



**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: The Longhorn Pub Ltd.
dba Carleton Lodge (Longhorn Pub)
4284 Mountain Square
Whistler, BC V0N 1B0

Case: EH08-056

For the Licensee: Richard and Joseph Gibbons

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: September 17, 2008

Place of Hearing: Whistler, BC

Date of Decision: November 3, 2008

**Ministry of Housing
and Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Longhorn Pub Ltd. dba the Longhorn Pub is located in the Carleton Lodge in Whistler, BC. The licensee holds Liquor Primary Licence No. 005564. The hours of sale are 9 a.m. to 1 a.m. Monday thru Sunday. The person capacity is 275 in area 1 and 170 on the patio. The occupant load is 275 persons for 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 licensee also holds a food primary liquor licence, which is located adjacent to the patio area of the Longhorn Pub.

The corporate licensee is part of the Gibbons Hospitality Group that owns and operates several licensed establishments in British Columbia and Ontario.

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the NOEA) dated May 15, 2008. The branch alleges that on April 18, 2008, the licensee contravened section 6 (4) of the *Liquor Control and Licensing Regulation* (the *Regulation*) by permitting more persons in the licensed establishment than the person capacity set by the general manager, and the number of persons in the licensed establishment was more than the occupant load. The proposed penalty is \$5000 (item 15 of 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 licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

The licensee disputes the alleged contravention.

RELEVANT REGULATORY PROVISIONS

Liquor Control and Licensing Act (the Act)

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

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).

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- Exhibit No. 1:** Branch Book of Documents #1, tabs 1 – 16.
- Exhibit No. 2:** Copy of floor plan depicting the licensed patio areas.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two branch liquor inspectors, A & B testified. Inspector A is responsible for the geographical area known as the Sea-to-Sky Corridor which includes Whistler. On April 18, 2008, the two inspectors were making inspections of establishments in the Whistler area. At approximately 11:30 p.m. they proceeded to the Longhorn Pub entering through the liquor primary patio area and into the main liquor primary area. As the main area appeared to be very crowded Inspector B made a count of the number of persons inside. Using a mechanical counter she counted 346 persons including staff. Inspector A spoke with the manager (witness C) and told him of the count. He disagreed with the number and it was decided that both he and inspector A would conduct separate counts using mechanical counters. Inspector A counted 318 persons, which did not include staff nor did it; include persons using the washrooms located outside of the licensed area. The manager told her that he counted 316 persons; he did not say whether this included staff. As the main liquor primary area is licensed for a total of 275 persons including staff she advised the manager that he needed to decrease the number of persons in the area and that she would be issuing a Contravention Notice (CN).

A CN for exceeding the person capacity and occupant load was subsequently completed by inspector A and provided to the establishment (exhibit 1, tab 2). The general manager later told her that there were 19 staff on duty that night (exhibit 1, tab 9). Inspector A conducted a compliance meeting with the manager and general manager on May 5, 2008. They committed to making changes in the manner in which they oversaw the number of persons permitted in the room. A count of the number of persons admitted inside would be kept by the door staff, as well one staff member would be dedicated to make periodic counts of the number of persons inside. The information would be reported to the manager.

Inspector A testified that she had conducted a previous inspection of the Longhorn Pub on January 26, 2008. It was "Aussie Day" in Whistler. All establishments were busy, the Longhorn Pub as the unofficial headquarters for the celebration was particularly busy and had taken extra measures to deal with the number of persons. At that time she made two counts of persons inside the main liquor area, 310 and 295 respectively, neither included on-duty staff. Another inspector with her at the time counted 320 persons. The manager (witness C) counted 304 persons. As the number of persons exceeded the authorized capacity, the manager was advised to decrease the number of persons in the area and that she would be issuing a CN. A CN for exceeding the person capacity and occupant load was subsequently completed on January 30th and mailed to the licensed establishment using the "mailing address" indicated on the liquor licence. As the inspector was satisfied that this was an isolated incident by a good licensee, the matter did not proceed to enforcement. In discussion later in April with Mr. Joseph Gibbons, a principal of the corporate licensee, he was upset that he did not receive the CN and requested that the mailing address be changed so that any correspondence would come directly to his office.

The inspector reviewed the branch file for the establishment. In her testimony she referred to copies of documents from the branch file:

- Exhibit 1, tab 4; floor plan for the main area, total area capacity 275 persons, total exit capacity 1090 persons.
- Exhibit 1, tab 16; the liquor primary licence in effect at the time of the alleged contravention. It is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees."
- Exhibit 1, tab 18; a copy of the "Guide" in effect at the time of the alleged contravention. She referred to excerpts from the Guide dealing with: "Occupant load", "Patron Capacity", "Person Capacity" and "Terms and Conditions" (pp 1 & 2); "Your Role as a Licensee" (p3); and "Overcrowding" (p12).

She testified that she is familiar with the Gibbons Hospitality Group and its involvement as licensees and operators of several establishments in Whistler. They operate to a high standard with concern for community standards. Their management and staff are always co-operative. She knows Joseph Gibbons, a representative of the Group and she is familiar with his involvement and leadership within the hospitality industry in Whistler.

In determining whether to proceed to enforcement on the April 18th incident she considered the earlier incident in January and was concerned that a pattern of overcrowding was developing that needed to be stopped. She completed a NOEA on May 15, 2008, outlining the alleged contravention and recommending a penalty be imposed (exhibit 1, tab 1). She was satisfied that the minimum monetary penalty would be sufficient to ensure future voluntary compliance by this licensee.

EVIDENCE - THE LICENSEE

Mr. Richard Gibbons testified that he is a principal of the Gibbons Hospitality Group and is an officer and director of the corporate licensee for the Longhorn Pub. He has been in the hospitality industry as a licensee for over 35 years, owning hotels, nightclubs and restaurants throughout the province and more recently in Ontario. He has been president of the provincial liquor licensee association and continues as a director. He has participated in government initiated liquor regulation reviews, understands the liquor laws and agrees with them. He emphasizes the necessity of compliance for all of his establishments and has never been the subject of enforcement proceedings until this occasion. Co-operation with the local liquor inspector is mandatory and the inspector is looked upon as a resource to the operation of their establishments.

He testified that in the hospitality industry it is impossible to operate at a level of perfection, mistakes will occur. Overcrowding can occur as a result of the inexact nature of counting the number of persons in an establishment. The Longhorn Pub is primarily a daytime operation with 30% of its sales coming from the sale of food and is probably the busiest bar in the province. It is subject to hundreds of inspections each year, there have been only two instances of overcrowding. He is dismayed that they have put themselves in position for this to occur and that the branch has not been able to recognize that the two incidents are aberrations from their normal operation. Every reasonable effort will be made to ensure that they do not occur again.

The Longhorn Pub maintains an Employee Handbook that is discussed with and understood by each employee (exhibit 1, tab 12-a & b). Door control persons are known as hosts or hostesses. They are responsible to ensure that the establishment does not exceed its licensed capacity (exhibit 12-a, pp14 & 15).

Mr. Joseph Gibbons testified that he is a principal of the corporate licensee for the Longhorn Pub. He has been involved in the operation of licensed establishments for approximately 12 years working in virtually all positions. He is active in local community organizations and in liquor licensing associations. He meets regularly with the local liquor inspector and police officers. The Longhorn Pub maintains a policy manual (exhibit 1, tab 12 a) which is read and understood by all staff (tab 12 b). All managers meet every Monday morning and staff meetings are held monthly. It is mandatory that all staff work within the rules. He maintains an office in the Carleton Lodge overlooking the Longhorn Pub patios. A video system has been installed which allows him to monitor the operation of the pub from his office or thru the Internet on his laptop computer.

He testified that he did not learn of the CN issued for the incident of January 26th until the liquor inspector advised him that the April 18th incident was the second involving overcrowding. He met with her the following day in her Pemberton office. She advised that she was scheduling a compliance meeting with the manager and the general manager of the pub but it was unnecessary for him to attend. He was not told that the matter was going to enforcement otherwise he would have cancelled his plans to be out of town on business and would have attended the compliance meeting. Upon learning that the matter was proceeding to enforcement, he spoke with the liquor inspector who advised him that the decision was not hers but came from higher up in the branch. He attempted without success to contact the Regional Manager for the branch.

He testified that on April 18th at the time of the alleged contravention there were seven hosts on duty, including being stationed at all the street entrances to the food primary and liquor primary areas and between the patios and the main liquor primary area. These were sufficient to monitor capacity requirements.

Licensee witness C testified that he has been employed in the hospitality industry for approximately five years and holds a S.I.R. certificate. He is currently the general manager of the Longhorn Pub. He was previously a manager at the pub and was

working in that capacity on the nights of April 18th and January 26th, 2008. Joseph Gibbons oversees operations and compliance issues at the pub. Mr. Gibbons frequently discusses issues with him and regularly monitors the operation through the in-house video system. He stresses that compliance is of utmost importance particularly regarding minors, overservice and overcrowding. Weekly meetings are held with all managers and monthly meetings with all staff. They maintain an ongoing working relationship with the local liquor inspector. At no time has it been suggested that there were compliance concerns at the pub. From time to time the inspector would say that something needs correcting, such as the need to reduce the number of persons in the establishment. In November 2007, the inspector attended and spoke to staff at their monthly meeting. The system employed to keep track of the number of persons in the establishment was for the manager to conduct periodic counts. The hosts were not provided with counters. The liquor inspector was aware of the system used and did not object to it.

He was working the night of April 18th with the marketing manager acting as his assistant manager. Approximately 9:30 to 10 p.m., the room was not busy so he instructed the assistant manager that he would be doing payroll in the office. The assistant said that everything was OK and took the counter and went onto the floor. A short time later the assistant manager advised him that the liquor inspector had arrived and counted approximately 350 persons in the room. He took the counter and went onto the floor to conduct a count. The inspector counted 318; he counted 316 persons in which he included approximately 10 - 15 persons who may be in the washrooms located outside of the licensed area. He agreed that this was in excess of the licensed capacity and agreed to reduce the number of persons in the room. He believed that the increase in the number of patrons in the room was due to an influx of persons from the patio coming inside when the featured singer performed.

He and the then general manager attended the compliance meeting on May 5th with the liquor inspector. They committed to deal with the capacity issue and have done so. The liquor inspector did not tell them at the compliance meeting that the matter would proceed to enforcement. The number of hosts has been increased and radio communication has been established between the hosts and managers. The manager, assistant manager and lead host now all use counters. Counts are made every 10 minutes and the information provided to host and managers to ensure that they do not exceed capacity.

He testified that he was working the night of January 26, 2008, "Aussie Day." He does not recall that he did a count of persons in the establishment with the liquor inspector nor that she said that she would be issuing a CN. He did not receive a CN from the inspector and was unaware that one had been issued until advised by Joseph Gibbons in April. The establishment has an incident log, however, it is rarely used and was not completed for January 26th or April 18th.

Licensee witness D testified that he has been employed at the Longhorn Pub since 2005, beginning as a host and currently as the marketing manager. He was working the night of April 18th as assistant manager supervising the room. It was "Reggae Friday" with live entertainment and a special guest singer. There were seven hosts on duty and everything was in order, they were well within the capacity limits. He had conducted a count of persons in the main area of approximately 240 - 250 persons. When the guest singer commenced her performance it created an influx of persons from the patio to the main area inside. He was about to take corrective action when the liquor inspector arrived. The inspector and the manager both counted 316 318 persons and the inspector advised them to reduce the number of persons inside which was quickly complied with. The surge of persons from the patio was unique. It had not occurred on previous "Reggae Fridays."

Licensee witness E testified that he is a municipal councillor for the Resort Community of Whistler. As such he represents the municipality on various committees including the Liquor Advisory Committee and the Whistler Bar Association. Joseph Gibbons chairs the Bar Association, monthly meetings are held and it serves the community well. He is familiar with the Gibbons Hospitality Group and the licensed establishments that it operates including the Longhorn Pub. He is not aware of any problems occurring with any of their establishments. He was shocked and surprised to hear of the enforcement action taken against the Longhorn Pub. They understand the community standards and have been leaders in bringing the bars together to avoid problems occurring within the community. He agreed that he would be concerned if an establishment exceeded its occupant load and action should be taken if done on a regular basis. His concerns would be lessened if the exiting capacity exceeded the occupant load and the overcrowding was minimal.

SUBMISSIONS – LICENSEE

The licensee submitted that on April 18, 2008, at the time of the alleged contravention the establishment employed a system to prevent overcrowding which required the manager to make periodic counts of the number of persons in the establishment and advise the hosts if any action was necessary. That system had been in place for several years during which it was accepted by the liquor inspector and there were no contraventions. On April 18th prior to the arrival of the liquor inspector the assistant manager counted 240 - 250 persons in the main licensed area, well within the capacity limit.

The licensee is entitled to a defence of due diligence. The licensee had manuals in place which had been read and signed-off by all staff. Weekly management meetings and monthly staff meetings were in place. The hosts met regularly. The licensee policy was clear, overcrowding beyond the permitted capacity was not allowed. The manager controlled the room through having adequate staff, making counts using a mechanical counter and working closely with the liquor inspector and police. On April 18th the

evidence is that prior to 11:30 p.m. the pub was not unreasonably busy, the crowd was spread out and there were no issues. At approximately 10 – 10:30 p.m. the manager went to the office to perform other duties, the assistant manager told him that all was in order; hosts were in their assigned positions. It was unexpected that the singer's performance attracted persons from the patio into the main area. The assistant manager was moving into the room to deal with that when the liquor inspector arrived. The mistake was in not anticipating the surge of persons from the patio. It had not occurred in the past in similar circumstances. The situation may have been different if the January 26th incident had come to the attention of the licensee. The CN mailed to the licensee was not received. The mailing address has now been changed.

The Gibbons Group as licensees for 35 years have never been subject to enforcement action. The Longhorn Pub has been in business for 26 years without a contravention. This must indicate their ability to comply. If their efforts do not amount to due diligence, they nor anyone else should be in the hospitality business.

The licensee submitted that due diligence requires that the licensee establish on a balance of probability reasonable efforts to comply. He submitted that has more than been met here. He referred to the general manager's decision in Central City Brewing Company Ltd. dba Central City Liquor Store (EH07-152) April 23, 2008, wherein it was found that the licensee had been duly diligent.

REASONS AND DECISION

The evidence is that on April 18, 2008, the Longhorn Pub, area 1 was found to be overcrowded. The number of persons in the licensed area exceeded the maximum capacity and was greater than the occupant load. That is a contravention of section 6(4) of the Regulations to the *Liquor Control and Licensing Act*.

Due Diligence

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.

The leading case is: *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299. At p. 1325, Dickson J sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC (para 25), set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*.

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in Plaza clarified that the directing mind need not be an officer or director of the licensee:

It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee. (para 27)

Here, I find that the directing mind of the licensee at the time of the contravention was the manager (witness C). He supervised the staff including the hosts and was responsible for conducting counts of the number of persons in the licensed area and ensuring that the number of persons not exceed the authorized capacity. He knew or ought to have known that the number of persons on the patio combined with the number of persons in the main area would exceed the authorized capacity of the main area. He knew or ought to have known that providing live entertainment in the main area would act as an attraction for persons on the patio to enter into the main area. That it had not occurred in the past provided no guarantee that it could not occur, particularly if the entertainment was particularly popular. One of the purposes of providing entertainment is to attract persons to the establishment. At the very least he could have alerted the hosts to the possibility and instructed them that it was not to be allowed to occur. There is no evidence that the hosts responsible for monitoring the entrance from the patio into

the main room took any action to prevent the “surge” of persons into the main area. In consequence, I find that the licensee has not met the test for due diligence.

In conclusion, on the evidence, I find on a balance of probabilities, that on April 18, 2008, the licensee contravened section 6 (4) of the *Liquor Control and Licensing Regulation* (the *Regulation*) by permitting more persons in the licensed establishment than the person capacity set by the general manager and the number of persons in the licensed establishment was more than the occupant load.

PENALTY

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 to follow the minimums set out in Schedule 4 of the *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

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 this incident. The range of penalties for a first contravention of 43 (2)(b) of the *Liquor Control and Licensing Act* pursuant to Schedule 4, item 11 is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

On the whole of the evidence of this case, I find that a penalty is not necessary to ensure future compliance. This is a long-standing licensee operating by all accounts a well-run establishment. The same licensee group has operated this establishment for a period of 26 years and other establishments in the province for a longer period of time without a contravention. There is a record of continuing co-operation with the branch. I am satisfied in this case that the circumstances of the contravention are not likely to be repeated.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: November 3, 2008

cc: RCMP Whistler Detachment
Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Surrey Office
Attention: Bode Fagbamiye, Branch Advocate