



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267**

Licensee: 601539 B.C. LTD.
dba Daddy's On Broadway
1236 West Broadway
Vancouver, BC

Case: EH02-96

Appearances:

For the Licensee Dennis Coates, QC

For the Branch Shahid Noorani

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing May 26, 27 & July 17, 2003

Place of Hearing Vancouver, B.C.

Date of Decision August 20, 2003

INTRODUCTION

The licensee, 601539 B.C. Ltd. operates the cabaret Daddy's On Broadway located at 1236 West Broadway, Vancouver, BC. At the time of the alleged contraventions it held "C" Cabaret Licence No. 22580. The licence permitted the sale and consumption of liquor during the hours of sale from 7:00 P.M. to 2:00 A.M. Monday through Saturday and from 7:00 P.M. to Midnight on Sunday. The licence permitted 250 patrons in Area 1 and 68 patrons in Area 2. The maximum occupant loads were 260 and 100 respectively. The current capacity reflects the occupant loads and is 260 and 100 persons respectively.

Alleged Contraventions and Recommended Enforcement Action

The alleged contraventions are outlined in the Notice of Enforcement Action (NOEA) dated September 24, 2002, as amended January 16, 2003; three contraventions of overcrowding beyond the license capacity occurring on or about May 26, July 6 and September 22, 2002, contrary to Sections 12 and 38(3)(b) of the *Liquor Control and Licensing Act*.

For these contraventions, the branch is recommending a suspension penalty of **three (3) days, four (4).days and four (4) days** respectively. The suspensions would be served starting on a Saturday and would continue on successive business days until completed.

The licensee has agreed that the contravention of September 22, 2002, occurred as alleged by the branch and has waived the opportunity of a hearing and accepted the proposed penalty (Exhibit 2, tab 10). It has not formed part of these proceedings.

Pursuant to Schedule 4 of the Regulations to the Liquor Control and Licensing Act a second contravention of this type of contravention carries a suspension of three to six days, thus the recommended suspension penalties of three (3) and four (4)

days respectively for the two remaining alleged contraventions represent the minimum and lower mid-range for a second contravention.

ISSUES

1. Whether the delay between the alleged contraventions occurring on May 26 and July 6, 2002, and the Notification of Enforcement Action to the licensee on August 8, 2002, unduly prejudiced the licensee?
2. Whether the standard of proof required by the branch is higher than a balance of probabilities?
3. Whether there was overcrowding beyond the license capacity and the occupancy load on or about May 26 and July 6, 2002?
4. If so, is the recommended penalty in each instance an appropriate penalty in the circumstances?

Sections 12 and 38(3)(b) and of the Act state as follows:

Licences

12 (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

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

(c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,

(d) designate the areas within an establishment where minors are permitted,

(e) approve, prohibit or restrict games and entertainment in an establishment,

(f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,

(g) vary seating requirements in the dining area of an establishment,

(h) vary requirements with respect to the location of an establishment,

- (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
 - (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
 - (k) specify requirements for reporting and record keeping, and
 - (l) control signs used in or for an establishment.
- (4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.
- (5) A licence expires on the date specified on it as the expiry date.
- (6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.
- (7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.

Unlawful sale of liquor

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

EXHIBITS

1. Book of Documents: Book 1 (Tabs 1 – 5)
 2. Book of Documents: Book 2 (Tabs 1 – 13)
 3. Book of Documents: Book 3 (Tabs 1 – 14)
 4. Floor plans for Daddyo's on Broadway
 5. LCLB letter of January 23, 2003, 2 pages
 6. Memorandum "Re: Daddyo's Safety Issues (Procedures and Improvements)", 2 pages
 7. Memorandum "Daddyo's on Broadway: Doormen Job Description", 3 pages
 8. Memorandum "Liquor Sales", 4 pages
 9. Maximum Occupant Load certificates, 2 pages
 10. Memorandum signed _____, 1 page
 11. Memorandum signed _____, 1 page
 12. Incident Report dated May 25th, 2002, 1 page
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13. Incident Report dated July 6th, 2002, 1 page
14. Memorandum "Daddy's on Broadway: Closing Procedures" dated May 25th, 2002, 1 page (contains times and numbers written on the right bottom corner)
15. Memorandum "Daddy's on Broadway: Closing Procedures" dated July 6th, 2002, 1 page (contains times and numbers written on the right bottom corner)
16. Memorandum "Daddy's on Broadway: Closing Procedures" dated May 25th, 2002, 1 page (appears identical to exhibit 14 with the exception that it does not contain the times and numbers written on the right bottom corner)
17. Memorandum "Daddy's on Broadway: Closing Procedures" dated July 6th, 2002, 1 page (appears identical to exhibit 15 with the exception that it does not contain the times and numbers written on the right bottom corner)
18. CFT Engineering Inc. letter of January 17, 2003, with attachments, 6 pages
19. Government of British Columbia memorandum of October 30, 2000 with 3 pages of "Guidelines", 4 pages
20. City of Vancouver, Fire & Rescue Services memorandum "Calculation Package", 4 pages

EVIDENCE - The Liquor Control and Licensing Branch

A constable of the Vancouver Police Department (Cst. A) testified that on **May 26, 2002**, he arrived at the establishment at approximately 1:19 A.M. for the purpose of conducting a licensed premises check as part of his duties for that night as problems are often encountered at and near closing time with street congestion and disturbances and impaired drivers. He noted 4 vehicles illegally parked outside which were subsequently ticketed and towed. There were approximately 20 – 25 persons waiting to enter the establishment, they were spread out across the sidewalk impeding traffic.

He entered the establishment and requested to speak with the staff member in charge. He was directed to the 'promoter', a person he knew from previous inspections and who he had found to be co-operative and truthful. He asked the promoter if the establishment was at capacity or was it over the limit. He was advised that they were approximately 70 persons over the licensed capacity, that the owner likes the bar full, likes it packed. He asked the promoter to accompany him and count the number of persons in the establishment. The establishment was crowded making it difficult to move, he followed behind the promoter who cleared a path through the crowd. Using mechanical counters they counted persons in the lower level and then the upper level. The count took approximately 6 – 10 minutes to complete. Cst. A counted a total of 400 persons, excluding staff, 370 lower and 30 upper. Upon completion of his count the promoter showed Cst. A the counter that the promoter had used, it read 391. Cst. A stated that as a result of his experience in conducting counts at this and other licensed establishments he was confident with the accuracy of his count. He advised the promoter not to allow additional persons to enter the establishment and to begin reducing the number of patrons inside. He wrote out a Licensed Premises Check Form at 1:57 A.M. (Exhibit 2, tab 5) and issued it to the promoter.

Two Constables of the Vancouver Police Department (Csts. B & C) testified that they were part of a three person undercover (u/c) operation tasked with making observations at Daddy's on **July 6, 2002**. Prior to the operation they were briefed on the problems occurring at the establishment, namely overcrowding, the use of illicit drugs and disturbances on the street. The police officers had use of a cell phone by which means they made calls to the 'road boss' at approximately one-half hour intervals. The road boss made hand-written notes (exhibit 1, tab 4) of the information provided by the u/c officers from which a composite report (exhibit 1, tab 3) was made by the u/c officers at the end of their observations. Both u/c officers were experienced in making counts of persons within licensed establishments as a result of their experience within the police department and previous employment as door control persons. A mechanical

counter was not used by either of the officers as they believed that its presence if detected could compromise their operation.

The u/c officers stood in line outside the establishment for approximately ten minutes prior to entering at approximately 10:42 P.M. Two door control persons supervised the entry of patrons from the line-up at street level. They were patted down prior to being admitted entry into an upstairs foyer where a cover charge was collected. They entered as part of a group of 6 – 7 patrons, the process taking approximately one minute to complete. At approximately 11:00 P.M. they counted 200 persons within the establishment. Cst. B testified that at midnight he conducted a count of 558 persons, unknown number of staff included. The count took approximately 15 minutes to complete because of the crowded conditions making it extremely difficult to move. He advised that he was very confident of the number of persons counted. Cst. C testified that at approximately 11:30 P.M. he counted 360 persons in the establishment and at 12:15 A.M., 550 persons. At this point movement was near impossible and the count took from 10 – 15 minutes to complete. He testified that he was confident that his counts were accurate within 15 – 20 persons, plus or minus.

Both u/c officers testified that they became increasingly concerned for their safety should an emergency occur as the number of patrons increased in the establishment. During the course of the night they changed locations to ensure access to an exit. At 1:14 A.M. they made a determination to cease the operation earlier than anticipated and exit the establishment as a result of concerns for their safety due to the number of persons in the establishment. In response to the question of whether, as a result of their concerns, the establishment should be ordered closed for the night, Cst. B responded that the safety concerns had not yet reached that level. Cst. C responded that it was not his decision to make and that any attempt to shut down the establishment under such conditions would carry its own risks.

A Sgt. from the Vancouver Police department testified that as a result of problems such as overcrowding, weapons, drugs and street disturbances at closing time occurring at and around Daddy's Cabaret he tasked two of the members of his patrol to develop an operational plan that would deal with the problems. The plan involved three u/c officers attending the establishment on **July 6, 2002**, making observations and reporting to a road boss. The Sgt.'s role was to go into Daddy's shortly after midnight, ascertain from the doorman the number of patrons inside and to advise the owner or manager to maintain control and then to leave.

He arrived at the establishment between 12:15 and 12:20 A.M., there were approximately 70 persons in a line-up outside. He spoke with the doorman supervising the line-up who advised him that 533 patrons had entered, 153 had left, leaving 380 remaining. He spoke with the owner inside who advised him that the legal limit was 360. The doorman stated that he would not allow further patrons to enter until 40 had left. The Sgt. left the establishment, reported to the road boss (Exhibit 1, tab 4) and wrote up his notes (Exhibit 1, tab 5).

A Liquor Inspector testified that in May and July, 2002, she was responsible for the area in which the establishment is located. She referred to Exhibits 2 and 3, two Books of Documents relating to the licensed establishment, the contents of which are listed in the Index to each book. She advised that the liquor license for this establishment was transferred in November 2000 to the current licensee. This resulted in the new licensee being interviewed by the liquor inspector responsible for the area at that time and an Inspection Interview Information Sheet (Exhibit 3, tab 4) being completed. The interview, which takes approximately one hour to complete, deals with the licensee's responsibilities including those involving maximum capacities and overcrowding. The licensee is provided with a copy of the branch publication, 'A Guide to Licensees' which also deals a licensee's responsibilities, including overcrowding (exhibit 2, tabs 13 & 13A).

The inspector advised that the licensee signed a waiver on July 31, 2002, agreeing to accept a one day suspension on Friday September 13, 2002, for overcrowding beyond the license capacity on August 24, 2001, (Exhibit 3, tab 3).

The inspector advised that as a result of receiving two Licensed Premises Check forms from the Vancouver Police Department (Exhibit 2, tabs 5 & 8) concerning the May 26 and July 6, 2002, alleged contraventions she convened a Compliance Meeting on August 8, 2002, (Exhibit 3, tab 1) and served two Contravention Notices to the owner at the meeting (exhibit 2, tabs 4 & 7). Branch policy requires an inspector to recommend enforcement action when it is alleged that an establishment has exceeded the building occupant load (see 4(c) at page 4 of Exhibit 2, tab 12). Enforcement Action Recommended forms were completed August 13 and September 10, 2002, (Exhibit 2, tabs 6 & 9). A Notice of Enforcement Action was completed September 24, 2002, and provided to the licensee (Exhibit 2, tab 3). She advised that although the persons counted within the establishment on both dates, May 26 and July 6, 2002, were alleged to exceed the building occupancy load the branch policy at the time was to proceed with the lesser contravention of exceeding the licence capacity because a clearer definition of building occupancy was being sought.

EVIDENCE - The Licensee

The Representative for the Licensee testified that he has been the owner and general manager of the establishment since purchasing it in September 2000. It is normally open 4 to 7 nights per week and he is there most nights that it is open. On taking over the establishment he met with members of the Vancouver Police Department to discuss the problems that had occurred with the previous establishment at that location. Changes were subsequently made to cut down on the problems. The number of control staff were increased from 6, to 12 – 15. He has purchased two metal detectors to search patrons for weapons. A staff plan has been put together by himself and his manager describing the duties and procedures for all staff (exhibit 6). The video system has been upgraded to 13

cameras inside and outside with 4 infra-red cameras inside. Video tapes are kept for 30 days unless an incident occurs in which case they are kept for as long as necessary. They are available to the police. Radios are provided to doormen to allow them to communicate with each other. There are 2 doorman outside, 1 to check ID, the other has 2 mechanical counters and keeps track of the number of patrons entering and exiting. One doorman immediately inside downstairs frisks patrons and checks purses for liquor or weapons. A doorman located inside upstairs uses a mechanical counter to keep track of the number of cover charges collected. Additionally there are several control persons inside standing on elevated boxes to observe the crowd. A job description has been prepared by the manager for the doormen (Exhibit 7). The fire inspector was requested to inspect the establishment following the renovations and was impressed with what he saw. There are more fire extinguishers than are legally required and they have installed a monitor to the sprinkling system and the fire alarm.

The licensee has spent \$17,000.00 to reduce noise problems. There are new closing procedures in place as a result of the establishment being robbed 2 – 3 years ago. After 2:30 A.M. doormen check all areas including exits and washrooms to ensure all patrons are out. To decrease the energy of the patrons and to reduce the problems outside at closing time slow and quiet music is played prior to closing. The licensee representative offered his opinion that the establishment has gone from being one of the roughest in the past to one of the safest.

The licensee representative testified that he was working the night of May 26, 2002, when Cst. A attended at the establishment. He knows the constable from the constable's frequent bar walks and generally has a good relationship with him. He was just on his way out of the establishment at that time and the constable dealt with the promoter who is the staff person responsible for security who told him that the constable told him everything was fine. It was at the following Wednesday meeting that the promoter told him that the constable issued

an LPC for overcrowding. The licensee representative was upset upon learning this because he believed that it was not correct.

He testified that he was working on July 6, 2002, when the Sgt. came into the establishment. He spoke with him in the lobby. The Sgt. asked whether they were overcrowded, he told the Sgt. no, they were at their capacity and asked the Sgt. whether he wanted to conduct a count. The Sgt. said that was not necessary but to let some patrons out before allowing more in. He did not recall him saying to let 40 patrons out before allowing more in. Approximately 3 weeks later, on July 28, 2002, he was served with a Licensed Premises Check form from the police regarding their observations (Exhibit 2, tab 8).

The licensee representative testified that he met with the liquor inspector on August 8, 2002, and received the two contravention notices. He referred to the income statement for May 26 and July 6, 2002, (Exhibit 8) and advised that the establishment opens 8:00 P.M. until 2:00 A.M. with the busy hours being from 10:00 P.M. to 2:00 A.M. He advised that at the time of the two alleged contraventions the licensed capacity was 318, the building occupancy 360, he had been told by the liquor inspector that the branch allowed establishments to operate at the licensed capacity plus 10% as long as they don't exceed the building occupancy. During July to September of 2002 he kept the establishment at the building occupancy capacity of 360. It is the responsibility of the manager, the promoter and the downstairs doormen to keep track of the number of patrons in the establishment. Staff may be disciplined if the capacities are exceeded, a doorman was fired as a result of the overcrowding contravention in September 2002. There was no discipline imposed as a result of the May and July 2002 incidents.

The Promoter testified that he has been in the night club business for seven years of which the past one and a half have been at Daddyo's. As promoter he works Saturday nights which are ladies' nights, he is in charge of security and reports to the club manager. He was working in that capacity on May 26, 2002,

which he described as an average to slow night, not a busy night. Cst. A arrived at approximately 1:55 A.M. He accompanied the Cst. through the establishment, both doing a count of patrons using mechanical counters. On completion of the count he showed his counter to Cst. A, it read 391. He testified that during the count there was lots of movement by patrons on and off the dance floor and in an out of the main area getting their coats and getting ready to leave the establishment. He testified that the count was done quickly and that if he knew it would lead to a hearing he would have insisted on doing it over, taking the time to do it accurately. To do an accurate count of the patrons it is necessary to stand above the crowd and it takes from 10 – 15 minutes. This count was done in just a few minutes. He referred to his notes at exhibit 10 which provide the number of patrons in the establishment at various times during the night. These notes were prepared about two weeks prior to the hearing from notes made by the manager who gets the numbers from the mechanical counters kept by the doorman at the front door. The notes indicated that at 1:30 A.M. there was a total of 341 patrons in the establishment. It was the promoter's view this number would have decreased by the time of the arrival of Cst. A. Peak hours for the establishment on a Saturday night are between approximately 12:00 – 12:30 A.M. with patrons beginning to leave around 1:30 A.M.

The promoter testified that he was working the night of July 6, 2002, when the Sgt. attended at the establishment. This was a busier night than May 26, 2002, and they were at capacity. The Sgt. told them not to allow any more patrons inside until 40 had left, he also asked that they move patrons away from the front of the club. The promoter referred to his notes at exhibit 11 which provide the number of patrons in the establishment at various times during the night. The notes were prepared with the manager about two weeks prior to the hearing using the numbers that the manager had recorded. The notes indicate that at the approximate time of the Sgt.'s visit at 12:30 A.M. there were 340 patrons in the establishment. When asked about the discrepancy between this number and the 380 which the Sgt. had been given he testified that this was probably due to the 10% leeway which was allowed.

The Manager of the establishment testified that he has worked there for approximately eight years, the last five as manager. He is responsible for the operation of the establishment and providing a safe environment for patrons. His responsibilities include hiring and firing of staff, the number of patrons permitted in, cashing out and preparing incident reports at the end of the night. He testified that he monitors the number of patrons in the establishment during the course of the night. He checks with the outside downstairs doorman who keeps track of the number entering and leaving. If he is not satisfied with the numbers provided he does his own count. It is his view that his count is more accurate than that of the doorman as the doorman is often not aware of the number of patrons leaving or ejected through other exits and because he knows the club better than anyone else. His counts take from 7 – 9 minutes to complete. He counts the front and back halves of the club, the dance floor from the DJ booth as it provides an elevated observation point, and the upstairs portion. He keeps track of the numbers on a piece of paper during the course of the night, transposing them to the 'Closing Procedures' sheet at the end of the night at which time the paper on which the numbers are kept are disposed of. He referred to 'Incident Reports' written following the dates of May 26 and July 6, 2002, (Exhibits 12 and 13) and 'Closing Procedures' completed for the same dates (Exhibits 14 and 15).

The manager testified that he was present on May 26, 2002, when Cst. A attended. It was a slow night resulting in two bartenders leaving early. He saw the constable do a quick walk around with the promoter following which the promoter told him that the constable counted 400 in the establishment. This angered him because he knew it wasn't true. He said the Cst. is too short to be able to count accurately without being in an elevated position. The manager testified that his count at 1:30 A.M. was 341 (Exhibit 14) which he believed to be accurate within 10% and that the numbers would have declined with persons leaving at the time of the constable's count.

The manager testified that he was present on July 6, 2002, when the Sgt. attended. In his opinion the number of 380 provided to the Sgt. by the outside downstairs doorman was not accurate. His count at that time, 12:30 A.M., recorded on exhibit 15 was 340 which he believed to be more accurate. In response to the evidence of the police officers' counts of 550/558 persons he testified that it is physically impossible for that many persons to be inside the club without first removing all the tables and chairs. Further, it was impossible for approximately 200 persons to enter within the 40 minute period provided by the police officers' evidence.

The manager was presented with exhibits 16 and 17. These are copies of the 'Closing Procedures' reports for May 25 and July 6, 2002, identical to those in exhibits 14 and 15 with the exception that those of 16 and 17 have Fax headers at the top of each and do not have the time and numbers recorded on the bottom right of each. He was asked if he could provide an explanation why exhibits 16 and 17 did not have the times and numbers written on them. He was unable to do so. It was suggested to him that the explanation was that those times and numbers found on exhibits 14 and 15 had been recently written. The manager responded that he did not think that that was the case, the times and numbers were written on the date the document was prepared as far as he knew.

Legal Counsel for the establishment testified that he was part of the liquor policy review undertaken by the provincial government in 2000. The review resulted in changes to liquor policies, particularly those related to enforcement and to the capacities permitted in licensed establishments, which were implemented in January 2001. At that time the branch announced that it permitted licensed establishments to increase their capacities by up to 150% as long as the building occupancy load was not exceeded. This later gave rise to the policy now found in the 'Compliance and Enforcement Policy and Procedures Manual' at Section 4.8.1, page 5 (exhibit 2, tab 12) with the exception that those conditions outlined in the current policy were not present. Thus licensees were told that the branch would not take enforcement action against licensees for exceeding the licensed capacity

where the number of patrons or persons did not exceed the building occupancy load. Counsel was unable to provide any written confirmation of the branch's announcement and was uncertain if it had been committed to writing.

Occupant Load

During the course of the hearing the issue arose as to the interpretation to be given to the documents titled, "MAXIMUM OCCUPANT LOAD" at exhibit 9, namely whether exceeding the number of persons in the area covered by the document constituted a safety risk. Witnesses were presented by the licensee and the branch.

Witness A, an Applied Science Technologist with many years experience in dealing with building and fire codes (Exhibit 18) testified on behalf of the licensee that occupancy load certificates such as that of exhibit 9 are intended to represent the fire safety threshold for the area covered. Whether they do so is dependent upon how the load is calculated by a municipality. The City of Vancouver with its own fire and building bylaws differs from the remainder of the municipalities within the province which are governed by provincial fire and building codes. This has the result that identical buildings located in the City of Vancouver and in a neighbouring municipality could have different occupancy loads. In Vancouver it is a matter of discretion whether to include areas such as dance floors and washrooms with the result that different officials within the city calculate differently with different results. Although the calculation figures for 'licensed beverage establishments' in the City of Vancouver calculation package (Exhibit 20) are given at 1.2 square meters per person (sq. m/p) they have in the past used a figure of .95 sq. m/p. This practice has recently ceased with the result that 1.2 sq. m/p is now consistently used.

Occupancy loads are meant to deal with all persons in the area covered, including patrons and employees thus the area measured for the certificate must include those spaces to which only employees have access to. Guidelines for 'Licensed

Beverage Establishments' issued for municipalities (Exhibit 19) other than Vancouver allow .95 or 1.2 sq. m/p and has gone as low as .75 sq. m/p in a case currently under appeal. He advised that he is not familiar with Daddyo's and could not speculate whether going beyond the capacity in the Maximum Occupancy Load certificates (Exhibit 9) would constitute a fire safety risk as that is dependent upon such things as the exits, sprinklers, alarms and the layout. He agreed that there is no 10% leeway applied to building occupancy loads.

Witness B, a fire protection engineer and architect testified at the request of the branch that he is responsible for setting the building occupancy loads for the City of Vancouver. Other City officials do not set occupancy loads. Council may do so, however he is not aware of this occurring. Overall, he disagreed with the former witness that the City of Vancouver has used other than 1.2 sq. m/p, except in error or an anomalous situation, and he disagreed that other municipalities deviate from the 1.2 sq. m/p standard for licensed establishments.

He defined occupancy loads as the number of persons that can safely occupy the space within a building. In Vancouver occupancy loads are determined by either the net floor area or the units of exit width, whichever is more restrictive. He agreed that Vancouver requires twice the amount of exiting for licensed establishment as for other municipalities, however most often the determining factor for occupancy load is net floor area because most new establishments provide sufficient exiting. The requirement for determining occupancy load in Vancouver are outlined in a 4 page handout (Exhibit 20). Net floor area is determined from scaled plans, measurements are taken of the interior space excluding structural features such as wall and passages and excluding areas such as kitchens, the space behind the service bars and washrooms. The net floor area determines the number of persons permitted, to this is added the number of employees to arrive at the maximum occupant load. "Licensed beverage establishments" are a defined term in the Vancouver calculation processes and require an area per person of 1.2 sq. meters. There is no discretion to this figure. He knows of only one case where .95 sq. m/p was used and when it was brought

to his attention it was amended to 1.2 sq. m/p. He agreed that there are equivalency provisions which would allow an exception to the 1.2 sq. m/p formula. This however has only been used once to his knowledge and came about as a result of an anomaly occurring from converting from imperial to metric. He testified that Daddy's would be included in the definition of "licensed beverage establishment" and as such subject to the 1.2 sq. m/p formula in calculating the occupancy load. Any increase to the maximum occupancy loads contained in exhibit 9 would affect safety. There is no tolerance allowance to the numbers in the certificate. It was his view that the same formula of 1.2 sq. m/p would apply in determining the occupancy load of licensed establishments located in other municipalities within the province. Outside Vancouver dining and beverage facilities use the same 1.2 sq. m/p formula to calculate occupant load.

SUBMISSIONS

Liquor Control and Licensing Branch

The Branch Advocate in his submission referred us to the following cases:

Civic Hotel	Decision of the General Manager LCLB December 19, 2002, Case Number EH02-78
Richardson Richards	Decision of the General Manager LCLB August 20, 2002 Case Number EH02-26

The branch advocate submitted that the contraventions have been proven. The police witnesses were truthful and candid. Cst. A during his visit to the establishment on May 26, 2002, was told at the outset by the promoter of the establishment that they were 70 over the licensed capacity of 318. Subsequent counts by the promoter and Cst. A at 391 and 400 confirmed this statement. The promoter in his evidence now says that those counts can't be relied on. The advocate submitted that the police testimony should be accepted over the promoter's as being more credible.

On July 6, 2002, two undercover (u/c) police officers gave evidence that they counted 550/558 persons in the establishment. The manager of the establishment

says that it is physically impossible for the establishment to accommodate that number of persons and further that it is impossible for almost 200 persons to enter the establishment in approximately 40 minutes. The advocate submitted that this is not borne out by the evidence of the u/c officers. The manager states that his counts on both dates are more accurate than the police officers or other staff of the establishment. He provides exhibits 14 and 15 as evidence of his counts. He is unable to explain however exhibits 16 and 17 which are identical except they lack the times and counts. The advocate submitted that the only plausible explanation is that the times and numbers were not written at the end of the night but in fact were written far after those dates in preparation for this hearing.

The advocate submitted that of the two witnesses providing expert evidence regarding the occupant load certificates at exhibit 9 the evidence of witness B is to be preferred, exceeding the maximum occupancy load creates a risk to safety.

The branch policy at exhibit 2, tab 12 is clear on how it will proceed on overcrowding issues. Here the licensee exceeded the occupancy load and falls within the branch policy for taking enforcement action.

There is no evidence of prejudice to the licensee as a result of delay in being notified of the contraventions. On May 26, 2002, the promoter was issued a Licensed Premises Check form at the time of Cst. A's visit. There was no delay. Observations made by police officers on July 6, 2002, were part of an undercover operation. Previous enforcement hearing decisions have accepted that covert investigations are necessary.

With regard to penalty, there have been two previous contraventions thus these are second contraventions under Schedule 4 of the Regulations to the Act. Schedule 4 defines a 2nd contravention as one of the same type occurring within a 12 month period. The recommended penalty of a 3 day suspension for the May 26, 2002, contravention represents the minimum. The recommended penalty of a 4 day suspension for the July 6, 2002, contravention is low mid-range and is

warranted by the number of persons exceeding the occupant load. The advocate submitted that the adjudicator give consideration to increasing the penalty as a result of the extent of the overcrowding and the ensuing risk to safety.

The Licensee

Counsel for the licensee in his submission referred us to the following cases:

Hotel Rendezvous Decision of the General Manager, LCLB December 18, 2001
Case Number EH00-13

Richard on
Richards Decision of the General Manager, LCLB August 20, 2002
Case Number EH02-26

Lucky Bar Decision of the Liquor Appeal Board, May 23, 2002
Case Number L-0111

Daddy's on
Broadway Decision of the General Manager, LCLB, March 25, 2002
Case Number EH01-44

1. **Delay** – Counsel submitted that it is incumbent on the police and the branch to immediately notify the licensee when a contravention is being alleged. Comments and discussions quickly disappear from memory. Police officers make frequent visits to the licensed establishment and staff cannot recall each visit, the licensee is then faced with rebutting the evidence of the police officers which is tantamount to being guilty until he proves himself innocent and is administratively unfair. Counsel disagreed with previous decisions which found that it would be untenable if undercover operations were unenforceable.
 2. **Burden of Proof** – Counsel submitted that the branch must prove the ‘actus reas’ of the regulatory offence beyond a reasonable doubt.
 3. **Overcrowding** beyond the occupancy load – Counsel argued that occupancy load is an unsolved mystery. Because of differing processes and factors the occupancy load for an identical building may differ between Vancouver and other municipalities. There is no evidence that exceeding the occupancy load
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numbers creates health and safety issues. If the branch is alleging that is the case it must produce evidence.

Counsel submitted that the evidence of the promoter concerning the May 26, 2002, incident was that the count was not accurate and had he known that enforcement action would result would have insisted on taking a 2nd count.

He submitted that the evidence of the u/c police officers concerning the counts conducted on July 6, 2002, could not be relied on. Anyone attempting to take an accurate count must be elevated above the crowd.

4. **Penalty** – Counsel submitted that these are not 2nd contraventions pursuant to Schedule 4 of the Regulations. The previous contravention did not occur until the waiver was signed July 31, 2002, (Exhibit 3, tab 3) and just prior to the serving of the two NOEA's in this case thus there was no previous contravention at the time of these two incidents.

He argued that the setting of penalties is not to be considered as automatically arising from the numbers but is a matter of discretion taking all factors into account. Further, the penalty should not be increased over the minimum simply because there have been other contraventions. If the branch is intending to argue that the recommended penalty be increased by the adjudicator, the licensee should be made aware prior to the hearing. If the branch position is that a higher penalty is warranted because the occupant load has been exceeded it should proceed under the applicable contravention.

REASONS AND DECISION

1. **Delay** – Counsel has argued that as a result of the delay the licensee was prejudiced in making defence to the allegations. He did not offer any evidence of such prejudice. No witnesses were presented who were unable to recall the events of the dates in question. There was no evidence of witnesses or of
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documents being no longer available. The chronology of the events are as follows: on May 26, 2002, a police officer visited the establishment, observed it to be overcrowded and at that time advised the licensee through its employee by way of a written Licensed Premises Check form (LPC); on July 6, 2002, undercover police officers visited the establishment and observed it to be overcrowded, because this was a covert investigation the licensee was not advised of the observations until July 28, 2002, when an LPC was given to the representative for the licensee; on August 8, 2002, the representative for the licensee met with the liquor inspector, was provided with two Contravention Notices and advised that branch policy necessitated taking enforcement action where it was alleged that the occupancy load had been exceeded; on September 24, 2002, the licensee was provided with the Notice of Enforcement Action. In the absence of evidence that the licensee was unduly prejudiced I find that the chronology does not represent unreasonable delay.

2. **Burden of Proof** – Counsel has argued that the branch has the obligation to prove the allegations on the criminal standard of ‘beyond a reasonable doubt’. I do not agree. This issue has been thoroughly argued in previous decisions of the general manager and it has been consistently held that the burden of proof on the branch is that of the civil standard of ‘on a balance of probabilities’ (see Hotel Rendezvous, December 18, 2001, Case No. EH00-13 and Bridge Street Billiards Café, October 31, 2001, Case No. EH01-02). I find that the burden of proof on the branch is ‘on a balance of probabilities’.
 3. **Overcrowding** – Pursuant to branch policy (see exhibit 2, tab 12 at page 5) it is necessary to find that the number of persons in the establishment exceeded that of the licence capacity and of the occupancy load before enforcement action is to be taken. Having carefully considered all of the evidence and for the reasons following, I am satisfied that on May 26 and July 6, 2002, the number of persons in the establishment exceeded that of the licence capacity of 318 patrons and of the maximum occupant load of 360 persons and thus the licensee has contravened sections 12 and 38(3)(b) of the Liquor Control and
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Licensing Act as alleged. I accept the evidence of police witnesses, Csts. A, B and C. The officers had the ability and the opportunity to make accurate counts of the number of persons in the establishment and I am satisfied that they did so. I do not accept the evidence of the promoter in attempting to recant from his earlier statement that on May 26, 2002, the establishment was 70 persons above the licensed capacity, nor do I accept his assertions that his count of 391 persons was inaccurate and that he was not aware of the importance of the count. I do not accept the evidence of the manager that he kept track of the number of patrons in the establishment during the course of the two nights in question and transcribed those numbers on the documents in exhibits 14 and 15 at the end of those nights. Given the existence and nature of the documents in exhibits 16 and 17, I have arrived at the inescapable conclusion that exhibits 14 and 15 were prepared some time later, perhaps following notification of enforcement action. This conclusion also taints the documents prepared by the promoter, exhibits 10 and 11, as it was his evidence that they were prepared using the numbers from exhibits 14 and 15.

4. **Penalty** - Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I 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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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*. The purpose of the Branch in bringing enforcement action is to encourage voluntary compliance on the part of all

licensees. Having heard all of the evidence and giving consideration to the enforcement history of this licensee I am satisfied that a penalty is necessary to ensure voluntary compliance.

I find that these contraventions represent 2nd contraventions as defined in Schedule 4 of the Regulations to the Act. These contraventions occurred on May 26 and July 6, 2002, the previous contravention for which a waiver was signed occurred on August 24, 2001 (see exhibit 3, tab 3 at page 3).

The expert evidence was directed to the issue of whether occupant loads are consistent throughout the province and whether exceeding the occupant load necessarily means that health and safety have been endangered. In my view, this evidence is directed to the level of penalty to be imposed. To an extent, the licensee's submissions invite me to find that the City of Vancouver occupancy loads are not truly indicative of health and safety concerns, because they may be more restrictive than occupancy loads around the province. On the evidence presented, I am not prepared to make a finding that the City of Vancouver differs in a substantive or consistent manner from other municipalities. Further, regardless of how they might differ, the fact is that the City has the responsibility for imposing occupancy loads and the licensee is obligated to comply with those numbers. It is clear from my findings of fact that the licensee was well in excess of the occupant load on both occasions.

For the purposes of this decision, I find it is not necessary to determine the extent to which the levels of overcrowding may have endangered public health and safety. The penalty schedule sets out a range of penalty for second contraventions and the branch's recommendations are within those ranges. I have considered the advocate's suggestion that I am not bound by the branch's recommended penalties or the penalty schedule. However, I am satisfied that staying within the range is sufficient in this case.

For the contravention of May 26, 2002, I concur with the branch recommendation of the 3 day minimum suspension pursuant to Schedule 4 of the regulations. For the contravention of July 6, 2002, giving consideration to the number of persons in the establishment I am of the opinion that a penalty greater than that of the minimum 3 day suspension is necessitated to deter such conduct in the future and I concur with the branch recommendation of a 4 day suspension.

ORDER

I suspend the liquor licence for a total of seven (7) business days starting as of the close of business Friday September 26, 2003, and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (section 54(1) of the Regulations to the Liquor Control and Licensing Act.)

Since I do not know whether the establishment would normally be open seven (7) days per week as of September 26, 2003, I do not know what the "business day" will be. To ensure that 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 Friday, September 26, 2003, until the licensee has demonstrated to the Branch's satisfaction that the licensed establishment has been closed for seven (7) business days. A suspension sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 20, 2003

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office
Attention: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Surrey Office
Attention: Shahid Noorani, Advocate