



**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

Licensee: 633593 B.C. Ltd.
dba Flying Beagle Pub
301 Cook Street
Victoria, BC

Case: EH04-080

APPEARANCES

For the Licensee: James Legh, Counsel and Owner

For the Branch: Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: November 19, 2004

Place of Hearing: Victoria, B.C.

Date of Decision: December 7, 2004

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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Introduction

The Flying Beagle Pub (the "Pub") is located in the Cook Street village, which is within the community known as Fairfield. The Cook Street village is primarily residential with a stretch of commercial along Cook Street which includes a few restaurants and the Flying Beagle Pub. The current licensee began operating in approximately October 2001.

The Pub operates under a Liquor Primary Licence No. 137823, which permits a capacity of 85 patrons - 65 patrons inside the Pub and 20 patrons on the patio. The Occupant Load (OL) certificate from the Victoria Fire Prevention Office permits 113 persons inside, including staff. The licensee has applied for an increase to 125 persons but the application had not been finalized by the time of this hearing. The licence permits operating hours from 11:00 A.M. to 11:00 P.M. seven (7) days a week.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action dated August 27, 2004, the Branch alleged that on June 7, 2004, the licensee contravened section 12(2) of the *Liquor Control and Licensing Act* and section 71(2)(b) of the *Liquor Control and Licensing Regulation* by permitting more patrons in the licensed establishment than the patron capacity set by the general manager, and that the number of persons in the licensed establishment exceeded the occupant load.

The prescribed penalties for this contravention are contained in *Liquor Control and Licensing Regulation*, Schedule 4, item 15. The ranges of penalty for a first contravention are 4 to 7 day licence suspension and \$5,000 to \$7,000 monetary penalty.

The branch's recommended enforcement action is a four (4) day suspension of the liquor licence, commencing on a Monday.

Relevant Statutory Provisions

See Appendix A

Issues

The licensee acceded to the statements of the Police Officer and Liquor Inspector concerning their counts, thereby accepting that the contravention occurred.

The issue is whether the branch's recommended penalty is appropriate. The licensee submitted that no penalty is necessary given the unique circumstances.

Preliminary Application

At the time the Branch Advocate presented the Book of Documents, the Licensee took issue with the admissibility of tabs 13 and 14 which relate to an alleged contravention of service after hours and a compliance meeting. The Licensee maintained that the contravention did not occur, was not proven and that material related to that allegation is irrelevant to these proceedings. The Licensee submitted that it is apparent that the branch included the information for purposes of determining penalty. Since it is an unproven contravention and an unrelated issue, the adjudicator should refuse to admit it as evidence.

I reserved on the issue of admissibility in order to determine the relevancy argument.

It frequently happens that the branch includes unproven contraventions, not as proof of the contravention but as indication that issues have been brought to the licensee's attention, through contravention notices or compliance meetings. Such evidence can indicate that the branch had been communicating with the licensee in an attempt to achieve voluntary compliance and could have an effect on the adjudicator's assessment of the licensee's efforts at voluntary compliance and the licensee's submissions on due diligence.

Having completed the hearing, I am of the view that the alleged contravention is not relevant to this proceeding. Although the evidence is indicative that the branch has had discussions with the Licensee, it is not relevant to the issues of overcrowding, to the assessment of voluntary compliance and due diligence, or to the penalty for overcrowding. I grant the Licensee's motion that tabs 13 and 14 not form part of Exhibit No. 1.

Exhibits

Exhibit No. 1 Branch's Book of Documents, tabs 1 -12, 15

Evidence

The branch's witness was the Liquor Inspector. The Licensee's witness was the General Manager/owner who was working as a bartender on this occasion.

Branch's Evidence

The Liquor Inspector attended the Pub on June 7, 2004, at approximately 6:30 in the evening. This was the day of the seventh game of the National Hockey League playoffs. The sixth game had been played on the previous Saturday. The branch had received a complaint about the Pub from that occasion and that resulted in the Regional Manager assigning the Liquor Inspector to do an

inspection on June 7, 2004. The Regional Manager had asked the Inspector to work outside his usual shift to inspect the Pub. This was the only licensed premises the he inspected that evening.

The Inspector testified that he did not communicate with the Licensee about the complaint in advance of the inspection because he wanted to see how the Pub normally operated. Further, he stated that the branch expects all licensees to comply with the terms and conditions of their licences at all times and, therefore, there would have been no reason to contact the Licensee in advance.

The Inspector testified that during his fourteen (14) years as a Liquor Inspector in Victoria, he has attended this Pub approximately 100 times. He viewed the Pub from outside and testified that the doors were open, people were milling about inside and outside and some people were outside smoking. When he entered, he noted that there was no staff on door control and that the inside was heavily congested and overcrowded. The atmosphere was electric with excitement, due to the hockey game. Patrons were jammed together back to the walls and everyone was watching the game. There are seven (7) television sets in the Pub. Liquor was being served from the bar and by servers moving around the room.

The Inspector conducted two counts of 188 inside and 10 on the patio, and 194 inside and 14 on the patio. He testified that the staff members would have been included in his counts. The Inspector went outside and telephoned for Victoria City Police assistance. A uniformed Police Officer arrived, was briefed by the Inspector, and went inside and conducted a count of 161 inside and 21 on the patio. The Inspector testified that by the time of the Officer's count, the second period had ended and some patrons had left.

The Inspector testified that liquor service continued during the time he was at the Pub, he did not see any staff attempting to remove patrons, and he did not hear or see any attempts by the Licensee to reduce or stop liquor service.

The Inspector testified that he did not speak with any staff about the situation because he felt the Licensee needed every resource to keep the premises safe. He said he did not want to distract the Licensee from dealing with patrons. Additionally, he said in his experience when the branch has attempted to correct overcrowding in similar circumstances, patrons have wanted to get involved in the discussion and, in his view, this can lead to problems. Patrons would not take kindly to being asked to leave as the game was nearing its end. He said that sporting events that are so electric always have the potential to be problematic. He felt it was in the interest of public safety not to intervene and to let the occasion run its course.

Neither the Inspector nor the Officer spoke to any staff that night. The Inspector hand delivered a Contravention Notice on June 9, 2004, after he had confirmed the Occupant Load capacity. The Inspector testified that he recommended a four (4) day suspension penalty because of the magnitude of the overcrowding and the neighbourhood concerns about noise, and he noted it is the minimum of the range.

The Inspector testified that there has been an historical objection to the Pub from a local committee called the Friends of Cook Street Village. Since the current Licensees took over, there have not been any problems that he was aware of. He described the current Licensee as cooperative and pleasant to deal with and said there have been no complaints since this incident. He acknowledged that the Licensee's actions and operations since this incident would lead him to agree that there are no concerns for future compliance. He also indicated that when liquor inspectors see a contravention, they do not have discretion whether to

issue a Contravention Notice; they must issue the CN and must make a recommendation on penalty.

Licensee's Evidence

The General Manager (GM) testified that the Licensee is a good citizen in the neighbourhood, providing a community meeting place plus participating in community events, donating gift certificates, sponsoring sports events, and investing thousands of dollars back into the community. The Licensee employs 29 staff.

This NHL series marked the first time in ten (10) years that Canada had a team in the Stanley Cup playoffs. The GM testified that he knew there might be a large crowd for the final game, although Mondays are traditionally one of the slowest days. He did not know what to expect but had the staff schedule out three (3) weeks in advance, anticipating that the series might go to a seventh game and anticipating it could be busy. He had arranged for eleven (11) staff to work, which is the average he employs for a busy Friday night. He did not have any staff assigned to door control. He testified that staff see who is coming in and, generally, the Licensee trusts the clientele.

The GM stated that he was the person ultimately responsible for ensuring that the Pub was not over capacity. He testified that the licence capacity was 85 patrons and the Occupant Load was 113 and that the Occupant Load is the capacity that prevails.

He testified that the evening started slowly but by the time the second period was half over, he knew that the Pub was over capacity. By then, people had stopped coming in so there was no issue of putting someone on the door. From that point, the numbers started to drop. He acknowledged that the Licensee's staff did not do a count, that there were no attempts to reduce the numbers of patrons,

and that they continued to serve alcohol. He testified that he asked the servers if they were still able to get through the aisles and stated that the employees do not mind working in those circumstances. In his view, the Licensee was able to adequately serve the patrons.

The GM testified that he would not have been concerned about asking patrons to leave. He said the staff know many of the patrons and he would trust the patrons to be well behaved. However, he did not even think of asking patrons to leave because of the importance of the game. Once the game was over, within fifteen to twenty minutes, the Pub was down to being about two-thirds full. The GM testified that he went outside to ensure there were no glasses or bottles lying around and to keep the impact on the neighbourhood down.

After receiving the CN, the GM talked with some other licensees in Victoria to see what their capacities were like for the seventh game and whether they had received enforcement action proceedings from the branch. He testified that some licensees admitted to having been overcrowded but would not testify for obvious reasons. No other licensee reported having liquor inspectors that evening.

Submissions

Although acknowledging they were overcapacity, the Licensee submitted that the importance of having a Canadian team in the Stanley Cup playoffs for the first time in ten (10) years makes this a unique situation, deserving of special consideration.

The Licensee emphasized that it has a good reputation as testified to by the Liquor Inspector. Because the Inspector and Police did not speak with the staff about their counts, the staff did not have an opportunity to check the numbers and, therefore, the Licensee was deprived of the ability to present their own

evidence on how many patrons were present. The branch has policies but the Inspector did not follow them to speak with staff or in completing the subsequent documentation.

The Licensee stressed that the purpose of enforcement action is to achieve voluntary compliance, not to mete out punishment. The branch did not contact the Licensee to indicate there had been a prior concern over the sixth game. If the Licensee had been notified of the concern, the Licensee could have taken steps to ensure that it did not occur again. That is the goal of voluntary compliance.

The Licensee noted that the evidence from the branch and the Licensee supports finding that the Licensee has responded to the concerns and that there will not be compliance issues in the future. The Licensee has not demonstrated any pattern of non-compliance. If the objectives are to protect the public interest, ensure future compliance, and ensure that employees, patrons and the community recognize the seriousness of the contraventions, those have all been satisfied.

The Licensee submitted that the fact that neither the Liquor Inspector nor Police Officer decided to take corrective action indicates that the situation did not constitute a threat to public safety. Further, given the magnitude of the Stanley Cup playoff, it is likely that there were breaches in other premises in the City, and throughout the Province, but the branch did not take action against any other Licensee in Victoria.

In summary, the Licensee submitted that there are no prior contraventions or past warnings for overcrowding, this was a unique event, and there is no reasonable concern for any future re-occurrence. Further, the minimum penalties are out of proportion with the circumstances of this case and would

amount to an unfair and disproportionate penalty to the Licensee and its employees.

The Licensee submitted that the circumstances warrant no penalty being imposed and referred to a number of past cases touching on the safety issue and circumstances in which no penalty was imposed. However, in the event I impose a suspension penalty, which is preferable to a monetary penalty, the Licensee requested that it commence on January 3, 2005.

Analysis and Decision

The Licensee admitted that there had been a contravention of overcrowding beyond the occupant load, but submitted mitigating circumstances warrant no penalty being issued.

Compliance History

There is no record of similar prior contraventions, offences or enforcement actions ("compliance history") for this licensee or this establishment within the year preceding this incident. Therefore, this contravention is considered a first contravention for the purposes of the Penalty Schedule.

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
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- 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 *Regulation*.

The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. The branch considers 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 have taken into consideration that these are the first proven contraventions since this establishment opened and that the Liquor Inspector spoke well of the Licensee's overall operation, cooperation and current compliance. There have been occasions when the branch has not imposed a penalty because of extenuating circumstances. I find that the Licensee has not substantiated that this event amounts to extenuating circumstances warranting no penalty, for the following reasons.

I note that the General Manager/owner was not aware that the licensed capacity of 85 patrons is the governing capacity. This indicates a serious lack of attention to, and knowledge of, the liquor regulations. The same General Manger/owner admitted that he was aware that the night could be busy but did not think it necessary to have door control. His reason for not having door control - that the staff know and trust the clientele – again indicates a lack of knowledge of the liquor regulations. That is, it is necessary for Licensees to control the number of patrons being admitted to avoid overcrowding.

The General Manager/owner acknowledged that he was aware that the Pub was overcrowded, at some point during the second period. He did not take steps to

reduce the numbers or put staff on door control. His concern was whether the servers could move through aisles. In my view, this demonstrates a blatant disregard for the capacity limits set by both the branch and municipality and a corresponding disregard for the safety of patrons and staff.

The Licensee says that safety was not compromised as demonstrated by the fact that neither enforcement officer took action. I do not accept this view of the situation. I accept the Liquor Inspector's evidence that he was concerned about safety to the point that he did not want to distract the Licensee because he felt the Licensee needed every resource to keep the premises safe.

One of the cases referred to by the Licensee, *600428 B.C. Ltd. dba Tonic Bar v. the General Manager, Liquor Control and Licensing Branch*, 2004 B.C.S.C. 1422, involved allegations of overcrowding and the licensee's submission that safety was not compromised. The licensee asked the Supreme Court to overturn the branch's penalty as being unreasonable. Mr. Justice Hutchison upheld the branch's decision noting, at paragraph [25], that "public safety is not the only issue in such an event as this, but as well, obtaining voluntary compliance is much at issue." The Court had considered the following passages from pages 24 and 26 of the branch's decision:

It is trite to say, but I find that it is not the branch's function to second guess the OL [occupant load] capacities set by various municipalities. That is municipal responsibility. A licensee has choices it can make within the parameters of the municipal Bylaws. The Provincial Legislation has defined contraventions and the range of penalty for each contravention. Clearly, municipalities impose requirements based on their standards for safety, etc. Although the licensee contends that the facts of this case do not give rise to any safety concerns, I find that the fact of overcrowding does give rise to safety concerns. Safety is one of the primary purposes of imposing capacity requirements. The branch's stated policy is directed to those overall, primary concerns and I find it is a legitimate statement.

I do not accept the licensee's contention, to the limited extent that it was argued, that the expert evidence demonstrates that there are no safety issues and, therefore, the branch should not impose penalties. The branch will not look behind the municipal OLs to determine whether they are overly strict. In my view, comparing one municipality with another is not of assistance. There are many factors for a municipality to consider including density within the municipal borders, so it is not helpful to compare them as the licensee suggests. As noted at the hearing, the licensee made a decision to open a licensed establishment within the City of Vancouver borders and must comply with the City requirements. The *Liquor Control and Licensing Act* recognizes municipal safety requirements and provides a penalty schedule for contraventions of the OL capacities.

I reiterate my views expressed in that case that the branch will not second guess the OL capacities, that overcrowding gives rise to safety concerns, and that the Act and Regulation recognize municipal safety requirements and provide a penalty schedule for contraventions of the OL capacities. The branch has a duty to ensure that licensees comply with the statutory requirements.

Although the Liquor Inspector agreed that future voluntary compliance does not appear to be an issue now, I am of the view that is not sufficient reason to support not imposing a penalty. This Licensee's lack of knowledge of the liquor regulation and lack of action to reduce numbers in the face of obvious overcrowding, demonstrates lack of due diligence and disregard. This has to be recognized in a penalty to bring home to the Licensee the importance of compliance. Additionally, it is important to the branch's overall duty of ensuring compliance that the industry appreciates that the branch will mete penalties according to the severity of the circumstances.

The Licensee submitted that if the branch had communicated the complaint from the previous Saturday night, the contravention would not have occurred. Further, the Licensee noted that the Liquor Inspector did not follow branch policy by not speaking with the staff when the contravention was occurring and by not forwarding documents within the time frames set out in the policy manual.

I have considered the failure to notify and the possible prejudice that arises to the licensee. In a previous case, *Funky Planet Cabaret*, May 4, 2001, I declined to issue a penalty in circumstances of the Licensee having acted on a mistaken belief that operating hours had been extended. In part, I was influenced by the fact that the branch had notice, through a competitor complaint, that the Licensee was intending to operate later than the licence permitted and the branch did not contact the Licensee in advance. I accepted the Licensee's evidence that they were trying to do everything legally although I found that their mistake was founded on insufficient inquiry about the legal situation.

That case is much different from this one. Here, there was no issue of the Licensee being mistaken about the state of the law, or being affected by pending legislation, new legislation or alteration of the terms and conditions of the liquor licence. The Licensee suggests that it would have operated differently if it had known of the neighbour's complaint. In my view, that is not an answer to the contravention. The Licensee's submission amounts to – let us know you are coming to inspect and we will act within the terms and conditions of our licence. I find the Inspector's evidence was reasonable, that he wanted to see how the Pub operated normally. I find that the Inspector did not owe a duty to the Licensee to communicate the complaint or give advance notice of the inspection.

Concerning the policy issues, I have considered the Licensee's submissions and find no compelling argument that the Licensee was prejudiced by the Inspector's actions. The Licensee knew the Pub was overcrowded and could have directed that a count be conducted to verify that or to make a notation of the numbers. That ability was not affected by the Liquor Inspector's decision not to communicate his counts. The Licensee did not strenuously advance argument that it was prejudiced by the Inspector's subsequent conduct and I find that the submissions do not indicate prejudice to the Licensee.

Although my comments may sound overly harsh, I acknowledge that the Licensee has a reasonably good reputation which is probably founded on responsible due diligence. As I stated above, the Liquor Inspector appreciates the efforts made by the Licensee to be a good licensee and a good neighbour. Nonetheless, a serious contravention occurred which cannot be ignored.

I find that the recommended minimum penalty, a four (4) day licence suspension, is appropriate to this case. I accept the Licensee's request that the suspension commence on January 3, 2005.

Order

Pursuant to section 20(2) of the *Act*, I order a suspension of the liquor licence No. 137823, issued to the Licensee 633593 B.C. Ltd., for a period of four (4) days to commence as of the close of business on Sunday January 2, 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 (s. 54(1) of the *Regulation*).

Since I do not know whether the Flying Beagle Pub would normally be open seven (7) days per week as of January 2005, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the Primary Liquor Licence No. 137823 for the Flying Beagle Pub be held by the branch or the Victoria Police Department from the close of business on Sunday, January 2, 2005, until the licensee has demonstrated to the branch's satisfaction that the Flying Beagle Pub has been closed for four (4) business days.

Original signed by

DATE: December 7, 2004

M. G. Taylor

Enforcement Hearing Adjudicator

cc: Victoria Police Department

Liquor Control and Licensing Branch, Head Office
Attention: Gary Barker, Regional Manager

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

APPENDIX A***Liquor Control and Licensing Act [RSBC 1996] CHAPTER 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,
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- (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.

Liquor Control and Licensing Regulation B.C. Reg. 244/2002

Licence categories, terms and conditions and endorsements

71 (1) A category of licence referred to in Column A of the following table and held by a licensee immediately before December 2, 2002

- (a) is converted on December 2, 2002 to the category of licence set out opposite that licence in Column B, and
- (b) subject to subsection (2), is on December 2, 2002 subject to the terms and conditions of the category of licence set out opposite in Column B:

Column A	Column B
A licence, other than for a club	Liquor primary licence
C, D, E, F or I licence	Liquor primary licence
A licence for a club	Liquor primary club licence
B licence	Food primary licence
B licence with a designated food optional area	Food primary licence with a lounge endorsement
Winery licence	Winery licence
Winery licence with an endorsement for a consumption area	Winery licence with a winery lounge endorsement

Winery licence with a picnicking endorsement	Winery licence with a picnicking endorsement
G or H licence	Licensee retail store licence
Agent's licence	Agent's licence
Distiller's licence	Distiller's licence
Brewer's licence	Brewer's licence
U-Brew licence	U-Brew licence
U-Vin licence	U-Vin licence
Private special occasion licence	Private special occasion licence
Family private special occasion licence	Private special occasion licence
Public special occasion licence	Public special occasion licence

(2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:

(a) the terms and conditions imposed on the licence by the general manager under section 12 and 12.1 of the Act in effect immediately before December 2, 2002;

(b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002;

(c) endorsements on the licence in effect immediately before December 2, 2002, except an endorsement on a winery licence for a consumption area.
