



**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: Commodore Ventures Ltd.
dba The Commodore
369 Victoria Street
Kamloops, BC V2C 2A3

Case: EH12-154

For the Licensee: Dennis P. Coates, QC

For the Branch: Peter Mior

General Manager's Delegate: Dianne Flood

Place of Hearing: Kamloops, BC

Date of Hearing: April 24, 2013

Date of Decision: June 26, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Commodore Ventures Ltd., operates a liquor primary establishment under the name of The Commodore at 369 Victoria Street, Kamloops, BC under Liquor Primary Licence 302593 (the "Licence"). Under the Licence, liquor sales are permitted from 9:00 a.m. to 2:00 a.m., Monday to Saturday and from 9:00 a.m. to midnight on Sunday. The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated September 7, 2012. The Branch alleges that on April 1, 2012, the Licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation") – "Overcrowd beyond person capacity more than occupant load". The proposed penalty is a four (4) day suspension (Item 15, Schedule 4, of the *Liquor Control and Licensing Regulation*).

The Licensee does not dispute that it exceeded the person capacity permitted under the Licence but says the occupant load for the Licence was set incorrectly. The Licensee says that if the occupant load had been set correctly, the number of persons present would not have exceeded that correct number. The Licensee says this is a defense to the contravention alleged by the Branch.

OVERVIEW OF THE ISSUE AND THE SUBMISSIONS

Broadly, the issues are:

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

The contravention alleged is overcrowding beyond person capacity more than occupant load. This requires findings of:

- whether the number of persons in the premises exceeded the licensed capacity, and
- whether that number of persons was greater than the occupant load

The Branch says it has proven both elements of the contravention: the number of persons in the premises exceeded the licensed capacity and that number of persons was greater than the occupant load.

The Licensee's Legal Counsel does not dispute the first element, but says that the Branch has failed to make out the second element. Legal Counsel says that to find a contravention of exceeding the occupant load, the General Manager's hearing delegate is required to make findings of fact as to what the licensed capacity and the occupant load are, based on evidence (see: *Roxy Cabaret v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2005 BCSC 459 ("*Roxy Cabaret*") and *C.P. White Holdings Inc. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2007 BCSC 1810). Legal Counsel says the hearing delegate may hear evidence how the occupant load is set (see *Roxy Cabaret*) or, in the absence of other evidence, rely on the certificate (see *Aztec Properties Co. v British Columbia (General Manager, Liquor Control and Licensing Branch* 2005 BCSC 1465)("Aztec Properties").

Legal Counsel says that from this line of cases it follows that the hearing delegate can also hear evidence that the occupant load was set incorrectly. He says an example of this would be evidence of taking the wrong considerations into account when setting the occupant load. Legal Counsel submits that if the evidence of what the correct occupant load should be is different than the occupant load relied upon by the Branch, the hearing delegate must make that finding, which would be a defense to the contravention.

Legal Counsel says that the evidence submitted by the Licensee supports a finding that the occupant load relied on by the Branch was incorrectly set and that the correct occupant load is greater than the number of persons in the establishment on April 1, 2012. As such he submits the second element has not been proven.

In the alternative, the Licensee says there has been due diligence by the Licensee, which is a defence to the contravention.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set out in Appendix A.

EXHIBITS

- Exhibit 1:** The Branch's Book of Documents
- Exhibit 2:** A copy of an email exchange between the Branch and the City of Kamloops
- Exhibit 3:** The floor plan approved by the City of Kamloops dated June 4, 2007
- Exhibit 4:** A copy of a letter dated June 20, 2007 from the Branch to the Licensee's Legal Counsel
- Exhibit 5:** A three page excerpt from the Liquor Licensing Policy Manual (pp. 4 – 6)
- Exhibit 6:** A copy of section 53 of the Liquor Control and Licensing Regulation

- Exhibit 7:** A copy of the prior license, Food Primary Licence 301234, dated November 30, 2006
- Exhibit 8:** A copy of an Extract of a Resolution from the minutes of a meeting of the Kamloops City Council held on May 29, 2007
- Exhibit 9:** A copy of “Guidelines – Occupant Load” No. 04-01, jointly issued by the Office of the Fire Commissioner (BC) and the Building Policy Branch, Housing Department (BC)
- Exhibit 10:** Three full-page colour photographs of the establishment
- Exhibit 11:** A copy of a letter from the Licensee’s Legal Counsel to the City of Kamloops, dated March 11, 2013, together with a copy of the amended application for a liquor licence permit alteration enclosed with the letter
- Exhibit 12:** A copy of the Licensee’s Policy Manual dated September 2011
- Exhibit 13:** Five full-page black and white photographs of the establishment
- Exhibit 14:** A copy of an opinion letter from CFT Engineering Inc., dated February 28, 2013, together with a coloured floor plan of the establishment
- Exhibit 15:** CV of the Licensee’s expert witness

EVIDENCE

The Licensee did not challenge the licensed person capacity. Tab 7 of Exhibit 1 is a copy of the Licence. It clearly states that the licensed capacity for the premises is 86 persons—12 on Patio 01 and 74 in Person Area 01. Patio 01 is an outdoor patio area.

The Branch called three witnesses: the two RCMP officers who had attended at the establishment on April 1, 2012 and the Inspector who issued the contravention notice. The Licensee’s Legal Counsel called three witnesses: two representatives of the Licensee, Mr. Monteleone and Mr. Bernardo, and an expert witness.

The RCMP officers

The RCMP Corporal gave evidence that on an earlier drive-by on the evening of March 30, 2012 the establishment looked overcrowded. He testified that he returned to the establishment later that evening, just after midnight on April 1, 2012. A Constable attended with him.

Both RCMP officers' evidence was that the patio was not operational that evening. They said there was a line up of about 15 persons and a doorman on duty. The RCMP officers entered and made their way to the back. They each described the establishment as very busy and difficult to walk through due to the number of people. The tables had been moved from the middle of the premises to create a dance floor and there was music and dancing.

The RCMP officers began to make independent counts, using mechanical counters, working their way from the back to the front. The Corporal said he counted 88 persons, excluding several females in the washroom, and the Constable said he counted 95 persons. Both said their counts included staff. They said they advised Mr. Bernardo, one of the Licensee's representatives who was working the bar, about the counts and Mr. Bernardo checked with the doorman whose count was 80 patrons.

The Liquor Inspector

The Inspector testified that the occupant load set by the City and stamped on the floor plan (Exhibit 1, Tab 8 and Exhibit 3) is the occupant load recognized and enforced by the Branch. That occupant load is 86 – 12 on the patio and 74 inside.

The Inspector gave evidence about an email exchange between him and a City official about setting occupant loads. A copy of those emails was marked as Exhibit 2. In his email the Inspector asked about the considerations taken into account by the City when issuing a Liquor Primary occupant load. The City official responded that a number of

things were considered and set those things out in the email. In the email, the City official told the Inspector that for an existing licence, the historical capacity is considered. The City official said that there are numerous examples where the capacity noted on the licence is less than what the building can accommodate from a Code perspective. The official said where an existing licensee wants an increase and the building can accommodate more from a Code perspective, council policy is that the licensee is put through a public capacity increase process “that includes input from the surrounding neighbourhood, schools if they are located within 400m, the RCMP, Bylaws and the BIA, if applicable”. For a new licence, the City official said the City considers the size of the building (it has to be able to accommodate the capacity according to Code), “as well as input from the RCMP, the BIA, Liquor Licensing, and Bylaws”. He said the City also looks at similar “LP’s” (presumably this refers to licensed premises) in the vicinity to ensure they are not creating an issue.

The Inspector then referred to the Guide that forms part of the Terms and Conditions of all liquor licenses in BC (Exhibit 1, Tab 9). He said the Guide is intended to support the Branch’s objective of voluntary compliance by educating licensees about their obligations, using laymen’s terms to describe the Act and Regulation. The Inspector referred specifically to page 24 where overcrowding is addressed. At that page, the Guide tells licensees that the local building/fire authorities may establish a maximum occupant load that may be different from the liquor licence maximum capacity. The Guide specifically says that if the fire and building officials have each calculated an occupant load for an establishment or if an engineer or architect has, and the numbers are not the same, the lower number is the one a licensee must use.

When asked by the Licensee’s Legal Counsel whether the City made its decisions on occupant load based on factors that did not have much to do with Building Code, the Inspector advised that he was not intimately involved in how the City determines occupant load.

The Inspector acknowledged there had been changes in the licensing scheme and under the new scheme "person" capacity now included both patrons and staff. He also said all licensed establishments have a "red-lined" area, and in the Commodore, there was the red-lined area plus the bar. He agreed the building also had a large kitchen that was not part of the red-lined area.

Mr. Monteleone (Licensee's representative)

Mr. Monteleone is one of the owners and actively involved in the operations of the Licensee.

He testified that a couple of years ago the Licensee applied to the City for an increase in the occupant load. The Licensee asked the City to apply a Building Code ratio of .94 square metres per person, which would result in an occupant load of 107. However, a city official told him the occupant load had to stay at 74 persons, based on the Building Code ratio of 1.2 metres per person, which was similar to restaurants like The Keg and Earl's.

Mr. Monteleone said the Licensee has recently re-applied to the City to increase their capacity to 107 persons. He said the Licensee has now been told by a City official there will be no problem getting that increased occupancy. He said that no structural or physical changes to the establishment have been required to get that approval.

Mr. Monteleone testified that either he or Mr. Bernardo, the other owner and representative of the Licensee, works in the premises every night. On most nights, they are both there, working as bartenders and managing the premises. Usually Mr. Monteleone does the counts of persons in the premises as Mr. Bernardo is busy with technical matters like the debit machines. Mr. Monteleone said that he will usually do two counts an evening. Sometimes Mr. Monteleone acts as door person early in the evening if they are full, and he has turned people away.

He testified that the premises are popular and often busy. They have a doorman from 9:30 p.m. to 2:30 a.m. from Monday to Saturday. On Fridays and Saturdays when it is busier, they have more door staff on—two at the front door and one inside the door and an additional person at the back.

Mr. Monteleone said they have a maximum of 15 staff working. The kitchen is busy and a “huge part of the business”. Mr. Monteleone also gave evidence that after the dinner service is finished, tables from the middle are removed for a dance floor. He said at about 10 p.m. the kitchen staff goes home, so only nine staff are present after that.

In Mr. Monteleone’s opinion, at an occupancy of 74 persons, the establishment is empty, and there is room for more people. He said that when they close off the door at 74, they get complaints because it appears to people waiting in line in that more people could be allowed in.

Mr. Monteleone testified that the door staff uses two mechanical counters to count patrons coming in and patrons going out. Staff are instructed that if they are at capacity not to let anyone in unless someone leaves. He said that since April 1, 2012, door staff have been directed to walk around the interior every 15 minutes from 9:15 p.m. to 2:00 a.m. and do a capacity count of patrons and staff. That count is to be recorded on a clipboard and signed off, and then handed in to Mr. Monteleone who records it. Mr. Monteleone also does nightly counts of persons in the premises, usually two, later in the evening.

Mr. Monteleone said Mr. Bernardo was the one who dealt with the RCMP on April 1, 2012, and that Mr. Monteleone stayed behind the bar. Mr. Monteleone’s evidence was that on that evening, the doorman thought they were at capacity but on checking when the police came, the doorman realized he made an error and allowed a few too many in.

Mr. Monteleone said he knew the interior capacity was 74 and it was that number that had to be maintained, despite the application for an increase to 107. He said the occupant load of 74 was not a problem when the Licence was a Food Primary, but that the Licensee always wanted a greater occupancy when the Licence changed to a Liquor Primary licence. He testified that the Licensee did not operate at overcapacity on purpose.

His evidence was that he understands the patio has to be opened to have the licensed capacity at 86, and they never use the patio numbers without the patio being open. Mr. Monteleone also said when the patio is open, patrons from the patio are allowed to enter the interior area to use the washroom.

According to Mr. Monteleone, at this point they are trying to keep capacity at 70 to avoid slip-ups but it's never more than 74 with the patio closed or 86 when the patio is opened. Since April 1, 2012, they count everyone in the room. He says the Licensee's goal is to ensure safety of the patrons and staff.

He testified that staff is verbally reminded about capacity. He said he and Mr. Bernardo have shown the liquor licence to staff, and staff are aware of the seriousness of overcapacity charges. They had a staff meeting about it after a 2010 contravention for overcrowding. There has been some staff turnover since 2010 but there is still some of the staff from 2010.

Mr. Bernardo (Licensee's representative)

Mr. Bernardo, the other owner of the Licensee, also gave evidence. He testified that he was behind the bar on April 1, 2012. He said four doormen were on duty. Of these, two had the BST security license as required, the third was a corrections officer who worked for them part-time and the fourth was not technically a door person, but provided an extra set of eyes to monitor the room.

Mr. Bernardo said he was the one who dealt with the RCMP. He confirmed that on April 1, 2012 the doorman's count was 80 patrons. He said the doorman made the count using two counters – one in and one out. Mr. Bernardo said the doorman simply lost track of the numbers.

Mr. Bernardo confirmed there was five or six staff on duty at the time. Mr. Bernardo said he personally thought that because bar and door staff were not in the red-lined area, they were not included in the occupancy count. However, he said the discrepancy between the doorman's count and the RCMP count was not due to this reason. He said that the doorman simply lost track and his numbers were not accurate. Mr. Bernardo said the doorman was suspended for a week due to the seriousness of the issue.

Mr. Bernardo testified that when they found out they were overcapacity that night, they asked patrons who they knew well to leave and those people left within five or ten minutes after the RCMP left.

Mr. Bernardo also said counting the number of persons is easy when people are seated, but becomes more difficult when they are standing up and moving around as they were that night. He also said that when the patio is open, at any given time there may be two or three patrons from the patio inside, using the washrooms.

Mr. Bernardo said the Licensee's policy manual did not address overcrowding. He said the Policy Manual was developed after the prior contravention in 2010 and they were told they needed one. He said that the door staff have to have their security training and other staff must have their Serving It Right, so in the Licensee's opinion, capacity issues were addressed there.

The expert witness

The Licensee called a witness to give expert opinion evidence about the occupant load. The witness's professional credentials are set out in Exhibit 15. The Branch advocate accepted the witness as an expert for that purpose and his opinion evidence was admitted. The expert's opinion letter was marked as Exhibit 14. A floor plan was attached to that letter.

The expert witness testified that he determined the occupant load under the Building Code and the Fire Code. Applying the Building Code, he divided the establishment's main floor into different areas depending on who would occupy the area—staff or the public. He excluded those areas (e.g. washrooms, coolers, stairs and foyer) where someone might be present on occasion but who would be generally coming to or from a staff area or the public area. He said he then applied the Building Code factor that applies to space with non-fixed seats and tables to that area he had designated as the public area. This resulted in an occupant load for that area of 92 persons. Next, he added the Licensee's stated maximum staff load of 15, and determined the total occupant load for the establishment to be 107 persons. He said this number applies to the whole of the space.

The expert witness testified that he determined the facility had an exit capacity under the Fire Code for a maximum of 298 persons. He said this was more than sufficient for the occupant load he had established under the Building Code. He testified that the Building Code sets the number based on the intended use of the facility as determined by the designer, and the Fire Code sets the maximum number for any use. This accounts for the difference in the numbers under the two Codes. He confirmed that 107 persons was the occupant load for this establishment.

In the expert witness's opinion, the 107 persons allowed by the occupant load could be anywhere in the establishment—on the patio, in staff areas, or in the public area inside the building—as long as the 107 was not exceeded.

The expert witness testified that he did not include the patio area of the establishment when making his calculations because the Building Code does not deal with occupant loads outside of buildings. The expert witness acknowledged that different municipalities treat patio areas differently. He said that some municipalities consider the demand by persons on patios on washrooms. Other municipalities say the demand on washrooms is seasonal and should not influence the interior facilities and so do not include the patio if it is seasonal.

When asked about Exhibit 3, the floor plan on which the City had stamped its approved occupant load, the expert witness was of the opinion that the floor plan “spoke to the public area” and not the full facility. He said he concluded this because the kitchen, the coolers and the back of house (which were shown on the floor plan he used to determine the occupancy load which was attached to Exhibit 14) were not shown. However, he said that he did not know if the City considered these areas when setting occupancy. While it appeared to him that the City had not, he could not say what the City had considered.

The expert witness said that the Building Code uses prescriptive numbers and formulas to establish densities and acceptable levels, and allows for increases depending on practical densities. The expert witness said the Building Code consideration of higher densities does not differentiate based on whether the premises are licensed and so he did not take into account liquor licensing. He did say he knew that the City of Vancouver bylaw does differentiate occupant loads for licensed premises but he did not know if the City of Kamloops had a bylaw that differentiated licensed premises.

SUBMISSIONS

The Branch

The Branch says that the licence tells the licensee the maximum number of persons (patrons and staff) allowed in the premises at one time. The Guide also reinforces that it is important for a licensee to stay within the limits of the licence and that there are different sources for setting occupant load—the local fire and building authorities or an engineer or architect—but the licensee must use the lowest number set by any one of these. In this case, the floor plan stamped by the City sets that number at 74 persons for inside the premises. The RCMP counts at 88 and 95 are both over the occupant load of 74, by a significant number. The Licensee's own count was well over the known occupant load, showing a disregard for the limits set by the Licence.

The Branch says that the expert witness's testimony is wholly irrelevant as it is the occupant load set by the City that is to be considered. The Licensee can, and is, applying to the City for an increase in the occupant load but the contravention hearing is not the place to change or amend the occupant load of a licence.

The Branch also says this is the second time this Licensee has been issued a contravention for overcrowding beyond occupant load. In a 2010 Branch decision (EH10-059), the Licensee admitted a contravention of overcrowding beyond occupant load. According to that decision, a representative of the Licensee gave evidence that he was fully aware that the maximum capacity was 74 plus the patio. The premises were found to be over capacity, and a monetary penalty was imposed. The Branch says that this contravention shows the Licensee knew the occupant load was 74 and disregarded that.

The Branch says the Licensee has not met the test for due diligence, and that the steps the Licensee has taken toward due diligence have only been implemented after the 2012 contravention. This is even though the Licensee had a similar earlier contravention. On April 1, 2012, the Licensee had failed to put in place training and policies to prevent overcrowding from happening again.

The Branch recommends a minimum suspension of 4 days. The Branch says overcrowding is a serious contravention. Exceeding the occupant load disregards health and safety. The Branch says a suspension is necessary for voluntary compliance as this is the second time overcrowding has occurred, and on the previous contravention a fine was imposed. The payment of a fine does not seem to be enough to impress on this Licensee the seriousness of the contravention. The steps taken since then to prevent overcrowding have been insufficient. Two representatives of the Licensee were present that evening and they should have recognized that they were at or close to capacity and taken steps to make sure that they did not exceed the capacity.

The Branch is only asking for a four day suspension as the earlier contravention was more than one year ago and as such this is not a second contravention for the purposes of the Regulation.

The Licensee

The Licensee's Legal Counsel says the occupant load set by the City can't be relied on by the Branch to support a finding of a contravention. He says the City set the occupant load incorrectly when it considered irrelevant matters and also when it simply carried over the occupant load from the former licence. Legal Counsel further says the occupant load, if set correctly, would be 107 persons, which is higher than the number of persons in the establishment on April 1, 2012, and that is a defense to the contravention.

Legal Counsel says the proper considerations for setting occupant load are those under the Building Code (building design and intended use) and the Fire Code (safe egress). He says that the City took into account the wrong considerations when setting the occupant load. Legal Counsel says that Exhibit 2 shows that when setting the occupant load the City considered things like the neighbourhood and closeness to schools. He says these things are only appropriate to consider when a licence is to be issued or amended under sections 6 and 10 of the Regulation. Legal Counsel also points to and relies on the Liquor Licensing Policy Manual (Exhibit 5) which sets out that community interests are to be considered for person capacity and that safety concerns are the consideration for occupant load. He says there is no reference under either the Regulation or the Policy to considering community issues, neighbours, churches, schools when setting the occupant load. The Licensee says that in considering these kinds of things, the City went beyond the matters that should be considered when setting the occupant load.

Legal Counsel also says the problem with the contravention of capacity over occupant load arises because the Branch has not yet figured out how to properly integrate changes made to the licensing scheme regarding patron and person capacity and how that relates to occupant load. He says under the old "red-lined" scheme, the area where the patrons were was important. Now, under the new scheme, it doesn't matter where in the facility people might be – they could be anywhere in the establishment. In this regard, he refers to the Terms and Conditions (Exhibit 1, Tab 9) which, at page 47, sets out the contravention in layman's language. In describing Item 15, the Guide refers to "licensed establishment" which means the whole of the facility. It also refers to "patron or person capacity". He says while patrons are those confined to the red-lined area, person includes everyone in the facility.

Legal Counsel says from Exhibit 3 and the expert witness's evidence, it can be concluded that the City only took into account the "red-lined" area when setting the occupant load, not the whole of the facility as the City ought to have done. Looking at only the "red-lined" area is a carry-over from the former licensing scheme which set limits on the number of patrons, not the number of people, and is an error in setting the occupant load.

Legal Counsel further says the occupant load set by the City is simply a carry-over from the previous Food Primary licence, issued to the prior licensee (Exhibit 7). He says the May, 2007 City Resolution in support of the Liquor Primary Licence (Exhibit 8) sets out council's considerations. None of those considerations is about building occupant loads and the Licensee says council simply maintained the occupant load of the former licence. Legal Counsel also says at the time the Resolution was passed the City would not have seen any floor plans and so set the occupant load improperly. He says the numbers used were from the previous licence and were incorrect. He also says the City was obliged to set an occupant load for the whole of the establishment and was in error in setting separate numbers for the patio and the inside area.

Legal Counsel also says the Branch has an obligation to ensure occupant loads are properly set. He says the system requires an occupant load in order to get a licence, but the Branch does not monitor how it is set. He says the Branch turns a blind eye to the different calculations for how the occupant load is set. He says the Branch has a responsibility to ensure the occupant load is set correctly.

In the alternative, Legal Counsel says the Licensee has met the test for due diligence. The owners had door staff on duty to limit the number of persons in the premises. A mistake was made when they allowed a few extra people in. Steps have been taken to ensure it won't happen again.

The Licensee's Legal Counsel says even if the Licensee is technically guilty of the contravention, there should be no penalty as the expert evidence is that the occupant load is 107, and there is no evidence to say the expert is wrong. The Licensee's Legal Counsel says that the Licensee has a good track record. If the number of 86 was used as the occupant load for the whole facility, using the lower of the RCMP's count of persons, then the Licensee was simply over by two persons. The contravention, if committed, was not that significant. The increase in the occupant load is now expected without any problem, which means there would not have been any contravention had that increase been in place on April 1, 2012.

REASONS AND DECISION

Contravention

As set out in the overview, the contravention of overcrowding beyond person capacity more than occupant load requires findings of:

- whether the number of persons in the premises exceeded the licensed capacity, and
- whether that number of persons was greater than the occupant load

Whether the number of persons in the premises exceeded the licensed capacity:

Based on the uncontroverted and unchallenged evidence, I find that the licensed capacity of the premises to be 12 on the Patio and 74 in Person Area 01. The uncontroverted and unchallenged evidence is that the patio was closed on April 1, 2012. Therefore I find the licensed capacity on April 1, 2012 was 74 persons, which includes patrons and staff.

In considering all of the evidence of the counts of the number of persons in the establishment on April 1, 2012, I prefer the evidence of the RCMP because the officers testified in person and were subject to cross-examination about their counts. The RCMP testified they had done counts before, they used mechanical counters and they went about the task methodically. They were unshaken in their numbers and in the method of their counts.

I accept the RCMP's evidence that the premises looked crowded and was difficult to move about in, and that it did not appear to be empty. I do not find that the evidence of the doorman's count to be as strong, as he was not presented in person to testify about how he did his count. While I find that evidence not to be as strong, I do note that the doorman's patron number of 80, when added to the staff of 6, is close to that of the lower of the two RCMP counts at 88 persons.

From all of the evidence, I find that there were at least 88 persons in the establishment on April 1, 2012. This number exceeds the licensed capacity of 74. Based on this, I find that on April 1, 2012, the licensed capacity of 74 was exceeded and there was overcrowding beyond the licensed person capacity.

Whether the number of the persons in the premises was greater than the occupant load:

The Act provides that the occupant load of a licence is the lowest of the numbers set by the Building Code, the Fire Code and the local government which, in this case, is the City of Kamloops (the "City"). The Guide is also clear, if there is a difference in those numbers, the lowest of them applies.

I accept the unconverted evidence of the expert witness that the occupant load under the Building Code is 107 persons. However, Tab 8 of Exhibit 1 and Exhibit 3 both show that the City set the occupant load at 12 persons on the outdoor patio and 74 persons inside. The evidence that the City set this occupant load was not challenged.

As such, I find that on April 1, 2012 the occupant load set by the City for these premises was 12 on the patio and 74 persons inside. This is the lowest number, and absent a successful defense on the basis suggested by the Licensee's Legal Counsel, that is the occupant load that applies, the number of persons present on April 1, 2012 exceeded that occupant load.

I now turn to consider the Licensee's submission that the City set the occupant load incorrectly and as such, that occupant load should be set aside and the occupant load that would be set under the Building Code substituted instead. The Licensee relies on the Court's decisions in *Roxy Cabaret* and *Aztec Properties* to say evidence of the "correct" occupancy load may be submitted by it.

I do not find those decisions to support that proposition. I find that the decision in *Roxy Cabaret* simply stands for the principle that the hearing delegate may rely on oral or written evidence of the occupant load set by the responsible authority, and that evidence may be produced by the Branch or the Licensee. I do not read this case as an open invitation to licensees in a contravention hearing to lead evidence that a different occupancy load should have been set by the responsible authority, or that a higher occupancy load that would have been set by a different responsible authority should be substituted.

I do not find that *Roxy Cabaret* or any of the case law gives me authority to set aside the occupant load set by the City that forms part of the Licence. I find the Act intended that once the occupant load has been set by a responsible authority recognized by the Act, and a licence issued based on that occupant load, a licensee is obliged to comply with that occupant load until such time as the occupant load is amended and a new or amended licence issued.

I find that when issuing or amending a licence it is not the General Manager's responsibility or jurisdiction to ensure the occupant load, set by an authority recognized by the Act as capable of doing so, has been set correctly. Nor is it the responsibility or jurisdiction of the hearing delegate in an enforcement hearing to look behind an occupant load set by a responsible authority to confirm if it has been set correctly. The Act intended that the General Manager and the hearing delegates should rely on the responsible authorities and professionals to have done their job correctly. To require the General Manager or the hearing delegates to ensure that the responsible authorities have fulfilled their obligations correctly places too high a burden on the General Manager and the hearing delegates. This is supported by the findings of the Court in *Aztec Properties* at paragraph 16 where the Court said: "In my view there is no provision in the Act or the Regulation that requires the General Manager to confirm the method by which occupant load is calculated."

Licensees must comply with the terms of their licences, even if they think those terms are incorrect. If a licensee thinks that a term has been incorrectly set, then the licensee should take the proper steps to have the licence amended or revised. A licensee cannot simply operate outside the terms of a licence and then claim, as a defense, that the licence term does not apply. To do so would throw the licensing system into disarray, which is not in the public interest. I find that in an enforcement proceeding the Branch is entitled to rely on the occupant load set by the responsible authority as being correctly set.

If I am wrong, and as the Licensee's Legal Counsel has argued, as the General Manager's hearing delegate I have an obligation to determine whether the occupant load was set correctly, I find on the evidence before me, as reviewed below, that the occupant load was set correctly.

I find that the occupant load was set by City resolution (Exhibit 8), which is a proper, legal process. From the email exchange (Exhibit 2), among the things considered by the City were its bylaws. The expert witness's evidence was that some cities have bylaws that differentiate when setting occupant loads depending whether the building has a liquor licence. There is no evidence before me that the City did not have a bylaw that addressed building safety when setting occupant loads or that differentiated between premises that had liquor licences.

While the City may have considered additional matters beyond building safety when setting the occupant load, there is no evidence before me to show that the City's considerations did not include those considerations the Licensee says are proper: building design, use and safety. While the Licensee says the City did not have floor plans when the Resolution was passed, there is no evidence of that before me. Simply because the approval of the plans were dated after the Resolution does not mean the plans were not available earlier. Further, given the fact the Resolution supported a change in the type of licence, I find it more likely than not that the City officials would have had a copy of the floor plan available to them before the Resolution was passed.

The Licensee also says that I should find here that the City calculated the occupant load with consideration only of the "red-lined area" which would be an error. The Licensee relies on the decision in *Aztec Properties*. I find that case to simply stand for the proposition that it was reasonable for the hearing adjudicator to conclude that the occupant load was not calculated in reference to the red-lined area only, even though the plan associated with the occupancy load showed a red-lined area. I agree, and make the same finding. The only contrary evidence of that was the expert witness's supposition that the City may not have considered the whole of the facility and may have only considered the area shown on the floor plan Exhibit 3. This supposition is not enough to make a finding of an incorrect calculation.

Here the Licensee clearly knew its occupant load. The Licensee had a prior conviction in 2010 for overcrowding beyond that occupant load. The Licensee had applied for and abandoned an earlier application to the City for an increase in the occupant load. It is not open to the Licensee to now claim as a defense that the occupant load was set incorrectly, thereby providing a defense to the contravention. To do so would be disingenuous.

Based on all of the evidence before me, I accept that the occupant load set by the City applies to this Licence. As such, I find that on April 1, 2012, with the patio closed, the occupant load that applied to the premises was 74 persons. I find that the number of persons in the premises on April 1, 2012, being greater than 88 persons, exceeded the occupant load of 74 and the Licensee has contravened the Act and the Regulation.

If I am wrong and the occupancy load is the total number for both the patio and the inside area, so that the occupant load is 86, I still find on the evidence that the number of persons in the premises was at least 88 persons and the occupant load was exceeded.

Therefore, I find the Licensee contravened the legislation on April 1, 2012 by permitting more persons in the licensed establishment than the patron or person capacity set by the General Manager and the number of persons in the licensed establishment was more than the occupant load.

Due Diligence

The Licensee is entitled to a defence if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The Supreme Court of Canada set the legal test for the defence of due diligence in the case of *R v. Sault Ste. Marie* (1979) 2 SCR 1299 at page 1331, as:

One comment on the defence of reasonable care in this context should be added. ... Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

The defence of due diligence is to be considered in two stages:

1. Whether the person who permitted the overcrowding was a directing mind of the Licensee. If so, the defence fails.
2. If the person who allowed the overcrowding was not a directing mind of the licensee, then the questions to be considered and answered are whether the Licensee had
 - a. implemented adequate training and other systems to prevent the contravention (the overcrowding), and
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems

Both of these issues are factual, and will depend on the evidence presented. The onus is on the Licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

Based on the evidence, the Licensee's representatives were both present on April 1, 2012. They are the directing minds of the Licensee. They are highly familiar with the premises and know when it looks crowded and when it does not. With a permitted capacity and occupancy of 74 and at least 88 persons present, that is 20% more than the permitted occupancy. I find the Licensee's representatives, who are the acting

minds for the Licensee, either knew or should have known the establishment was overcrowded and taken active steps to address the issue. They failed to do so, and I find the defense of due diligence fails.

If I am wrong and the Licensee's representatives did not "permit" the overcrowding to occur, I find the person who "permitted" the overcrowding to occur was the doorman, who was not a directing mind of the Licensee. However, I also find that on April 1, 2012, the Licensee had not implemented adequate training or other systems for the doorman to prevent the overcrowding. There were no policies or training in place about overcrowding. The Licensees simply relied on the security training and the SIR program, which I find is not adequate in terms of training or systems to deal with this issue. As such, I find the defense of due diligence is not available to the Licensee.

PENALTY

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

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

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

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

I cannot agree with the Licensee that the contravention is trivial and no penalty should be imposed. The Licensee was well aware of the occupant load and knew what the premises looked like when the occupant load was reached, yet permitted the occupant load to be exceeded. The Licensee had done the same thing only two years previously. And after that, the Licensee did not implement any policies about or institute any training about how to ensure they did not exceed the occupant load. I find a penalty is required to emphasize to this Licensee the seriousness of complying with this term and condition of its Licence.

There is no record of a contravention of the same type for this Licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item #15 in Schedule 4 provides a range of penalties for a first contravention of this type: a 4-7 day licence suspension and/or a \$5,000 to \$7,000 penalty.

In these circumstances, I find that a suspension is warranted. As noted above, although this is not a second contravention for the purpose of determining the extent of the penalty, there is a prior contravention for the exact same thing in 2010, which resulted in a monetary penalty. This says to me that a suspension is necessary to impress on the Licensee the need to comply with the terms and conditions of the Licence, not simply to comply with only those terms and conditions the Licensee agrees with. The Licensee knew the occupant load, they had been found in contravention previously, they took few, if any, steps to prevent the contravention from happening again. I order a 4 day suspension, the minimum under the legislation.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 302593 for a period of 4 days to commence at the close of business on Friday, July 26, 2013 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the Branch or the Kamloops RCMP from the close of business on Friday, July 26, 2013 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that the Licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Dianne Flood
Enforcement Hearing Adjudicator

Date: June 26, 2013

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate

APPENDIX A

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Under the *Liquor Control and Licensing Act*:

Definitions

"establishment" means a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served;

"licensed establishment" means an establishment licensed under this Act;

"local government" means,

(b) in relation to a municipality, the council of the municipality

2. Under the *Liquor Control and Licensing Regulation*:

Definitions

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

(a) the Provincial building regulations,

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

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

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

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

General manager may require local approval

5 Before issuing a licence for an establishment, the general manager may require evidence of local government or first nation approvals in relation to the establishment, including any applicable zoning approvals.

Capacity

6 (1) Before the general manager

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

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

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

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

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

Also of some interest is section 10:

Application for liquor primary or liquor primary club licence

10 (2) If a person applies for a liquor primary licence or a liquor primary club licence for an establishment, the general manager must give notice of the application to the local government or first nation for the area in which the establishment is located or proposed to be located unless the local government or first nation has indicated that it does not wish to receive notice.

(3) In considering an application for which notice has been given under subsection (2), the local government or first nation must, in providing comments with respect to the licence application, take into account the following criteria:

- (a) the location of the establishment;
- (b) the proximity of the establishment to other social or recreational facilities and public buildings;
- (c) the person capacity and hours of liquor service of the establishment;
- (d) the number and market focus or clientele of liquor primary licence establishments within a reasonable distance of the proposed location;
- (e) the impact of noise on the community in the immediate vicinity of the establishment;
- (f) and (g) Repealed. [B.C. Reg. 26/2011, Sch. s. 1.]
- (h) the impact on the community if the application is approved.

(4) If the operation of the establishment as a licensed establishment may affect nearby residents, the local government or first nation must gather the views of residents in accordance with section 11.1 (2) (c) of the Act.

- (5) If the local government or first nation wishes to provide comments to the general manager, it must provide the following in writing:
- (a) its comments addressing the criteria in subsection (3) of this section;
 - (b) if it has gathered the views of residents under subsection (4),
 - (i) the views of the residents,
 - (ii) the method used to gather the views of the residents, and
 - (iii) its comments and recommendations respecting the views of the residents;
 - (c) its recommendations with respect to whether the licence should be issued;
 - (d) the reasons for its recommendations.