



**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* RSBC c. 267

Licensee: Wasteland the Urban Cabaret Ltd.  
dba Sugar  
860 Yates Street  
Victoria, BC

**APPEARANCES**

For the Licensee: Greg Harney, Counsel  
James MacPherson, Owner

For the Branch: Peter Jones, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Dates of Hearing: December 13, 18 & 19, 2002

Place of Hearing: Victoria, B.C.

Date of Decision: January 30, 2003

## **Introduction**

Wasteland the Urban Cabaret Ltd., operates a cabaret known as Sugar (referred to in this decision as “Sugar” or “the cabaret”), with a Class “C” Cabaret liquor licence #48985. The licence permits hours of operation from 7:00 P.M. to 2:00 A.M. Monday through Saturday and from 7:00 P.M. to 12:00 Midnight on Sundays. The cabaret is located in downtown Victoria in a commercial area. The current owners purchased the establishment in July 1999.

The cabaret is on two levels. The main level is one story above street level, with stairs leading from the street entrance. At the top of the stairs is the coat-check and ticket booth area, before the entrance to the licensed premises. The main level, area 01, has a licensed capacity of 268 patrons. The second floor is a semi-circular balcony overlooking the main level, and it has a licensed capacity of 76 patrons. The total licensed capacity is 344 patrons.

On a busy night, there will be approximately 28 staff working, including management. Typically this would be 10 security people, 8 bartenders, 2 coat checkers, and 8 support staff (servers, bussers, washroom attendants).

## **Alleged Contraventions and Recommended Enforcement Action**

The branch alleged that on March 7, 2002, the number of patrons in the cabaret exceed that permitted by the liquor licence, contrary to section 12 of the Act. The branch’s recommended penalty was a one (1) day licence suspension to be served on a Thursday.

Initially, by Notice of Enforcement Action dated April 23, 2002, the branch alleged that the number of patrons in the cabaret exceed the building occupancy load capacity. That was amended on August 2, 2002, to the current allegation.

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## **Compliance History**

There is no record of prior contraventions, offences or enforcement actions for this licensee (“compliance history”) or for this establishment.

## **Issues**

1. Does the evidence support the branch’s allegation that the capacity in the cabaret exceeded that permitted by the liquor licence?
2. If yes, is the branch’s recommended penalty an appropriate penalty?

## **Exhibits**

Exhibit No. 1	Hearing Brief submitted by the branch, containing 7 tabs
Exhibit No. 2	Floor plan marked by Office A
Exhibit No. 3	Victoria Police Department Occurrence Report, dated March 8, 2002
Exhibit No. 4	Floor plan marked by Witness #1
Exhibit No. 5	Videotape recording of the interior of the cabaret
Exhibit No. 6	Series of ‘Z’ reports
Exhibit No. 7	Second series of ‘Z’ reports

## **The Branch’s Evidence**

### *Overview*

Four police officers testified for the branch. Two officers (who I will refer to as “A and B”) attended the cabaret for a routine inspection at approximately 11:30 P.M. They testified that when they went inside they immediately had the sense that the cabaret was very crowded. After inspecting the cabaret and doing an estimate of the number of patrons, they left the cabaret and called for back up to provide an independent count. Two other officers attended (“C” and “D”).

All four officers testified that this was a cheap drinks night, \$0.75 for a highball, there was a lengthy line up outside, the cabaret was crowded, there was a disk jockey playing music and patrons were dancing. They agreed that the array of lights, mirrors and fog machine contribute to making it difficult to see all areas of the cabaret clearly and to count precisely. The officers acknowledged that this cabaret attracts a young clientele, many university students, and that the patrons, servers and bussers resemble each other in age and dress. The officers who performed counts or estimates of the numbers testified that they would have counted the serving and bussing staff unless they were clearly identifiable as employees. The officers also acknowledged the difficulties of accurate counting in a crowded cabaret and agreed that this cabaret's method of door counting would be more accurate than a head count, if the door count was being properly conducted.

The officers described the outdoor smoking area, which is accessed by a separate stairwell and is roped off from the main street. None of the officers counted patrons who were in this area.

The officers acknowledged that the Sugar cabaret staff are always cooperative and that there are not many difficulties associated with this cabaret. On this night, the staff and management indicated that their door count showed the cabaret was at capacity. The manager told the officers that he disputed their contention that it was overcrowded.

*Officer A*

Officer A described the entrance area at the top of the stairs, on his initial inspection, as being a 'wall of people'. He testified that he had done approximately 6 routine inspections in this cabaret in the preceding 6 months and had seen the cabaret at or near capacity and when it has been very quiet.

The officer testified that he did a visual estimate of numbers from the upper level balcony, by dividing the cabaret into approximately 8 foot grids. He testified that he could not see some areas of the cabaret, which he noted on Exhibit No. 2, and that he did not count people in the washrooms. He recalled that it was difficult to see the far side of the cabaret. His estimate was 400 persons. He testified that he considered the cabaret to be far in excess of the licensed capacity, that it was difficult to move and, although he is accustomed to being bumped into in bars, this was far more crowded than usual. He said that the operator/manager had accompanied him around the cabaret, or for part of the time, but they did not discuss the officers' perception of overcrowding until later.

He and his partner left the cabaret to discuss the situation. They decided they wanted to get a second opinion of the numbers, and have a count done with a mechanical counter. Additional officers arrived with a mechanical counter and officer D reported the number on the counter was 388 people. Officer A completed a Licensed Premises Check (LPC) showing a count of 388 and gave it to the operator/manager who indicated his disagreement with the count, both orally and on the LPC.

*Officer B*

Officer B accompanied officer A. She did not do an independent count. She testified that she had inspected this cabaret many times, approximately twice per month, had never seen it this crowded and she thought there was an over abundance of people. When the additional officers arrived, she accompanied officer D on the count and assisted by counting in the women's washroom.

*Officer C*

Officer C testified that he walked around the cabaret and from the upper level he did a grid count of the dance floor and main floor although he could not see the far side, the area directly below him or the washrooms. He estimated about 300 people in the area of the dance floor and main floor. He did not do a grid count on the upper level but estimated about 75 to 100 people on that level. He acknowledged that there may have been a change of song during his count and that there would have been constant movement on the main floor. He testified that he has been in this cabaret when it has been at capacity. He judges that a cabaret is overcapacity when he has to push his way through, as he had to do on this night.

Officer C did not make any notes and did not have documents to refresh his memory. However, he testified that this was the only occurrence of this nature in the past year and he trusted his memory. He thought his reported count was 375 persons and that would be a minimum since he always errs on the side of the licensee. His count would have included the servers and bussers, but not the bartenders or security staff who are readily identifiable. He testified that he conferred with Officer D whose count at 388 included the washrooms but excluded part of the floor area. Officer C thought that Officer D may have had a separate count of 100 for the dance floor. Officer C noted that the Liquor Control and Licensing Branch had impressed upon the police the need to verify counts and, therefore, officers ensure they have two counts.

*Officer D*

Officer D testified that he thought the cabaret looked overcrowded as soon as he entered. He had inspected this cabaret approximately twice per month and had

seen it at various capacity levels. On this occasion he had a mechanical thumb clicker and he asked officer B to assist him.

He described the circular route he followed in doing his count on the main floor and upper level, ending by the dance floor. Officer B reported 25 in the women's washroom and he added her count to his clicker count.

Officer D testified that in addition to the clicker count of 388 people, he estimated 100 people on the dance floor by visual approximation. He testified that he was aware from speaking with the owners that the dance floor accommodates approximately 100 people. He said that the dance floor was either sunken or on the same level as the main floor and he could not recall whether people were dancing on the raised stage that night. He acknowledged that there was movement within the cabaret while he was doing his count and that there would have been some duplication during the counting.

Officer D reported his count to officer A. He recalled his reported count was 450 people and that he recorded in a report he wrote the next day. He thought officer A had also recorded the count as 450. However, as of the day of the hearing, he realized that the LPC indicated 388 people. He testified that it would not have made sense for him to click in 100 additional people on the counter so he orally reported that. Neither the branch nor the licensee had a record of having received officer D's notes or report. Officer D testified that officer A's report, Exhibit No. 3, was incorrect in stating that both officers C and D counted 388 people.

Officer D testified that it was crowded and noisy, music was blaring and people were yelling and the officers had to yell at each other. He thought the discrepancy by officer A in recording the count on the LPC as 388 instead of 450 or 488 was miscommunication because of the noise level.

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### **Application by Licensee Based on Insufficient Evidence**

At the close of the branch's evidence, the licensee submitted that I should find that the branch had not submitted sufficient evidence to found the alleged contravention. The licensee submitted that the allegation is capacity beyond 344 and is not separated between the upper and lower areas. On the floor plans, the red lined areas are delineated. The insufficient evidence application was based on the licensee's contention that it would not be legal to count the patrons found outside the red lined areas, for example in the washrooms. If those patrons are removed from the total reported count of 388, and if the staff were removed from the count, there is no evidence of overcapacity.

I denied the licensee's application on two grounds. First, I find the submission based on the red lined areas to be without merit. The intention of the capacities, set out on the face of the liquor licence, is to limit the number of patrons permitted inside the cabaret. The licensee's own method of door counting recognizes this. Accordingly, it is the number of patrons admitted to the establishment that concerns the branch, regardless of whether a patron steps outside the red lined area for a period of time.

Second, I find there was some evidence from officers A and C that the total numbers within the red lined areas exceeded the licensed capacities.

### **The Licensee's Evidence**

The licensee's witnesses were two owner/operators and one operator/manager, who I will refer to witnesses #1, #2 and #3, in the order they testified.

The licensee's witnesses testified that they have always considered the licensed capacity to be 344, total, rather than 268 on the main level and 76 on the upper.

They have not attempted to monitor the number on each floor and have understood that the branch's concern is the total not the individual capacities.

*Witness #1*

Witness #1 is responsible for handling administrative and legal matters, banking, etc. during the day. At night, he opens the cabaret at 8:00 P.M. and leaves around 11:00 P.M. He prepares cash trays, video tapes, and generally oversees things until the acting manager arrives. If the night is busy he stays to handle cash, VISA and ATM machines, tills. On March 7, 2002, he had left at his usual time.

This witness explained the many changes the owners effected to the previous operation, including systems for administration, reducing noise levels, installing video cameras, and using mechanical clickers for front door in and out counts. At the request of the city police, they installed additional lighting at the front door and in the side parking lot.

This witness testified that the door staff are trained to control the patrons allowed in and that part of that training has been with police consultants. He said that the smoking area is contained and when a patron goes into that area, the patron is still considered part of the overall count. He described the front door procedures for checking identification, recording the number of patrons in and out, payment of cover charge, and the VIP line up for special guests or people who have made reservations. He said that sometimes patrons wait in line for 2 hours and the fact that there was a lineup on the night in question shows that the door staff were doing their job to keep within the licensed capacity.

This witness described the desirability for the cabaret to look busy, both with a lineup and at the entrance.

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He said there is a beer tub just inside the entrance which causes some congestion. He indicated that it is good for business for this area to look busy and be noisy as this sets the energy. Sometimes management puts tables and chairs in this area to enhance the sense of being crowded and busy.

This witness recalled that March 7, 2002, had been a busy night and was at capacity. However, it was not so busy that he needed to stay. He described the layout of the stage, which was protruding into, and reduced the size of, the dance floor because they had stored a band's gear behind the stage. He described the stage as being 30" higher than the dance floor; patrons sometimes dance on the stage.

Witness #1 testified that from the balcony where the officers did their grid counts, it is not possible to count patrons on the far side of the room when the lights are turned on the dance floor. The floor is approximately 160 feet long. There are mirrors reflecting people and the fog machine, which would have been in use on this night, would have obscured patrons. He disputed the officers' counts by either the mechanical clicker or grid method and said there is far too much movement for those counts to be accurate. He provided a video recording which he filmed on a similar Thursday evening. The first part is before patrons arrive showing the cabaret layout and placement of lights, strobes, mirror balls, etc. The second part is during the busy night, between 11:30 P.M. and 12:00 midnight, taken from the spot the officers were standing to do their grid counts, just above the dance floor. The witness noted that the stage in the video was less than half the size of the stage on the night in question and, therefore, the dance floor area in the video was considerably larger.

Witness #1 testified that he never attempts to do a head count to verify the door counts because it just is not possible to get an accurate count.

He acknowledged that it is possible for the door counter to make a mistake but disputed the possibility that it could be as large a mistake as is alleged. One of the owner/operators oversees the door counter. At the entrance, patrons are identified, they pay the cover charge, they check their coats and the door staff clicks in them in. In his view, there is not much margin of error.

*Witness #2*

This witness' area of responsibility is overseeing the door counts, patron capacity. He testified that the policy is to attempt to maintain capacity and not to exceed capacity. Thursdays generally are cheap drinks nights in Victoria. He recalled the events of March 7, 2002, that it was a busy night, and that there was a substantial line up.

Concerning the counts this night, he testified that none of the officers asked him to join them on their counts, that he is familiar with the various capacities in cabaret and would be able to "guestimate" numbers on the dance floor, that it would have been impossible for the officers to do an accurate grid count, and that a clicker count couldn't be even close to accurate. He testified that sometimes he does visual head counts, particularly at the beginning of a night when there would be between 100 and 200 patrons. When it is busy, he relies on the door counters. He testified that the owners consider this cabaret to be the best in the city and they ensure their door staff is the best in the city. Over the years, the police have issued over one hundred LPCs, all indicating no problems. Approximately 2 years ago, the liquor inspector indicated a concern about overcrowding. Other than that, there have been no concerns raised about overcrowding.

*Witness #3*

Witness #3, the operator/manager, had primary responsibility for monitoring the front door, the numbers in and out and the collection of cover charge. He is the person who received and disputed the police LPC. He testified that the officers did not ask him to accompany them on the counts.

This witness identified the two staff who were working the front door that night, who had worked there for about 2 years, and explained that neither is working there now. One returned to studies and the other moved away from Victoria. He described their individual responsibilities for checking identification and keeping accurate counts.

He testified that the clicker system in place is virtually flawless because there is only one entrance which is also the exit, it is well lit, there is a video camera, and a management person watches the door staff. Patrons cannot leave the premises until the door staff opens the chain for them and, therefore, it is not possible to miss people leaving. In his view, the door count system is accurate.

Witness #3 was adamant that there was no way there were 388 - 488 patrons as officer D testified. He testified that he saw open pockets of room that night and that the crowded conditions around the stage gave the illusion that it was busier than it really was.

Referring to the Z report at Exhibit No. 1, tab 4, this witness testified that it indicated this night was slightly below average

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## Reasons and Decision

I have reviewed all of the evidence and submissions against the test of a balance of probabilities. I find that the evidence presented during the hearing is insufficient to found the allegation of overcrowding, for the reasons that follow. I find that the police evidence was inconsistent and did not accord in some material respects to the evidence outline in the LPC and the police occurrence report.

I accept the evidence of officers A and B that their impression was that the cabaret was more overcrowded than they had previously experienced. Officer A performed a grid estimate of 400 people. The officers went outside to discuss the numbers and decided to ask for assistance for a mechanical count. The officers did not relate their concerns to the cabaret staff. In my view, the evidence of officers A and B at this stage raises a concern about possible overcrowding but is far from conclusive. Obviously, the officers were not prepared to allege overcrowding at that point.

It is not clear from the evidence how long officers A and B were outside before the next two officers arrived. There is no record of how many patrons entered or left during this time. When officers C and D arrived, the other officers briefed them about their concern and asked for a mechanical count.

Contrary to the branch's summary of evidence and Officer A's occurrence report, only officer D conducted a mechanical count, with assistance in counting the women's washroom. A major component of officer D's testimony was a surprise to the branch and the licensee. It is apparent officers A and B did not know about his additional count for the dance floor, nor his overall estimate of 450 persons, and they did not understand that only one count was conducted.

Where officer D's testimony differed from the LPC and the police occurrence report, which alleged a count of 388 persons, I found that his testimony was not compelling. I find that officer D's evidence was not sufficiently credible or reliable to found this contravention.

I find that there was only one count performed, that by officer D. I find that Officers A and C did estimates rather than counts, and I find their estimates are not persuasive to establish the contravention. Officer A was clear in saying he 'estimated'. His estimate was prior to officers C and D arriving. As there is no evidence about how many patrons entered and left while he was outside, his estimate does not provide support for officer D's count.

Although Officer C testified that he 'counted', I find that his evidence establishes that he made an estimate. His estimate of both levels was approximately 375, including staff. Although he said he erred in favour of the licensee, having weighed his evidence, I find his estimate could support a conclusion close to the licensed capacity of 344.

I do not accept the licensee's contention that it is not possible to do a head count in a busy cabaret. I acknowledge that there are difficulties because of the lighting, the mirrors, patron movement, and movement to and from the dance floor as songs change. Police officers and liquor inspectors are familiar with these obstacles and are able to conduct reliable counts. In my view, licensee staff could also perform reliable counts.

This decision should not be read as suggesting that a grid count could not be a reliable count. The evidence indicated that police officers are taught to conduct counts by a variety of methods, including grid counts. Officers are required to count for a variety of purposes. In licensed premises, their task is to count as accurately as possible the number of patrons and, in my view, this could be

accomplished by a grid count. However, in this instance, I found that officer C had not counted with that degree of precision.

I also do not want to be taken as suggesting that estimates are not valid evidence upon which to found a contravention for overcrowding. It depends on how the estimates are conducted and whether the results are reliable. In the case of officer C's estimate, I found that the result was as consistent with a finding of capacity as with overcapacity.

The branch's evidence in this case fails to substantiate the alleged contravention because of difficulties with the police evidence. In particular, there were inconsistencies between the evidence of the officers, the evidence recorded at the time of the incident, and the new evidence that was disclosed for the first time at the hearing.

### **Order**

I find that the evidence does not support a finding that the number of patrons in the licensed premises exceeded that permitted by the liquor licence.

*Original signed by*

M. G. Taylor  
Enforcement Hearing Adjudicator

Date: January 30, 2003

cc: Victoria Police Department  
  
Liquor Control and Licensing Branch, Victoria Office  
Attention: Gary Barker, Regional Manager  
  
Liquor Control and Licensing Branch, Victoria Office  
Attention: Peter K. Jones, Advocate