



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: Rooster's Country Cabaret Ltd.
dba Rooster's Country Cabaret
#4 – 19040 Lougheed Highway
Pitt Meadows, BC

Case: EH14-071

For the Licensee: Bert Hick

For the Branch: Peter Mior

General Manager's Delegate: Nerys Poole

Date of Hearing: Written Submissions

Date of Decision: November 25, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Rooster's Country Cabaret Ltd. dba Rooster's Country Cabaret (the "licensee") holds Liquor Primary Licence number 173568 (the "licence") for the operation of its liquor primary establishment located in Pitt Meadows, B.C. The establishment is permitted to sell liquor from 4:00 p.m. to 2:00 a.m. Monday to Saturday and from 4:00 p.m. to midnight on Sundays. Mr. Bert Hick of Rising Tide Consultants Ltd. provided the written submission on behalf of the licensee.

The person capacity on the licence is 350 persons, which includes the patio area and all patrons and staff. The building occupant load for the establishment is 398 persons.

The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (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 dated July 4, 2014 (the "NOEA"). The branch alleges that on Saturday, June 14, 2014 (business day of Friday, June 13, 2014), the Licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (the "Regulation") by overcrowding beyond person capacity less than or equal to occupant load.

The proposed penalty is a two day suspension in accordance with Schedule 4 of the *Regulation*. Item 14 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of one to three days and/or a monetary penalty of \$1,000 to \$3,000.

The licensee has agreed to a hearing by way of written submissions. The licensee indicated to the branch that it does not dispute the contravention nor is it pursuing a defence of due diligence. The licensee disputes the proposed penalty. The licensee asks that the proposed suspension of two days be replaced with a monetary penalty of \$1,000 to \$3,000.

RELEVANT STATUTORY PROVISIONS

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

"**occupant load**", in relation to an establishment or event site, means the lesser of the following:

- (a) the maximum number of persons allowed in the establishment or event site under Provincial building regulations;
- (b) the maximum number of persons allowed in the establishment or event site under the *Fire Services Act* and British Columbia Fire Code Regulation;
- (c) the maximum number of persons allowed in the establishment or event site under 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;

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

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.

...

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

ISSUES

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

EXHIBITS

- Exhibit 1: Branch Book of Documents, tabs 1 to 14.
Exhibit 2: Licensee's written submission with attachments.

FACTS

The following facts are set out in the NOEA.

At 12:20 a.m. on June 14, 2014, a multi-agency team composed of a member of the Ridge Meadows RCMP (the "first RCMP officer"), a bylaw services officer from the City of Pitt Meadows (the "bylaw officer") and a branch liquor inspector (the "liquor inspector") attended the establishment. Upon arrival, they noted a second RCMP member (the "second RCMP officer") on site.

The liquor inspector spoke to the doorman/security guard (the "first doorman") stationed outside the establishment and requested a count be made. The first doorman stated someone else was doing a count and went inside to inquire. He returned soon after and advised that the count in the establishment was 400. The staff person who was in charge of conducting this count (the "second doorman") was stationed immediately inside the main entrance and was using two mechanical counters to maintain the count: one for patrons entering the establishment and the other for patrons exiting the establishment.

The liquor inspector instructed the two doormen to ensure that patrons not enter or exit as she would be conducting a count. She asked the second RCMP officer to monitor the entrance to ensure patrons did not enter or exit the establishment while the count was being conducted. The liquor inspector, the first RCMP officer, and the bylaw officer then entered the establishment. Both RCMP officers observed that, while the team was entering the establishment to organize the count, several patrons were leaving the establishment.

The liquor inspector and the bylaw officer conducted two counts with mechanical counters. The liquor inspector's counts were 390 and 378 and did not include any staff. The bylaw officer's counts were 435 and 364. The liquor inspector noted that, while conducting the count, she had considerable difficulty walking through the establishment without bumping into patrons and pushing her way through. She also noted that patrons were moving within the licensed areas between the main area and the patio, to and from the washrooms, between tables, and to and from the dance floor. Both the first RCMP officer and the bylaw officer made observations similar to the liquor inspector's in their notes.

While she was conducting the second count, the liquor inspector noted that patrons were crowding around the main entrance and attempting to exit. They were expressing frustration at not being allowed to exit. The first RCMP officer overheard some patrons advising other patrons to exit through the patio. The liquor inspector encountered a principal of the corporate licensee (the "manager") near the women's restroom entrance and advised him that the establishment was overcrowded. The liquor inspector asked the manager if patrons were being allowed to exit via the patio despite her instructions to the contrary. The manager's response was that an alarm would sound if the patio door were opened. The liquor inspector, the first RCMP officer, and a security staff member went to test the alarm. When they opened the patio door, the alarm did not sound. At that point, a staff member turned on a switch located by the upper bar and the alarm bell then sounded.

The liquor inspector spoke to the second doorman at approximately 12:54 a.m. The second doorman advised her that the count at the time was 551 entering and 205 exiting (equalling 346 in the establishment). She then inquired about his original count when the multi-agency team first arrived. He stated it was approximately 350 and that approximately 15 patrons had exited the establishment since then. These patrons left despite the specific instructions from the liquor inspector not to allow any entries or exits. The liquor inspector then informed the second doorman that he had initially told them that his count upon their arrival was 400. He then stated that he was not aware the capacity was 350 and that he was using 398 as the capacity and that he had not been informed otherwise. He stated that he had worked at the establishment for about one year.

The liquor inspector informed the doormen on duty about a discussion she had held about two weeks prior to this incident. At the time, she had explained the licensed capacity to the security staff member on duty that night, later confirmed to be the night of May 15, 2014. The security staff member on duty at that time was unaware of the licensed capacity. She showed him the licence posted beside the entrance and discussed the details of the licence.

She asked the security staff on duty on June 14, 2014 if they were aware of the discussion she had had with the security staff on this previous visit. The security staff told her they were unaware of this discussion and issues raised at that time. They stated further that no one had informed them that the licensed capacity was 350; they all believed it to be 398. She then pointed to the licence posted at the front entrance.

While the liquor inspector was speaking with the security staff, she saw several patrons enter the establishment. She reminded the second doorman that no one was allowed to enter as they were already overcrowded and must lower the capacity before allowing more patrons to come in.

The liquor inspector and the bylaw officer left the establishment at approximately 1:50 a.m. Prior to leaving, the liquor inspector informed the manager that she would be sending him a contravention notice for overcrowding. On June 17, 2014, the liquor inspector delivered the contravention notice to the manager, who signed for receipt of

the notice. She discussed the circumstances of the inspection that occurred on June 14, 2014 and the penalty consequences. She requested the licensee meet with her the following week to discuss issues of concern identified during the inspection.

SUBMISSIONS – BRANCH

The NOEA provides reasons for the enforcement action and reasons for the proposed penalty. Licensees that exceed their capacity by overcrowding are operating contrary to the public interest. Specifically, they are operating contrary to the principles of public safety and community standards.

In the NOEA, the branch submits that the proposed suspension of two days is warranted given the particular circumstances of the incident, which include:

- Overcrowding is a major public safety violation.
- The licensee has held this licence for approximately 18 years.
- There have been three identified incidents of overcrowding.
- The liquor inspector spoke to staff on duty on May 15, 2014, to remind them of the licensed capacity and occupant load requirements.
- Staff members in charge of maintaining the count on June 14, 2014 were not aware of the licensed capacity and stated they were never told the requirement.
- The liquor licence is posted immediately inside the main entrance where door staff are stationed.

SUBMISSIONS – LICENSEE

The licensee admits the contravention and has made a written submission on penalty. The licensee advised the branch that it was selecting the option of a written submission hearing, which was described in the branch's July 11, 2014 letter to the licensee: "The penalty-only written submissions hearing includes all of the following elements: the licensee admits that it contravened as alleged in the NOEA; the licensee is not pursuing a due diligence defence to the contravention; the licensee only disputes the proposed enforcement action (penalty)."

In its written submission (Exhibit 2), the licensee disputes the accuracy and some statements contained in the NOEA. The licensee also disputes the proposed enforcement action of a two day suspension. The licensee requests that I replace the two day suspension with a monetary of penalty of \$1,000 to \$3,000.

The licensee admits that it was over its person capacity of 350 persons as stated on the liquor licence, but says at no time was it over the occupant load capacity. The licensee attached a copy of the current occupant load certificate for the establishment, which sets the person capacity for the occupant load at 398 persons. The licensee points out that public health and safety were not at risk at any time.

The licensee disagrees with the statement in the NOEA about the RCMP officer saying that the alarm did not sound when staff first opened the patio door. The licensee's recollection is that the alarm did sound and that the RCMP officer's comment to the manager standing nearby was something about the alarm working.

The licensee points out that it has operated for the past eight years without any incidents or enforcement action and says this is a positive record for a night club type establishment that caters to the 19 to 35 age bracket.

The licensee also notes that the licensee founded BarWatch in the community and has been a very active participant in the organization. The licensee has always promoted and advocated for a close working relationship between liquor primary licensees, the local fire authorities, the police, and liquor branch officials.

The licensee submits that the proposed two day suspension will have a severe impact on the individual employees of the establishment, whether they are servers, bartenders or security, as they will all lose two days of wages.

After the contravention on June 14, 2014, the licensee attended an enforcement meeting on July 10, 2014, at the branch office in Surrey. The licensee attached notes from that meeting showing items discussed and proposed courses of action. The licensee invited the liquor inspector to attend a meeting with all of its staff including bartenders, servers, security staff, and management to give a presentation on the branch's concerns

and expectations. The liquor inspector attended this meeting on September 9, 2014. Since the incident, the licensee has prepared a comprehensive Policy and Procedures Manual for both managers and staff who are required to read and sign each page to indicate they have read the manual (copy of the table of contents attached to the submission in Exhibit 2).

The licensee submits that I should recognize the cooperation of the licensee with the liquor inspector and the initiatives taken by the licensee to have her meet with their staff, as well as the preparation of the manual, done at a significant cost to the licensee. The licensee submits that it has taken the initiative with respect to voluntary compliance and refers to the branch's primary goal which is to achieve voluntary compliance.

The licensee further notes the recommendation of the Liquor Policy Review report about the need for Government to review enforcement penalties of the branch and other jurisdictions to ensure that B.C.'s penalty levels are appropriate. The licensee believes that this recommendation is a result of submissions that fines be implemented as a penalty in place of suspensions.

The licensee submits a decision of the General Manager (*Javce Management Ltd. dba Patron Tacos & Cantina*, EH13-171, decision dated March 14, 2014) to support a monetary penalty in place of the two day suspension.

The licensee concludes with its request that I impose a monetary penalty in lieu of the suspension.

REASONS AND DECISION

Contravention

The licensee admits the contravention occurred. I, therefore, find that the licensee contravened section 6(4) of the *Regulation* on June 14, 2014, by overcrowding beyond the person capacity as set by its liquor primary licence.

Due Diligence

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

The licensee has not presented any evidence to demonstrate due diligence nor has it raised a defence of due diligence. By agreeing to a written submission hearing, the licensee agreed not to pursue a due diligence defence to the contravention. I, therefore, find that the licensee has not established due diligence and I turn now to the question of penalty.

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 NOEA. 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.

Is a penalty warranted?

The consequences of overcrowding in a licensed establishment can be serious. It can lead to control and safety problems inside the establishment and to disturbances and other problems within the community at closing. Overcrowding also makes it difficult for a licensee to ensure compliance with other laws, such as preventing minors from consuming and removing intoxicated patrons.

Overcrowding beyond the person capacity as set by the licence attracts a lesser penalty than overcrowding beyond the occupant load. This is reflected in the penalty schedule. Item 15 of Schedule 4 of the *Regulation* sets a penalty of four to seven days suspension and/or a monetary penalty of \$5,000 to \$7,000 for overcrowding beyond the occupant load. Item 14 sets the lesser penalty of one to three days suspension and/or \$1,000 to \$3,000 for overcrowding beyond the licensed person capacity.

I agree with the licensee that overcrowding beyond occupant load is a more serious contravention, as demonstrated in the penalty schedule. However, overcrowding beyond person capacity can create negative impacts in a community, such as parking problems, late night disturbances, and traffic issues. Overcrowding beyond person capacity in a nightclub-type establishment that is open six days a week until 2:00 a.m. can aggravate these impacts on the neighbourhood, with patrons leaving at a late hour. The person capacity on a licence reflects community input and standards and is intended to reduce these effects on the local neighbourhood.

The facts as set out in the NOEA demonstrate that the licensee failed in its responsibility to train its staff about the basic rules of its licence; in particular, the licensed person capacity of the premises. None of the security doormen were aware that the occupant load was different from the person capacity of the licence. The first doorman thought his count of 400 was only two over the capacity for the establishment and indicated to the liquor inspector that he had not been told otherwise. The liquor licence showing the allowable person capacity of 350 was posted just inside the entrance; the security door staff seemed unaware of this. In addition, the staff did not react promptly to the instructions from the RCMP members and the liquor inspector to not allow patrons to enter or to exit while they were conducting the counts.

Because of these circumstances and the admission of the licensee that a penalty is warranted, I find that a penalty is warranted here to remind this and other licensees of their responsibilities to prevent overcrowding and to encourage future voluntary compliance.

Suspension or monetary penalty?

The licensee does not dispute that a penalty is warranted and requests that the recommended two day suspension be changed to a monetary penalty. Having found that a penalty is warranted, I must apply at least the minimum penalty in the Schedule.

The licensee says that a two day suspension of the licence is excessive and unreasonable given the circumstances of the contravention and follow up actions of the licensee. In its submission on requesting a change in the penalty, the licensee disputes a fact in the NOEA. The licensee submits that the alarm bell sounded when the patio door was opened. By agreeing to a written submissions hearing, the licensee agreed to accept the facts as set out in the NOEA. Without hearing directly from witnesses giving live testimony, I have no way of judging what happened with the alarm and whether it was working or not. The licensee's representative is aware that by choosing a hearing by way of written submissions, the licensee is accepting the facts as set out in the NOEA. Nevertheless, I have not relied on this fact (whether the alarm sounded or not) to draw conclusions about the appropriateness of the penalty here.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

In the present case, I rely on the following to determine the appropriateness of the recommended penalty:

- The conversation about licensed capacity between the liquor inspector and security staff on May 15, 2014, only a month before the incident
- The failure of the licensee to adequately train its staff about the licensed capacity

- The extent of the overcrowding and its negative effect on the surrounding neighbourhood

I am giving very little weight to the licensee's previous overcrowding contraventions, given that they occurred over nine years ago.

The licensee submits that in many establishments the licensed person capacity is the same as the occupant load. The licensee asks that I consider this fact, as at no time were public health and safety in jeopardy. As noted above, overcrowding beyond the occupant load attracts a greater penalty because it is a more serious public safety issue. The lesser penalty set for the contravention of overcrowding beyond person capacity clearly reflects this. Furthermore, I do not agree that public safety was not at risk here. The establishment was very crowded, with very little room to move amongst the patrons, as noted by the liquor inspector in the NOEA. Exceeding person capacity that is not over the occupant load may affect public safety and patron well-being, and most certainly, ignores the impacts of this overcrowding on the neighbourhood.

The licensee requests that I consider the fact that the licensee attended an enforcement meeting with the liquor inspector on July 10, 2014 to discuss the incident on June 14, 2014. The licensee points to its willingness to ensure its staff are better trained on the issue of overcrowding and to its review of its policies, with the subsequent introduction of a Policy and Procedures Manual.

I commend the licensee for taking the initiative with the liquor inspector to achieve voluntary compliance. However, "after the fact" efforts to improve its policies, although a hoped for result of any contravention notices, do not relieve a licensee of a penalty for a contravention.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences and to train their staff accordingly. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

The licensee submits that I should consider a recommendation from the Liquor Policy Review report about the need for Government to review enforcement penalties in other jurisdictions to ensure that B.C.'s penalty levels are appropriate. The licensee believes that this recommendation is a result of submissions that fines be implemented as a penalty in place of suspensions. This may be the licensee's belief but this is not something I can consider when determining appropriate penalties under the existing legislation. The Schedule allows for suspensions and/or monetary penalties. The branch here has recommended a two day suspension, based on the existing Schedule. Until a change is made to existing legislation, I am obliged to follow the current regulatory regime, which includes the penalty schedule in the *Regulation*, and provides for either a suspension and/or a monetary penalty. I do not accept the licensee's submission that I am able to give preference to a monetary penalty because of the licensee's belief that the British Columbia government may at some point implement monetary penalties only.

The licensee provides a decision of the General Manager to support its argument that I should replace the recommended suspension with a monetary penalty. First of all, decisions of the General Manager are fact specific and are not binding. Secondly, in the decision submitted by the licensee, the branch recommendation was for a \$5,000 monetary penalty for a contravention of overcrowding beyond the occupant load. The General Manager's delegate followed this recommendation in the decision.

In its argument for a monetary penalty over a suspension, the licensee says that a suspension will have a severe impact on all the employees of the licensee, as they will lose two days' wages. A licensee has the option of paying its employees during the period of suspension. I find that the public and other licensees may view a monetary penalty as the cost of doing business, while a suspension is a public notice to the licensee, the community, the public at large, and other licensees of the seriousness of the contravention. In particular, when the contravention is one that ignored community input or standards with respect to the person capacity of the establishment, it is important for the community to see that enforcement action is being taken to encourage all licensees to comply with the terms and conditions of its licence.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 14 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of one to three days and/or a monetary penalty of \$1,000 to \$3,000.

I conclude that the proposed penalty of a two day suspension is reasonable and appropriate in all the circumstances of this contravention.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence number 173568 for a period of two days to commence at the close of business on Thursday, January 8, 2015 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 Ridge Meadows RCMP detachment from the close of business on Thursday, January 8, 2015 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

Nerys Poole
General Manager's Delegate

Date: November 25, 2014

cc: Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Rupi Gill, A/Regional Manager

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