



**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***

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| Licensee:                        | The Roxy Cabaret Ltd.<br>dba Roxy Cabaret<br>932 Granville Street<br>Vancouver, B.C. V6Z 1L2 |
| Case:                            | EH05-148   |
| For the Licensee:                | Kristen Tonge  |
| For the Branch:                  | Shahid Noorani   |
| Enforcement Hearing Adjudicator: | Sheldon M. Seigel  |
| Date of Hearing:                 | July 12, 2006  |
| Place of Hearing:                | Vancouver, B.C.  |
| Date of Decision:                | July 20, 2006  |

## **INTRODUCTION**

The Roxy Cabaret is a nightclub on Granville Street in the entertainment district of downtown Vancouver. It operates under Liquor Primary Licence No. 016089.

The licence has a patron capacity of 275 and an occupant load of 300 persons.

On Saturday, August 13, 2005 (business day of Friday, August 12, 2005), at approximately 1:15 a.m. a Vancouver police constable conducted a licensed premise check (LPC) of the establishment and counted more than both the person capacity and the occupant load.

As a result the Liquor Control and Licensing Branch (the branch) issued Contravention Notice #B008502.

## **ALLEGED CONTRAVENTION**

On August 13, 2005, the licensee allegedly contravened Section 12(2) of the *Liquor Control and Licensing Act (Act)* and Section 71(2)(b) of the *Liquor Control and Licensing Regulation (Regulation)* by permitting more persons 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.

## **ISSUES**

1. Did the licensee permit more patrons in the licensed establishment than the patron capacity set by the general manager and more persons than the occupant load?
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2. If the answer is yes, is a penalty warranted under the circumstances, and if so, what is an appropriate penalty?

## **EXHIBITS**

Exhibit No. 1            Branch's Book of Documents

Exhibit No. 2            Licensee's Book of Documents

## **EVIDENCE**

A constable with the Vancouver Police Department testified that he has considerable experience both within and without the police department relating to counting patrons in licensed drinking establishments and large social functions.

He was working on August 13 and 14, 2005, as part of the Vancouver Entertainment District Specialty Squad and had occasion to attend at the Roxy Cabaret to do a LPC. He described his entry to the Club, the doorman's inability to provide a current patron count, and his introduction to the Club manager. He described the establishment as being "shoulder to shoulder" with patrons, and notably that it was busier than he had observed in the past. He proceeded to use a mechanical counter to do two counts, while two officers covered him so that he could concentrate on the task at hand.

He counted a total of 326 patrons, exclusive of those in the back room, and 27 patrons in the back room. He did not count persons recognizable as staff and employees. He recorded the results of the counts on his hand in ink, along with the time of the count. He worked from the front of the establishment to the rear. Then he conducted a second count, retracing his route in reverse. Again, he recorded the start time of the count and the total count in ink on his hand. The

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result of the second count was 370 patrons in total. He testified that his counts took approximately four minutes each.

The constable advised the manager of the results of his count. The manager disagreed with the constable's counts and indicated that there were 291 patrons in the establishment, by a recent doorman's count.

The constable issued police LPC #B135491.

The constable described the flow of information from the notes on his hand to the issuance of the police LPC, and to the police documentation identified in Exhibit No. 1.

The Compliance and Enforcement officer (C & E officer) testified that she knows the Roxy and has a very positive relationship with its management. She indicated that although the layout of the establishment is not wide open, neither does it have a lot of hidden alcoves. She described the level of difficulty for counting patrons in the Roxy as "medium".

The C & E officer stated that the Roxy had previously enjoyed extended hours, and that the privilege was withdrawn after the allegation of overcrowding.

The C & E officer identified the documents in Exhibit No. 1 as the relevant portions of the branch's file relating to the licensee in general, and in particular the documentation relating to the enforcement of the alleged contravention.

The general manager of the Roxy testified that he was fully aware of the capacities of the establishment, including both licence patron capacity and occupant load. He indicated that management has established a routine counting protocol for consistency. It takes approximately three minutes to count patrons following the preferred route through the establishment.

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He testified that there are vantage points that the employees use to advantage, including at the front door and the stage. From those vantage points, he indicated that one could "see the actions of the patrons better".

The licensee's general manager indicated that he reviewed available surveillance video footage recorded at the time, and he was able to watch the officers walking through the establishment doing their counts. He said he watched the constable enter, stand by the front cashier, walk to the back and turn around and return to the front with a counter in his hand. He said, "He is in front of the other officers and you can see him count the room. He pauses in front of the DJ booth and walks through to the back area of the club, and then writes on his wrist and looks at the counter."

He also testified, that the Roxy was not shoulder- to- shoulder and at no time did the constable have trouble moving through the club or have to move anyone physically.

The general manager confirmed that he reviewed the videotape several times in preparation for the hearing but did not bring it with him to the hearing.

The general manager said of the patron capacity, "The number is 275. That is the number we have. There are instances that the room sometimes goes over. There are going to be fluctuations."

He also testified that, "If the room is at capacity and a star appears at the front door, it depends on the situation and it depends on how many people show up. If its one or two people we make a judgement call." When asked if the Roxy was at capacity and [a famous actor] showed up with his crew seeking admission, whether the group would be allowed in, he replied, "That is a tough question".

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He testified that on the night in question, there were 291 patrons in the establishment, and that it was not a busy night.

Finally, the licensee's general manager identified the documents in Exhibit No. 2.

The doorman and head of security testified that there is a counting routine that management and staff follows to ensure consistency among them.

He testified that when the constable entered the club, he provided the constable with a current patron count of 291.

He also testified that 275-280 patrons is the "normal business on the inside" of the club.

The licensee's assistant manager testified. He stated confidently that the establishment operates at 275 patrons and does go over the patron capacity. He also said that the count of 291 that the door staff had done was probably not accurate.

He testified, "When the police came in, we were not concerned because the numbers were so low according to us."

## **SUBMISSIONS**

The licensee submitted that the evidence of the Roxy's employees should be preferred to that of the constable. The constable was not as familiar with the establishment as were the employees, and he did not take advantage of the known vantage points. The methodology used by the constable including writing on his hand or forearm was questionable and could create confusion, as could his method of conveying that information to written reports. The licensee, by contrast, knows how to accurately perform patron counts in the establishment

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due to familiarity with the layout of the premises. Therefore, the licensee's counts should be relied upon.

The licensee submitted that it did not present the video showing the constable's patron counts because it has provided video to the branch in the past and those videos have not been found to be conclusive as to the actual patron count. The branch did not specifically request the video, so the licensee did not provide it. The general manager, who testified that he watched the video, did not see anything damaging to the licensee's case in the video. Accordingly, there should be no adverse inference drawn from the lack of production of the video.

The licensee argued that it has shown due diligence in that it has policies in place, and training which was carried out as planned. After the police made the allegations of overcrowding, the licensee held a meeting of staff to discuss the matter. Counts were done every half an hour, and the evidence shows in detail how the licensee's staff conducts the counts.

The licensee further argued that the branch adduced no evidence that public health and safety were compromised by the number of people who were in the Roxy at the relevant time, and the constable did not demand that the club reduce its numbers.

Finally, the licensee argued that as the Roxy was denied extended hours after the contravention was alleged, it has already served a penalty for the contravention and assessing any additional penalty would amount to double jeopardy.

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**ANALYSIS AND DECISION**

I find that the police constable exercised reasonable care and used a reasonable technique in conducting two counts of the licensed establishment. I have no doubt that the licensee has refined the routine of conducting counts in its premise to a level superior to what would be expected of someone not intimately familiar with the establishment's peculiarities. However, a better process does not in every case produce a better result. I find no evidence that the constable's count was inaccurate. I note also that management and staff of the licensee, when faced with the police count with which they disagreed, did not take the opportunity to recommend a different technique to the officer, or indeed to ask him to monitor one of their own counts. I find on the evidence that the counts of the police constable were accurate and the establishment was overcrowded beyond patron capacity and occupant load.

The licensee attempted to discredit the police constable. One of the pivotal attacks of the constable's credibility was centred on the constable's characterization of the room as being "shoulder to shoulder". The licensee's witnesses made it clear that video data was available which would conclusively discredit the constable, and relied upon the video but did not present it in evidence. I find that the video was within the control of the licensee and the licensee chose not to present it as evidence in this hearing. Accordingly, I find an adverse inference may properly be drawn. This assists but is not determinative in accepting the constable's evidence over that of the licensee's witnesses as credible with respect to the level of physical closeness of the patrons. To the extent that the evidence of the licensee's witnesses differ from that of the constable on this point, I prefer the evidence of the constable.

I find that the testimony of the licensee's various witnesses corroborated that exceeding the establishment's patron and person capacities is a regular, rather than exceptional, occurrence. The evidence of two of the licensee's witnesses is

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that the establishment's own count was beyond the patron capacity, yet both the doorman and the general manager indicated that August 12, 2005, was a slow night. The licensee's third witness testified that the Club's own count was probably not accurate. Accordingly, I find that the evidence of the licensee's witnesses that the Roxy was not beyond occupancy load is unreliable at best.

I find that the number of patrons in the establishment exceeded the patron capacity and the occupancy load.

Due diligence is a complete defence to the finding of a contravention if established by the licensee. The onus, however, is on the licensee to establish that it had done all that it could reasonably have done to control the environment and eliminate the possibility of a contravention from occurring. I find that notwithstanding the submissions of the licensee, the evidence does not disclose anything approaching due diligence.

Finally, the licensee argued that the branch has not proven that the number of patrons in the establishment compromised the health and safety of the public. There is no obligation for the branch to do so with respect to a finding of contravention. The matter of public safety is but one consideration to which an adjudicator may refer in relation to penalty, after having made a finding of contravention.

The contravention has been proven.

## **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 its licence, I have the discretion to order one or more of the following enforcement actions:

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- 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 award at least the minimums set out in Schedule 4 of the *Regulation*.

The range of penalty for a first contravention of Section 12 of the *Act* in accordance with Schedule 4 of the *Regulation* is a four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000. The branch recommended a suspension of five (5) days.

The evidence of the licensee's witnesses, particularly its general manager and assistant manager confirms that the licensee has a cavalier approach to the patron capacity and occupancy load limits imposed upon it. I find that the licensee treats both the patron capacity and the occupancy load as guidelines, which may be exceeded when the opportunity presents itself.

I note that the licensee's general manager, aware of the licensee's position that the door count was 291 patrons, testified that, "When the police came in, we were not concerned because the numbers were so low according to us." He also indicated, "It was not a busy night." I note that 291 patrons is 15 patrons more than the patron capacity and nine persons less than occupancy load without taking into account staff members and musicians (all persons are to be included in a calculation of occupancy load).

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I find this to be an egregious contravention of both the letter and the spirit of the regulatory scheme. I find the contravention occurred as the result of a conscious approach adopted by the licensee to employ business practices inconsistent with the Legislative provisions and licence requirements.

In considering penalty, I also note that the licensee's history of proven and unproven contraventions relating to overcrowding is considerable.

Finally, the licensee submitted that a penalty has already been assessed for the contravention. No detailed evidence was put before me as to the circumstances under which extended hours were either granted or withdrawn from the licensee. If there were terms and conditions appended to the extension, I have not been informed of them. I do not accept that a penalty has been assessed previously for the contravention, which I have herein found. The only relevant evidence relating to this is the testimony of the C & E officer, which is that as a result of the allegation, the extension of hours was withdrawn. One might conclude that the extension was conditional upon no such allegations being made. That is, however, outside of the purview of this adjudication.

Accordingly, I find that a penalty is warranted and that the appropriate penalty is the maximum prescribed by the *Regulation* for a first contravention of this nature.

## **ORDER**

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 016089 for a period of seven (7) days, to commence as of the close of business on Thursday, August 24, 2006, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).

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To ensure this Order is effective, I direct that the Liquor Licence No. 016089, be held by the branch or the Vancouver Police Department from the close of business on Thursday, August 24, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

[ ORIGINAL SIGNED ]

Sheldon M. Seigel  
Enforcement Hearing Adjudicator

Date: July 20, 2006

cc: Vancouver Police Department

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

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

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