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:	Mastma Enterprises Limited dba Sapphire PO Box 28041 RPO East Kelowna Kelowna, BC V1W 4A6
Case:	EH12-056
For the Licensee:	Dennis Coates, Q.C.
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Dianne Flood
Place of Hearing:	Written Submissions
Date of Decision:	December 6, 2012

INTRODUCTION

The Licensee, Mastma Enterprises Limited, operates licensed premises under the name of Sapphire at 238 Leon Ave. Kelowna, BC under Liquor Primary Licence 015483. Under the Licence, liquor sales are permitted from 7:00 p.m. to 2:00 a.m., seven days a week. The establishment has a total licensed capacity of 473 persons: 219 in Person Area 01, 114 in Person Area 02, and 140 in person area 03. The occupant load is also 473 persons as issued by the Kelowna Fire Department.

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”).

Dennis Coates, Q.C., legal counsel for the Licensee, made a written submission on behalf of the Licensee.

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 May 16, 2012. The Branch alleges that on February 11, 2012, the Licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation"), overcrowded beyond person capacity more than the occupant load. The proposed penalty is a four day suspension (item 15, Schedule 4, of the Regulation).

An oral hearing was scheduled for November 13, 2012, but prior to the hearing being held the Licensee’s legal counsel advised that the Licensee was willing to accept that the contravention occurred but the Licensee wanted to speak to the penalty. By way of written submissions, the Licensee’s legal counsel submits that a monetary penalty is more appropriate than a suspension in the circumstances of this case.

RELEVANT STATUTORY PROVISIONS

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

6 (1) Before the general manager

(a) approves the issuance of a licence,

(b) approves a structural alteration of or a change to the size of any area of a licensed establishment,

(c) approves a transfer of a licence under section 21 (3) of the Act, or

(d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

ISSUES

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

EXHIBITS

Exhibit No. 1: The Branch's Book of Documents

Exhibit No. 2: The Licensee's submission, dated November 15, 2012

Evidence

The Branch says that on February 11, 2012, two liquor Inspectors attended at the premises at about 12:45 a.m. Two staff were at the door; one checking identification and the other collecting a $10 cover charge. There was a hip hop event on, and there was no line up to get in. The Inspectors did not observe the door staff to be conducting a count or to be using mechanical counters to track person capacity.

The Inspectors entered the premises and noted it was very crowded. A band was playing and the main floor, the stairway and the upper level were crowded with persons watching the band. Both Inspectors had difficulty proceeding to the upper level due to the number of patrons on the main floor. Inspector A conducted a count of 150 persons on the upper level, and from there both Inspectors made an estimate at 400 people on the main floor, based on a count of 25 persons in the front row, extrapolated to the 13 other rows of patrons watching the band, plus the patrons on the stairs and in the serving area. This count did not include Patron Area 03 which has a capacity of 140. The Inspectors also reported that the dance floor was densely packed with patrons shoulder to shoulder. Movement through the club was very difficult. A third Inspector was contacted and asked to attend and to bring mechanical counters.

The two Inspectors then began a count at the entrance/exit to the premises and began to count the number of persons exiting; Inspector A using a mechanical counter, Inspector B using his iPhone. The third Inspector confirmed that persons were not gaining access to the premises through other means. When persons entered the premises, the Inspectors did not count the same number of persons exiting, to keep an accurate count of the persons in the premises. The Inspectors say they conducted the

count from outside the premises because, due to the inability to move freely through the premises, it was the only way to obtain an accurate count of the occupants. After the door staff discontinued allowing persons into the premises, the third Inspector entered the premises and conducted a count of 77 persons still on the premises. This was added to the door count of Inspector B, for a total of 587 persons by his count. Inspector A continued his count at the door of the persons leaving and arrived at a final count of 581 persons. The inspectors left the premises and the Contravention Notice was mailed to the Licensee on February 15, 2012.

During a discussion with Robert Audy, a shareholder of the Licensee on March 15, 2012, Mr. Audy reported to Inspector B that he had conducted his own count that night at 501 persons, minus 30 persons in the unlicensed smoke pit area, for a total of 471 persons.

SUBMISSIONS

The Branch says that overcrowding beyond licence capacity is contrary to public safety, community standards, and patron well being. Fire or other threats can have even greater consequences from overcrowding where liquor is served, loud music is playing and the lights are dim. Risk of death or serious injury is even greater when occupant load (and not just the patron capacity) is exceeded. Additionally, the surrounding neighbourhood is negatively impacted by increased opportunities for later night disturbances.

The Branch says that these Inspectors had never entered these premises before, but immediately on entry perceived it to be overcrowded, which was confirmed by the counts made. The Licensee, having operated these premise and at these occupancy levels since 2004, ought to have known that the premises were overcrowded and that he failed to monitor his staff and the situation. The Branch says with the $10 cover charge, the Licensee was motivated by the opportunity for financial gain.

The Licensee does not dispute that a penalty ought to be imposed, but says a monetary fine ought to be imposed as the appropriate punishment. The Licensee refers to three prior decisions of the Branch: Irish Times Pub Co. (September 24, 2012), Silver Dollar Cabaret Ltd. (January 14, 2011), and Fort Chelsea Holdings Ltd. (September 21, 2012). The Licensee also refers to the Surich Report (May 20, 1999).

The Licensee's submission is that:

- There is or should be a presumption that on a first offence within a year, a monetary penalty will be imposed, except in exceptional circumstances. This is in accordance with the Surich Report which intended a timely, fair, and efficient process and the subsequent "specific and negotiated" inclusion of monetary penalties as an alternative for first offences at a time when penalties were increasing due to an emphasis on public safety issues. He says the General Manager has strayed from this important and negotiated philosophy. The Licensee says the reasoning in the Irish Times Pub decision is flawed as it fails to reflect the historical development of the penalty scheme, and reflects the "direction given by the enforcement section of the LCLB".
- The purpose of enforcement proceedings is to achieve voluntary compliance, and a monetary penalty would achieve this as the Licensee's position is that they were complying with the licensed capacity restrictions, noting however the "difference of opinion" whether this is correct. He refers to the Silver Dollar Cabaret decision where a monetary penalty was considered as most appropriate to achieve that.
- The Branch is in error in its position that the occupant load as set by a city, fire department or other professional is reflective of the fire and safety calculations for a premise. The Licensee says that in fact the occupant load may have nothing to do with fire and building safety but instead is simply reflective of the desired licence capacity of the municipality, and is often much lower than the technical capacity for fire and safety issues. He says that when legislation was brought in requiring the licence capacity and occupant load to be the same, and when the legislation brought in person capacity (which includes staff) to replace

patron capacity, confusion arose about what occupant load was meant to be. With licensed and unlicensed areas in all establishments, the occupant load is for the whole facility, with patron capacity counted in terms of people.

- The building also has an unlicensed smoking area that holds 40 people, and also other areas (storage, office, back of bar and stage), so that a count made from outside the building could not be accurate with respect to the occupancy of the licensed areas within the building.

REASONS AND DECISION

The Licensee has agreed to a hearing on penalty only. This can only mean that the Licensee does not dispute that on February 11, 2012, the premises were overcrowded beyond the licensed capacity and the occupant load of 473. As such, I find that the Licensee contravened the terms of its licence.

I find that the Inspectors' preliminary head count of 550 made inside the premises and their subsequent respective counts of 587 and 581 made (substantially) from outside the premises using counters, to be reasonably consistent. Information as to the times, methods and means of each of the counts was provided. In contrast, the Licensee's stated count of 501, reportedly made to an Inspector on March 15, did not provide any details of the time, method or means of the count, and as such, I do not find it to be as reliable. Therefore, I accept the best evidence of the number of persons on the premises to be that of the Inspectors' counts and I find the best evidence to be the later counts made using the mechanical counter and an iPhone.

I find that the premises were overcrowded by at least 108 patrons and possibly as many as 114 patrons, which is a significant number in excess of the licensed capacity and the permitted occupancy load.

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 did not provide any evidence of the steps taken to avoid the overcrowding on the night in question or at any other time. No evidence was presented of any staff policies, procedures, training, or meetings, or of any discussions with staff about the importance of not exceeding occupancy limits and/or how to ensure that that did not happen. The two door persons did not make any count of persons entering the premises, which would have been easy enough to do with the cover charge being collected. There was no line up established or other controls on the number of persons entering.

Two inspectors, both unfamiliar with the premises, immediately on entering determined the premises to be extremely crowded, and that a count needed to be taken. Mr. Audy was apparently present that evening, and he is an experienced and knowledgeable owner with many years experience with this establishment. He should have a good sense of the capacity of the establishment, and he ought to have known it was overcrowded and taken steps to remedy that. As noted above, there was no evidence submitted about how Mr. Audy conducted his count or when or how he did it or of how he ensured the permitted capacity was maintained throughout the evening.

Based on the above, I find the defence of due diligence is not available to the Licensee.

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.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve 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 4-7 day licence suspension and/or a $5,000 to $7,000 penalty.

The issue here is whether the penalty should be a suspension or a monetary penalty. In determining the appropriate penalty, I will address each of the Licensee's arguments for imposing a monetary penalty.

Presumption of a monetary penalty being applied, except in exceptional circumstances: There is no express presumption of a monetary penalty set out in the Regulation, but the Licensee says the Surich Report and subsequent actions gives rise to an implied presumption which was negotiated with the industry. The Licensee says the general manager has strayed from this "negotiated philosophy". With respect, I find no such presumption to exist.

While industry is often consulted when regulations are being considered, the making of a regulation is a legislative action carried out by the person or entity to whom the Legislature has, under the Act, delegated its legislative powers. As such, to characterize regulatory enactments as "negotiated" is incorrect.

The Regulation speaks for itself and is to be applied and interpreted in accordance with the rules of statutory interpretation as directed and guided by the Interpretation Act (BC) and by the courts. While extraneous material like the Surich Report may be of assistance in interpretation, such materials are not definitive in and of themselves.

Setting out an express presumption in the Regulation would have been very easy to do, and would have provided a clear and unequivocal direction to the general manager and her delegates, had the government intended that to be the case. However, no such express provision was made, so there is no clear direction to apply such a presumption; instead a wide discretion is given to the general manager and her delegates. To in effect "override" the wide discretion provided to the general manager and her delegates by the Regulation and to find an implied presumption would require something very clear and cogent in terms of statutory interpretation. The referred-to Surich Report simply recommends: "Appeal Board procedures are to be reviewed to ensure timely, fair and efficient hearings". Assuming that this Report is an appropriate aide to interpretation (about which I make no finding), this very general recommendation would not be enough to find and apply a presumption that one form of penalty is to apply, except in exceptional but undefined circumstances. There is nothing else submitted as

an aide to interpretation to support finding an implied presumption in favour of monetary penalties.

To apply a presumption in the absence of such clear direction would in effect be to fetter the discretion of the general manager and her delegates. While, over time, there may be a body of decisions that develop that lead to a general approach, that is not and should not be taken to be a legal presumption.

Further, to simply suggest the reasoning in the Irish Times Pub decision is flawed, without specific reference to how or why except to suggest ignoring this alleged historical basis for a presumption (which was not put at issue in that case), does not assist.

Finally, there is no evidence before me that establishes that in fact a monetary penalty will always be a lesser penalty than a suspension of a licence. There may be circumstances where, for some licensed premises, a fine would be more onerous than a suspension. Indeed, there are cases where that is suggested, so a presumption of monetary penalty would work against those licensees.

For all of these reasons, I do not accept this submission and find there is no presumption in favour of a monetary penalty on a first offence, except in exceptional circumstances, as suggested by the Licensee. However, if I am wrong, I would find that exceeding capacity by 100 persons or more than 20%, to be exceptional circumstances to consider not applying any such presumption.

The purpose of enforcement proceedings is to achieve voluntary compliance:

As I understand the Licensee's submission it is that with the goal of enforcement proceedings being to achieve voluntary compliance, because the Licensee believed it had been complying with the licensed capacity restrictions (and the contravention was simply a result of a "difference of opinion"), a monetary penalty would better achieve the goal of compliance in this case. The submission appears to suggest that a subjective

test be applied in assessing penalties – if a Licensee believes they are complying, despite any evidence of actually taking any steps to comply, they intended to voluntarily comply and thus should only be subject to a lesser penalty. That is, I am being asked to accept that because the Licensee thought it was in compliance, the Licensee does not need any measures to get it to voluntarily comply. I find this submission to be somewhat disingenuous, and I reject this argument.

The defence of due diligence is intended to address those situations where the Licensee intended to comply, took all reasonable steps to prevent the contravention from occurring by not only establishing procedures to identify and deal with problems, but also ensuring that those procedures are consistently acted upon and problems are dealt with. Here, there is no evidence of any steps to prevent the overcrowding, no procedures in place and no consistently acting on the procedures or addressing the potential problem.

I find that to impose a lesser penalty because licensees thought they were in compliance, especially without any evidence of the reasonableness of this belief, would in fact have the opposite effect to obtaining voluntary compliance. Licensees would then have little incentive to voluntarily comply with the terms and conditions if they thought that a lesser penalty may be imposed simply based on their belief of compliance, as opposed to an objective finding of the actual facts of compliance.

There may be cases, such as the Silver Dollar Cabaret decision (Cactus Jacks) where a monetary penalty is determined to be appropriate to achieve voluntary compliance. Each case must be assessed on its facts. In that case, the adjudicator referred in detail to the numerous steps taken by the licensee to address the contravention and to ensure that it did not happen again, and in that case the adjudicator thought that that was sufficient to achieve voluntary compliance. In this case, I have no evidence of any steps taken by this Licensee to ensure that the overcrowding does not occur again and that the Licensee has taken this seriously. In addition, the goal of voluntary compliance is also a more general one – not just for this licensee but for all licensees, their patrons,

and the public. The message must be clear to all that voluntary compliance, without the need for enforcement action to achieve it, is the goal.

Occupancy limits have little to do with safety standards:

The Licensee says, as I understand the submission, that for the Branch to equate occupant load as having any special relationship to fire and safety issues, and the need to protect the public from any hazards in relation to those, and thus to impose a higher penalty (suspension), is in error. The Licensee says that when legislation was brought in requiring the licence capacity and occupant load to be the same, and when the legislation brought in person capacity (which includes staff) to replace patron capacity, confusion arose about what occupant load was meant to be. The Licensee says that the occupant load may have nothing to do with fire and building safety but instead is simply reflective of the desired licence capacity of the municipality, and is often much lower than the technical capacity for fire and safety issues. With licensed and unlicensed areas in all establishments, the occupant load is for the whole facility, with patron capacity counted in terms of people.

I find that the Regulation has three definitions that are pertinent; they are:

"occupant load" means the least number of persons allowed in an establishment under

(a) the Provincial building regulations,

(b) the *Fire Services Act* and British Columbia Fire Code Regulation, and

(c) any other safety requirements enacted, made or established by the local government, first nation or treaty first nation for the area in which the establishment is located;

"patron capacity", in relation to an establishment, means the maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12 (3) (b) of the Act as the area where liquor may be sold or served;

"person capacity", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment;

I find each of these is different from the other, and they are not the same. Patron capacity is set by the general manager and refers only to the persons who may consume alcohol on the premises. Person capacity refers to the maximum number of persons, which includes both patrons and others – for example, staff who are on duty and are not to be consuming alcohol. Person capacity and occupant load may be the same number; however, occupant load is set by an entity external to the general manager.

Without any evidence to substantiate the Licensee's submission that the setting of the occupant load is not related to safety and harm reduction, given the language used in the Regulation and the nature of the entities who may set these limits, I am unable to find that safety standards are not a concern of the external entity setting the occupancy load. If the Licensee wishes to pursue an argument that setting the occupancy load has little or nothing to do with safety standards and reduction of fire hazards, then the Licensee should lead evidence of that. Without any such evidence I find that occupancy loads are intended to do just that – address safety concerns related to the number of persons in premises to avoid tragic accidents that can occur from overcrowding, especially related to the ability of persons to safely vacate the premises in the event of a fire, explosion, or other such event.

The occurrence of the contravention is a matter of a "difference of opinion" because the Inspectors' counts, taken from outside, could not have been accurate.

Having limited its submission to penalty only, the Licensee cannot then say a lesser penalty (which in its view is a monetary penalty) ought to be imposed because it doesn't believe the evidence of the Inspectors' counts (and thus the basis for the contravention) to be accurate. If the Licensee believed that the Inspectors' counts were inaccurate, it should have lead evidence to refute the occupant counts and should not have limited their submission to penalty only. To suggest that because in its view the contravention

is on “shaky ground” factually this should provide a basis for a monetary penalty is simply not a well founded argument and I reject it.

I have rejected all of the Licensee’s arguments that a monetary penalty ought to be imposed, but need to consider what penalty is appropriate in this case. I have the discretion to impose a monetary penalty or a suspension and while the minimums are set by the Regulation, I have the discretion to exceed the maximum. The factors I have 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, and the goal of voluntary compliance.

The Licensee compliance history is set out in the Branch’s submission, Exhibit 1. Proven contraventions are from November 3 and 15, 2003 for overcrowding with a 7 day suspension and a $7,000 penalty respectively, and compliance meetings on September 22, 2005 for overcrowding and also on May 12, 2003, July 16, 2008, March 24, 2011, and January 3, 2012, for other issues.

The contravention is serious. Admitting patrons beyond the permitted patron capacity is serious. As noted in the Irish Times Pub decision, when a premise is overcrowded, staff are less able to monitor patrons for issues like intoxication or the potential for fights or other patron misbehaviour. And permitting persons over the occupancy load is even more serious with respect to the threat of death or serious injury if there should be a fire or other mishap. I have found that the patron capacity and occupancy limits are set with these issues in mind. The potential for harm increases with the number of persons over the limits so that it is more serious with each person over the limit. I am mindful of the extent of the overcrowding here – at least 100 persons, and that this was late in the evening. No procedures or policies were in place to avoid the situation and management should have realized that the premises were over patron capacity and over occupancy load and taken steps to address that.

What penalty will be necessary to give the message to this Licensee and other licensees about the need to comply with such a serious term of a licence? Monetary penalties may simply be seen by some as a cost of doing business, and the impact on a business can be difficult to determine, with a higher or lower penalty impacting on different licensees differently. A suspension is a much more public notice to the Licensee, the community, the public at large and to other licensees of the seriousness with which these matters are taken by the general manager and the need to voluntarily comply with the terms and conditions of the license without the need for enforcement action.

Given the compliance history, the seriousness of this contravention, the threat to the public safety and the goal of voluntary compliance, and all of the circumstances surrounding the contravention, I find that a suspension is the most appropriate penalty and order a 4 day suspension.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 015483 for a period of 4 days to commence at the close of business on Thursday, January 10, 2013, 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 Kelowna Police Department from the close of business on Thursday, January 10, 2013, 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

Dianne Flood
Enforcement Hearing Adjudicator

Date: December 6, 2012

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

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