



**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 Cafe Turner Road Ltd. dba Cactus Club Cafe 5-5800 Turner Road Nanaimo, BC V9T 6J4
Case:	EH09-004
For the Licensee:	William Kaplan, Q.C.
For the Branch:	Olubode Fagbamiye
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	June 8, June 18 to 22 inclusive & July 17, 2012
Place of Hearing:	Nanaimo and Victoria, BC
Date of Decision:	January 9, 2013

---

Liquor Control and  
Licensing Branch

Mailing Address:  
PO Box 9292 Stn Prov Govt  
Victoria BC V8W 9J8  
Telephone: 250 952-5787  
Facsimile: 250 952-7059

Location:  
4<sup>th</sup> Floor, 3350 Douglas Street  
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

## INTRODUCTION

The Licensee, Cactus Club Café Turner Road Ltd., operates the Cactus Club Café located in the North end of Nanaimo, British Columbia (the Licensed Establishment). The Licensed Establishment operated under Food Primary Licence Number 171335. Under the licence, the Licensee is entitled to sell liquor from 11 a.m. to 1 a.m. Monday to Saturday and 11 a.m. to midnight on Sunday. The licensed capacity of the restaurant and lounge is for a total of 159 persons (person capacity in the restaurant 127; person capacity in the interior lounge 32; as well, there is a 60 person capacity allowed for the patio).

The licence is, like all similar licensees operating in the Province, subject to the terms and conditions contained in the publication “Food-Primary Licence Terms and Conditions – A Guide for Liquor Licensees In British Columbia.” The licence is also subject to the terms and conditions appended therein, including for sale and consumption of all types of liquor with a primary focus on the service of food; liquor only to be sold, served or consumed within the areas outlined in red on the official plan, and a permitted patio extension as outlined in red on the official plan.

On December 23, 2008, the Liquor Control Licensing Branch (the “Branch”) approved a temporary change to the liquor licence for a planned New Year’s Eve celebration on December 31, 2008. The approval was for a Temporary Patron Participation Entertainment Endorsement from 8 p.m. to 12 a.m. A notation was appended to the approval letter which advised that the Branch operates on the basis Licensee is responsible for understanding and complying with requirements of the *Liquor Control and Licensing Act* (the “Act”) and *Liquor Control and Licensing Regulations* (“*Regulation*”), and the terms and conditions of the Licence.

## **ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES**

The Branch's allegations and proposed penalty are set out in a Notice of Enforcement Action (the "NOEA") which is dated April 3, 2009 and contains an Amended schedule dated January 19, 2012. The Branch alleges that the Licensee contravened section 6(4) of the *Regulation* on December 31, 2008 at 11:45 p.m. by overcrowding beyond the person capacity greater than occupant load.

In the Amended NOEA, the Branch gave public safety concerns as the reason for recommending enforcement action:

Licensees that exceed their capacity by overcrowding are operating contrary to the public interest. Specifically, they are operating contrary to the principles of public safety and community standards. The issue of public safety is most apparent when the overcrowding exceeds the occupant load. Getting out of a building safely during a fire or other threat is difficult in a place where liquor is served, loud music is played, and lighting is dim. The risk of death or serious injury is greater when the building is overcrowded. The public interest in community standards is also relevant to the contravention of overcrowding. The maximum capacity established for a food-primary licence is the result of community input during the licensing process."

The proposed penalty was a seven day suspension. In its reasons for the proposed penalty, the Branch noted that by selling the same number of tickets to patrons that their person capacity permitted, the Licensee ignored the need to consider its staff in the permitted capacity. Beyond that, the Licensee provided entry to patrons to a level at double their permitted capacity. This placed the health and safety of all occupants in the premises in serious jeopardy. The maximum level penalty of a seven day suspension was recommended to impress on the Licensee and its staff the requirement to operate at the levels deemed appropriate and safe.

Section 6(4) of the *Regulation* provides “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 out under subsection (1) or (3).” Item number 15 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type ranging from a 4 to 7 day suspension of the Licence and/or a monetary penalty of \$5000 – \$7000.

## ISSUES

1. The Licensee submits that the NOEA should be quashed because it was issued at the outset for improper purposes.
2. The Licensee also submits that the manner in which the Branch proceeded with an amended NOEA was invalid as a matter of law.
3. Subject to these arguments, it is not disputed by the Licensee that overcrowding occurred on the night in question. The issue then is whether the Licensee acted with due diligence in all of the circumstances.
4. If the Licensee did not act with due diligence, what if any penalty is appropriate?

## EXHIBITS

- Exhibit No. 1:** Branch’s Book of Documents, tabs 1 – 19
- Exhibit No. 2:** 3 Video Clips
- Exhibit No. 3:** Exiting Example
- Exhibit No. 4:** Email from Liquor Inspector January 5, 2009
- Exhibit No. 5:** Email from Liquor Inspector December 29, 2008

- Exhibit No. 6:** NOEA dated January 9, 2009
- Exhibit No. 7:** Email from the Branch dated January 21, 2009
- Exhibit No. 8:** Email from the Branch dated January 21, 2009
- Exhibit No. 9:** Email from the Liquor Inspector March 25, 2009
- Exhibit No. 10:** Email string from the Branch dated March 25 - 30, 2009
- Exhibit No. 11:** NOEA dated April 03, 2009
- Exhibit No. 12:** Copy of ticket “New Year’s at the Cactus Club Cafe”
- Exhibit No. 13(a) and (b):** Copy of Signs “Design Occupant Load 159” and “Design Occupant Load 60”
- Exhibit No. 14:** Photographs inside the Restaurant taken on December 31, 2008
- Exhibit No. 15:** Licensee’s Policies and Procedures

## **EVIDENCE - THE BRANCH**

This matter was remitted back to the Branch consequent upon a decision of the BC Court of Appeal “to be dealt with in accordance with the *Act* and the *Regulations*”: see *Cactus Club Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2011 BCCA 414 at paragraph 33. The Branch called several police witnesses and the Liquor Inspector. While a summary of their evidence follows, it may be expanded upon later in the reasons for decision.

**CONSTABLE A**

Constable A testified that he was in charge of the Bicycle Unit, and was conducting licensed premises checks (called "LPC's") with his team on New Year's Eve 2008. The team was working from the south end of Nanaimo towards the north. The Licensee is located in a mall in the north part of the city. The Constable was aware that a Temporary Patron Participation endorsement had been issued to the Licensee for New Year's Eve. As a result of information which was provided by a Licensee in the mid-town area, he and three other police officers went to the north end of the City to check on the restaurant operated by the Licensee. Two other members of the Bicycle Unit were in the area but did not come in to the facility.

Constable A said that he and the other officers arrived at 11:45 p.m. in police vehicles. They were wearing police uniforms. On entering the north entrance, there was a table set up to greet guests and check coats. There was very significant congestion around the bar and lounge where patrons were standing shoulder to shoulder. The dance area extending from the lounge was also very congested, shoulder to shoulder. The south side of the facility was less congested.

Constable A testified that he spoke to the Licensee's General Manager (the "G.M."), who said there was a problem; the restaurant was really overcrowded. The G.M. asked for police assistance. The Constable asked about tickets for the event, and was told that all of the patrons had produced tickets at the door. They were not numbered, however, and the G.M. thought they must have been copied as there were significantly more patrons present than the 220 tickets that had been printed. The tickets had been shredded at the door, and so could not be used as part of a count.

Constable A called the Fire Marshal to come to the restaurant to assess the situation. The Fire Marshal did not attend, and the Constable was not informed of any discussions between staff of the restaurant and the office of the Fire Marshal. No one in the Bike Unit had mechanical counters to count the number of patrons in the restaurant. Constable A testified that normally, he would walk through the crowd and count as he went. He thought it would be provocative to do so in the circumstances, and so tried to use a grid system to count blocks of patrons. He made a very rough estimate of 350 patrons in the restaurant.

The G.M. asked him if he should announce that the facility was going to be shut down. Constable A advised that this would not work. He should get staff to the doors so that there would be no in and out privileges. Let the patrons have their midnight celebration, then slow the music down and bring the lights up and announce last call at 12:15 a.m. He also asked two officers to stand outside the main entrance and count people leaving the restaurant. This would provide two separate counts. They were also to try and exclude people going back into the facility. Three officers in plainclothes had arrived to assist; they were sent to assess the mood inside the restaurant.

Constable A observed a female patron limping due to an injury to her foot. She was escorted out of the premises. A male patron was arrested because he was punching holes in the wall outside of the washroom. At about 1:20 a.m., he was advised by the officers posted outside that 406 people had been counted leaving the restaurant. There were about 30 patrons remaining inside excluding staff. At this point, Constable A had to leave to go downtown. Three short video clips were taken by the police during their visit and produced as evidence.

Constable A expressed concern for public safety and for the safety of staff of the restaurant. He said there was a small number of staff working, and they did not have a dedicated security team. He was aware that the restaurant had engaged some martial arts personnel to guard the doors. Constable A testified that, because of the crowd, it would be very difficult for the Licensee to assess the amount of liquor consumed by patrons, and to assess whether minors were being served. He noted that the temporary change to the liquor licence allowed the restaurant to operate until 4 a.m.

In cross-examination, Constable A agreed that he was unaware that the plan by the Licensee was to close the restaurant by 2 a.m. He had not gone out onto the patio to assess whether there were patrons outside the main restaurant area. He described the crowd inside the restaurant as “edgy.” The crowd was loud, there was a good deal of intoxication apparent, and areas of the restaurant were congested.

Constable A acknowledged there were a number of exits that could be used if patrons had to leave quickly. He said the patio area seemed to be unused. There was no flow of patrons back and forth from the patio area. Constable A was concerned that with the numbers inside the restaurant, patrons could start jostling, and fights could break out. His main concern was public safety with a secondary concern about the numbers of people inside the restaurant. He said that his count of 350 was only an estimate. The best count was from the officers stationed outside.

He was asked if he would have proceeded in the same manner if he had arrived earlier at 11:15 pm, and said he wasn't sure as the Bike Unit had other duties that evening. Since it was close to midnight on his arrival, he allowed the licensed facility to keep operating until after midnight.



Constable A identified a Police Licensed Premises Check (LPC) which he issued for overcrowding beyond licensed capacity, and overcrowding beyond occupant load contrary to section 6(4) of the *Regulation*. The LPC specified the licensed capacity as 250 and the count excluding staff at 436. He agreed that the proper licensed capacity is 219 but whatever the number; the crowd was over the allowed capacity for which the facility was licensed. The LPC was later forwarded to the local Liquor Inspector. He left it to the liquor inspector to sort out the details.

## **CONSTABLE B**

Constable B testified that she was part of the Bike Unit, and attended at the restaurant of the Licensee on New Year's Eve. She said the Unit arrived at 11:45 p.m. When she went inside, the lighting was dim but she could see well. The restaurant was very busy in the bar area, and on the dance floor. She did a visual estimate of 350 people inside. Constable B then went outside to get a better count. She and another officer did a continuous count, and 423 was her final number. This included subtracting people who went back into the restaurant. The count started at 12:04 a.m. and ended at 1:20 a.m. Her final count was similar to that of the other officer who was outside with her. She said that the number did not include staff.

Constable B said the police concern for overcrowding was the potential for problems developing from a group mentality, accidents, impaired response by emergency personnel if someone is hurt or there was a fire, and difficulty determining over-service of patrons.

Constable B reviewed pictures taken by the Licensee at about 11 p.m. on New Year's Eve (Exhibit 14), and testified that while some of the angles in the pictures did not reflect the actual size of the crowd, they appeared for the most part to be generally accurate. She agreed there were no fights and no arrests made when she was present, and no shoving or pushing. She needed to shoulder her way through the crowd when

she was inside the restaurant. The dance floor and the bar areas were most crowded. Constable B maintained that her count was accurate; there were no difficulties in counting people exiting through the main doors of the restaurant or in accounting for staff who came outside the restaurant.

### **CONSTABLE C**

Constable C testified that he was a member of the Nanaimo drug unit but was assigned to Bar Watch on the night in question. He recalled arriving at the restaurant of the Licensee at 11:30 p.m. He was dressed in plain clothes wearing a jacket that was marked "Police." He was inside for 20 minutes, and then spent the rest of the evening outside in a police vehicle observing the patio area. While inside, he observed one of his fellow officers arresting a patron for punching a hole in the wall in the washroom. He did not go onto the dance floor. It was crowded there, and he would have to shoulder his way through. While he was outside, he saw 6 to 8 patrons on the patio, where guests were allowed to smoke. He did a rough count of patrons leaving, and his count was in the high 300's to low 400's. He left the facility at about 1:30 a.m.

### **CONSTABLE D**

Constable D testified via telephone. He had been part of the Bike Unit in Nanaimo in 2008, and had attended at the restaurant. When he went inside the restaurant with his fellow officers, he noted one employee at the door who acted as a greeter. He didn't see any employee with mechanical counters. There was a large crowd in the entrance area, on the dance floor, and in the bar areas. He asked about tickets so they could be counted, and was told they had all been destroyed.

Constable D testified that he went outside with Constable B to count patrons. He has since lost his notebook, and so did not have the exact number that he counted. He said that he had given his number to Constable A after he finished. He recalled comparing his count several times with his fellow officer. He did not recall patrons leaving in large numbers at any time. He agreed that when he was inside, he did a rough count, estimating 300 to 350 patrons, with a margin of error of 50 – 80 patrons. He left the restaurant at approximately 1 to 1:30 a.m.

### **CONSTABLE E**

Constable E testified that he was also working with the Bike Unit on New Year's Eve 2008, and attended at the restaurant. When he went inside the entrance, he noted there was a table set up and a couple of female employees were serving customers. No mechanical counters were observed. Inside the restaurant, there was a large crowd along the length of the bar. He made a conservative estimate of 350 patrons inside the restaurant. He found it very hard to get through the crowd, and he had to push or squeeze his way through, especially near the dance floor.

Constable E said the Licensee's G.M. approached and told him the facility was overcrowded, and police assistance was required. There was a discussion about slowly shutting the facility down after midnight. He recalled that a couple of female patrons came by and said that the event was out of control and should be shut down. He made one arrest of a patron for being drunk in a public place. Later, he spoke with the officers who were doing the count outside. One said that his count was 406 patrons. After this, he counted 30 patrons who either left with drinks or remained milling about the restaurant. He left later with the other officers in the Bike Unit.

**CONSTABLE F**

Constable F testified that she was working in plainclothes on December 31, 2008 when she was called in to the Licensee's restaurant to assist with an overcrowding issue. During the evening, she had been involved doing LPC's looking for overcrowding, over-service, service to minors, and other licence infractions.

The restaurant is in the north part of town and is surrounded by residences. She was not aware, however, of any noise complaints that evening. Constable F arrived near midnight with two other officers in plainclothes. When she arrived, the restaurant was a bit dark inside. There were a lot of people inside, and she had to push her way through in order to get through the dance floor to the patio area. Her role was to make sure people did not come and go from the patio. There was also a staff member on the patio to make sure no one snuck into the restaurant. There were 10 to 15 people at most on the patio as it was very cold outside.

Constable F testified that the police are concerned about crowds and alcohol. The patrons can turn on the police. While she was in the restaurant, someone threw something at her which she took to be a balled up napkin, and she chastised the individual who threw it.

Constable F reviewed pictures which were taken by the Licensee on the night in question, and agreed that they reflected the way restaurant was when she arrived. She said the patrons she observed were different from those seen in a normal bar scene because they were all dressed up.

**BUILDING INSPECTOR A**

Building Inspector A is employed by the City of Nanaimo. He testified about the occupant load that had been designated for the Licensee by the City of Nanaimo. Once it is prepared, it is also reviewed by the Fire Department. The calculation of occupant load for the Licensee's restaurant was 159 patrons. It did not include the 9.3 meters of space allocated for employees or the 20 meters of space allocated for storage.

Building Inspector A testified that the calculation includes exit capacity, which is a variable in the calculation of occupant load. If it is not large enough the City will either reduce the occupant load or the exit doors must be upgraded. He agreed that the exit capacity for the restaurant was at least 750 persons. This exit capacity was, however, consistent with the occupant load that had been calculated for the restaurant.

Building Inspector A said the calculation of occupant load for a cabaret is higher because the patrons are standing. This kind of calculation is never used for restaurants. As well, the City no longer adds patios or exterior space to an occupant load calculation. Instead, these spaces are subtracted from the allowance for patrons inside the facility unless upgrades are done to add washrooms, etc.

**CONSTABLE G**

Constable G testified that he was engaged in undercover drug enforcement in Nanaimo in 2008. On New Year's Eve, he was involved in the Bar Watch program doing LPC's looking for service to minors, intoxicated patrons, etc. He said that he was called to the restaurant somewhere around 11 p.m. and Constable A was already there. He recalled there was an employee stationed at the entrance. He did not see any mechanical counters being used. He stood on the area overlooking the dance floor. The bar area was heavily packed and was hard to manoeuvre there. He estimated about 350 patrons inside, and when he walked to the patio, he estimated 30 in that area. An employee

told him that it appeared some of the tickets for the event had been copied so there were a lot of people present with fake tickets.

Constable G said the concern for the police in overcrowding is patron safety. If a hazard develops, it is hard to get them out. As well, it is difficult to monitor patrons to avoid over-service and to ensure there are no minors on the premises.

## **LIQUOR INSPECTOR A**

Liquor Inspector A identified the Food Primary Licence for the Licensee. Under the Terms and Conditions for the licence, a lounge and patio are included. The person capacity for the restaurant is 32 in the lounge, 60 on the patio and 127 in the eating area, for a total person capacity of 219. Person capacity is the maximum number of persons allowed by the General Manager for the establishment, and person capacity includes staff.

Liquor Inspector A testified that he was made aware of the overcrowding issue in the restaurant by Constable A after the New Year. On January 5, 2009, he issued a Contravention Notice which indicated a breach of section 6(4) of the *Regulation*. It stated that the RCMP conducted a capacity count of approximately 436 patrons in premises with a licensed capacity for 219.

Inspector A referred to the Guide for Food-Primary Licensees, which sets out the terms and conditions applicable to a licence of this kind. It provides that police officers may make regular, unannounced visits to licensed establishments, and when present, will look for evidence of liquor contraventions. If contraventions are found, they will record them in a LPC. The Branch follows up on all such LPC's. The role of the liquor inspector is also described in the Guide. Included in their role is identifying any contraventions of the legislation. If found, a Contravention Notice is issued, and the

liquor inspector may recommend that the General Manager of the Branch take enforcement action.

With respect to overcrowding, the Guide provides that the liquor licence will stipulate the maximum number of patrons or persons that may be allowed in the premises at one time. It is important for the licensee to know the type of capacity for which the establishment is licensed, and to make sure that these limits are followed. As well, local authorities establish a maximum capacity or occupant load which may differ from the person capacity of the liquor licence. In most cases, the occupant load maximum capacity will be greater than the liquor licence maximum capacity. If the numbers differ, the licensee is supposed to use the lower number.

Liquor Inspector A said that he issued a Contravention Notice to the G.M. of the Licensee on January 5, 2009. He was advised by the G.M. that 225 tickets were printed for the event, and that maybe 295 people were on premises when the police arrived. He had not called for police assistance. Instead, he spoke with his manager before the police arrived. The Inspector advised that it was the responsibility of the Licensee's G.M. to control overcrowding and a NOEA may be issued.

Liquor Inspector A said that he was also involved in approving the temporary change request to allow for patron participation on New Year's Eve. This endorsement allowed patrons to dance and shifted the focus of the facility from eating to dancing, more like a liquor primary. It did not, however, convert the facility into a liquor primary.

Liquor Inspector A testified that, on January 7, 2009, he drafted a NOEA. It was sent to his manager for review. He had recommended both a \$7000 fine and a seven day suspension. He could not, however, enter both penalties into the Branch's computer system simultaneously, and so the penalty of the seven day suspension was stipulated.

Liquor Inspector A testified that his concern was for public safety as overcrowding with intoxication and music elevates risk. Public interest and community standards are issues. Noise violations may be a problem. The Licensee needs to take steps to control overcrowding, including calling the police for assistance if necessary. Here the police came on their own, and did not feel safe with the numbers found inside the restaurant. There was a risk of overcrowding because the number of tickets sold included the patio area. The Licensee did not monitor the number of people that came into the restaurant. As well, police facilities were tied up in order to control the crowd at the restaurant. No incident log or other written policies on overcrowding were provided by the Licensee.

The Liquor Inspector said that he conducted a Compliance Meeting with the Licensee on January 20, 2009. The meeting was to discuss the contravention that had occurred, and how to avoid it in future. He reviewed the conditions of the licence, applicable sections of the legislation that might have been contravened, and strategies to avoid the problem in future. He discussed the range of possible penalties for the contravention, and the waiver process if the penalty was not disputed. The incident was discussed in more detail as the Liquor Inspector had more information from the police. He told the Licensee there was to be no large parties until policies were developed to control crowds. The Licensee said it would not hold such an event anywhere in its chain of restaurants again until they changed their processes for all of their facilities.



The Liquor Inspector agreed in cross-examination that he was considering a NOEA before he met with the management of the restaurant. He disagreed with the suggestion that he offered to reduce the proposed penalty at the Compliance Meeting in return for a waiver from the Licensee. He had no authority to make such an offer. He said that the Licensee's G.M. informed him there were 295 patrons inside by 10:30 p.m., and they were still lined up outside. He did not recall being told that the G.M. tried to give people their money back in order for them to leave. He said this might mitigate the penalty but the count was a problem. The only means of crowd control used by the Licensee was the tickets which were issued. He agreed there had been no issue of overcrowding prior to this, and none afterwards.

The Liquor Inspector said that the size of the penalty reflected the size of the overcrowding that took place. It is to deter the Licensee from holding similar events without proper planning. Being able to exit safely from the facility was also an issue for the Branch. As well, offending community standards by overcrowding, causing complaints or disturbances are all issues. The evidence of the effect of the overcrowding was taken from the police reports.

The Liquor Inspector had the final NOEA approved by his manager in accordance with the practices of the Branch. He agreed that the only change in the amended NOEA is in Schedule 1 where it refers to an occupant load of 219 instead of 159.

## **EVIDENCE – THE LICENSEE**

### **HOSPITALITY CONSULTANT**

The Hospitality Consultant testified that he has worked in the hospitality industry for 30 years, and the group of restaurants operated by the Licensee have been a client for 20 of those years. His services include development work, permitting, WCB issues, liquor licensing, design consultation, and building completion. He is involved in applications for liquor licenses, and has appeared at hearings on such matters on behalf of clients.

He noted there are 23 restaurants in the Cactus Club chain in British Columbia and Alberta. The Hospitality Consultant has been involved in training employees for the restaurant group from bussing staff to managers. He has developed the staff manuals for the restaurant group but has not addressed overcrowding as an issue because it is normally not an issue for restaurants.

The Hospitality Consultant was involved in the planning for the 2008 New Year's Eve event. Normally, the restaurant would close at 10:30 p.m. It was decided to have two seatings for dinner. The first would have to be out of the restaurant by 9:30 p.m. The second seating patrons were to be given wristbands if they were staying on for the dance.

The Hospitality Consultant testified that he was not concerned about gatecrashers because the restaurant chain has a customer base that is a known entity, and the restaurant is located in a remote area. While the licence for the Year's Eve event allowed the restaurant to stay open until 4 a.m., he advised that it should close at 2 a.m. to avoid trouble. The plan was to slowly change the tempo of the music after midnight and slowly bring up the lights until the patrons left.

The Hospitality Consultant was available by telephone to the Licensee's G.M. on New Year's Eve. He testified that he received a telephone call from the G.M. at the restaurant at about 8 p.m. At that time, the count of patrons was about 100, and the G.M. was worried the event might not fill up. At about 10 p.m. the G.M. called and was anxious as there were about 180 patrons inside and more lined up outside. The G.M. said that he thought there were some fraudulent tickets. He advised the G.M. not to let any more guests inside and to remove those inside who could be removed by refunding their money. After 11 p.m., the G.M. called again and said the police were present. He told the G.M. to cooperate with police. The G.M. told him that count was approximately 297 patrons, and the police count was about the same.

The G.M. said he had spoken with an official of the Fire Department, and the Fire Department was not going to attend because there was no safety concern. The Hospitality Consultant said that he spoke with an official of the Fire Department himself a few days later, and was told that since the reported number did not represent a public safety issue, the Fire Department did not attend the event. At about 1 a.m., the G.M. called him again, and said that all of the customers were out of the restaurant and only staff remained to shut it down.

The Hospitality Consultant said that he spoke with the Liquor Inspector on January 2<sup>nd</sup>, and told him that the Licensee would never hold one of these events again, and so it was therefore fully compliant. The Liquor Inspector told him there would be an investigation, and he would not grant another licence for a similar event again. He also said he would conduct a compliance meeting. The Hospitality Consultant attended the Compliance Meeting with other employees of the Licensee including the G.M. The Hospitality Consultant testified that the Liquor Inspector told them he was going to recommend enforcement, but if the Licensee wanted to sign a waiver and shorten the process, a 3 to 5 day suspension would be provided. The Hospitality Consultant had the President of the restaurant chain call the Liquor Inspector to confirm the Licensee would not host a similar event again.

The Hospitality Consultant agreed that he signed the record of the Compliance Meeting prepared by the Liquor Inspector. In it, the Licensee committed that there would be no more large-scale parties until a new policy was developed, including a policy for door control chain-wide. As well, the Licensee stated that the occupancy was over limit due to fraud with respect to the number of tickets sold. The Hospitality Consultant also agreed that he did not file a complaint or protest with respect to the alleged statements of the Liquor Inspector, and subsequent meetings did not deal with the issue of penalty. He agreed there had been no training for door control or crowd control, and the tickets which were issued were not numbered. He also agreed that Constable A had raised

safety concerns about the event in a letter he sent to the Hospitality Consultant on January 7, 2009.

## **GENERAL MANAGER**

The General Manager of the Licensee (G.M.) testified that the idea for a party on New Year's Eve came from a few regulars at the restaurant. They wanted an event to attend that was in the north end of the City. Staff advised him that the former owner of the restaurant had put on smaller events on New Years that were disorganized and understaffed. The G.M. wanted something for regular guests and staff that was well run, and so obtained approval to host an event from his Regional Manager. He planned for the event with the assistance of the Hospitality Consultant.

The G.M. testified that planning began late in October. Security was to be provided by four to five individuals for visual support and crowd control. Ultimately, five individuals from a local martial arts club were hired for this purpose. He arranged to have tickets printed, and had a reservation book used to record the people coming for dinner who also had tickets for the event. He arranged for wristbands for those who would stay on after dinner. All of the managers of the restaurant were to be working during the evening.

The G.M. testified that there was to be a pre-shift meeting to discuss what to expect, including making a report to on-duty managers about excess drinking by patrons. A patron could only run a tab with one server. The dancing was to end after midnight, and the facility would close at 2 a.m. The plan was to gradually raise the lights and slow the music over two hours after midnight so that all of the patrons would be gone by 2 a.m.

The G.M. said that 220 tickets were printed for the event, 175 of those were sold at the restaurant. The rest were used for promotional purposes, including as gifts to some of the regular clientele whether they attended the event or not. The G.M. retained about 10 to 15 tickets for himself. He said that the facility's licence was for 219 persons. There were 20 staff on duty and five at the door. Based on these arrangements, the G.M. said that he did not believe the restaurant would exceed the 220 licensed person capacity including patrons and staff. The G.M. said that the seating capacity of the restaurant is 127 patrons. It is never full because booths are not seated at full capacity. The average seating in the restaurant is at about 70% of capacity.

The G.M. testified that the tickets were priced at \$15 each to recoup the cost of printing, for a DJ, and for decorations. The north end of Nanaimo is not usually busy, so he did not expect a crowd for the event. Before the evening began, he met with staff to discuss over-service issues, and to explain that security was there as a visual deterrent. Everyone was to work in sections where their managers would be located. Security was posted at the front door, and at two exits. Two of them would also float around the restaurant throughout the evening. Tickets were ripped when the guests arrived so they could not be reused.

The G.M. said he had a mechanical counter. Wristbands were given to guests who were to stay on after the second dinner service. This was a first time event for the G.M., and he wanted it to run smoothly. He spoke with the Hospitality Consultant at about 8:30 p.m., and advised that they were ready to go at 9 p.m. He spoke to the Hospitality Consultant again at 9:30 p.m. and advised that the event might be a failure as it was very quiet. At 10 p.m., he counted again, and found 250 patrons present. He knew then there was a problem. From a discussion with staff, it appeared that some of the tickets had been copied.

The G.M. testified that he directed the door staff to stop admitting patrons at about 10:30 p.m. after he had spoken to the Hospitality Consultant. After that discussion, he gave a manager \$600.00 to refund money to their guests. He asked people who were known customers if they would leave to reduce pressure on the restaurant. He recalled that 15 to 20 guests did leave. At about 11 p.m., his count was 290 or 300 patrons. This was one half hour after the front door had been shut. He recalled that police arrived around 11:15 p.m. He disagreed with the evidence of Constable A that the police arrived at 11:45 p.m.

He told Constable A that there had been a fraud on the tickets for the event and more patrons were present than expected. The G.M. testified that Constable A asked for and was shown the licence for the event. He recalled that Constable A said that he counted 300 patrons, not 350. He asked the Constable if the event should be shut down, and was told it should be done gradually. At this time, the bar and dance areas were busy while the corners of the restaurant were not.

The G.M. said he had told staff to dress up for the evening. He was wearing a tuxedo. He identified pictures which were taken by the wife of one of the staff members at around 11 p.m., and said they fairly represented the crowd that was present.

The G.M. testified that, after the police arrived, he received a call from the Fire Department about overcrowding. At that time, his count was 295. The Fire Marshal told him that he would come to the restaurant if the police called him again.

The G.M. said that the original plan had been to bring the lights up and the music down for a 2 a.m. closing, but since it was done shortly after midnight; most of the guests were gone by 12:45 a.m. He later spoke to Constable A, who said he was pleased that the event had been wound down smoothly. Constable A advised that he had a count of 436 people, and would be issuing an LPC.

The G.M. said that all of the four managers and two to three of the kitchen managers had first aid training. No injuries of patrons were reported to him. The only incident was the patron who punched his fist through a wall.

During the Compliance Meeting, the G.M. said that he explained the issue of the fraudulent tickets to Liquor Inspector A. The G.M. advised him about asking people to leave, and the offer to refund the ticket price for people who were inside the event. He recalled that the Liquor Inspector said that the Licensee could take a five or seven day suspension. The Liquor Inspector acknowledged that the restaurant was now in compliance but said it did not matter; the Branch was going to seek a penalty.

In cross-examination, the G.M. acknowledged he had not called the Fire Department or police himself for assistance with the overcrowding. The tickets that were printed for the event were not numbered. About 175 were sold and 40 were available for promotional purposes. The G.M. said that the count at 10 p.m. of 250 excluded the 25 staff that were working that evening. At 10:30 p.m., his count was 295 including staff and was obtained using a mechanical counter. None of the other managers or door staff had mechanical counters. There were no written policies on door control for the restaurant, and no policies on overcrowding. The five martial arts security staff did not have a security plan in place.

## **DIRECTOR OF CORPORATE OPERATIONS AND HUMAN RESOURCES**

The Director of Corporate Operations and Human Resources (“Director”) testified about the training programs used by the Licensee. Employees start from the bottom and work their way up. It is preferred that they learn how to do all of the jobs required to operate the restaurant. Included is training about the applicable liquor laws. All employees must pass the Serving it Right program. Service in bar training includes training on licensing issues. Manager training procedures are more complex, and include greeting customers, seating, and service. Overcrowding is normally not an issue because

customers are only seated as space becomes available. Pagers are used to allow patrons to shop and attend to other business if there are no seats currently available.

The Director first heard about the plan for a New Year's Eve event in October. She was not overly enthusiastic about the proposal because it was not something the Licensee had done before. It was agreed that the event could take place if the required licences were obtained, and all managers were on duty. After the event, senior management had decided they would not hold another similar event again because the restaurants operated by the Licensee had never had an overcrowding problem.

She testified that the impact of the proposed penalty, namely a seven day suspension, would be to deny employees \$20,000 in wages and 15% in tips. Because of staff changes, only about 25% of the employees currently employed by the Licensee were present on New Year's Eve 2008.

The Director testified that the Licensee is one of the best employers in the province, and has good staff training programs. The Licensee is adamant about compliance with rules and 100% compliance is the objective.

The Director acknowledged that the manuals used by the Licensee do not deal with door control or overcrowding. The staff working at the doors are trained to greet customers, not to maintain crowd control.



## **JUNIOR NIGHT MANAGER**

The Junior Night Manager testified that he now works for the Cactus Club restaurant chain in Victoria as a Day Manager. He has been employed in the hospitality industry for 18 years. In 2008, he was the Junior Night Manager at the Nanaimo restaurant of the Licensee. He was responsible primarily for dining room floor service. On New Year's Eve, he dressed in a tuxedo for the event. He attended the staff meeting that was conducted at 6 p.m. prior to the first seating in the restaurant. He did not count guests during the evening but recalled that the G.M. had a mechanical counter and was counting guests. There were about 160 guests in the restaurant at 9 p.m., and some were leaving. At about 10 p.m., the restaurant was reaching its maximum number but was not yet uncomfortable.

The Junior Night Manager worked on the floor helping servers with food and drink orders. There was a ramp leading down into dining room, and he tried to make sure it remained clear. He recalled that the police arrived at about 11 p.m. and spoke to the G.M. There were more guests than expected at this time; he believed the count was about 290.

He heard the G.M. in discussion with the police. The police told the G.M. they did not want to upset the patrons by shutting down before midnight, so after the New Years count-down, they would stop the dancing and music. Afterwards, the Junior Night Manager stated that the departure of the patrons was well organized. It was slow at the coat check, and a few patrons came back inside because they were cold while waiting for cabs and rides. However, the staff discouraged patrons from coming back into the restaurant. At about 1 p.m., the restaurant was shut down, and the staff remained to clean up.

The Junior Night Manager testified that his wife attended at about 11 p.m. with a ticket for the event. The police were already there when she arrived, and she stayed until after the dancing stopped. While in attendance at the event, she took several pictures which were introduced into evidence. The Junior Night Manager testified that the pictures were an accurate reflection of the interior of the restaurant from about 10:30 p.m. until the patrons left, as no more guests arrived after that time. He said there was still room on the dance floor to move, and others could still come onto the floor to dance.

The Junior Night Manager said that the mood of the crowd was light, and he did not notice a change during the evening. There were no arguments or fights, and no one was trampled. His wife was present during the most congested dancing, and he was not concerned for her safety. He was unaware of any injuries, although he heard a patron hurt her foot. None of the customers complained about overcrowding, only about the restaurant shutting down early. There was congestion around the bar but the ends of the dining room were not as congested.

In cross examination, the Junior Night Manager said that he thought that 175 tickets were sold for the event. He did not know how many promotional tickets were distributed. His wife and her friend attended with promotional tickets. There were 15 to 20 employees working that evening, as well as five employees who were hired for security. Those employees came from a martial arts club. He agreed that there was no training on door or crowd control. Only the G.M. had a mechanical counter. There were no written policies on dealing with crowd control, and no incident log for reporting unusual problems.

## **AFFIDAVIT EVIDENCE**

The Licensee introduced an affidavit from a Registered Architect into evidence by agreement. The evidence related to his opinion with respect to the occupancy load and exit capacity that could be supported by the facility operated by the Licensee. The Registered Architect wrote that the dining area square footage of the restaurant facility was calculated at 291.5 m<sup>2</sup>. If used for dining, beverage or cafeteria space, the occupant load could be 243 persons. If the space was used for standing instead, the National Building Code of Canada allowed for an occupant load of 728 persons. The exit capacity of the restaurant was calculated at 750 persons. As such, the exit capacity could support the calculation for a standing occupant load of 728 persons.

## **SERVER A**

Server A testified that she was an employee who worked as a server on the night in question. She attended the staff meeting held prior to the New Year's Eve festivities. Servers were instructed to ask patrons for at least two pieces of ID. The sections that were to be assigned to the servers were described, and they were instructed not to run a tab for anyone who was not in their section. Further, there was to be only one tab open for each party. If a patron was served more than six drinks, the server was to discuss further service with a manager.

Server A testified that, during the evening, the mood of the crowd was festive. The only problem was that they had to wait too long for drinks. The area around the bar was congested, so it was difficult to get in to get drink orders. She was, however, able to do her job, and did not spill drinks before they were delivered to her customers. She was not concerned about her safety at any time during the evening.

In cross-examination, Server A acknowledged that she did not count patrons during the evening. She worked from 5 p.m. until 2 a.m., and during that time, did not discuss the number of patrons with any of the managers. She did not have training in overcrowding or door control. There were no staff meetings after the event was over to discuss what had taken place. She said that the pictures which had been introduced in evidence by the Licensee were accurate. The bar area and the dance floor were the parts of the restaurant that were most congested.

## **SUBMISSIONS**

### **BRANCH**

The Branch says that the Licensee exceeded the person capacity of the restaurant because there were more than 400 patrons when the maximum licensed person capacity was 219 including the patio. The Licensee does not dispute that it exceeded the person capacity for the restaurant. It is a contravention under section 6(4) of the *Regulation* to exceed the person capacity set for the restaurant. According to police evidence, there were 423 patrons counted on the evening in question. The occupant load for the restaurant which was established by the City of Nanaimo is 159 while the licensed person capacity is 219, made up of 127 in the restaurant, 32 in the interior bar and 60 in the exterior patio. The number present at the facility on New Year's Eve 2008 was clearly far in excess of 219.

The police count outside was the only accurate measure of the number of people who were present that evening. The count taken by the G.M. was unreliable. As well, the only way in and out of the facility was the main entrance. Observations of the patio area established that it was not being used heavily, and people were not entering and exiting through the patio area. This means that most of the 400 patrons were inside of the restaurant.

While the G.M. testified that the police did not appear to be concerned about congestion, the police were concerned enough to place a call to the Fire Department. The police tried to count tickets to establish the number of patrons present but were told they had been destroyed. The police also implemented a plan to slowly shut down the restaurant after the midnight celebration. The measured response of the police did not reflect a lack of concern about overcrowding.

The Branch submitted that the draft NOEA and the comments by managers on it were designed to ensure there was a clear reason for enforcement action. It does not show bias or misfeasance. There was a no obligation to show the draft NOEA to the Licensee. As far as the Compliance Meeting was concerned, the Liquor Inspector denied offering a lesser penalty in exchange for a waiver. The Hospitality Consultant, who is familiar with the policies of the Branch, did not raise an objection or concern at the meeting.

As to the evidence about exit capacity, the issue is not what it could be but what it was on the night in question. Further, the evidence shows that public safety was compromised for patrons inside. There were complaints made to police to shut down the restaurant because it was out of control. Constable A saw a patron who had been injured, and there were arrests of intoxicated patrons outside.

As far as the proposed penalty was concerned, the Branch submitted that the loss of revenue on wages for staff must be balanced against public safety concerns. This is especially important because the Licensee operates a food primary facility, not a cabaret. The lack of history of problems does not negate the responsibility of the Licensee to anticipate overcrowding.

In response to the written submission of the Licensee, the Branch says that the reason for the enforcement hearing is to deal with the contravention that occurred on December 31, 2008. It is the specific act of non-compliance which occurred in the past that is the subject of the NOEA. Assurances of future compliance are no reason not to pursue enforcement action for an alleged contravention of overcrowding of an egregious nature. Numbers that exceeded 400 in an establishment licensed for 219 persons can impede public safety in matters such as a fire or other emergency.

The suggestion that the NOEA is defective for failure to particularize an occupant load that is legally permissible mischaracterizes the facts and has no evidentiary basis. The occupant load is the least number of persons allowed in an establishment and was calculated by the City of Nanaimo. The NOEA correctly references the applicable occupant load for the licensed establishment.

The suggestion that the public safety threat was exaggerated by the evidence of the RCMP is contradicted by the objective evidence of the police witnesses. As well, the G.M. asked for police assistance when the police arrived at the restaurant. Further, there is no basis in the evidence to support the assertion that the count taken by the officers outside of the restaurant was inaccurate. The Occurrence Report filed by Constable A also documented instances of problems experienced by patrons and plain clothes police officers because of the overcrowding.

As far as pre-judgment and bias is concerned, none of the staff involved had a statutory duty to act as adjudicators before the enforcement hearing. At the enforcement hearing stage, the licensee has an opportunity to be heard and present evidence.

The Licensee did not raise an issue in cross-examination about whether the RCMP had sufficient time to engage in a gradual shutdown based on their evidence about arriving at the licensed facility at 11:45 p.m. In any event, it is not relevant to the count of over 400 persons which was subsequently made by police witnesses.

With respect to the argument that there were no concerns expressed by the RCMP about public safety, the Occurrence Report prepared by Constable A referenced objects being thrown at police officers, a woman asking that the party be shut down because it was out of control and because people on the dance floor were being trampled, four patrons were arrested for intoxication, and a call was placed to the Fire Department. The Branch does not have to wait until there are fatalities resulting from overcrowding before taking steps. The police officers were sufficiently concerned about the overcrowding to make arrangements to bring the proceedings to a close after midnight instead of 2 a.m. as had been originally planned.

The Branch submits that the Licensee was not in compliance with the terms and conditions of its licence at the time of the alleged contravention. Assurances that it would never repeat the event again deal with future compliance, and are not a reason for failing to proceed with enforcement action with respect to the specific act of non-compliance.

As far as accusations of pre-judgment are concerned, the information that was provided by the RCMP was the evidentiary foundation for the alleged contravention notice, and the steps that were taken by the Branch. The matter could not proceed to an enforcement hearing if the Branch was not of the opinion that a contravention had occurred.

## **LICENSEE**

The Licensee submits that it was not reasonably foreseeable that there would be overcrowding on the night in question. The restaurant is located in the north part of the City of Nanaimo, and is not frequented by gangs or other troublemakers. Further, the Licensee had taken steps to handle the expected number of patrons, including keeping all of its managers on staff during the evening.

The Licensee submits that the evidence of the RCMP was in conflict, and not reliable on key points. Constable A stated that he arrived at the restaurant about 11:45 p.m. His evidence on this point was not supported by other police witnesses, and he would not have had sufficient time to conduct counts of the patrons in the licensed facility, or to arrange to shut down the music after midnight within a 15 minute time frame. Further, the count conducted by the RCMP was not reliable. The positioning of the officers made it difficult for them to accurately count the number of people who were flowing in and out of the restaurant, especially after midnight, and did not accurately determine whether staff members were included in the count. The rush of patrons leaving the facility after midnight would make the count difficult. In the result, the likely count was somewhere between 300 and 350 people. While over the licensed capacity, it did not pose a specific and actual threat to public safety so as to justify a maximum penalty.

The plan proposed by the RCMP to turn down the music and turn up the lights after midnight was not materially different from the plan that the Licensee had intended to implement. Nor did the RCMP officers appear to be concerned about public safety.

The Licensee submits that the facility was no more congested than a typical cabaret. While areas such as the dance floor were crowded, pictures that were taken during the evening showed that other areas of the restaurant were not overly busy. Server A testified that she was able to serve her guests even though the process was slower than normal.

The concerns about public safety were exaggerated. The statement that plainclothes officers had some objects thrown at them turned out to be an incident in which one patron threw a rolled up paper napkin at a Constable. The patron was chastised, and nothing further happened afterwards. The crowd was described as happy, not unruly. The Licensee submits that in the circumstances, there was no evidence of a real threat to public safety. As well, there were no community complaints about the events that took place on the evening in question.



The Licensee says that there was a failure of process because the Liquor Inspector pre-judged the matter, and decided to proceed to a maximum penalty without input from the Licensee. At the outset, the Licensee had advised the Liquor Inspector that it would not conduct such an event again. In so doing, it was immediately in compliance with the terms of its licence. Nevertheless, the Liquor Inspector had resolved to move to a penalty prior to hearing from the Licensee in the Compliance Meeting. He had recommended both a maximum suspension, and a maximum monetary penalty.

During the Compliance Meeting, there was no discussion about future compliance as the Liquor Inspector had no specific concerns about a reoccurrence of overcrowding. The Licensee explained that the overcrowding occurred because of the unexpected copying of tickets. At this point, the Liquor Inspector stated that if the representatives agreed not to contest enforcement, he would suspend the licence for a shorter period. The approach was intended to be punitive, not focused on future compliance. Based on the commitment of the Licensee, there was no risk of a failure of future compliance. A maximum penalty would have the effect of shutting down the licensed facility, and result in 80 employees losing one week of wages plus tips. Since there was no real risk to public safety, and no issue about future compliance, the penalty selected by the Branch was punitive, and inappropriate. The purpose of the legislation should be grounded in prevention, not punishment.

The Licensee submits that the NOEA was defective. Under the *Act* and the *Regulation*, there are greater penalties applicable where both the licensed person capacity and the occupant load are exceeded. The Branch sets the person capacity, and it must not be set higher than the occupant load. The Branch alleges in the NOEA overcrowding beyond the person capacity greater than occupant load. While the City of Nanaimo has omitted to include the patio such that the occupant load for municipal purposes is 159 persons, the number cannot apply under the legislation. The licensed person capacity of 219 persons is not compliant with the legislation.

On the question of due diligence, a full defence is available if the Licensee can demonstrate it took reasonable steps to prevent a contravention from occurring. The Licensee submits that this is based on determining what a reasonable licensee would do in organizing the event, and at the moment an issue was identified. It is not a retrospective analysis. The accused is to take all reasonable steps, not all conceivable steps.

The Licensee submits that the directing mind of the Licensee in this case was the Licensee's G.M. He took all reasonable steps to prevent overcrowding prior to the event, and to address the situation when overcrowding became evident. While the door staff may have permitted entry to a number of people greater than the licensed person capacity, they were not the directing mind of the Licensee. The G.M. had instructed staff to monitor the ticketing system in order to prevent overcrowding, and when he learned there was overcrowding in the restaurant, he directed the door staff to bar entry to further guests, and he asked people to leave. The RCMP did not ask him to take any additional measures.

The question to determine is whether the Licensee established and implemented a system to ensure that no more than 219 persons were admitted. The Licensee submits that the decision to sell 175 tickets and give away 40 was reasonable in that all of the guests were not expected to attend. It was expected that less than 195 patrons would attend, and there were 20 to 25 staff available to assist them. Reasonable steps were taken afterwards to prevent overcrowding. Shredding the tickets prevented them from being reused. The Hospitality Consultant assisted in planning the event and was available by telephone during the evening. Reservations for dinner were staggered so that individuals without tickets were served in the first seating. The G.M. had a mechanical counter and used it during the evening. All of the management staff were present, and were trained in the policy manuals of the Licensee. There was a dedicated manager at the door to take tickets and control of flow of patrons. External security was

retained to oversee patron activity. The facility was organized in a way to ensure patron safety.

Due diligence is not a retrospective analysis. The copying of tickets was not reasonably foreseeable in the circumstances. Once staff was aware that there were more tickets in circulation than sold, reasonable steps were taken. When his count was 250, the G.M. was in touch with the Hospitality Consultant for instructions. He later offered to shut the event down immediately, but was instructed not to do so by the RCMP. The plan implemented by the RCMP was similar to the one that the Licensee had planned to implement itself.

The Licensee submits that it has been denied procedural fairness. According to an information template published by the Branch, the purpose of a compliance meeting is to “promote voluntary compliance with the liquor licensing rules, and to assist the licensee in anticipating and creating solutions for potential problems.” Instead, the Liquor Inspector did not invite the Licensee to make any submissions prior to deciding to proceed with enforcement action.

The Licensee submits that the role of the Branch General Manager combines the usually separate roles of investigation, prosecution and adjudication. An adjudicator has jurisdiction to refuse to impose a penalty if considered appropriate to do so. The procedure engaged by the Branch must be considered in determining whether to impose a penalty.

In this case, the Branch decided to seek a maximum penalty without speaking to the Licensee. This is done on the basis of public safety concerns which have not been established. The Liquor Inspector had made up his mind prior to the compliance meeting, and had not considered the question of future compliance or due diligence, and did not seek out or listen to such evidence.

The Licensee submits that voluntary compliance and public safety are the two considerations relevant to overcrowding penalties. The risk of the circumstances which arose in this case being repeated is remote, and so no penalties should apply. The safety of patrons was never truly in jeopardy. There is no risk of future noncompliance. The overcrowding was unintentional and not reasonably foreseeable. The response of the Licensee was reasonable in the circumstances.

## **ANALYSIS AND DECISION**

The Licensee in its evidence and argument has raised several issues for my consideration as a delegate of the General Manager. I will begin with some of the procedural issues as these are raised preliminarily to my jurisdiction to adjudicate the substantial complaint on its merits.

### **ROLE OF THE GENERAL MANAGER**

#### **THE NOEA WAS A NULLITY**

The Licensee argues that the NOEA was a nullity because, by proceeding as if the occupant load for the purposes of the legislation was less than the licensed person capacity, the Branch has ignored the express provisions of its legislation, and so the NOEA is null and void.

Alternatively, the Licensee argues that the portion of the NOEA regarding the occupant load is defective. Since the occupant load set by the City of Nanaimo cannot apply, the occupant load is to be determined under the Regulation. Since there is no pleading in respect of the definition of occupant load in a Regulation, the Branch is limited to the penalty set out in Item 14 of Schedule 4.

Section 6 of the *Regulation* provides:

**6 (1)** Before the general manager

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

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

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

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

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

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

As Building Inspector A testified, the City of Nanaimo no longer includes patio or exterior areas as part of its calculation of occupant load unless they are updated with washroom and other facilities. The City of Nanaimo endorsed the occupant load of the Licensee's restaurant as 159 on March 17, 2004. The Branch endorsed a similar person capacity consisting of 127 persons in the restaurant area and 32 in the interior lounge on April 12, 2004.

The licence which was issued under Licence Number 171335 contains a permit for a patio extension as outlined in red on the official plan. It is this extension which brings the person capacity of a licensed facility to 219. The City of Nanaimo now assumes that patron sitting inside will use the patios in good weather.

This argument was not made to the Supreme Court in the judicial review application of the Licensee: see *Cactus Club Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2010 BCSC 1691. Instead, the Licensee argued that the Adjudicator had wrongly relied upon the occupant load of 159 instead of the person capacity of 219 to find that the G.M. had improperly issued tickets for the New Year's Eve event which exceeded this number. It is somewhat ironic that the Licensee now argues that the whole process was invalid because the licence was not issued for a person capacity of 159 persons. Nor is it clear what result would occur if I was to find that the liquor licence for the facility is invalid. Presumably, the Licensee would be required to terminate liquor service until the General Manager of the Branch issued a new licence.

In any event, there was no evidence in the hearing before me as to why the occupant load and the person capacity were different when the licence was transferred to the Licensee. In *Roxy Cabaret Ltd. dba The Roxy Cabaret v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, 2005 BCSC 459, the Court considered an argument about whether the contravention of being overcrowded beyond person capacity more than occupant load was valid. At paragraph 35, the Court noted that section 6 of the *Regulation* only requires that person capacity be reduced to equal

occupant load when there has been an issuance, an amendment or transfer of a licence. Until this happens, person capacity or patron capacity may be in excess of occupant load. This may be why the person capacity and occupant load are different in this case but no evidence was provided on this issue.

I do not agree therefore that this goes to jurisdiction, or renders the NOEA defective. The licence which was produced in evidence contains as part of the person capacity the licence for the patio area and for the purposes of this proceeding, the contravention was for exceeding a person capacity of 219. Whether the licence should be re-issued to reflect only the occupant load without the patio area is a matter for the General Manager. I would for the same reasons dismiss the alternate argument of the Licensee that part of the NOEA dealing with occupant load is defective.

### **FAILURE OF PROCESS**

The Licensee notes that the Liquor Inspector drafted a NOEA on January 9, 2009, which was placed in evidence as Exhibit 6. The Licensee submits that the Branch had already decided to seek the maximum penalty available without regard to objective evidence about public safety or voluntary compliance in disregard of its statutory duties.

The Licensee acknowledges that the Supreme Court of Canada found that the scheme contemplated by the *Act* does not automatically give rise to an apprehension of bias: see *Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, [2001] 2 SCR 781. The Supreme Court of Canada rejected the argument that the appointment of members to a Liquor Appeal Board on term part-time appointments did not provide a sufficient assurance of independence. The Court found it was for Parliament to determine the degree of institutional independence that was required of these members.

The Licensee submits, however, that procedural fairness is owed to the Licensee during the prosecution leading up to an enforcement action. It submits that the Branch proceeded with a punitive resolve to apply the maximum penalty. The Licensee submits that liquor inspector was obligated to invite submissions prior to deciding to proceed with any enforcement action. He did not do so; nor did his seniors address his prejudgement when they reviewed the draft NOEA. Since the General Manager of the Branch combines the roles of investigation, prosecution and adjudication, her delegates at the investigation stage must maintain an objective and open-minded attitude to the investigation. The Liquor Inspector is a delegate of the General Manager, and so must maintain an objective and open-minded attitude during the investigation. The Liquor Inspector's mind cannot be closed so as to make submissions futile. Unfairness or bias by an investigator may raise an apprehension of bias in the decision-maker in arriving at the ultimate determination.

To begin, the role of the liquor inspector in enforcement matters is described in section 6(4) of the *Regulation*:

**64 (1)** If an inspector forms the opinion that a licensee has committed a contravention, the inspector must, unless otherwise authorized by the general manager, provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

**(2)** If, after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice to the licensee

(a) specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree under subsection (3) that the licensee has committed the contravention, and



(b) notifying the licensee that, unless the licensee provides a notice of waiver in accordance with subsection (3),

(i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and

(ii) an enforcement hearing may be scheduled for that purpose.

There is nothing specific in the *Regulation* that requires the Liquor Inspector to involve the Licensee in an investigation before forming an opinion that the Licensee has committed a contravention. The analysis of the Supreme Court of Canada in *Ocean Port Hotel Ltd., supra* suggests that the role of the various delegates of the General Manager are to be considered in the context of the legislative scheme as a whole.

I agree that at the end of the day the procedure engaged by the Branch must be fair and open: see *R.G. Facilities (Victoria) Ltd. (c.o.b. Save on Foods Memorial Arena) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2009 BCSC 630. The Supreme Court of BC in this case remitted the matter back to the Branch because the NOEA that was issued did not provide sufficient notice to the Licensee. As well, there was an issue about whether the Licensee had sufficient information regarding witness contact information and evidence summaries. The Court noted at paragraph 58 that since the Branch as prosecutor is a Crown agency, it justifiably raises the expectation of an exhibition of substantial fairness, openness, and transparency in dealings with Licensees.

As well, in *Shooters Sports Bar Inc. v. Ontario (Alcohol and Gaming Commission)* (2008) O.A.C. 9, the Ontario Superior Court considered a case that involved a contravention by permitting drunkenness on the licensed premises. The Alcohol and Gaming Corporate Board had suspended the licence of the licensee for 10 days. There was an issue about the manner in which the Board addressed evidentiary matters in failing to properly assess the evidence of the licensee's witness. Only the liquor inspector provided evidence about the drunkenness witnessed that evening, and her evidence suffered from some inconsistencies and weaknesses. As well, the reasons of the Board did not adequately state the basis on which it found against the licensee. There were issues concerning delay in notifying the licensee about the contravention, and a failure to provide sufficient particulars. The Court concluded that the duty of procedural fairness was flexible; in this case, the duty was at the high end of the scale because case dealt with whether to revoke or suspend the liquor licence for a bar, a matter of critical importance to the continuation of the business and ability of the owner to earn a livelihood.

I accept that transparency is part of the process which the licensee can expect when the Branch chooses to exercise its powers to pursue enforcement action. In concluding whether the process is fair or open, however, it must be looked at as a whole. The Liquor Inspector is required under the *Regulation* to form an opinion that the Licensee has committed a contravention. This can, as occurred here, be based on information provided by third parties such as police officers. It may be based on personal observation of the Liquor Inspector. In any event, the obligation at this stage is to notify the Licensee in writing that the Inspector is of the opinion that the Licensee has committed a contravention.

The Inspector gathers the evidence that it considers relevant to determine whether a contravention has occurred. If the Liquor Inspector concludes that a contravention has occurred, written notice of an alleged contravention is provided. At this stage, liability is not established. Instead, a Licensee who wishes to contest a proposed enforcement action is entitled to a hearing where it can present evidence and cross-examine witnesses called by the Branch. Prior to the hearing, the Registrar will speak to the parties about exchanging their reliance documents. At the end of the day, the onus is on the Branch to adduce sufficient evidence to establish the contravention on the balance of probabilities. Judicial review is available should a Licensee feel that there was a failure of process in the proceedings engaged by the Branch. All of this is available to ensure that the process is both transparent and fair.

At the beginning of the process, a Liquor Inspector is not bound by an obligation to act with procedural fairness by allowing the licensee to be heard in advance of issuing a NOEA. The role of the Inspector is to gather sufficient information on which to form an opinion as to whether or not a contravention has taken place. The Liquor Inspector in this case relied on information that was provided by the RCMP. This included a Police Licensed Premises Check (LPC) and a detailed Occurrence Report. There is nothing improper about the Liquor Inspector acting upon such information to base an alleged contravention pursuant to section 6(4) of the *Regulation*. The draft NOEA flowed from this process. The senior managers who reviewed the NOEA were advising on its form. They were under no duty to engage in a process of procedural fairness by consulting with the Licensee before issuing a NOEA or to advise the Liquor Inspector to engage in such a process.

In any event, the evidence establishes that the Liquor Inspector spoke to the Licensee's G.M. after receiving the LPC, and then conducted a Compliance Meeting. As noted in the Food-Primary Licence Terms and Conditions Guide, a Compliance Meeting is not required before the Branch takes enforcement action. As well, the purpose of the meeting is to promote voluntary compliance with liquor licensing rules, and to assist in creating solutions for potential problems. It is not normally intended as part of the investigation process.

Nevertheless, as a practical matter, it would be useful to hear the Licensee in respect of the matter for which an enforcement action is being considered. Otherwise, a Liquor Inspector is deprived of the opportunity to possibly mitigate the intended enforcement action based on explanations provided by the Licensee. In the event that such a process is entertained, it should be informal and non-binding on either side in the event that a formal enforcement hearing takes place afterwards.

According to the notes of the Liquor Inspector, there was a discussion with the Licensee about why the overcrowding had occurred, or at least the Licensee made a statement to that effect. The Licensee also stated it was formulating a policy for door control for all of its facilities.

There was a divide in evidence about whether the Liquor Inspector offered a lower penalty in return for a waiver at the Compliance Meeting. He vigorously denied making such an offer, and pointed out that the alleged offer was unavailable because it was less than the minimum set out in the Schedule. The Hospitality Consultant testified that he was surprised when he heard the proposal as he knew it was less than the scheduled minimum. He did not, however, raise this inconsistency with the Liquor Inspector at the meeting. The G.M. on the other hand testified that a five or seven day range of penalties was discussed, which is different from what was recalled by the Hospitality Consultant.

It is not unusual that the issue of a waiver would be discussed as *Regulation 6(2)(b)* requires an inspector to advise a licensee that unless a waiver is signed, enforcement action may occur. In the end, it appears that there was a discussion about the range of penalties available under the Schedule in the *Regulation*. It seems to me unlikely, however, that the Liquor Inspector would offer a reduced penalty in return for a waiver when prior to the meeting, he was seeking both a maximum suspension and a maximum fine as penalties under the *Regulation*. I am unable to conclude on the above evidence that a waiver offer was specifically made by the Liquor Inspector.

## **JUDICIAL REVIEW**

The Licensee submits that the Branch failed to engage in a fresh reassessment of the alleged contravention following the decision of the Court of Appeal to remit the matter back for reconsideration. In *Lange v. School District No. 42* [1978] B.C.J. No. 1084 (BCSC), the Court considered whether a school board was estopped from reviewing the termination of a teacher on the merits when he was reinstated by a board of reference because of a failure of natural justice in the original termination. The board of reference agreed that the information about the teachers striking pupils would justify termination but not before the teacher had a hearing into a third allegation of misconduct. The teacher was therefore reinstated with back pay, and then terminated again following a further review by the school board. The teacher argued on judicial review that the decision of the board of reference was final, and his termination could not be reviewed again. The BC Supreme Court disagreed. It found that as a result of the decision of the board of reference, the matter that was *res judicata* was the question about whether the teachers should be given an opportunity to be heard. The school board was not prevented from a further hearing on the merits.

In this case, when the decision of the original Adjudicator was quashed, it was referred to the Branch to be reconsidered afresh. As in the *Lange* decision, the matter that was *res judicata* was taking enforcement action based upon a person capacity of 159. This did not, however, require a further investigation. In fact, all of the evidence that was needed to reconsider the matter was already available. Whether or not the evidence justifies enforcement proceedings is determined ultimately in the enforcement hearing.

In *Brett v. Ontario*, [1992] 9 O.R. (3d) 613 Ontario Court (General Division), Divisional Court, the applicant was a registered physiotherapist who was investigated for professional misconduct. Three members of a five-member board decided after reviewing inspection reports to send the matter to a hearing. The same three members sat on the hearing panel. One of the issues considered by the Court was an allegation of misleading disclosure to the board by the staff of the board. The Court found that while this may be an argument at the hearing, it was a question of fact relevant to the merits of the allegations. There was no statutory limit on what might be contained in an investigation report. The board was not required as a condition precedent to the ordering of a hearing to rely upon, and consider any particular kind of report or evidence or to refrain from relying upon and consider any particular kind of report or evidence.

Similarly, the question of whether the Branch had sufficient evidence to pursue an enforcement action or whether it acted upon improper information is a matter for the enforcement hearing. This also goes to questions of pre-hearing disclosure. The Licensee may raise issues of the inadequacy of disclosure at the hearing, and if successful, may be granted an adjournment with an order that the Branch provide the required information. I find that the process engaged in the Branch did not result in a failure of natural justice to the Licensee.

## **DUE DILIGENCE**

The Licensee has admitted that the licensed facility was overcrowded on the evening of December 31, 2008. The question then is whether the Licensee exercised due diligence with respect to the issue of overcrowding. Due diligence is a complete defence to the enforcement action proposed by the Branch. The onus of establishing due diligence is on the Licensee. The factors that are considered were set out by the Supreme Court of Canada in *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 at 1331. The first question involves the “directing mind” of the Licensee. Did the contravention take place with the Licensee’s direction or approval? If an individual who constitutes a “directing mind” of the Licensee was involved in causing the contravention, due diligence is not made out.

Provided the directing mind is not involved, proof of due diligence is otherwise a two part test. The Licensee must show first that it exercised all reasonable care by establishing a proper system to prevent the commission of a contravention, and second, that it took reasonable steps to ensure the effective operation of that system.

The actions of the Licensee are not to be judged with the clarity of hindsight but instead, are to be viewed at the time the contravention occurred. The standard necessary to establish due diligence is reasonableness; perfection is not required: see *R. v. Saskatchewan Ltd.*, 2004 SKPC 135 at paragraph 13 and 14.

The decision of *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch General Manager)*, 2004 BCSC 248 sets out the requirements to establish the defence of due diligence in the context of liquor licensing matters at paragraph 25:

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 Licensee submits, and I accept, that its G.M. was its directing mind on New Year's Eve 2008. It was in fact the G.M. who recommended holding the New Year's Eve event following a request by some regular patrons. Similar events had been held by the previous licensee but the G.M. wanted this one to be better. Permission was given to hold the event by senior management of the Licensee's ownership on the proviso that all managers would work during that evening.

The Hospitality Consultant arranged to obtain the special purposes licence needed to host the event. The Temporary Patron Participation Entertainment Endorsement was granted on December 23, 2008 for the hours of 8 p.m. to 12 a.m. The letter of that date noted that if the event was not managed to the satisfaction of the General Manager, future approval for similar temporary changes may be denied. As well, the Branch noted in the letter that it operates on the basis the Licensee is responsible for understanding and complying with the requirements of the *Act* and *Regulation*.



Under the Terms and Conditions Guide for Food-Primary licensees, there is a statement about overcrowding. It states "It is important for you to know the type of capacity for which your establishment is licensed, and to make sure you stay within this limit." There is no evidence to support that overcrowding had ever been an issue for the Licensee in the past. The nature of restaurant food service is such that customers are seated in a way which does not reach capacity. 80% of capacity would be the maximum that is normally seen for food service.

There was no apparent history of overcrowding in prior New Year's Eve events that had been conducted by the previous licensee. Nevertheless, the Licensee was venturing into new territory since it was intending to hold an event different from its normal food service operations. Certain steps were taken to limit the number of guests who would attend the function. 220 tickets were printed, to be sold at a nominal cost to cover the decorations and for providing a DJ. 175 of these were sold, and the balance held for complementary distribution. Wristbands were provided to those dinner guests who attended the second seating for dinner on the night in question, and who would be staying on for the celebration. Security was provided by members of a local martial arts club. Servers were instructed that they could only provide liquor to guests in their service area to avoid over-service. The Hospitality Consultant was available by telephone to the Licensees G.M. during the evening. Since the event was being held in the north part of Nanaimo away from downtown celebrations, it was not thought that overcrowding would be an issue.

There were, however, some flaws in the planning that took place prior to the event. First, the number of tickets sold and distributed together with the staff of the Licensee would take it close to its licensed person capacity. Second, the security personnel had no training or experience in crowd control, and were not given any guidance prior to the start of the festivities. Third, the tickets were not numbered, and were shredded as guests arrived at the restaurant. While this prevented the tickets from being re-used, it meant that there was no way that use those tickets to determine the number of guests

present during the evening. Finally, the door staff was not given instructions about counting guests coming and going, and only the G. M. had a mechanical counter for counting guests inside the facility.

During the evening, the Licensee's G. M. was in touch with the Hospitality Consultant. At the outset, the event was not crowded, and there was a concern that it might not be successful. At about 10 p.m., the G.M. first noticed they were over capacity. This was about an hour into the event. He spoke to the Hospitality Consultant about 10:30 p.m., and then took steps to limit the number of people coming into the restaurant. As well, he instructed staff to pay some of the guests in attendance if they would leave early. His count at 11 p.m. was 295 including staff.

The Licensee's G.M. did not think that public safety was significantly at risk given his count, and his view that the crowd was boisterous but not edgy. He was also a view that the RCMP arrived at 11 p.m., and took no urgent steps to address the overcrowding issue. He recalled the count by Constable A was said to be 300, which was similar to what he had counted himself.

In this, there is a significant divide with the evidence of the RCMP. Two of the officers from the Bike Unit who attended said they arrived at 11:45p.m. Their evidence on the timing issue was not significantly challenged. Constable A said that his rough grid count inside the facility was 350 patrons. He said an accurate count was difficult because of the numbers of people inside the facility. For this reason, he directed two officers to go outside to count patrons leaving in order to get a more accurate number. Constable B had a final tally of 436 people excluding staff. She testified that she had no difficulty with her count as people did not leave in great numbers at any time. She was also able to distinguish between staff and patrons, and deducted people who went back inside the building. The Constable that counted with her has since lost his notebook but testified that no one was leaving the facility in large numbers. He said that he gave his count to

Constable B. A third member of the Bike Unit recalled Constable A and B telling him at one point in the evening that the count was 406.

The Licensee admits that the licensed facility was overcrowded but says that the police count was exaggerated and did not properly account for staff. There was evidence that staff members dressed up in colourful clothing instead of their usual uniforms, and so were mistaken for guests. On balance, I accept the evidence of the police officers where it is in conflict with the evidence of the Licensee. The count was taken from outside of the restaurant as patrons left, so was more accurate than counts taken inside the facility.

I cannot conclude that the count of the officers was thrown off because some of the staff wore colourful clothing. It is not at all clear that a significant number of staff were going outside of the restaurant as the guests were leaving. While the Licensee argued the count outside was made difficult by guests leaving in large numbers, the police witnesses disagreed. The Licensee had no direct evidence from anyone outside the restaurant concerning the flow of guests in and outside of the facility. I accept the police evidence that the guests did not leave in large numbers so that the count outside was impaired, and I accept the police count taken outside the facility was accurate.

The only person who was conducting a count for the Licensee was its G.M. His attention was significantly distracted with trying to deal with the surge of overcrowding that developed during the evening. I conclude that as a result, his estimate of the number of patrons that were present inside the facility was significantly underestimated as it was well below the count taken by the police. As Constable A observed, he could not perform an accurate count because of the overcrowding inside the restaurant. Accordingly, there was either a significant build up of patrons into the facility after the last count taken by the G.M., or he significantly underestimated the actual numbers at the time of his last count. The pictures that were taken by a guest at 11 p.m. do not assist either way. Constable B said that they were accurate, although some of the angles were not captured. Nevertheless, she and a fellow officer counted in

excess of 400 patrons present that evening. As well, video evidence taken by the police shows significant crowding on the dance floor and in the bar areas.

The Licensee also argued that the RCMP arrived much earlier than 11:45, and the evidence of Constable A about the time of arrival was not supported by any other witness evidence. Constable B, however, testified to the same time of arrival. Nor was the evidence of Constable A about the time that the police attended challenged directly. Instead, he was asked if he would have done anything differently if he had arrived earlier than the time that he specified in his evidence. He replied that he might have because the police had other things to do that evening. While I am inclined to accept the police evidence on this point, it really matters little to the ultimate conclusion that the restaurant was significantly overcrowded at whatever time the police arrived. Nor does the fact that the Fire Department did not attend lead me to conclude there was no safety issue. In the opinion of the police, a call to the Fire Department was appropriate. The G.M. testified he told the Fire Department his count was 300. Since his count was inaccurate, it is unknown what the response of the Fire Department might have been had an accurate number been provided.

In its preparation for the New Year's Eve event, the Licensee took steps in its planning to control the numbers of patrons who would be present. It did not, however, take any steps to deal with potential overcrowding of the event. Door staff were not experienced in counting patrons coming into the facility because overcrowding is not normally a problem when the Licensee operates as a restaurant. They were not given instructions to count guests as they arrived, and the shredding of the tickets made an ongoing count impossible. Even noting the number of tickets that were presented by guests before they were shredded would have been of assistance to controlling the number of patrons, but no instructions were given to effect such a count.

While I appreciate that the Licensee did not suspect a closed event would be overwhelmed as it was, the Terms and Conditions Guide clearly places the responsibility to control overcrowding on the Licensee. During the planning phase of the event, steps should have been taken to control the numbers that were coming through the main entrance. It was not enough for the G.M. to walk around with a mechanical counter because his responsibilities for overseeing the event took him away from controlling the influx of patrons through the main entrance. Hindsight is not the test but reasonable foresight would have made door control part of the event planning. This bears as well on the ability of the Licensee to estimate the number of patrons present during the New Year's event. Only the G.M. had a mechanical counter, and as I have found, his count greatly underestimated the number of patrons present in the restaurant.

On the analysis mandated by *R. v. Sault Ste. Marie, supra* the G.M. was the "directing mind" of the Licensee on the night in question. He was primarily involved in planning and establishing the procedures that were to be used to put on the event. He met with staff prior to the event to discuss the procedures that were to be followed. While he sold and distributed tickets close to the licensed person capacity, he was not directly involved in causing the overcrowding, so the question remains if effective procedures were put in place by the Licensee. In this the Licensee was remiss for failing to plan effectively to control the numbers of patrons coming through the door. This led to the failure that occurred when the faulty door control procedures were put into effect. I conclude that the actions of the Licensee in planning for the 2008 New Year's Eve celebration were not duly diligent in all of the circumstances.

## **PENALTY**

I turn now to consider penalty. Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation*, and/or the terms and conditions of the licence, I may do 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 monetary penalty is warranted, I am bound by the minimums set out in Schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

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

There is clearly no record of a contravention of the same or similar type for the Licensee at this establishment within the preceding 12 months of this incident. This was the first time that the Licensee had endeavoured to hold a patron participation event at this location.

The Licensee argues that this case is one where the penalty should be waived. The Licensee says it has ensured voluntary compliance by committing not to hold a similar event again. As well, the Licensee argues that a seven day suspension would be unfair to the staff because only a small percentage of the current employees were working on New Year's Eve 2008.

A penalty was waived in the decision of *Longhorn Pub Ltd. dba Carelton Lodge (Longhorn Pub)*, EHO8-56. In this case, the licensee operated a liquor-primary facility licence for 275 persons. It was overcrowded with the count of 346 including staff. The Adjudicator noted that factors considered to determine an appropriate penalty include past history of warnings by the Branch or police, the seriousness of the contravention, the threat to public safety, and the well being of the community. A penalty was not necessary to ensure future compliance as the licensee operated by all accounts a well run establishment. There was a record of continuing cooperation with the Branch, and the contravention was not likely to be repeated.

There is a significant difference on the facts of the above case and the facts before me. In *Longhorn Pub, supra* the Branch was dealing with a licensee that had a long experience holding this type of event. It was not expected that there would be a repeat of the same problem again. Significantly, the seriousness of the contravention was a factor in determining penalty. The overcrowding in the *Longhorn Pub* was nowhere near as serious as that which occurred at the Licensee's restaurant. While the Licensee submits that evidence of voluntary compliance is enough, the seriousness of the contravention must be considered. Otherwise, there would be no need for a range of penalties under the *Regulation*.

I conclude that in all of the circumstances, a penalty is appropriate, and the seriousness of the contravention justifies a suspension. On the other hand, there are factors which mitigate the length of the suspension. The Licensee did not sell all of the tickets that it printed so that its staff exceeded the licensed person capacity as alleged in the NOEA. Instead, the evidence was that 175 tickets were sold, and some promotional tickets were distributed. I accept the testimony of the G.M. that the number of tickets sold and distributed and the number of staff working were together at or below the licensed person capacity of the restaurant. While the numbers were close to capacity, and so put the Licensee at risk, it did not constitute a deliberate act of overcrowding. As well, while the Licensee did not take sufficient steps to count patrons coming in the door, its plans to try and limit the numbers of guests must be given some consideration in mitigation. These included giving patrons who were seated for dinner service wristbands if they were staying on for the New Year's Eve event, and tearing up the tickets to prevent their reuse. Both were designed to restrict the number of guests present. As well, a staff member was present on the patio to prevent access to the restaurant from means other than the main entrance.

On balance, I conclude that a minimum suspension under the Schedule is appropriate to recognize both the seriousness of the overcrowding that occurred, and to acknowledge the steps that were taken in mitigation.

## **ORDER**

Pursuant to section 20(2) of the *Act*, and Item 15 in Schedule 4 of the Regulation, for the finding of a contravention of section 6(4) of the *Liquor Control and Licensing Regulations*, I find that the Licensee's liquor licence will be suspended for four (4) days to commence at the close of business on February 19, 2013, and to continue each succeeding business day until the suspension is completed.



To ensure the effectiveness of this Order, I direct that the liquor licence be held by the Branch or by the Nanaimo RCMP detachment from the close of business on February 19, 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*

---

A. Paul Devine  
Enforcement Hearing Adjudicator

Date: January 9, 2013

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

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