licence and cannot simply be disregarded. Whether the basis on which the City is setting the occupancy limits is reasonable or whether the City ought to adopt different or other standards in setting occupancy loads is not something that is appropriate to be determined in an enforcement hearing. If a licensee has an issue with a term of a licence, the proper course is to request a change in that term.

Secondly, the occupant load is not intended to only address safety issues, it is also to address community standards. Simply because an establishment may be able to accommodate more people does not mean that a higher number of persons is necessarily appropriate for the neighbourhood in which it is located.

Community input on occupancy load is an important aspect of the public consultation process when a licence is issued. The permitted occupant load is intended to reflect the nature of the neighbourhood and any concerns neighbours and other may have with respect to the operations of the establishment. The number of establishments in a

neighbourhood may be a factor in setting the occupancy. For this reason, an enforcement hearing is not an appropriate place to second guess a municipality's reasons for setting a permitted patron number and occupant loads.

Finally, I do not find that this enforcement hearing is the appropriate forum to consider whether there is a constitutional right to operate a business or for a change to certain terms in a liquor licence. The determination of constitutional rights is typically reserved to the courts. As the General Manager's delegate, I do not have the jurisdiction or authority to make declarations of constitutional rights. Any application for such a declaration should be brought before the court.

As noted above, for the reasons set out, I find the Licensee has contravened section 78(1) of the Regulation.

Due Diligence

The Licensee did not claim a defence of due diligence but is entitled to that 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:

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

depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

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

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

1. Whether the employee who committed the contravention 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 committed the contravention was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when contravention was committed), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention (here, exceeding the permitted occupancy); 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.

I find, based on the evidence submitted by the Licensee, that the person charged with the responsibility for controlling the number of persons in the premises was the Head of Security. I also find, based on the evidence submitted by the Licensee, the Head of Security was not a directing mind of the Licensee.

I then turn to the next step in the inquiry, whether the Licensee had put into place adequate training and other systems to ensure the Head of Security knew his responsibilities and was trained in how to carry them out, and if the Licensee had a means to and did ensure that that responsibility and training was in fact being effectively carried out in the Licensee's day-to-day operations.

I find the evidence of the Licensee's training to be less than satisfactory. The On-duty Manager and the Licensee's representative both gave oral statements that there was training and their belief as to the content of that training. No further details of the training were provided. No manuals or outlines of the training were submitted. The Director of Operations, the person responsible for developing and delivering the training, was not called to give any evidence of what or how that was done, or how employees were tested to ensure they understood and could carry out their duties pursuant to that training. The Head of Security was not called as he is no longer with the Licensee, but nor was any other current security personal called about the training they received.

For these reasons and on these facts, I find the Licensee has failed to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training.

I also find that even if there was adequate training, there is little evidence of any systems in place to ensure that that training was being effectively applied. The On-duty Manager and the Licensee's representative gave oral evidence that the Director of Operations held monthly staff meetings for each category of staff. No further details of the meetings were provided. The Director of Operations was not called to give any evidence. No agendas for or minutes of meetings were provided. I find that while the Licensee says that after the June 2018 contravention a policy was put into place to do regular room counts, the evidence that that was in fact done was limited. No records of those counts were kept.

For these reasons and on these facts, I find the Licensee has failed to establish on a balance of probabilities that it had exercised all reasonable care by ensuring effective application of its training and systems in place to prevent the contravention from occurring.

For all of the above reasons, I find the Licensee has failed to show that it was duly diligent.

PENALTY

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

Pursuant to section 51(2)(b) of the Act, having found that the Licensee has contravened the Regulation and the terms and conditions of its 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

The range of penalties for a second contravention of section 78(1), as at the date of the contravention, is a 10 to 14-day suspension (item 13, of the then Schedule 2 of the Regulation). In the Notice of Enforcement Action and at the hearing, the Branch proposed a suspension of 10 days under the Schedule in force at the time of the contravention.

I am not bound to order the penalty proposed in the Notice of Enforcement Action nor am I bound by the maximums, and I may impose higher penalties when it is in the public interest to do so. 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 2 of the Regulation, unless section 4(4) of the Schedule applies. Section 4(4) provides that if I am satisfied that imposing the minimum period of suspension for a second contravention would create undue hardship on a licensee, I may impose a period of suspension that

falls within the range of suspension for a first contravention. In the case of a contravention of section 78(1), the range of suspension for a first contravention is 4 to 7 days.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history, a past history of warnings by the branch and/or the police, the threat to the public safety, and the well-being of the community.

In this case, there is a record of a proven contravention by this Licensee of the same type at this establishment within the preceding twelve months of this incident. On this basis, I find this to be a second contravention for the purposes of Schedule 2 and calculating a penalty.

The first contravention occurred in June 2018, despite a compliance meeting held in May 2018 to address this very issue. Earlier contraventions for this very same issue occurred in 2011 and 2016, for which waivers were signed and a monetary penalty paid for those contraventions and for the June 2018 contravention. On considering this factor, I find the Licensee shows a disregard for the need to comply with this term and condition of its Licence. I also find that despite the payment of the penalty, the Licensee has not put into place sufficient practices and policies to prevent this type of contravention from re-occurring. It appears as if the penalties are simply a cost of doing business. This concerns me.

With respect to the threat to public safety, I am mindful of the Architect's testimony that as presently configured, the premises provide sufficient space, exits and washrooms to safely accommodate about 261 persons and about the existence and effectiveness of the fire sprinklers. Weighed against this is that the Fire Department set the occupancy load at a maximum of 200 persons and must be seen to also have expertise in this area. I also considered Inspector 1's testimony that it was hard to count the number of people because of the bottleneck in front of the bar but have weighed against that the fact Inspectors 2 and 3 were able to complete both their counts.

And while I find that Barwatch program has done a very good job of addressing gangs and other criminal and violent behavior in or near licensed establishments, that is only one and perhaps a lesser aspect of assessing the safety of persons in relation to occupant load.

With respect to the well-being of the community, the evidence is that the premises are located in the Granville Entertainment Area, an area with a number of licensed premises. The City of Vancouver would be well aware of this when setting the occupancy limits. It is not unreasonable to assume that the City took neighbourhood concerns into consideration when setting the occupancy load. Impacts on a neighbourhood may include noise, and the number of persons emptying onto the streets at closing time.

For these reasons, I am unable to find the contravention should not warrant some form of penalty as the Licensee has suggested, and as stated above, a monetary penalty seems to have little or no impact on achieving compliance. For these reasons, I find that a suspension is the penalty that will best achieve the goals of addressing the Licensee's non-compliance and encouraging future compliance by way of deterrence.

The Licensee has claimed a 10-day suspension would create undue hardship and that in all likelihood the establishment would permanently close and approximately 30 employees and others would be put out of work. I have considered this, and also considered that licensees need to be mindful and should consider impacts on their employees when they fail to ensure compliance with any term of their licence. While I accept the truthfulness of the Licensee's representative's evidence on this and find that in this matter imposing the minimum period of a 10-day suspension for a second contravention would create undue hardship, clearly some period of suspension is warranted. Given the Licensee's compliance history, I find a suspension at the high end of the range for a first contravention is appropriate.

I find that the appropriate penalty is a seven-day suspension.

ORDER

Pursuant to section 51(2)(c) of the Act, I order a suspension of Liquor Primary Licence 303935 for a period of seven days to commence at the close of business on Thursday, October 3, 2019 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 October 3, 2019 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

Dianne Flood
General Manager's Delegate

Date: August 22, 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