



**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 RSBC c. 267**

Licensee:	0888240 B.C. Ltd. dab The New Oxford 1140 Homer Street Vancouver, BC V6B 2X6
Case:	EH11-015
For the Licensee:	Jeff Donnelly
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing:	Written Submissions
Date of Decision:	April 5, 2011

INTRODUCTION

The corporate licensee operates The New Oxford restaurant and lounge located in Vancouver, BC. The licensee holds Food Primary Licence No. 302722. The hours of sale are 9:00 a.m. to 1:00 a.m. Sunday through Thursday, and 9:00 a.m. to 2:00 a.m. Friday and Saturday. The person capacity is 99 persons. The occupant load is also 99 people. 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*" ("*Guide*").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated January 19, 2011. The branch alleges that in the early hours of January 16, 2011 (the business day of January 15, 2011), the licensee contravened section 6(4) of the *Liquor Control & 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 exceeded the occupant load.

The proposed penalty is a four-day suspension in accordance with 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: a licence suspension of four to seven days and/or a monetary penalty of \$5,000 - \$7,000.

RELEVANT STATUTORY PROVISIONS***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).

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

ISSUES

1. Did the contravention occur?
2. In the event that the contravention is found to have occurred, can the licensee establish a defence of due diligence?
3. If the contravention is proven, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- Exhibit 1:** Branch book of documents with covering letter dated March 3, 2011
- Exhibit 2:** Branch's letter re: prehearing conference dated February 17, 2011
- Exhibit 3:** Licensee's submission dated March 7, 2011

EVIDENCE

The branch's documents include the NOEA, which at Schedule 1 describes the events of January 16, 2011. That document indicates that a branch regional manager and a police constable were travelling past the establishment when they noticed some activity outside and entered to do a compliance check. Inside the establishment, the regional manager found the venue to be extremely crowded. She approached the manager and asked for the use of a mechanical counter but the manager indicated that there were none available. The regional manager did two person counts without the aid of a mechanical counter. The first count produced a figure of 195 people including staff, but not including persons in the kitchen or washrooms. The second count produced a figure of 165 persons with the same qualifications. The document indicates that between the counts a significant number of persons left the establishment through the front door. This was confirmed by the constable who remained at the front door to

monitor the safety of the regional manager as she conducted her counts. The constable indicated that 28 persons left the establishment between counts. The regional manager asked someone what the establishment's count was and was advised that the doorman had a count of 120. It is unclear whether this figure included staff or not. The NOEA indicates that during her first count "it was difficult to near impossible to move through, to the point where [the regional manager] was unable to move forward or backward and had to physically move people aside to get through."

The NOEA provides reasons for recommending enforcement action and reasons for the proposed penalty. Essentially, they are:

- Overcrowding is contrary to public interest and safety.
- When overcrowding exceeds the occupant load public safety is most at risk.
- The licensee is an experienced operator and was in possession of this establishment for approximately two months prior to the alleged contravention.
- A suspension is required to enforce the impact of the seriousness of this contravention.
- Four days is the minimum suspension set out in the *Regulation* for a first contravention of this type.

The licensee does not dispute that the licensed capacity and the occupant load of its liquor licence are both 99 persons, or that the contravention occurred.

SUBMISSIONS

The branch provided no submissions.

The licensee's submission (Exhibit 3) states: "...we have accepted responsibility for the contravention which occurred on January 16, 2011, but we are disputing the proposed penalty." The licensee's submission also indicates that it operates 13 businesses in the

hospitality industry and has been a participant in that industry since 1999. They are industry leaders, active in community organizations and interested in promoting safety and responsible drinking.

Finally, the licensee's submission states that it has learned from this experience and accordingly no penalty is required. As a newly formed business, it indicates that a suspension will hurt goodwill and the licensee therefore submits that if a penalty is imposed it should be a monetary one.

REASONS AND DECISION

The description of the events of January 16, 2011, set out in the NOEA are uncontested, but for the general denial that there: "were as many people in the establishment" put forth by the licensee at the prehearing conference. By March 7, 2011, the licensee had accepted responsibility for the contravention.

As to the number of persons in the establishment, the evidence is that the regional manager counted 195 and 165 persons, the second figure being strongly supported by the police constable confirming 28 persons leaving between counts (for a total of 193 at first count). The doorman's count was 120. As to when the doorman's count was 120, I conclude from the description in Schedule 1 that it was most likely after the regional manager's second count. There are no submissions addressing this point. I find, therefore, that there were between 148 (the doorman's count of 120 plus the police constables noted 28 departing) and 193 persons in the establishment at the time of the first count. This count most closely corresponds with the time the contravention was alleged to have occurred, based on the description in Schedule 1 (The regional manager and the police constable indicated that they arrived at approximately 12:30 a.m.). I find that the overcrowding was of the magnitude of 50% more than the person capacity stated on the licence and the occupant load indicated stamped on the floor plan. I find the contravention occurred as alleged.

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. There is no evidence in the documents before me that addresses due diligence. The onus is on the licensee to provide evidence of this defence if it is to rely on it. I find no evidence of due diligence relating to this contravention.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* and/or the terms and conditions of the licence, I may do any one or more of the following:

- 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 *Regulation*. 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 Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. The range for first contraventions of this type is a licence suspension for four to seven days and/or a monetary penalty of \$5,000 - \$7,000.

The establishment has not faced allegations of overcrowding in the past. It had, however, only been under the stewardship of the licensee for some two months at the time of the contravention. Indeed, it is this newness that the licensee relies on to dispute the appropriateness of a suspension as a "suspension will hurt the goodwill of the business and adversely affect our view to the neighbourhood." It is an inescapable conclusion that this statement would apply to each and every establishment that is suspended for a contravention of the legislation or the terms and condition of their licence. I must therefore conclude that this possibility was both considered and endorsed by the drafters of the *Regulation* when deciding on penalties.

As for the licensee's claim that it is a responsible operator and a leader within the industry, I have no reason to doubt this is the case. It did, however, contravene the *Regulation* on the date in question and penalties are assessed only in part based on the history of the licensee and of the establishment. Another consideration when selecting an appropriate penalty is the significance of the contravention based on the facts found to have existed at the relevant time. In this case, the licensee is an experienced operator and has numerous establishments under its control. It should therefore be well prepared to implement and enforce compliance with the *Act* and *Regulation* from the first moment of operation, and in particular with respect to issues of public safety.

Having 50% more persons in the establishment than allowed under the licence or occupant load that this experienced operator has run for approximately two months, does not convince me that a penalty is unnecessary. A suspension of a licensed establishment accompanied by the required signage is notice to both the licensee and the public that the branch takes compliance seriously. I find that result to be warranted in this case.

A four-day licence suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 302722 for a period of four (4) days to commence at the close of business on Friday, May 6, 2011, 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*).

To ensure this order is effective, I direct that Food Primary Licence No. 302722 be held by the branch or the Vancouver Police Department from the close of business on Friday, May 6, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 5, 2011

cc: Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

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