



**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:	Wenwood Holdings Ltd. dba Monkey Tree Pub 4025 Borden Street Victoria, BC V8X 2E8
Case:	EH12-028
For the Licensee:	Robert J.G. Card
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	Nerys Poole
Date of Hearing:	Written Submissions
Date of Decision:	August 8, 2012

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Liquor Control and  
Licensing Branch

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## **INTRODUCTION**

The licensee, Wenwood Holdings Ltd. dba the Monkey Tree Pub, is located in Saanich, B.C. Robert J. G. Card is a principal of the corporate licensee and represented the licensee for the purposes of this hearing. The licensee holds a Liquor Primary Licence No. 114963. The hours of operation are Sunday to Thursday, 11:00 a.m. to midnight, and Friday and Saturday, 11:00 a.m. to 1:00 a.m. The patron capacity in the main indoor area, described on the licence as patron area 01, is 98 and on the patio area is 20. The occupant load for the establishment is 116 persons.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the "Guide")."

## **ALLEGED CONTRAVENTION AND PROPOSED PENALTY**

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated April 11, 2012. The Branch alleges that on Saturday, February 18, 2012, the licensee contravened section 12 of the *Liquor Control and Licensing Act* (the "Act") and section 71(2)(b) of the *Liquor Control and Licensing Regulation* (the "Regulation"), by permitting more patrons in the licensed establishment than the patron capacity set by the general manager, and more persons than allowed by the occupant load maximum.

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 to \$7,000.

The licensee does not dispute the contravention but disputes the proposed penalty.

At a prehearing conference on May 28, 2012, with the branch advocate and the principal for the licensee in attendance, the Branch Registrar decided that the hearing regarding what penalty, if any, would proceed by way of written submissions.

## **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 licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

(c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,

(d) designate the areas within an establishment where minors are permitted,

(e) approve, prohibit or restrict games and entertainment in an establishment,

(f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,

(g) vary seating requirements in the dining area of an establishment,

- (h) vary requirements with respect to the location of an establishment,
- (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
- (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
- (k) specify requirements for reporting and record keeping, and
- (l) control signs used in or for an establishment.

(4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.

(5) A licence expires on the date specified on it as the expiry date.

(6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.

(7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.

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

#### **Licence categories, terms and conditions and endorsements**

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

- ...(b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002;

#### **ISSUES**

1. Did the contravention occur?
2. If so, has the licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

## EXHIBITS

The following exhibits were presented:

**Exhibit No. 1:** Branch book of documents, tabs 1 to 10.

**Exhibit No. 2:** Licensee's submission dated June 29, 2012.

## EVIDENCE AND SUBMISSIONS

### The Branch

The Branch's book of documents includes the NOEA, which describes the events of February 18, 2012.

Two liquor inspectors were conducting a routine liquor inspection in Saanich and Victoria on the evening of February 18, 2012. This included an inspection of the licensee's establishment, the Monkey Tree Pub (the "Pub"). Inspector A parked their car in the parking lot adjacent to the Pub and noted that it was full of vehicles as was the Pub's parking lot. The two inspectors synchronized their watches and walked towards the main entrance of the Pub where Inspector A observed three persons outside smoking and talking on cell phones. A group of approximately eight people walked behind them as the inspectors entered via the main doors.

The two inspectors entered and noted a stanchion across the entranceway restricting entrance inside. Inspector A undid the stanchion and then replaced it to prevent the large group behind from entering.

The Pub was holding a weekly event described as Saturday Night Music Bingo. Upon entering, inspector A observed a person to his left in the corner who was conducting the musical bingo and patrons, some singing, with bingo cards. He noted that it was very crowded throughout patron area 01, more so than he had seen during his past four years of inspections of this pub.

A person who appeared to be the doorman (although later the inspectors discovered he was a bartender/host) approached the two inspectors and advised them that the Pub was at capacity. The two inspectors then identified themselves as liquor inspectors and asked what the count was. The bartender/host stated there were 118 patrons which he said was their allowable maximum. He also stated he was a bartender and was acting as door staff for the evening. As no other person approached the inspectors, they concluded that the bartender/host was the person in charge for the evening.

The two inspectors decided to conduct counts and noted that the bartender/host did not have a mechanical counter. Inspector A did not have a mechanical counter so he did a physical head count starting on his right at the main entranceway, proceeding toward the rear of the establishment counting only those people on his right as he walked to the far end. As he reached the back of patron area 01, he noted that there was no one on the patio. He then exited the rear room returning towards the main entrance way and continued counting all persons on the other side. He excluded identifiable staff.

Upon concluding this count, inspector A's total tally was 141 patrons. He then went behind the bar where inspector B was standing and checked the liquor licence which stated the Pub was permitted 98 patrons in patron area 01 and 20 patrons on the patio. At that time, inspector A did not know the occupant load.

Inspector B conducted a count with her mechanical counter and she counted 139 patrons, again with no staff included.

Inspector A then asked for inspector B's mechanical counter, zeroed it and checked it for proper operation and then zeroed it again and conducted a second count in the exact same way as he had conducted his first physical count. This resulted in a tally of 132 patrons. As he was conducting this count, he noted a group from the right corner table beside the main entranceway leave the establishment. There were approximately eight persons in that group and he did not count them as he was counting further back at the time.

Inspector A advised the bartender/host of his count tally. The bartender/host then asked to use the counter and returned a few minutes later stating he counted 130 patrons. He agreed that they were overcrowded.

Inspector A then advised the bartender/host that they must reduce the number of patrons inside to the allowable 98 immediately and that the liquor inspectors would return within the hour to conduct another count and to ensure the number of patrons in patron area 01 was at or below the permitted capacity.

At no time during any of the counts were the washrooms included in the area counted.

The two inspectors returned to the Pub approximately one hour later and conducted another count. They immediately noted that there were very few patrons in the establishment and none on the patio or back room. Inspector A used the mechanical counter in the same manner as the first two counts. The tally was 37 patrons. During this time, a person came forward and identified himself as the manager. Inspector A advised the manager that he would be contacting the principal of the licensee regarding the contravention they had observed.

Inspector A, in summarizing the evening's events in the NOEA, noted that the occupant load for the establishment was 116 persons.

The NOEA provides reasons for the enforcement action and reasons for the proposed penalty. 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 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.

The proposed penalty for the overcrowding is four (4) days suspension, the minimum suspension for a first contravention. The penalty is proposed to emphasize the necessity to remain at or below the allowable patron capacity as well as below the allowable occupant load.

### The Licensee

The principal of the licensee, Robert J. G. Card, provided a one page email as the written submission for the licensee. He noted again that the licensee did not dispute the contravention but disputed the proposed penalty.

The licensee submits that the liquor inspector counted the patrons just as their “game night” was finishing and that at that time of the evening, there are always many cabs, with drivers as well as a surge of people that are picking up customers from the pub. The Licensee points out that, when the liquor inspectors returned, there were less than 30 people in the building.

The licensee submits that they do everything to promote a safe environment for their customers and community. Other than the prescribed and outlined mandates for the British Columbia Serving It Right program, they verbally, over the microphone throughout the night and week after week, suggest to all patrons that have chosen to drink that they also choose a smart way to get themselves home.

With respect to a four day suspension or a monetary fine of \$5,000 to \$7,000, the licensee submits that these proposed penalties would be on the extreme end as a penalty for the contravention. The licensee hopes that through good, genuine and honest communication and understanding between both parties that another solution or alternate penalty will prevail.

The licensee further submits that they have cultivated a relationship with the Branch over the last 26 years of being in business and that there has never before been a contravention with respect to occupant load. They take the operation of their family business very seriously and like to do things the right way. They are hopeful that another solution may be found.

## **REASONS AND DECISION**

The licensee accepts the facts as set out in the NOEA. The three counts performed by the two liquor inspectors were 141, 139 and 132. The count performed by the bartender/host was 130 and upon completing this count, the bartender/host agreed that the Pub was overcrowded. The patron capacity in patron area 01 (where the counts were made) is 98. The occupant load is 116.

I find, based on the uncontroverted facts that the contravention of overcrowding beyond the patron capacity and above the occupant load occurred on February 18, 2012.

### **Due Diligence**

The licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention 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 are dealt with.

The licensee presented no evidence to demonstrate due diligence. The licensee has stated that it accepts the facts as presented by the liquor inspectors. There was no evidence of processes in place to ensure monitoring of those coming and going. The evidence from the NOEA report is that the bartender/host was not aware of the capacity for patron area 01 as 98 and the capacity for the patio as 20. He indicated to the inspectors that they were within the total allowable capacity which he stated was 118. He had no mechanical counter to properly count the patrons nor was he standing at the door when the inspectors entered. He did not appear to be aware of the occupant load maximum of 116.

I find that the licensee was not duly diligent.

## **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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a 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.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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 a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 15 in Schedule 4 provides a range of penalties for a first contravention of this type: a four to seven day licence suspension and/or a monetary penalty of \$5,000 to \$7,000.

I find that a penalty is warranted to ensure voluntary compliance in the future. There was no evidence of processes in place to prevent the contravention of overcrowding. It is incumbent on the licensee to have such processes in place. The Guide specifically states that the licensee “must have controls at each entry point and . . . must be able to count the number of people entering and leaving.”

As this was a special event night, the licensee should have expected greater than normal attendance and been prepared to control the number of people coming and going in the establishment. The licensee did not have a dedicated door control person responsible for limiting and counting the number of people. In addition, the person who appeared to be in charge for the evening, the bartender/host, did not know the correct capacity maximum as noted on the licence nor did he have a mechanical counter.

The licensee submits that the overcrowding was a result of people and cab drivers coming to pick up customers as it was nearing the end of the Saturday Night Music Bingo event. This may be true, but the question is whether or not there were persons beyond the occupant load within the establishment, regardless of what their intentions were or how long they were to remain. The licensee has an obligation to keep the numbers of people in its establishment below the patron capacity and below the occupant load.

The consequences of overcrowding can be serious. It can lead to control and safety problems inside the establishment and to disturbances and other problems within the community at closing. Overcrowding negates the community input that forms part of the Branch’s decision to issue a licence and set the capacity. Overcrowding beyond the occupant load is a serious public safety issue, which can result in injury and death to customers.

The licensee maintains that it has had a good relationship with the Branch over its 26 years of operations and that there has never been a contravention of overcrowding over the occupant load. The licensee asks for an alternative solution and submits that the proposed penalty is at the extreme end. As an experienced licensee, the licensee should have been aware of the importance of preventing overcrowding and should have ensured the proper processes were in place.

Having found that a penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I order the minimum penalty of a four day suspension for this contravention.

## **ORDER**

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 114963 for a period of four (4) days to commence at the close of business on Friday, September 7, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the Branch or the Saanich police department from the close of business on Friday, September 7, 2012, until the licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager 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*

Nerys Poole  
Enforcement Hearing Adjudicator

Date: August 8, 2012

cc: Liquor Control and Licensing Branch, Victoria Office  
Attn: Gary Barker, Regional Manager  
Liquor Control and Licensing Branch, Victoria Office  
Attn: Olubode Fagbamiye, Branch Advocate