



**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: Cactus Club Turner Road Ltd.  
dba Cactus Club Cafe (Nanaimo)  
8 – 5800 Turner Rd.  
Nanaimo, BC V9T 6J4

Case: EH09-004

For the Licensee: Kinji Bouchier

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: October 1, 2 & 28 and November 20, 2009

Place of Hearing: Nanaimo & Victoria

Decision Date: December 3, 2009

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**Ministry of Housing  
& Social  
Development**

Liquor Control and  
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## **INTRODUCTION**

The Cactus Club Cafe (Nanaimo) is a restaurant located in the city of Nanaimo BC. It has food primary class liquor licence, number 171335. The licence is for the sale and consumption of all types of liquor in an establishment with a primary focus on the service of food. The hours for the sale of liquor are from 11:00 am to 1:00 am, Monday to Saturday and to midnight on Sunday. The licensed capacity is 127 persons in the main dining area, 32 persons in the lounge area and 60 persons on the patio. The official floor plan bears a stamp by the City of Nanaimo, Building Inspection Division, dated March 17, 2004 which shows an occupant load of 159 patrons. The licensee received a temporary approval by the branch permitting patron participation entertainment by way of dancing for the hours of 8:00 pm to midnight on New Year's Eve, December 31, 2008.

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*'.

### **Alleged Contravention and Proposed Penalty**

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the NOEA) dated April 3, 2009. The branch alleges that on December 31, 2008, the licensee contravened section 6 (4) of the *Liquor Control and 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 was more than the occupant load. The proposed penalty is a 7 day liquor licence suspension (item 15 of 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 of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5,000 - \$7,000.

The licensee disputes the alleged contravention.

## **RELEVANT REGULATORY PROVISIONS**

### **Liquor Control and Licensing Act**

### **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).

## **ISSUES**

1. Did the contravention occur?

- Number of persons in the establishment at the time of the alleged contravention?
- Liquor license capacity for the establishment?
- Occupant load for the establishment?
- Due diligence?

2. If so, is a penalty necessary and if so what is an appropriate and reasonable penalty?

**EXHIBITS**

The following exhibits were presented:

- |                  |   |
|------------------|---|
| <b>Exhibit 1</b> | Branch Book of Documents #1, tabs 1 – 19. |
| <b>Exhibit 2</b> | CD video disc.                            |
| <b>Exhibit 3</b> | Police officer's notes.                   |
| <b>Exhibit 4</b> | Licensee Disclosure Package tabs 1 – 5.   |
| <b>Exhibit 5</b> | Licensee Photographs, A - H.              |
| <b>Exhibit 6</b> | Branch written submission.                |
| <b>Exhibit 7</b> | Licensee written submission.              |

**Preliminary Matters**

1. The branch advocate proposed that one of the witnesses, a police officer be permitted to testify via teleconference. The witness had recently been transferred and now worked and resided in Prince Rupert BC. Counsel for the licensee objected that without the witness present it would not be possible to assess the witness's credibility through observing his demeanour and response to cross-examination, and it would be impossible to be assured that the witness was not using notes during his testimony. Counsel argued that other witnesses were travelling from Vancouver and this witness could also travel to the hearing.

A decision was reached that the officer be permitted to testify via teleconference. While there is a preference to have witnesses testify in person, it is not always possible. Having a witness testify by teleconference allows for the evidence to be heard. It is the responsibility of the adjudicator to assess credibility. Safeguards can be put in place. [I pause to note that here that the officer did testify (witness C) and affirmed that he was not using notes during his testimony. Another police officer was present and also affirmed that the witness was not using notes from which to testify.]

2. Counsel for the licensee proposed that a consultant acting for the licensee and expected to be called as a witness (witness O) be permitted to attend the hearing as the representative for the licensee. The branch advocate objected as the consultant was not part of the licensee corporate structure and should be excluded from the hearing until he had testified. The exclusion of witnesses is normally followed during the hearing process.

A decision was reached that the consultant be allowed to sit in the hearing as the representative for the licensee. The principal of the corporate licensee has provided written authority for the consultant to act on behalf of the licensee. The branch advocate can present argument at the conclusion of the hearing whether less weight should be given to the consultant's evidence as a result of having first heard the evidence of other witnesses. [I pause to note that the consultant excused himself from the hearing when witnesses testified on matters in which he was directly involved.]

3. Counsel for the licensee proposed to present as evidence a series of photographs without presenting the person taking the photographs as a witness. The branch advocate objected that the photographer was necessary to present evidence of the time and location the photographs were taken.

A decision was made that that evidence could be provided by another of the licensee's witnesses (witness L) who was familiar with the establishment and who could inform himself of the time that the photographs were taken.

4. The branch proposed that it would call as a witness (witness H) the City of Nanaimo official familiar with the Cactus Club establishment who would present evidence of the occupant load for the establishment. Counsel for the licensee objected that the witness would be providing opinion evidence and as such should be presented as an expert witness. The branch had not provided the licensee with the qualifications of the witness.

A decision was reached that the witness will be restricted to providing factual information on the occupant load and how determined. He may be examined on his qualifications if necessary.

## **EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH**

**Six police officers, witnesses A to F** testified that they attended at the Cactus Club shortly before midnight on December 31, 2008, remaining until sometime between 1 – 1:30 am. The weather that night was cold and damp. It was at or near freezing.

On the night of December 31<sup>st</sup> the bike patrol unit, consisting of four uniformed officers, was assigned responsibility for conducting inspections of licensed establishments in the city of Nanaimo. The Cactus Club was on the list to be inspected as the officers were aware that the establishment, which normally functions as a restaurant, had received temporary approval to operate in a manner similar to a nightclub. During the inspection at another licensed establishment the officers were told that, “Things were out of control at the Cactus Club”. The four officers proceeded directly to the Cactus Club, arriving at approximately 11:45 pm. There was no line-up of patrons outside, inside there was a short line of patrons and a staff member was collecting tickets prior to patrons being admitted. Allowing patrons entry ceased shortly after the officers’ arrival. The officers described the conditions as being crowded particularly in the areas of the bar and the dance floor where patrons were densely packed, shoulder to shoulder. None of the officers conducted a count of the number of patrons but each provided their general estimate of there being between 300 – 350 patrons inside including a few on the patio. They each agreed that in those conditions, with a large number of persons moving around, an accurate count would be impossible. All of the officers testified about their concerns with the crowded conditions. Large numbers of people consuming liquor in crowded conditions can lead to disputes and altercations. Should an emergency situation arise it could lead to serious consequences. The safety of patrons, employees and emergency responders could be at risk.

**Officer A**, the corporal in charge of the unit testified that upon arrival he spoke with the general manager of the establishment. The general manager appeared relieved at the officers' presence. He said something to the effect that, "I'm glad you're here. We have a problem. We are way over capacity and need some help." He said that they had a restricted number of tickets printed for the event in order to control the number of participants. He surmised that the tickets must have been copied because there were more persons present than tickets sold. The tickets were not available for inspection as they were being shredded as they were being collected.

The corporal viewed the liquor license and the notice from the branch for the temporary entertainment approval. He made an assessment of the number of persons in the establishment and testified that he conservatively estimated it to be 350 persons. The general manager did not provide the number of persons present and he was not aware of the general manager having made a count. He didn't inspect the patio area but believed that it was not in use for the event. He advised the general manager to post staff at the entrances to ensure that no more persons were allowed in and persons leaving were not allowed re-entry. The general manager was fully co-operative and said that he would do whatever was necessary to make the situation safe. He asked the corporal whether they should announce that the police are ordering the establishment to close. The corporal advised him that to do so could create a serious and volatile situation. He wanted to de-escalate the situation slowly. It was now approximately 11:55 pm and he told the general manager to let the patrons celebrate the New Year then begin to slowly brighten the lights and in about 15 minutes make a last call for service.

The corporal requested the attendance of plain-clothes police officers to assist the uniform officers. He also requested that the police dispatcher notify the fire department to assess the situation. He assigned **uniformed officers, C & D** to go outside and count the number of patrons exiting the establishment. The corporal and **officer B** remained inside and made short video clips of the activity (exhibit 2). [I pause to note that because of the low light conditions the video clips reveal little more than persons

enjoying themselves in a party-like atmosphere.] Some of the patrons expressed alarm at the number of persons present and said that they were happy to see the police officers as people were getting trampled. Some of the patrons were loud and were staggering, they appeared to be intoxicated. The corporal did not wish to intercede unless it was absolutely necessary. One intoxicated patron was arrested inside for damaging the washroom wall. Four persons were arrested outside for intoxication or creating disturbances. The officers left the area at approximately 1:20 am. There were staff and approximately 30 patrons remaining inside. Officers B and C advised him that they had counted just over 400 patrons exiting. Given the number of persons in the establishment the corporal believed that it must be over its licensed capacity and the building occupancy load and prepared a licensed premise check form (exhibit 1, tab 3). A copy was given to the general manager of the establishment. The corporal prepared an Occurrence Report later that night at 4:24 am (exhibit 1, tab 13a). A copy of which was forwarded to the local liquor inspector. At the request of the consultant acting for the licensed establishment he prepared a letter dated January 7, 2009 summarizing his observations (exhibit 1, tab 13b).

**Police officer B** testified that he was present during the conversation between the corporal and the general manager. He corroborated the testimony of the corporal. He testified that he conservatively estimated there to be 350 persons in the room. He did not view the patio. The general manager did not provide him with the number of persons present. He agreed that the general manager was co-operative and carried out the instructions given to him by the corporal. He did not believe that the general manager had a plan to deal with the situation prior to the police arrival. The general manager suggested that he announce that the police were requiring the establishment to shut down. He testified that he arrested a male patron who was punching holes in the washroom wall. The person was obviously intoxicated. On March 12, 2009 he sent an email to the liquor inspector about his observations on the night of December 31<sup>st</sup> (exhibit 1, tab 14 (a)).



**Police officer C** testified by way of teleconference. Upon arrival he estimated there to be between 300 to 350 persons in the room. He looked into the patio on two occasions, there were 10 – 15 persons on the first occasion and 6 – 8 on the second. It appeared to be used as a smoking area. He was assigned to count the number of patrons exiting the establishment. He and officer D positioned themselves outside of the front entrance, each keeping a separate count and exchanging their numbers from time to time. He recorded the numbers in his notebook however it was destroyed in an incident about a month later. He recalls that he wrote that there were 420 persons counted leaving the establishment. There were some cases where persons re-entered after leaving the establishment. To maintain accuracy he excluded these persons from his total. He did not see any persons exiting through the patio. On January 9, 2009 he sent an email to the liquor inspector about his observations on the night of December 31<sup>st</sup> (exhibit 1, tab 14 (b)).

**Police officer D** testified that upon her arrival inside the establishment she estimated there to be between 300 to 350 persons in the room. She and officer C were assigned to count patrons as they left the establishment. They went outside and stood outside the front doors and commenced their counts as patrons began leaving at approximately 12:07 am, completing their count at approximately 1:20 am. She recorded the numbers in her notebook from time to time (exhibit 3) and exchanged numbers with officer C. Their counts were always close in the numbers of persons leaving. She compensated for persons exiting and re-entering and reached a total of 423 persons having left the establishment. She did not take specific notice of the patio exit.

She testified that shortly after the officers arrived at the establishment she was standing near the front door. She observed two males persistently arguing with the employee at the door when they were advised that they were not permitted into the establishment. They argued that they had paid for tickets. She went outside but did not see the males leave. She asked the staff member what happened to them. He said that they were allowed to go in and look for a friend. Later, at approximately 1:00 am while counting patrons exiting she observed both males leaving, both appeared intoxicated. One was

angry and creating a disturbance. He was arrested and taken into custody. On January 9, 2009 she sent an email to the liquor inspector about her observations on the night of December 31<sup>st</sup> (exhibit 1, tab 14(c)).

**Police officers E & F** testified that on December 31<sup>st</sup> they and a third plainclothes officer were directed to the Cactus Club to assist the uniformed bike squad members. They spent time making observations both inside and outside of the establishment. They testified about the large number of persons inside and the congested conditions. Officer E estimated the number of persons inside to be between high 300's and low 400's. They testified that there were only 12 – 15 persons on the patio, heaters and fireplaces were in use but it was still cold. When the establishment shut down patrons exited via the front entrance. Only two persons were observed leaving via the patio. The officers left the area sometime after 1:00 am. On March 12, 2009 they each sent an email to the liquor inspector about their observations on the night of December 31<sup>st</sup> (exhibit 1, tab 14(d & e)).

**A liquor inspector, witness G** testified that he is the inspector responsible for the geographical area in which the Cactus Club (Nanaimo) is located. In his testimony he referred to copies of documents from the Branch file:

- Exhibit 1, tab 4; the food primary liquor license in effect at the time of the alleged contravention.
- Exhibit 1, tab 5; the floor plan for the establishment.
- Exhibit 1, tab 8; a copy of the "Guide" in effect at the time of the alleged contravention. He referred to excerpts from the Guide dealing with: "Occupant load", "Patron Capacity", "Person Capacity" and "Terms and Conditions" (pp 1 & 2); "Your Role as a Licensee" (p3); and "Overcrowding" p12).
- Exhibit 1, tab 12; branch correspondence to the Cactus Club authorizing a temporary change to the liquor license to permit patron participation entertainment in the form of dancing at the establishment on December 31, 2008 from 8:00 pm to midnight for a New Year's Eve celebration.

He testified that he was not at the Cactus Club the night of December 31, 2008 and had no first hand knowledge of the alleged contravention. He first learned of the incident on January 2, 2009.

During his investigation he spoke with the principal of the corporate licensee, a consultant acting on his behalf, and the general manager of the establishment. He was advised that they would co-operate with the investigation. He learned that the establishment had 225 tickets printed and distributed for a New Year's Eve celebration. Some of the tickets had been illegally copied and used to gain entry into the establishment resulting in it being over its licensed capacity. When the general manager observed that this was occurring he advised staff not to allow further persons to enter. Sixty-three persons waiting with tickets were given refunds.

He issued a Contravention Notice (CN) to the general manager on January 5<sup>th</sup> for the contravention of overcrowding beyond occupant load (exhibit 1, tab 2).

He received correspondence from the police outlining their observations made at the establishment the night of December 31<sup>st</sup>:

- A Police License Premise Check form dated December 31, 2008.
- A police Occurrence Report dated January 1, 2009 (exhibit 1, tab 13).
- A copy of a letter dated January 7, 2009 from the police to the consultant acting for the establishment (exhibit 1, tab 13).
- Emails from police officers C & D dated January 9, 2009 outlining their observations at the establishment on the night of December 31, 2009 (exhibit 1, tab 14 b & c).
- Emails from police officers B, E & F dated March 12, 2009 outlining their observations at the establishment on the night of December 31, 2009 (exhibit 1, tab 14 b & c).

He received correspondence from the City of Nanaimo advising that the approved occupancy for the inside of the Cactus Club is 159 patrons (exhibit 1, tabs 10 & 11).

From the information provided to him and the information on file he believed that the licensed capacity for the Cactus Club was 159 persons inside and 60 on the patio for a total of 219 persons. He believed the occupancy load to be 159 patrons inside and 60 on the patio for a total of 219 patrons.

He conducted a compliance meeting with the consultant, the general manager, and the night manager on January 20, 2009 (exhibit 1, tab 6). They advised that they were working with the City of Nanaimo to have the building occupancy increased. They committed to having no more large scale parties at the establishment until a new policy on door control was developed.

In making a determination to proceed to enforcement, he considered that the overcrowding had the potential for creating a significant disturbance and a breach of community standards and could have lead to persons being injured. There was no plan in place to prevent or deal with the occurrence. It was a major public safety issue. It occupied significant police resources on an already busy night. He believed that a penalty was necessary to reinforce the need for compliance and recommended a seven-day liquor license suspension, the maximum suspension for a first contravention of this type. He completed a NOEA on April 3, 2009 which was forwarded to the principal of the corporate licensee and the consultant (exhibit 1, tab 1).

**Witness H** testified that he has been the supervisor of building inspections for the City of Nanaimo for the past ten years. Previous to that he was a building inspector for twelve years. He testified that in Nanaimo the Building Department does the calculations for the occupant load and forwards the plans to the Fire Department, which draws up the Occupant Load Certificate and delivers it to the premises. The statutory provisions for setting the occupancy loads are found in the Fire Protection Bylaws and the Building Bylaws. The current approved occupancy load for the inside area of the Cactus Club was set in March 2004 at 159 patrons by a plans checker within the building inspection office. It is noted on the floor plans for the establishment at exhibit 5 and remains the same to date.

He testified that occupant load calculations could be based on the square foot area or on seating. He recently recalculated the occupant load on the basis of square footage for the inside area as being 198 persons not including staff. The owner of the premises could make an application to have the occupant load increased. There has not been an application made to date and the current approved occupant load is 159 patrons. The exiting capacity would be approximately 750 persons. This is separate from occupancy load and doesn't mean that the building could hold 750 persons.

### **EVIDENCE - THE LICENSEE**

The corporate licensee, Cactus Cafe Turner Road Ltd. dba Cactus Club Cafe (Nanaimo) is part of the Cactus Club Group of restaurants (CCG). Counsel presented a senior executive officer from the corporate head office (Witness I) and five management level employees from the Cactus Club (Nanaimo) (Witnesses J – N).

All of the witnesses were familiar with the series of training manuals and workbooks developed by CCG for its employees (exhibit 4 tab 5). Every employee hired, regardless of previous experience, must complete the training program. It provides for progressive employment opportunities within the CCG. Employees cannot be promoted to a higher position without having completed the training for that position. The training program is very comprehensive, consisting of over 100 hours of training at a cost of approximately \$5000.00 per employee. The manuals contain a set of guidelines and expectations for its employees titled, "35 Things You Must Know" (exhibit 4, tab 5A). It requires that every bartender and server must obtain a "Serving It Right" certificate prior to commencing their first work shift (item 22). It includes instructions on dealing with inebriated guests (item 26). The manuals contain provisions on "Liquor Laws and Alcohol Awareness" (exhibit 4, tab 5 B) which outlines the rules and responsibilities for the service of liquor. Servers and bartenders are tested on their knowledge. Weekly management meetings are held at each location. Daily one-on-one meetings are held by each manager with their staff.

The witnesses each acknowledged that none of the manuals or training materials dealt with the issues of overcrowding or door control. They each testified that the CCG establishments operate as restaurants and overcrowding is not a problem in the normal course of their business.

An industry consultant (witness O) to the Cactus Club group of restaurants also provided evidence on behalf of the licensee as did an architect qualified to provide expert evidence on the setting of occupant load capacities for buildings (witness P).

**Witness I** testified that she is the Director of Corporate Operations and Human Relations for the Cactus Club Group of restaurants (CCG). She is a professional accountant and is one of five senior executives reporting directly to the CCG president. The CCG has been in operation since 1988 and currently operates 21 restaurants located in the provinces of British Columbia and Alberta. It provides extensive training and promotional opportunities for its employees. It has received awards for being one of the best companies in the province and in the country.

CCG management staff is encouraged to get involved in community activities. The company supports many local charities and is a sponsor for charitable organizations such as "The Make a Wish Foundation", "Cops for Cancer" and other similar organizations. They try to give back to the communities in which they operate their businesses.

A few months prior to December 31<sup>st</sup> she was contacted by the general manager for the Cactus Club Nanaimo restaurant who wanted to offer his guests a New Year's Eve event with dinner, dancing and a DJ. This was a departure from their ordinary course of business which is the service of food and beverages. She agreed that the event could proceed subject to the requirements that all managers be on duty for the night and that a special endorsement to their liquor license be obtained authorizing the event. The general manager was advised to contact the CCG consultant to ensure that all the bases were covered. When the event didn't go as planned the company president was

emphatic, "Not again!". We would stick to what we do best, that is offering a great dining experience for our guests.

She testified that the proposed penalty of a seven day liquor license suspension would create a loss of sales of between \$80 - \$100,000. The restaurant would close for that period, staff would lose a week's work and they may lose their regular customers.

**Witness J** testified that he is the general manager of the Cactus Club Nanaimo restaurant and was so employed on December 31, 2008. He has worked for the CCG for nine years in several different locations beginning in an entry-level position and working his way through the system. A large part of his responsibility is the training of staff. He provides orientation training for service and bar staff using the CCG training program.

He testified that overcrowding has never been a problem at the restaurant, neither before nor after December 31, 2008. He has never had to deal with it in his nine years at CCG.

The New Year's Eve event was a one-time occurrence. Regular patrons raised the possibility of coming to the restaurant to celebrate the New Year. In receiving authority for the event from corporate management he was told that if the event was to go ahead all managers must work that night and a liquor license endorsement be obtained. The endorsement was done through the CCG consultant.

Planning for the event involved having 220 tickets printed, 175 to be sold at \$15.00 each, 45 used as promotional incentives of which he used 15 for regular customers with the remaining 30 being given to staff for family and friends. The junior night manager would be stationed at the main entrance, persons with tickets would exchange their tickets for a wristband identifying them as guests for the event. Security, consisting of four or five members of a local martial arts group, was hired. They were dressed in T-shirts marked "Security" and were told to keep alert for problems and to provide a visible

deterrent. They were stationed at the entrances to check patrons for either a ticket or a wristband.

He testified that he was aware of the liquor license capacity for the restaurant as being, 127 in the dining area, 32 in the lounge, and 60 on the patio, for a total of 219. He was not aware of what the occupant load was for the establishment.

He arrived at the restaurant at approximately 3:00 pm on December 31<sup>st</sup>, ensured that all was ready for the New Year's Eve event and conducted a pre-shift meeting with staff to discuss the game plan for the night. He was uncertain of the number of staff working that night, he estimated it to be about 18.

During the course of the evening he used a mechanical counter to conduct counts of the number of persons including patrons and staff in the restaurant. There were approximately 150 persons total including about 35 on the patio at 8:00 pm. At 9:00 pm he counted 190 persons, including about 35 – 40 on the patio. Between 9:30 and 10:00 pm he counted 250 persons and asked the manager at the door if people were being permitted in without tickets. He was advised, "Absolutely not." The guest relations manager told him that she had heard that some persons were using fake tickets. At this point he called the CCG consultant, told him that there were a total of 250 patrons inside and on the patio and line-up at the door. He asked the consultant what he would like him to do. He was told to cut-off entry and to have some persons leave. He told the door manager to hold the line-up and to refund the tickets. He gave the door manager \$500.00 - \$600.00 and believes that they refunded 60 – 62 tickets. He went up to a few persons he knew and asked them to leave to alleviate the situation. He does not know whether any of them left.

The police officers arrived at approximately 11:10 – 11:15 PM. He advised the corporal that they had been the victim of ticket fraud and showed him the liquor license and special endorsement approval. He did not say that they were overcrowded or that they needed assistance. He and the corporal each did a separate count. He counted 295



persons, of which 20 were on the patio. He believed that the corporal counted about 300. The corporal did not appear concerned. He asked the corporal whether they should shut down the event. The corporal advised, "Absolutely not. It will cause more problems." He received a call from the Fire Chief who told him that the RCMP advised him that they were overcrowded. He told the chief that there were 290 – 295 persons in the establishment. The fire chief told him that if the police called again he would have to attend. No one from the fire department attended.

They announced last call for liquor service at 11:55 pm, played the last song for the night and turned the lights on at 12:10 am. Things were hectic at the front exit with persons trying to leave. Persons were leaving then re-entering looking for friends. It was possible that some persons left via the patio. Managers were going in and out. It went smoothly with all persons out by 1:00 am. The corporal told him that the officers counted 463 persons leaving the establishment.

He spoke with the CCG consultant the following day. The consultant told him that the liquor inspector would meet with him regarding the event. He was to have the managers remember what had occurred because the matter may have to go to a hearing. He met with the liquor inspector a few days later and was given a CN. He explained to the inspector the plans in place for the night. He didn't seem interested in listening to any explanation. The inspector told him that the police said there were between 250 – 350 persons in the establishment. He told the inspector that he and the corporal both counted about 300 persons not 350. He later attended the compliance meeting. They told the inspector that it was a one time event, it would never happen again, fraudulent tickets were used, the occupant load was wrong or outdated and they would make any changes necessary to update the occupant load. The inspector said that they could plead guilty now and receive a five-day suspension. If they went to a hearing it would result in a seven-day suspension. The consultant was shocked and told the inspector that that was unfair. A hearing was unnecessary, the event was a one time thing, wouldn't happen again and the restaurant had no previous enforcement

history. The inspector didn't care. He said it would be a seven-day suspension because they weren't pleading guilty.

The witness testified that he didn't discuss the matter with staff. They knew it wouldn't happen again, they didn't need to know anything further, and overcrowding is not a factor at the establishment. They keep an incident log which is mostly used for staff relations and WCB issues, it can be used for liquor related issues. There was no incident report completed for that night.

**Witness K** testified that he worked his way through the CCG system to being the senior night manager of the Nanaimo restaurant, the position he occupied on December 31<sup>st</sup>. He did not have a lot of direct involvement in the planning for the event. The event was delegated to the guest relations manager. He was aware that a number of tickets were printed and sold or given out to regular customers. Some were sold that night to diners who wished to stay for the New Years celebration. He didn't expect it to be a large event because there were other events being held in the community. He didn't anticipate that tickets would be forged. On that day he started work at 3:00 pm and focused on dealing with reservations and dinner guests. At 9:00 pm he took charge of the door and remained there for the night. Guests attending the event were checked for identification. Only persons 19 years or older were allowed into the event. Identification was checked and tickets were exchanged for a wristband. The tickets were destroyed as they were collected to ensure that they were not reused. Patrons for the event began arriving between 9:00 – 9:30 pm. Attendance picked up between 10:00 and 11:00 pm. A line-up built as he controlled entry so as not to overwhelm staff. People without tickets were turned away. By 10:45 pm he knew that they were getting close to capacity and realized that something was wrong. The general manager said that he counted about 250 persons inside and called the consultant for advice on what to do. The general manager then said that we couldn't allow any more people in and we would have to refund those with tickets. People waiting to get in were upset, many had to find friends waiting inside. He refunded approximately \$300.00 – 400.00. Tickets had presold for \$15 or those sold at the door for \$20.

The police officers arrived and were told that they had closed off entry to further patrons. After midnight the bartenders were told to stop serving, the lights were turned on and persons began leaving. He tried to make certain that people leaving did not go back in. This created problems as people wanted to meet with their friends inside or wanted to have a taxi called or had forgotten their coats. He made a judgement call to allow some persons back in order to have all exit as quickly and safely as possible. By 1:30 am everyone had left except staff, the DJ and a few stragglers. He estimated that there were about 30 staff on duty including five managers, four to five security, two DJs, nine servers, five bartenders, three coat checkers, three or more kitchen staff. He was aware of the license capacity but not the occupant load. Overcrowding has never been a problem at the Nanaimo restaurant. He is not aware of an incident report being completed for the night. If there were, it would have been done by the general manager.

**Witness L** testified that he has been employed with the CCG for over four years working his way through the system to being the senior night manager of the Nanaimo restaurant. In his current position he is responsible for some of the staff training.

He had some involvement in the planning for the New Years event. He is uncertain how many tickets were printed and sold. Some were sold in the days prior to the event, some were sold that night. He hired four of his friends as security. A DJ was hired to provide the music. One of the security persons was stationed at the patio door to prevent persons from entering from the outside. Patrons were permitted in and out between the patio and the main dining area. The CCG consultant had told the general manager that they were not permitted to operate as a nightclub. They were not allowed to set up a beer tub as it was out of the licensed area.

On December 31<sup>st</sup> he was the junior night manager at the restaurant and was responsible for maintaining service levels in the restaurant. He started work at 5:00 pm and ensured that the restaurant was prepared for the regular dinner seating's at 5:00 and 7:00 pm. Those diners with tickets for the last seating remained for the event while

others left after completing their meal. Staff prepared the restaurant for the event. Eight tables were removed and placed against the wall in the patio to make way for a dance floor, the DJ set up and the lights turned to the night setting. Persons began arriving and sometime between 9:30 and 10:00 pm the general manager said he counted between 165 to 180 patrons. At approximately 11:00 pm the police arrived, it was not unusual for them to do a walk-thru of the premises. At approximately 11:30 pm the general manager showed him the counter showing 265 persons. There was a line-up at the door and the night manager who was stationed there said that all persons entering had tickets. The general manager phoned the consultant for advice following which he said that they would wait until after midnight to turn off the music so as not to cause a panic. The music was turned off around 12:10 – 12:15 am and staff began collecting their bills. Patrons were moved slowly towards the door. Some remained, waiting for rides. Most patrons had left by 1:15 to 1:20 am. He does not know how many persons were in the restaurant but he does not believe it to be 400.

The witness testified that the photographs at exhibit 5, A – H were taken by his wife. He identified the time and location that each was taken and the area in the restaurant depicted. [I pause to note that the time for each photograph has been written on each photograph. The location where each photograph was taken and the area depicted is noted on the floor plan at exhibit 5-I. The photographs commence at 11:34 pm and continue to 12:06 am.]

**Witness M** testified that he has been employed with the CCG since 2007 working his way through the system to being the night manager of the Nanaimo restaurant. He was responsible for having the tickets printed for the New Year's event. He took one of the restaurant's gift cards, added some information about the event and had 220 tickets printed. The tickets were not numbered and did not contain any security features. Approximately 175 – 180 were sold prior to the event, the remainder were kept for customers who wished to remain after their dinner that night. All the tickets were distributed, there were none left over.

On December 31<sup>st</sup> he started work at noon managing the lunch service following which he assisted with dinner arrangements and setting up for the event. At about 8:30 pm he provided wristbands for dinner guests which showed that they had tickets for the event and had been checked for identification. Members of a martial arts group provided security. They were at the patio to ensure that people only entered through the main door. The patio was not crowded, about ten people were using it as a smoking area. He spent most of the night primarily assisting at the bar. At approximately 10:30 pm the general manager told him that he thought that there was a problem with fake tickets and he told the door manager to stop letting persons in. Shortly after 11:00 pm the police arrived and spoke with the general manager. They didn't appear to be concerned. He was told later by the general manager that they were closing the restaurant. Last call for liquor service was made at 12:15 am. He went to assist at the coat check where people were milling around trying to get their coats. All patrons were out by 1:00 am. They had anticipated tht the event would continue later with last call being made about 1:30 am with all patrons leaving by 2:00 am.

**Witness N** testified that she has been employed with the CCG for four years working her way through the system to being the guest relations manager of the Nanaimo restaurant. She was in charge of planning for the New Year's event. Arrangements were made for decorations, a DJ, security with identifiable T-shirts, tickets and wristbands. She spoke with the liquor inspector about their plans, he said that he didn't see a problem. There were 225 tickets printed, 175 were pre-sold. She spoke to diners at the last seating and sold tickets to those wishing to remain. All patrons of the event were checked for identification and their tickets were exchanged for wristbands. During the night she was at the front door assisting the hostesses who were doing the coat-check and she later assisted the bartenders. She did not see any fake tickets and was unaware that some people with tickets had their money refunded. The night manager was at the door in charge of persons entering. She is not aware of the total number of staff working that night although there were five managers, 6 hostesses, 9 servers, bartenders, cooks and dishwashers. She knows that the total licensed capacity of the

restaurant is 219 persons but is unaware how that is distributed between the areas. She does not know what the building occupancy capacity is.

**Witness O** testified that he is a **consultant** to the restaurant industry with 25 years experience dealing with liquor licensing issues. He is on a permanent retainer with CCG and is on call on a round-the-clock basis. He deals frequently with the president, senior executive and management staff on issues arising with the operation of their establishments and is the contact person for each establishment with the branch. He is familiar with their training manuals and was involved in developing the portions dealing with liquor licensing matters. CCG are dining establishments and have no desire to become nightclubs. Overcrowding and door control issues are not relevant to their operation and need not be covered in the manuals.

He was contacted by CCG regarding holding a New Year's event at the Nanaimo location. This was to be an experimental departure from their practice of only offering dining. He spoke with the general manager of the Nanaimo location. He advised him that an entertainment endorsement to the liquor license was necessary. He directed him not to include beer tub sales locations. He advised him that they should operate like a supper club for the event, not like a nightclub. He advised him to close earlier than the 2:00 am time proposed.

On December 31<sup>st</sup> he checked with the general manager in the afternoon and was assured that all necessary preparations had been carried out. He received the first call from the general manager at about 8:15 pm who reported that everything was proceeding well and that they had approximately 180 to 190 persons present. He received a second call about 10:15 and was told that that there were approximately 250 to 260 persons present with another 30 to 40 persons waiting in line with tickets. He asked how this could have happened and was told that some people must be using fraudulent tickets. The general manager asked what he should do, he told him that he must stop any further entry and to get as many people to leave as possible. He was to refund all persons in the line with tickets whether the tickets were genuine or fraudulent.

The general manager told him later that they had refunded between 60 and 63 tickets. He spoke with the general manager a while later and was told that the police had arrived. They hadn't told him to close down. He told the general manager to do whatever the police requested. The general manager told him later that the fire chief had called at the request of the police, they said that they would attend if the police were to call again.

The consultant spoke to the police corporal a day or two later who advised him that the police had received the co-operation from management and staff the night of the event. He said that the premises were congested but not extremely overcrowded. He felt that immediately shutting down the event upon their arrival would have lead to greater problems. He advised the consultant that they would not be pursuing the fraudulent tickets. The corporal followed up with a letter outlining the police officers' observations the night of the event (exhibit 1, tab 13b). He did not agree with everything in the letter. He did not agree with the reported number of people in the establishment. The number counted by the general manager with the corporal was between 295 and 300 and this was the number given to the fire department. The high counts by officers stationed outside were due to persons going in and out of the establishment and being counted more than once.

The consultant spoke with the fire chief. He said that the police had advised that there were between 280 – 290 persons in the restaurant. He did not see the need to attend at the establishment that night.

The consultant met with the liquor inspector and told him that they would co-operate with his investigation. He told the inspector that it was a one-off event and wouldn't happen again. He and other Nanaimo management staff attended the compliance meeting held by the liquor inspector. The inspector advised them that he was preparing a NOEA to commence enforcement action and would be recommending a seven day suspension. The suspension would be reduced if they signed a waiver. He told the inspector that he was flabbergasted that he would be proceeding without having all of

the information. He explained to the inspector that the situation arose as a result of the fraudulent tickets and would never happen again and that the police were not interested in further pursuing the matter. The inspector was not interested in their explanations.

He contacted the CCG president and brought him up to date. He suggested that the president might wish to contact the inspector.

The consultant testified that nothing could have prepared the licensee for what had occurred. Staff was properly instructed for the event, tickets were printed, wristbands were obtained and used. It never crossed anyone's mind that the tickets would be falsified. It never occurred to him that the tickets would not be numbered, it was never discussed.

**Witness P** testified that he holds a Bachelor of Architecture degree and has been a Registered Architect and a member of the Architectural Institute of British Columbia for over 20 years. He has been a Certified Professional since 1990 with specific expertise in the review, analysis, interpretation and application of the BC Building Code and Vancouver Building Bylaw. His qualifications and experience are outlined in his sworn Affidavit found at exhibit 4, tab 3.

The witness was accepted as an expert in the calculation of occupant load for the purpose of these proceedings.

He testified that using as-built drawings he determined the square footage of the restaurant and applying the provisions of the BC Building Code and the City of Nanaimo's publication, "Occupant Load Calculations for Licensed Beverage Establishments and Licensed Restaurants", he calculated the occupancy load of the Cactus Club Nanaimo restaurant as 243 people, exclusive of the patio area. The occupancy load of the patio was calculated as 151 people. He calculated the exit capacity of the restaurant as being in excess of 750 people.



He agreed that his process of calculations in his Affidavit (exhibit 4, tab 3) does not show the square footage used for the calculations.

## **SUBMISSIONS**

The advocate for the branch and counsel for the licensee both provided extensive written submissions. I have included these as exhibits 6 (Branch) and 7 (licensee).

Additionally, the advocate and counsel both made oral submissions on the final day of hearing which essentially summarized their written positions.

**The branch submission** is essentially that the elements of the contravention have been proven; the number of persons and patrons in the licensed establishment on December 31, 2008 exceeded both the licensed capacity and the building occupant load. The licensee was not duly diligent and “permitted” the contravention. The proposed seven-day license suspension is reasonable and necessary for future voluntary compliance.

**The licensee submission** is essentially that the contravention has not occurred, as the number of patrons in the licensed establishment on December 31, 2008 did not exceed the building occupant load. The branch has used the wrong building occupancy load, the correct load is as testified by the expert witness. The licensee at all times exercised a high degree of diligence and did not “permit” the alleged contravention. If a contravention is found a penalty is not necessary to ensure voluntary compliance as this scenario cannot again occur. In the alternative if a penalty were warranted, the appropriate penalty would be the minimum monetary penalty.

I have considered the submissions.

## REASONS AND DECISION

### 1. Did the contravention occur?

- **The number of persons in the establishment at the time of the alleged contravention.**

There is no agreement on the number of persons present in the establishment at the time of the contravention, which is shortly before midnight of December 31, 2008. The police officers attending at the establishment did not make an actual count of the number of persons present at the time of their arrival. They testified that a conservative estimate was 300 - 350 persons inside the establishment. The general manager of the licensed establishment testified that he counted a total of 295 persons inside the licensed areas of whom twenty were on the patio at the time of the police arrival. He also testified that the police corporal counted with him reaching a count of 300 persons. That was not the evidence of the corporal during his testimony or in a report that he made a few hours later prior to going off shift., "The crowd was conservatively estimated to exceed 350." (exhibit 1 tab 13a). Two police officers stationed outside of the main entrance counted the number of persons leaving the establishment as the event was closed down shortly after midnight. Both counts were in excess of 400 persons. They both compensated for persons exiting and returning inside but agreed that there may have been a small number of persons double counted. The corporal and another officer counted an additional 30 people, not including staff, remaining inside after the two officers completed their count outside.

Taking into consideration all of the evidence I find on a balance of probabilities that there were no fewer than 350 persons in the establishment at the time of the alleged contravention. In my view there is a strong likelihood that the actual total number is closer to 400 persons.

- **The liquor license capacity for the establishment.**

The liquor license capacity is not in doubt. It is clearly shown on the liquor license (exhibit 4) and the floor plans (exhibit 5). The inside capacity consists of the main dining area of 127 persons and the lounge area of 32 persons. The patio is a separate area with a capacity of 60 persons. That does not mean that the capacities of the three areas could be combined to allow for 219 persons in any one area. For our purposes here I accept that the capacities of the inside areas could be combined to allow for 159 persons generally within those two areas. That is not the case for the patio. It is a separate and distinct area for 60 persons and the capacity may not be combined with either of the inside areas.

My finding as noted above is that the number of persons within the inside licensed areas far exceeded the licensed capacity. I pause to note that even were we to take the best case scenario favouring the licensee that there were only 295 persons in the licensed areas of whom twenty were on the patio, i.e. 275 persons within the inside licensed areas. That is still far in excess of the licensed capacity.

- **The building occupancy load.**

The official floor plan at exhibit 1, tab 5, bears a stamp by the City of Nanaimo, Building Inspection Division, dated March 17, 2004 which shows an occupant load of 159 patrons. The supervisor of building inspections for the city of Nanaimo testified that in Nanaimo the Building Department does the calculations for the occupant load. The current approved occupancy load for the inside area of the Cactus Club is as noted on the plans. He testified that occupant load calculations could be based on square foot area or on seating. He recently recalculated the occupant load on the basis of square footage for the inside area as being 198 persons not including staff, i.e. 198 patrons. The owner of the premises could make an application to have the occupant load increased. The Cactus Club has not made an application to increase the occupancy load, the building occupancy load remains at 159 patrons for the inside areas.

An expert witness testified that using as-built drawings he determined the square footage of the restaurant and applying the provisions of the BC Building Code and the City of Nanaimo's "Occupant Load Calculations for Licensed Beverage Establishments and Licensed Restaurants", he calculated the occupancy load of the Cactus Club Nanaimo restaurant as 243 people, i.e. patrons and staff, exclusive of the patio area.

I am satisfied that the setting of occupancy loads for a building is not within the jurisdiction of the Liquor Control and Licensing Branch. It is my view that an adjudicator acting as the general manager of the branch does not have jurisdiction to look behind an occupancy load. Here the municipal authority has set the building occupancy load as being 159 patrons. There is evidence that a building occupancy load can be calculated by area square footage or by seating. There is evidence that an increase to the building occupancy load may be approved upon application by the building owner. That was not done by December 31, 2008 or at the time of the hearing. The building occupancy load for the inside of the licensed establishment remains at 159 patrons. My finding as noted above is that the building occupancy load was by far exceeded. I pause to note that even were we to take the best case scenario favouring the licensee with a building occupancy load for the inside of the establishment as being 243 persons, my finding as noted above is that the building occupancy load was by far exceeded.

- **Due diligence.**

On December 31, 2008 the inside licensed area was found to be overcrowded. The number of persons in the licensed area exceeded the maximum licensed capacity and was greater than the occupant load. That on its face, is a contravention of section 6(4) of the Regulations to the *Liquor Control and Licensing Act*.

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.

The leading case is: *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299. At p. 1325, Dickson J sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In the context of liquor enforcement in British Columbia, the BC Supreme Court in the case of *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC (para 25), set out the criteria a licensee must meet in order for it to be found not responsible for a contravention under the *Act*:

If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

The court in Plaza clarified that the directing mind need not be an officer or director of the licensee:

It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee. (para 27)

Here, I find that the directing mind of the licensee at the time of the contravention was the general manager (witness J). He was the senior manager for the Nanaimo location and was responsible for its operation. He was on site and in charge at the time of the alleged contravention. He knew or ought to have known the licensed capacities for the licensed areas and the building occupancy load. He authorized the printing of 220 tickets to allow that number of patrons into the establishment. He knew or ought to have known that to allow that number of patrons together with the number of staff on duty in the inside licensed areas with a combined licensed capacity of 159 persons would exceed the licensed capacity. He knew or ought to have known that to allow that number of patrons together with the number of staff on duty in the inside licensed areas with a building occupancy load of 159 patrons would exceed building occupancy load. There is no evidence that he intended that 60 of the patrons to whom tickets were sold be restricted to the patio area so as not to overcrowd the inside areas. The evidence is to the contrary, few persons used the patio other than for a smoking area on a temporary basis. Further he did not take reasonable measures such as numbering or placing other security measures on the tickets to prevent the tickets from being illegally duplicated. He did not take reasonable measures to ensure that tickets being presented at the door were authentic.

In the result I find that the licensee has not met the test for due diligence and may be said to have "permitted" the contravention.

In conclusion, on the evidence, I find on a balance of probabilities, that on December 31, 2008, the licensee contravened section 6 (4) of the *Liquor Control and 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 was more than the occupant load.

## **PENALTY**

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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 *Regulations*. 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 NOEA.

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 of penalties for a first contravention of 43 (2)(b) of the *Liquor Control and Licensing Act* pursuant to Schedule 4, item 11 is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

There is much to commend the CCG on the operation of their licensed restaurants including the Nanaimo location. They have developed extensive manuals that are used to instruct, guide and train their staff. They have an excellent training program offering progressive employment opportunities for staff interested in pursuing a career with the company. They have a knowledgeable industry consultant on a continuing retainer from whom they receive advice on the operation of their restaurants. That said, they fell far short in the planning and operation of the New Year's Eve event of December 31, 2008. They failed to recognize that the event as planned would allow their licensed and building occupancy capacities to be exceeded. Further they failed to recognize that safeguards should be put in place to ensure that only those persons with authentic tickets would be admitted into the licensed establishment. The result was that the number of persons permitted into the establishment far exceeded what they anticipated and far exceeded their authorized capacity.

While the management and staff co-operated with the police officers on site at the time of the contravention and assisted with the investigation, their response since has been primarily reactive. The decision was made that there would be no more such events and consequently the problem can never arise again. They view themselves as being victimized by the fraudulent actions of others. I respectfully disagree. The real problem here was the failure within all levels of the CCG to be aware of, and to operate within, one of the most basic requirements of their license, namely the licensed capacities and the building occupancy load. That amounted to negligence. It was that negligence which permitted the contravention to occur. Without that awareness and without steps taken to ensure that all management are aware of all their license requirements there



remains the opportunity for a further contravention. In the result I find that a penalty is necessary to ensure future voluntary compliance.

In determining what is a reasonable and appropriate penalty, I give consideration to factors such as: 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. Here there is no previous compliance history. The contravention is serious. The number of persons permitted into the establishment far exceeded both the licensed capacity and the building occupancy load. Management attempts to prevent any further persons from entering and to have some persons leave was not particularly effective. It is unlikely that security consisting of 4 – 5 members of a martial arts group could deal with the situation should it get out of control. All of the police officers expressed concerns with overcrowding. Large numbers of people consuming liquor in crowded conditions can lead to disputes and altercations. Should an emergency situation arise it could lead to serious consequences. The safety of patrons, employees and emergency responders could be at risk.

Much was made of the fact that the police corporal did not immediately order the restaurant to shut down. The evidence is that he did not because to do so could create a serious and volatile situation. He wanted to de-escalate the situation slowly by letting everyone celebrate the New Year, announce “last call”, commence turning up the lights, and request persons to leave. One intoxicated patron was arrested inside for punching holes in a washroom wall. Four persons were arrested outside for intoxication or for creating disturbances. In my view it is the fortuitous appearance of the police officers, together with their measured approach, that prevented the situation existing at the time of their arrival from escalating into a very dangerous situation. The potential threat to public safety and community disturbance was considerable. The situation tied up seven police officers on a traditionally busy night. A significant penalty is required.

In the circumstances a seven-day liquor license suspension is reasonable, appropriate and necessary. That such a penalty may cause business losses and disruptions for

staff is not in itself determinative. It is in the public interest that any penalty imposed must be effective in bringing about the desired results.

### **Order**

Pursuant to Section 20(2) of the *Act*, I order a suspension of Food Primary License No. 171335 for a period of seven (7) days, to commence as of the close of business on Tuesday, January 19, 2010, 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 License No. 171335 be held by the branch or the RCMP Nanaimo Detachment from the close of business on Tuesday, January 19, 2010 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

*Original signed by*

Edward W. Owsianski  
Enforcement Hearing Adjudicator

Date: December 3, 2009

cc: RCMP Nanaimo Detachment

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

Liquor Control and Licensing Branch, Victoria Office  
Attention: Bode Fagbamiye, Branch Advocate