BRITISH COLUMBIA

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:	557213 B.C. Ltd. dba D'Arcy McGee's 1127 Wharf Street Victoria, BC
Case:	EH03-026

APPEARANCES

For the Licensee:	Gregory N. Harney, Counsel Rob Ward, Principal
For the Branch:	Peter K. Jones, Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Dates of Hearing:	May 12 & 15, 2003
Place of Hearing:	Victoria, B.C.
Date of Decision:	June 17, 2003

Introduction

The licensee, 557213 B. C. Ltd., has operated D'Arcy McGee's since February 2001. It was a restaurant, then a Neighbourhood Pub and now, under the new licensing regulations, holds a Liquor Primary Licence No. 212046. The licence permits hours of operation Monday, Tuesday, Wednesday and Sunday from 11:00 A.M. to 12:00 Midnight and Thursday, Friday and Saturday from 11:00 A.M. until 1:00 A.M.

The maximum licenced capacity is 98 patrons inside and 20 patrons on the patio. The allowable occupant load is 130 persons.

Alleged Contraventions and Recommended Enforcement Action

By a Notice of Enforcement Action (NOEA) dated April 11, 2003, the Branch alleged that on January 17, 2003, the licensee contravened section 12 of the *Act* by permitting overcrowding beyond the patron capacity, less than or equal to the occupant load. The Branch recommended a licence suspension of one (1) day, to be served on a Friday.

Schedule 4 of the Liquor Control and Licensing Regulations, BC Reg. 608/76, Enforcement Actions, provides a range of licence suspensions and monetary penalties for each contravention. Under Item 14 of the Schedule, the range of penalties for this contravention is 1 to 3 day licence suspension, or $1,000 to $3,000 monetary penalty.

Compliance History

This is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident ("compliance history"). Therefore, these contraventions, if proved, would be considered first contraventions for the purposes of the Penalty Schedule.

This is the first enforcement action the branch has taken against this licensee. However, the branch has issued numerous Contravention Notices and the police have issued numerous Licensed Premises Checks for alleged contraventions at D'Arcy McGee's between October 2001 and January 2003. The alleged contraventions included failing to clear the premises within ½ hour of closing time, permitting patrons to consume liquor ½ hour after closing time, permitting liquor to be removed from the premises, contravening a term and condition of the licence and permitting overcrowding. Concerning overcrowding, notices were issued, or issues brought to the licensee's attention on July 27 and 28, 2002, August 17, 2002, and January 1, 2003 (business day December 31, 2002).

The branch conducted compliance meetings with the licensee on October 3 and 16, 2001, October 2, 2002, and January 29, 2003. Since the date of this alleged contravention, the branch has issued Contravention Notices on two separate occasions, one for alleged overcrowding.

Issues

1. Has the branch demonstrated that the licensee permitted overcrowding beyond the licensed capacity?
2. Is the branch's alleged contravention flawed for being alleged under an inappropriate section of the Act?
3. Is the recommended penalty of one (1) day licence suspension appropriate?

Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Minutes from Regional Team meeting April 2, 2003
Exhibit No. 3	Notice of Enforcement Action dated February 20, 2003
Exhibit No. 4	Notice of Enforcement Action dated February 24, 2003
Exhibit No. 5	Licensee's staffing roster for January 17, 2003
Exhibit No. 6	Original Contravention Notice B003297

Applicable Statutory Provisions

1. The branch has alleged that the licensee contravened section 12 of the *Act*.

Liquor Control and Licensing Act, R.S.Chap. 267

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.

2. The licensee argued that the appropriate section for alleging overcrowding is section 6(4) of the *Regulations*.

Liquor Control and Licensing Regulation, B.C. Reg. 608/76

Capacity

6 (1) Before the general manager
(a) approves the issuance of a licence,
(b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
(c) approves a transfer of a licence under section 21 (3) of the Act, or
(d) approves an application for an increase in the person capacity of a licensed establishment,
the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.
(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.
(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.
(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).
(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

Preliminary Application for Adjournment

At the outset of the hearing, it became apparent that the branch was proceeding on an amended Notice of Enforcement Action that neither counsel for the licensee nor the adjudicator had seen. I had conducted a Pre-Hearing Conference (PHC) on March 26, 2003, and had a copy of a NOEA dated February 24, 2003. The NOEA contained in Exhibit No. 1 is dated April 11, 2003 and notes that it replaces the earlier one. The branch advocate advised that the purpose of the amended NOEA was to clarify that the branch was alleging the number of patrons exceeded the allowable capacity, not the number of persons. The alleged contravention had been changed from section 6(4) of the Regulations to section 12 of the *Act*.

The licensee applied for an adjournment on a number of grounds:

1. At the pre-hearing conference (PHC), the adjudicator denied the licensee's request for a preliminary application to determine whether any contravention was disclosed on the face of the Contravention Notice (CN) or the NOEA. Subsequent to the PHC, the branch issued an amended CN which effectively corrected the problem the licensee raised. However, no amended NOEA was served and the licensee came to the hearing prepared to argue that the facts did not support an alleged contravention of s. 6(4).
2. The licensee would have had little difficulty defending a contravention under 6(4) and the branch is not being fair in changing the allegation section. Section 12 is not a proper section under which to allege a contravention.
3. The licensee needs time to consider whether to challenge the alleged contravention, or the section under which it is alleged.
4. The licensee had not been given notice that the branch would no longer be recording hearings.

A primary concern in deciding whether to grant an adjournment is whether the licensee has been prejudiced in its ability to proceed to hearing as scheduled. Once I heard the background and concerns from the branch's and the licensee's perspectives, I was satisfied that the amended NOEA was just clarification of what was apparent all along – the branch was proceeding on an allegation that the licensee had exceed the permitted patron capacity, not the permitted person capacity. That was clear from the outline of the facts contained in the original NOEA and in the recommended penalty.

Although the licensee may not have been served with the amended NOEA, a proposition the branch challenged, it was served with the amended CN (Exhibit No. 6) which clearly identifies section 12 of the *Act* and clearly states that it replaces the previous CN. The licensee's argument, at the PHC and in this preliminary application, has been a legal one, involving interpretation of sections of the *Act* and the Regulations. Regardless of which section the allegation was framed under, the evidence at the hearing is the same.

After considering the submissions by the licensee and the branch, I found there was no evidence that the licensee's ability to proceed to hearing was prejudiced. The licensee's main contention over interpretation is not affected by the branch's amended NOEA and there is nothing in that NOEA which alters the branch's allegation beyond what was shown in the CN. I determined that the licensee knew in advance of the hearing what the branch was alleging and had ample opportunity to prepare for the hearing. By proceeding with the hearing as scheduled, the licensee would not lose any right to present legal argument or to challenge the section.

The licensee did not seriously advance the lack of recording as a ground for adjournment.

I denied the application for adjournment.

Evidence

The branch presented one witness, the liquor inspector ("inspector") who conducted the inspection on January 17, 2003. The licensee presented three witnesses, a principal of the licensee company ("company representative"), the regional manager of the licensee company ("regional manager"), and the general manager of this establishment ("manager").

The liquor inspector

The inspector, who has been employed as such since 1980, testified that he was directed by his regional manager to conduct an inspection of D'Arcy McGee's. The regional manager informed him that this was considered to be a "problem" establishment. The regional manager was present during the inspection, but did not participate in the counts or discussions with the licensee staff. This was the first enforcement inspection of this establishment by this inspector.

The inspector testified that he conducted the inspection between 7:50 P.M. and 8:05 P.M. He did two counts with a mechanical clicker, resulting in counts of 112 and 110 patrons, respectively. He did not include any obvious staff members in his counts. After his counts, he spoke with the licensee's manager who completed a count and reported 106 people. The manger told him there were 5 band members who were seated and eating. The inspector said he assumed the manager did not count the 5 band members in his count, but the manager did not specifically tell him whether he did or not. At the hearing, the inspector was satisfied that his own counts should be reduced by 5, to 107 and 105, to account for the 5 band members

The licensed capacity was 98 inside and 20 outside. The manager told the inspector he had been told by a different liquor inspector that if he kept the overall numbers to 118 or 120, he would be in compliance.

The inspector testified that it is not possible to see the whole of the interior at one time and that his counts could be off by a small margin. He testified that he assumed the patio was closed and did not see any patrons out there. He testified that it was a chilly night and, although there might have been heaters on the patio, he did not see heaters and he emphasized that he was not aware of patrons on the patio. He acknowledged that his count could have included patrons travelling from the patio to the bar or the washrooms, if indeed there were patrons using the patio.

Allowing for a margin of error and reducing his counts for the band members, he agreed the numbers could have been as low as 103 patrons, which is within 10% of the licensed capacity of 98 patrons. The inspector referred to the branch policy about whether to recommend enforcement action (Exhibit No. 1, tab 6). The branch will not always recommend enforcement action if a licensee is within 10% of the licensed capacity. However, if the establishment has been designated as a problem establishment, the branch will not grant that leniency.

The inspector testified that he issued and served the amended CN and NOEA as a result of a change in branch policy. He said this was just one of a number of hearings coming up for which CNs had to be amended to reflect s. 12 of the *Act* rather than s. 6(4) of the Regulations. He produced Exhibit No. 2, which reflects the branch's direction to staff to make the amendments.

The new regulations took effect on December 2, 2002, with the result that this establishment changed from a Class D licence to a Liquor Primary Licence (see Exhibit No. 1, tab 6 for both licenses). The inspector did not know whether the branch issued the first new licence before or after this incident.

General Manager

The manager testified that he has worked in the hospitality industry for 12 years. He started working at D'Arcy McGee's as a bartender in January 2002 and took over as manager in October 2002. He had dealings with one liquor inspector and said he thought that inspector was content with the way he was handling things. On New Year's Eve he made a mistake that resulted in overcrowding. He spoke with another inspector about that incident, told him what had happened and apologized. The manager testified that he did not have the impression that the inspector considered this to be a problem establishment. The manager said that he had not previously met the inspector who was present on January 17, 2003.

The manger testified that, on January 17, 2003 after being approached by the liquor inspector, he counted 106 persons including the 5 band members who were seated at the bar. He used a mechanical clicker and counted the interior only. He testified that the patio is always open and has furniture and heaters. Patrons go to the patio to smoke and some prefer to stay out there. Patrons on the patio go to the interior bar to order food and drinks. They use the interior washrooms. On January 17, 2003, he was not aware of whether there were patrons on the patio.

A hockey tournament was in Victoria and on this night there was an influx of patrons around 7:30 P.M. For staffing, there were 2 managers and 5 service staff working at 7:50 P.M. and another 3 service staff as of 8 P.M. He said the staff do not wear uniforms. There is a policy requesting staff to show up at least 15 minutes early for their shifts and they are entitled to a 40% meal discount. He thought there probably were off-duty staff members in the establishment at the time the inspector did the count.

Company representative

The company representative has been involved at this establishment, and several associated outlets, since February 2001. When his company took over D'Arcy McGee's it was a restaurant with a licensed capacity of 168 inside and 45 on the patio. The company applied for, and was granted, a D Neighbourhood Pub licence which resulted in a decrease in the licensed capacity, first to 65 and 20 and then to the 98 and 20, respectively. The Building Occupancy Load (BOL) is 130 persons. The company understood from the Liquor Control and Licensing Branch (LCLB) that if the City approved an increased in the BOL, the LCLB would allow the same capacity.

He testified that there was no alteration in the square footage between the licence changes, there is one more fire exit than required and there are no safety issues.

In 2001, the company approached the City to increase the BOL to 148 persons. At the same time, the company was also negotiating to take over operation of a cabaret space above D'Arcy McGee's. The company was represented directly by company officers, by a consulting company, and by the management company. In November 2002, they got approval in principle from the LCLB for a licence for the cabaret. In January 2003, they had the first official meeting with the City for the BOL increase and in February 2003 submitted the application for increase.

In October 2002, the company representative was told there had been an incident of overcapacity. He flew to Victoria, met with the licensee's regional manager and the staff at D'Arcy McGee's. He met with the liquor inspector and told him the staff had been reprimanded. He testified that he did not consider it to be a "compliance" meeting and that he was not advised that the LCLB considered this to be a problem establishment. Further, he was not aware of any

concerns by the LCLB between October and January and he was not aware that the New Year's Eve incident resulted in a designation of "problem "establishment.

The company representative testified that when the new liquor Regulations were coming into effect, the company was told by the consultant and by a liquor inspector that there would be no future distinction between capacities inside and on the patio, provided the patio was open. The company representative testified that the patio is open 364 days of the years and that he clearly understood, under the new Regulations, the capacity for D'Arcy McGee's was 118 patrons. The company has an establishment in West Vancouver with a similar situation and understood the same theory of combined capacity applied there. In that case, the local liquor inspector indicated that with the combined capacity they could, as example, add tables to the patio.

Licensee's Regional Manager

The regional manager had been in the hospitality industry for 15 years, with this licensee for 2 years, and regional manager for 8 months. He testified that around Christmas 2002, the liquor inspector came to the establishment for a routine inspection. In response to the regional manager's questions about the new regulations, the inspector told him that if he was to operate the interior and patio at 120, combined capacity, he would be fine. He specifically recalled this conversation because the number was slightly over the actual capacity. The regional manager testified that the patio is always open.

The regional manager testified that he had telephoned the LCLB previously and asked a liquor inspector about the December 2 amendments and effect on capacity. The inspector indicated that the answer would depend on who he spoke with because no one really knew for sure. After that conversation, he

spoke with the company's consultant and with the other inspector in December, and from them understood the capacity was 118.

Submissions

The licensee submitted that the branch is incorrect to apply a standard of balance of probability to these hearings because the statute is, in effect, penal and the consequences can be devastating. The standard should be closer to beyond reasonable doubt.

The licensee submitted that there was insufficient evidence to conclude that the licensee had breached the capacity requirements. In the alternative, the evidence shows that the licensee was in substantial compliance and, therefore, there is no contravention.

In making those submissions, the licensee submitted that some of the people the liquor inspector included in his count, aside from the band members, would have been employees, perhaps having a meal before their shifts. The mischief the Act is directed to is overcrowding of patrons. The goal of the branch is to achieve substantial compliance. With those goals in mind, it is not appropriate to include pre-shift staff as "patrons." The inspector's count reduces to 102 patrons with the 5 band members and the 3 working staff members. It is not known how many other staff the inspector included in his count. The general manager's count, without the band members, was 101 patrons. Both acknowledged that it is not possible to see the whole room at once and that there would be a margin of error.

The licensee submitted that there was no evidence that the branch had designated this as a 'problem' establishment. The branch did not tell the licensee it had been designated as a problem establishment.

The licensee submitted that the branch's allegation is vague and does not disclose a statutory contravention. The allegation does not specify what part of section 12 was contravened. The wording of the alleged contravention is not found in section 12. Sections 84(3) and (4) grant Regulation making authority for setting terms and conditions for all matters relating to the sale of liquor and operation of establishments and s. 83(4)(g) specifically allows for regulations governing the allowable seating and patron capacity. The only Regulation that applies to this alleged contravention is s. 6(4).

The licensee argued that the branch is incorrect to apply section 12 of the Act to this alleged contravention. Under the previous Regulations, sections 17(4) and 17.1 dealt with capacities for Neighbourhood Pubs. Section 17.1 specifically permitted maximum capacity of 20 persons on a patio, in addition to the interior capacity. With the new Regulations, sections17, 17.1 and other related sections were repealed. The new Regulation section 6(4) establishes a 'person' capacity. The licensee argued that this supports the contention that it is the total number of persons allowed into the premises that is important, with one capacity. The advice the licensee got from the consultant and at least one liquor inspector was that the system had changed to a combined, or one number, capacity.

The only section in the new Regulations that addresses capacity is section 6(4), as was initially alleged, and that is the section that is operable. If section 6(4) was applied it would be clear that the 'person' capacity is one number which is the combined capacities of the interior and the patio. If there is a contradiction between the *Act* and the Regulations, the contradiction must be construed against the branch, not the licensee.

Reasons and Decision

Standard of Proof

Counsel for the licensee took exception to the branch applying the standard of balance of probabilities. However, he did not seriously advance arguments. I have had this argument raised previously and have found that the standard applied is the appropriate one for this regulatory branch. In the absence of compelling argument, I will not revisit the reasons.

The legislative framework

Section 12(2) of the *Act* authorizes the general manager (a) to vary terms and conditions to which the licence is subject under the Regulations and (b) to impose terms and conditions on a licence in addition to those referred to in paragraph (a). In my view, this gives the general manager very broad authority, having regard to the public interest, to impose terms and conditions, regardless of the matters enumerated in section 83. In the Regulations, "patron capacity" is defined as the maximum number of patrons allowed by the general manager in the area designated under section 12(3)(b) of the *Act*. That section specifically authorizes the general manager to set terms and conditions that *(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served*. "Person capacity" is also defined in the Regulations and is the subject of s. 6(4).

I do not accept the licensee's argument that the new Regulations effectively repealed 'patron capacity' and that s. 6(4) covers the entire capacity issue. Nor do I accept that there is a contradiction between the *Act* and the Regulations. "Patron capacity" is still defined in the Regulations and is cross-referenced to s. 12 of the *Act*. And, the general manager has broad authority to attach terms and conditions to a licence.

The evidence is clear that the general manager had issued a licence for this establishment that set out the maximum capacities for the interior and the patio. The Regulations changed on December 2, 2002. The licensee did not receive any documentation from the branch to indicate that the licensed capacities changed. The licensee's submissions do not satisfy me that there was any statutory change that would have resulted in an automatic change in the licensed capacities. When the branch issued the new Liquor Primary Licence, it contained the same capacities as before – 98 patrons inside and 20 on the patio.

The licensee maintains that during December 2002 and January 2003, staff received advice from an unknown employee at the LCLB, a consultant, and a liquor inspector that the separate capacities could be combined – provided the patio was open. The licensee did not obtain this information in writing and did not produce evidence from any of these people. However, the licensee admitted operating on the assumption that the capacity was 118 patrons. I do not accept the licensee's evidence of the statements attributed to the liquor inspector because of the frailty of hearsay evidence. Oral communications are dependent on how questions are phrased and are open to interpretation. The licensee could have requested that the inspector provide evidence at the hearing.

The licensee knew the process for applying for an increase in the capacity and was in process of doing that. In my view, the licensee was careless and, possibly, willfully blind in not seeking more authoritative assurances before assuming it could relax the capacities.

As an aside, I offer a comment on the licensee's submissions that the new Regulations were bringing the branch to a "one number" capacity. The licensee suggested during the hearing that it would be a combination of the capacities for the licensed areas. As I understand the new Regulations, a discussion of 'one number', which is not a branch phrase, might refer to bringing the licensed capacity to the municipal occupancy load, or what has commonly been referred

to as the BOL. The licensee was apparently aware of this and had submitted an application by the time of the hearing. I caution the licensee to seek further advice from the branch if there are lingering questions about the status of the patio capacity.

The substantive allegation

When the liquor inspector prepared his notes on the night of the inspection, he noted that he had counted the 5 band members in his two counts. Therefore, when he recommended enforcement action it was based on a patron count of between 105 and 107 patrons and the licensee's count of 106. It was not until the hearing that he understood the licensee's manager to say his count was only 101 patrons. Although the inspector acknowledged that the manager did not tell him otherwise, he assumed the manager's count of 106 did not include the band members. Obviously, that would have made the counts very similar.

The licensee challenged the accuracy of the inspector's counts based on other staff being included and a margin of error. Although the inspector acknowledged room for margin or error, I find that is mainly addressed through his two counts. That is a primary reason for the branch policy that inspectors conduct more than one count. The inspector testified that he would not have counted any apparent staff. I note that the manager was sufficiently aware of the problem to point out the band members. If there were other staff having meals, as suggested during the hearing, I find it probable that the manager would have pointed them out. Similarly, I find that the manager was sufficiently alive to the issues that if there had been patrons using the patio, he would have indicated that at the time.

The licensee's manager testified that he included the 5 band members in his count. It is apparent to me that he did not make that clear to the inspector. In fact, in the Enforcement Action Recommended form and in the NOEA, the inspector stated that the manager's count did <u>not</u> include the 5 band members.

On the CN, the inspector noted his own counts and the manager's count of 106. The inspector issued that form and the manager signed it, at approximately 8:00 P.M. that night.

Although the inspector seemed prepared to accept the manager's assurances that his count had included the band members, I find that it stretches the limits of credibility. The manager was aware of the potential difficulty posed by receiving another CN. Granted, he may have thought the licensee was safely operating at 118 patrons, but when confronted with the inspector's advice to the contrary, I find it likely he would have taken some extra caution to ensure that the record was clear from the outset. The manager knew the inspector's counts before he did his count and he knew the inspector's opinion that it was overcrowded.

Based on the inspector's figures on the CN, the three counts are almost identical. If in fact the manager was of the view that the inspector's counts were so much higher than his own, I find it probable he would have wanted it corrected, which at the time could easily be accomplished by another count. I find it questionable that the manager would have included the band members in his count and I find his after-the-fact revelation to the branch is lacking in credibility. I find that the manager's count did not include the band members or any other staff.

I accept that the patio was open in the sense that patrons could have gone there to smoke and, if they wanted to sit out there and place their own orders, they could. However, based on the evidence of both the licensee's manager and the liquor inspector, I find that no patrons were using the patio during these counts and that the counts were not tainted by movement in and out.

Based on the evidence from the licensee and the branch, I find that there were 105 patrons in D'Arcy McGee's at the time of the counts.

The licensee questioned why the inspector did not apply the branch policy that enforcement will not be pursued if the overcrowding is within 10% of the licensed capacity. The answer was that this had been designated a problem establishment because of a pattern of behaviour. The licensee took exception on the basis that the branch did not notify the licensee of that designation.

There is no legal requirement for the branch to give an allowance of 10% and there is no requirement for the branch to notify the licensee that it considers the establishment to be a problem. Between October 2001 and January 2003, the branch had numerous concerns with the licensee's operation, including problems with overcrowding. The concerns were noted by police licensed premises checks, contravention notices and meetings. The last problem was only 2 weeks prior to this occurrence.

I find that the licensee's submission concerning the 10% and designation of problem establishment does not affect the finding that there was overcrowding. It was the inspector's discretion to proceed with enforcement action. That decision was approved by the branch's regional manager on the Enforcement Action Recommended form. The licensee's submissions do not raise concerns of procedural or administrative fairness.

I find that the branch has substantiated the alleged contravention.

Penalty

Pursuant to ss. 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*. For overcrowding beyond the licensed capacity, the range of penalties for first contraventions is 1 to 3 days or $1,000 to $3,000 fine.

Concerning the recommended penalty, the licensee noted the reasons put forward by the branch in the NOEA and appendices. The branch suggested that imposing a monetary penalty would amount to the 'cost of doing business', that this licensee had an established pattern of overcrowding, and that overcrowding results in serious public safety issues and could result in injury or death. In reply to the NOEA, the licensee submitted there was no evidence of the 'cost of doing business' argument, of the licensee reaping "considerable income" from the excess number of patrons, or of a pattern of overcrowding. Concerning the safety issue, the licensee submitted that the BOL was 130 persons, the alleged capacity was not close to that and there was no evidence of any safety issues.

The licensee submitted that, if a penalty is imposed, a monetary penalty would be more appropriate than closure on Friday.

I have taken into consideration that these are the first proven contraventions since this establishment opened, that the staff was cooperative with the Liquor Inspector and that the overcrowding was not blatantly excessive. I have also considered the branch's numerous concerns with this licensee over enforcement issues, including overcrowding. In the circumstances, I find that either a licence suspension or monetary penalty is appropriate.

Although the branch has recommended a one day licence suspension, I find the licensee's submissions on monetary penalty to be persuasive. I have given weight to the compliance history only to the extent that it demonstrates the branch has told the licensee in the past of concerns about overcrowding. From July 2002 to January 2003, the branch raised concerns on 5 occasions, including the compliance meeting in October 2002. Given the circumstances, I am of the view that a mid-range monetary penalty is warranted, and I impose a penalty of $2,000.

Order

Pursuant to section 20(2) of the *Act*, concerning licence #212046, for the contravention of overcrowding on January 17, 2003, 557213 B.C. Ltd. to pay a monetary penalty of $2,000, to be paid no later than July 18, 2003.

Original signed by

M. G. Taylor Date: June 17, 2002
Enforcement Hearing Adjudicator