



**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:	The Roxy Cabaret Ltd. dba Roxy Cabaret 932 Granville Street Vancouver, BC
Case Number:	EH04-031
Advocates for the Licensee	Dennis Coates, Q.C. Ian G. Waddell Kirsten R. Tonge
Advocate for the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Suzan Beattie
Date of Hearing	October 5, 6, & 7, 2004 November 26, 2004
Place of Hearing	Vancouver, BC
Date of Decision	May 5, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, The Roxy Cabaret Ltd. doing business as Roxy Cabaret is located at 932 Granville Street, Vancouver, BC. It holds Liquor Primary Licence No 016089 with hours of operation in which liquor may be sold, purchased and consumed being 7:00 p.m. to 2:00 a.m. Monday to Saturday and 7:00 p.m. to 12:00 Midnight on Sunday.

The licence permits 275 patrons and the occupant load is 300 persons.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Liquor Control and Licensing Branch alleges that the licensee contravened the following three sections of the *Liquor Control and Licensing Act and Regulation* on January 2, 2004:

1. Section 43(1) of the *Liquor Control and Licensing Act* by selling liquor to an intoxicated person contrary to the *Act*.
2. Section 42(3) of the *Liquor Control and Licensing Regulation* by the licensee or employee consuming liquor while working in the licensed establishment, contrary to the *Regulation*.
3. Section 12(2) of the *Liquor Control and Licensing Act* and Section 71(2)(b) of the *Liquor Control and Licensing Regulation* by overcrowding beyond patron capacity more than occupant load, contrary to the *Act* and *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 Section 43(1) the penalty range is a four (4) to seven (7) day licence suspension or five thousand (\$5,000) to seven thousand (\$7,000) dollar monetary penalty for the first

contravention. In this case, the branch is recommending the maximum licence suspension of seven (7) days.

For the contravention of Section 42(3), the penalty range is a one (1) to three (3) day licence suspension or one thousand (\$1,000) to three thousand (\$3,000) dollar monetary penalty for the first contravention. In this case, the branch is recommending the maximum licence suspension of three (3) days.

Finally, the contravention of Section 12(2) and Section 71(2)(b) is treated by the branch as a second contravention. The penalty range is a ten (10) to fourteen (14) day licence suspension. In this case, the branch is recommending the minimum licence suspension for a second contravention of ten (10) days.

In summary, the branch is recommending a total licence suspension of twenty (20) days for the three alleged contraventions.

The relevant statutory provisions of the *Liquor Control and Licensing Act and Regulation* state:

43 Drunkenness

- (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

42 Consumption of liquor in licensed establishments

- (3) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

12 Licences

- (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
 - (b) that vary the terms and conditions to which the licence is subject under the regulations, or
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(c) that are in addition to those referred to in paragraph (a)

71(2) (b) Licence categories, terms and conditions and endorsements

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

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

ISSUES

1. Whether the burden of proof is beyond a reasonable doubt or on a balance of probabilities.
2. Whether the licensee permitted the selling of liquor to intoxicated persons contrary to Section 43(1) of the *Liquor Control and Licensing Act*.
3. Whether the licensee contravened Section 42(3) of the *Liquor Control and Licensing Regulation* by a licensee or employee consuming liquor in premises.
4. Whether 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 overcrowding beyond patron capacity less than or equal to occupant load.
 - Whether the definition of occupant load is flawed.
 - Whether the occupant load certificate is valid.
 - Whether the contravention of overcrowding beyond patron capacity less than or equal to occupant load exists in law.
5. Whether the contravention of January 2, 2004, of overcrowding beyond patron capacity less than or equal to occupant load is a second contravention.
6. Whether there is a defence of due diligence.
7. Whether the recommended penalties are appropriate in the circumstances?

Witnesses

The branch called five witnesses: Vancouver police constable 1, Vancouver police constable 2, a captain of the Vancouver Fire Prevention Office, a Vancouver police

sergeant and a liquor inspector. The witnesses for the licensee were an Applied Science Technologist, an assistant manager, the interim manager and its president.

EXHIBITS

The branch and the licensee presented the following exhibits:

Exhibit 1

Book of Documents

- Tab 1 Notice of Enforcement Action letter
 - Tab 2 Enforcement Action Recommended Report
 - Tab 3 Contravention Notices B001284; B200003 and B001128
 - Tab 4 Police Licence Premise Check (LPC) No.125801 and 125802
 - Tab 5 Handwritten notes of Inspector Donna Lister
 - Tab 6 Vancouver Police Department (VPD) GO Report
 - Tab 7 VPD GO Report
 - Tab 8 VPD GO Report prepared by Sgt. Robinson
 - Tab 9 Road Boss Notes prepared by Sgt. Robinson
 - Tab 10 Liquor Licence No. 016089
 - Tab 11 Pages 1, 3, 12, 13, 14 from the Liquor Primary Licence Terms and Conditions - A Guide for Liquor Licensees in B.C.
 - Tab 12 Red line floor plan for establishment
 - Tab 13 Occupant Load Certificate & City of Vancouver Properties Search
 - Tab 14 Application for a Licence or Transfer of a Licence
 - Tab 15 Interview Sheet
 - Tab 16 Letter from L. Boland to Roxy Cabaret
 - Tab 17 Decision Letter dated January 31,1992
 - Tab 18 Licence Premise Check dated November 11,1992
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Exhibit 1**Book of Documents**

- Tab 19 Suspension Notice dated December 31,1992
- Tab 20 Decision letter dated February 10, 1993
- Tab 21 Warning Letter dated May 20, 1993
- Tab 22 Suspension Notice dated August 5,1993
- Tab 23 Warning Letter dated March 8,1994
- Tab 24 Warning Letter dated January 27, 1997
- Tab 25 Contravention Notice A000824
- Tab 26 Contravention Notice A002519 and Licence Premise Check A072326
- Tab 27 Contravention Notice A000419; A000845
- Tab 28 Waiver Notice signed August 2, 2002 re: CN A000419
- Tab 29 Contravention Notice A013766
- Tab 30 Compliance Meeting form C002036
- Tab 31 Contravention Notice A014086
- Tab 32 Contravention Notice B004484
- Tab 33 Contravention Notice B004534
- Tab 34 Contravention Notice B004786; B003995; B004000
- Tab 35 Decision letter dated June 22, 2004
- Tab 36 Decision letter dated March 29, 2004

Exhibit 2

Occupant Load Drawings:

- (a) BCBC 1998 and BCFC 1998 (outside Vancouver)
- (b) VBBL 1999 and VFBL 2000 (current calculations)

Exhibit 3

Door Report January 2, 2004

Exhibit 4Enforcement Action Recommended – B001284 42(3)

Exhibit 1	Book of Documents
Exhibit 5	Enforcement Action Recommended – B001284 – 12(2) & 71(2)(b)
Exhibit 6	Enforcement Action Recommended – B001284 – 43(1)
Exhibit 7	Georgia Straight Letter – Mike Usinger, Music Editor
Exhibit 8	Downtown Bulletin – June 1999
Exhibit 9	Employee letters
Exhibit 10	Employee Time Sheet – January 2, 2004
Exhibit 11	Records Access Request

EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS

Branch

Sergeant

The sergeant involved as the supervisor responsible for the undercover operations taking place on January 2, 2004, testified that the undercover initiative was arrived at when other attempts to change the behaviour of the owners and operators of various licensed establishments failed. The plan involved the undercover operators telephoning in their observations from within the establishments throughout the evening. The Sergeant recorded their observations and later provided his notes to the undercover operators. More than one undercover operation was taking place on January 2, 2004.

Two liquor inspectors were involved in the briefing for the undercover operation. They advised the undercover operators what contraventions to look for, the layout of the premises and the patron capacity and occupant load capacities of the establishments. The liquor inspectors were requested to inspect the premises but specifically advised not to issue any Contravention Notices to the establishments.

The licensed premises check for the Roxy was prepared by constable 1 and issued on Wednesday, January 7, 2004. The sergeant telephoned the president of the establishments' operating company and met him at the establishment. They walked down the street to the Community Police Office along with another senior member of the management team and the then general manager. At one point the then general manager was asked to leave the meeting.

The sergeant explained that the Vancouver Police Department does not carry out undercover operations in licensed premises on a regular basis. Such operations are expensive, time consuming and take officers away from their other duties. The decision to do an undercover operation on January 2, 2004 arose out of a number of incidents.

The sergeant testified about the following incidents and time line leading up to the undercover operations of January 2, 2004.

1. June/July 2002 – The sergeant recalled a discussion with a senior staff member of the licensee. The sergeant took the position in the discussion that licensee's who served liquor had an obligation not to just close the door at 2:30 a.m. and put their patrons on the street. The sergeant recalls the staff member stating that once the establishment closed at 2:30 a.m., the exiting patrons are the responsibility of the police.
 2. Summer 2002 – The sergeant recalled speaking at a Barwatch meeting about possible undercover operations regarding overcrowding, over service, staff consuming and outside control of patrons. The sergeant stated he has spoken at 3 or 4 Barwatch meetings about the same topic.
 3. Summer /Fall 2002 - this incident involved a male in his mid 40's in a tuxedo exiting the establishment with a blonde woman in a white dress. The blonde woman was observed to be so intoxicated she could not walk but rather dragged her feet trailing behind her. The pair got into a limousine and left. The sergeant was parked across the street in a police zone. He asked the doorman why such an intoxicated female was allowed to stay in the establishment. The doorman said the male was a friend of the owners.
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4. Summer/Fall 2002 – another incident witnessed by the sergeant was a young male patron exiting the establishment, leaning against the wall, vomiting and then sliding down onto the ground. The sergeant called an ambulance and, being unable to find friends of the young male, sent him to jail to sober up because he felt he could not look after himself.
 5. Summer/Fall 2002 – in another incident, the sergeant recalled an altercation on the street outside the establishment. A female patron exiting the establishment was verbally abusive. Ultimately it took a police wagon, an ambulance and uniform officers to resolve the issue as everyone was intoxicated.
 6. Summer/Fall 2002 – The sergeant recalled that he was so frustrated at his inability to address issues surrounding licensed establishments that he entered the licensee's establishment at their opening and asked to speak to the then general manager. The sergeant explained that he held an impromptu staff meeting and said that the establishment had to make changes in how it was run so there was no overcrowding, no over service and that they maintained order and control throughout the evening. The then general manager advised that the staff of the establishment had a meeting earlier that week. The sergeant stated that, if licensees did not listen, another tool that could be used to secure compliance was a plain clothes undercover operation.
 7. Summer/Fall 2002 – on a Friday evening about 1:00 a.m. the sergeant stated he noticed no change in the style of operating the establishment so he entered the establishment while on duty and in uniform. He recalled the establishment was too crowded for him to walk from front to back so he asked to speak to the then general manager. He recalled asking the then general manager what it was he did not understand about being overcrowded and still having a line up outside and still letting patrons into the establishment. The response of the then general manager was that he was "doing his best". The sergeant returned the following evening about the same time and asked the then general manager to walk with him down the street to the Community Police Office. The sergeant advised him that the
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establishment would be subject to an undercover operation if no changes were made to the operations.

8. November 2002 – at this time a Crime Suppression Team was selected and a mandate written. However, other police priorities became a focus and nothing further was done.
9. Summer/Fall 2003 – there was a change of commanding officers and the Crime Suppression Team received the approval for the January 2, 2004, operation.

The sergeant admitted that the issues in the downtown entertainment district occur mainly at closing when a number of intoxicated patrons are on the street. The sergeant felt it was fair to say there are not enough police resources.

The sergeant explained that the liquor inspectors were sent into the establishment for evidentiary purposes. The intent was to demonstrate that the establishment had no regard for the directions of a liquor inspector when asked by them to “get the numbers down”. He admitted he had been in the licensee’s establishment approximately 24 times as an officer and had not issued a licensed premise check. The sergeant was aware that, as a result of the undercover operation, the president of the establishment fired the then general manager.

Vancouver Police Constable 1

Constable 1 testified that he was a member of the Crime Suppression Team that conducted an undercover operation in this licenses’ establishment (as well as others) on the evening of Friday, January 2, 2004. He attended a briefing at the police station along with constable 2 and other constables, the sergeant who operated the mobile unit and two liquor inspectors. Constable 1 was a doorman for a local establishment for a few years prior to becoming a police officer. With respect to the alleged contraventions, constable 1 testified as follows:

Selling liquor to intoxicated persons

Constable 1 was in the establishment's wash room at approximately 10:50 p.m. when he first observed a male patron vomiting. No staff member was in the washroom at the time. Constable 1 observed the male patron kneeling in front of the toilet bowl, then using the toilet bowl and the door stall to help himself stand. He was unsteady on his feet and bounced off the stall door. Constable 1 followed the male patron out into the bar area. He observed the male patron was unsteady on his feet, weaving back and forth and generally stumbling. The male patron met his friends who handed him two bottles of beer. Constable 1 observed the male patron drink the two beers. He was never close enough to the male patron to smell his breath or observe his eyes. He observed the male patron finish both bottles of beer within a couple of minutes.

Between 11:20 p.m. and 11:55 p.m. constable 1 again observed the male patron as he approached a beer tub and ordered two bottles of Miller Gin Dry. He was served by a white male staff member who had a shaved head and was wearing a grey nylon vest with a white long sleeve T-shirt with a black strip down the arm and faded jeans (staff 1). The male patron's unsteadiness on his feet appeared to increase; he swayed back and forth and bumped into people as he approached the beer tub. He had difficulty removing his wallet to pay for the beer and difficulty removing money from his wallet. He appeared to constable 1 to be confused when he received his change and just stuffed the money into his pants pocket. Constable 1 observed the male patron begin drinking one bottle immediately as he left the beer tub. The beer tub is approximately three meters from the front door and cover charge area.

At approximately 11:55 p.m., constable 1 observed a fight involving a friend of the male patron. The fight was immediately dealt with by the bouncers who separated everyone involved and ultimately removed the male patron's friend from the bar. Constable 1 testified that he was 8 – 12 feet away and saw the male patron talking directly to one of the bouncers. The male patron was swaying back and forth, and appeared more dishevelled with his jacket pulled over to one side. The bouncer did not appear to the

constable to be concerned about the male patron's level of intoxication. The male patron remained on the premises while his friend was removed.

Throughout the time of his observations, constable 1 was not close enough to the male patron to observe his eyes or smell his breath.

Employees consuming liquor in the premises

Constable 1 testified that he was seated at the bar located at the front end of the establishment by the pool table. Two staff were working the bar throughout the evening. Staff 2 wore a name tag of "Willie 522" and was described as a white male about 30 years old with black ear length hair and a mole on the right side of his neck. He wore a black short sleeved shirt with black square framed glasses and black pants. Staff 3 was not wearing a name tag but wore an "I am Canadian" hockey jersey. He was a white male with short blond spiked hair and approximately 30 years old. The constable also observed a bar porter ("porter") who was a white male about 25 years old with a goatee, one hoop earring in each ear and wearing a long sleeved black "Roxy" T-shirt, black "Roxy" toque and knee length shorts.

Constable 1 observed two incidents of employees' allegedly consuming liquor in the premises.

Incident 1

At approximately 10:55 p.m., staff 2 and staff 3 were approached by two male patrons who ordered drinks. Constable 1 watched as staff 3 poured a quantity of Red Bull into four large highball glasses and then poured four shot glasses of Jagermeister. The shot glasses of Jagermeister were balanced atop each of the highball glass and then knocked into the highball glasses like dominoes. The two male patrons, along with staff 2 and staff 3, appeared to randomly select glasses and drank them immediately.

Incident 2

At approximately 11:20 p.m. constable 1 observed staff 2 and staff 3 pour a line of approximately eight drinks on the bar while two patrons stood in front. The patrons passed staff 2, staff 3 as well as the porter each a drink. The patrons appeared to randomly select the drinks. All three staff drank their drinks immediately. There was one drink left and staff 2 called the porter back and gave him the extra drink. Constable 1 observed the porter drink the last glass.

Constable 1 was not able to see what was poured into these eight drinks. He approached the bar and, because of the noise, he twice asked staff 3 what was in the drinks. Although it was difficult to hear, he believed the bartender told him the drinks contained Peach Snaps and Raspberry Sour, both of which are liqueurs, as well as some 7-Up.

Overcrowding beyond patron capacity more than occupant load

At approximately 12:30 a.m. constable 1 observed the liquor inspectors arrive in the establishment. Constable 1 did not conduct his count until approximately 1:40 a.m. He did so without a mechanical clicker. However, he testified that as a police officer he has done hundreds of counts of establishments. As well, he was a doorman at a local bar for two years before joining the police force. He stated that, by 12:10 a.m. the bar was congested, the dance floor was crowded and the area between the pony wall and bar was almost impossible to pass through. As he was moving through the bar area he was jostled about by patrons and had to step aside and allow other to pass with the flow of traffic. He did not observe any door staff attempting to take proactive steps to clear the area.

At 1:40 a.m. constable 1 counted 360 patrons not including the identifiable staff, waitresses or doormen. It took him approximately 10 – 12 minutes to complete his count. He divided the bar into sections and moved, section by section, around the pool table, up and along the bar and pony wall to the front area and counted the patrons

seated along the bench on the wall and at the tables seated in the area, the dance floor, the seating around the washrooms and back in to the rear of the establishment.

Constable 1 agreed that, during his routine inspections of this establishment, he has never issued a Licensed Premises Check and had not noticed any issues with this establishment. He also agreed that his count was subjective and that he did his best. He agreed that counting is not an accurate science and that individuals counting often come up with different counts due to people moving around and possibly being counted twice or not counted at all. As well, the Roxy is a difficult establishment to count as it has many areas and patrons move between the areas and the dance floor.

Constable 2

Constable 2 worked within the hotel industry prior to becoming a police officer. He has training in standard field sobriety testing and in using roadside devices for determining impairment. With respect to the alleged contraventions, constable 2 testified as follows:

Selling liquor to intoxicated persons

Constable 2 testified that at approximately 11:30 p.m. he also noticed the male patron previously identified by constable 1. He saw the male patron speaking with a bouncer after the fight mentioned earlier by constable 1 had been broken up. One patron had been ejected from the establishment and he observed the male patron continuing to consume liquor. Constable 2 stated that the male had a glazed look on his face, was dishevelled in appearance and appeared unsteady on his feet. He was close enough to reach out and touch the male patron. He did see the male patron consuming liquor but not being served liquor by a staff member.

At approximately 1:00 a.m., constable 2 observed a heavy set female wearing a blue top with friends at a table in the south west corner. This female patron appeared extremely intoxicated and was resting her head on a friends shoulder and appeared to be falling asleep at the table. She had droopy eyes and at one point lay down on the

floor by the pool table. She eventually went to the bar near the pool table and ordered a beer. While ordering she stood and held onto the bar for balance and fumbled with her money. While waiting for her change she drank a good portion of the beer and then walked unsteadily back to her table. Constable 2 said she was served by the bartender previously identified in the hearing as staff 2.

During the 15 minutes constable 2 observed this female patron he did not see any staff members approach her. When he left the establishment at approximately 1:45 a.m. she was still inside the establishment.

Constable 2 admitted he did not know how much the female patron had to drink. Nor did he know how long the bartender had observed her. He also agreed that other medical conditions would demonstrate symptoms similar to intoxication such as diabetes, tiredness and balance problems. He further agreed that there were means to have more scientific evidence than merely his observation.

Employees consuming liquor in the premises

Constable 2 witnessed a number of incidents in which it appeared staff members were drinking.

Incident 1

Constable 2 was sitting alongside constable 1 at the bar and only approximately 10 feet from the staff 2 and staff 3 when he observed the two staff members consume the mixture of Jagermeister and Red Bull along with the two male patrons.

Incident 3

Constable 2 also saw staff 3 prepare drinks of Southern Comfort in shot glasses lined up on the counter. He observed the contents from a bottle of Southern Comfort being poured into each of the shot glasses and he observed patrons paying. He witnessed staff 3 consume the contents of one of these shot glasses.

Incident 4

Between 11:30 p.m. and 11:50 p.m., constable 2 also observed staff 4, a male bar staff with the name tag of "Jay", drink three shot glass. Constable 2 was not able to observe what was poured into the first two shot glasses. However, he did witness the third shot glass being filled with Jose Cuervo Tequila.

Incident 5

At approximately 12:15 a.m. constable 2 observed another white male staff member with a large build and blond streaks in his hair and no name tag, staff 5, consume a drink with Jagermeister and later a shot of Jose Cuervo Tequila. Constable 2 was sitting at the bar within 10 feet of the bartender, and saw the labels of both the Jagermeister bottle and the Tequila bottle. Exactly the same drinks were poured for patrons as consumed by staff 5.

Incident 6

At approximately 12:25 a.m., constable 2 observed a staff member (staff 6) wearing a name tag of "Russ", pouring Jack Daniels into shot glasses for patrons and a glass for himself. Again, constable 2 saw all drinks being poured from the same bottle.

Constable 2 admitted that he was relying on the names on the bottles as the best evidence that in fact liquor was being poured into glasses consumed by the staff members. He stated that he made an assumption that there would be unhappy customers if he witnessed the drinks being poured from the same bottle and the bottle did not contain liquor.

Overcrowding beyond patron capacity more than occupant load

At 12:00 Midnight constable 2 conducted a count of the premises and determined there were 325 patrons. He counted in groups of 10 patrons and did not include staff in his count. He was conservative in his walk through the bar and gave the example that if he saw a group of 13 or 14 patrons he would only count them as 10 patrons as that was easier for his count. He did not use a mechanical clicker.

His count took approximately two minutes. He testified that in certain areas it was shoulder to shoulder and he was bumping into people but the back pool room and the pool area in the south west corner were not overly crowded.

Liquor Inspector

The liquor inspector responsible for the area in which the establishment is located testified she has been employed as a liquor inspector since September 2001 during which time she has conducted hundreds of inspections of licensed establishments. The liquor inspector was familiar with the licensee's establishment having visited it on thirty-some occasions and is aware that it has a liquor licence capacity of 275 patrons and a maximum occupant load of 300.

The liquor inspector referred to a branch publication "Liquor-Primary Licence, Terms and Conditions, A Guide for Liquor Licensees in British Columbia, updated November 2003" which was in effect on January 2, 2004, and which had been provided to all licensees. She explained that the Guide "imposes further terms and conditions, in addition to those found in the Liquor Control and Licensing Act and Regulation. It also provides a definition for "patron" capacity, discusses the "role of the licensee", "overcrowding" as well as "over service and intoxicated patrons."

The liquor inspector was one of two liquor inspectors involved in briefing the undercover team on January 2, 2004, to explain what evidence was needed by the branch to proceed to enforcement action. The information required included what the undercover operators saw in enough detail to "paint a picture" of any contravention(s).

The liquor inspector, accompanied by a second inspector, initially entered the establishment at 10:00 p.m. It was not crowded at the time and nothing untoward was noted. The liquor inspectors returned to the establishment at 12:30 a.m. after receiving a telephone call from the sergeant. The sergeant reported that the undercover operators believed the establishment was now overcrowded. He requested the licence inspectors do a routine inspection and walk through the establishment. The sergeant

specifically requested that, if the liquor inspector found any contraventions, that the contraventions not be written up in a Contravention Notice. The liquor inspector believed this request was made because of the undercover operation.

Upon arriving at 12:30 a.m., the liquor inspector observed approximately 20 people in a line-up outside waiting to enter the establishment. The inspector explained that the premises are always very crowded at the front bar. To obtain a correct "feel" for the room the liquor inspector goes to the middle of the room. She has been in the establishment so many times that she can tell if the premises are overcrowded. It appeared overcrowded to her but she did not do a count due to her instructions from the sergeant

As she left the establishment, the liquor inspector spoke with the assistant manager and a doorman. She told both individuals that they were at least at capacity and that the establishment appeared to her to be overcrowded. She advised them not to let anyone else in and they should start to move patrons out of the establishment. The assistant manager said he would follow her request. The doorman disagreed with the liquor inspector and argued that they were well below capacity.

After discussions with the assistant manager and doorman the two inspectors spoke with the sergeant and advised him what they had told the manager and doorman. Both liquor inspectors then stood nearby and observed the establishment for 5-7 minutes. They did not see anyone leave the establishment, did not notice any change in the line-up, but did see patrons continue to enter the premises. The liquor inspector saw no indication that the manager or doorman advised prospective patrons that the establishment was full and that they should go somewhere else.

The liquor inspector agreed that her observations were only for approximately 5 – 7 minutes and that she did not know what happened at the establishment after she left.

The liquor inspector explained her routine inspection procedure was to enter an establishment, make her observations and, if it appeared overcrowded, **he** would

conduct counts and, if necessary, issue a contravention notice. If there was no undercover operation, the liquor inspector explained that she would have entered the premises and, if she believed it was overcrowded, she would have conducted two counts and instructed the liquor inspector accompanying her to also do two counts.

Prior to December 2001, liquor inspectors had full discretion to enter an establishment, and if necessary, advise the licensee that they would return in 15 minutes and at that time the inspector would need to see the number of patrons reduced. After the legislative changes in December 2001 the liquor inspectors had no discretion. If a liquor inspector confirmed overcrowding or any other contravention, a Contravention Notice must be issued. The one exception for the liquor inspector was when the sergeant on this undercover operation asked her not to write a Contravention Notice as he had operators inside the premises.

The liquor inspector was asked what she guessed the effect was on the doorman when she left the establishment without issuing a Contravention Notice. The liquor inspector believed the doorman would think he “won” because they did not receive a Contravention Notice. The inspector explained that, when she observes a contravention, a Contravention Notice is issued on the spot and a second copy is mailed to the licensee.

The liquor inspector defined “intoxication” as an individual who is unable to control their motor skills. She agreed that determining intoxication for appearance alone is a subjective evaluation.

City of Vancouver Fire Department Captain

The captain testified that for the past two years he has been responsible for reviewing building plans and calculating maximum occupancy loads within the City of Vancouver. He referred to the Maximum Occupancy Load Certificate which sets the maximum occupancy load for the Roxy Cabaret at 300 persons. The certificate was issued on

June 18, 1997, prior to his time in the position. The licensee has not made an application for an increase to its occupant load.

The captain referred to an internal City of Vancouver report dated June 10, 1997, which stated in part as follows:

“Net floor area = 355 m² @ 1.2 m²/person = 296 persons

Exit width = 6.86 m @ 18.4 mm/person = 372 persons

Floor area governs. Issued maximum occupant load certificate for 300”

The captain did not know why the Occupant Load Certificate was issued for 300 and not 296 persons. He suggested that the 296 may have been “rounded-up” to 300.

The captain testified that the City of Vancouver doubled its exit capacity requirements in 1999. This affected how the exit capacity was calculated. To determine the occupant load both the exiting capacity and the net floor area is calculated and the least of these two calculations is the occupant load.

The Maximum Occupant Load Certificate applies only to the area depicted in the floor plans and not to the basement area of the cabaret. The basement, if required, would have its own Occupancy Load Certificate.

Licensee:

Applied Science Technologist

An Applied Science Technologist with many years experience in dealing with building and fire codes testified that municipalities use differing formulas to calculate occupant loads for different use areas. He explained, for example, a formula of 1.2 sq m/p is used for fixed seating areas, .9 sq m/p for non-fixed seating areas and .75 sq m/p for standing areas. The Applied Science Technologist provided occupant load drawings that applied these differing formulas to the establishment. The results were a total

occupant load, including staff, of 418 persons with an exit capacity outside Vancouver that would allow for 1139 persons (based on BCBC 1998 and BCFC 1998 (outside Vancouver)). He concluded that, if the establishment were located outside the City of Vancouver, its fire and safety thresholds would be 418 persons.

Referring to occupant load drawings for the establishment based on VBBL 1999 & VFBL 2000 (current calculations), he explained that the occupant load set by the City of Vancouver using the formula of 1.2 sq m/p for both standing and seating areas and using their current procedures of subtracting non-public areas when calculating net floor space but including the dance floor area, would be 292 persons. Exit capacity using the double exiting requirements for the City of Vancouver is 569 persons.

He testified that in his opinion the fire and safety threshold of the establishment is that arrived at by using the standards set outside the City of Vancouver, 418 persons. He did agree that the building occupant load as noted on the Occupant Load Certificate is 300. However, he could not confirm that number without seeing the building plans and making his calculations.

Assistant Manager

The assistant manager testified that he has been employed at the establishment for ten years, nine of which have been spent overseeing the operation of the cabaret at the front door. He is currently the assistant manager and spends the majority of his time at the door assisted by two doormen.

Selling liquor to intoxicated persons

For the most part the assistant manager leaves it to the inside door staff to deal with any over service. He explained that over servicing is hard to judge. However, if a patron goes out for a smoke and is "wobbling" the doorman will not let the patron back into the establishment. If necessary, the doorman will get the patron's coat and

call a taxi. However, he admitted that sometimes people fall through the cracks and do not get noticed because their friends are purchasing and/or delivering their drinks.

He advised that, since the January 2, 2004, incident the doorpersons have "cracked down big time" and have little tolerance for intoxicated patrons.

Employees consuming liquor in the premises

The assistant manager stated it is part of the rules and regulations of the establishment not to drink while working. The consequences for staff of consuming alcohol in the premises would be up to the then general manager. For the most part the assistant manager is at the door and is not involved with the inside staff.

Overcrowding beyond patron capacity more than occupant load

The assistant manager and the two doorpersons maintain two line-ups of persons waiting to enter the premises, one for regular patrons and one for VIPs. A cover charge is collected from regular patrons. The establishment does not have a designated smoking room and patrons wishing to smoke are allowed to exit and are directed to a nearby public street area. They are allowed to re-enter upon their return as are patrons who leave for a short period of time for such things as getting a pizza or paying for parking.

The assistant manager and the two doorpersons each maintain a mechanical counter recording the number of persons "in" the establishment. There are no separate counters maintained of those persons "out" i.e. leaving the establishment. If there is a discrepancy in the number of persons recorded "in" the lowest number is chosen. One of the doorpersons is assigned to count the number of persons inside approximately every 15 minutes using an established routine procedure. A second count is conducted if there is a discrepancy with the previous count. These counts are recorded in the "Door Report". The door report counts for January 2, 2004, recorded at 30 minute intervals from 11:30 p.m. until 2:30 a.m. are: 278, 285, 275, 269, 265, 275, and 281.

The assistant manager testified that the establishment is a difficult room to count. In the past, police officers have conducted a second count at the request of the cabaret and ended up with 100 persons less than the original count. This was documented on a Police Licensed Premises Check dated June 16, 2002. The licensee has established a routine counting procedure. The doormen wait for a song to start which stabilizes the number of persons on the dance floor, start the count at the back where the room is less crowded and work towards the front of the room. In the middle of the room, the doorman steps into the elevated DJ booth, moves over to the dance floor and steps up onto the stage which is also elevated. The doormen finish the count by counting persons up to the front door.

The assistant manager testified that in his opinion it is impossible to get an accurate count of persons on the dance floor without getting onto an elevated area. A count can be completed within a couple of minutes if there are no interruptions. He testified that he is aware that the liquor licence capacity is 275 and the occupant load 300. His instructions are to keep within the 275-300 range as the room is capable of holding more than 275. He agreed that there may sometimes be a "blip" where the capacity goes beyond 300 for a short period of time owing to such things as a large number of persons leaving and entering at one time or the arrival of VIPs.

Following an overcrowding incident in February 2002 for which a monetary penalty was paid, the assistant manager was told to be more careful with his numbers. The incident did not lead to a review of policy and procedures. The establishment does not have a policy and procedures manual for the door staff. It is the responsibility of the assistant manager to ensure that door staff knows their job. They are given verbal instructions from him and comply.

The assistant manager recalled that he attended a Compliance Meeting on January 22, 2003. This Compliance Meeting was convened because of a Contravention Notice regarding a failure to request identification. The procedures for counting the room remain the same now as they were at that time.

With respect to the evening of January 2, 2004, the assistant manager recalled the liquor inspector telling him and the other doorman that they were above their numbers. He replied "perhaps by 15" and he recalled that the liquor inspector concurred and said "okay" or "fair with me" and that was the end of the discussion. He agreed that, if told to reduce the number of patrons, he "will lose people, no problem". He does not want to alienate the liquor inspector.

He recalled that the Contravention Notice regarding January 2, 2004, was received within a couple of weeks of the incident. He knows the liquor inspectors' automobile and knows liquor inspectors are out on weekends. He asked "why would I jam when I know the inspector is out? Why would I shoot myself in the foot?" He also advised that the police visit every night on the weekend and the Community Police Office is adjacent to their establishment.

The assistant manager explained that he was not sure if there was a written policy to guide the staff regarding the establishment's capacity. He believed it was a verbal policy and basically it was his responsibility, and, in his absence, the responsibility of the head doorman.

He also explained that the general manager who was employed on January 2, 2004, was dismissed after the receipt of the Contravention Notice. He remembered seeing and speaking with the liquor inspector on the evening of January 2, 2004. He could not explain the liquor inspector's comment that the doorman was upset and argued with her. He did agree that the liquor inspector said they might be overcrowded. He recalled their response was "if we are it would be by 15" and she said okay. He believed she said okay because, if they were over by 15 patrons they were still within their occupant load. If she had done a count, she would have given them a Contravention Notice. On January 2, 2004, he did not believe the liquor inspector counted the room but rather "assessed" the room. He admitted that he did not know the liquor inspectors' procedures.

Interim Manager

At the request of the owner, the interim manager looked after the establishment for the period of February 11, 2004, to April 2, 2004. The interim manager was the manager of the establishment from 1986 – 2000. Currently he is the founding chair and current vice president of Barwatch, an organization consisting of owners of licensed premises and officials of regulatory and enforcement agencies formed to protect the safety of patrons in downtown Vancouver licensed establishments.

The interim manager testified that the previous general manager had been let go from his employment for failing to pass on to the president any of the concerns raised by the liquor inspectors as well as the police. In particular, discussions between the sergeant and the then general manager were not reported to the president.

Selling liquor to intoxicated persons

The interim manager explained that it is difficult for bartenders to tell if patrons are over served due to the bar atmosphere, with patrons standing and milling about, drinks being bought by one individual for another, and the general busyness of the bar area. It is much easier if the bartender can get a good close look at the patron and engage them in conversation.

Employees consuming liquor in the premises

The interim manager confirmed that staff drinking is against the law. He said, that when patrons wished to buy him a drink, he would be served coke in a shooter glass. The bartender would pour five or six shooters and put the shooter of coke amongst them. He would then be served the shooter of coke, screw up his face, and pretend he was drinking an alcoholic drink. He testified that bartenders keep the coke below the bar counter.

Overcrowding beyond patron capacity more than occupant load

During the 12 years he managed the Roxy Cabaret, the establishment was operated at a capacity between 275 (the liquor licence maximum) and 300 (the maximum occupant load) persons. Separate line-ups were maintained for regular and VIP patrons. During this time, smokers were allowed to exit and re-enter without having to line-up again as they had already paid their cover-charge. The number of smokers ranged between a handful and 30 to 40 persons at a time. The doorman could see the number of smokers on the street and they would be added to the number of persons counted inside.

In order to keep track of the number of persons inside the cabaret, the witness explained that from 1986 – 2000, counts were conducted every 15 minutes and recorded every half hour. He personally checked the numbers at least once an hour taking approximately five minutes to perform a count. To make an accurate count he would wait for a new song to commence which would stabilize the number of persons on the dance floor, he would then begin counting from the rear of the cabaret, proceeding to the front. He would climb up onto the raised stage area to count the number of persons on the dance floor. He testified that his count could be at a variance of up to 100 persons with the numbers counted by police officers and liquor inspectors.

President

The president of the company that operates the establishment testified, that over the last 17 years, the establishment and its operating company have been granted many awards for their involvement in revitalizing the entertainment district and their contribution to tourism. In early 2004, the president had health problems and an emergency operation. As a result, the interim manager was retained. The president was not involved in the dismissal of the then general manager. It was not until February 2005, as a result of a Freedom of Information Request, that he saw a heavily censored police report outlining the alleged contraventions. The branch provided an uncensored report in April, 2005.

The president did not recall the sergeant speaking about potential undercover operations. The one time the sergeant did telephone the president, his telephone call was returned within 15 minutes and a meeting arranged. At this meeting were the then general manager, the president, and another member of the operating companies' senior management team. At some point in the meeting the then general manager was asked to leave. The sergeant advised the president and the other member of the senior management team about problems he was encountering with the then general manager.

The president was not at the establishment on January 2, 2004. However, he made the following comments on issues surrounding the alleged contraventions.

Selling liquor to intoxicated persons

The president explained that the licensee does not allow intoxicated persons to be served. He testified it is difficult to define intoxication but, as there is usually a line-up of people outside the establishment willing to pay a cover charge to enter, there is absolutely no percentage in over serving customers.

Employees consuming liquor in the premises

There is no way the licensee encourages or allows its' staff to consume liquor in the premises. The president explained that he does not want employees consuming his liquor. The employee identified as staff 2 was discharged from employment within two days of the receipt of the police report. Other individuals were not easily identified and no one else was dismissed as a result of the alleged contravention. However, all employees were sternly spoken to.

Overcrowding beyond patron capacity more than occupant load

The president explained that, from his perspective, the occupant load in the City of Vancouver is an issue of municipal regulation and not a safety issue. The establishment operates between 275 – 300 patrons but, at times throughout an evening, it may have in excess of 300 patrons.

The president stated they do have parts of a staff manual but not a full operating manual. New staff is trained in an intensive one-on-one teaching program by management and sign a form stating they understand the rules and regulations and other information given to them. They are not tested to see if their knowledge is up to date.

Submissions:

Counsel for the licensee filed a written outline and summary of their submissions. These submissions were similar to those made by counsel in cases involving the same issues with this and other licensees (see, for example: *Roxy Cabaret Ltd.* June 22, 2004, *Sky Bar Ltd.*, February 3, 2005).

Burden of proof

The licensee submitted that the standard of proof to be applied to the facts of this case is beyond a reasonable doubt. In the alternative, if the burden is found to be on a balance of probabilities, it is argued that the fact this was a full police undercover operation with onerous consequences for the licensee, warrants the standard of proof on a balance of probabilities at the high end of the scale.

Selling liquor to intoxicated persons

The licensee submitted that it did not permit the sale of liquor to intoxicated persons. It relied on the test outlined in *Ed Bulley Ventures Ltd. dba Planet Sports Lounge v. General Manager, Liquor Control and Licensing Branch* [2001] B.C.L.I. No. 5-L9905) and said that in the circumstances it “observed as high a degree of diligence as [it]

should have done in the circumstances and that it did not “shut its eyes to the obvious, or had allowed something to go on, not caring whether an offence was committed.” (Ed Bulley, *supra* at 9).

Employees consuming liquor in the premises

The licensee argued that there is no proof that the liquid consumed by the staff was liquor. The licensee submits that the undercover constables could have drunk from the same bottle as the liquor was poured from, they could have seized the liquor bottle and or the shot glasses and had them analyzed. Alternatively, they could have poured the contents of the shot glasses into a container and had the contents analyzed.

The licensee further suggests expert evidence could have been called with respect to the pattern of conduct in the industry. Finally, the licensee points out that the undercover constables were themselves drinking and their observations are consequently suspect.

Overcrowding beyond patron capacity more than occupant load

With respect to this alleged contravention, the licensee made the following submissions:

- Second Contravention

The licensee submitted that, as Judicial Review proceedings have been filed with respect to the general manager’s decision dated June 22, 2004, there is no completed or proven contravention while the appeal is pending. As a result, the licensee argues that the alleged contravention should be considered a first contravention.

- The contravention of “*Overcrowding beyond patron capacity more than occupant load*” was not proven.

The licensee submitted there was a significant variance in the counts conducted by constable 1 and constable 2. As well, the liquor inspector did not do a count as requested by the sergeant due to the undercover operation. In fact, the assistant

manager was left with the impression the establishment was not overcrowded as they did not receive an enforcement notice from the liquor inspector.

- Definition of Occupant Load.

The licensee submitted that the alleged contravention is based on a flawed definition of “occupant load” in Section 1 of the *Regulation* and as such there is no authority for the penalty provision found in Schedule 4 (15) of the *Regulation* upon which the recommended penalty is based. Section 4 of the *Regulation* provides a table of ranges and penalties to be imposed once a contravention has been proven. Schedule 4 only provides a range of penalties and does not, in and of itself, create an offence.

- Validity of Occupant Load Certificate.

The licensee submitted that the Maximum Occupant Load Certificate is fatally flawed as it does not have an approved plan attached. Without the approved plan tendered as evidence, the licensee argues that the branch has failed to prove the occupant load.

- A contravention of “*Overcrowding beyond patron capacity more than occupant load*” does not exist in law.

The licensee submitted that Sections 12(2) of the *Act* and 71(2) of the *Regulation* do not give rise to a contravention. The *Regulation* at Section 6(4) provides a term and condition regarding the “person” capacity, but not for “patron” capacity as is alleged here where the contravention is for exceeding the “patron” capacity.

Further, the definition of “patron capacity” in the *Regulation* refers to the maximum number of patrons allowed in the licensed red-lined area of the “establishment”. The definition of “establishment” in the *Act* refers to the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area. As well, Schedule 4 (15) of the *Regulation* which outlines the penalties for contraventions refers to “occupant load” which by definition refers to the number of persons allowed in an “establishment” which is defined as the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area.

As a result, the licensee argued there is authority for a contravention of being over patron or person capacity. However, it submitted the branch cannot provide authority for a contravention of being over patron and person capacity and beyond the occupant load. The contravention, as alleged, does not exist in law.

The defence of due diligence

The licensee submitted that, if a contravention is found, it had met the test of due diligence by its actions, policies and procedures.

ANALYSIS and FINDINGS

Burden of Proof

This issue of the burden of proof has been thoroughly argued in previous decisions of the general manager, and it was determined that the burden of proof on the branch is that of the civil standard. 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 v General Manager, Liquor Control and Licensing Branch*, Madam Justice Gill, April 23, 2004 [12].)

Selling liquor to intoxicated persons

In answering the question of whether this licensee permitted a person to sell or give liquor to intoxicated persons or persons apparently under the influence of liquor, I look first at the evidence surrounding the allegations involving the male patron. Based on the evidence of constable 1 and constable 2, I am prepared to find that the male patron was intoxicated when he was served liquor by staff 1 between 11:20 and 11:55 a.m. on January 2, 2004.

I base my finding on the observations of indicators of intoxication made by both constables. As noted, constable 1 first observed the male patron vomiting in the

washroom. Constable 1 followed the male patron and formed the conclusion, based on his unsteadiness on his feet, weaving and generally stumbling behaviour, that the male patron was intoxicated. At some point between 11:20 p.m. and 11:55 p.m. constable 1 observed this male patron being served two bottles of Miller Gin Dry by staff 1 from a beer tub

At approximately 11:55 p.m. constable 1 observed from a distance of 8 – 12 feet a bouncer talking directly with the male patron. Constable 1 testified that the male patron looked more dishevelled than he had earlier in the evening and was swaying back and forth. The bouncer, who had removed the male patron's friend from the establishment, allowed the male patron to remain.

Constable 2 also observed the male patron speaking with a bouncer. Constable 2 stated he was close enough to the male patron to touch him. He described the male patron as having a glazed look on his face, being dishevelled and unsteady on his feet. Constable 2 had not observed staff 1 serving the male patron.

Turning now to the evidence surrounding the female patron, who was initially observed by constable 2 at approximately 1:00 a.m. She appeared to him to be extremely intoxicated, resting her head on a friend's shoulder and appearing to be falling asleep at the table. Constable 2 observed that the female patron had droopy eyes and at one point had lain on the floor by the pool table.

Sometime later constable 2 observed the female patron being served by the bartender identified as staff 2. The constable also observed that, while she was ordering, the female patron stood and held onto the bar for balance, fumbled with her money, and then walked unsteadily back to her table. When constable 2 left the establishment at approximately 1:45 a.m. the female patron was still inside.

On the totality of this evidence I am prepared to find, on a balance of probabilities that the licensee permitted the sale of liquor to an intoxicated patron. I accept the evidence of constable 1 and constable 2 that the male patron demonstrated the physical

indicators of a dishevelled appearance including a glazed look, lack of motor skills such as unsteadiness of feet and fumbling with money. Based on this evidence, I find that the male patron was intoxicated. I accept the evidence of constable 1 that he witnessed the sale by staff 1 of two bottles of Miller Gin Dry to the male patron.

I also accept the evidence of constable 2 that the female patron demonstrated the physical indicators of intoxication including droopy eyes and a lack of motor skills such as unsteadiness of feet and fumbling with money. The female patron was also observed to show mental indicators of intoxication when she was resting her head on a friend's shoulder and lying on the floor by the pool table. Based on this evidence, I find that the female patron was intoxicated. I accept the evidence of constable 2 that he witnessed the sale by staff 2 of liquor to this female patron.

I now turn to the issue of whether the licensee permitted the sale of liquor by staff 1 and staff 2 to intoxicated patrons. I follow the definition of "permit" endorsed by the Liquor Appeal Board in *Ed Bulley Ventures Ltd. (c.o.b. Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, June 28, 2001, LAB L-9905 which states, in part:

The interpretation approved by the courts is as follows: a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.

I find that in the circumstances surrounding both the male and female patron, staff 1 and staff 2 respectively shut their eyes to the obvious signs of intoxication in both the male and female patrons and accepted an order for liquor from them. On the totality of the evidence I find that the licensee did permit the sale of liquor to intoxicated patrons on January 2, 2004.

Employees consuming liquor in the premises

I do not agree with the licensee that in the circumstances of this case, the fact the undercover constables were consuming alcohol in line with their covert operation renders their observations suspect. Nor do I agree with the licensee that the constables have to make efforts to analyze or otherwise identify the liquid consumed by the various staff members.

In incident 1, both constable 1 and constable 2 witnessed the liquid being poured from the same bottle and were able to identify the label. Constable 1 testified that it appeared that the male patrons and staff 2 and staff 3 randomly selected glasses of the liquid and immediately drank it. I find, on a balance of probabilities, that staff 2 and staff 3 consumed liquor in the premises.

In incident 2, constable 1 was not able to observe what was poured into the eight shot glasses. His testimony relied on statements made by staff 3. In this incident I am not prepared to find that staff 2, staff 3 and the porter consumed liquor in the premises.

In incidents 3, 5, and 6, constable 2 observed the liquid being poured from the same bottle and the drinks being consumed by staff 3, staff 5 and staff 6. I find that in these three incidents, staff 3, staff 5 and staff 6 consumed liquor in the premises.

In incident 4, constable 2 observed staff 4 drink three shot glasses of liquid. While he was not able to observe the liquid poured into the first two shot glasses, constable 2 did observe Jose Cuervo Tequila being poured into the third shot glass. I find that staff 4 did consume liquid in the premises with respect to drinking the third shot glass.

In summary, I do not find incident 2 has been proven on a balance of probabilities. However, I do find that incidents 1, 3, 4, 5 and 6 have been proven.

As a result I find that staff 2, staff 3, staff 4, staff 5 and staff 6 did consume liquor on the premises contrary to Section 42(3) of the *Regulation*.

Overcrowding beyond patron capacity more than occupant load

I agree with the licensee that, on a balance of probabilities, the alleged contravention of overcrowding beyond patron capacity more than occupant load has not been proven. I have reached this conclusion after considering the chronological order of the evidence. At 12:00 Midnight, constable 2 conducted a count and concluded there were 325 patrons in the establishment. Constable 2 used a grid method of counting without a mechanical counter. When in doubt, constable 2 erred in favour of the licensee

I am not prepared to find a contravention based on this evidence of one count, performed in challenging circumstances, without a counter, in an establishment that is difficult to count.

Continuing the chronological thread, constable 2 advised the sergeant of his count of 325 patrons. The sergeant telephoned the liquor inspector, who arrived at the establishment at 12:30 a.m. The liquor inspector has performed routine inspections at the establishment approximately thirty times and is familiar with the "feel" of the room at various capacities.

Before entering the establishment, the liquor inspector observed a line-up of approximately 20 individuals outside the establishment. The liquor inspector did a routine walk-through the establishment but, at the specific request of the sergeant, did not perform a formal count with a mechanical counter. It was the liquor inspectors understanding that no Contravention Notice was to be issued because of the undercover operation. After performing a walk-through, the liquor inspector reached the conclusion that the establishment appeared overcrowded.

Upon leaving the establishment, the liquor inspector advised the assistant manager and the doorperson she felt there were "at least at capacity" and appeared overcrowded. She advised them to move patrons out and not let any other patrons into the establishment. The liquor inspector observed the establishment from some distance for approximately 5-7 minutes. It appeared to her that her advice was not followed as no

patrons left the establishment and patrons continued to be allowed to enter the establishment.

I agree with the licensee that, in these circumstances, a contravention cannot be found on the evidence of the liquor inspector alone. In the unique circumstances of this case, no counts were performed by the liquor inspectors.

At approximately 1:40 a.m., constable 1 conducted his own count. He divided the bar area into sections and counted without the aid of a mechanical counter. Constable 1 estimated it took him approximately 10 – 12 minutes to complete his count.

I am not persuaded by the evidence of constable 1's count that the branch has proven this contravention. Nor am I convinced on the totality of the evidence of the two constables and the liquor inspector that the branch has established overcrowding beyond patron capacity more than occupant load.

The evidence from this operation, involving as it did a busy crowded cabaret with patrons dancing and moving about and two undercover operators retaining their cover while attempting to conduct their counts, falls short of proving on a balance of probability that the establishment was overcrowded.

I therefore dismiss this allegation.

Defence of Due Diligence

I turn now to consider whether the defence of due diligence is available to the licensee with respect to the contraventions of selling liquor to intoxicated persons and employees consuming liquor on the premises.

The defence of due diligence refers to conduct or activity designed by the licensee to prevent the commission of a contravention. If a licensee can demonstrate that its "operating mind" had policies and procedures in place to ensure that the alleged

contravention did not occur, then a defence of due diligence may be established. If a licensee successfully establishes a defence of due diligence, the result is a finding that the contravention did not occur.

In this case, I assume the operating mind of the licensee on January 2, 2004, was the then general manager. The licensee's evidence of due diligence was presented by its assistant manager and its president. Both witnesses referred to training staff on an individual basis. The assistant manager said the establishment did not have a policy and procedures manual for the door staff. The president explained that there is a staff manual but not a full operating manual for the establishment. Employees are required to sign a form after their training to confirm they understand the rules and regulations but are not tested on their knowledge.

I find the licensee has not demonstrated a defence of due diligence through policies, procedures, training, or the actions of its staff.

One test of whether a licensee has established a defence of due diligence is whether there is anything further the licensee could have done to guard against the commission of the contravention. For both of these contraventions, I conclude the licensee could have taken steps to prevent their commission. In general, the licensee could have also had staff meetings and ongoing training, emphasizing its standards of conduct and reiterating its policies and expectations.

With respect to the contravention of selling liquor to an intoxicated patron, the licensee could have instructed its staff to remain aware and observe its patrons at all times. Staff can be instructed to not sell liquor to patrons who appear intoxicated. As well, staff could have taken measures to remove the intoxicated male and female patron from the licensed area.

Turning to the contravention of employees consuming liquor while working in the licensed premises, the licensee could have instructed its staff that they are not to pour liquor for their own consumption, nor are they to provide liquor to other employees.

I find the licensee has not made out a defence of due diligence to either contravention.

Summary of Findings

Burden of Proof

I find that the burden of proof on the branch is on a balance of probabilities.

Selling liquor to intoxicated persons

I find that the licensee did permit a person to sell or give liquor to intoxicated persons.

Employees consuming liquor in the premises

I find that incidents 1, 3, 4, 5 and 6 have been proven and that employees were consuming liquor in the premises. I do not find incident 2 had been proven on a balance of probabilities.

Overcrowding beyond patron capacity more than occupant load

On the totality of the evidence I do not find the licensee was overcrowded beyond patron capacity more than occupant load.

As a result of my finding on the contravention of overcrowding beyond patron capacity more than occupant load, it is not necessary for me to deal with the other issues, evidence and submissions raised by the licensee on this allegation.

I do, however, feel it is necessary to emphasize that it is not the branch's function to second guess the occupant load capacities set by various municipalities. That is a municipal responsibility. A licensee has choices it can make within the parameters of a municipality's bylaws. The branch has stated many times it will not look behind the municipal occupant load capacities. The branch recognizes municipal requirements and provides a penalty schedule for contraventions of overcrowding beyond patron capacity more than occupant load.

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

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*.

The *Regulation* provides 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 public safety and the well being of the community.

Compliance History

There is no record of prior contraventions, offences or enforcement actions of these types for this licensee or this establishment within the year preceding this incident

("compliance history"). Therefore, these contraventions are a first contravention for the purposes of Schedule 4 of the *Regulation*.

The Notice of Enforcement Action, Appendix A indicated that on March 18, 2003, the branch issued a Contravention Notice for an employee consuming liquor in the premises contrary to *Regulation 42(3)* and that the branch did not pursue enforcement action on this allegation. On April 12, 2003, the branch did pursue enforcement action on an allegation of employee consuming liquor in the premises contrary to *Regulation 42(3)*. That allegation was dismissed.

For the purposes of this hearing, I have considered that occurrence not as proof of the contravention, but as an indication that the issue and the branch's concern had been brought to the licensee's attention.

Submissions and Decision

The licensee submitted that it should receive the minimum monetary penalty for both contraventions. It argued that a licence suspension imposes a penalty on all staff with respect to lost salaries as well as lost tax revenue. As well, a licence suspension results in lost patronage.

I am not convinced a monetary penalty is appropriate for these two contraventions. A monetary penalty may be seen as the cost of doing business, particularly as selling liquor to intoxicated persons may lead to increased revenue and profits through liquor sales. A licence suspension penalty brings the seriousness of the contravention and its consequences to the attention of all staff as well as the licensee.

With respect to the contravention of selling liquor to intoxicated persons, the penalty range in Schedule 4 of the *Liquor Control and Licensing Regulation* is a four (4) to seven (7) day licence suspension for the first contravention. In this case, the branch is recommending the maximum licence suspension of seven (7) days. There is nothing on

the evidence, notwithstanding the seriousness of intoxication as a public interest that convinces me the maximum licence suspension is appropriate.

In this case I find that imposing the minimum four (4) day licence suspension will impress upon the licensee the need to operate its establishment in a manner that will not have a negative affect on its patrons or the community.

For the contravention of employees consuming liquor in the premises, the penalty range is a one (1) to three (3) day licence suspension for the first contravention. In this case, the branch is recommending the maximum licence suspension of three (3) days. I agree with this recommendation.

In imposing the maximum licence suspension for this contravention I am mindful that this issue has previously been brought to the licensee's attention. I am also mindful that there were five separate instances involving five employees consuming liquor while working. When staff of a licensed establishment drink liquor while working it can impair their judgement and their ability to manage and control the establishment. This creates a public safety risk for other staff members, the patrons and the community. The maximum licence suspension for a first contravention is warranted.

ORDER

Pursuant to Section 20(2) of the *Act*, concerning the Liquor Primary Licence No. 016089, I order a licence suspension totaling seven (7) days, as follows:

- For the contravention of Section 43(1) I suspend the liquor licence for a total of four (4) days.
 - For the contravention of Section 42(3), I suspend the liquor licence for a total of three (3) days.
-

I order the licence suspension of seven (7) days to commence as of the close of business on Thursday, June 9, 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 54(1) of the *Regulation*).

Since I do not know whether the establishment would normally be open seven (7) days per week I do not know what the "business days" will be. To ensure that this order is effective, I direct that the liquor licence be held by the branch or the Vancouver Police Department from the close of business Thursday, June 9, 2005 until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for seven (7) business days. A suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or police officer.

A liquor inspector or a member of the Vancouver Police Department will be requested to attend the premises, take possession of the liquor license and hold it in safekeeping during the term of the suspension.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: May 5, 2005

cc: Vancouver Police Department, Liquor Coordinator

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Doug Dyck, A/Regional Manager

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