



**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:	Tabor Arms Pub 100 Tabor Blvd S Prince George, BC V2M 5T4
Case:	EH09-025
For the Licensee:	Trevor Dungate
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	September 23 & 24, 2009
Place of Hearing:	Prince George, BC
Date of Decision:	October 9, 2009

INTRODUCTION

The Tabor Arms Pub is a neighborhood pub in Prince George B.C. It operates under Liquor Primary Licence #037622. The licence stipulates that the hours of liquor sales are from 9:00 a.m. to midnight Sunday through Thursday, and 9:00 a.m. to 1:00 a.m. Friday and Saturday. The licence is also subject to terms and conditions, including those contained in the *Guide for Liquor Licensees in British Columbia* (Guide).

ALLEGED CONTRAVENTIONS

By way of a Notice of Enforcement Action (NOEA), dated April 6, 2009, the Liquor Control and Licensing Branch ("Branch") alleged that on February 20, 2009, 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*, B.C. Reg. 244/2002 (*Regulation*), by permitting more patrons in the establishment than the patron capacity set by the general manager, and the number of persons in the establishment was more than the occupant load. The Branch proposed a five (5) day suspension of the liquor licence in accordance with Schedule 4, item 15 of the *Regulation*.

The NOEA also alleged that on February 20, 2009, the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The Branch proposed a five (5) day suspension of the liquor licence (item 11 of Schedule 4, *Liquor Control and Licensing Regulation*).

ISSUES

1. Did overcrowding occur in the licensed premises as alleged by the Branch?
2. Did the licensee permit an intoxicated patron to remain in the licensed establishment contrary to the *Act*?

3. If either or both of the allegations occurred, is a penalty warranted and if so, what penalty is reasonable?

RELEVANT STATUTORY PROVISIONS

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 license 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).

Drunkenness

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(2) A licensee or the licensee's employee must not permit

(a) a person to become intoxicated, or

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002**Licence categories, terms and conditions and endorsements**

71 (2) The following apply to a license converted under subsection (1) unless and until rescinded or amended by the general manager:

(a) the terms and conditions imposed on the license 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 license in effect immediately before December 2, 2002, except an endorsement on a winery license for a consumption area.

EXHIBITS

Exhibit No. 1: Compliance and Enforcement Desk Reference s.9, p.1.

Exhibit No. 2: Compliance and Enforcement Desk Reference s.9, p.2.

Exhibit No. 3: Compliance and Enforcement Desk Reference s.3, p.2.

Exhibit No. 4: Compliance and Enforcement Desk Reference s.9, p.4.

Exhibit No. 5: Compliance and Enforcement Desk Reference s.18, p.1-6.

Exhibit No 6: Compliance and Enforcement Desk Reference s.15, p1-10.

Exhibit No. 7: Branch Book of Documents.

Exhibit No 8: Compliance and Enforcement Desk Reference s.8, p.2.

Exhibit N0 9: Compliance and Enforcement Desk Reference s.8, p.1.

Exhibits 1-6, 8, 9 were submitted by the Licensee. Exhibit 7 was submitted by the Branch.

BRANCH EVIDENCE

RCMP Constable:

An experienced officer of the local RCMP detachment testified that he attended the establishment at 11:30 p.m. on February 20, 2009 with a training recruit. The establishment was busy and noisy. He had been dispatched to the establishment for a reason unrelated to the Branch's allegations. Two liquor inspectors met the two constables and asked the constables to go into the pub with the inspectors to ensure their safety. He noted a line-up to enter the pub and a doorman at the entrance. The constable testified that he did not make any notes of the visit.

While at the pub, the constable was aware that the liquor inspectors had issues with both the number of people in the establishment and the level of intoxication of at least one patron. He was not asked to participate in a patron count, or deal with any intoxicated patrons. The constable said that he did not have the resources to direct his attention to whether or not there were intoxicated patrons in the establishment at the time.

Captain of the P.G. Fire Department:

The Branch sought to call a representative of the fire prevention branch of the Prince George Fire Department to speak to the issue of the establishment's occupant load. The Licensee objected on the basis that it had been notified that the Branch would call an individual from the Prince George Building Department to speak to the matter of the occupant load. When the representative of the Building Department was not available, the Branch notified the Licensee that it would be seeking a replacement to speak to

occupant load. The Licensee argued that they had inadequate notice of the Branch's intention to call a member of the Fire Department for this purpose.

I held that the witness could testify. The Licensee had notice from the Branch of the Branch's intention to call a witness from the municipality to speak to the occupant load. Establishing the occupant load is a necessary component of one of the allegations made against the Licensee and the Licensee had knowledge and notice of the Branch's intention in that regard. The witness's association with one municipal department as distinct from another was not critical to the evidence in this regard.

The witness testified that he has been with the P.G. fire department for thirty years, and for much of that time was responsible for calculating occupant loads in establishments. He indicated that there are two definitions of occupant load used by the municipality: the BC Building Code has one definition based on the number of fire alarms and exits and uses gross floor area for its calculation, and the Fire Department's definition uses net area exclusive of the surface of tables and areas that persons do not normally occupy. He confirmed that the occupant load established by the Fire Department for the Tabor Arms is 131 persons and has always been thus since it was established in June, 2001. He identified tab 10 of Exhibit 7 as the calculation and confirmation of the occupant load for the licensed establishment.

Liquor Inspector #1:

The liquor inspector testified as to her considerable experience both as a liquor inspector for the Branch and in functions where she was required to observe and interpret signs of intoxication and mental deficit before her current employment. She indicated that she has conducted as many as 700 patron counts in licensed establishments and as many as 1,000 inspections, and has had formal training in observing and identifying symptoms of intoxication.

She indicated that she attended at the licensed establishment with another inspector at approximately 8:50 p.m. and then departed for other business to return at approximately 11:25 p.m. that night. On the second visit she observed a line-up of patrons outside the establishment, a doorman working the door, and a lot of people in the pub. She

approached the doorman and asked if he had a mechanical counter, and the doorman advised that he did not have one.

She thought the establishment looked crowded and so she decided to do a patron count. It was difficult to move in the pub and it was very loud. She used a counterclockwise route while counting. At the hearing she demonstrated this with the use of the floor plan at tab 8 of Exhibit 7. The result of her count was 170 persons in the main area and 7 in the patio area. She noted that it was very difficult to move through the patrons while doing her count. She used her usual mechanical counter, pressing the button one time for each person she saw (exclusive of the people behind the bar).

She advised the other Liquor Inspector of the result of her count and suggested that he speak to the Licensee and conduct another count. She testified that after doing the count, she stood by the RCMP constables as she felt unsafe elsewhere in the pub. She described the establishment as hot, crowded, and unsafe. Inspector #1 said that she saw the other liquor inspector speaking to the Licensee, and saw that inspector do a count of the room and then speak to the Licensee again.

She also testified that at some point a stranger approached her and said he counted 135 patrons. She did not know if that individual was an employee or not. He advised her that he did not have or use a mechanical counter.

She said that she understood the other inspector to have asked the Licensee to remove 40 patrons.

Inspector #1 said that while patrons were being removed from the establishment, she noted a female who she thought to be intoxicated. She observed two patrons helping the female to stand. The female had a red face, disheveled hair and she was yelling incoherently. The patron had difficulty standing on her own. The inspector observed the female for up to two minutes from 3-6 feet distant, and then the patron walked by her and left the establishment. The liquor inspector said the female was staggering, had bloodshot eyes and was definitely intoxicated.

The witness testified that when she left the establishment to talk to the police outside the front door she observed another intoxicated patron. This patron was male, and exited the pub complaining to the other inspector that his conversation with the police was being interrupted. She said there was no doubt that this individual was intoxicated, and that the patron may have actually said that he was drunk. She testified that she has no knowledge of whether the Licensee knew about the intoxicated male.

The inspector identified the Branch documents in Exhibit 7, and her notes at tab 3 of that exhibit. In particular, she identified the licence at Exhibit 7 tab 6 and pointed to the patron capacities noted thereon of 131 in the main area of the establishment and 20 in the patio. She also identified the *Compliance and Enforcement Policy and Procedures Manual - Desk Reference* (the "Desk Reference") excerpts that make up the Licensee's exhibits. She identified that Desk Reference as a guide for the use of liquor inspectors. She said that the document is not a bible, but assists in day-to-day work. She is supposed to comply with the Desk Reference but it is not all-encompassing and the inspectors do not always make reference to it. She confirmed that inspectors are governed by the *Act* and regulations under the *Act*. She said that she does not carry the Desk Reference with her on inspections. She conceded that the Desk Reference and the *Guide* recommend leaving a contravention notice with the licensee at the time the alleged contravention is noted, but indicated that this is not a requirement. She said that she pointed out the intoxicated patrons and discussed the patron counts with the Licensee and so the Licensee should not have been surprised by the allegations.

Liquor Inspector #2:

This inspector also testified to considerable experience in the field, and a history of observing intoxicated persons professionally for several police forces and the Canadian military over a considerable time. He also described significant formal training in identifying symptoms of intoxication and separating those from non-alcohol related symptomology. He also testified to having executed more than a thousand liquor inspections though he said he had formally counted not more than about twenty establishments for patron capacity. He identified his notes in Exhibit 7 as well as all of the licensing documents and correspondence in that exhibit. He said he was the author of the contravention notice and was responsible for an error on its face. He said he

initially inserted the year as 2008 rather than 2009, and when this mistake came to his attention he amended the contravention notice and served it on the Licensee.

The inspector described his attendance at the licensed establishment with inspector #1 at approximately 8:49 p.m. on February 20, 2009 and then returning at approximately 11:35 p.m. His observations of the pub during the first visit was of a crowded and noisy environment. There was a lineup of patrons waiting to gain entry and a doorman said the pub was "already at capacity." Inspector #2 testified that the doorman did not have a mechanical counter visible, and the inspector was concerned that the "count" was just an estimate.

The inspector testified that on the second visit he and Inspector #1 came upon two uniformed RCMP officers outside the establishment and engaged them in conversation. He acknowledged that the doorman refused the inspectors entry on the basis of a "full house" until they flashed their (Branch) badges. The inspector testified that inside he found the noise level uncomfortably high and patrons milling about "shoulder to shoulder". He formed the opinion that there were approximately 180 people in the establishment, and he discussed doing a count with Inspector #1.

He said that Inspector #1 did a counter-clockwise count with the use of her mechanical counter while he conversed with the doorman and the Licensee. He said that the doorman advised that he had only been a doorman for two weeks, and he confirmed that the doorman had no mechanical means of counting patrons. He was advised by Inspector #1 that she had counted 177 persons including 7 in the patio.

He took the counter from her, zeroed it and counted himself. He actuated the button head-by-head and divided the floor space into four quadrants for his count. He noted the 7 persons in the patio and counted 171 in the pub area. He testified that it took him approximately four minutes to count the room and that for whatever reason the patrons were fairly static while he was counting. The inspector testified that the licence indicated a patron capacity of 131 in the main room and 20 in the patio area.

He spoke to the licensee and requested that 40 people be removed from the premises. The inspector testified that the licensee did not act immediately on that request and the

inspector made three requests before he said he would have to “pull the licence” in the event that 40 people were not removed immediately.

The inspector testified that he observed a male come up to a female and leer down the top of her dress. The male made inappropriate comments and this got the inspector’s attention. The male had bloodshot eyes and smelled of liquor and his gross and fine motor skills were delayed and his speech slurred. The inspector formed the opinion that the male was intoxicated. As the male left, his gait was unsure and unsteady and he weaved back and forth through the crowd until the inspector lost sight of him. When the inspector was outside, he observed the same intoxicated male exiting the front doors of the establishment. He testified that three or four minutes elapsed between when he first saw the male and when the male left the establishment.

Inspector #2 began to testify as to his reasons for recommending enforcement action. I stopped him and ruled that the Branch has a right to choose when to seek enforcement action on an alleged contravention and the reasons they decided to do this is not an issue that I should deliberate upon.

Inspector #2 then described his reasons for recommending the penalty that he did. He said there was a serious public safety risk occurring. He testified that it was his opinion that if a fire broke out the patrons would not be able to extricate themselves from the pub safely. He said that if a patron required medical attention there would be a problem getting that attention to the patron. The inspector said the doorman knew the establishment was overcrowded yet was prepared to allow that situation to continue.

The inspector said the Desk Reference, was a guide that should be followed generally, but that it cannot be blindly followed irrespective of the situation at hand. He agreed that the Desk Reference was not followed, in particular with respect to noting on the contravention notice the results of the two counts conducted by the inspectors.

PARTIAL RULING

At this juncture of the hearing, an oral ruling was made dismissing the allegation of section 43(2)(b) of the *Act* and providing direction regarding evidentiary matters. The following is the text of that oral ruling:

The Branch has concluded its case subject only to re-examination of [inspector #2]. Re-examination may only be based on new issues brought out in cross-examination that could not reasonably have been anticipated by the branch advocate. I therefore have the ability to make a partial decision on the Branch's case at this juncture.

The Branch has alleged two contraventions relating to Feb 20, 2009. One of them is "permit intoxicated person to remain" in contravention of s. 43(2)(b) of the *Act*. I find sufficient evidence to conclude that the male was intoxicated. It may be that the female referred to by [Inspector #1] was also intoxicated. In this regard I have not the need to do a complete analysis of the balance of probabilities. I find insufficient evidence that the licensee *permitted* either of the aforementioned patrons to remain. The male was first observed either outside the establishment or exiting from it, depending on which evidence is accepted. According to [Inspector #2] the male was later seen inside but exiting, or exiting again, as the case may be. The second sighting was within three to four minutes and then the male was no longer in the establishment. The female was said to be in plain sight of the Licensee, but was exiting the establishment. There is no evidence as to how long either of these individuals were in the establishment, whether they interacted with the licensee or its staff, or whether they demonstrated any signs of intoxication prior to the inspectors' observations.

I will hear no further evidence or argument with respect to the issue of the allegations of intoxicated patrons under the allegation of a contravention of s.43(2). This allegation is dismissed.

With respect to whether or not the remaining allegation of overcrowding occurred, I wish to advise that the following matters are not relevant to my decision: organized crime, noise, nature of clientele, noise complaints, bad blood between licensee and inspectors. I will hear no further evidence or argument in that regard.

With respect to the amendment to the contravention notice, I find the Branch required an amendment to the contravention notice only because the year was indicated to be 2008 instead of 2009. I find no prejudice occasioned by the inclusion of the wrong year, as the licensee knew from conversations on the night in question and from the telephone conversation of Feb 23, 2009 to what occasion the contravention notice referred. I find the claims of irregularity in the process of producing the original or amended contravention notice to be the cause of no prejudice to the Licensee and therefore of no significance to this matter. I will hear no further evidence or argument in that regard.

LICENSEE'S EVIDENCE

Two of the corporate licensee's shareholders and directors testified on behalf of the Licensee.

Licensee #1:

This witness testified that he arrived at the establishment at 10:45 p.m. on February 20, 2009. He saw it was busy and thought that was good. He asked another of the Licensee's shareholders, who was already present, how things were going, and that person advised that the establishment was full. He inquired as to whether the doorman had been told, and he was advised that indeed the doorman had been so told and was keeping a lineup - one patron out, one patron in. The witness said he sat where he usually does, by the doorman and the bar where he can watch the servers and help out with staff and any problems that arise.

He saw the two liquor inspectors arrive and then one of the inspectors told him that the establishment looked crowded and the inspectors were going to do a count. He said that one of the inspectors did a count and arrived at a number of 177 or 178 and then the other inspector did another count about five minutes later. He said that from where he was, he did a count and arrived at a conclusion of 144 patrons.

An inspector asked him to remove 40 patrons and he found it difficult to find 40 patrons who were ready to leave. Then the inspector gave him an ultimatum so he just told some tables of people to leave and not pay their bills because they had to get out immediately. He removed 40 people. He then counted twice more, getting counts of 93 and 92 people.

The Licensee said that on February 20, 2009 there were seven staff (bartender, swamper, four servers, and a doorman) two owners and a friend. The friend was the individual who conducted the count of 135 inclusive of staff at 11:00 pm. He testified that he typically tells the doorman when to "hold the line". Sometimes that is at 125 persons, sometimes at 110. He said the doorman knows what the capacity is.

He said there was a journal entry made in the incident logbook for February 20, 2009, but he did not provide that entry as evidence or bring it to the hearing.

As to training and supervising his staff, Licensee #1 said that he has read the *Act* and provided his staff with policies and procedures including a manual (that they no longer use) to train staff. He said the Licensee pulled the manual off of the internet and some of it is not applicable. He conceded that there is no reference in that material or any other materials shared with employees about maintaining a pre-set number of patrons or directing staff as to how to conduct counts. He said that the guide (Exhibit 7, tab 9) is available behind the bar, and he assumes everyone looks through it. It is required that all staff read it at the start of their employment.

Licensee #2:

This witness testified that he also arrived at the pub at 10:30 p.m. on February 20, 2009. He did a count and got 140 persons including staff. He went to the doorman and said: "that's it, start a line." He said that the liquor inspectors arrived and greeted him and he

could hear one of the inspector's advice Licensee #1 that the pub was overcrowded and the inspectors had counted 170 or 171 persons. He said he got a friend to count the patrons, and then he and Licensee #1 started to remove patrons from the pub.

Licensee #2 testified that he is familiar with the Guide, and asked some of his staff to read it. He said the staff knows what the occupancy requirement is, but it is not their responsibility but the doormen's. He said they have staff meetings, but he did not say how often. There are no minutes of those meetings and no memos to staff resulting from them.

SUBMISSIONS

The Branch submits that the Licensee permitted more patrons entry to its licensed establishment than it should have, and the licensee knew or ought to have known that the establishment was overcrowded.

The Branch submits that the Licensee did not exercise as high a degree of diligence as it should have as it did not articulate and enforce adequate policies for door control, and did not adequately train identifiable employees to supervise the implementation of those policies. The Branch says the Licensee did not provide and/or insist on the usage of mechanical counters for all door staff working in the establishment at the relevant times.

The Branch submits that the events of February 20, 2009 consist of serious acts of non-compliance with the *Act* and *Regulations*. The witnesses confirmed the occupant load is 131, and two very experienced liquor inspectors found the establishment crowded "shoulder to shoulder." They conducted two separate counts with the aid of a mechanical counter. The results of the two counts were very close, which lends credence to the accuracy of each count. The counts indicated that the establishment was considerably over the patron capacity and the occupant load.

The Branch says that the Licensee failed to act immediately on the inspector's request to reduce the number of people in the room by 40, and that is indicative of the Licensee's reluctance to comply with its license requirements.

The Licensee argues that the notice served of the alleged contravention of s. 12(2) of the *Act* and s. 71(2)(b) of the *Regulation* does not disclose any contravention and does not constitute notice of the allegations. The Licensee says s. 6(4) of the *Regulation* is the correct section to have alleged was contravened.

The Licensee says the establishment was not overcrowded beyond the patron capacity indicated on the licence and it did not have more persons than the occupant load.

The Licensee says the Desk Reference available to the liquor inspectors was not followed with respect to several elements of the process including amending the original contravention notice when a new one should have been issued; serving the contravention notice some ten days after the alleged contravention rather than leaving it at the scene; failing to use a single notebook for all observations related to the allegations; and separate counts being made by two inspectors rather than two counts being made by one inspector.

Finally, the Licensee argues that in the event that the contravention is established, a penalty of \$5,000 in accordance with the minimum penalty available for a first contravention of this type is appropriate.

ANALYSIS AND DECISION

I accept the evidence of the liquor inspectors that the patron capacity of the establishment is 131 patrons and 20 patrons in the patio area.

Occupant load is an established figure. I find the evidence discloses that the occupant load is 131 persons exclusive of those on the outside patio. That figure is on the face of the document at tab 10 of Exhibit 7, and is identified on the License (tab 6, Exhibit 7). The working papers that led to the production of the fire department's conclusion of occupant load are not relevant to the occupant load with which the Licensee has to comply. Whether or not the occupant load was correctly calculated is irrelevant to the fact that the Licensee is obligated to comply with the stated occupant load. If the Licensee has issues with that figure, it is open for it to make application for a review of the occupant load. There is no relief from the Licensee's obligation to comply with the

limits imposed by the current occupant load. There is no evidence to suggest that the occupant load at the time of the allegation was anything other than 131 persons as set out at Exhibit 7, tab 10.

The Desk Reference does not carry the same weight as the *Act* and Regulation. Its self-descriptive title indicates that it is a reference for liquor inspectors. While consistency in enforcement is a desirable attribute of administrative fairness, compliance with the letter of a desk reference, in absence of demonstrated prejudice to a licensee, is not reason enough to find a process irregular. The Licensee knew of the allegations against it from the night in question and participated in the considerable process of enforcement action leading to the hearing itself. The Licensee has established no prejudice as a result of the administrative process followed by the Branch, in particular receiving the contravention notice some ten days after the allegation instead of on the night it was observed.

With respect to the fact that the contravention notice did not have the results of the two patron counts specified on it as required by the Desk Reference, the relevant question is whether in the face of that omission, the allegations should be deemed void for procedural irregularity. The test is again one of prejudice. In this case, the Licensee was on site at the time the counts were conducted. He was advised of each of the count results, and then repeatedly advised to reduce the number of patrons in the establishment by 40. This reinforced the knowledge that the Licensee already had of the alleged number of patrons in the establishment. In light of this knowledge, there can be no prejudice to the licensee in not having those very same numbers indicated on the face of the contravention notice. I note also that the Notice of Enforcement Action also refers to the results of the counts, and the Licensee came to the hearing knowledgeable and prepared to contradict those figures.

I emphasize that the Desk Reference is a tool for use of the liquor inspectors. It is one of the inventory of tools available for the Branch in the pursuit of consistency of application and enforcement of the *Act* and regulations. Perfection is not required with respect to recommendations in the compliance and enforcement desk reference in order to establish procedure sufficient to satisfy the requirements of administrative fairness. I find that taken as a whole, the actions of the Branch satisfy the requirements

of administrative law.

The Branch argued that the Licensee demonstrated its reluctance to follow the rules by not acting immediately to remove 40 patrons as had been directed by the inspectors. I find that the licensee did not move quickly because he was of the opinion that the premises was not overcrowded. He asked an individual to make a count and held that the result of that count was an acceptable level of persons. Only when the inspector said he would pull the licence and shut the establishment down for the night, did the Licensee respond. Despite that, I do not find that the actions of the Licensee amount to an acknowledgement that the establishment was overcrowded or a display of defiance of the rules or the administration of the Branch.

When the Licensee #1 counted patrons from his seat near the doorman, he counted 144. Later he retold this testimony and referred to the count as a count of persons inclusive of his staff. I find it difficult to accept that in a situation in which the Licensee wanted to show the liquor inspectors less people than the inspectors counted, he would count his employees whom he clearly would have been able to identify. The witness then says that he removed 40 people and counted again, that count resulting in 93 and 92 patrons. I find his evidence less credible as to the number of persons in the establishment than the counts completed by the liquor inspectors. The inspectors counted in a methodical fashion with mechanical counters, and the Licensee did not attend on the inspectors' counting rounds though he might have done so. I find both of the inspectors have considerable experience and ability to count the room accurately.

Both Licensee #1 and Licensee#2 advised that they are responsible for telling the doorman when to hold the line and not allow any more patrons in. Licensee #2 said that on arriving at 10:30 on the night in question, he counted 140 persons including staff and then he told the doorman to hold the line. This evidence is problematic as it indicates that he did not believe the doorman was already holding the line, and it requires that one accept that it was only coincidental that the room was exactly at capacity when he first arrived on the scene and counted. Also, it is at odds with his evidence that the doorman knows on his own to hold the door whenever the establishment is at capacity.

I find the evidence of the liquor inspectors consistent with the facts as they came out in evidence and corroborated by each other. In particular, I find their counts of the patrons to have been conducted in a consistent and reliable fashion with the aid of a mechanical counter. There is insufficient evidence to establish that the mechanical counter was improperly used or was inaccurate. I find the evidence of the Licensee #1 and #2 with respect to the instructions given to the doorman, and the usual protocol and obligations of the doorman inconsistent with the facts. I find any counts that the Licensees or their friend to have conducted were not made pursuant to any consistent or reliable standard. I therefore prefer and accept the evidence of the liquor inspectors as to the fact that the main area of the establishment was occupied by approximately 170 patrons.

The licensee has argued that the Branch should have proceeded under s. 6(4) of the *Regulation*. However, I note that section 6(4) *Regulation* applies to licenses for which a “person” capacity has been set, and the licence that is the subject of this hearing has a “patron” capacity. I find the notice of an alleged contravention of s. 12(2) of the *Act* and s. 71(2)(b) of the *Regulation* does disclose a contravention and does constitute notice of the allegations. Although the language of those sections does not refer to the capacities cited on the licence, the enforcement process, beginning with the contravention notice, including the Notice of Enforcement Action, and through to the correspondence, telephone calls, and indeed the pre-hearing conference all make it clear to the Licensee what was alleged. The sections cited above constitute the authority of the general manager of the Branch to set the capacities on the license and enforce those capacities.

Accordingly, I find the establishment was overcrowded beyond the patron capacity set on the licence and that there were more people in the establishment than the occupant load.

DUE DILIGENCE

The Licensee brought up arguments that relate to due diligence but did not present evidence that would support a finding of due diligence. The facts disclose that the Licensee has flexible training programs that arguably may educate new employees as to the obligations of maintaining capacities equal to or lower than the imposed limits. However, the Licensee believes that only the doorman and supervising management

are responsible for ensuring that those capacities are enforced. There was insufficient evidence of regular meetings with staff, records of those meetings, written policies and procedures manuals, education protocol, testing and updating of the staff. The doormen entrusted with limiting the number of patrons entering the establishment were not provided with mechanical counters. There was no evidence of an “in-and-out” counting system. Backup for doorman during breaks was not systematically available. The limit that Licensee #1 and Licensee #2 put on the door, and the decision about when the doorman would be instructed to hold the line, are similarly arbitrary and dependent on if and when the Licensee attended or noticed the number of patrons in the establishment. I find that the evidence of due diligence falls significantly short of establishing a defense.

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 license 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.

The Branch submitted that a five day suspension was warranted for the overcrowding contravention.

Inspector #2 explains in the NOEA that the proposed penalty is based on his belief that the Licensee knew that the establishment was overcrowded but that the Licensee made no attempt to reduce numbers until directed to do so by the inspectors. I note that Inspector #2 said that the doorman knew the establishment was overcrowded. The inspector said that he engaged the doorman in conversation and ascertained that the doorman had been at his job for only two weeks. The inspector concluded that without a mechanical counter, the doorman did not have the ability to estimate the number of patrons in the establishment. Yet, the inspector also said the doorman knew the establishment was overcrowded. The uncontroverted evidence is that the doorman was controlling the door, and although he let in too many patrons, I do not find that he knew that the establishment was overcrowded. I find, however, that the doorman was ill-equipped to know how many patrons were in the establishment and the Licensee took no steps to make him aware or provide him with the education or resources to monitor the door effectively in order to prevent the contravention from occurring.

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 \$5,000-\$7,000.

Licensees that exceed their capacity by overcrowding are operating contrary to the public interest. Specifically, they are operating contrary to the principles of public safety and community standards.

The risk to public safety is most apparent when the overcrowding exceeds the occupant load. Getting out of a building safely during a fire or other threat is difficult in a place where liquor is served, loud music is playing, and lighting is dim. The risk of death or serious injury is greater when the building is overcrowded.

The public interest in maintaining community standards is also relevant when assessing a penalty for a contravention of overcrowding. The maximum capacity established for a liquor primary license is the result of community input during the licensing process. The maximums are set to reduce the risk of negative impacts on neighborhoods and

communities. These negative impacts include late night disturbances, parking problems and traffic flow problems. Allowing licensees to exceed their approved capacity effectively negates this community input and puts undue pressure on community resources.

I find that a license suspension of five (5) days is appropriate.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary License No. 037622 for a period of five (5) days, to commence as of the close of business on Thursday, November 5, 2009, 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. 037622 is to be held by the branch or the local detachment of the RCMP 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 by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: October 9, 2009

cc: Prince George R.C.M.P.

Liquor Control and Licensing Branch, Surrey Office
Attn: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate