



**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**

<b>Licensee:</b>	T. & V. Enterprises Ltd. dba Civic Hotel
Case Number:	EH02-78
<b>Appearances:</b>	
For the Licensee	Donald W. Skogstad
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Suzan Beattie
Date of Hearing	November 14 & 26, 2002
Place of Hearing	Nelson, B.C.
Date of Decision	April 10, 2003

## **INTRODUCTION**

The licensee, T. & V. Enterprises Ltd., doing business as the Civic Hotel, is located at 705 Vernon Street, Nelson, B.C. It holds a Class "A" Pub Licence #119233 for the sale and consumption of all types of liquor and for off-premises sales. The establishment is located on the main road in Nelson in a mixed commercial area that includes shopping stores, professional enterprises, a theatre hall and a number of other licensed premises. It is also in close proximity to residential neighbourhoods.

The hours of the liquor licence are Monday to Thursday from 11:00 A.M. to 1:00 A.M., Friday and Saturday from 12:00 Noon to 2:00 A.M. and Sunday from 11:00 A.M. to 12:00 Midnight. The liquor licence dated May 10, 2001, shows a maximum capacity for area 1 of 175 and for the patio of 32. The maximum occupant load for the premises is 211 persons.

## **ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES**

In a Notice of Enforcement Action dated July 17, 2002 and subsequently amended on August 8, 2002, the branch alleges that on March 28, 2002 the licensee contravened sections 12 and 38(3)(b) of the *Liquor Control and Licensing Act* by permitting overcrowding beyond the licence capacity, contrary to the *Act*.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of overcrowding beyond licence capacity the penalty range is one to three days or \$1,000 to \$3,000 for the first contravention. In this case, the branch is recommending a three-day suspension, the maximum penalty for a first contravention, starting on a Thursday, and continuing on successive business days until completed for the alleged contravention of sections 12 and 38(3)(b).

The relevant statutory provisions of the *Liquor Control and Licensing Act and Regulations* state:

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## 12 Licences

- (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

## 38 Unlawful sale of liquor

- (3) A licensee must not sell liquor except
  - (b) in accordance with this Act, the regulations and the terms and conditions of the licence.

## ISSUES

1. Whether the licensee contravened sections 12 and 38(3)(b) of the *Liquor Control and Licensing Act*.
2. If so, is the recommended penalty appropriate in the circumstances?

## COMPLIANCE HISTORY

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

A summary of the branch's enforcement file for this establishment and licensee is contained in Exhibit No. 2. There is nothing in this file that refers to overcrowding as a problem with this establishment or this licensee.

## WITNESSES

The branch called three Nelson City police officers as witnesses. The licensee called its bartender/night manager, a server/back-up bartender, its owner and an individual who has owned and operated licensed establishments in British Columbia and Alberta for over 40 years as its witnesses.

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**EXHIBITS**

The branch and the licensee presented the following exhibits:

**Exhibit 1****Book of Documents II**

- Tab 1 Notice of Enforcement Action dated August 8, 2002
- Tab 2 Enforcement Action Recommended Report dated July 7, 2002
- Tab 3 Compliance and Enforcement Policy Manual "Overcrowding"
- Tab 4 Excerpts Taken from The Guide for Licensees

**Exhibit 2****Compliance Documents**

- Tab 1 Compliance Meeting Form dated September 11, 2001
- Tab 2 Contravention Notice No. A001165
- Tab 3 Contravention Notice No. A001164
- Tab 4 Licensed Premise Check No. A0124101
- Tab 5 Warning Letter dated August 17, 1999
- Tab 6 Warning Letter dated March 4, 1998 with Licensed Premise Check
- Tab 7 Warning Letter dated September 30, 1997
- Tab 8 Inspection and Interview Report dated August 5, 1997

**Exhibit 3****Book of Documents I**

- Tab 1 Liquor Licence No. 119233
  - Tab 2 Floor Plan
  - Tab 3 Contravention Notice No. A003159
  - Tab 4 Contravention Notice No(s). A003156/A003158
  - Tab 5 Licensed Premise Check No. A124051
  - Tab 6 Statement and Occurrence Report of Sgt. Bank
  - Tab 7 Statement of Cst. Halstead
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Tab 8	Statement and Occurrence Report of Cst. Severyn
Exhibit 4	Book of Photographs
Exhibit 5	Floor Plan
Exhibit 6	Maximum Occupant Load Certificate

## **EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS**

### ***Alleged overcrowding beyond licence capacity, contrary to sections 12 and 38(3)(b)***

#### **Background**

At the outset, I make two points. First, the bartender/night manager, the server/back-up bartender and the owner believed they could operate up to the maximum occupant load of 211. The owner stated he was told he could do so by the liquor inspector sometime in 2000 or 2001. The owner was aware that his licence stated 175 persons and, as a result of his concern, he telephoned branch headquarters in Victoria for clarification. The woman he spoke to said "she was on it" but he did not receive a reply. He and his staff have maintained the establishment at just fewer than 200 to allow room for VIP's. They claim however, that they can operate up to 235 patrons, being 211 plus a 10% tolerance factor.

On this point, I find the licensee is in error. First, the 1999 Liquor Policy Review report recommended that some categories of licences be permitted to increase their capacities to either the building occupancy load, or 150 percent of their existing capacity, whichever is less. In March 2001, the licensee's capacity was 125. At that time, it applied for and received a patron capacity increase under this policy recommendation that allowed it to increase 150 percent of its current licensed capacity (125) to 175 patrons.

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Second, inspectors use the 10% tolerance level in determining whether to recommend enforcement action. If an establishment has a licensed capacity of 175, and an inspector identified no other contraventions, no other previous problems and the establishment was operating at a level of 193 (or 10% of 175), the inspector would not recommend enforcement action. The policy does not, as the licensee has argued, allow it to add 10% to its licensed capacity.

As a result, I emphasize that the licensed capacity of the establishment is 175 patrons.

Second, I point out that in the Notice of Enforcement Action, the inspector states the fact that the licensee acknowledged it was over their licensed capacity. The licensee has, however, questioned the police officers' count of 415 patrons.

### **Evidence**

The totality of the evidence of the seven witnesses established the following scenario. On the business day of March 28, 2002, the establishment employed three bouncers, a bartender/night manager, a server/back-up bartender and two servers. The entertainment by the DJ was hip-hop.

There are two entrances to the establishment, a main entrance and a smaller entrance off the hotel lobby area. The evidence established that the lobby area held approximately 30 individuals. Patrons exit through the main entrance.

There is an additional exit door onto the patio area with stairs down to the back of the hotel. Due to security concerns, the owner installed a rolling chain link gated fence in the back of the hotel. Individuals have damaged this chain link fence by climbing over it to get to the patio and the back exit door. This exit door cannot be locked due to fire regulations. Patrons inside the establishment have been known to push the exit door open to allow individuals on the patio into the establishment.

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Turning now to the events of March 28, 2002. The establishment employed three doormen, one on the back exit to the patio, and two doormen at the front entrances. At one point in the evening the bartender/night manager counted 197 patrons. He asked the front doorman not to let additional patrons into the establishment. The front doorman ignored his request and allowed anywhere from 7 – 20 additional patrons into the establishment. The front doorman was reprimanded at the time and subsequently dismissed.

Shortly before 1:40 A.M. on the business day of March 28, 2002, three police officers were dispatched to the establishment to attend to a female passed out in the ladies washroom. The first two officers to attend noted that patrons were still purchasing and being served alcohol.

The first officer has experience carrying out inspections of licensed premises in Vancouver's downtown eastside, Vancouver's west end, and in Nelson. He entered the establishment through the main door and spoke to the front doorman. The front doorman was monitoring the queue lined up to enter the premises as well and those inside the lobby. This officer noticed the doorman allowing patrons to enter the premises only after the same number of patrons departed. The front doorman advised this officer there were 205 patrons in the premises.

The first officer initially observed a "sea of heads" as the patrons were standing shoulder to shoulder. The area off to the right from the entrance where the bar is located was "plugged" with patrons approximately 8 deep. In this officer's opinion, it was not possible to walk through the crowd. Further, the crowd generated body heat and stale air due to the number of individuals.

As this officer was attempting to push his way through the patrons, the bartender/night manager approached him and suggested the officers walk behind the bar to reach the washroom area. A few minutes later, the emergency personnel attended and decided they would remove the female patron from the premises.

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The officers assisted the emergency personnel in cutting a swath through the crowd to bring a stretcher to the washroom. The officers used a "V" formation to get the stretcher to and from the washroom. The third officer to testify explained it was necessary to "cut" their way through the crowd. Many patrons did not see or hear the officers, so they had to push their way through the patrons to obtain the stretcher, bring the stretcher back through the crowd to the washroom and return with the female patron loaded on the stretcher.

After the female patron was removed from the premises, the first officer decided to wait for the premises to close, stand outside the main exit and count patrons as they left the establishment. This officer stood with his back against the building, holding the door open for the patrons to leave. The front doorman was standing on the inside of the door. The second police officer to testify was standing facing the patrons as they exited. The third officer was assigned to ensure patrons were not exiting through the back of the hotel. In this manner the first officer counted the constant, orderly flow of patrons as they exited. When he reached a milestone of 100 patrons, he yelled the number out to the second officer. The second officer, who was in full view of the patrons as they left, attempted to also count exiting patrons, but was frequently interrupted. The officers commenced counting at 2:00 A.M. and stopped at approximately 2:25 A.M. The first officer's count was 415 patrons.

The first officer entered the establishment and spoke to the bartender/night manager, told him there were 415 patrons, and left. He said the bartender/night manager did not say anything to him. When the third officer served the Licence Premise Check on April 20, 2002, the bartender/manager openly argued with the officer and stated it was not possible to have that many patrons in the establishment.

The bartender/night manager confirmed that there was a doorperson on the exit to the patio and two doorpersons at the entrance. While one of these doorpersons may have acted as a rover earlier in the evening, both were at the entrance at the time in question.

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He testified that the line up at the bar area when the officers entered was only about 3 or 4 persons deep with about 50 patrons at the two serving stations and mingling in front of the bar and hallway area.

The server/back-up bartender also stated it is physically impossible to have 415 patrons in the establishment. There were individuals trying to climb the fence at the back because the hip hop entertainment was so popular. When the establishment is too crowded, the servers make less money as they cannot serve efficiently and patrons have to wait for service.

The owner verbally stated the cash receipts for the evening. No records were produced. He also confirmed that licensees and their staff are just as concerned as the police about the potential of fights breaking out in establishments. It has happened that patrons push open the back fire exit and allow individuals to enter the premises. This occurs most often once liquor service has concluded and the doorman at the back patio fire exit moves to the front to assist in monitoring the front exits. The owner also stated that, with two pool tables, two stand up counter bars and large washrooms, it is not possible to have 415 patrons standing in the establishment.

The individual with over 40 years industry experience confirmed that, given the size of the establishment, even 250 patrons would be extremely crowded. This individual also confirmed that, given the verbally stated receipts for the evening and working backward from those financial figures, he would estimate that approximately 155 patrons were served on March 28, 2002.

## **Submissions**

### **Licensee's**

The licensee disputes the claim that there were 415 patrons in its establishment. First, the licensee points out that none of the officers are claiming they counted patrons in the establishment.

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At best, the officers' evidence is that 415 patrons exited the establishment. The licensee suggests there is no evidence before me to say 415 patrons were even in the establishment at the same time.

Secondly, the licensee states it did do a count. The licensee's count established it was within its licensed capacity plus the ten percent tolerance factor. The licensee admits their doorman acted erratically on March 28, 2002, and allowed an additional 7 to 20 patrons to enter the establishment. However, the licensee argues it is not physically possible to have 415 patrons in its establishment. It relies on the evidence of the individual who has owned licensed establishments for over 40 years as well as its current staff.

Third, the licensee suggests that because of the popularity of the hip-hop entertainment, there could have been potential patrons waiting in the lobby as well as at the back door. Those at the back door or patio would have climbed over the damaged chain link fence. At closing, when the back door/patio doorperson moves to the front, the licensee claims that individuals at the back door/patio could have been let into the establishment so they could exit through the main door. As a result, it is possible to have 415 individuals exit but not have 415 patrons in the establishment. Lastly, the licensee points out that its night manager did challenge the officers' count.

In summary, the licensee admits it was at capacity, acknowledged that its rogue doorman let in potentially 20 more patrons and that it cannot be precise in its count. It denies the possibility of 415 patrons in its establishment on March 28, 2002.

## **Findings**

I note at the outset that, even on the licensee's count, the establishment exceeded its licence capacity of 175 patrons.

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The licensee's witnesses on the issue of overcrowding were credible and forthright. However, the manager and individual experienced in the industry were not present on the day of the contravention. The bartender/night manager and server/back-up bartender were candid in their recollection of the numbers they were aware of in the establishment. In the end, I find I disagree with their recollections and their belief that the premises would not hold 415 patrons.

On balance, I am persuaded by the evidence of the officers. I find the licensee contravened the *Liquor Control and Licensing Act* by permitting overcrowding beyond its licence capacity.

#### **PENALTY SUBMISSIONS AND DECISION**

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

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## **Submissions**

### **Licensee's**

The licensee argues there are no prior contraventions, offences or enforcement actions. In this community, there is normally a beat officer who enters licensed premises on a regular basis. It suggests that licensees are aware the beat officer will show up.

If there were problems with overcrowding the officers would be aware of them. In this case, the officers testified to a good relationship with the licensee.

The licensee further argues that the overcrowding could not have been anticipated; it was unintended and inadvertent as it was brought about by the pressure for hip-hop entertainment. The licensee terminated the entertainment because of this problem.

As a result, the licensee has taken proactive, corrective action to ensure this is an isolated incident. The licensee emphasizes its financial evidence, which, working backwards from a dollar figure to a number of patrons, supports its view that there were no more than 200 patrons drinking in the establishment.

In its submission, the licensee urges me to consider that it has and understands the message, has complied, has made a financial sacrifice, and does not require further deterrents. It argues it should not receive more than a fine of \$1,000.00 (one thousand dollars).

### **Decision**

The *Regulations* provide for a graduated scale of penalties for contraventions of the *Act*. The graduated nature of the penalties is necessary for the consistent and vigorous enforcement of the provisions in the *Act* and *Regulations*. The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a

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past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

Finally, I note a penalty may be imposed upon a finding of a contravention both as recognition of the risks created by the contravention and as deterrence to others. Harm need not actually have occurred from a breach of a contravention. Licensees are required to ensure that they have the appropriate measures in place to monitor and control all access to their establishment. In the event that they cannot maintain control they are expected to close their doors.

In this case, the branch is recommending the maximum penalty of three days. The Notice of Enforcement Action states the reason for the recommended penalty is the excessive number of patrons in the establishment.

I find the excessive number of patrons in the establishment is one factor. However, based on the number of patrons alone, I am not convinced the maximum penalty is warranted in this case. Nor am I convinced by the branch's documentation of prior discussions and warning letters that the maximum penalty is appropriate. None of the file documentation indicates overcrowding as an issue with this licensee or establishment.

I am, however, persuaded that the contravention is serious and, notwithstanding the licensee's favourable compliance history, the circumstances on the evening of March 28, 2002, presented a risk to the community.

Based on these factors, I consider a two-day penalty appropriate in the circumstances. I am convinced the mid-range signifies to this licensee and others the seriousness of this contravention.

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**ORDER**

Pursuant to section 20(2) of the *Act*, concerning the Class "A" Pub Licence #119233,  
I order as follows:

For the contravention of sections 12 and 38(3)(b) of the *Liquor Control and Licensing Act* on March 28, 2002, I order the licence suspended for two (2) days. I order the licence suspension to take effect as of the close of business on Wednesday, May 14, 2003, and continue through to the opening of business on Saturday, May 17, 2003.

*Original signed by*

Suzan Beattie  
Enforcement Hearing Adjudicator

Date: April 10, 2003

cc: Nelson City Police Department

Liquor Control and Licensing Branch, Vancouver Island & the Interior  
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Marc Matoul

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