



**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: KKBL No. 324 Ltd.
dba Granville Room
957 Granville Street
Vancouver, BC

Case Number: EH03-125

Appearances:

For the Licensee Dennis P. Coates

For the Branch Peter K. Jones

Enforcement Hearing Adjudicator Suzan Beattie

Date of Hearing November 27, 2003

Place of Hearing Teleconference

Date of Decision February 26, 2004

INTRODUCTION

The licensee, KKBL No. 324 Ventures Ltd. doing business as Granville Room, is located on Granville Street in Vancouver, B.C. The licensee holds a Food Primary Liquor Licence No. 208836 issued effective May 26, 2003. Its hours of operation in which liquor may be sold, purchased and consumed are from Noon to 2:00 A.M. Monday to Sunday. The maximum person capacity is 60 persons; the same as the occupant load as set by the Vancouver City Fire and Rescue Services Department.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Liquor Control and Licensing Branch alleges that on July 13, 2003, the licensee contravened regulation 6(4) of the *Liquor Control and Licensing Regulations* by permitting overcrowding beyond the person capacity.

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 *Regulation* 6(4) the penalty range is four (4) to seven (7) days or five thousand (\$5,000.00) to seven thousand dollars (\$7,000.00) for the first contravention. In this case, the branch is recommending the minimum monetary penalty of five thousand dollars (\$5,000.00).

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

6 Capacity

- (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,
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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 license 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).

ISSUE

The licensee concedes that the contravention occurred, but disputes the proposed five thousand dollar (\$5,000) monetary penalty.

COMPLIANCE HISTORY

There 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.

In March 2003 the branch issued a Contravention Notice for overcrowding beyond person capacity, but did not pursue enforcement action on that allegation. The branch's file also indicates various complaints or contraventions in 2001, 2002 and 2003. The branch did not pursue enforcement action on these allegations.

EXHIBITS

The branch and the licensee presented the following exhibits:

- Exhibit 1** **Book of Documents**
- Tab 1 Notice of Enforcement Action dated August 20, 2003
 - Tab 2 Contravention Notice No. B003983
 - Tab 3 Notes taken on August 20, 2003, by the Vancouver City District Fire Inspector and the Liquor Control and Licensing Branch Inspector
 - Tab 4 Enforcement history of the establishment
 - Tab 5 Food Primary Licence No. 208836 dated May 26, 2003, and related documentation
 - Tab 6 Official floor plan of the establishment
- Exhibit 2** **Book of Documents**
- Tab 1 Written submission
 - Tab 2 Merriam-Webster OnLine Dictionary meaning of "least"
 - Tab 3 British Columbia Fire Code, Vancouver Fire By-Law 2000
 - Tab 4 Vancouver Building By-Law 1999
 - Tab 5 The Interpretation of Legislation in Canada, Third Edition
 - Tab 6 British Columbia Telephone Co. v Shaw Cable Systems (B.C.) Ltd.,
 - Tab 7 Email from Brad Walton of CFT Engineering dated Nov. 26, 2003
 - Tab 8 Letter dated Nov. 25, 2003, and attachments
 - Tab 9 Letter to Liquor Control & Licensing Branch dated May 21, 2003.
- Exhibit 3** Chronological Description of attachments to Tab 8 in Exhibit 2
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EVIDENCE, PENALTY SUBMISSIONS AND DECISION

Branch Evidence

The branch's evidence, contained in the narrative to the Notice of Enforcement Action and in the documentation in Exhibit 1, indicates that on July 13, 2003, a member of each of the City of Vancouver, the Vancouver Fire and Rescue Services and the branch conducted a routine inspection of the establishment. The Vancouver Fire and Rescue Services representative counted 98 persons in the establishment and the City of Vancouver representative counted 96 persons.

The liquor license issued May 26, 2003, provides for a capacity of 60 persons. When asked for the liquor license, the establishment's manager provided the liquor inspector with a previous liquor licence that reflected a licensed capacity of 81 persons. When questioned, the manager stated, they did not use the person capacity on the current license as they disputed the 60 person capacity. Further, the manager disputed the counts taken by the Vancouver Fire and Rescue Services representative and the representative from the City of Vancouver. The manager counted 76 persons in the establishment.

The establishment's hostess also disputed that the establishment had a 60 person capacity. When instructed not to permit any further patronage until the overcrowding was corrected, the manager initially refused. The license inspector remained in front of the establishment to ensure actions were taken to control the overcrowding in the establishment.

The branch's documentation showed that, on July 4, 2001, the City of Vancouver Fire and Rescue Services determined a maximum occupant load of 60 persons based on the fact there was only one acceptable exit from the premise. On April 8, 2002, the branch wrote to the licensee, explaining that section 4(7) of the *Regulations* require the licence capacity to be in compliance with the Fire Safety Code. The branch concluded it had no authority to overrule the Vancouver Fire and Rescue Services. Therefore, the

branch was required to ensure the licence capacity was in compliance with the 60 persons determined by the local authority. The branch concluded by stating, in part:

If you believe that there was an inaccuracy in the measurement, please have the calculation reviewed with the Fire and Rescue Services for the City of Vancouver

On May 14, 2003, the licensee was advised that the branch intended to amend its seating capacity to coincide with the occupancy load set by the Vancouver Fire and Rescue Services within ten (10) days unless the branch received information as to why the capacity should not be changed. On May 26, 2003, the branch again corresponded with the licensee. At this time, it stated it had not received any written reasons why the seating capacity should not be changed and therefore was amending the license to reflect the 60 person capacity.

Licensee Evidence:

The licensee presented extensive documentation in support of its submission that no penalty should be imposed in this case. For ease of reference, I will refer to this documentation (some of which has been mentioned earlier in this award) in chronological order:

- On July 4, 2001, the City of Vancouver Fire and Rescue Services determined a maximum occupant load of 60 persons based on the fact there was only one acceptable exit from the premise.
 - From July 2001 until early 2002 there was continuing correspondence between the licensee's architect, the licensee's project manager and the City of Vancouver Fire and Rescue Services.
 - In March 2002 the licensee's legal counsel sent a letter to the Deputy City Building Inspector and the Deputy Chief of the Vancouver Fire and Rescue Services requesting a meeting to discuss the issues surrounding the occupancy load. At this time the licensee's legal counsel suggested that the licensee was suffering
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financially due to the arbitrary decision to reduce its occupancy by approximately 30%.

- It appears from the documentation that, despite numerous requests, there was no response from the City of Vancouver Fire and Rescue Services.

I pause to note that it was in March 2003 that the branch issued a Contravention Notice for overcrowding beyond person capacity, but did not pursue enforcement action on this allegation.

- On May 14, 2003, the branch wrote the licensee advising it intended to amend the licensee's seating capacity to coincide with the City of Vancouver Fire and Rescue Services occupancy load.
- On May 21, 2003, the licensee's project manager responded to the branch's letter of May 14, 2003. He explained that, after several meetings with City of Vancouver officials, the establishments' rear door was recognized as a rear exit. At these meetings, the City of Vancouver requested seven items be completed by the licensee. The project managers' letter reported that six of the seven items had been completed. The City's Environmental Department had approved the seventh item. On this basis, the licensee's project manager requested the branch not to change the licensee's seating capacity.
- On May 26, 2003, the branch amended the license capacity to 60 persons. In its letter the branch stated it "has not received written reasons as to why the seating capacity should not be changed". At the hearing there was no explanation offered for the inconsistency between the branch's letter of May 26, 2003, and the May 21, 2003, letter of the licensee's project manager.

I pause again to note that, on July 13, 2003, the multi-party inspection resulted in the contravention agreed to in this hearing.

- On August 13, 2003, the licensee's project manager again wrote to the City of Vancouver outlining their agreement that seven items be completed and the original occupancy of 81 would be restored. This letter detailed the letters of understanding,
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assurance and other documentation regarding the completion of the seven items requested by the City of Vancouver.

- On August 15, 2003, the licensee's project manager again wrote to the City of Vancouver enclosing the appropriate documentation and application form for maximum occupant load determination.
- On August 20, 2003, the branch issued its Notice of Enforcement Action with respect to the July 13, 2003, overcrowding contravention.
- On August 25, 2003, the licensee's project manager wrote to the Chief of the City of Vancouver Fire and Rescue Services requesting a meeting to finalize the occupancy load. In this letter the licensee's project manager references the Chief's verbal agreement "to increase the occupancy load to 75 patrons for the weekend".
- The Chief's temporary occupant load increase to 75 patrons was also referred to in an email from an engineering firm. This engineering firm had been attempting to contact the Chief of the City of Vancouver Fire and Rescue Services and had succeeded in receiving email confirmation of the Chief's "temporary occupant load of 75".
- The earliest the Chief of the City of Vancouver Fire and Rescue Services is available to meet with the licensee and its representatives is January 2004.

Submissions

The licensee makes three points in support of its argument that no penalty should be imposed in these circumstances. In doing so, the licensee acknowledges the stated capacity of this license has been "a work of art" over the years and appears to have fluctuated for no apparent reason. For the purposes of my decision I shall refer to the original maximum occupant load as being 81 persons.

The licensee's first point is that the branch incorrectly converted the licence from its maximum occupant load of 81 persons to a maximum occupant load of 60 persons. In support of this argument, the licensee starts with its original maximum occupant load of 81 as issued in the mid 1990's. The licensee says that, in the mid-1990's, the maximum occupant load of 81 was a patron capacity not a person capacity.

On July 4 2002, the Vancouver Fire and Rescue Services determined the maximum occupant load should be reduced to 60 persons based on the fact that there was only one acceptable exit from the premises. The licensee argues that, in May 2003, when the branch changed the occupant load to 60 persons it incorrectly transformed what was previously called a person capacity, but was in actuality the patron capacity into the person capacity as defined in the December 2002 *Regulations*.

The licensee claims that the branch and the Vancouver Fire and Rescue Services have not harmonized their definitions or understanding of "occupant load". Traditionally both the branch and the Vancouver Fire and Rescue Services referred to the occupant load as the patron capacity in the red-lined area. In December 2002, the branch introduced a person capacity that, by definition, includes the occupant load for the whole establishment.

As a result, the licensee argues that when the branch received the correspondence from the Vancouver Fire and Rescue Services in July 2001 the 60 persons referred to the capacity of the red-lined floor area where liquor consumption can occur and where a count can be conducted of patrons or persons in the establishment at any given time.

The licensee continues by submitting that when the branch re-issued the licence on May 26, 2003, for a 60 person capacity, it incorrectly converted the licence from its former patron capacity to the "person capacity" as defined in the December 2002 *Regulations*. The licensee submits the licence should be issued for a patron capacity of 60 and not a person capacity of 60.

If in fact the license should state a 60 patron capacity, then the licensee continues by stating, that the alleged contravention of a violation of *Regulation* 6(4) is incorrect. *Regulation* 6(4) refers to "more persons than the person capacity" and the licence should, if the licensee's argument is accepted, state the patron capacity. In the result, the branch should withdraw the allegations.

Second, it argues that, due to the definition of the term "occupant load" in the *Liquor Control and Licensing Act Regulations*, an absurd result follows the literal application of the definition. Therefore, as the *regulation* is not perfected the licensee argues there is no legal basis for imposing a penalty.

Third, the licensee argues that the facts in this case form a convoluted bureaucratic web that the licensee has made many attempts to resolve. It argues that the licensee was pro-active in attempting to resolve a complex problem and should not be penalized.

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 minimum set out in Schedule 4 of the *Regulations*.

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 *regulation* 6(4) the penalty range is four (4) to seven (7) days or five thousand (\$5,000.00) to seven thousand dollars (\$7,000.00) for the first contravention. In this case, the branch is recommending the minimum monetary penalty of five thousand dollars (\$5,000.00).

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 along the scale is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a 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.

I begin my analysis by outlining the key events in chronological order. In this case the City of Vancouver Fire and Rescue Services determined a maximum occupant load of 60 persons in July 4, 2001. The licensee and its architect, project manager, and then legal counsel communicated with the City in an attempt to increase the occupant load. In April 2002, the branch advised the licensee that section 4 (7) of the *Regulations* required the licence capacity to be in compliance with the Fire Safety Code. The section referred to by the branch stated, in part:

4. (7) The licensee and the licensed establishment shall at all times comply with the British Columbia Building Code or the Vancouver Building By-law, as the case may be, and with the regulations under
 - (a) the Fire Service Act, and
 - (b) the Health Act.

The April 2002 letter to the licensee continued by explaining that the "General Manager has no authority to overrule the local authority and is required by *regulation* to ensure that the licence capacity is in compliance with the capacity set by this authority". The letter concluded by advising the licensee, that if it believed there was an inaccuracy in the measurement, the calculation should be reviewed by the Fire and Rescue Services for the City of Vancouver. If it was successful in securing changes, the licensee was free to reapply to the branch.

I find that, in this case, the licensee made numerous requests to the City of Vancouver, but was unsuccessful in securing a response from the Fire and Rescue Services. I also find that the licensee believed that the reduction of its occupancy by approximately 30% resulted in financial losses to its business.

In March 2003, the branch issued a Contravention Notice for overcrowding beyond the person capacity but declined to pursue enforcement action at that time. Shortly thereafter, in May 2003, the branch advised the licensee it intended to amend its seating capacity to be equal to but not exceeding the occupant load determined by the City of Vancouver Fire and Rescue Services. I find that, in a case such as this, where there is a defined occupant load, the licence must be issued to a person capacity equal to but not exceeding that occupant load (see *Regulations* section 6).

I also find that the licensee and its then advisors understood this requirement and outlined to the branch the results of their meetings with the City. For reasons not explained at the hearing, the branch does not refer to this correspondence in its final decision to amend the license capacity to 60 persons.

In this case the licensee admits being in contravention of its licensed capacity. Its first argument in support of its submission that no penalty should be imposed amounts to an attempt to re-argue the process followed by the branch in amending its capacity. That process acknowledges that, when and if a higher occupant load is granted by the Fire and Rescue Services for the City of Vancouver, the licensee may reapply to the branch for an increase in its seating capacity. I find that in this case the licensee understood this process and made extensive attempts to finalize its occupancy load. At the time of the hearing the licensee was unsuccessful in increasing its occupancy load.

I am not prepared to accept the licensee's first submission that the branch incorrectly transformed a "patron" capacity into a "person" capacity. Where there is a defined "current" occupant load as determined by the City of Vancouver Fire and Rescue Services, the licence must be issued to a person capacity equal to but not exceeding that occupant load. (see: *Regulations* section 6). It follows that I am also not

persuaded by the licensee's second argument regarding the definition of "occupant load" in the *Regulations*.

I agree that the licensee has been pro-active in attempting to resolve this complex problem. However, I do not find that its attempts absolve it from complying with the *Act* and *Regulations*. In the circumstances of this case I find the licensee was deliberately and consistently attempting to operate its establishment beyond its licensed capacity. I base my finding on the facts agreed to in the Notice of Enforcement Action, specifically the fact that the manager provided the liquor inspector with a previous liquor license showing a higher licensed capacity, the fact that the manager admitted they did not use the current license capacity and the actions of the establishment's hostess.

As a result I find the proposed monetary penalty of five thousand dollars (\$5,000) is appropriate.

ORDER

Pursuant to section 20(2) of the *Act*, concerning the Food Primary Licence No. 208836, I order as follows:

For the contravention of section 6(4) of the *Liquor Control and Licensing Regulations* on July 13, 2003, I order the licensee KLBL No. 324 Ltd. to pay a monetary penalty of five thousand dollars (\$5,000) to be paid no later than March 31, 2004.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: February 26, 2004

cc: Vancouver Police

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Wendy Jones, A/Regional Manager

Liquor Control and Licensing Branch, Victoria Office

Attention: Peter Jones, Branch Advocate