



**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: Bastion Inn Ltd.
dba Touch Lounge
751 View Street
Victoria, BC V8W 1J9

Case: EH12-260

For the Licensee: Greg Harney

For the Branch: Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: February 18, 2014

Date of Decision: April 29, 2014

**Liquor Control and
Licensing Branch**

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC
<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

The Licensee, Bastion Inn Ltd., operates a licensed establishment under the name of Touch Lounge, at 751 View Street, Victoria BC under liquor primary licence number 151099 (the "Licence").

Under the Licence, liquor sales are permitted from 7:00 p.m. to 2:00 a.m. Monday to Saturday, and from 7:00 p.m. to midnight on Sunday. The licence has a person capacity of 400 (divided between Person01 area 340 and Person2 area 60 persons).

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

A Third Party Operator, 1972 Productions Incorporated, manages the establishment on behalf of the Licensee. The Licensee was represented at this hearing by the Third Party Operator.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch ("Branch") specified its allegations and proposed penalties against the Licensee in a Notice of Enforcement Action (NOEA) letter dated January 18, 2013. The Branch alleges that on November 1, 2012 (business day beginning on October 31, 2012), a routine inspection of the premises of the Touch Lounge resulted in an observation that the premises were operating over capacity.

Two independent counts resulted in a count of 528 including staff in the licensed area and 17 in the unlicensed area, and a count of 521 not including staff. This exceeded the person capacity of the premises which is set at 400.

The Branch proposed a penalty of a four day suspension of the Licence, which is a minimum suspension under the applicable Regulation.

On behalf of the Licensee, the Third Party Operator disputes the allegations and penalties proposed in the NOEA, and so I was appointed as a Delegate of the General Manager to hear the matter.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Regulation, B.C. Reg. 244/2002*****Capacity**

6(4) It is a term and condition of the Licence that there must not be, in the Licensed establishment at any one time, more persons than the person capacity under subsection (1) or (3).

ISSUES

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

EXHIBITS

Exhibit 1: Branch's book of documents

Exhibit 2: Licensee (Third Party Operator) book of documents

EVIDENCE—BRANCH**Liquor Inspector**

A Liquor Inspector was called by the Branch to give evidence about the events set out in the NOEA. The Liquor Inspector testified that the Guide sets out the definition of "person capacity" as the maximum number of persons including staff that may be inside a licensed establishment. The "occupant load" is calculated by the municipality or other responsible government agency, and refers to the number of people (including staff) that may be in a licensed establishment at one time.

The Liquor Inspector pointed out that, on page 24 of the Guide, licensees are advised to know the type of capacity for which the establishment is limited, and to stay within that capacity. Further, occupant load set by the local government will normally be more than the person capacity licensed by the Branch. Inside Touch Lounge, the occupant load is set by the City of Victoria at 340 on the main floor (designated as 01 inside the

licensed or red-lined area of the premises), and 60 in the mezzanine (designated as 02 inside the red-lined area), for a total occupant load of 400.

The Liquor Inspector testified that she was working with another liquor inspector on the morning of November 1, 2012. They arrived at the establishment at 12:20 a.m. to perform a routine walk through the premises. When they arrived, there was a line-up of approximately 50 people outside. There were also several staff at the door dressed in costumes as it was Halloween night.

The Liquor Inspector said that as she and her partner walked to the door, they heard two women say the establishment was very crowded inside. This statement was hearsay but admitted not for the truth but as evidence of the state of mind of the inspectors upon entering the premises. On hearing this, the liquor inspectors prepared their mechanical counters before entering the establishment.

The Liquor Inspector testified that she asked the door staff for their count, and was told there were 373 people inside. From past visits, she knew that the door staff normally used mechanical counters, although she did not recall seeing them upon entering the establishment. She entered the establishment with the other liquor inspector, and both proceeded to conduct a count of the persons inside. She testified that she had never seen the establishment as busy as it was on that evening.

Once inside, the Liquor Inspector went about her count, proceeding up the stairs and into the lounge areas in a counter-clockwise direction. There were a number of raised areas that she went into, and then she counted patrons on the dance floors. She also went by an area described as the smoking room. She did a head count there but did not add it to her count as it was outside of the red-lined area of the establishment.

Her count was 521 on the dance floors and in the raised areas. She counted another 20 in the smoking room outside the red-lined area. While these people would eventually come back inside the establishment, they were not counted. There were another 20 upstairs in the mezzanine area. The count may have included these patrons but it did not include the bartenders behind bar or anyone in the washrooms.

The Liquor Inspector testified that, after the count, she called the police as she was concerned with the numbers inside the establishment. She was concerned about safety issues from people exiting onto the street because of the significant overcrowding. At about 12:35 a.m., she spoke to the Manager of the establishment and told him to hold the line outside until enough people left to get the numbers back in line. She testified that her first count took about 15 minutes altogether. She then waited outside until the police arrived, and waited for patrons to exit.

The Liquor Inspector recalled that a manager of Touch Lounge also did a couple of counts. At 12:50 a.m. he said his count was 320. At 1:00 a.m. he said it was 308. The Liquor Inspector then went inside and did another count. She testified that her second count was 326 for all sections. She did not count staff behind the bar or in the smoking lounge. She recalled that the police walked through Touch Lounge but did not conduct a count. At this time, the establishment was much more open inside.

The Liquor Inspector testified that she had seen Touch Lounge close to capacity before but it was not nearly as busy then as it was on this evening. She testified that on the other occasions one could still move around, but on the evening in question she had to push through the crowd. She testified that she recorded her count in her notes which were produced for the hearing. She could not recall if she told the Manager her number but she may have done so. He wanted to conduct his own count, and his results were lower than hers. Her second count took approximately five minutes.

The Liquor Inspector testified that a four day suspension was recommended by the Branch due to the nature of contravention, which raised an issue of public safety. The recommended suspension was the minimum for a first contravention considering the serious nature of the contravention. The Liquor Inspector testified that the NOEA and the Contravention Notice were issued by the other liquor inspector as he was in charge of the inspection. The other liquor inspector was not available to testify at the hearing.

Cross-examination

The Liquor Inspector agreed that she has had a good relationship with the current operator of the establishment. The Third Party Operator has been a good operator, and there had been no prior issues of overcrowding. She has dealt with the Third Party Operator since she returned to work in the Victoria area in 2010.

The Liquor Inspector agreed the visit to the establishment was routine and not in response to any calls about overcrowding. Other inspections had been conducted that evening as well. She testified that she was not surprised that the police would visit Touch Lounge on a regular basis.

The Liquor Inspector was asked if she had ever seen patrons lined up on stairs to get in when she arrived there. She testified that this was not normal, as in her experience the stairs are kept open. The stairs are outside of the red-lined area for the establishment. She agreed that the coat check area at top of the stairs can be crowded, and it is inside the red-lined area. She was not aware of the policy of the establishment not to allow drinks in the coat check area.

The Liquor Inspector testified that she began her count right from start of stairs. She was asked why she decided to count without going inside first to confirm there was apparent overcrowding inside. She testified that it was already her view that there was general crowding inside the establishment. She had not conducted a count in the other establishments she visited that evening.

She recalled that the other liquor inspector was near her but she did not know where he was when he counted. Both counts were done at the same time but she did not stand beside him. She testified that she is 5 feet 6 inches tall and was wearing flat shoes. Nothing that she wore identified her as a liquor inspector. She was accompanied by the Manager as she conducted her count. She did not ask him to conduct a separate count at the same time.

The Liquor Inspector agreed that there is a bar in the centre of room with seating. There is a pool table in a raised area inside the establishment but she did not conduct a count of that area. She did not separate her count into different areas. There were also booths where people were seated, and there were no wide open areas inside the establishment. She recalled that many customers were wearing costumes. There was a narrow hallway with female and male washrooms which was very crowded with a line-up to use these facilities. She did not count inside the washrooms.

The Liquor Inspector testified that she did not track people moving around inside the establishment but found it was hard to move, and she had to push her way through. The bar area near the entrance to the male washroom was narrow and congested. The rest of club was congested too. She agreed that customers could enter and leave the dance floors from the other end from where she was counting, and that the nature of a song will impact the number of people who stay to dance.

The Liquor Inspector counted in the area of the second DJ booth which is in a raised area, and also counted in the booths and raised seating areas. After this, she proceeded to the smoking room. Her mechanical counter clicked 521 times. The Liquor Inspector agreed that she could not be certain she did not count some of the people inside the establishment twice. She also agreed that the lighting around the dance floors is soft, and there are a number of lights there including three light reflecting balls.

The Liquor Inspector was asked if she knew that the police had walked through the establishment earlier and found nothing wrong. She said she was not aware of a police walk through. It was suggested that police walk through the establishment regularly. She replied that the establishment is part of the Victoria area Bar Watch program, so the police may have been looking for other issues. She did not know if the police would ignore overcrowding as she did not see them do a walk through.

The Liquor Inspector agreed the patrons could have moved around inside the establishment during the 15 minutes of her first count. She thought the movement would be slight because of the congestion inside the club. She testified that she finished her count in the mezzanine area. She could not recall if she spoke to the Manager before she called the police.

She did not tell the Manager to empty the establishment or accept his invitation to shut the establishment down and count the people out. She testified that this is done in Vancouver but not in the Victoria area, and is usually done with the assistance of police officers. Instead, she asked the Manager to hold the line. In response to the suggestion that the line was not held, and that a further 27 patrons were allowed inside, she replied that was possible.

The Liquor Inspector was questioned about the timing of the NOEA, since the video taken inside the establishment was erased by the time it was received. She advised that she was not involved in the preparation of the NOEA. She was also not involved in the Compliance Meeting that was conducted with the licensee.

The Liquor Inspector agreed her count of 521 did not include the smoking area, persons in the mezzanine area or the bartenders in the establishment. Adding these to her count would bring her total closer to 575. The Liquor Inspector testified that five police officers arrived and entered the establishment at 12:49 a.m., by which time the egress of people and the line being held resulted in the numbers coming down, which is what she wanted.

The Liquor Inspector agreed the Licensee had a system in place for counting patrons in and out. At 12:50 a.m., she was told that the Manager's count was 323. Her notebook showed "no entry" after this, so it was likely then when ingress into the establishment stopped. She stated that she counted near the area of the dance floors. It was crowded, so she did not go onto the dance floors to conduct her count. She agreed the Manager told her he thought the count was 340. She agreed that costumes added to the crowding inside the establishment.

The Liquor Inspector testified that her second count occurred at 1:05 a.m., at which time she counted 326 patrons. By her count, some 250 must have left since her first count concluded. At this time, her count and that of the Manager were similar. She recalled telling the Manager this was the busiest she had seen at the establishment, and he replied it was busier on the previous Saturday.

EVIDENCE—LICENSEE

Owner

An individual testified that he is an owner of Touch Lounge, which operates under a third party agreement with the Licensee. The Third Party Operator became a tenant of the establishment in 2003. The Owner testified that the establishment first operated as the "Red Jacket Lounge and Cabaret". The current name was taken in July or August of 2009.

The Owner appeared with the permission of the Licensee and was authorized to speak on its behalf.

The Owner testified that he has been involved for 25 years in the entertainment and service industry. He started by delivering pizza in Calgary at age 16, and began bar tending in Alberta at age 18. He worked in the industry from the pizza business to fine dining. He is also a partner in another licensed club in Victoria known as "Sugar". The Owner testified that since he has been in the business in Victoria, there have been no Contravention Notices issued against his clubs, and his businesses had never been cited for overcrowding before.

The Owner testified that a number of changes were made to Touch Lounge when he took it over. The establishment was quite open before, and so a number of elevated areas were created to provide congestion by design. Furniture also created areas of perceived congestion. These were added because a club with a large open area will seem dead to its customers when it is not full. The changes gave Touch Lounge an impression of fullness. When it is at capacity of 400, it feels and appears to be overcrowded.

The Owner testified that the landing area past the coat check is also congested by design as much as possible. For example, there is an area occupied by a large table, 30 seats around the lounge area, a pool table in a raised area, and two ATM machines. There is a pony wall and two steps up to the pool table area. The hallway into the washrooms is as narrow as the building code permits, and it is normal for it to be crowded. There is security at both ends of the hallway to regulate the washroom area, and there are also male and female washroom attendants. The bar area at the end of the hallway nearest to the washroom is where the Lounge's most popular bartender is placed, and it also gives the impression of being very congested. It is not a safety issue as there are exits in the area, as well as a flashing light to show if someone tries to open the door to the outside.

The appearance of congestion is continued by raised areas with alcoves, furniture, and tables. The establishment has the largest DJ area in town, and there is someone employed to control the lighting for the dance floors. The dance floor areas also appear to be congested by design. It is more so on Halloween because some of the costumes worn by patrons are quite large. For example, on one Halloween evening, a patron appeared inside a cardboard box with "kissing booth" written on the side.

The Owner testified that there is more seating and furniture south of the main dance floor to take up space and create the appearance of congestion. Smoking is allowed in an area outside of the red-lined but patrons do not drink there. It is monitored by staff to ensure compliance. There is an "L" shaped booth full of seats in the dance floor area, and there is also a beer dispensary area. The mezzanine has a separate DJ, sound system, and bar.

The Owner testified that he has never seen the establishment over capacity before. Nor has a liquor inspector or police officer conducted a count before the one that was performed on Halloween. The establishment has a history of good relations with police and with the Branch. The Owner testified that the police walk through Touch Lounge every night, and there is regular communication with them.

The Owner testified that, in his experience, it is difficult to count on the dance floors at night because of the lighting that is used there. All of the lighting in Touch Lounge is dark by design. Purple lights are used in the booths to compliment skin but it is dark. The coat check area is well-lighted but most lighting in Touch Lounge is low mood lighting. The main dance floor has three light reflecting balls as well as strobe lights. The lights are intense and cause double imagery, which makes counting virtually impossible. There are three dance areas inside Touch Lounge, and all have strobe lights. As well, the dance floors can empty quickly when the music changes. In a test conducted at the establishment, 125 people left right away when the music changed.

The Owner testified that Touch Lounge scans most of its male customers as part of the Bar Watch program. An employee with two manual counters does a separate count for patrons coming in and out of the establishment. He has found the counts to be accurate, and has never been cited by police or the Branch before. On Halloween there would have been three DJ's changing music, so customers moved in and out of each area. An

accurate manual count would, therefore, require someone at each entrance to avoid double counting. Normally, a manual count of patrons into and out of the establishment is most accurate.

At the entrance to the establishment, there are two lines—one regular line, and one VIP line. There is a staff person on each entrance, and a staff person who only watches the egress of customers. One staff person does ID scanning for the Bar Watch program, and a manager is also involved. A staff person does bag checks for weapons, alcohol, and drugs. Metal detectors are used, and staff pat down all males. There is a policy of a mandatory coat check at the top of the stairs. All items are checked and tagged. It is very common to see a line-up of customers in this area as people are leaving and coming in. It is time consuming to provide coats, and some people need help down the stairs when wearing heels. There is no alcohol allowed in the coat check area but is permitted on the landing as it is within the red-lined area.

The Owner disagreed with the Liquor Inspector that 250 customers would leave Touch Lounge within 15 minutes without being directed to do so, as a group this large would place a burden on the coat check area. Egress can be slower in winter, but as long as Touch Lounge stops serving liquor, the police have never raised an objection.

The Owner testified that there are two managers employed at the establishment: the General Manager and the Manager. The General Manager has many years in the industry. He is “life of the party” type of host. He has been with Touch Lounge four years, and is very reliable. Overcrowding affects him directly as he is minority owner, and would be reprimanded. The Manager has been with the business for 10 years. He started in security and worked up. He rarely drinks and is very level headed. During the day, he works as a carpenter.

In terms of staff training, the Owner testified that all staff are instructed on the contents of the Guide, and need to read it all in conjunction with the policies of the licensee. All staff have the Serving It Right certification or BC Security licensing. In October 2012, there was a question raised about possible over-service when, on a routine inspection, the liquor inspector saw a female patron throwing up in washroom. She was being attended by a staff member at the time. The inspector asked for and reviewed video

surveillance footage, and was satisfied the problem was not caused by the Third Party Operator.

The Owner also introduced several exhibits that reflected staff training procedures. A log book entry for the night of the incident was reflective of records routinely kept by staff. Security personnel carry a flashlight notebook and pen on their shifts. They make notes of any incidents that may occur during the evening whether they are small or large. Staff may stay for up to a half hour after closing to enter data from the evening. The staff working at the door are governed by specific policies relating to their position.

Similarly there is a coat check security protocol, a coat check opening check list, and a bartender manual. All staff are given pop quizzes to make sure they have read the policies of the licensee. The policies include information about the occupancy load numbers applicable to Touch Lounge. Staff meetings are held for purposes of refreshing staff on the policies and attendance is mandatory. Sign in sheets are used to confirm attendance.

The Owner said he was not present on Halloween as he was out of the country. He spoke to the Branch after the Halloween event. The liquor inspector he spoke to advised that the video recording for the evening was not required. There are 20 cameras inside Touch Lounge. He testified that his concerns over a Licence suspension included: loss of revenues, loss of salaries for staff, and loss of business to other clubs in town.

Cross-examination

The Owner acknowledged the policy manual for Touch Lounge did not mention capacities. He said the subject is discussed with staff. He was asked why 250 would not be able to leave the club in 15 minutes, if 125 people left the dance floor after a change of music. The Owner responded that moving from one room to another is different than coat check because it is a bottle neck. The establishment keeps coat check records but the Branch did not ask to see them.

He testified that door staff do not record counts but the ID scanning system will give a close count. As he was out of country when the incident occurred, he did not check these records. The first he heard of the alleged overcrowding was when he received a call from one of his managers on the Halloween evening. The manager told him the

Branch alleged Touch Lounge was overcrowded but he disagreed with that allegation. He told the manager to empty the establishment, and count the patrons out. The Owner testified that he did not preserve the video for Halloween as he was under the impression there was not going to be a contravention finding. He was out of the country and did not see the Contravention Notice dated November 6, 2012.

The Owner testified that the Guide was last reviewed with staff in the past year. Staff review the Guide when they are hired and, when updates are sent by the Branch they are reviewed with staff. The policy of Touch Lounge is to get to capacity as quickly as possible and maintain it there. He did not believe staff were holding the line on Halloween. Instead, customers were trying to get in or waiting. A line-up does not mean Touch Lounge is at capacity because it takes time to check ID, perform bag checks, etc. The entrance is through a four foot side walk into a small room where bag and ID checks occur, so the line-up is mainly all on the street outside.

Manager

The Manager testified that he is the foreman of a cabinet shop during the day and works Fridays and Saturdays and special events at Touch Lounge as head of security. He has been doing this for 8-9 years altogether. His job is to oversee staff and deal with problems that may arise. He spends most of his time outside to make sure the right people get in as part of the Bar Watch program, and to ensure that no intoxicated customers or minors are allowed inside.

The system for counting is primarily by the use of manual counters. As well, there are count sheet records, and an ID swipe for Bar Watch. Once admitted, a customer is clicked in on a manual counter. The manual counter for counting customers out is operated by the VIP checker as this line is less busy. The VIP checker looks at bags, then the customer goes to ID inspection. Police attend Touch Lounge once or twice each evening. There is an excellent relationship with the municipal police force.

It was expected that the police would visit on Halloween, and a visit by liquor inspectors is not unusual. Customers wear costumes and act a bit crazier. There are some bigger outfits such as card board boxes, women dressed as fairies with wings, horse heads and rears, and super heroes. The night was busy but under control.

The line-up outside could be for many reasons such as slow coat check, or some customers trying to get back into the establishment. The Manager kept an eye on the numbers going in and Touch Lounge was definitely not over capacity. His notes for the evening were produced from a book he has maintained over several years. The records are kept for training, for the police, or for dealing with liquor inspectors. The security personnel are also trained to keep records.

The Manager testified that the liquor inspectors entered Touch Lounge at 12:15 a.m. The door count was available to them but it was not requested. The total number inside was around 370 then. The inspectors did not ask that the door persons hold the line at the entrance. He followed them into the establishment to make sure they were not bothered by staff. Security was present on each end of the hallway, and it was crowded at the bar near the male washroom. The crowd moved as he walked through by tapping people on the shoulder. One of the liquor inspectors was not aggressive, so he helped her get through the establishment.

The Manager testified that there were about 23 staff working during the evening. The General Manager got involved because he wanted a secondary count done. The Manager conducted a count and his number was 268. The police arrived at 12:49 a.m. and chatted about what was going on in town. At 12:58 they exited, and nothing was said to him by the police about overcrowding. The inspectors did not tell staff at any time to hold the line during the counts.

The Manager testified that it was not possible for 250 people to leave before the second count. He was on the street, and the police said it was calm and orderly outside. He said the count taken at the entrance is generally more accurate when compared with a manual count inside the establishment. At the entrance, patrons are counted only once, where a manual count inside requires following patrons around where fog and strobe lights make it difficult to count. The door count can be cross-referenced against the ID scanner and also there is a door sheet. The "Serve All" ID scanner counts all of the patrons that come in as it is used mainly to verify ID. No one is allowed to work the door if they are not trained, and all know the permitted loads.

Cross-examination

The Manager stated that as a policy the person capacity of Touch Lounge is kept as one number, and the count of patrons is by manual clickers which are calibrated to zero every day. The VIP line consists of guest list reservations or the staff guest list; they have to wait in line like others. He testified that his personal notes were made from times recorded on the video footage, and were made that evening after Touch Lounge closed. He recalled that his 268 count was made going through the establishment on the same loop as the Liquor Inspector, and included a staff count. He recalled seeing video footage and counting in 26-27 patrons entering into the establishment after the inspectors started their count. He agreed that there were congested areas in the establishment but maintained that there were walk ways through the crowd.

General Manager

The General Manager testified that he deals with all issues in Touch Lounge including bar staff and servers. He was in the establishment when the liquor inspectors attended on Halloween. He recalled that the crowd was normal, like on Saturday or Friday night. Halloween costumes took up a lot of space and made the establishment seem crowded. He walked through the club with one of the liquor inspectors, and she later told him there were more than 500 patrons inside Touch Lounge. The General Manager told her that he did not believe it, and offered to shut down and count the patrons out to get an accurate number. The Liquor Inspector said no because shutting down created a safety issue. Instead, she called the police.

The General Manager did his own count at this point and got 308. The inspectors counted again and got 315. The count included staff. The General Manager testified that in his opinion, 250 patrons could not have left between counts because congestion at the coat check would not allow it. He also maintained that the door count is more accurate because people move around inside the establishment and the three fog machines and strobe lights make counting difficult. The police attended on two occasions and did not suggest the establishment was overcrowded. There was no danger to patrons.

The General Manager testified that there is no financial advantage to allow overcrowding because the bartenders can't keep up with the additional patrons.

Cross-examination

The General Manager testified that he first saw the liquor inspectors at about 12:00 midnight. The Manager was behind them and he followed the group. He did not see any of the inspectors counting. When he was told the count was over capacity, he disagreed and suggested the establishment should be shut down in order to count the patrons out. When this suggestion was rejected, he got a counter from a doorman and counted 305-308 including staff. The count took about 5 to 10 minutes.

He advised that the Branch's Guide was reviewed with staff whenever a new issue was available, usually every three months or so.

SUBMISSIONS – BRANCH

Overcrowding is one of most serious infractions for a licensee because of the danger to the health and safety of occupants. The evidence was the Third Party Operator that operated under the Licence was in excess of person capacity on the Halloween evening in question, and a minimum four day suspension is appropriate in-keeping with the Regulation.

Touch Lounge has a combined person capacity of 400 as set by the City. The evidence of the Liquor Inspector establishes that she attended in the early hours after midnight and counted 525 persons in one of the red-lined areas and 21 in the second. She testified that the crowd was shoulder to shoulder and she had difficulty walking around. She had experienced no such difficulty before in prior visits. After she exited and called the police, she did a second count at about 1:00 a.m., and the count was well below capacity. She was able to move around freely, and her count was 326. Since crowding was no longer a danger, there was no need to shut the establishment down.

The policies of the Licensee do not mention capacity numbers, so there is a question about what instructions are given to staff about maintaining numbers, and what are the consequences for exceeding those numbers? There were no notes of staff meetings in which numbers were discussed. The system to control overcrowding is flawed. One employee counts patrons in while another counts them out. There was no evidence of how they communicate back and forth or who maintains the number of patrons inside. The Liquor Inspector used reasonable care in conducting her count, and there is no suggestion her count was inaccurate, so the recommended penalty should apply.

SUBMISSIONS – LICENSEE

The Licensee representative referred to the NOEA for evidence of the count of the door persons when the liquor inspectors attended on Halloween night. The NOEA confirms that the door staff told the inspectors that their count was 373. The Manager testified that he spoke to door staff and was told it was about 370. The count included staff working inside Touch Lounge.

The Third Party Operator does not challenge the credibility of the Liquor Inspector but says that her accuracy was not as good as that of the door personnel. The evidence established that ingress and egress counters work closely together. The Serve All ID scanner also counts the patrons entering into the establishment.

The Liquor Inspector testified that she is 5 feet 6 inches tall, and was counting in a crowded establishment with only one counter. The Manager testified that she was not moving patrons out of her way. Her results from her count were not as accurate as those of the Third Party Operator. As well, she entered the establishment with a pre-conclusion that it was over capacity.

The nature of the costumes worn on Halloween, and the designed areas of congestion inside Touch Lounge gave an impression that it was overcrowded. There was no safety issue, otherwise the liquor inspectors and police would have acted. There was no evidence the servers inside Touch Lounge were unable to serve their tables because of crowding.

The Liquor Inspector agreed her number was really over 565 if staff and patrons who were outside of the red-lined area were all included. Such a number would reflect a complete abdication of responsibility by the Third Party Operator. This would be contrary to the degree of professionalism shown by them in the operation of the establishment, which is beyond the norm, and the Liquor Inspector agreed that it is a good operator.

The Branch did not accept the offer to count out the patrons for an accurate result. The number obtained in the first count is excessive and does not make sense because the second count was close to the one obtained by the Third Party Operator. This demonstrates that the methodology used in the first count did not result in an accurate number.

The Liquor Inspector testified that she has been to Touch Lounge 12 times before the Halloween visit but did not say she had been there when it was near capacity. The observation she made on Halloween was influenced by the costumes of the patrons, which gave an appearance of overcrowding. As a result, the evidence of the Third Party Operator should be preferred.

There was only one count that demonstrated overcrowding in evidence from the Branch, and it was internally inconsistent. There was no way that Touch Lounge could empty out the number of people to reduce to the second count numbers in the time between counts. Further, there was no reason why people would leave en masse between the first count and later counts when they were not required to leave by the liquor inspectors or by the police.

Touch Lounge is uniquely designed to give an aura of congestion. The Liquor Inspector's count was miles apart from the 373 count of the door persons. She also concluded there were 50 patrons in line, and did not tell the licensee to hold the door. Other patrons were entering and leaving the establishment as her count was being carried out, so the results were inherently inaccurate.

The Licensee representative said that, if there is a finding that Touch Lounge was overcrowded as alleged, it is submitted it acted with due diligence. There is a credible management team in place and an active policy where no one is instructed to bend the rules. Staff are updated on changes to the Guide as these occur. There is no history of non-compliance, and nothing more could be done by the Third Party Operator to protect against overcrowding. There was a door tally kept by staff although it was not requested by the Branch. The evidence established the Third Party Operator is a duly diligent operator.

REASONS AND DECISION

Contravention

Section 20(2)(d) of the Act permits the General Manager of the Branch to suspend all or part of a licensee's licence in accordance with the prescribed Schedule of penalties that are set out in the Regulation. Item 15, Schedule 4 of the Regulation provides for a schedule of penalties when a licensee permits more persons in the licensed establishment than the patron or person capacity set by the General Manger, and the number is more than the occupant load. The penalty for a first contravention (no contravention of the same type within the 12 months preceding the current contravention) is a four to seven day suspension, and/or a \$5,000 - \$7,000 monetary penalty. There is no issue that the alleged overcrowding is a first contravention as defined in the Regulation.

The Branch has the onus of establishing on the balance of probabilities that the contravention of operating in excess of licensed capacity contrary to the Regulation occurred as alleged in the NOEA. The Branch alleges that on November 1, 2012 (business day beginning on October 31, 2012), a routine inspection of the premises of Touch Lounge resulted in an observation that the premises were operating over capacity. It was alleged that two independent counts resulted in a count of 528 persons including staff in the licensed area plus 17 in the unlicensed area, and a count of 521 (not including staff). This exceeded the person capacity and occupant load of the premises, which is set at 400. As a result, the Branch proposed a penalty of a four day suspension of the Licence, the minimum suspension for this kind of contravention under the Regulation.

To begin, only one of the two independent counts conducted at Touch Lounge were introduced in evidence by the Branch. As a result, the reference in the NOEA to two independent counts is not established, and so there is a lack of corroborating evidence to correspond with the count taken by the Liquor Inspector on the evening in question.

The Liquor Inspector testified that, on the Halloween evening in question, she was engaged in routine visits to licensed establishments in the Victoria area in the company of another liquor inspector. They were not responding to any particular complaints at the time, including any complaint of overcrowding. On the way inside Touch Lounge, however, she overheard a patron who was leaving the establishment say that it was very crowded inside. As a result the inspectors were prepared to engage in a count when they entered the establishment.

The Liquor Inspector testified that she had been into the establishment several times before but had not seen it overcrowded. She had, however, never attended there on a Halloween evening before. She testified that she had not seen the establishment as crowded as it was on the evening in question. She testified that she had seen it operating close to capacity before. When she entered, the door staff gave her a count of 373, below the person capacity of 400 patrons and staff.

The Liquor Inspector testified that she told the door staff to hold the line that was waiting outside the establishment. The Manager, however, did not recall a direction to hold the line. The Liquor Inspector agreed she would not be surprised if patrons came inside the establishment during the time when she conducted her count. I accept the evidence of the Manager that the video cameras showed about 26 patrons entering the establishment while the Liquor Inspector conducted her first count.

The Liquor Inspector testified that the crowd inside made movement around the establishment difficult. She had to push her way through the crowd. She agreed that the Halloween costumes being worn by the patrons added to the overall sense of overcrowding. She was, in any event, able to move throughout the establishment to complete her first count despite the crowd inside the establishment. Her count was 521 but she agreed that there were at least 20 persons in the smoking area outside the red-lined area, and she did not count all of the staff. Adding these would make the actual count of patrons and staff inside the establishment closer to 575.

The Liquor Inspector also agreed that people were able to move around the establishment while she conducted her count, so that some patrons may have been counted more than once. I conclude that the lighting and fog machines on the dance floors would have made counting difficult in these areas.

It is significant that the Victoria police walked through the establishment before the liquor inspectors arrived, and did not raise a concern about overcrowding. Nor did they remain at Touch Lounge for more than about 10 minutes when they were called out for a second visit by the liquor inspector. While they may not have been looking for overcrowding on Halloween, it is one of the things that the police will look for when visiting licensed establishments. Moreover, I would anticipate they would have stayed to assist if there was a public safety issue about overcrowding when they were called out a second time.

The second count that was taken by the Liquor Inspector, some 15 minutes after her first count, was similar to the one taken by the General Manager of Touch Lounge. At this point, the counts of the Liquor Inspector and the Third Party Operator were essentially in agreement. In order for the two counts to agree, however, approximately 250 patrons must have left the establishment in the 15 minutes or so between the first and second count of the Liquor Inspector.

There was no direction given to patrons to leave during that time, as the Liquor Inspector declined the suggestion to shut the establishment to count the patrons out because it is not done in Victoria for safety reasons. I agree with the Third Party Operator that it would be unusual for such a large number of patrons to leave at the same time without being directed to do so. The evening was still in full swing, as testified by the numbers of people outside trying to get in. Moreover, Touch Lounge has a mandatory coat check, so the patrons would have to exit using the coat check area. The evidence of the managers of Touch Lounge, that it was not possible for such a number to leave so quickly through the coat check, was not seriously challenged. I accept this evidence and conclude, therefore, that less than this number left between the first and second counts that were conducted by the Liquor Inspector.

There must have been some patrons leaving the establishment, as the Liquor Inspector found that movement inside Touch Lounge was easier when the second count was conducted. I cannot conclude, however, that the first count taken by the Liquor Inspector was accurate, given that there were people coming inside the establishment as others were leaving, and given that it is not disputed by the Liquor Inspector that some guests may have been counted twice. As well, counting would have been difficult on the dance floors with the lights and fog machines, and guests could move around as the count was conducted. It is possible Touch Lounge was overcrowded in excess of the numbers provided by the door staff of the establishment, but without an accurate count I am unable to find that the contravention as alleged by the Branch is proven.

The Third Party Operator testified that two door persons conduct a count using mechanical counters. One counts patrons in and the other counts them out. The Branch alleged the system is flawed, but there is no evidence that it is otherwise an unreliable system. As the Liquor Inspector testified, the Third Party Operator is considered to be a responsible operator. There have been no incidents of overcrowding at the establishment in the past.

The Third Party Operator complained that it was not provided with the NOEA in time to retain the video footage taken inside Touch Lounge on the Halloween night in question. This cuts both ways as there was a timely Contravention Notice served on the Licensee. Service on the Licensee is deemed to be service on the Third Party Operator as well, so there was an opportunity to prepare and retain such evidence before it was overwritten.

The evidence does not establish that there was overcrowding in excess of person capacity of Touch Lounge on the morning of November 1, 2012 (business day of October 31, 2012). I find, therefore, that the alleged contravention as set out in the NOEA is not proven on a balance of probabilities. There is no need to consider the issues of due diligence or penalty.

CONCLUSION

I have found the contravention has not been proven on a balance of probabilities.

Original signed by

A. Paul Devine
General Manager's Delegate

Date: April 29, 2014

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

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