LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: Powerhouse Corporation o/a (to be determined) v. Registrar of Alcohol, Gaming and Racing, 2017 ONLAT LLA 10349

Date: 2018-08-20
File Number: 10349/LLA

Appeal from a Notice of Proposal to Review an Application for a Licence of the Registrar of Alcohol, Gaming and Racing under the *Liquor Licence Act*

Between:

Powerhouse Corporation

Appellant

and

Registrar of Alcohol, Gaming and Racing

Respondent

and

Toronto Island Noise Committee, Queen City Yacht Club, the City of Toronto, and York Quay Neighbourhood Association

Added Parties/Objectors

REASONS FOR DECISION AND ORDER

Adjudicator: D. Gregory Flude, Vice-Chair
Harinder Gahir, Vice-Chair
Sandeep Johal, Member

Appearances:

For the Appellant:	Richard E. Kulis, Counsel
For the Respondent:	Tamara Brooks and Rena Khan, Counsel
For TINC:	Robert G. Tanner
For the City:	Mark Crawford and Ellen Penner, Counsel
For YQNA:	Ed Hore, Counsel

Heard in Toronto: March 20, 21, 30, 31, June, 12, 14, 16, 19, 21, 27 and 29, September 25, 27, 29, November 1, 3 and 20, 2017

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OVERVIEW:

[1] The appellant, Powerhouse Corporation, has applied for a licence to sell alcohol at 11 Polson Street in Toronto. There were several objections to the application, including objections by the added parties, Toronto Island Noise Committee and Queen City Yacht Club (TINC), the City of Toronto (City), and York Quay Neighbourhood Association (YQNA). The Registrar issued a Notice of Proposal to Review an Application. The appellant appealed that Notice to this Tribunal and the matter proceeded to a hearing.

[2] There has been a licensed establishment at the premises since the mid-1990s. In its current configuration it has an indoor area licensed for 3,735 people called Rebel. It also has an outdoor area licensed for 2,510 people called Cabana Pool Bar. Although originally this application placed no capacity limits on the licence other than those mandated by fire and building code regulations, the appellant now seeks to limit the increase in indoor capacity to 830 more than the current number and to increase in outdoor capacity by 1,000. Total fire and building code capacity is approximately 15,500 in total for both parts of the premises so the reduced total capacity the appellant is seeking is approximately 8,000.

[3] By issuing a Notice of Proposal to Review an Application rather than its counterpart, a Notice of Proposal to Refuse an Application, the Registrar indicates that he takes no position concerning the issuance of the licence to the appellant for these premises. The Registrar does take a position on conditions that we may attach to the licence should we decide in favour of the appellant.

[4] The *Liquor Licence Act*, R.S.O. 1990 c. L 19 (the "Act"), creates a qualified right to a liquor sales licence. A licence may be denied on a number of listed grounds including concerns about the financial fitness of the licensee, the ability of the proposed licensee to operate the business in accordance with the law and to keep control of the premises, or that the licensee has made a false statement in the application for a licence.[1] The Registrar could have, but did not raise any of these grounds in issuing the Notice of Proposal to Review. He invoked only the provision relating to the public interest having regards to the needs and wishes of the residents of the municipality in which the licensee will operate: in this case, the City of Toronto.

[5] The Registrar submits that he has considered the other enumerated grounds and determined that they are not a bar to the issuance of a licence. In the Registrar's submission this consideration is part of the administrative authority of the Registrar and the choice of proceeding is in his discretion and not subject to review by us. The added party/objectors argue that all of the enumerated factors in s. 6(2) may be considered in determining the public interest. We agree with the Registrar's position. By specifically enumerating other grounds in s. 6(2), the Legislature has removed

[1] Subsections 6(2)(a) to (g.1) of the Act

them from the public interest analysis. The public interest analysis is focused on the impact of the licensed premises on the local municipality.

PROCEDURAL HISTORY:

[6] The premises were originally operated as The Docks by Cherry (The Docks). The Docks ran into regulatory problems arising out of noise complaints that initially led to the revocation of its licence by the then Alcohol and Gaming Commission of Ontario, ("AGCO"). Following an appeal to the Divisional Court and negotiations with TINC about conditions on the licence, a new organization, Sound Academy, took over the premises in 2008. The licence issued to Sound Academy had consent conditions attached that brought the litigation to an end and permitted continued operation of the premises.

[7] In and around 2013, Sound Academy transferred its licence to Maya Corp. Maya Corp. brought a proceeding under s. 14 of the Act to remove or vary the conditions it had inherited. It abandoned that proceeding just before it was scheduled to be heard in March 2015 and continues to operate the premises under the current licence and attached conditions to this day. The appellant was incorporated in January 2015. It is 75% owned by Maya Corp and 25% owned by another investor. It applied for a licence to operate the premises in 2015 with less restrictive conditions than those on the current licence.

[8] The Registrar initially refused to process the application, taking the position that the proper route for the appellant to take was to have Maya Corp. transfer its licence to the appellant. Following a decision of the Divisional Court in 2016 holding that the Registrar's refusal exceeded his authority under the Act,[2] the Registrar processed the licence application, received objections and issued a Notice of Proposal to Review an Application.

ADDED PARTIES' POSITION:

[9] The added party objectors take great exception to the issuance of a licence to the appellant. They do so on two grounds. The first ground is procedural. In their view, the appellant's actions are an attempt to circumvent the provisions of the Act relating to the amendment or removal of conditions. These provisions would place an onus on the appellant to show a change of circumstances since 2008 when the current consent conditions were negotiated. The current procedure shifts the onus to the objectors to show that the licence is not in the public interest. The second ground is that the licence the appellant seeks, with increased capacity and fewer restrictions

[2] *Powerhouse v Registrar of Alcohol and Gaming*, 2016 ONSC 2549 (CanLII)

than the current conditions, is not in the public interest having regard to the needs and wishes of the residents of the municipality.

[10] In opening remarks, the objectors took the position that the issue of the increase of indoor capacity at Rebel was not as contentious as the increase at the Cabana Pool Bar. As the hearing progressed this position became less flexible and in their closing submissions they argue that the indoor capacity should not be increased. They relied on two tragic events that occurred between December 2016 and the conclusion of the hearing: a young woman died from a drug overdose at the premises and a double homicide occurred outside the premises where patrons leaving the premises were murdered in the parking lot.[3] They also pointed to an altercation inside the premises where a security guard allegedly committed an unprovoked assault on a patron.

INITIAL CONCLUSIONS

[11] Having reviewed the Act and regulations, we are of the view that the public interest as that term is used in s. 6(2)(h) of the Act must be interpreted contextually. In the context of the applicable subsection, it is our view that it does not extend so far as to include consideration of the application process on the basis that the current licence holder and majority shareholder of the appellant, Maya Corp., had another route available to it to address conditions on its licence.

[12] In addition to our finding that the public interest enquiry does not include an enquiry into the ability of this management group to manage the premises, we are not persuaded that the incidents cited above at Rebel indicate that the present permitted number of patrons in Rebel is unmanageable or the conditions are unsafe. We are prepared to issue a licence to the appellant for the requested indoor capacity of 4,565. This is an increase of 830 over the current licence.

[13] With respect to the request to increase capacity at the Cabana Pool Bar with increased hours when music is permitted, we are of the view that it is not in the public interest. We note that the current conditions under which the Cabana Pool Bar is operated and the interpretation of them by Maya Corp detrimentally impacts the lives of the residents of the Toronto Island community. The impact is such that we cannot see that a liberalization of those conditions is in the public interest. Indeed, we are of the view that the current terms need revision to ensure that those detrimental impacts are addressed and improved.

[3] As will be discussed later, the parking lot is not owned or controlled by the appellant or Maya Corp.

ISSUES AND RESULTS:

[14] There is one overriding issue: Is the licence in the public interest? That issue may be further broken down into three components. While the parties each use different language in framing the issues, we have identified them as follows:

a) Should we direct the registrar to refuse to issue a licence as not being in the public interest because, by applying for a new licence, rather than applying to remove conditions, the appellant and Maya Corp. are attempting to evade the public interest protections established in the Act?

b) Is it in the public interest to direct the Registrar to issue a licence for the Cabana Pool Bar permitting a capacity of 3,500 patrons and outdoor amplified sound between 11:00 a.m. and 11:00 p.m. Sunday to Thursday and 11:00 a.m. to 2:00 a.m. on Friday and Saturday as well as the Sunday before a holiday Monday?

c) Is it in the public interest to direct the Registrar to issue a licence to the appellant for Rebel for a capacity of 4,565?

[15] In our view the first issue is essentially one of process. It is a legal question that does not require us to consider extensive evidence. The second issue may be characterized as a pure public interest question. It requires an examination of the impact that the proposed licence may have on the community in which the appellant operates.

[16] We heard very little evidence regarding the capacity of Rebel. What evidence we heard largely went to the question of the failure of Maya Corp. to control the premises. It was open to the Registrar to issue a Notice of Proposal to Refuse an Application for Licence because of concerns about the relationship between Maya Corp. and the appellant and the common management team. The Registrar did not invoke that procedure, taking the position that he has no concerns about the ability of the appellant to operate the premises. In our view, the question of Maya Corp.'s past behaviour has been specifically removed from our consideration by the Registrar's choice of proceeding.

[17] There is a role for us to examine certain aspects of the historical operation of the premises. This proceeding is unique in that it is the first where the premises are currently licensed, there is no disciplinary action to revoke that licence, yet the applicant seeks a totally new licence. Aspects of the history of the operation of the premises can provide us with valuable insight into the effectiveness of proposed conditions and lead us to a fuller understanding of the public interest in granting this licence.

PUBLIC INTEREST AND PROCESS:

[18] The objectors argue that the term “public interest” should be given a large and liberal interpretation that should include our ability to reject the current licence on the basis that it circumvents the change of conditions provisions set out in s. 14(2) of the Act. With respect, we do not agree. We are of the view that the structure of the Act is such that the term “public interest” is qualified by the balance of s. 6(2)(h). When the full wording of s. 6(2)(h) is read in the context of the other provisions of s. 6(2) and in accordance with the scheme of the Act, it is clear the term “public interest” is used to focus our attention on the need to balance the appellant’s qualified right to a licence against the needs and wishes of the residents of the municipality. This interpretation has been the basis for the tribunal’s analysis of the public interest in another case cited to us by the added parties in their materials.

[19] In *Matador Corp. (c.o.b. Matador Ballroom) (Re)* [2015] O.L.A.T.D. No. 265 (the “*Matador*”) the Tribunal identified the public interest as follows:

> In determining whether or not a licence is in the public interest, the Tribunal must balance the interests of all the community residents and those of the Appellant. The Appellant has a qualified right to a licence, and therefore the onus is on the objectors to establish, on a balance of probabilities, that the issuance of a licence is not in the public interest.

[20] The undisputed facts giving rise to this issue flow from the negotiated settlement between Sound Academy and TINC in 2008 when the current licence conditions were agreed. Section 14(2) of the Act sets out a mechanism by which a licensee may seek to have conditions removed. The key provision of s. 14(2) is that in order to remove conditions on a licence, the licensee must show there has been a change of circumstances.

[21] In 2015, Maya Corp. invoked the provisions of s. 14 and applied to the Tribunal to remove some of the conditions on its licence. The added parties were put on notice of the application and raised objections. The matter was scheduled for a hearing in mid-March 2015 but several days before the hearing was to start, Maya Corp. withdrew its application. The appellant then applied for the new licence that is the subject of this appeal.

[22] Initially, the Registrar refused to process the appellant’s application. He took the position that the appellant could not apply for a licence for premises that were currently licensed. The appellant sought judicial review of that decision. In the judicial review application, the Registrar argued that it was not in the public interest to permit the application to proceed. The added parties have adopted those

arguments before us and rely in large part on the Registrar's factum from the judicial review proceeding.

[23] The public interest argument put forward by the Registrar at the Divisional Court hearing addressed the various interrelated provisions of the Act concerning licence applications, applications to change conditions and the ban on making a new application within a certain time following the denial of licence. The Registrar argued these provisions and public interest protections are rendered ineffective if a licensee can simply incorporate a closely related company and the new company can apply afresh for a new licence. The Divisional Court did not disagree with the position taken by the Registrar but ultimately found that the Registrar had exceeded his authority under the Act. At paragraph 54 of the decision,[4] the court stated:

> While I do not disagree with the Registrar's assessment that Powerhouse, Maya and PPEI's actions in proceeding as they have are contrary to the public interest, I do not agree that the Registrar's decision to refuse Powerhouse's application was reasonable as that standard has been defined. The authority for the Registrar to refuse Powerhouse's application must come from the Act. The authority to refuse an application in the public interest is set out in s. 6(2)(h) of the Act. The wording of the Act is clear. In order to refuse an application based on s. 6(2)(h), the Registrar must issue a proposal to refuse the application (s. 8(4)(b.1)). By not doing so and simply refusing the application outright, the Registrar exceeded its authority under the Act.

[24] Our authority in considering this appeal from the notice issued by the Registrar is set out in ss. 23(10) and (12) of the Act. Following a hearing of an appeal from this proposal to review an application, we may direct the Registrar to issue the licence or to refuse to issue the licence. Subsection 23(12) permits us to attach conditions to the licence if we direct the Registrar to issue it.

[25] Subsection 23(11) deals with all other types of notice the Registrar may issue and gives the Tribunal further powers to approve a proposal in whole or in part. Reading these provisions together, it is clear that our authority to craft a remedy is defined by the process invoked by the Registrar. In the current case, our authority is limited to determining the public interest as that term is qualified by s. 6(2)(h).

[26] Section 6(2) of the Act creates a presumptive right to a licence subject to several exceptions. Subsection (h) is the applicable subsection in this appeal. The section states that "an applicant is entitled to be issued a licence to sell liquor except if:"

[4] *Powerhouse v Registrar of Alcohol and Gaming*, 2016 ONSC 2549 (CanLII)

> (h) the licence is not in the public interest having regard to the needs and wishes of the residents of the municipality in which the premises are located.

[27] The use of the words “public interest” in this subsection does not give us a mandate to embark on a far-reaching consideration of the public interest as a general concept. The added parties point to the statement made by the court to the effect that the court did not disagree that the appellant’s chosen method of proceeding is against the public interest, but we are of the view that the way the court is using the term is not the test that we must apply. The court’s words are not critical to its ultimate decision that the Registrar, and by extension, this Tribunal, can only act pursuant to the authority granted by s. 6(2)(h).

[28] In our view the court is expressing a concern that, notwithstanding that there is a process for removing conditions on a licence that assigns the onus to the applicant, that process can be circumvented by the simple expedient of forming a new closely related corporation and applying for a new licence. The Registrar argued, and the court did not disagree, that this procedure did not reflect the policy of the Act when dealing with conditions. The problem, then, is in the way the Act is drafted to permit the policy to be circumvented. It is up to the Legislature to decide if changes to the legislation are necessary to address this situation. We are bound to apply the Act as written.

[29] Support for a contextual approach to the application of the public interest test in statutory settings is found in *Ontario Historical Society (Re)* [2007] O.L.A.T.D. No. 61 The case involved an application to close a cemetery. In the applicable legislation, closing cemeteries involved the removal and re-interment of any human remains with the land being returned to normal use. The legislation provided only one criterion for cemetery closure, that it be in the public interest to do so. At paragraph 71, the Tribunal stated:

> The term, "public interest" was first considered by this Tribunal in the Clendennen matter. While the test is *obiter dicta*, this Tribunal finds that it is a useful guide. It is set out as follows:
>
> > From the foregoing, it is clear that the term "public interest" is not a term that has a fixed definition in law and does not have the same meaning across various statutes in which the term appears. Where "public interest" must be determined under a particular statute, the term's meaning is determined by the context, objects, and purposes of the statute in which the term is found and means the best possible accommodation of all interests contemplated by that statute, whether or not those interests are individually represented at a hearing under that statute.

[30] Section 6(2)(h) focusses our enquiry on the public interest as it relates to the impact of the licence on the residents of the local municipality and not on the process by which the appeal ended up before us.

GENERAL EVIDENCE ISSUES:

[31] We heard from over 20 witnesses for the added parties, most of whom were residents of the Toronto Island community or the mainland adjacent to the Inner Harbour. We did not hear from any residents in favour of the appellant. Its witnesses were restricted to managers of Maya Corp. who will also have a role in the appellant if it is licensed and employees and contractors of Maya Corp. The added parties urge on us the proposition that, absent evidence in support of the application from residents of the municipality, based on the wording of s. 6(2)(h), the application must fail. In their view, we have heard a clear statement of the "needs and wishes of the residents of the municipality" with nothing to contradict it.

[32] The added parties also point to the resolution of the Toronto City Council opposing the issuance of the licence. According to s. 7.1 of R.R.O 1990, the Registrar is to consider such a resolution as proof of the needs and wishes of the residents of the municipality. The added parties argue that the only evidence before us of the needs and wishes of the residents of the municipality indicates that they do not want this licence to be issued and, thus, they have satisfied the public interest test.

[33] The appellant points to a broader concept of the needs and wishes of the residents of the municipality. It points to the evidence of the success of Maya Corp. in attracting thousands of patrons to its events in support of its position that the residents of the municipality are in favour of the licence. The appellant argues that the municipality in this case extends further than the immediate environs of the Inner Harbour and Island community to the whole of the City of Toronto.

[34] The appellant also argues that s. 7.1 of the regulation is procedural and not substantive and relies on a decision of the Divisional Court in support.[5] Essentially it argues that the provision was created to address the situation where no residents objected. In this case, residents having objected, no weight should be given to the resolution. We are not persuaded that the distinction between a procedural or a substantive interpretation is important. The regulation provides that if there is no evidence to the contrary, then a municipal council resolution is proof of the needs and wishes of the residents. In this case, Toronto City Council issued a resolution opposing the licence. However, Maya Corp. argues that the fact that thousands of

[5] *Barracuda Entertainment Inc. v. City of Toronto* (unreported, 1996) appeal to Court of Appeal dismissed [1996] O.J. No. 908

people flock to its events constitutes evidence contrary to Toronto City Council's resolution.

[35] We agree with the appellant that the success of its events is evidence that a substantial number of community members support the operation on Polson Street. The *Ontario Historical Society* case states, and we accept, that the concept of the public includes a consideration of even unrepresented interests: "Public interest" […] means the best possible accommodation of all interests contemplated by that statute, whether or not those interests are individually represented at a hearing."

[36] We also agree with the appellant that determining the needs and wishes of the community is not determinative of the public interest without further enquiry. This question was addressed by the Tribunal in the *Matador* decision:

> In assessing the needs and wishes of the residents, the Tribunal must consider the totality of the evidence to determine if their concerns are *bona fide*, which includes determining whether these concerns are supported on a valid and objective basis.

[37] We must look at the objections and concerns raised and balance them against the appellant's qualified right to a licence. Sometimes this balancing may result in the denial of a licence; sometimes it may result in a licence with or without conditions.

[38] The evidence we heard from the witnesses was not as universally against the issuance of a licence to the appellant as the added parties' submissions in this area would suggest. Frequently we heard evidence that the witness was not opposed to the operation of a licensed premises at Polson Pier but wanted the operator to abide by the 2008 deal. To sum up the evidence, not all of the residents object to the operation of a nightclub at Polson Pier, including the outdoor Cabana Pool Bar, if their quiet enjoyment of their property can be protected. It is with this evidence in mind that we proceed to consider the disturbance and possible licensing scenarios.

CABANA AND THE PUBLIC INTEREST:

[39] In considering the application to licence a capacity of 3,500 outdoors at the Cabana Pool Bar with amplified music, we have a lengthy history of dealings between TINC and Maya Corp. and its predecessors. We have the advantage of looking at that history through the lens of which of the existing conditions appear to have worked and which have not. We also note that the premises have a unique location on the shores of the Inner Harbour and that noise attenuation over water is difficult and may be impossible. When applying that lens, considering all the evidence, we are of the view that a capacity of 2,500 is more reflective of the public interest and that no amplified music be permitted.

[40] The licensing of outdoor patios is subject to the provisions of s. 46 of Reg. 719, R.R.O. 1990. In our view, the regulation is clear and concise. It states: "The holder of a licence that applies to outdoor premises shall not permit noise that arises directly or indirectly from entertainment on the premises or from the sale and service of liquor to disturb persons who reside near the premises." Put more simply, neither entertainment nor crowd noise shall disturb the neighbours.

[41] In her evidence, Dalila Giusti, a sound expert called by the City of Toronto, stated that she found the word "disturb" to be too subjective. She gave an ingenious example. She posed two listeners, A, who likes the rock group AC/DC and B who doesn't. A, who likes the group's music, would not be disturbed by the music even at high decibel ratings. Her level was 85db. B who does not like the music would be disturbed even at a relatively low level such as 45db.[6] Given the subjective meaning of the word "disturb," her view was that the only way to manage such situations is to impose reasonable hours of operation so the neighbours who might be disturbed can enjoy a night's sleep. With respect to Ms. Giusti, she misunderstands the point of s. 46.

[42] Section 46 of the regulation addresses the needs of B in her example. It does not create a regime where A can expose B to many hours of unwanted music if it stops before some arbitrarily defined reasonable time. Rather, s. 46 places an onus on A to ensure that, if A wants to have loud music in an outdoor licensed area, A must do so in such a manner that B is not disturbed, period. The focus is on the impact of the noise on B. In that respect, it largely defines the public interest enquiry we must embark upon.

THE NOISE ISSUE – TORONTO ISLAND COMMUNITY:

[43] The greater part of the hearing was devoted to the impact of noise from the premises on the surrounding area, particularly Toronto Islands. We heard from several residents of the Toronto Islands, several residents from the mainland, two City councillors, and several witnesses involved in the extensive waterfront and docklands development currently underway. At present the impact of noise from the premises falls mainly on the Toronto Island residents and we will focus on that evidence.

[44] We do not intend to review the evidence of each resident in minute detail. The residents who testified all kept noise logs and they were cross-examined on them. We note the appellant's position that the number of noise logs increased as the possibility of a Tribunal hearing approached. It points to an upswing in the number of logs before the March 2015 hearing and a second upswing before this hearing.

[6] The decibel scale is logarithmic, not linear, such that 45 decibels is much less than approximately half of 85 decibels, i.e. the number arrived at by dividing 85 by 45.

In its view, the upswings indicate that TINC has been tailoring its evidence. We disagree. It is not unnatural for a litigant to focus its mind shortly before a hearing and ensure that it has captured all the relevant evidence. Laxity in doing so when a hearing is not imminent as opposed to vigilance when it is should not be interpreted as tailoring.

[45] Lynn Robinson is the chair of TINC and the person to whom concerned residents send their noise logs. She is a long-time resident of the Island community and was active in the proceedings against The Docks and the 2008 agreement with Sound Academy. She provided a history of those dealings.

[46] At the outset of this evidence it is important to understand that The Docks had a total capacity of approximately 10,000, with 7,000 outdoors. Due to numerous noise complaints against The Docks, the Registrar moved to revoke its licence. After a hearing extending over 26 days, the AGCO revoked the licence in 2005.[7] That decision was appealed, and the Divisional Court remitted the matter back for a rehearing on the basis of new evidence that might have affected the outcome had it been available during the hearing.[8] The court specifically did not address the merits of the appeal.

[47] Following the court's decision, a new entity, Sound Academy entered into an agreement to take over the premises. It applied for a licence and entered into discussions with TINC that resulted in the current conditions. It is worthy of note that Sound Academy applied for a new licence while the premises were licensed by The Docks.

[48] Ms. Robinson described a very cooperative relationship with Sound Academy. For five years after the 2008 agreement there were few noise concerns from the premises. On occasion, Sound Academy would anticipate the possibility of a noisy event and would contact TINC to discuss. The language used during the testimony indicates that TINC felt, or was made to feel, that it had a veto over potentially noisy events. Ms. Robinson talked in terms of "permitting" Sound Academy to host a charity event and not permitting it to host other outdoor events. Sound Academy transferred its licence to Maya Corp. in 2013. Ms. Robinson states that the soundscape of the Toronto Harbour changed dramatically for the worse in 2013.

[49] In very balanced testimony concerning sources of noise around the Harbour, Ms. Robinson acknowledged that there are many sources and that the 2013 upswing in noise was not solely attributable to Polson Pier. She admitted that the premises are not the worst source. That dubious honour goes to several of the charter boats that

[7] Prior to July 1, 2011 the AGCO was both the regulatory authority and the adjudicative tribunal for liquor licensing matters. On July 1, 2011, the adjudicative function was transferred to this Tribunal.
[8] *1132165 Ontario Limited v. Alcohol and Gaming Commission of Ontario*, 2007 CanLII 7997 (ON SCDC),

ply the Harbour and Islands on summer evenings.[9] In testimony and submissions they were generally referred to as party boats. There are several fixed outdoor concert venues around the Harbour, including Sugar Beach, Cherry Beach, Sherbourne Commons, Electric Island and the Amphitheatre at Ontario Place. In earlier days there was the Guvernment Nightclub on the mainland. There is also noise from the Billy Bishop Airport, traffic on the Gardiner Expressway and Lakeshore and rail traffic. In all, the soundscape is complex and diverse.

[50] Because of the multiple sources of music, Ms. Robinson described the efforts that she personally would take to confirm the sources of music. When she was disturbed by music, she would walk up to the lake to confirm where it was coming from. When she ascribed noise as coming from Polson Pier, it was because she had walked to the Eastern Gap (the ship channel between the east end of the Island and the mainland) or to the junction of the last two streets at the extreme northeast of the community where she got a clear and unobstructed view across the water. Once she ruled out all other sources, she would prepare a log recording the disturbance and attributing it to Polson Pier.

[51] For the most part, all the other residents who submitted logs used the same or a similar process as Ms. Robinson to confirm the source. Overall, with few exceptions, we were impressed with the noise log evidence and the efforts the log keepers made to make sure they were not blaming Maya Corp. for noise problems that were not its responsibility. The evidence indicates that from 2013 onwards there were numerous incidents when noise disturbed Island residents. These disturbances clustered on weekends when Maya Corp. was holding celebrity disc jockey (“DJ”) events at the Cabana Pool Bar. They consisted of thumping bass, the amplified voice of the disc jockey generating excitement in the attendees and crowd noise and music in general. Not all of these phenomena were experienced on each occasion.

[52] The impact of the noise was such that it often drove people inside on summer weekends when they had been outside gardening, barbequing, or otherwise enjoying the fresh air. One witness, who had built a relatively new home in the community with noise attenuation features, stated that she and her family no longer spend summer weekends on the Island because of noise issues. They are fortunate enough to be able to use a family cottage, but they have a feeling that they are being driven from their home.

[53] The logs are not perfect. The primary means of identification was directional. The appellant pointed to other sources in the area. The parking lot on the north side of Polson Street is sometimes used for outdoor concerts. Maya Corp. does not own that property. There has been a St. Patrick’s Day event and a reggae festival on that property for which noise logs were submitted blaming Maya Corp. There is also a

[9] There are many charter boats, most of whom have formed an association that makes efforts to minimize the impact of noise. There are several hold-outs, however, who do not.

large supermarket on Cherry Street that holds a music event on occasions. There was an early morning disturbance on one occasion that related to sound testing. The event in question was a charity walk. It was to begin early in the morning on a golf range abutting the premises and finish around 11:00 or so at Polson Pier. On the evidence, we are of the view that this sound likely came from the golf range. The party boats and private boats may dock outside the premises and become a source of noise.

[54] Viewing the evidence from the noise logs in its totality, we are satisfied that the operation of the Cabana Pool Bar has been a source of noise disturbance to residents of the Island community. It has been sufficiently disturbing to effectively deny many residents the ability to enjoy their gardens and outdoor areas during summer weekends when the Cabana Pool Bar has been operating. The only expert evidence concerning noise attenuation across open water came from Ms. Giusti. It was her opinion that there is no way to stop noise from this source reaching the Island. On one measurement, because of atmospheric conditions, noise measured on the Island was as loud as the noise immediately outside the Cabana Pool Bar.

THE MONITORING SYSTEM:

[55] There are conditions on the current licence designed to address the noise disturbance issue. There is a condition that noise is not to be audible on the Island. There is also a condition that Maya Corp. maintain an employee on the Island at all times when the Cabana Pool Bar is operating to advise if the noise is audible. Given the number of noise logs submitted and the noise evidence, it would be fair to say that that system has been ineffective. Its failure, however, cannot be placed solely at the feet of Maya Corp. TINC must takes it share of responsibility.

[56] It seems from Ms. Robinson's testimony that TINC failed to advise Island residents of the monitoring process during the period from 2008 to 2016. Given the general lack of noise disturbance from Polson Pier during that time, the evidence suggests that TINC became less vigilant. Once noise became a problem again from 2013 onwards, TINC's response was to direct complainants to make their issues known to the City of Toronto and the AGCO. The difficulty with this approach was that it did not provide the immediate relief that the monitoring system was designed to achieve. As stated above, the noise problems arose on weekends when Cabana Pool Bar had celebrity DJs attend. Calls to the City's 311 number would not result in the immediate attendance of a noise inspector on the Island. They would cause a report to be generated and a subsequent investigation. Several noise violation charges have been laid because of these calls, but, as of the date of the hearing, none had yet come to trial.

[57] Late in each patio season, TINC provided its logs to AGCO. Each season, AGCO appointed an inspector who would contact Maya Corp. and advise of the noise

complaints. Invariably this contact occurred after the Cabana Pool Bar had closed for the season. Maya Corp. was able to answer truthfully that there would be no further disturbance from that source for that season. Despite extensive evidence of breaches of a licence condition, AGCO took no further steps to investigate.

[58] What TINC initially failed to do was to advise complainants that there was a monitor in the community or to give them the contact number of the monitor or the direct line to Polson Pier. Thus, while there was a process in place, witness after witness testified to being unaware of it until 2016. Thereafter, people recognized the monitor and would contact him or seek him out.

[59] The current monitor, Thomas Rutherford, has lived on the Island all his life. In emotional testimony, he spoke of how he was seen by other Island residents as a representative of Maya Corp. and shunned. When he was looking to rent accommodation, no-one would rent to him, so he ended up in a small shed on his parent's property. In contrast to the way he was seen by other residents, Mr. Rutherford saw himself as a protector of the Island community. He saw his job as making sure that noise did not disturb the residents. He tried to do his job well but at times he had ill-considered words with complainants when his perception of noise was at odds with theirs. Nonetheless, he would generally radio Polson Pier and advise that the noise was too loud and ask for it to be turned down.

[60] Jason Chan was the video room operator whose job it was to receive the calls from Mr. Rutherford or Island residents, log them and ask the sound technicians to turn down the volume. Mr. Chan produced extensive logs covering reports from the monitor on the Island. The logs show the monitor was active in listening for and reporting noise issues. Most entries noted that the monitor reported regularly that there was no noise on the Island. When there was a noise, Mr. Chan noted the nature of the problem and asked the sound technicians to take appropriate steps. Until recently, Mr. Chan's authority was limited to advising the sound technicians that there was a problem and requesting that they act. The technicians were not obliged to act on this information. The technicians have now been advised that they must turn the sound down if Mr. Chan reports that it can be heard on the Island.

[61] There is evidence that the complaints were often addressed promptly with the next report from the monitor indicating all was quiet on the Island. There is also evidence that, despite advice that noise was audible on the Island, the sound may have been turned down initially but turned back up again. This evidence came from several sources, including the complainants, Mr. Chan, Mr. Rutherford, and in an email between management of the premises. It seems that the celebrity DJs had some method of overriding the volume limiters on Polson Pier's sound equipment. Whether it was because they used their own sound equipment or could override the house system is not totally clear on the evidence. One particularly damning email indicates that when a noise issue was raised by Catherine Fowler, one of the

principals of Sound Academy who continued to work for Maya Corp. for some time, Charles Kabouth, part of the Maya Corp. ownership team, and other members of the management team ordered the music to be turned up again.[10]

THE NOISE ISSUE – NORTH OF THE PREMISES:

[62] Evidence concerning sound being heard north of the premises covered two distinct areas – noise disturbance of present residents and the impact of a noisy environment on the development of the Port Lands currently in its beginning stages. The evidence of current noise disturbance was meager. It consisted of evidence from a representative of YQNA and the evidence of two residents, one in the West Don Lands and the second north of the Gardiner Expressway. One witness, who happened to be the chair of the North Toronto Residents' Association purported to speak on behalf of that association. In fact, her evidence related to her personal experience on her boat moored at the Royal Canadian Yacht Club moorings. We have considered her evidence as part of the general evidence relating to Island noise and we note that her evidence was not specific in identifying the source of any noise.

[63] We do not give any weight to her evidence in her role with her residents' association other than to note it as a general statement of the needs and wishes of some of the residents of the municipality. The association's area is north of St. Clair Avenue, an area that cannot be impacted by noise from the premises. We are of the view that its concerns are captured by the City resolution.

[64] The representative of the YQNA testified that she has never been disturbed by noise from Polson Pier. There is a building in between her unit and Polson Pier and Polson Pier is over two kilometres away. She stated that she had been advised that residents with a direct line of sight to Polson Pier had been disturbed. One of her concerns was with respect to new developments along Queen's Quay and is better addressed when we consider the evidence regarding development.

[65] Two current residents each gave evidence relating to sound heard to the north of Polson Pier. One witness called by TINC referred to hearing pounding bass in the early morning hours of September 20, 2014. She lives north of the Gardiner Expressway but stated that she has an unobstructed view over to Polson Pier approximately 1,200 to 1,500 metres away. She described feeling the vibrations through the building. While she referred to other occasions when she could hear sound, she has no other sound logs. There are no contemporaneous logs from TINC for the date in question. Maya Corp. logs show no outside events and that sound at

[10] Ex 36. The email is dated Sunday, July 21, 2013. It states: "Tyler and Tuna [two sound technicians] have told me that they do turn the audio down whenever this is flagged [by the Island monitor], but then have been told a few times by you, Orin or Cabana Managers (apparently relaying the message from you or Orin), to turn the sound back up again."

Rebel was turned off at 1:00 a.m., before the time the witness claims she heard the noise.

[66] The second resident was called to rebut the appellant's evidence that sound did not travel north from Rebel. He was awakened around 3:00 a.m. by loud music in the early morning hours of October 1, 2017, the night of the fatal shooting. He then described going out on his balcony to see what was happening. He saw the police and ambulance response. He admitted that sound from Rebel is an unusual event in his area.

[67] As stated above, there has been a series of calls from the Island community to the City of Toronto's information line to complain about noise. These calls have resulted in inspectors from the Municipal Licensing and Standards department of the City going to Polson Street immediately to the north of the premises from time to time to check if sound could be heard. Inspector Samantha Minnear has attended 10 times while events were in progress at both the Cabana Pool Bar and Rebel and has not heard any sound on the street.

[68] Having reviewed the evidence of the impact of noise to the north of Polson Pier, we note that it is scant. We heard evidence of two incidents in five years. The 2014 incident is unsupported by any contemporaneous complaints from TINC and appears to have occurred at a time when the Polson Pier logs indicate that the music was turned off. The 2017 incident occurred in the special and tragic circumstance of a double murder, not likely to be repeated. That witness stated that noise disturbance from Polson Pier in his area, the West Don Lands, is unusual.

FUTURE DEVELOPMENT:

[69] It is a gross understatement to say that these are dynamic times with respect to the development of the eastern end of the Inner Harbour, the Port Lands and the lower Don Lands. All three levels of government have invested more than $1 billion to move the mouth of the Don River to prevent flooding and open the area up for development. It is expected that private developers will invest multiples of that number to convert the area from its current usage to residential and commercial uses.

[70] Work is currently underway to move the mouth of the Don River further south from its current outlet into Lake Ontario through the Keating Channel to the channel immediately to the north of Polson Street. There will then be a spillway or greenway from the channel mouth to enter the Lake further south again in case of very high outflows. This work will relieve flooding of lower Don Lands and allow for intensification in that area.

[71] The work will also create a new island, Villiers Island, surround by parkland and marshes to dissipate any excess outflow from the Don. The plan for Villiers Island calls for a mixed-use commercial/residential development. Work was scheduled to start on the project, “shovels in the ground” as it was referred to, during the fall of 2017 with completion in 2024 or 2025. Cherry Street, the main access to the western Port Lands from Lakeshore Boulevard will be rerouted. Following the completion of Villiers Island there are plans for the redevelopment of all the former Port Lands. These plans are expected to take many decades to come to completion.

[72] Work is currently underway to construct three residential towers on the north side of Toronto Harbour in a development known as the Bayside Community. One of the three towers is complete and occupied; the other two are under construction. There are other developments planned for the north shore further west from Bayside over towards Queen’s Quay.

[73] In encouraging us to take into account the future development, the added parties have relied on *1317596 Ontario Ltd. (Re)*, [2009] O.A.G.C.D No. 302, a decision of the AGCO. In that case, the appellant was seeking a licence to open a bar in Sarnia. The premises abutted a residential area with an apartment block and family dwellings nearby. Close by a hospice was nearing completion and was soon to receive its first occupants. In denying the application the Board took the concerns of the not yet completed hospice into consideration. The Board stated:

> A licensed premise cannot dominate the neighbourhood to the exclusion of others. There must be a balance and a harmony between the needs of the residents and the licensed commercial entity. Development of a neighbourhood cannot be jeopardized by the existence of a licensed premises.

[74] We have been asked to take the projected residential development into account in this case. We decline to do so. Unlike the *1317596 Ontario Ltd.* decision cited above, the evidence in this case is completely speculative. It assumes that all the new residents will object to the appellant’s operations without an evidentiary basis for that assumption. It also asks us to restrict present usage of the site because at the earliest in 7 years and in a possible 30 to 40 years for the complete development, the use of the site may not be in harmony with its surroundings. We are the view that those are issues to be raised in the future. The appellant’s obligation to control noise escaping from the Cabana Pool Bar pursuant to s. 46 of O. Reg. 719 and to comply with noise by-laws may become the basis for future regulatory action, but it is too remote to make up a part of this public interest analysis.

[75] We note that the witnesses who testified regarding planning and development concerns were put on the spot by the appellant’s last-minute reduction in the capacity it is seeking. Its original application had no capacity limits included. Under

building code and fire regulations the maximum total indoor and outdoor capacity of Polson Pier is approximately 15,500 and many witnesses prepared their objections based on that number. At the outset of the hearing, the appellant informed us that it was not seeking a 15,500 capacity. It was seeking a total capacity of just over 8,000. Thus, witnesses testifying about the problems created by 15,500 patrons were severely undermined when the new number was put to them out of the blue. We do not discount their testimony because they were forced to adjust their thinking on the fly. It was unfair for them to be put into that position.

[76] What we do note about their evidence is that, in almost every case, despite being intimately involved in the future development of the Harbour and Port Lands environment, they were shocked to discover that Polson Pier currently operates at a capacity of approximately 6,000 patrons. In each case the witnesses thought the premises had a current capacity of approximately 2,000. We agree with the appellant's submission that the premises have been in view and in full operation throughout the extensive planning phase. Its operation does not seem to have raised any concerns or to have figured into the design parameters, leaving us skeptical about the dire consequences these witnesses predicted from an increase of capacity of approximately 1,500 patrons.

CONDITIONS:

[77] We have discussed the impact of noise from Cabana Pool Bar on the residents of the Toronto Island community above and found that there is frequent disturbance clustered around weekends when the Cabana Pool Bar is hosting an event. We have also discussed the current monitoring system. That evidence showed that it was not well used by the community between 2013 and 2016, the community preferring to contact Municipal Licensing and Standards and the AGCO. There is also evidence to indicate that even when the monitor did report problems, the sound was turned down and then turned up again. We have examined the operation of the current conditions, not to find fault with the current operator, Maya Corp., but with a view to try to understand what conditions, if any, might work to permit the licence and yet protect the public interest. Having done so, we are not persuaded that noise from the Cabana Pool Bar can be contained to not create a disturbance in the Toronto Island Community. We see the only workable condition regarding the Cabana Pool Bar is to prohibit amplified sound on or directed towards any outdoor patio.

[78] While it is the position of the added parties/objectors that the licence application should be denied as not being in the public interest, they also have made submissions about applicable conditions if we decide to approve the licence application. The Registrar has also made submissions on conditions that it considers to be enforceable. Of note in this regard is the fact that the Registrar is of the view that most of the current conditions are unenforceable.

[79] In considering whether to impose conditions, we agree with certain of the Registrar's submissions but find others problematic. We accept the submission that conditions that are unenforceable should not be put on a liquor licence. Where we are at odds with the Registrar is in our understanding of the concept of enforceability when it comes to noise emanating from outdoor licensed premises.

The Registrar's Position:

[80] The principle that unenforceable conditions should not be attached to a liquor sales licence is one of long standing. In the decision revoking the licence of The Docks by Cherry, the Board of the AGCO stated: "This Board will not impose conditions that are not enforceable by AGCO Inspectors or anyone else empowered to enforce the Liquor Licence Act."[11] In the proceeding against The Docks, The Docks had proposed a noise monitoring condition with defined decibel levels. The Board found such a condition to be unenforceable and went on to revoke The Docks' liquor sales licence for continual breaches of s. 46 of O/Reg. 719/90.

[81] *10084 v Registrar of Alcohol and Gaming*[12] is a case in which this Tribunal refused to impose noise conditions on licensed premises in the Blue Mountain/Collingwood area of Ontario. At page 11 the adjudicator states:

> With regard to the conditions the objectors, through their counsel, have requested, the Tribunal supports the AGCO's position that any conditions must be enforceable by the AGCO. Noise is not something the Registrar can monitor, restrict or enforce.

[82] While we accept the general premise in the first sentence of the above noted paragraph, we do not agree with the sweeping nature of the second sentence. A review of the conditions proposed by the Registrar indicates that neither does the Registrar. With respect to noise from the Cabana Pool Bar, the Registrar does not propose that noise conditions are unenforceable as a general principle. The Registrar proposes two alternatives: no amplified music on the patio, or music on the patio only during certain defined hours. It is the Registrar's position that either of these conditions is enforceable. Inspectors can immediately ascertain if the condition is being breached.

[83] We think the Registrar's interpretation is too narrow. There is a third scenario that is clearly contemplated by s. 46 of the regulations: a condition that noise from a patio is not to disturb the neighbourhood. In our view, such a condition is equally enforceable. The Registrar's evidence regarding enforceability was that it was difficult to get its inspectors onto the Island to listen for noise, mainly because the

[11] *Docks By Cherry (The)*, AGCO Decision released on July 24, 2006 at page 38
[12] *10084 v Registrar of Alcohol and Gaming*, 2016 CanLII 50130 (ON LAT)

hours during which they worked did not accord with the ferry schedule. This is a logistical problem that is far different from attempting to measure decibel levels or the imposition of vague standards. The more difficult question for us is, given all the evidence of noise disturbing residents of the Island, is amplified music at Cabana Pool Bar in the public interest.

[84] We have difficulty with the Registrar's position regarding the enforceability of capacity limits on a liquor sales licence. The Registrar took the position that capacity limits on licences were unenforceable and the only capacity limits that he would find acceptable would be the maximum capacity permitted under the building code and fire regulations, in this case approximately 15,500. This position would seem to run counter to the provisions of s. 43 of O. Reg. 719/90 which contemplates capacity limits on licences: "The licence holder shall ensure that the number of persons on the premises to which the licence applies, including employees of the licence holder, does not exceed the capacity of the licensed premises as stated on the licence." Again, while it may be onerous in a club as large as the appellant's to conduct a head count, the regulations clearly define capacity as an obligation of the Registrar to control and enforce.

[85] We find the Registrar's position on capacity limits particularly hard to understand given that the Registrar has identified his five main areas of regulatory concern as: "Permitting intoxication, service to minors, **overcrowding**, after hours service, and violent and illegal activities" [emphasis added].[13] Without a capacity number, it is impossible to determine if a bar is overcrowded. To accept the Registrar's position is to find that it is easier to establish that the applicant is overcrowded if the capacity is 15,500 than if it is 8,000. We reject this notion.

[86] In our view, a condition on a liquor licence is enforceable if the impugned behaviour is clear, can be objectively identified and addresses a licence requirement set out in the Act or regulations. By way of example, there is a current condition on Maya Corp's licence that music is not to be audible to the unaided human ear in the Island community. If it can be heard, the condition is being breached. The wording considers the whole range of human hearing from sensitive to less sensitive hearing. What is more, it can be acted upon by taking enforcement action under the Act or turning the music down until it no longer offends. Because the Registrar does not want to send inspectors to the Island to check if the conditions are being breached does not make it unenforceable. It means the Registrar has chosen not to enforce it. These are two distinct concepts.

The Appellant's Position:

[87] The appellant has divided its submissions on conditions into two categories: conditions on the licence and house policies. It has also given an undertaking to

[13] Registrar's Final Submissions at paragraph 8

limit capacity. House policies are actions the appellant is willing to undertake voluntarily to address the concerns of the Island residents. The appellant's proposed conditions are:

Conditions

a) The licence holder shall file by [date to be determined by Registrar of Alcohol, Gaming and Racing] a Compliance Plan [or similar style of Plan] to be approved by the Registrar of Alcohol, Gaming and Racing that will address in addition to matters required by the Registrar (a) measures controlling the sounds produced on the licensed premises to be in accordance with section 46 of Ontario Regulation 719/90.

b) The licence holder is required to be in compliance with the terms of the Compliance Plan as approved by the Registrar of Alcohol, Gaming and Racing.

c) The Licensee shall provide to the Ward Councillor's office a telephone number and e-mail address for residents to register concerns or complaints. The telephone number will normally be answered by a staff member during the Licensee's published hours of operation. The telephone number will be equipped with a functioning message service for those periods when the Licensee's staff is otherwise occupied and when the establishment is closed.

d) Clearly visible signs will be posted, at least 11" x 14" in dimension, near each exit of the Premises, requesting that patrons respect their neighbours by keeping outdoor noise to a minimum.

e) The Licensee shall provide to the Toronto Island Noise Committee the telephone number and e-mail address of the Licence holder's Monitor stationed on the Toronto Islands and the telephone number and e-mail address referred to in Condition c).

f) The Licensee shall post the phone numbers and e-mail addresses referred to in Conditions c) and e) on the Licensee's website.

g) No music shall be played on the outdoor area after 11:00 pm until 11:00 am from Sundays (subject to the further reference herein) to Thursdays; and no music shall be played on the outdoor area after 2:00 am until 11:00 am on Fridays, Saturdays and additionally the Sundays before holiday Mondays.

h) All windows and doors located on the Premises shall remain closed, except for normal entrance and exit purposes, when music is playing in the interior licensed premises.

i) The holder of the licence shall ensure the following persons have no involvement in the business operations of the licensed establishment, including as an officer, director, shareholder or owner and have no beneficial or financial interest in the business or ongoing operations of the licence: Jerome (Jerry) Sprackman. [Mr. Sprackman had previously been involved with the premises and the added parties do not wish to see him return. The appellant consents to this condition so we shall include it below.]

House Policies

[88] The appellant also proposed a number of house policies should the licence be granted

a) During all hours of operation of the licensed premises, the Licensee shall have present in the Toronto Island community an individual ("Monitor") who shall monitor in the Toronto Island community sounds approaching the area from the Toronto mainland and Lake Ontario. The Monitor will report to the Licensee audible sounds the Monitor hears emanating from the licensed premises and the Licensee shall take immediate measures to reduce the volume from the licensed premises.

Should conditions e), f) and h) not be included on the licence, the appellant will institute house policies b), c) and d).

b) The Licensee shall provide to the Toronto Island Noise Committee the telephone number and e-mail address of the Licensee's Monitor stationed on the Toronto Islands and the telephone number and e-mail address referred to in Condition c).

c) The Licensee shall post the phone numbers and e-mail addresses referred to in Conditions c) and e) on the Licensee's website.

d) All windows and doors located on the Premises shall remain closed, except for normal entrance and exit purposes, when music is playing in the interior licensed premises.

e) The Toronto Island Noise Committee (TINC), York Quay Neighbourhood Association (YQNA) and the City of Toronto shall receive timely notice of any application to transfer the liquor licence or vary the conditions on the liquor licence or an increase in the licensed capacities.

f) The Licensee shall take all reasonable steps to minimize exposure of the Licensee's lighting to the Toronto Island residents.

g) The Licensee shall make a representative(s) of the licence holder available to meet with members of the Toronto Island Noise Committee, York Quay Residents Association and the City of Toronto to discuss issues related to the operations of the licensed premises. The meeting shall occur at a location mutually convenient to all participants and at a minimum of once every two weeks between May and September of any year and at least once a month between January to April and October to December of any year.

Undertaking

[89] The appellant also gave an undertaking regarding both indoor capacity and outdoor capacity:

a) If a liquor licence is approved to be issued to Powerhouse Corporation, then prior to the issuance of the liquor licence Powerhouse Corporation hereby undertakes to amend the application for a licence regarding the capacities of the licensed areas as follows: interior capacity shall be limited to 3,735 people downstairs and 830 people upstairs; and exterior capacity on premises now operating as Cabana Pool Bar shall be limited to 3,500 people.

[90] Our first concern with the proposed conditions is that conditions a) and b) have the effect of rendering this whole appeal process ineffective. They postpone consideration of noise issues to a compliance plan to be negotiated between the Registrar and the appellant. The added parties have no input into an agreement where the Registrar has shown a lack of interest in enforcing noise issues and our involvement is rendered unnecessary. With respect, while we do not foreclose the negotiation of a compliance plan, any such plan must be subject to conditions addressing the impact of the appellant’s operation on the community that we find to be in the public interest, whether they are included in the plan or not.

City’s Proposed Conditions

[91] The proposed conditions put forward by the City closely mirror the conditions suggested by the appellant. In addition to the compliance plan proposed by the appellant, the City seeks to include conditions to address the concerns raised by City Councillor, Paula Fletcher in her evidence about measures she would like to see to ensure crowd safety at all-ages electronic dance music (EDM) events.

[92] We heard evidence from two City councillors; Deputy Mayor, the late Pam McConnell and Councillor Fletcher. The late Deputy Mayor's ward included the Toronto Island community while Councillor Fletcher's ward includes Polson Pier.

[93] The late Deputy Mayor testified about her involvement in addressing concerns about the impact of noise on the Toronto Island community. She had worked with TINC to ensure that noise events were properly attributed and documented. She had addressed noise concerns arising from events on City property, being involved in moving events from Olympic Island to Hanlon's Point where the noise impact on residents was much reduced. She testified at the 2005 hearing and was involved in the 2008 settlement. It was her view that the 2008 settlement was a good settlement for all and she resisted any move to permit outdoor music at Polson Pier after 11:00 p.m. on any night.

[94] Councillor Fletcher's evidence was very finely focussed on her concern for the safety of young people attending EDM events. In her view, EDM as a music genre, created specific problems that should be addressed with a strict set of conditions. She points to the death of a young girl from a drug overdose at Polson Pier in December 2016 as underscoring her concerns regarding this particular music genre. Her proposed conditions pertain to proper assessment and planning for EDM events involving City staff, having an ambulance and City Emergency Medical Services (EMS) staff on site, having a dedicated first aid room, protocols for separating underage patrons from of-age patrons, and adequate access to free water during events.

[95] In response to Councillor Fletcher's proposals the appellant's head of safety and security, Jamil Kamal, testified about the steps Maya Corp. currently employs to guarantee the security of patrons. He described his involvement in international organizations dedicated to crowd safety and security and stated that the current protocols in operation at Polson Pier lead the industry in best business practices. There are on-site medical staff, drinking water is available free of charge and the protocols currently in place exceed the protocols put forward by Councillor Fletcher.

[96] Our difficulty with Councillor Fletcher's proposed conditions is that our authority is limited to setting licence conditions on the appellant only when it is involved in the sale of alcohol. We have no authority to limit or condition the activities of the appellant when the sale of alcohol is not involved, such as after 2:00 a.m. during an all-night, all-ages EDM event. In fact, if the appellant did not seek to be a licensed premise, its single obligation would be to comply with the City by-laws and other laws of general application.

[97] Overall, we are satisfied from the evidence of Mr. Kamal that the appellant, if licensed, will take its crowd safety and control responsibilities seriously. We are of

the view that these types of conditions are more properly included in a compliance plan formulated under the Registrar's risk-based licensing practices.

TINC and YQNA Proposed Conditions

[98] TINC and YQNA both strongly urge that the licence should be denied as it is not in the public interest. In the alternative both have proposed a condition that is elegant in its simplicity. To use TINC's wording: "There shall be no amplified sound on or directed to a patio." YQNA states it as: "Amplified music shall not be permitted on the patio at any time." YQNA then goes on to argue that it be a condition of the licence that the current capacity levels be maintained at 3,763 indoors and 2510 outdoors.

[99] The prohibition on music on the patio has the attraction that it is clear and easily "enforceable by AGCO Inspectors or anyone else empowered to enforce the Liquor Licence Act" to use the wording in the *Docks by Cherry (Re)* cited above. In fact, the Registrar identifies it as an acceptable condition in his submissions. It also addresses the whole issue of noise monitoring in the Island community and ensures that residents will not be driven indoors by sounds emanating from the Cabana Pool Bar on warm summer days. It is, of course, more restrictive than the conditions TINC agreed to in 2008.

PUBLIC INTEREST HAVING REGARD TO THE NEEDS AND WISHES OF THE RESIDENTS:

[100] Having reviewed the positions of the parties on the issuance of the licence and what conditions might attach, we must consider first the question of whether the issuance of this licence is in the public interest. Given that s. 6(2) of the Act creates a qualified right to a licence, the onus is on the added party/objectors to demonstrate that the grant of this particular licence is not in the public interest. In considering this question we note the long history of dealings between the various establishments operating on the site and the community. We also note that for a five-year period the establishment was operated without problems. Finally, we are cognizant of the fact that by denying this appellant a licence the result will not be the termination of a licensed establishment at Polson Pier. The focus, in our view, is on what conditions should be imposed on the licence are in the public interest.

Impact of 2008 Conditions

[101] It follows from the wording of s. 6(2) of the Act that when a licence is issued for any given premises, that licence is in the public interest in respect of those premises having regard to the needs and wishes of the residents of the municipality. This is equally true whether there are objections or not or whether the licence is issued following a hearing. The absence of objections simply suggests that the residents have no problems with a licensed premise in their area. Where the licence is issued

subject to conditions following extensive negotiations between the parties, there is the extra dimension that the agreement reflects the necessary balance between competing interests referred to in the *Matador* decision rather than an imposed solution. In our view, such negotiated conditions deserve a large measure of deference.

[102] We find that the 2008 agreement and the conditions flowing therefrom are a strong statement of the public interest as it applies to these premises. It represents the balance that the Island community, that is, the most affected community, and the licensee struck to permit the continued operation of the premises. Any departure from those conditions on a new licence, must in our view, maintain the intent of that consent agreement and only make changes where the evidence indicates that a condition is not working or not achieving the desired result, or new concerns are identified.

[103] The major irritant for the residents of the Island community is sound from the Cabana Pool Bar. In its submissions, the appellant argued that the response of the Island community to Maya Corp's activities at the Cabana Pool Bar is conditioned to be more sensitive to noise by the difficulties created by The Docks. This submission suggests that the disturbances suffered by Island residents since 2013 were not significant and that, had it not been for a heightened response because of experience with The Docks, there would have been no complaints. We strongly disagree. The submission ignores the copious evidence led by TINC about the impact of Maya Corp's operation on the Island community. It was not an echo from The Docks that drove people indoors, it was noise from Cabana Pool Bar.

[104] The 2008 agreement addresses noise in several areas. Because of our finding that it is impossible to control amplified noise from the Cabana Pool Bar impacting the lives of the residents of the Island community, we do not need to consider most of those areas.

[105] In addressing the question of amplified noise at the Cabana Pool Bar, we are hindered by the failure of the appellant to give us any expert evidence about the effectiveness of measures it has purportedly taken to direct noise away from the Island. We heard from the designer of the system, Themmy Pappas, about what he was asked to achieve in his design. It was his evidence that he felt that many smaller speakers focussed into specific areas of the Cabana Pool Bar would reduce noise on the Island. He also described the control mechanisms with the sound technicians having an override to stop a DJ from turning up the volume. We have no evidence of tests on the system to determine the effectiveness of these measures.

[106] Mr. Pappas' evidence is very similar to the evidence adduced at the *Docks by Cherry (The)* hearing. At page 18 of the decision, reviewing the evidence of one of the

management, Robert Gilroy, the Board noted Mr. Gilroy's sound control evidence as follows:

> Management had 24 small speakers installed instead of eight large ones recommended for the patio area. The "limiters" on the sound system are set by the Dymax Sound Co. with a special key for the amplifier racks. Most bands use the house P/A system. Very few use their own […] While there are seven (7) zones where the entertainment may be used, seldom are they all operating at the same time […] [Mr. Gilroy] emphatically stated that all DJs will use the Docks house system going forward. [emphasis in the original]

[107] The 2005 hearing took place between February and November 2005 with the decision being released on July 24, 2006. The hearing time included a summer season. At p. 38 the Board stated:

> The length of time of this hearing was indeed an opportunity for the Docks to establish that its system was effective…The issue that presented itself in the evidence from the Docks and in the logs from 2005 (Exhibit 54) is that despite the significant investment of time and dollars by the Docks in this new state of the art system, issues of control and enforcement continue to exist. In June 2005, Ms. Pitcher [the then chair of TINC] logged a conversation with Mr. Grossi wherein he said he had had the volume turned down, but the D.J turned it up again. This raises questions about the reliability of a system where sound levels are set at levels which, according to Mr. Coulter [The Docks' sound expert], are within acceptable levels and which the sound system will not, we are told, allow exceedances.

[108] This statement mirrors the evidence that we heard. This hearing lasted from March 2017 to November 2017. Twelve years after the above findings, there were noise complaints from Island residents over the summer of 2017.[14] There was evidence from earlier years of noise not being turned down despite action by the monitor. There is similar evidence in this hearing. In one noise log, dated June 18, 2017 relating to a MOET event at Cabana, the logger states:

> While walking dog, and after identifying sound coming from Sugar Beach, I walked down 4th street and noticed loud music to the EAST once I hit Channel Ave. I followed the sound down Channel to 1st street where TR [Thomas Rutherford, the monitor] was standing in the street with guitar over shoulder talking to a tourist. I identified the sound as coming directly from PP Cabana patio. It was CLEARLY audible, in fact, you could almost make

[14] There were noise logs from May 27, 28 and June 18, 2017. Thereafter we declined to accept further noise logs. We ruled that the evidence had to be crystallized at some point for the hearing to be completed in a timely manner.

> out the words to the song. There were NO tour boats or any other noise sources. I would give it a 5 or 6/10 […] TR replied he notified the "club" it was audible. [emphasis in original]

There is no evidence that any action was taken in response to Mr. Rutherford's report. The logger is unsure when the noise ended.

[109] Reviewing all the noise evidence we are left in doubt if it is possible for the appellant to implement a workable protocol to ensure that noise from Cabana does not disturb the residents of the Island community. In Ms. Giusti's expert opinion it is not. Her report states:

> As the proposal to increase the permitted patron capacity of the facility will likely include outdoor events, it is not feasible to achieve the requirement of Section 46 of R.R.O., 1990 Reg. 719, which requires that the activities should not permit noise to disturb persons that reside near the premises.

[110] There is evidence the current monitoring system can be ineffective, either because it is ignored as would seem to be the case in June 2017 or because DJs can override noise controls. We do not discount the evidence that, on occasion, it has been effective. The appellant has led no evidence to support its position that its new, state of the art sound system with small focussed speakers can address the problem. We know its design and its aims but not its effectiveness.

[111] Considering all of the above, we are the view that it must be a condition of the licence that there be no amplified noise on or directed towards the Cabana Pool Bar patio or any other outdoor area. As a result, we do not need to consider the proposed extended hours when music is permitted or the question of a monitor.

[112] There remains a lingering concern that indoor noise from Rebel may impact the community. There was very little evidence of disturbing noise escaping from Rebel. We are of the view that the signage the appellant has suggested it post and the measures it proposes to take to keep doors and windows closed represent good policy decisions and we would like to see them implemented. We have included such a condition.

CAPACITY:

[113] We have stated above our view that we can order limits on capacity lower than the capacity permitted by the building code and fire regulations. We reiterate the incongruity in the Registrar's position that overcrowding is a major enforcement priority but that setting capacity limits on a licence is not enforceable. How then is overcrowding identified and enforced? Given the general lack of evidence about issues with Rebel (other than allegations of an inability to control the number of

patrons addressed above), we are prepared to increase the indoor capacity to now reflect a capacity of 3,735 people downstairs and 830 people upstairs.

[114] We are not prepared to increase the outdoor capacity to the 3,500 number the appellant seeks. While not as prevalent a problem as disturbance from the music, there was evidence that crowd noise was also an irritant. The 2,510 current capacity came about as a consent condition and, in our view, is reflective of the compromises that defined the public interest in 2008. We are not persuaded that the public interest has changed between 2008 and today. In this it differs from the indoor capacity where the evidence established that noise from Rebel is generally no longer a problem.

ORDER:

[115] Having considered the evidence and submissions of the parties, we order the Registrar to issue a licence to the applicant, Powerhouse Corporation for the premises located at 11 Polson Pier, Toronto and comprising the Rebel and the Cabana Pool Bar with the following conditions:

a) The capacity of the premises shall be limited to 4,565 patrons and staff in the indoor area of the premises currently known as Rebel and to 2,510 patrons and staff in the outdoor area currently known as Cabana Pool Bar;

b) There shall be no amplified music on or directed towards any outdoor area or patio;

c) The licence holder is required to be in compliance with the terms of the Compliance Plan as approved by the Registrar of Alcohol, Gaming and Racing.

d) The Licensee shall provide to the Ward Councillor's office a telephone number and e-mail address for residents to register concerns or complaints. The telephone number will normally be answered by a staff member during the Licensee's published hours of operation. The telephone number will be equipped with a functioning message service for those periods when the Licensee's staff is otherwise occupied and when the establishment is closed.

e) Clearly visible signs will be posted, at least 11" x 14" in dimension, near each exit of the Premises, requesting that patrons respect their neighbours by keeping outdoor noise to a minimum.

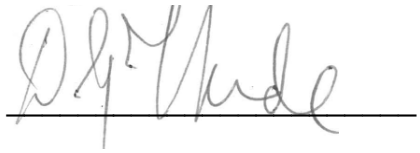
f) The Licensee shall post the phone numbers and e-mail addresses referred to in Conditions d) on the Licensee's website.

g) All windows and doors located on the Premises shall remain closed, except for normal entrance and exit purposes, when music is playing in the interior licensed premises.

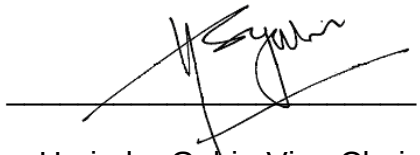
h) The holder of the licence shall ensure the following persons have no involvement in the business operations of the licensed establishment, including as an officer, director, shareholder or owner and have no beneficial or financial interest in the business or ongoing operations of the licence: Jerome (Jerry) Sprackman.

i) The Toronto Island Noise Committee (TINC), York Quay Neighbourhood Association (YQNA) and the City of Toronto shall receive timely notice of any application to transfer the liquor licence or vary the conditions on the liquor licence or an increase in the licensed capacities.

LICENCE APPEAL TRIBUNAL



D. Gregory Flude, Vice-Chair



Harinder Gahir, Vice-Chair

Sandeep Johal, Member

Released: August 20, 2018