



**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 Victoria Social Club Ltd. dba The Social Club #27, 360 Johnson Street Victoria, BC V8W 36C
Case:	EH07-179
For the Licensee:	Gregory N. Harney
For the Branch:	Olubode Fagbaymiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 30, 2008
Place of Hearing:	Victoria, BC
Date of Decision:	July 9, 2008

INTRODUCTION

The Victoria Social Club is a nightclub operating in Victoria under Liquor Primary Licence No. 113467. The licence stipulates that the hours of liquor sales are from 3:00 p.m. to 2 a.m. seven days per week and that the licensed capacity is 305 patrons. 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 January 11, 2008, the Liquor Control and Licensing Branch ("Branch") alleged that on December 1, 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*, B.C. Reg. 244/2002 (*Regulation*), by overcrowding the establishment beyond patron capacity more than occupant load.

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

RELEVANT STATUTORY PROVISIONS

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

Licenses

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 license 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

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(2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager: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 license in effect immediately before December 2, 2002, except an endorsement on a winery licence for a consumption area.

ISSUE

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

EXHIBITS

Exhibit No. 1: Branch's book of documents

Exhibit No. 2: A guide to responsible nightclub security (provided by the licensee)

EVIDENCE

A sergeant with the Victoria Police Department (VPD) testified that he has been a constable and a sergeant for 28 years, and has done hundreds of licensed premise checks (LPCs) for safety issues including overcrowding. He also said that he is the VPD member responsible for all liquor establishments in Victoria, and the member trained to deal with issues of overcrowding, crowd management, emergency management, and operational planning.

He indicated that at 1:27 am on December 1, 2007, he attended at the Social Club in response to a phone call from within the premises indicating that the establishment was very crowded. He attended in uniform and with other VPD members. He was familiar with the premises as he had been there many times professionally and socially - some of those times during a previous licensee's ownership of the establishment. He said that when he arrived, he asked the doorman "What is the count?" The doorman first answered that he did not know, then reconsidered and indicated that there were 290 patrons in the club.

The sergeant indicated that he formed the opinion that the club was "wall to wall people" and there was little room to move about. He took up his mechanical counter, confirmed that it was set to zero and did a patron count. The sergeant produced his counter at the hearing. He indicated that he conducted two counts, zeroing the counter before each. The total number of patrons that he counted was 453 on the first count and 375 on the second count. He said that he conducted the second count on the insistence of the security manager. The security

manager indicated that he would count the patrons who left in between counts. The sergeant said the security manager advised that 47 patrons had left between counts. Though the sergeant believed it was more, he added this to his count for a total of 422. He testified that it was the easiest count he has ever performed in dozens, if not hundreds of times, that he has counted the number of patrons in a licensed establishment. He said it was easy because the club was so crowded that there was little movement of the patrons due to the congestion, and there was an elevated vantage point from which to count the stationary heads.

The sergeant indicated that a second VPD member did a count contemporaneous with his first, and the result of that count was approximately the same. He was not surprised at how close the counts were to each other because of the ease in counting that the crowded environment provided.

The sergeant said the principal owner (principal) of the club was on the site at the time and asked that the VPD members stay while the management close the club down and count the patrons as they leave. The sergeant replied that he had satisfied himself as to the patron count and the licensee would receive its contravention notice in due course. He also said that there was considerable outflow of patrons during his 20 minutes in the establishment, and staying for another count of the smaller crowd would not provide any relevant information. The sergeant testified that he did not see any of the establishment staff in possession of mechanical counters.

He identified the General Occurrence Report and the notes he took after leaving the establishment (exhibit 1, tabs 11, 12).

A second sergeant testified. He indicated that he has been a police constable for 19 years and has recently become a sergeant. He said that he has considerable experience counting crowds including in his previous employment at Wilkinson

Road Jail. There, he had to count the yard and other common spaces, precisely and without counters. On the relevant night he was assigned to the liquor task force. He said that he has previously conducted 20 or 30 formal LPCs and hundreds of licensed premise "walkthroughs," and that he has probably done 40 or 50 formal counts since becoming a member of the VPD.

He indicated that he attended at the Social Club with the other members of the VPD because of a call from an undercover constable who was inside the establishment. The undercover member advised that the club was highly overcrowded and she had difficulty moving around inside it. The sergeant testified that the team arrived at the Social Club at approximately 1:15 am on December 1st, 2007. He said that he was familiar with the establishment and had previously attended on a number of occasions.

He testified that he went inside the club with the first sergeant and they had a difficult time moving through the crowd. He said he did not have a mechanical counter, as did the first constable, but he was able to count heads quite effectively, as there were clear sight lines from his vantage point above the dance floor and the patrons were not moving around very much. He counted 250 patrons exclusive of the dance floor. He then counted half of the dance floor, and doubled the number of patrons he counted on the dance floor to estimate the total number of patrons on the dance floor. He felt that this was a reasonable method of counting that space in light of the very restricted movement of the patrons. His total count was 450 patrons, consisting of 250 off the dance floor, 100 on half of the dance floor and 100 estimated on the second half of the dance floor. He did not do a second count. This sergeant indicated; "It was one of the worst cases of a crowded bar I have ever seen."

He said that he saw at least four door staff, but he did not see a mechanical counter on the premises but for the one carried by the first sergeant. He emphasized that the club is "basically an open room with an elevated vantage

point allowing a very good opportunity to count patrons.” He also said that if there had been a medical or other emergency, it would have been very difficult for emergency personnel to reach a patron in trouble in the club.

The liquor inspector testified. He identified all of the documents in Exhibit No. 1; the patron capacity of the Social Club, the terms of the licence (tab 3) including the provisions of the Guide (tab 15), and the relevant sections of the *Act* and *Regulation* (tab 16). He also identified his notes (tab 12), and the Occupant Load Certificate (tab 7) that indicates an occupant load of 305 persons. The inspector also testified that the reason the branch recommended enforcement action relating to this matter is that overcrowding presents safety issues, with respect not only to the patrons in attendance, but also to police and emergency personnel who may find themselves working in the environment of the licensed establishment.

The principal testified that on the business night of November 30 and into the morning of December 1, 2007, the Social Club hosted a fundraiser. The licensee was not getting the door proceeds and would have had no financial reason to overcrowd the establishment. He said that it was inconceivable that there were 450 patrons in the club that night, as it is not possible to put 450 people in the space. He indicated that he met with the architect of the club and was advised that the size of the room is 2400 square feet, less 50 square feet for the bar, and 50 square feet for the pinball machine.

He also testified that the room was dark and there were two fog machines in use at the relevant time. He said there were three doormen inside the ropes, a staff member taking cover charges and stamping hands, and two other staff members confirming patrons' identification at the door. In total, he said there were seven doormen on duty that night. He said two of the doormen have mechanical counters. Each of those doormen has two counters, for a total of four mechanical counters in all. The doormen with the counters count people in and people out

and keep a running count of how many patrons are in the establishment at all times. He said that there is a "counter sheet" behind the till used to record the number of patrons in the club." He also said that although he did not do a count himself, one of his employees (DH) did. He said:

He told me the amount of the count. I do not know that count. There were so many numbers thrown around that night that I don't know that count...I don't know what the number was. Something under capacity. I don't care what the number is, as long as it is under capacity.

He also said that the establishment is dimly lit during business hours and that two smoke machines were operating on the night in question. He said that when the police indicated that they counted 450 patrons, he demanded a recount and was adamant that there were not 450 patrons in the club. He also said that it was highly unlikely that 75 people left the club between the sergeant's first count and the second count because: "We don't kick people out. If they are there at 1:30 they stay until the end. I've never seen people who want to leave at 1:30."

The principal testified that the establishment has a favourable patron capacity, and looks full with 305 people in the room.

He testified that once the officers were convinced of the accuracy of their counts, he offered to empty the club and count patrons as the patrons left. Indeed he did close the club and count patrons as they left. With a mechanical counter, he counted 278 patrons, and one of the other doormen counted 279. The police did not remain long enough to witness the count despite being requested to do so.

Finally, the principal testified that the establishment keeps an incident logbook, and that there is an entry in the logbook relating to the issue of overcrowding on December 1, 2007.

An employee of the licensee testified that he is head of security and was working at the door when the police came in. He said that one of the officers asked what the door count was, and he said 292 "give or take one or two." He said that as the first officer did a head count of the room, he did his own. He testified:

I did a count at the time with a mechanical counter. My final count was 304. My approach to the count was counting heads in the whole room, plus I add 15-20 just for anyone I missed. The 304 is after I added 15-20.

The employee also said that he told the first officer that 450 was an impossible count and he asked the officer to count again. The officer did so and showed the employee his counter. It indicated 375 patrons on the second count.

He also testified that there is a security training manual (exhibit No. 2), that the staff is provided a copy but is not tested on it, and that there is no incident logbook. He added that he wrote out a detailed description of the incident, but it was "on a couple of pieces of paper that [he] put away" and could not afterwards find.

In light of the considerable evidence of sight-lines and the layout of the establishment, and given the close proximity of the establishment to the hearing room, I attended for a visual inspection of the club in the presence of the licensee, his counsel, and the branch advocate.

SUBMISSIONS

The branch submits that the licensee permitted more patrons entry to its licensed establishment than it should have, as there were more patrons in the establishment at the time of the alleged contravention, and the licensee knew or ought to have known that the establishment was overcrowded.

The branch cites *Ed Bulley Ventures Ltd. (c.o.b. as Planet Sports Lunge) v. British Columbia (LCLB, GM)* [2001] B.C.L.I. No. 5 for the established definition of “permit” (...where the licensee does not exercise as high a degree of diligence as it should have in the circumstances).

The branch submits that the evidence is clear that on the date in question, the establishment had more than 400 patrons in an area where both the Occupant Load and Patron Capacity is 305 patrons.

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 also submits that the security training manual presented at the hearing represented an insurance agency paper without any input or modification from the licensee to suit the particular circumstances of the licensed establishment, and inadequate evidence of written and enforced house policies of the nature that would tend to enforce a claim of diligence on behalf of the licensee.

The licensee submits that on the date of the alleged contravention the establishment employed four doormen on duty. The sergeants noted the presence of only one doorman - contrary to the evidence of the preponderance of witnesses. The licensee says that the doormen had mechanical counters in their possession and that the evidence that the police did not see them does not indicate that the counters were not there.

The licensee submits that the sergeants formed their impressions that the club was overcrowded immediately on entering the stairway area and did not consider that the stairs were the venue of line ups for the coat check, the ATM, and the pinball machine. The licensee says the sergeants then began a count of unusual methodology which produced unreliable, implausible, and incredible results.

The licensee submits that the sergeants provided inconsistent and inaccurate testimony, including the following:

- How many doormen at the entrance to the club;
- Doormen did not have mechanical counters;
- Whether or not the bylaw enforcement officer was in the club;
- Unaware of coat check line up on the stairs;
- Unaware of cell phone users concentrating on the stairs;
- Unaware of ATM users lined up on the stairs;
- Unaware of pinball machine users congregated at the bottom of the stairs;
- The bylaw enforcement officer did not do a count at the same time as the sergeants;
- Believed the overcrowded situation dangerous, but took no steps to do anything;
- Did not recall strobe lighting;
- Did not recall fog machine;

The licensee submits that the only conclusive count on the relevant night was that performed by the licensee when the club was shut down and the patrons were counted as they exited the premises. The police, say the licensee, missed a golden opportunity to participate in that count to reach a conclusive result. The result of that count was 292 patrons.

ANALYSIS AND DECISION

I find that each sergeant had exceptional recollection of the events of December 1, 2007. They were each able to consistently, and corroboratively answer questions on cross examination about peripheral matters such as ID checks that took place at the time of the inspection and conversations they had with various employees of the licensee. Persistent suggestion and controverted submissions put to them failed to produce any significant inconsistencies or wavering of their conviction. I find the VPD witnesses to have presented credible and accurate evidence. I note further, that the licensee's employee corroborated the evidence of the sergeant that his second count was 375 patrons, exclusive of those patrons who left between counts.

I also find that each of the sergeants has considerable experience doing LPCs of like establishments, and in particular, considerable experience counting crowded rooms.

I find that the club is regular in shape and there are raised areas from which one may and the VPD members did count patrons. I accept the evidence of the police witnesses that the establishment was so crowded that the patrons were basically stationary for the duration of the counts.

I accept the sergeants' patron counts as correct and reliable.

The principal presented evidence of the size of the club space. This evidence included deductions for space used for purposes other than occupation by patrons. One such deduction was for the pinball machine. I requested clarification of the principal's testimony with respect to the deduction of 50 square feet attributable to the pinball machine, after viewing the pinball machine at the club. The pinball machine is approximately 6' long by 30" wide and therefore occupies an area of approximately 15 square feet. Adding space for a single player would increase that area to something well short of half of the area credited by the licensee. The principal also indicated that two speakers take up considerable floor area, though his testimony also included that patrons routinely use those speakers as dance platforms. The speakers therefore do not occupy calculable floor space exclusive of patrons. The principal testified that the room is dimly lit, and that there were two smoke machines operating, but stopped short of saying that those things would impair a visual headcount.

Further, the principal indicated that two doormen each have pairs of mechanical counters, yet he testified that when the police advised as to their patron counts, he disagreed and requested a recount. At no point during December 1st, or during the hearing did the principal present an alternate count of patrons prior to closing and emptying the club, or produce evidence of a total from the door staff mechanical counters. No doormen were called to testify as to their counts, and neither the "counter sheet" nor the incident report was provided. The principal also said that he did not know the result of the count that any of his employees conducted. He seemed to remember all of the discussions that he claimed he had with the police officers on site, but the single point in issue - and the only number available for his defence of the allegation, he did not know, or seem to make efforts to obtain.

I find the evidence of the principal to be problematic. It demonstrated considerable partisanship and failed to address the critical components of the contrary evidence. I find an adverse inference is appropriate in light of the absence of evidence that should have been available as to the employee's counts prior to closing down the establishment.

Further, although I defer to the principal's greater familiarity with the typical attendance habits of club patrons, his comment about patrons not leaving at 1:30 must be taken in context. I find that notwithstanding typical behaviour, patrons might indeed be inclined to leave in significant numbers if the crowd was uncomfortably thick, and the police were present in numbers at that time of the morning. In all, I found the licensee's evidence lacking in consistency and not nearly as credible as the evidence of the police sergeants.

I accept that the principal counted patrons as the club was closed, but I find it unnecessary to comment on the credibility of the counts recorded at that time as provided by testimony. I find that the establishment was emptying out prior to it being closed, and the number of patrons who remained until it was closed, does not reflect the number of patrons in the establishment 20 minutes earlier when the police began conducting counts.

The employee testified that he conducted his own count and it totalled 304 after adding 15-20 patrons "just for anyone [he] missed." I find that either this evidence or this witness's count was contrived. In order for his count to total just one patron shy of the patron capacity of 305, he would have had to count 284-289, and add just enough to come one patron under the limit. I find it inconceivable that knowing the results of a police count with which this employee was dissatisfied, he would have counted 284-289 patrons and then told the officer that he counted 304. I find this evidence not credible.

I note also that the principal and the head of security disagreed on whether or not there is an incident logbook kept on the premises. This reinforces my conclusion that in total, their evidence is not reliable.

Counting patrons in a crowded nightclub complete with music, fog (produced by mechanical means) and low lighting levels is an inexact process. The challenge, however, does not eliminate the need to execute such counts. It is expected under such circumstances that multiple counts will produce different results. In this case, I find that the physical layout of the establishment, the experience of the police officers, and the relatively static positions of the patrons allowed for very accurate counts. I find the evidence establishes on the balance of probabilities that the Social Club had approximately 450 patrons in it at 1:25 a.m. on December 1, 2007.

The patron capacity of 305 is not contested, nor is the occupant load of 305.

Accordingly, the establishment was overcrowded beyond patron capacity more than occupant load as prohibited by the *Act* and *Regulation*.

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 license, 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.

The branch submitted that a five (5) day suspension was warranted for the contravention.

The licensee submitted that a five (5) day closure would gravely hurt business and result in a \$40,000 top \$60,000 loss of revenue. The licensee further submitted that a \$5,000 monetary penalty would be more in keeping with the circumstances of the contravention.

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 issue of 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 community standards is also relevant to the contravention of overcrowding. The maximum capacity established for a liquor-primary licence is the result of community input during the licensing process. The maximums are set out so as to reduce the risk of negative impacts on neighbourhoods 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.

The Social Club is a vibrant and lively establishment and according to the licensee's own testimony, enjoys a favourable patron capacity for a small room. In allowing the premises to become so overcrowded that patrons and officials find great difficulty in manoeuvring within the red lined areas, shows a disregard for public safety. This type of close proximity of patrons is more likely to contribute to disturbances within the clientele and difficulty for door and security staff to gain access to patrons who require help, or need be removed from the establishment.

Whether this instance of overcrowding was caused by poor door control or lack of leadership by management or staff, it could have led to serious injury if an emergency had occurred. This type of contravention and the extent of the overcrowding warrants a significant suspension.

This penalty is designed to inspire the licensee to voluntary compliance in the future.

I find that a licence suspension of five (5) days is the appropriate penalty.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 113467 for a period of five (5) days, to commence as of the close of business on Thursday, July 31, 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. 113467 is to 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 by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: July 9, 2008

cc: Victoria Police Department - Sgt. Jim Simpson

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

Liquor Control and Licensing Branch, Surrey Regional office
Attn: Olubode Fagbamiye, Branch Advocate