



**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:	Shine Entertainment Inc. dba Shine 364 Water Street Vancouver, BC
Case:	EH04-105
For the Licensee	Timothy G. Knight
For the Branch	Sonja Okada
Enforcement Hearing Adjudicator	Edward W. Owsianski
Date of Hearing	April 11, 2005
Place of Hearing	Vancouver, BC
Date of Decision	June 23, 2005

Introduction

Shine Entertainment Inc. holds Liquor Primary Licence No. 010087. The hours of sale are 7:00 p.m. to 2:00 a.m. Monday thru Saturday, 7:00 p.m. to Midnight Sunday. The patron capacity is 198. The maximum occupant load is 200 persons. The establishment is located in Vancouver, BC.

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated November 4, 2004.

The branch alleges that on May 30, 2004, (the business day of Saturday, May 29), 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 the number of persons in the licensed establishment was more than the occupant load.

The recommended enforcement action is a four (4) day suspension of the liquor licence.

Schedule 4 at Item 15 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a license suspension for four (4) to seven (7) days and/or a monetary penalty of five thousand (\$5000) to seven thousand (\$7,000) dollars.

The licensee disputes the alleged contravention.

The relevant sections of the *Liquor Control and Licensing Act (the Act)* are as follows:

- 12.(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).
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The relevant sections of *the Regulation to the Act (the Regulation)* are as follows:

71 (2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager: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 licensee contravened Section 12(2) of *the Act* and/or Section 71(2)(b) of the *Regulation* on or about May 30, 2004?
2. If so, are the recommended penalties appropriate in the circumstances?

Exhibits

The following Exhibits were presented:

1. Book of Documents
2. Undated letter from the licensee to the Branch

Evidence - The Liquor Control and Licensing Branch

Two constables of the Vancouver Police Department testified that they were on duty in uniform during the late night/early morning hours of May 29/30, 2004. They were assigned to "liquor detail", the duties of which included walk-thru inspections of licensed establishments in the Gastown area of the city. **Cst. A** was the more experienced officer with in excess of five years experience and having made several hundred walk-thrus of licensed establishments and counts of the number of patrons inside. He had attended at the Shine establishment previously on several occasions. **Cst. B** accompanied him for training purposes; he was previously unfamiliar with the establishment. They made their first visit to the establishment at approximately 11:00 p.m. There was a line-up outside and the doorman advised that there were 160 persons inside. The officers entered and walked thru the establishment. The doorman's count of the number of patrons inside appeared to be accurate and no liquor related problems were identified.

The police officers returned at approximately 1:30 a.m. The line-up outside the establishment had greatly increased. The doorman advised that there were currently 198 patrons inside. Upon entering the establishment, they noted it to be considerably more crowded making it difficult for them to make their way through. They noted that some servers were also having difficulty moving through the crowd. With Cst. B in the lead, making a path thru the crowd, Cst. A used a mechanical counter to count the number of patrons inside the establishment. He counted "no less than" 273 patrons and advised the manager of the overcrowding. The manager disagreed with the number and Cst. A suggested to him that he do his own count. As the manager proceeded to do a count, Cst. A did a visual approximation of the number of persons without using the mechanical counter. He arrived at a figure of 353 persons. The manager advised Cst. A that he had counted 217 patrons in the establishment. The Cst. was advised that another employee had counted 194 patrons in the establishment. Cst. A wrote up a Licensed Premises Check (LPC) for overcrowding in which he recorded the number of persons counted inside the establishment and issued a copy to the manager (Exhibit 1, tab 3).

Cst. B testified that using the mechanical counter, he counted 275 patrons in the establishment. He did not record the number of persons counted but recalled the numbers when writing his report several days later.

The police officers spent approximately 25 – 30 minutes inside the establishment during the counting processes, and then proceeded to the front door where they spent approximately 20 minutes talking with the manager. Prior to leaving, they briefly re-entered the establishment and noted that the number of patrons inside had been greatly reduced, perhaps by as many as 100 persons.

A **liquor inspector** testified that at the time of the alleged contravention he was the inspector responsible for the area in which this establishment is located and was responsible for keeping the branch files for the establishment. He referred to the liquor licence for the establishment (Exhibit 1, tab 6), the approved floor plan (Exhibit 1, tab 8

and the Maximum Occupant Load Certificate (Exhibit 1, tab 9). The establishment is licensed for 198 patrons and has a maximum occupant load of 200 persons. The current licensee has been operating the establishment with approval from the branch since July 2000 (transfer of liquor licence documents at Exhibit 1, tabs 10, 11 & 12). During the licensing process the branch informed the licensee of the requirements of the *Act* and *Regulation* and provided a copy of the branch publication, "A Guide for Liquor Licensees in British Columbia: Terms and Conditions of a Liquor Licence", (the Guide).

The inspector referred to a number of Contravention Notices (CN) issued by the branch and Licensed Premises Checks (LPC) issued by the Vancouver Police Department to the licensee as a result of inspections conducted at the establishment:

October 5, 2002 – CN for overcrowding (Exhibit 1, tab 13)

February 6, 2003 – CN for failing to request identification (Exhibit 1, tab 14)

February 29, 2004 – LPC followed by CN issued for overcrowding
(Exhibit 1, tab 15)

March 6, 2004 - CN for failing to request identification (Exhibit 1, tab 16)

May 13, 2004 – CN for permitting a person to become intoxicated
(Exhibit 1, tab 21)

May 30, 2004 – CN and LPC for overcrowding (Exhibit 1, tab 3)

June 20, 2004 – LPC followed by CN for overcrowding (Exhibit 1, tab 17) and this
resulted in a monetary penalty of \$5000.00

(See documents at Exhibit 1, tab 19).

With the exception of the June 20, 2004, contravention and the LPC and CN for May 30, 2004, which are the subject of this hearing, the branch did not take enforcement action for the alleged contraventions.

The branch held Compliance Meetings with the licensee on April 13, 2004, (Exhibit 1, tab 20) and July 22, 2004, (Exhibit 1, tab 22) for failing to request identification, overcrowding, overservice and employee conduct.

The inspector testified that in reaching his decision (see Enforcement Action Recommended report at Exhibit 1, tab 2) to recommend that enforcement action be taken for the alleged contravention of overcrowding on May 30, 2004, he took into account the number and type of Contravention Notices issued and the Compliance Meetings held with the licensee. The recommended penalty of a four (4) day licence suspension was the minimum for a first contravention of overcrowding beyond the patron capacity and more than the occupant load.

Evidence - The Licensee

The **general manager** of the licensed establishment testified that he has been employed as the general manager for the past four years. The owner of the establishment has instructed him that the establishment is not to exceed the 200 person maximum capacity and that failure to comply could result in him losing his job. He has passed these instructions on to the door control staff. He was present when the two police officers visited the establishment on May 30, 2004. He disagreed that they were overcrowded. At the time, the establishment was below capacity, between 185 and 190 persons. He counted 188, while the doorman counted 196. The police said to do another count and he counted 180, and the doorman 190. He did not have a written record of the counts but recalled them quite clearly. He testified that the centre of the establishment gets congested which gives the police officers the impression that they are overcrowded. Persons move back and forth from the dance floor, as many as 50 to 100 persons can be on the move depending upon the popularity of the song being played. He disagreed that approximately 100 persons could have left during the time the police officers were at the establishment.

SUBMISSIONS

The licensee submitted that this contravention is alleged to have occurred on May 30, 2004. He was not made aware that the branch was proceeding with enforcement action until receipt of the NOEA of November 4, 2004. On October 28, 2004, he had signed a waiver for a previous contravention occurring on June 20, 2004. He would not have signed the waiver accepting a \$5000.00 monetary penalty had he known that the branch was proceeding with this enforcement action. There have not been any compliance issues since that time. He had a heated argument with Cst. A. two weeks prior to the alleged contravention of May 30, 2004. The evidence that the establishment was overcrowded is not compelling.

He submitted that should a contravention be found to have occurred, he would prefer a monetary penalty as a suspension affects all of the staff.

Findings and Decision

Having considered all of the evidence, I find that on May 30, 2004, (the business day of Saturday, May 29), 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 the number of persons in the licensed establishment was more than the occupant load.

In reaching this decision, I accept the evidence of Cst. A. He is an experienced police officer with several years of experience attending at licensed establishments and counting the number of patrons therein. On May 30, 2004, he made a careful count of the patrons in the establishment using a mechanical counter and recorded the results immediately thereafter. Other witnesses relied on their memories several months after the event.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention if it can be shown that he was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, he must ensure that those procedures are consistently acted upon and problems dealt with. I am satisfied that that has not occurred in this instance. The licensee attended Compliance Meetings at branch offices that dealt with several issues including overcrowding. The problems continued as noted by the evidence received at this hearing. In conclusion, I am satisfied that the licensee was not duly diligent.

Penalty

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; and
- 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 minimums set out in Schedule 4 of the *Regulation*.

The licensee received a monetary penalty for one previous contravention for overcrowding. The contravention occurred after the date of this contravention and the branch has treated this contravention as a first contravention pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b).

Additionally, there were previous Contravention Notices issued to the licensee. The branch did not pursue enforcement action; however, it did follow up with Compliance Meetings in an attempt to assist the licensee in bringing the operation of the establishment into compliance, to no avail. I have given weight to this compliance history not as proof of previous contraventions, but as proof that the branch has told the licensee in the past of concerns about the operation of the licensed establishment.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage 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.

Having considered the evidence, I am satisfied that a penalty for this contravention is necessary to ensure future voluntary compliance. I am satisfied that the minimum four (4) day license suspension is appropriate and necessary to bring awareness to the staff and the licensee of the importance of operating the establishment within the terms and conditions of the licence.

Order

Pursuant to Section 20 (2) of the *Act*, I order the suspension of liquor licence No. 010087 for four (4) business days starting as of the close of business Friday, August 5, 2005, and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (Section 67(1) of the *Regulation to the Liquor Control and Licensing Act*.)

Since I do not know whether the establishment would normally be open four (4) days per week as of August 5, 2005, I do not know what the "business day" 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 Friday, August 5, 2005,

until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for four (4) business days. A suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or police officer.

Original signed by

Edward Owsianski
Enforcement Hearing Adjudicator

Date: June 23, 2005

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Advocate
