



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING 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:	657713 B.C. Ltd dba Lumby Hotel 2004 Shuswap Avenue Lumby BC V0E 2G0
Case:	EH07-092
For the Licensee:	Gary Keenan, Owner
For the Branch:	Sonja Okada, Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	November 13, 2007
Date of Decision:	December 17, 2007

INTRODUCTION

657713 B.C. owns and operates the Ramshorn Pub (“the pub”) in the Lumby Hotel, under Liquor Primary Licence No. 020949. The licence stipulates that the hours of sale are from 11:00 a.m. to 1 a.m. Monday through Thursday, 11:00 a.m. to 2 a.m. on Friday and Saturday and 11:00 a.m. to midnight on Sunday. It also stipulates that the licensed capacity is 87 patrons in area 01, 51 patrons in the designated smoking area and 31 patrons on the patio. The licence is also subject to terms and conditions, including those contained in the Guide for Liquor Licensees in British Columbia (“Guide”).

ALLEGED CONTRAVENTION

By Notice of Enforcement Action (“NOEA”), dated August 16, 2007, the Liquor Control and Licensing Branch (“branch”) alleged that on June 9, 2007, the licensee contravened section 12(2) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (“Act”) and section 71(2)(b) of the *Liquor Control and Licensing Regulation* (“Regulation”), B.C. Reg. 244/2002, by “overcrowding beyond patron capacity more than occupant load.”

The branch proposed a penalty of a five (5) day suspension of the liquor licence in accordance with Schedule 4 of the *Regulation*, item 15.

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUE

1. Did overcrowding in the licensed premises occur as alleged by the branch?
2. If so, what is the appropriate penalty, if any?

EXHIBITS

- Exhibit No. 1: Liquor Primary Licence No. 020949
- Exhibit No. 2: Notice of Enforcement Action, dated August 16, 2007
- Exhibit No. 3: Branch letter to licensee, dated September 10, 2007
- Exhibit No. 4: Branch pre-hearing conference reporting letter, dated October 1, 2007
- Exhibit No. 5: Branch document package, dated October 25, 2007
- Exhibit No. 6: Letter from licensee's employee, undated

EVIDENCE

The branch's sole witness was the liquor inspector. The licensee's owner/manager provided the evidence for the licensee.

BRANCH EVIDENCE***Licensed Capacity and Occupant Load***

The inspector testified that he has spoken with the licensee on numerous occasions about the number of patrons found on the patio. These occurrences are usually during busy weekends such as Lumby Days, Buck Night or Funtastic. He did not have a record of the dates of his conversations. However, he testified that the licensee always replied that this was a special occasion and the only times that the patio was crowded.

The licensed capacity allows for a total of 138 patrons inside, and 31 patrons on the patio. There had been another liquor licence for a lounge which had expired and the inspector had given the licensee information about applying to include that area in the pub area. This application was received by the regional office on March 14, 2007, indicating a proposed increase in the occupant load to 200

patrons inside and 35 on the patio. On the floor plan contained in Exhibit No. 5, these figures show as approved as of June 18, 2007, after this alleged contravention. However, the inspector testified that these were the occupant loads that he accepted as accurate as of June 9, 2007.

Events of June 9, 2007

The liquor inspector testified that he and another inspector conducted a routine inspection just before 10:00 p.m. on the night of June 9, 2007, which was Saturday night of the annual Lumby Days celebration. He counted 171 patrons inside and 85 on the patio. Because of his concern about the excessive number of patrons on the patio, he spoke with the licensee about the safety issue created by the patio overcrowding and told him that if he did not reduce the numbers, the inspector would have to take enforcement action for being over the occupant load. The inspector testified that the licensee put more staff on the patio and reduced the numbers.

The inspector testified that he and his partner returned to the pub that night at 11:05 p.m. and did another count. This time the inspector counted 180 patrons inside and testified that the patio was so crowded he could not perform a count. The other inspector recorded his counts at 176 inside and 117 on the patio and these are the numbers that were recorded on the Contravention Notice (see Exhibit No. 5) issued June 25, 2007. The inspector testified that he spoke with the licensee about the patio overcrowding and that the licensee replied that this only happens twice a year.

The inspector issued Contravention Notices for both instances on June 9, but the branch only pursued enforcement on the second one.

Compliance History

The inspector referred to the Liquor Primary inspection Interview Sheet completed on May 16, 2003, in which all of the terms and conditions of the Act, *Regulations*, and Guide should have been discussed with the licensee. He referenced two Licence Premises Checks issued by police in June 2003, one of which alleged overcrowding on the patio. These were followed up with Contravention Notices issued by the branch but no enforcement action was pursued. The liquor inspector responsible for the area complete a compliance meeting form on June 24, 2003, in which he noted that the licensee "will have sufficient staff for special occasions in future." This is signed by the licensee.

The liquor inspector testified that he received emails in June 2006 and on January 21, 2007, from the local police officer. The licensee objected to the emails being admitted as evidence on the grounds that they were hearsay and the author was not available for questioning. After hearing evidence from the inspector about his follow up on this email with the licensee, and hearing from the branch advocate and the licensee, I determined that the emails should not be admitted and I removed them from Exhibit No. 5.

The inspector had spoken with the licensee about the concerns raised by the police officer in the January 21, 2007 email, and he conducted a compliance meeting with the licensee on January 31, 2007, via telephone. The officer made notes of his conversation and transferred those to a Compliance Meeting form. Both the notes and the form are included in Exhibit No. 5. The officer testified that, basically, the licensee's response was that the overcrowding only occurs a few times per year and should be overlooked. The inspector advised him that he should have extra staff on busy nights.

Penalty

The inspector testified that the proposed five day suspension reflects the branch's concerns for the safety of the licensee's staff and patrons which is at risk when the patio is overcrowded. Additionally, it reflects the substantial history of non compliance over four years, two compliance meetings and numerous conversations between the inspector and the licensee.

LICENSEE EVIDENCE

The licensee testified that the incidents are not as numerous as the inspector suggests and that there had been no incidents from 2003 until 2007. The reason that patrons flow onto to the patio is that the interior becomes too hot because the air conditioning does not work. Usually, this occurs when the band takes a break and the crowd returns inside when the band starts playing again. The licensee acknowledged that this has been a problem during Lumby Days and that the liquor inspector had spoken with him about overcrowding on the patio on two or three occasions.

He also testified that there have not been any reported problems since the former police officer left in early 2007. At one point, there was a meeting between the previous liquor inspector, the licensee and the former police officer. However, according to the licensee, the police officer left after about five minutes, frustrating attempts to work out their differences. When the new officer arrived this year, they had a two and half hour meeting. The officer insisted that the licensee hire professional door staff, but those are not available in Lumby. For Lumby Days this year the licensee hired five door staff.

Since the June 2007 Contravention Notice, the liquor inspector has talked with the licensee about applying to the municipal authority to increase his patio space. This could solve the problem. Until this occurs, the licensee believes that it is more dangerous to require people to go outside at the breaks as he does not have control over them when they leave.

Licensed Capacity and Occupancy Load

The licensee testified that he had taken advice from the former liquor inspector about the lounge licence. He understood the inspector to say he could save about \$1,000 per year by adding the lounge space to the pub. Before the current inspector spoke with him about it, he assumed it had all been taken care and that his occupancy load had been increased. He was of the opinion that his occupancy load was 250. However, he confirmed that he was the person who submitted the application to the branch, and confirmed that the occupancy is 235 with the patio.

June 9, 2007

The licensee testified that he had instructed the door staff to keep the occupancy to 250 patrons. When the liquor inspector spoke with him at the first inspection, he assigned one of the door staff to the patio but, he said, that person did not do a good job. When the inspectors returned, the outside door staff had done a good job as their counters showed the occupancy at 250, but the patio was again overcrowded. The licensee admitted that the patio was grossly overcrowded on this occasion.

SUBMISSION

The licensee submits that he has only been written up twice in five years – in 2003 and 2007 – and that is not bad, particularly considering that he has owned his own bar since 1986. The inference I take from this is that he has not received a contravention notice at any other time since 1986.

Despite his confusion over whether the occupancy load was 235 or 250, he submits that all he has been charged with is overcapacity on the patio. The branch never suggested total overcapacity. The licensee submits that not being over total capacity is a defence to this alleged contravention.

ANALYSIS AND DECISION

I find that the licensee's application to increase the occupant load had been submitted and accepted by the branch and that the licensee was entitled to assume the new occupancy loads for enforcement purposes. Accordingly, I find that the occupancy load was 200 inside the pub and 35 on the patio.

I find the evidence is clear that the licensee permitted more patrons on the patio than is permitted by the occupancy load. I do not accede to the licensee's argument that it is only the total occupancy load that counts. If that were the case, there would be no point in differentiating the two areas.

I find that the licensee was aware of the issue of overcrowding on the patio and that he did not take appropriate steps to ensure it did not occur. Accordingly, I find that the licensee contravened the *Act* and *Regulations* as alleged.

Due Diligence

The defence of due diligence is a complete defence to contraventions under the *Act*. The onus is on the licensee to demonstrate on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. The licensee must also establish that the employee connected to the contravention was not the directing mind of the licensee. The existence of policies is not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignores them, or makes no effort to see that they are enforced (*R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 QL 21; *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)* 2004 BCSC 248; *Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2005 BCSC 1465).

I find the owner/manager is the directing mind of the licensee and was present that night. He was aware of the issue with the patio overcrowding. He put a staff person on the patio door but did not monitor that person to ensure he was monitoring the patio. The licensee was aware of the problem when the band took breaks but did not take any other action to ensure that the patio occupancy was adhered to.

The licensee did not raise the defence of due diligence but I have considered it in any event. I find the evidence is insufficient to establish that the licensee meets the requirements of the defence.

PENALTY

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.

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* 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 *Regulations*. 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.

There is no record of prior contraventions, offences or enforcement action of the same type for this licensee or this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, Schedule 4, Item 15, the range of penalties for a first contravention is a four (4) to seven (7) day suspension and/or a monetary penalty of \$4,000-\$7,000.

I have considered the licensee's compliance history going back to 2003. It is apparent from his testimony, as well as from the inspector's, that he has been advised by the branch on a few occasions about the requirement to keep the patio from being overcrowded. In January 2007, the inspector conducted a compliance meeting with the licensee by telephone, specifically addressing concerns that had been raised by the police officer about overcrowding on the patio. I am satisfied that the licensee understood that enforcement action could be the result if he permitted overcrowding on the patio. I have already found that the licensee did not take appropriate steps to correct that problem during Lumby days when he knew it was likely to occur. The licensee agreed that the patio was grossly overcrowded when the inspectors attended the second time.

For these reasons, I find that the imposition of a penalty is warranted. I also find that imposition of a penalty is warranted to ensure voluntary compliance in the future.

The licensee submitted that a licence suspension would put considerable stress on his family, and on the staff which consists of four single mothers and a college student. He also submitted that the pub does not make enough money to pay a fine.

I find that a licence suspension is the appropriate penalty. I am not bound by the branch's recommendation and I find that the minimum penalty of four (4) days is appropriate.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 020949 for a period of four (4) days, to commence as of the close of business on Friday, January 11, 2008, 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 Primary Licence No. 020949 be held by the branch or the local Police Department from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: December 17, 2007

cc: RCMP Lumby Detachment

Liquor Control and Licensing Branch, Victoria Headquarters
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Sonja Okada, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licences

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(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).

...

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

Section 71(2)

(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.

Schedule 4
Penalties for Overcrowding

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First	Second	Subsequent	
15	Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load	4-7	10-14	18-20	\$5000-\$7000