



**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: 689914 B.C. Ltd.
dba Royal Hotel (Fernie)
501 - 1st Avenue
Fernie, B.C. V0B 1M0

Case: EH06-035

For the Licensee: Marko Maryniak

For the Branch: Shahid Noorani

Enforcement Hearing Adjudicator: Edward W. Owsianski

Date of Hearing: June 13, 2006

Place of Hearing: Fernie, B.C.

Date of Decision: August 22, 2006

INTRODUCTION

The licensee, 689914 B.C. Ltd. dba the Royal Hotel (Fernie) Fernie, B.C. holds Liquor Primary Licence No. 027944 for a liquor primary licensed area located in the hotel. The operation of the hotel, including this licensed area has been leased to 670115 B.C. Ltd. which has been approved by the Liquor Control and Licensing Branch (the branch) as a third party operator.

The licensed hours for the sale of liquor are noon to 2:00 a.m. seven day a week. The licence permits 23 patrons in the patio area and 95 patrons in the main area (designated as area 1). The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia'.

The licence contains the following endorsement: "Patio extension permitted as outlined on the official plan. Patio capacity must be taken from inside capacity when patio in use."

The maximum occupant load as indicated on the approved floor plan for the main area is 103 persons.

The third party operator, represented by its legal counsel, appeared on behalf of the licensee.

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (the "NOEA") dated March 14, 2006. The branch alleges that on March 3, 2006, the licensee contravened Section 12 of the *Liquor Control and Licensing Act* and Section 71(2)(b) of the *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.

The recommended enforcement action is a \$5000 penalty (Item 15, Schedule 4 of the *Regulation*).

Item 15 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a license suspension for 4 – 7 days and/or a monetary penalty of \$5000 to \$7000.

The licensee disputes that the contravention took place.

Section 12(2) of the Act states as follows:

Licences

- 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).

Section 71 of the Regulation to the Act states as follows:

Licence categories, terms and conditions and endorsements

- 71 (1) A category of licence referred to in Column A of the following table and held by a licensee immediately before December 2, 2002
- (a) is converted on December 2, 2002 to the category of licence set out opposite that licence in Column B, and
 - (b) subject to subsection (2), is on December 2, 2002 subject to the terms and conditions of the category of licence set out opposite in Column B:

Column A

A licence, other than for a club
 C, D, E, F or I licence
 A licence for a club
 B licence
 B licence with a designated food optional area
 Winery licence
 Winery licence with an endorsement for a consumption area
 Winery licence with a picnicking endorsement
 G or H licence
 Agent's licence

Column B

Liquor primary licence
 Liquor primary licence
 Liquor primary club licence
 Food primary licence
 Food primary licence with a lounge endorsement
 Winery licence
 Winery licence with a winery lounge endorsement
 Winery licence with a picnicking endorsement
 Licensee retail store licence
 Agent's licence

Distiller's licence	Distiller's licence
Brewer's licence	Brewer's licence
U-Brew licence	U-Brew licence
U-Vin licence	U-Vin licence
Private special occasion licence	Private special occasion licence
Family private special occasion licence	Private special occasion licence
Public special occasion licence	Public special occasion licence

- (2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:
- (a) the terms and conditions imposed on the licence by the general manager under section 12 and 12.1 of the Act in effect immediately before December 2, 2002;
 - (b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002;
 - (c) endorsements on the licence in effect immediately before December 2, 2002, except an endorsement on a winery licence for a consumption area.

ISSUES

1. Whether the licensee contravened the *Act* and *Regulation* as alleged by the branch.
2. If so, what penalty, if any, is appropriate?

EXHIBITS

The following exhibits were presented:

- Exhibit 1** Book of Documents
- Exhibit 2** Letter of May 18, 2006, from the branch advocate to counsel for the third party operators of the establishment.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

The representatives agreed that those documents found in Exhibit 1, tabs 8 – 14 would be admitted into evidence by consent.

A branch compliance and enforcement officer (C & E officer) testified that he has been employed as a C & E officer for the past 16 years and was employed as a police officer for the 20 years previous. During the course of his employment he has conducted thousands of inspections of licensed establishments, counting the number of patrons therein. He is familiar with this establishment and the terms and conditions of its liquor licence. He testified that on March 3, 2006, he was conducting inspections of licensed establishments in Fernie during the evening/early morning hours. The community was in the midst of an annual celebration known as Grizzly Days and he anticipated that licensed establishments would be busy as a result. He attended at the hotel at approximately 11:00 p.m. There were four to five persons at the door waiting to enter the establishment. He identified himself to the doorman and was permitted entry. He noted three police officers inside standing to the left of the door, and they left shortly thereafter. The licensed area appeared to be very crowded with persons standing shoulder to shoulder. The doorman showed him his mechanical counter which showed "86". The C & E officer proceeded to conduct counts of the number of patrons using a mechanical counter. The first count showed a total of 178 patrons of which 24 were located on the patio. A second count showed 171 patrons of which 24 – 25 were on the patio. The main area was crowded and movement was difficult. He told the doorman the results of his counts and instructed him to reduce the number of persons inside and not to let any more persons enter. The doorman said that there were only 44 persons in the front half of the licensed area. The C & E officer re-counted this portion arriving at a figure of 77 patrons in the front area. He advised the manager, who is one of the principals of the third party operator of the establishment, of his observations and they proceeded to make a count together. The C & E officer counted 75 patrons in the front portion and was told by the manager that he, the manager, had only counted 44 patrons in that portion of the area. The C & E officer advised the manager that he would contact the local police detachment to attend. He exited the establishment and while waiting out front for the police to arrive noted a few persons leaving the establishment via the front door. He was unable to observe the rear exit. Three police officers arrived approximately five minutes later and were advised of the situation. One of the police officers using a mechanical counter counted a total of 121 patrons. The C & E officer counted 125 patrons of whom 10 to 12 were on the patio. The area appeared less

crowded. The doorman advised that he had just completed a count upon their attendance and counted a total of 117 patrons and that that was within their permitted capacity of 100 in the main area and 25 on the patio. The C & E officer advised the manager that the liquor licence allowed for a total of 95 patrons, which included both the main area and the patio. He instructed that the number of patrons be reduced and that he would be returning during the course of the night. He departed the establishment, and recorded his observations in his notebook upon returning to his vehicle (Exhibit 1, tab 3). He returned to the establishment at approximately 12:55 a.m. at which time he was satisfied that they were within their maximum capacity. A Contravention Notice (CN) was completed and mailed to the licensee on March 6, 2006, (Exhibit 1, tab 2).

The C & E officer testified that he is responsible for the geographical area in which the hotel is located and is responsible for keeping the branch files for the establishment. The liquor primary licence for this establishment (Exhibit 1, tab 4) is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees". The Guide in effect at the time of the alleged contravention is found at Exhibit 2, tab 5. He referred to excerpts from the Guide dealing with "Overcrowding" at page 12. The approved floor plan is found at Exhibit 1, tab 6.

He testified that at the time that the liquor licence was transferred to the current licensee he notified the licensee of the provision within the licence requiring subtracting the number of patrons on the patio from the number permitted in the main area.

The C & E officer testified that in recommending that enforcement action be taken he was cognizant that branch policy required enforcement action where overcrowding exceeded the occupant load. Further, it was his opinion that enforcement action should be taken where public safety was an issue as it was in this case. He recommended a monetary penalty as he is of the opinion that in this instance a suspension penalty would not provide sufficient deterrence. The contravention occurred during high season while a suspension would occur during the summer, which is traditionally slower for business, and many establishments close as a result.

EVIDENCE - THE LICENSEE

Witness A testified that he has been the manager of the hotel since June 2005 and is one of the principals of the corporate third party that leases the hotel from the licensee. He had managed the hotel for the previous licensee for the period from the summer of 2002 until the spring of 2004 when the hotel was sold. He remained for two weeks then found other employment returning in June 2005 as a lessee. He is aware that the liquor licence permits 95 patrons in the main area and 23 on the patio. He was not aware that the number of patrons on the patio must be deducted from the 95 in the main area until advised by the C & E officer at the time of the March 3, 2006, inspection. He believes the occupant load to be 105 for the main area with 29 on the deck (Exhibit 1, tab 7). He was working in the licensed area on March 3, 2006, at the time that the C & E officer arrived. As it was "Grizzly Days" they expected to be busy and were fully staffed with a doorman on the front door and at the entrance to the patio. The doorman at the front door has worked at the establishment since June 2005, is experienced and uses a mechanical counter to keep track of the number of patrons inside. Once the maximum number is reached the doorman only permits patrons to enter as others exit. The doorman has been told that the maximum number permitted is that of the liquor licence of 95 in the main area plus 23 on the patio. A line-up was in effect at the front door at the time the C & E officer arrived at approximately 11:00 p.m. The witness testified that he was working behind the bar at that time when he was sought out by the C & E officer and told that the C & E officer had made two counts of 178 and 171 patrons in the main and patio areas. He felt that this was high and asked that they both proceed to do a count. They commenced counting the front half and compared numbers. The C & E officer counted 77, he counted 44. This caused both of them to be frustrated and the C & E officer advised that he would contact the police to attend. The witness testified that three police officers had been in the establishment just prior to the C & E officer attending. They had not brought any problems to his attention. The police officers are familiar with the establishment and have advised him in the past if they believed that the establishment was over its capacity. Three police officers arrived within ten minutes of the C & E officer's call and were given mechanical counters, they counted 121 patrons which the manager believed to be somewhat high. He did not conduct a count himself

but the doorman did with a total of 117 patrons that included an unknown number of patrons on the patio.

He testified that as the lessee he is responsible for any monetary penalties levied. The establishment remains open year round. While some establishments in the community close for the summer, the hotel does not. They have recently completed renovations and will be remaining open. He agreed that the summer months are slower for business than the winter.

Under cross-examination, he agreed that during the period that he had managed the hotel for the previous licensee a monetary penalty had been levied against the licensee on two separate occasions for overcrowding.

Witness B testified that he is the assistant manager of the hotel and a principal of the corporate third party that leases the hotel from the licensee. Upon learning that the C & E officer had said that there were too many patrons in the licensed area he asked the doormen located at the front and patio doors for their numbers which were 86 patrons entering through the front door and 32 through the rear door. Those patrons entering through the rear door are usually friends of the operators or special guests. Some pay the cover charge, others do not. He testified that he was surprised to learn from the C & E officer that they were only allowed to have 95 patrons total within the main and patio areas. When they leased the hotel from the owner, they received a copy of the building plan, Exhibit 1, tab 7, which indicated that the permitted capacities were 105 in the main area plus 29 on the patio and they had been operating under that belief. Once told by the C & E officer that the maximum permitted was 95 patrons total they commenced to reduce the number of patrons in the licensed areas.

Licensee Submissions

Counsel for the third party lessees submitted that the evidence of the count made by the police officer (121 patrons) had contradicted the earlier counts made by the C & E officer (178/171 patrons). While there was evidence of a few patrons leaving between

the two counts there was no evidence of it being a mass exodus of 50 patrons. Taking the count of 121 and subtracting the 12 patrons on the patio gives a count of 109 patrons inside, which is not significantly higher than the occupant load of 105. He submitted that the definition of occupant load in the B.C. Building Code is quite vague: "...the occupant load of a floor area or part of a floor area..." Thus the occupant load for the licensed area could include both the main area and the patio.

On penalty, counsel submitted that on the facts this contravention fell between the penalties listed in items 14 and 15 of the penalty schedule, 14 (1-3 day suspension, \$1000-\$3000 monetary) and 15 (4-7 days, \$5000-\$7000 monetary). He submitted that pursuant to Section 68(1) of the *Regulation* monetary penalties are available for first contraventions only thus a suspension penalty is seen as harsher than a monetary penalty. He submitted that while monetary penalties to larger establishment may be less than a suspension penalty that is not the case here where the establishment has just completed renovations and has just re-established itself. A monetary penalty would be too onerous and a suspension penalty would be more appropriate. The establishment having just completed renovations and reopened for business plans to remain open for the summer thus a suspension creating a forced closure would be an effective penalty.

Counsel submitted that in discussions with branch personnel he had been lead to believe that there would be no discussion concerning contraventions under the ownership of a previous licensee, yet it was brought up in cross-examination by the branch. He submitted that by not drawing a distinction between the current licensee and the previous licensee the potential for prejudice outweighs any probative value.

REASONS AND DECISION

At the outset of the hearing, at the request of the branch advocate and counsel for the lessee, the following amendments were made to the NOEA as it is found at Exhibit 1, tab 1: The proposed penalty was changed from \$7000 to \$5000; those items in Appendices A & B occurring under the ownership of the previous licensee were struck

from the record. Accordingly, I have taken the recommended penalty to be that of a \$5000 penalty. Further, I have not considered those items in Appendices A & B which refer to the previous licensee. I have, as I will note later, considered the evidence of witness A for the licensee given under cross-examination that he was the manager of the hotel when the previous licensee received monetary penalties for overcrowding. I note here that when the question was put to the witness there was no objection made by counsel. I consider the evidence to be relative and probative to the knowledge and credibility of the witness.

The evidence is that on March 3, 2005, within a 15 to 20 minute period five counts were made of the number of patrons in the main and patio areas of the liquor primary licensed area. The counts ranged from a high of 178 with 24 patrons on the patio to a low of 117 with 12 on the patio. The high counts were the early counts while the low counts were made later. There is evidence that in the period of time between the high and low counts some patrons left the establishment via the front door. There is also the possibility of some leaving via the rear door.

On the evidence, I find on a balance of probabilities that on March 3, 2006, shortly after 11:00 p.m. there were more patrons in the liquor primary licensed area 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 licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. I am not satisfied that that has occurred in this instance. The manager, a principal of the corporate lessee would have us believe that he was unaware of the provision in the licence requiring that the number of patrons on the patio be subtracted from the number of patrons permitted in the main area. This flies in face of the fact that he was the manager for the previous licensee when monetary fines were

imposed for two incidents of overcrowding. I am satisfied that he was either being disingenuous or wilfully blind. The results of either being the same.

I find that the licensee was not duly diligent and "permitted" the overcrowding constituting the alleged contravention.

In conclusion, I find that on March 3, 2006, the licensee contravened Section 12 of the *Liquor Control and Licensing Act* and Section 71(2)(b) of the *Regulation*.

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;
- 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*. I may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee within the year preceding these incidents. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions. The range for first contraventions for

both of these contraventions is four (4) to seven (7) day licence suspension, and/or \$5,000 to \$7,000 monetary penalty.

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance. In the circumstances of this case, I am satisfied that the lessee, operating the establishment on behalf of the licensee, took a calculated risk and got caught. Any penalty imposed must be sufficient to deter similar conduct in the future. In the circumstances I find that the minimum monetary penalty of five thousand dollars (\$5000) is appropriate.

Order

Pursuant to Section 20 (2) of the *Act*, I order the payment of a five thousand dollar (\$5000) monetary penalty by the licensee to the general manager on or before September 22, 2006.

[ORIGINAL SIGNED]

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 22, 2006

cc: R.C.M.Police Fernie Detachment

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

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