



**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, R.S.B.C. 1996, c. 267**

<b>Licensee:</b>	Newton Investments Ltd. dba Hildon Hotel 50 West Cordova Street Vancouver, BC
Case Number:	EH04-021
<b>Appearances:</b>	
For the Licensee	Dennis P. Coates, Q.C.
For the Branch	Peter Moir, Advocate
Enforcement Hearing Adjudicator	Suzan Beattie
Date and Place of Hearing	July 30, 2004 - Vancouver August 3, 2004 - Teleconference August 13, 2004 - Written Submissions
Date of Decision	December 15, 2004

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**Ministry of Public  
Safety and Solicitor  
General**

Liquor Control and  
Licensing Branch

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## **INTRODUCTION**

The licensee, Newton Investments Ltd., doing business as Hildon Hotel, is located at 50 West Cordova Street, Vancouver, BC. The establishment exists among many different commercial enterprises and is in close proximity to residences in the area. It holds a Liquor Primary Licence No. 016141 with hours of operation on the licence in which liquor may be sold, purchased and consumed being 10:00 A.M. to Midnight Monday to Sunday. The evidence established that the licensee has an extension of hours on Friday and Saturdays until 3:00 A.M.

The licence permits 302 persons in this establishment. The occupant load issued by the City of Vancouver is also for 302 persons.

## **ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES**

The Liquor Control and Licensing Branch alleges that on January 31, 2004, the licensee contravened regulation 6(4) of the *Liquor Control and Licensing Regulation* by permitting overcrowding beyond the person capacity greater than occupant load.

Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for each contravention. For this contravention, the penalty range is four (4) to seven (7) days or five thousand (\$5,000.00) to seven thousand (\$7,000.00) dollars for a first contravention. In this case, the branch is recommending the minimum suspension penalty of four (4) days.

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

### **1 Definitions**

“Occupant load” means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
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- (b) the *Fire Services Act* and British Columbia Fire Code Regulations, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located.

## 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,

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).

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

### 1 Definitions

“establishment” means a place or premises that may comply with the requirements of the Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served.

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**ISSUES**

1. What is the Burden of Proof?
2. Whether the licensee contravened section 6 of the *Regulation*.
3. Is the definition of 'occupant load' in the *Regulation* flawed?
4. If the licensee contravened as alleged, is the recommended penalty appropriate in the circumstances?

**WITNESSES**

The branch called two Police Constables, a Liquor Inspector, and the Plan Checker for the City of Vancouver as its witnesses. The witnesses for the licensee were its Head Doorperson and the Owner/Manager.

**EXHIBITS**

The branch and the licensee presented the following exhibits:

<b>Exhibit 1</b>	<b>Book of Documents</b>
Tab 1	Notice of Enforcement Action letter dated April 06, 2004
Tab 2	Enforcement Action Recommended Report dated February 12, 2004
Tab 3	Police Licensed Premises Check (LPC) B126411 Contravention Notice (CN) B000127
Tab 4	Handwritten notes of Constable
Tab 5	Vancouver Police Department Occurrence Report
Tab 6	Liquor Primary License -16141
Tab 7	Liquor-Primary Licence Terms and Conditions – p 1,3, and 12
Tab 8	Red-lined floor plans
Tab 9	Occupant load certificate
Tab 10	CN A000834 dated Nov. 2, 2001
Tab 11	CN A000847 dated March 8, 2002
Tab 12	Waiver Notice dated August 22, 2002; Letter from Deputy General Manager to Newton Investments Ltd.

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- Tab 13 CN A000670 dated February 6, 2003
- Tab 14 LPC A064426 dated August 17, 2003 & CN B004437 dated August 17, 2003
- Tab 15 LPC A074530 dated August 23, 2003 & CN B00478 dated October 28, 2003
- Tab 16 LPC B124561 dated October 3, 2003
- Tab 17 Compliance Meeting report dated October 28, 2003 with attached typed and handwritten notes; Notice entitled YO! Loudmouth; and photocopy of photographs dated October 25, 2003
- Tab 18 CN A000670 dated February 6, 2003
- Tab 19 LPC A064551 dated December 15, 2003
- Exhibit 2** Statement of Doorperson
- Exhibit 3** Statement of Owner/Manager
- Exhibit 4** Statement of Patron

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

### **EVIDENCE OF THE BRANCH**

#### **First Police Constable**

The first Constable explained that he entered the premises, along with the second Police Constable, at approximately 1:10 A.M. as part of a routine inspection by the liquor squad. His experience with the liquor squad was within the downtown core. As a result, he had not been inside the establishment before and he was not aware of the establishment's licensed capacity or its occupant load.

At the entrance of the establishment, he recalled speaking with one Doorperson. He did not recall whether the Doorperson was using a clicker. He did note in his occurrence report the "staff advised that the license permitted 302 persons and that the front Doorperson stated that there were 302 patrons inside." The first Police Constable observed that the establishment appeared very crowded in the first bar area and in the hallway area. He noted that the seating was full and, as far as he could see, the

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establishment appeared crowded. In this experience, if the hallway and corridor of an establishment is full, it indicates the establishment is crowded.

The first Constable decided to do a count of the establishment. He did not immediately recall if he had his own counter or if he asked the Doorperson for a counter. After referring to his Occurrence Report, he did recall that he used his own mechanical counter to conduct his two counts. His first count was 340 and his second count was 360 persons.

He believed he counted the staff but did not count the washrooms. He recalled there were persons in the smoking area and, after referring to his General Occurrence Report, stated he did not count those in the smoking area. He was "pretty confident" about his counts and could not be absolutely confident unless the doors of the establishment are closed during a count.

After conducting his second count he returned to the front bar and asked for the Manager. He spoke with the Owner/Manager and requested a copy of the liquor license stating he suspected the establishment was overcrowded. The Owner/Manager disagreed with his counts of 340 and 360. The first Constable began to write the Licensed Premise Check (LPC) while the Owner/Manager and the Head Doorperson were conducting their counts. At this time the second Constable was following behind the Head Doorperson while he was counting. The Owner/Manager counted 302 persons and the Head Doorperson had a count of 311 persons.

The first Constable gave the Licensed Premise Check to the Owner/Manager as they were leaving the establishment. He recalled when they left the establishment that he and the second Constable continued to walk through the area. He did know there was a police vehicle somewhere in the vicinity but he was not the driver that evening.

The first Constable was not aware of the follow-up process after issuing Licensed Premises Check. He viewed Licensed Premise Checks as similar to a traffic ticket.

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Once he has documented the occurrence and written the Licensed Premises Check or ticket his role was finished.

### **Second Police Constable**

The second Constable testified that he had attended the establishment a minimum of twenty (20) times and he was aware that its capacity was "just over 300". He also knew there were at least one, and possibly two, doorpersons on duty. He recalled speaking with the Doorperson who had a mechanical clicker in his hand. While he did not know the Doorpersons name, he did know that he also worked as a security person for another business in the vicinity.

This Constable stated that as soon as they were inside the "entry area" there were people everywhere and he thought it was odd the establishment would be as busy as it appeared. When the first Constable decided to do a count he followed him as his safety person. The second Constable stated they did not count individuals in the washroom or smoking areas. He recalled the first Constable talking for approximately twenty (20) seconds to a Bartender about an allegedly intoxicated person. The first Constable asked the Bartender to stop serving that person. The first Constable then continued on with his count until they came to their starting point. The second Constable did not recall if the first Constable spoke to the Bartender about the alleged intoxicated person during his first or second count.

The second Constable recalled the Owner/Manager demanding another count. Both the Owner/Manager and the Head Doorperson conducted counts. The second Constable followed behind the Head Doorperson as he was conducting his count. The second Constable recalled the Head Doorperson having a count of 311 persons on his mechanical counter. He also recalled that, when he followed the Doorperson, the entry area had cleared and it was possible to see through the crowd. It was not possible to see through the crowd when he and the first Constable conducted their counts.

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The first Constable gave the Licensed Premises Check to the Owner/Manager. The second Constable recollected that, after leaving the establishment, he drove the police vehicle while the first Constable typed the General Occurrence Report. He stated the police vehicle was parked outside the establishment on the opposite side of the street. The second Constable agreed there was at least one Police walkthrough of the establishment every Friday and Saturday night.

### **Liquor Inspector**

The Liquor Inspector explained that, as a result of numerous License Premise Checks and other concerns at the establishment, a Compliance Meeting was held on October 28, 2003. In attendance were the Liquor Inspector and the Owner/Manager. The Inspector found the Owner/Manager co-operative. Within a day of the meeting, the Owner Manager had contacted the Liquor Inspector to advise of the implementation of some of the Inspector's recommendations.

The Liquor Inspector confirmed that there are at least three (3) staff at the door, including the Owner/Manager with six (6) door people on duty on Friday and Saturday evening. One doorman is located at the exit to the back alley. The service bar, which is a major congregation area, is self service and the establishment also employs servers.

The Liquor Inspector confirmed that the only enforcement action was a waiver signed on August 22, 2002, as a result of overcrowding on March 8, 2002. The branch's recommended four (4) day penalty was based on the information provided by the first Constable. The Liquor Inspector and the first Constable had a discussion for clarification when his Licensed Premises Check was received by the branch.

### **Plan Checker**

The Plan Checker for the City of Vancouver defined occupant load as the maximum capacity that is deemed acceptable through the Vancouver Building and National Fire

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Code that allows a maximum occupancy of patrons and employees of a premises based on net floor area. The calculations do not permit for a margin of error allowing a building to go over the occupant load. For this establishment the Plan Checker confirmed that the occupant load is 302 persons.

## **EVIDENCE OF THE LICENSEE**

### **Head Doorperson**

The Head Doorperson explained that he works Wednesday to Saturday and is responsible for the scheduling of doorpersons as well as doing counts of the establishment. There are six (6) door staff on duty on Friday and Saturday, with three (3) (including the Owner/Manager) on the main entrance, one in the smoke pit, one at the back exit door and one doorperson as a floater. Door staff wear black t-shirts with the word "staff" on the back.

The door staff on the main entrance maintain one counter for patrons entering the establishment and at least one and sometimes two counters for patrons exiting the establishment. Two counters are used in case one doorperson needs to leave the door area. Two or three times an evening either the Head Doorperson or the Owner/Manager does a count of the establishment. The establishment is normally run between 287 – 290 persons to allow 12 – 15 places for regular customers or VIP's.

The Head Doorperson recalled that, on the evening of January 31, 2004, he was approached by two (2) Police Constables who asked him what the count was on his clicker. He replied that it was 302 people. He asked the Police Officers if he could assist them but they entered the premises and ignored his request.

Later, at the request of the Owner/Manager, he did a separate count with the second Police Officer following behind him. He counted 311 persons. He recalled that it took him about five (5) minutes to complete the count. The Head Doorperson believed at the time that the Officer following him was doing a separate count and that he and the second Police Officer would compare counts when they finished.

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After deducting for the 18 persons who left the establishment, his count was 293 persons. The Head Doorperson did not count staff but did include patrons in the smoking area and men's washroom.

During the weekends the Head Doorperson expects to see anywhere from 6 – 7 Police Officers. The Police normally do a head count although some Officers tell him they have a "feel" for the room and can guesstimate the count.

### **Owner/Manager**

The Owner/Manager stated that either he or his wife is at the establishment seven (7) days a week and outlined their respective schedules. He said the waiver signed on August 22, 2002, was for a contravention that occurred when the licence capacity of the establishment was for 150 and not the current 302 persons.

The Owner/Manager explained that he does not normally do the counts while he is at the main entrance. However, he is constantly eyeballing the establishment and will ask the Head Doorman for his numbers or do a count if he senses something wrong. Anytime Police Officers enter the establishment he "holds the door" and waits until the Police are finished.

The hotel has five (5) floors with cameras in the hallways and there are three (3) cameras in the bar area that record onto tape. The tapes are kept for one week and reused. There is also a non-recording camera on the front door that the waitress and bartenders can view. The tape from the evening of January 31, 2004, was not retained.

On January 31, 2004, the Owner/Manager noticed two Police Constables enter the establishment. He was advised by his Head Doorperson that they were doing a count. The Head Doorperson told the Owner/Manager there were 304 persons on the in counter with five (5) persons on the out counter making 301 persons. When the first Police Constable advised the Owner/Manager he was overcrowded, he angrily

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demanded a recount. He also did a count and, including those in the smoking area, counted a total of 302 persons. When the eight (8) persons exiting were accounted for, his count was that the establishment had 294 persons.

He explained that, on any given evening, three (3) units of Police Officers will walk through the establishment. As well, in late 2003 he was told that the Police and the branch were cracking down on overcrowding. He testified that there is no way he would deliberately overcrowd after receiving that information and knowing that the Police Officers regularly attend at his establishment. On January 31, 2004, the Owner/Manager did not see a police vehicle parked across the street from the establishment.

The Owner/Manager disputed the first Constable's counts of 340 and 360. He said that, unless there are only about 250 persons in the establishment, no one is allowed in the establishment after the Police Officers enter. In this case he questions how the first Constable's second count of 360 could possibly be twenty (20) persons more than his first count of 340.

He recollected that, earlier in the year, the first Constable and a female Police Officer attended at his establishment. At that time, they handcuffed a person in the establishment and escorted him off the premises. Simultaneously, the first Constable was counting patrons in the establishment. The Owner/Manager recalled being told by the first Constable that on the earlier occasion he also counted 340 persons. A handwritten letter dated March 26, 2004, and signed July 25, 2004, by a regular patron was entered as collaboration of this event.

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## SUBMISSIONS

### Burden of Proof

The licensee's first submission is that the burden of proof is "beyond a reasonable doubt" and not the civil standard of "balance of probabilities". (*The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 at [12])

### Occupant Load

In the licensee's next submission, the term "occupant load" which is defined in the *Regulation* as "the least number of persons allowed in an establishment" should more properly read "the lesser of the maximum number of persons allowed in an establishment". The licensee further suggests that the calculation of the occupant load under the *Act* and *Regulation* is different than the calculation of the occupant load under the *Fire Services Act* and the British Columbia Fire Code Regulations. It bases this submission on its interpretation of "occupant load" in the *Regulation* and the definition of "establishment" in the *Act*. The licensee maintains that the *Fire Services Act* excludes areas that would be included in the definition of "establishment" in the *Act*. The result, in the licensee's submission, is conflicting definitions of "occupant load."

The licensee's argument on this point was stated to be the same argument made by the licensee in the decision of the General Manager in *Sky Bar Ltd.* (EH03-164 July 21, 2004 at page 12-13). The licensee made further reference to the conclusion rendered in *Sky Bar Ltd.* (supra) and in particular referenced the following quote from page 16 of that decision as follows:

The licensee's interpretation is also plausible, in that the 'least' number could be zero, but it would defeat any purpose to the section and would result in an absurd consequence. I agree with the branch's statement in the *Atlantis* decision, above.

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I find that the definition of occupant load is not flawed and that the licensed capacity and the Occupant Load are 220 persons, including staff, for the second floor Skybar nightclub.

The licensee argues that its position is both plausible and logical and the fact that it could lead to an absurd consequence is not a valid reason to reject the argument. In support it filed a separate memorandum of argument supporting its position that, if there is an ambiguity in a statute, the ambiguity should be resolved in favour of the person (here the licensee) to be negatively impacted by the statute (see: *R v Ulybel Enterprises Limited* [2001] 2 S.C.R. 867, 2001 SCC 56, *Bell Express Vu Limited Partnership v. Rex* [2002] 2 S.C.R. 559, 2002 SCC 42, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1S.C.R. 27).

Since the conclusion of argument in this case, the Supreme Court of British Columbia rendered a decision in *613952 B.C. Ltd. v British Columbia (Liquor Control and Licensing Branch)* 2004 BCSC 1413 ( Atlantis Club ). The Branch Registrar advised the licensee of the Supreme Court decision and proposed a timeline for additional submissions. No additional submissions were received.

## **ANALYSIS AND FINDING ON CONTRAVENTION**

### **Burden of Proof**

This issue of the burden of proof 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'. I find that the burden of proof on the branch is on a 'balance of probabilities'. (See: *New World Entertainment Investments Ltd., doing business as Richard's on Richards's v General Manager, Liquor Control and Licensing Branch*, Madam Justice Gill, April 23, 2004 [12].

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**Section 6(4)**

The first step in determining whether the licensee contravened Regulation 6(4) by permitting overcrowding beyond the person capacity greater than the occupant load is to examine the evidence and make a finding of fact as to how many persons were in the establishment. For the reasons that follow, I accept the counts conducted by the Head Doorperson and the Owner/Manager.

While I accept both Constables' experience on the liquor squad, I am not able to rely on their counts for the following reasons. Turning to the evidence of the first Constable, this was his first time in the establishment and he made an observation that, if a hallway and corridor is full, it indicates to him that an establishment is crowded. On this point, I prefer the evidence of the Liquor Inspector that based on experience with this establishment the service bar area is an area of congestion in these premises. As well, the first Constable could not recall, without reference to the Occurrence Report, whether he used his own mechanical counter to conduct his counts. Nor could he recall whether he counted the people in the smoking area.

The second Constable was familiar with the establishment and knew the capacity was "just over 300". He recalled speaking with the Doorperson who had a mechanical clicker in his hand. He also recalled that the first Constable did not count the persons in either the washrooms or in the smoking area. As well, the second Constable recalled that the first Constable paused during one of his two counts to ask a bartender to stop serving an allegedly intoxicated person. This undermines the reliability of the first Constable's count because of the possibility of movement of patrons and the attendant difficulty of counting patrons more than once. While I find this Constable's evidence reliable, he did not conduct a separate count.

Finally, I agree with the Owner/Manager that it is difficult to understand how the second count by the first Constable could be twenty (20) people more than his first count. In examining this issue I turn first to the documentary evidence. The Licensed Premises Check and the Occurrence Report state that the Police Constables arrived at the Hildon

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at 1:10 A.M. The Licensed Premises Check was issued at 1:23 A.M. I accept that the Police Constables could conduct two counts and write a Licensed Premise Check in thirteen (13) minutes.

The Occurrence Report continues by stating that, while the first Constable was writing the Licensed Premises Check, the second Constable walked “with the Manager and a staff member, who both conducted counts – with clickers. The Manager’s count was 302 and the staff members was 311, both stated that they counted the smoking area and the men’s washroom“. Earlier in the Occurrence Report the first Constable notes that he did not count the patrons in the smoking are but notes it was “very full”.

There is no evidence before me to explain the dramatic difference, within a total span of thirteen (13) minutes, for the increase of twenty (20) patrons between the first and second count. Nor is there any evidence of the number of staff in the establishment or whether the staff was easily identified. As well, there is no explanation for the observation of the second Constable that, while the first Constable is writing the Licensed Premises Check and he is following the Head Doorperson, he notices that the entry area had cleared and it was now possible to see through the crowd. Within approximately the same time span I am presented with evidence of an increase of twenty (20) patrons and evidence the crowd was thinning. For all these reasons, I conclude I cannot rely on the Police Constable’s counts of this establishment.

I am persuaded by the testimony of the Head Doorperson that he believed the second Constable who followed him during his count was also doing a separate count. The Head Doorperson stated it took him five (5) minutes and he expected to compare his count with the count of the second Constable. I conclude that the Head Doorperson would be especially careful believing his count would be compared to that of the Police Constable. For this reason I find the Head Doorpersons count of 311 persons is reliable.

I also accept the Owner/Manager’s statements that he believed the branch and the Police were focusing on overcrowding and his knowledge that, on any given evening, up

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to three (3) units of Police Officers walk through his establishment. I conclude that the Owner/Manager would be particularly vigilant to ensure that his establishment was not overcrowded.

In the end, I accept the evidence of the Head Doorperson and the Owner/Manager that there was, given their respective counts anywhere between 302 and 311 persons in the establishments. Giving the licensee the benefit of the doubt, I accept the Owner/Manager's count of 302 persons.

However, accepting the Owner/Manager's count does not conclude the fact finding process. The licensee argues that the eight (8) individuals exiting the establishment while he was counting should be deducted from his count of 302 persons resulting in a finding that there were only 294 persons in the establishment. I disagree. Individuals leaving an establishment once a count has begun are not customarily deducted from the resulting count. Rather, they are counted as being present in the establishment. I therefore decline to deduct the eight (8) individuals from the count of 302 persons.

The next question is whether the counts by the licensee included staff. The licensee's Liquor Primary License and Occupant Load Certificate is for 302 "persons" which is defined in the Guide for Liquor Licensees in British Columbia to mean the maximum number of persons, including staff, who may be in a licensed premise at one time. The evidence of the Head Doorperson is that his count of 311 persons did not include staff but did include individuals in the smoking area and the washroom. The evidence of the Owner/Manager is that his count did include individuals in the smoking area. There was no evidence whether the count of the Owner/Manager included staff. On a balance of probabilities I concluded that counts conducted by the Owner/Manager and the Doorperson did not include the staff.

There was no direct evidence about the number of staff employed by the licensee on the evening of January 31, 2004. There is evidence that there were six (6) doorpersons on staff as well as four (4) bartenders and a bar pourer for the 42 foot bar area. Adding

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these eleven (11) known staff members to the count of 302 would result in at least a minimum of 313 persons in the establishment.

Even if I am wrong in declining to deduct the eight (8) individuals and accept the licensee's count of 294 persons, adding a minimum of 11 staff members would result in at least a minimum of 305 persons in the establishment.

In summary, I accept the licensee's lowest count of 302 patrons and decline to deduct from that count the number of individuals exiting the premises. I have concluded that the licensee's count did not include staff and have added a minimum of eleven (11) known staff members resulting in a finding of 313 persons in the establishment. Based on these findings of fact, the licensee had in its licensed establishment more persons than the person capacity of 302 as set pursuant to *Regulation 6*.

### **Due Diligence**

In *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 the court set out criteria for a licensee to meet in demonstrating due diligence. Initially the licensee must show that "the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose". In this case, the individual responsible for the licensee's operation is the Owner/Manager.

The next question posed in the *Plaza Cabaret (supra)* case is whether "those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities." The evidence of the Owner/Manager outlines the rationale for the six (6) doorpersons, how the establishment was counted, the length of time he was on the premises and his co-operation with the Liquor Inspector as a result of a Compliance Meeting. I also accept the Owner/Managers statements that he believed the branch and the Police were focusing on overcrowding and his knowledge that, on any given evening, up to three (3) units of Police Officers walk through his establishment. I conclude from this evidence

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that the Owner/Manager would be particularly vigilant to ensure that his establishment was not overcrowded.

However, notwithstanding the Owner/Managers vigilance, the evidence of the licensee falls short of establishing a sufficient degree of due diligence. I note that there was no evidence of regular staff meetings, no policy and training manual, and that none of the video surveillance from the three (3) cameras of the evening in question was provided. The nightly attendance and supervision by the Owner/Manager is not sufficient to demonstrate the defence of due diligence in these circumstances.

I find that the branch has proven that the licensee had in its licensed establishment on January 31, 2004, more persons than the person capacity of 302 as set pursuant to *Regulation 6* and that the licensee has not made out a defence of due diligence.

### **Occupant Load**

As noted earlier, since the licensee's submissions on the issue surrounding the definition of "occupant load", the Supreme Court of British Columbia rendered its decision in *613952 B.C. Ltd. doing business as Atlantis Club*. The licensee was extended the opportunity to file additional submissions and declined.

In the result, I adopt the reasoning of Mr. Justice Barrow in *613952* as follows:

[15] In my view, there is a difficulty in the petitioner's position. It argues that, on a literal meaning of the definition, all licensees would be in breach of the provision if they had anyone in their establishment. According to the petitioner, that renders the provision "incapable of application" presumably because the result would be absurd.

[16] That said, however, the issue remains as to whether the adjudicator was correct in the conclusion he reached. I find that he was. The

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definition is poorly worded and if interpreted literally it would mean what the petitioner suggests, namely, that any licensed premise with either no occupants or only one occupant would be in breach of the occupant load restriction. The alternative construction urged by the respondent and adopted by the adjudicator would be the most favourable to licensees. It would give effect to the obvious intention of the legislature. Finally, it would avoid the absurd result that would follow from the literal interpretation.

As a result, I follow the reasoning in the decision of the General Manager in *Atlantis Club* (EH03-086 & EH03-096, March 3, 2004) upheld on Judicial Review by Mr. Justice Barrow in *613952 B.C. Ltd. v British Columbia (Liquor Control and Licensing Branch)* 2004 BCSC 1413.

## **Finding**

In summary, I find that the branch has established that the licensee overcrowded beyond its licence capacity of 302 persons and that the overcrowding exceeded the licensee's occupant load of 302 persons.

## **PENALTY SUBMISSIONS AND DECISION**

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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
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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 *Regulation*.

Schedule 4 of the *Liquor Control and Licensing Regulation*, 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 (\$7,000.00) dollars for the first contravention. In this case, the branch is recommending the minimum suspension penalty of four (4) days.

The *Regulation* 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 *Regulation*.

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 the public safety and the well being of the community.

### **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, this contravention is a first contravention for the purposes of the Penalty Schedule.

The Notice of Enforcement Action, Appendix B indicated a number of complaints which are not relevant to the issue at hand. In addition, Appendix B notes there was a waiver signed in August 2002 for overcrowding beyond licence capacity. At the time of this contravention the licence capacity of the establishment was 150 patrons. As a result of the waiver, a monetary penalty of \$3,000.00 (three thousand dollars) was imposed.

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As well, a Compliance Meeting mentioned earlier in this decision is noted dealing with issues relating to operating contrary to the public interest.

### **Decision**

The licensee argued strenuously that the alleged contravention should be dismissed. I have declined to accept the licensee's argument and have found that the branch has established that the licensee overcrowded beyond its licence capacity of 302 persons and that the overcrowding exceeded the licensee's occupant load of 302 persons.

I find there are no extenuating circumstances and that the recommended minimum penalty is appropriate.

The range of license suspension penalties for a first contravention is a four (4) to seven (7) day licence suspension. On the evidence and submissions provided to me, I find that the minimum four (4) day suspension penalty is reasonable given the objective of voluntary compliance with the *Liquor Control and Licensing Act and Regulation* in order to safeguard the public safety and the well being of the community.

### **ORDER**

Pursuant to section 20(2) of the *Act*, I order a suspension of the Primary Liquor Licence No. 033214, for a period of four (4) days to commence as of the close of business on Thursday, January 6, 2005 and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the Regulation).

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Since I do not know whether the establishment would normally be open four (4) days per week as of January 6, 2005, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that Primary Liquor Licence No. 033214 be held by the branch or the Vancouver Police Department from the close of business on Thursday, January 6, 2005, until the licensee has demonstrated to the branch's satisfaction that it has been closed for four (4) business days.

*Original signed by*

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Suzan Beattie  
Enforcement Hearing Adjudicator

Date: December 15, 2004

cc: Vancouver Police

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

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Peter Moir, Branch Advocate

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