



**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:	Donegal's Pub (Surrey) Ltd. dba Donegal's Pub 12054 - 94 Avenue, Surrey, BC V3V 1W3
Case:	EH06-053
For the Licensee:	Dennis P. Coates
For the Branch:	James Macdonnell
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	July 20, 2006
Place of Hearing:	Teleconference
Date of Decision:	August 29, 2006

INTRODUCTION

The licensee, Donegal's Pub (Surrey) Ltd., operates a neighbourhood pub called Donegal's Pub (the "pub") under a Liquor Primary Licence (LPL) No. 039829. The current licensee purchased the business in January 2005. The Liquor Control and Licensing Branch (the "branch") transferred the LPL in August 2005. The licensed hours of sales are 11:00 a.m. to 1:00 a.m. on Monday through Saturday and to midnight on Sundays.

It is a term of every LPL that it is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia' (the "Guide").

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated May 1, 2006, the branch alleged that on March 17, 2006, the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "*Regulation*"), by "overcrowding beyond person capacity greater than occupant load."

The branch's recommended enforcement action is a four (4) day suspension of the liquor licence. Additionally, the branch recommended a change to the terms and conditions of the licence to include the following:

Should a licence suspension be ordered in this matter, the licensee will be required to post a Branch provided suspension sign, in a prominent location, for the duration of the licence suspension.

RELEVANT STATUTORY PROVISIONS

See Addendum A

ISSUE(S)

1. Is there evidence of the occupant load effective March 17, 2006?
2. Did the licensee contravene as alleged?
3. If the licensee contravened as alleged, should a penalty be imposed?
4. If the answer to No. 2 is yes, what is the appropriate penalty?

EXHIBITS

Exhibit No. 1	Branch's Book of Documents Authorities
Exhibit No. 2	Agreed Statement of Facts and Addendum
Exhibit No. 3	Application for Structural Change, dated June 15, 2006
Exhibit No. 4	Maximum Occupant Load Certificate, dated June 14, 2006

EVIDENCE

Due to an agreement on most of the pertinent facts, the licensee and the branch agreed to conduct the hearing without witnesses and by telephone.

The ***Agreed Statement of Facts*** contains the following, plus the addendum:

1. The licensee admits that there were an *[sic]* excess of 150 people in the premises;
 2. There have been no structural or physical alterations to Donegal's since the licensee purchased it in January 2005;
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3. A new occupant load plan was approved by the Surrey Fire Department on June 14, 2006, which provides for an occupant load of 377;
4. On or about June 15, 2006, an application to increase the licence capacity to the occupant load was submitted to the LCLB.

Addendum: The addendum is attached as part of Exhibit No. 2 and is in the form of an e-mail from the licensee's counsel to the branch advocate on July 18, 2006. The addendum sets out that the licensee does not dispute the results of the counts conducted by the branch's officer on March 17, 2006, in the pub.

The branch's evidence is that a branch compliance and enforcement officer (C & E Officer) attended the pub on March 17, 2006, at approximately 9:50 p.m. and spoke with the door security about the seemingly overcrowded conditions. The C & E Officer conducted two counts with a hand held mechanical counter. The first count was 220 persons inside and 10 on the patio; the second count was 217 inside and 12 on the patio.

The licensee presented the documents at Exhibit No. 2 through 4. The Surrey Fire Service issued a Maximum Occupant Load Certificate on June 14, 2006, for 377 persons, based on plans appended to Exhibit No. 3, which were drawn by an architect, and bear the date June 14, 2006. As set out in the Agreed Statement, there have been no structural changes to the establishment since the licensee purchased it in January 2005.

The branch advocate advised that he had spoken to a representative of the City of Surrey who informed him that the City requires a record of the occupant load and had not received a record of the June 14, 2006, Certificate issued by the Surrey Fire Services. The representative told the advocate that he was surprised

by the magnitude of the increase and would have expected such an increase only with a structural change to ensure safety.

Neither the licensee's counsel nor the branch's advocate had a copy of an Occupant Load Certificate that would have been in effect on March 17, 2006. Additionally, neither had a copy of the originating application to the Surrey Fire Services in 2006 and the licensee could not provide confirmation of when that application was submitted. Exhibit No. 3 contains an application to the branch to increase the licensed capacity, dated June 15, 2006.

SUBMISSIONS

The branch advocate submitted that as of March 17, 2006, the maximum occupant load and licensed capacity were both set at 150 persons. Accordingly, the licensee was clearly in breach. Referring to the Guide, at page 12, the advocate submitted that if there are differing occupant loads calculated by fire and/or building authorities or by engineers or architects, the licensee must abide by the lower number.

He also submitted that the licensee has not complied with the City of Surrey requirement that the new occupant load be registered. Further, the fact that there have not been any structural changes argues against the licensee's contention that a new occupant load has been established.

The licensee admitted being over licence capacity but submitted that is not what the branch has alleged. The fact that a new Occupant Load Certificate has been granted without any requirement for structural alterations indicates that it is, and was, the correct calculation of the occupant load. There is no evidence of why there was a calculation of 150 persons in 2002.

The licensee submitted that in order to answer the issue of whether the licensee was over the occupant load, it is necessary for the branch to prove what the occupant load was, and the branch has not been able to. The licensee submitted that the fact that the City of Surrey issued an Occupant Load Certificate on June 14, 2006, for 377 persons without requiring structural changes, demonstrates that the legal occupant load as of March 17, 2006, was also 377 persons. Additionally or alternatively, this fact also demonstrates that there were no safety issues resulting from the number of persons in the pub on March 17, 2006. The licensee submitted that since the branch was unable to produce a plan or an Occupant Load Certificate, the licensee was entitled to rely on the occupant load issued by the Surrey Fire Services on June 14, 2006.

The licensee submitted that on the facts there was no contravention. In the alternative, if I find there was a contravention, the licensee submitted there is no need to impose a penalty or, the further alternative, that a monetary penalty would be sufficient.

ANALYSIS AND DECISION

I have considered the evidence and the licensee's submission concerning whether there was an occupant load as of March 17, 2006.

At tab 9 of Exhibit No. 1 is the City of Surrey Building Permit dated October 31, 2002. In the comments section it is noted, in part:

"This permit is issued subject to: 1. "Maximum allowable occupant load of the pub occupancy is 150 persons. Maximum allowable occupant load shall be posted according to the requirements of the BC Fire Code."

The branch's official plan for this pub at Exhibit No. 1, tab 8, bears date stamps of December 3, 2002, and August 19, 2005, the only legible capacity notation on

the copy provided at the hearing notes 150 persons in area 01. The LPL at tab 6 permits 150 persons inside and 20 persons on the patio.

There was no evidence in the hearing indicating when the licensee applied to increase the occupant load. When I questioned the application date during the hearing, licensee's counsel was unable to say whether it had been submitted prior to March 17, 2006. Given the date of the Maximum Occupant Load Certificate, June 14, 2006, I find it is more probable than not that the licensee applied after the March 17, 2006, incident.

I find that the branch's failure to produce an occupant load document effective March 17, 2006, is not determinative. This is not a case in which the municipality failed or declined to issue an occupant load, rather the documentation was, for reasons I need not determine, not available for the hearing. There was one document from the municipality, which clearly stated that the Building Permit was subject to the occupant load of 150 persons. I accept that document as demonstrating that the Occupancy Load had been established at 150 persons as of October 31, 2002. There was no evidence that the occupant load had been increased between October 31, 2002, and March 17, 2006. I find there was no evidence to suggest that the occupant load was 377 persons as of March 17, 2006. I also find there was no evidence that the licensee thought the occupant load was 377 as of March 17, 2006. Based on the factual evidence, I find on a balance of probabilities that the maximum occupant load permitted under the *Fire Services Act* as of March 17, 2006, was 150 persons.

The licensee made reference to the defence of due diligence. However, the licensee did not lead evidence to support that defence. The licensee did not call evidence from the door staff on duty at the time or from the licensee to testify to the policies in place. In fact, the licensee's argument was that the occupant load was 377 persons and the licensee did not dispute the branch officer's counts of 230 and 249.

I find that the licensee contravened as alleged on March 17, 2006, and has not established a defence of due diligence.

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 by the minimums set out in Schedule 4 of the *Regulation*. However, I am not bound by the maximums and 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.

The branch's primary goal in bringing enforcement action and imposing penalties 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 the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Accordingly, pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), this is a first

contravention. Pursuant to Schedule 4, Item 15, the range of penalties for first contraventions is four (4) to seven (7) days suspension and/or a monetary penalty of \$4,000-\$7,000.

The licensee urged me to find that there is no need to impose a penalty, primarily, as I understand, on the grounds that there was no safety hazard created. I find that submission is not compelling. It is not up to a licensee to decide that there are no safety issues. The licensee's responsibility is to comply with *Regulations* imposed by legislation and by the appropriate agencies. On the evidence, there was no reason for the licensee to believe that its occupant load was anything other than 150 persons. Based on the undisputed evidence, the licensee admitted approximately 80 persons more than the legal limit.

I find the circumstances of this contravention warrant the imposition of a licence suspension or monetary penalty to bring home to this licensee the importance of voluntary compliance. The licensee argued that a monetary penalty would be appropriate. However, I find that might be nothing more than the cost of doing business given the large number of patrons the licensee admitted on this occasion.

I find that the appropriate penalty is a licence suspension and I find that the minimum penalty of four (4) days is sufficient.

ORDER

I order a licence suspension of four (4) days to commence as of the close of business on Thursday, September 21, 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*). I direct that Liquor Licence No. 039829 be held by the branch or the R.C.M. Police Surrey Detachment from the close of business on Thursday, September 21, 2006, until the licensee has demonstrated to the branch's satisfaction that Donegal's Pub has been closed for four (4) business days. A suspension sign notifying the public shall be placed in a prominent location by a branch C & E officer or a police officer.

[ORIGINAL SIGNED]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: August 29, 2006

cc: R.C.M. Police Surrey Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Mike Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
James Macdonnell, Branch Advocate

APPENDIX A

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

Capacity**6 (1) Before the general manager**

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

Definitions**1 (1) In this regulation**

...

"occupant load" means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

"patron capacity", in relation to an establishment, means the maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12 (3) (b) of the Act as the area where liquor may be sold or served;

"person capacity", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment;

Schedule 4, Penalty Schedule

Item 14: Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of person in the licensed establishment is less than or equal to the occupant load.

Item 15: Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of person in the licensed establishment is more than the occupant load.
