

File No. 10349/LLA

Appeal from the Notice of Proposal of Alcohol and Gaming under the
Liquor Licence Act to Review an Application for Licence.

POWERHOUSE CORPORATION, operating or intending
to operate as (to be determined), formerly known as Polson Pier.

Appellant

And

REGISTRY OF ALCOHOL, GAMING AND RACING

Respondent

And

CITY OF TORONTO, TORONTO ISLAND NOISE COMMITTEE,
QUEEN CITY YACHT CLUB and
THE YORK QUAY NEIGHBOURHOOD ASSOCIATION

Added Parties/Objectors

**WRITTEN SUBMISSIONS
OF THE YORK QUAY NEIGHBOURHOOD ASSOCIATION**

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EXECUTIVE SUMMARY

Issue 1: This Tribunal lacks authority under the Act to issue a second licence for the premises to Powerhouse, 75% subsidiary of Maya, the existing licensee.

Nothing in the Act gives this Tribunal authority to direct the Registrar to issue a second liquor licence for a premises to an existing licensee or its subsidiary. This is contrary to the plain and ordinary meaning of section 6, read in light of the statute as a whole. The Act allows only the issuance of a single licence for a premises.

Issue 2: Toronto City Council advised the Registrar that the proposed licence is not in the public interest. There is no evidence to the contrary.

As noted in the Notice of Proposal, Toronto City Council passed a resolution advising that the proposed licence is not in the public interest. The Regulations state this is proof of the needs and wishes of the residents of the municipality, absent evidence to the contrary.

The applicant filed no evidence to the contrary. Not a single resident of the municipality gave evidence before the Tribunal that he or she needs or wants a new liquor licence allowing longer hours or more people at the Premises, or gave evidence that granting such a licence would be in the public interest.

It is uncontested that the residents of the municipality do not need or want a new licence. On this ground alone, the Tribunal must find that the proposed licence is not in the public interest and deny it.

Issue 3: All the evidence establishes on a balance of probabilities that the proposed licence is not in the public interest

Even if there were a factual issue as to the needs and wishes of the residents of the municipality, which is denied, there is abundant evidence that the new licence is not in the public interest. The existing licence resulted from extensive negotiations. It balanced the interests of nightclub patrons and residents. It is not in the public interest that a settlement be set aside. There are enforcement issues, but that is not a problem this Tribunal can solve.

There is a long history of problems and noise at the premises, particularly the outdoor patio. There have been on-going noise infractions of the existing licence; the islanders' noise logs establish noise is periodically audible and irritating on the Island. Noise from the premises shakes windows and awakens people on the north side of the harbour.

Large-scale revitalization is on-going on the surrounding waterfront, including hi-rises with balconies. Amplified music and noise from the Premises is inconsistent with such development, and will devalue the land at the east end of the harbour, jeopardizing the future of waterfront revitalization.

There are more residents on the waterfront than in previous years. Residents now live in condominiums across the water on the north side of Toronto harbour, the same distance away from the premises as is Wards Island. Many more residents will move in shortly as developments are completed. The harbour is important to sailors, kayakers, strollers and residents of the city enjoying the waterfront. Longer hours of, and fewer restrictions on, amplified music will disturb these people and devalue the waterfront.

Sound carries well over water. The only sound expert before the Tribunal gave an opinion that amplified outdoor noise at the premises is audible on the Island, and this is difficult to attenuate by technical means. The sound from activities at the premises will have an even greater impact on high rise buildings on the city side of the harbour as there is less attenuation of sound at greater heights. She recommended that outdoor amplified music not be permitted after 11 pm. There was no expert evidence that any potential measure Powerhouse might take to limit disturbing amplified music would be effective.

There is also evidence of serious disruptions of public order connected with the premises, such as drug overdoses, one fatal, and two recent shooting murders in the parking lot outside the premises. The reasonable inference is that allowing more patrons will increase crowd control problems and negative impacts for residents.

Issue 4: The conditions proposed by Powerhouse are not in the public interest. If a new licence is granted with conditions, it should prohibit amplified music on the patio at any time.

If longer hours and/or more patrons were allowed, no conditions alleviating the negative effects for residents are likely to be agreeable to the Registrar.

If conditions are to be different from those in the existing licence, a condition prohibiting amplified music on the patio would be appropriate, in accordance with the Act, and agreeable to and considered enforceable by the Registrar. If the Tribunal finds it has power to set a condition limiting the number of patrons, it should maintain or reduce the number of permitted patrons in the existing license.

PART I: FACTS

1. Powerhouse Corporation (“Powerhouse”) “operates or intends to operate” the premises formerly known as Polson Pier, located at 11 Polson Street, Toronto Ontario, Establishment No. 804501 (the “Premises”).¹
2. Maya Corp.(“Maya”), which owns 75% of Powerhouse, already holds a liquor licence in respect of the Premises (hereafter, the “Existing Licence” or “Licence”). That licence was issued

¹ Exhibit 1: Notice of Proposal, July 19, 2016, paragraph 1.

on August 15, 2008 to Polson Pier Entertainment Inc. (“PPEI”), whose controlling shareholder and President was Tony Grossi. On June 4, 2014, the Registrar transferred the licence to Maya with the existing conditions.²

3. Maya owns 75% of Powerhouse. Michael Kimel owns the other 25%, but takes no active role in management. Tony Grossi was general manager of The Docks in 2006, is managing partner of Maya, and will hold the same position in Powerhouse.³

4. On May 16, while PPEI was still the licensee, it applied to the Licence Appeal Tribunal (“the Tribunal”) to remove conditions on the Existing Licence, pursuant to s. 14(2) of the liquor Licence Act (the “Act”). On March 3, 2015, two days before the hearing was to commence, Maya withdrew its appeal and application to remove conditions, without explanation.⁴

5. Powerhouse Corporation (“Powerhouse”) filed an application with the Alcohol and Gaming Commission of Ontario (“AGCO”) for a liquor sales licence for the indoor and outdoor Premises with capacities of 7548 and 7721 persons respectively on May 28, 2015. Notice of the application for a licence was advertised on the AGCO website on May 18, 2015.⁵

Divisional Court Decision

6. The Registrar of Alcohol and Gaming (the “Registrar”) refused to process Powerhouse’s application by letter dated July 3, 2015 on the grounds that the operator of the premises, Maya, should have filed a transfer of the existing licence to Powerhouse. On May 5, 2016, the Divisional Court set aside the Registrar’s decision on narrow procedural grounds:

The authority for the Registrar to refuse Powerhouse’s application must come from 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....The Act gives the Registrar no general administrative authority to refuse an application.”⁶

7. The Divisional Court Decision turned on *the Registrar’s* lack of statutory authority for refusing the application. The Court did not deal with the limits or extent of *this Tribunal’s* statutory authority, as that issue was not before it.

² *Powerhouse v. Ontario (Registrar, Alcohol and Gaming Commission)*, 2016 ONSC 2549, (Ont. Div. Ct.), (Referred to hereafter as “Divisional Court Decision”), paragraphs 6, 7, 9, 11, 14, 19. Tony Grossi cross-examination, September 25, 2017.

³ Divisional Court Decision, paragraph 9, 50. Grossi cross-examination, September 25, 2017.

⁴ Divisional Court Decision, paragraphs 12, 13, 16, 19.

⁵ Exhibit 1: Notice of Proposal, July 19, 2016, paragraph 2, 3. Divisional Court Decision, paragraph 20.

⁶ Divisional Court Decision, paragraphs 54 and 56.

8. The Court commented that the Registrar's assessment that the actions of Powerhouse, Maya and PPEI actions were contrary to the public interest might well be correct, but left that issue to this Tribunal to determine:

While I do not disagree with the Registrar's assessment that Powerhouse, Maya and PPEI's action in proceeding as they have is 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 to refuse an application must come from the Act...⁷

9. Written objections from residents of the municipality were received. The Deputy Registrar of the Commission directed that "a proposal to review the application be issued in order to determine whether the applicant is disentitled to a licence because the issuance 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."⁸

10. York Quay Neighbourhood Association ("YQNA") is a residents association representing residents of the waterfront from Yonge Street to Rees Street. The eastern harbour and the area along Queens Quay East had no residents' association as of the objectors' disclosure deadline in this matter on January 25, 2017, because the residential buildings there were mostly still under construction. In this proceeding, YQNA speaks for present or future residents on the city side of the harbour. YQNA was added as a party to this proceeding on consent by order dated September 27, 2016.⁹

Powerhouse's proposed conditions and undertaking

11. Powerhouse recently provided an "undertaking" to the Tribunal and parties that, if a new licence is granted, it will amend its licence application "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."¹⁰

12. Powerhouse did not propose to amend its application to seek any lesser numbers of patrons than was set out in the Notice of Proposal of July 19, 2016 until Mr. Kulis' opening statement on March 20, 2017, the first day of the hearing. There is no evidence it has in fact amended its application.

13. With respect to the noise concerns of residents, expressed by many witnesses before the Tribunal, Powerhouse's most relevant proposed condition is: "7. No live music, being music

⁷ Divisional Court Decision, paragraph 54.

⁸ Exhibit 1: Notice of Proposal, July 19, 2016, paragraph 6.

⁹ Witness Statement of Ulla Colgrass, adopted as her sworn testimony on March 20, 2017, paragraphs 2 and 4.

¹⁰ "Undertaking" in "Amended Conditions/ House Policies Proposed by Powerhouse Corporation to be Added to the Liquor Licence" sent by Powerhouse Counsel, November 24, 2017.

performed by musicians on instruments whether acoustical or electronically amplified, 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 live music will be played on the outdoor area after 2:00 am until 11:00 am on Fridays, Saturdays and the Sundays before holiday Mondays.”

Comparison of Powerhouse’s proposed conditions with the Existing Licence

14. Maya is now operating under the Existing Licence and has not surrendered it, although there was speculation it might do so at some unknown future time.¹¹ The Existing Licence permits Maya to serve 3763 patrons inside and 2510 outside.¹² Key provisions of the Existing Licence as to amplified music include:

(a) “No sound amplified by mechanical, electronic or other means (“Sound”) emanating from the Premises shall be audible on Ward’s Island or Algonquin Island (the “Community”) at any time. ‘Audible’ shall mean audible to the human ear of any person, unassisted by any mechanical, electronic or other means;”

(b) “... no amplified outdoor music, disc jockey, amplified voices or loudspeaker at the Premises between the hours of 11:00pm and 11:00 am;”

(c) “...no outdoor musical events, including concerns [sic. should read “concerts”], taking place at the Premises;”

(d) there must be a “sound monitor” on the Island; complaints must be recorded and the complained-of sound reduced in response; phone numbers must be provided to which complaints may be directed; the licensee must comply with a “Docks Noise Containment Proposal”; windows and doors must be kept closed when music is playing indoors; and the licensee must comply with City of Toronto by-laws and business licence requirements, and with section 46 of Regulation 719 of the Act.¹³

15. If a new licence were granted with the conditions proposed by Powerhouse, significant changes to the status quo would therefore include:

(a) the condition prohibiting audible sound on the island would be done away with;

(b) there would be no time restrictions at all on “non-live” i.e. recorded music outside, which the evidence showed is played at many large-scale outdoor disc jockey (“DJ”) events at the

¹¹ Liquor Sales Licence, August 15, 2008, Exhibit 10, Tab C, Divisional Court Decision, paragraphs 6, 7, 8, 9, 10, 11, 14, 17, 20.

¹² Divisional Court Decision, paragraph 6. Liquor Sales Licence, August 15, 2008, Exhibit 10, Tab C.

¹³ Licence Sales Licence dated August 15, 2008, Exhibit 10, Tab 2C, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Premises. Such events could apparently continue all night, if Powerhouse's proposed conditions were granted;

(c) "live music" would be permitted outside although it previously was not, as concerts were prohibited;

(d) the time limit on amplified music outside will be extended three hours (if it is "live music") from 11 pm to 2 am on Thursdays, Fridays, Saturdays and Sundays of long weekends, although there would be no time limit at all on non-live i.e. recorded music as noted above.

Evidence that the proposed licence is not in the public interest, having regard to the needs and wishes of residents of the municipality

16. The hearing revealed a total absence of any support whatsoever for the proposed license from residents of the municipality. Not one local resident testified in support of it. A great many residents of the municipality (essentially, every resident that the Tribunal heard from) are opposed to issuance the license and do not believe it is in the public interest.

17. Over 2000 residents signed an on-line petition objecting to the proposed liquor licence. Six YQNA witnesses, all residents of the municipality of Metropolitan Toronto, gave evidence opposing the liquor licence. YQNA submitted letters opposing the application from individuals representing 4500 members of the Royal Canadian Yacht Club; the Toronto Noise Coalition; the Federation of North Toronto Residents Association, a volunteer organization comprised of 30 residents' associations in Toronto; the Harbourfront Canoe and Kayak Centre which offers canoeing, kayaking and paddle boarding to thousands of guests each summer; the Board of Directors of York Condominium Corporation Number 510 at 55/65 Harbour Square, representing almost 1000 residents; the Property Manager of Pier 27 Condominium at 29 Queens Quay East; the Gooderham and Worts Neighbourhood Association representing the six condo buildings of the Historic Distillery District; the Board of Metropolitan Condominium Corporation no. 949 at 77/99 Harbour Square, representing 2000 residents; the Board of the Condominium Residences at 33 Harbour Square, representing 1000 residents; and Mr. Harold Smith. Sixteen Toronto Island Noise Committee witnesses, all except Suzanne Kavanagh residents of Toronto Island; two city councillors, Pam McConnell and Paula Fletcher; Christopher Glaisek, a representative of Waterfront Toronto; and the City's sound expert Dalila Guisti objected to the licence as proposed.¹⁴

TINC Noise Logs

18. YQNA will not repeat the detailed evidence as to the noise logs introduced by TINC, ably summarized in TINC's submissions. That evidence, it is submitted, establishes that, except during the 2008 to 2014 period, sound from the Premises has often been audible on Toronto

¹⁴ Testimony of Tim Ehlich, March 30, 2017. Letters, Exhibit 3, Tabs 8 to 18. Testimony of Pam McConnell, March 31, 2017. Testimony of Paula Fletcher, March 31, 2017. Testimony of Christopher Glaisek, June 29, 2017.

Island, disturbing residents. DJs at very large noisy events at Cabana Pool Bar have control over their sound system, and tend to crank the sound up, even if there are noise complaints. Complaints did not necessarily result in disturbing amplified music being turned down. The monitor system does not seem to have worked well, and has caused stress to the monitor, Thomas Rutherford. In general, since 2014, the applicant has shown a pattern of failing to respond to residents' concerns, and of ignoring the both the letter and the spirit of the Existing Licence. There has been continuity of management at the Premises for many years; Tony Grossi has been general manager or managing partner of the Premises at all relevant times.

A long history of noise issues at the Premises

19. A 2006 decision of the Alcohol and Gaming Commission, after a 26 day hearing, ordered the revocation of the liquor licence then in place at the Premises, due to excessive noise. The Board concluded: "The evidence given by the residents conveyed anger and anguish. The impact of the noise has been devastating to many...the Board concludes that there is nothing short of revocation that will ameliorate the public's concerns; the noise has been pervasive to their everyday existence. The volume and hours has not abated to any great extent over a ten year period. This is unacceptable for a community - any community."¹⁵

The Existing Licence was a settlement after lengthy negotiations

20. The Existing Licence was arrived at after extensive negotiations, and balanced the interests of nightclub patrons and residents. Many witnesses were of the view it is not in the public interest to set it aside.¹⁶

21. In the words of Deputy Mayor Pam McConnell, in 2008 when the Existing Licence was negotiated and issued on consent "The matter finally came to a resolution." There was "peace in the valley". It was an arrangement that worked. From 2008 until 2013, she got not one complaint, whereas prior to revocation of the licence in 2006, she had been getting complaints weekly or daily.

22. The Deputy Mayor objected to an application for a new licence, when there already is a licence in place. It is not in the public interest to return to the way things were before the Existing License was negotiated. She was concerned about the precedent if this application is approved, because then any liquor licensee can apply for a new licence. It will be difficult to manage similar issues if this application is approved. She noted there seems to be a "no lose"

¹⁵ Decision of Patricia McQuaid, G.R. (Randy) Barber, Commission, July 24, 2006. Exhibit 10, Tab E, page 39, and see page 32 re Tony Grossi role.

¹⁶ Witness Statement of Ulla Colgrass, adopted as her sworn testimony on March 20, 2017, paragraphs 18 and 19. Witness statement of Cathie MacDonald, adopted as her sworn testimony on March 20, 2017, paragraphs 17, 18. John Wilson testimony, March 21, 2017. Christopher Glaisek testimony, June 29, 2017.

situation for Powerhouse, if you lose you still have a licence and can ask for conditions to be removed. “We should not have to re-litigate and re-litigate.”¹⁷

23. The Deputy Mayor testified that the proposed licence is not in the public interest, even though she is aware that Powerhouse seems willing to reduce the number of permitted patrons from the 15000 set out in the Notice of Proposal. In 2014, her office started receiving complaints again about the Premises. There were more complaints in 2015 and 2016. Noise By-law advisories were sent to the Premises on 11 occasions by MLS. Charges for violation of noise by-laws were laid on 3 occasions.¹⁸

24. She notes there are more residents and visitors along the waterfront and around the harbour potentially impacted by noise from the Premises than there were in 2006. She is concerned about the effect of noise from the Premises on new residents, including those at Hines and Pier 27, both condominium developments at the water’s edge. Noise carries well over water, and can affect people’s health. She is also concerned that excessive noise from the Premises is detrimental to sailors, the sailing clubs on the Island, and visitors to Toronto Island.¹⁹

25. Deputy Mayor McConnell’s view was that there should be no amplified noise after 11 pm. There should be no live events or concerts on the outdoor area. Waterfront Toronto, an agency owned by three levels of government, whose purpose is to revitalize the waterfront, also does not support the proposal for a new licence unless the current conditions are kept.²⁰

Noise from the Premises shakes windows and awakens people on the north side of the harbour.

26. After 2014, Deputy Mayor Pam McConnell got complaints about noise from the nightclub from as far away as the St Lawrence neighbourhood.²¹ Suzanne Kavanagh, a resident of the St Lawrence Neighbourhood, who lives 1500 metres away from the Premises, north of the Gardiner Expressway, testified that the sound from the nightclub reaches her residence and rattles her windows.²² In reply to assertions by the applicant’s witnesses that no noise escaped from the Premises to the north, Scott Wilson who lives on the 34th floor of a high rise condominium building in the Distillery District, 1250 metres north east of the Premises testified that he was awoken by music from the nightclub at 3 am.²³

¹⁷ Deputy Mayor Pam McConnell testimony, March 31, 2017.

¹⁸ Deputy Mayor Pam McConnell testimony, March 31, 2017. Information Request, table of bylaw advisories and charges, Exhibit 13, Tab 1. Testimony of Samantha Minnear, provincial offences officer with City Of Toronto, June 29, 2017.

¹⁹ Deputy Mayor Pam McConnell testimony, March 31, 2017.

²⁰ Deputy Mayor Pam McConnell testimony, March 31, 2017. Testimony of Chris Glaisek, Senior Vice-President, Planning and Design, Waterfront Toronto, June 29, 2007.

²¹ Deputy Mayor Pam McConnell testimony, March 31, 2017.

²² Suzanne Kavanagh testimony, March 30, 2017.

²³ Scott Wilson Testimony, November 3, 2017.

27. This may be because entrances to the Premises open and close continually, letting loud music out. Ja Chan of Powerhouse, in cross examination, described the entrance doors on the north side of the Premises through which every patron must pass, both going in and out. If there are thousands of patrons both inside and outside, then the doors will be open thousands of times. Each time the door is open, sound can escape from inside. There are other doors on the north and west side of the building that are open from time to time, used by staff or patrons coming out onto the promenade beside the Premises.²⁴

Waterfront revitalization

28. Massive development is occurring and planned on the surrounding waterfront. 3000 residential units have been built-out on the waterfront, and 6000 are planned. 1800 of these will be occupied in the next 18 months to two years.²⁵

Hines/Tridel Bayside Community

29. Michael Gross, Senior Construction Manager and Bayside Program Director at Hines Canada, described the Aqualina condominium building Hines is building across the water around 750 metres from the Premises, which he expected to be fully occupied at the end of 2017. They are the same distance away from the Premises as is Wards Island. Tridel will be the property manager. More residents will follow as two additional phases, Aquavista and Aquabella, are occupied in 2018 and 2020. There will be families living in the units. All the residential units have balconies. The residential condominiums will have ground floor retail units which will likely include restaurants and patios. Mr. Gross expressed concern that residents will be disturbed by noise from the premises. He noted that the applicant made no effort to reach out to Hines/Tridel, or the neighbours to provide information about their plans. On cross-examination, he said that if residents move in, and are disturbed by noise from the Premises, then the market will learn of it, and it will affect the desirability of the units and the waterfront.²⁶

Waterfront Toronto

30. The area immediately north of the Premises is the site of a revitalization project, the Port Lands Flood Protection, run by Waterfront Toronto, an agency co-owned by the federal, provincial and city governments, at a cost of \$1.2 billion, shared equally by the three levels of government. The plan involves creating a new island at the mouth of the river called Villiers Island which will be the site of a mixed use neighbourhood containing 5000 residential units. There will also be other nearby residential neighbourhoods along the Keating Channel and the north side of the harbour containing 4000 residential units, as well as a new park, Promenade Park. The plan involves re-locating Cherry Street, the main access to the Premises from the City.

²⁴ Testimony of Ja Chan, September 27, 2017.

²⁵ Deputy Mayor Pam McConnell testimony, March 31, 2017. Testimony of Christopher Glaisek, Vice-President, Planning and Design, Waterfront Toronto, June 29, 2017.

²⁶ Testimony of Michael Gross, March 30, 2017. See photographs and images of Bayside Community, Exhibit 3, Tab 4, exhibits A to F.

Physical construction was scheduled to commence in late 2016 and to take seven to eight years. The project has been the subject of years of consultation.²⁷

31. Longer hours of amplified music will reduce the value of the land. Revitalization involves the sale of public land which produces revenues to Waterfront Toronto and those funds flow back into revitalization. A large noise-generating nightclub is an inconsistent land use; excessive noise from it will reduce the land sale revenues, jeopardizing the future of the revitalization project.²⁸

32. To expand the nightclub by allowing more people and noise would be a serious mistake from a public policy perspective. Mr. Greenberg testified he lives near the nightclub district. In his experience, as an urban designer both in Toronto and elsewhere around the world, noise from a large nightclub tends to bring urban blight to the surrounding area.²⁹

Sound Expert

33. Dalila Guisti of Jade Acoustics, a sound expert whose credentials were not challenged, testified that sound such as amplified music carries well over water. Her 2005 measurements of sound adjacent to The Docks, as the Premises were then known, and on the Island were of the same magnitude. That is, the sound level did not diminish over a distance of approximately 750 metres over water. She also noted that low frequency sound from the Premises was particularly audible within the houses on the Island located closest to the water. She personally would find the low frequency sound she heard inside these Island homes disturbing.³⁰

34. Ms. Guisti also noted that outdoor activities that include amplified sound are difficult to attenuate. Low frequency sound is audible at large distances particularly over water. It readily passes through building materials. Sounds created by activities of patrons such as yelling, cheering and singing cannot be easily controlled, when they are occurring outdoors. Sound has a greater impact in high rise residential buildings as there is less attenuation of sound at greater heights.³¹

²⁷ Testimony of Ken Greenberg, a lead member of the team that created the winning design for the revitalization project, March 30, 2017. Testimony of John Wilson, co-chair of the West Don Lands Committee, March 21, 2017. Testimony of Chris Glaisek, Senior Vice-President, Waterfront Toronto, June 29, 2017. City Report “Port Lands Flood Protection: Due Diligence Review and Next Steps”, October 16, 2016, Exhibit 13, Tab 5. See aerial view at Exhibit 3, Tab 3, exhibit A, compared with aerial view of existing conditions, same tab, exhibit C.

²⁸ Testimony of Chris Glaisek, Senior Vice-President, Waterfront Toronto, June 29, 2017.

²⁹ Testimony of Ken Greenberg, March 30, 2017. Witness statement of Ulla Colgrass, adopted as her sworn evidence, March 20, 2017, paragraph 22.

³⁰ Guisti Expert Report, Exhibit 14, paragraph 3.2, 3.3. Testimony of Delila C. Guisti P. Eng., Jade Acoustics, June 21, 2017.

³¹ Guisti Expert Report, Exhibit 14, paragraphs 1, 4.4, 4.5.

35. The applicant's proposal to increase the permitted patron capacity will likely include live outdoor events. It will not be feasible to achieve the requirement of Section 46 of R.R.O, 1990, Regulation 719, which requires that the activities should not permit noise to disturb persons that reside near the Premises.³²

36. There was no expert evidence that any potential measures Powerhouse might take to limit the effect of excessive amplified noise on residents would be effective.

Importance of the Harbour

37. Witnesses expressed the importance maintaining a tranquil environment, free of amplified music from the Premises, around Toronto Harbour and the waterfront because many people from the city visit to enjoy strolling, dining, sailing, kayaking, visiting the Island etc. Amplified music and noise travels easily across the harbour waters, so excessive noise from the Premises, if not restricted, will disturb many people.³³

38. Hearing episodic amplified music from occasional special events in your home is different from being disturbed on a regular basis by amplified music from a single site. The latter is harder to cope with.³⁴

Murders and drug overdoses

39. The Tribunal heard evidence of drug overdoses at the Premises, one fatal, and two recent shooting murders in the parking lot outside the Premises. Mr. Kamal testified, implausibly, that although there were newspaper reports of six overdoses, including a fatality, at the Premises on the night of December 16-17, 2016, no other drug overdoses ever occurred at the Premises.³⁵ The reasonable inference to be drawn from these incidents is that allowing more patrons at the Premises will increase crowd control problems and negative impacts for residents.

Lack of information and consultation

40. Witnesses objected to the lack of information about the applicant's plans, or how it proposed to change its operation, and its general lack of consultation with residents. Deputy Mayor Pam McConnell stated that her office had never been contacted by the applicant and informed about its proposed new liquor licence or its plans to change its operation, as would typically occur for example before a special event permit is granted. On-going consultation is

³² Guisti Expert Report, Exhibit 14, paragraphs 4.6.

³³ Cathie MacDonald, witness statement, adopted as her sworn evidence on March 20, 2017, paragraph 13, 14. Deputy Mayor Pam McConnell testimony, March 31, 2017.

³⁴ Cross-examination of Michael Gross, March 30, 2017. Cross-examination of Christopher Glaisek, June 29, 2017.

³⁵ Cross-examination of Jamil Kamal, November 1, 2017. CTV News, "One female dead of apparent drug overdose after all-ages event at Toronto nightclub", Exhibit 3, Tab 24.

important as there are many interests to be balanced on the waterfront and around Toronto Harbour.³⁶

Limited “toolbox” of conditions that the Registrar will agree to.

41. The Registrar’s witness Sergeant Heather Thompson testified as to the potential licence conditions that she, and presumably the Registrar, considers enforceable or not enforceable. Various potential conditions that might seem to provide some protection of the public are not enforceable in her view, for example: that sound not be audible on the Island, that there be a sound monitor, that complaints be recorded and responded to using a given procedure, that a schedule of events be provided to residents, or that sound not exceed certain decibel levels.

42. Sergeant Thompson also said that the Registrar will not agree to and cannot enforce a condition on a liquor license limiting the number of patrons on the Premises. The number of patrons, she seemed to say, is dictated solely by municipal fire regulations etc. The applicant, she said, cannot voluntarily amend its application to reduce the number of patrons.³⁷

43. The only significant conditions that would be enforceable in Sergeant Thompson’s view were: a clear prohibition on amplified outdoor music, or a time limit when amplified music outdoors is to stop. Minor conditions such as providing a contact number to the City Councillor’s office, and posting signs asking patrons to keep noise down would also be enforceable.³⁸

PART II: THE ISSUES

Issue 1: Does this Tribunal have authority to direct the Registrar to issue a second liquor licence for the Premises to the existing licensee Maya or its 75% subsidiary, Powerhouse?

Issue 2: As Toronto City Council advised the Registrar that the issuance of a new liquor licence for the Premises is not in the public interest, and the applicant filed no evidence to the contrary, does section 7.1(1) of O.Reg. 719/90 require this Tribunal to find the licence is not the public interest and must be denied?

³⁶ Deputy Mayor Pam McConnell testimony, March 31, 2017. Cross-examination of Michael Gross, Vice-President of Hines, March 30, 2017. Witness Statement of Ulla Colgrass, adopted as her sworn evidence, March 20, 2017, paragraph 26. Witness Statement of Cathie Macdonald, adopted as her sworn evidence, March 20, 2017, paragraphs 15 to 17.

³⁷ Her evidence was ambiguous in this respect, as noted in the submissions of TINC. The AGCO’s and applicant’s submissions may clarify their positions in this regard. The applicant has throughout sought an increase in the number of patrons permitted, implying this Tribunal has control over such matters. YQNA submits that the Tribunal has the power to maintain the number of patrons at the levels set out in the Existing Licence, or to reduce that number, under its power to set conditions in section 23(12) of the Act.

³⁸ Testimony of Sergeant Heather Thompson, November 20, 2017.

Issue 3: Is the issue of a licence to sell liquor, in light of all the evidence, “not in the public interest having regard to the needs and wishes of the residents of the municipality” under section 6(2)(h) of the Act?

Issue 4: If the Tribunal finds that a new licence is in the public interest, what conditions must be attached to it under section 12 (10), to give effect to the purposes of the Act?

PART III: SUBMISSIONS OF LAW

Issue 1: Does this Tribunal have authority to direct the Registrar to issue a second liquor licence for the Premises to the existing licensee Maya or its 75% subsidiary, Powerhouse?

44. The Tribunal must interpret the Act in order to determine if it has authority to grant the applicant’s unprecedented request that it direct the Registrar to issue a second licence for the Premises to Powerhouse, 75% subsidiary of Maya, the existing licensee at the Premises.

45. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.³⁹ Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.⁴⁰

46. The Divisional Court did not resolve this key issue of statutory interpretation. It merely determined that *the Registrar* is not the statutory decision-maker.⁴¹ This Tribunal is the decision-maker as to whether it should direct that the licence be issued, issued with conditions, or denied, but it must first determine if the Act even permits the issue of a second license for a Premises.

47. As the Supreme Court of Canada observed in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (SCC) at paragraph 33 (cited in the Divisional Court Decision at paragraph 29):

...the resolution of unclear language in an administrative decision maker’s home statute is usually best left to the decision maker. That is so because the choice between multiple interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker — not the courts — to make. Indeed the exercise of that interpretive discretion is part of an administrative decision maker’s expertise.

³⁹ *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 (“Rizzo”), per Iacobucci J, paragraph 21 citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983).

⁴⁰ *Interpretation Act*, section 10.

⁴¹ Divisional Court Decision, paragraphs 54, 56. *Liquor Licence Act*, R.S.O. 1990, sections 23(10) and (12).

48. The ordinary and grammatical meaning of sections 5(1) and 6(2) read harmoniously with the scheme of Act is that only one license can be issued for a premises. Neither Maya nor Powerhouse is entitled to a second license for the Premises.

The plain and ordinary meaning of the Act

49. Under the scheme of the Act, there is a blanket prohibition on selling liquor: “5. (1) No person ... shall...sell liquor...” but also exceptions, such as: “...except under the authority of *a licence* ... to sell liquor...” Section 6(1) sets out how a person may seek this statutory exception: “A *person* may apply to the Registrar for *a licence* to sell liquor”, and section 6(2) states “...an applicant is entitled to be issued *a licence* to sell liquor” subject to the listed exceptions.

50. The plain and ordinary meaning of “a licence” in s. 5(1) and 6(1) and (2) is that a person is entitled to *a single licence* for a premises. The Act repeatedly refers to “a person” and “a licence” or “the licence”. The Act nowhere states a person is entitled to two licences for a premises, or that a licensee or its subsidiary is entitled to seek a second licence for the same premises.

51. The Act always ties “a licence” or “the licence” in the singular to the “premises”. For example, an applicant is entitled to a licence under section 6(2) except if “(g) the premises... in respect of which *the licence* is to be issued are not... in compliance...” or if “(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.” References to “a premises” or “the premises” in respect of which a licence may be issued appear throughout the Act.

52. The plain and ordinary meaning of the words “a licence” and “the licence” in sections 5(1) and 6(1), when read harmoniously with the scheme of the Act, is that a person (including a 75% owned subsidiary of that person) is either subject to the Act’s statutory prohibition on selling liquor or not subject to it. The Act does not contemplate that a person or its subsidiary, once subject to the statutory exception, can apply again to be subject to the same exception. That determination has been made.

53. If it was the intent of the legislature that a licensee (or its subsidiary) may seek more than one licence for a single premises, then section 6 could have easily have been drafted to say so. Interpreting section 6(1) to mean a licensee (or a 75% subsidiary with the same management) may apply for another licence for a premises requires reading in statutory wording that is not there.

54. The Registrar “refused to process Powerhouse’s application based on the fact that the existing licensee for Polson Pier was substantially related to Powerhouse.” However, the Divisional Court found there had not been a “prescribed change of ownership.” It did *not* decide

that the subsidiary of a licensee *could* be issued a second licence (that is for this Tribunal to decide); its decision turned on the Registrar's lack of decision-making authority.⁴²

Absurd consequences of the applicant's interpretation of the Act

55. The applicant's novel proposed interpretation of section 6(1) of the Act (i.e. that a licensee or its closely-held subsidiary can apply for a second licence for a premises) is wrong for the additional reason that it makes no sense if the words are read harmoniously with the Act as a whole; it renders section 14(2) superfluous and absurd.

56. Section 14(2) says "the Tribunal may, on the application of a licensee, remove a condition of a licence... if there is a change in circumstances." Section 14(2) is superfluous if the licensee can, by simply incorporating a closely-held subsidiary, apply for another licence under section 6, and by doing so put the onus of opposing the application on objectors. This neuters the Act's intent that the licensee bears the onus under section 14(2) of showing a change of circumstances justifies dropping a condition.

57. The applicant's interpretation leads to other absurd consequences not in keeping with the scheme or object of the Act:

- (a) nothing then prevents any licensee, or its affiliates, from applying for a third or fourth licence for the Premises and so on, potentially leading to a limitless sequence of hypothetical liquor licence applications for the same premises. There would likely be similar applications from many licensees across the Province, creating administrative chaos and prejudicing objectors;
- (b) if the licensee, or its subsidiary, is granted a second licence for the premises with different conditions, the licensee is then in the bizarre position of being able to "pick and choose" which licence to operate under and which to surrender. If the Tribunal sees fit to direct the Registrar to put more onerous conditions on the second licence, nothing would appear to prevent the licensee from surrendering or never operating under the second licence and keeping the first one, instead of *vice versa*;
- (c) as this lengthy hearing demonstrated, under the applicant's novel and unprecedented interpretation, the s. 6 hearing is absurdly backwards, making the Tribunal's job more difficult, and prejudicing opponents. The licensee seeks what is in effect a change in the status quo i.e. a new "improved" licence to replace the old one, but because the onus is on the opponents under section 6, the opponents must lead evidence first, without knowing what changes the licensee seeks to that status quo or what its hypothetical plans are.

⁴² Divisional Court Decision, paragraphs 48-50. If there is a "prescribed change of ownership" between Maya and Powerhouse, then a transfer is necessary under section 16 of the Act and section 94(1) of the Regulations. But that is not a matter this Tribunal need decide. It is unknown if or when Powerhouse will take over management of the Premises.

- (d) The applicant's ingenious but incorrect interpretation of the statute defeats the public interest in the finality of settlement and the resolution of disputes. A liquor licence dispute may appear to be resolved, perhaps through a settlement involving negotiated conditions, or through a final Tribunal decision and exhaustion of appeal routes, but the licensee or its subsidiary could simply apply for another licence at any time, re-opening the dispute.

58. The Tribunal should refuse to order the Registrar to issue a second liquor licence for the premises to the applicant, as it lacks statutory authority to do so under the Act.

Issue 2: As Toronto City Council advised the Registrar that the issuance of a new liquor licence for the Premises is not in the public interest, and the applicant filed no evidence to the contrary, does section 7.1(1) of O.Reg. 719/90 require this Tribunal to find the licence is not the public interest and must be denied?

59. The Notice of Proposal states: "The City of Toronto stated the Council's position in a letter to the Commission: "1. City council direct the City Clerk advise the Registrar of the Alcohol and Gaming Commission of Ontario ("AGCO") that the issuance of a new liquor licence for the premises currently operating as Polson Pier, 11 Polson Pier, (the "Premises"), is not in the public interest..."

60. Section 7.1 (1) of O. Reg. 719/90 as amended states: "In the absence of evidence to the contrary, the Registrar shall consider a resolution of the council of the municipality, in which are located the premises for which a person makes an application to sell liquor or holds a licence to sell liquor, as proof of the needs and wishes of the residents of the municipality for the purposes of clause 6(2)(h) of the Act."

61. The applicant filed no evidence to the contrary. The needs and wishes of the residents of the municipality for the purposes of section 6(2)(h) are therefore undisputed before this Tribunal: the residents of the municipality do not need or wish for a new licence. The regulation creates a presumption which is undisputed on the facts. On that basis alone, the Tribunal must find that on the balance of probabilities, the licence is not in the public interest under section 6(2)(h).

Issue 3: Is the issue of a licence to sell liquor, in light of all the evidence, "not in the public interest having regard to the needs and wishes of the residents of the municipality" under section 6(2)(h) of the Act?

62. The *Matador* case describes the test in an application under section 6(2):

The issue to be addressed in this hearing is whether or not the granting of a licence to the Appellant is in the public interest. The Act recognizes the impact that the establishment of licenced premises may have on a community: section 6(2)(h) states that an applicant is entitled to be issued a licence to sell liquor except if "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."

In determining whether or not a licence is in the public interest, the Tribunal must balance the interests of all of 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. 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.

The needs and wishes of residents in closest proximity to an establishment merit close consideration because those residents would be most impacted by the issuance of a liquor licence. In this case, there are both objectors and supporters among the residents in the area surrounding the Matador.⁴³

63. As set out in the last sentence above, in *Matador* a factual issue arose as to the public interest having regard to the needs and wishes of the residents of the municipality. *Unlike here, there was conflicting evidence as to what those needs and wishes were.* The appellant in *Matador*, for example, filed evidence of 1,054 letters of support for the proposed liquor licence, including 195 from nearby residents, and its witnesses testified before the Tribunal that a music venue would benefit the public in that it would, for example, revitalize the neighbourhood. There were 47 letters supporting the licence and 59 letters objecting from residents of Dovercourt Road, where the nightclub was located.⁴⁴

64. This case is very different. Not one resident of the municipality, in fact no witness at all, gave evidence that the proposed licence, or proposed new conditions, are in the public interest or are needed or wanted by the residents of the municipality. There can be no doubt that the concerns of residents are *bona fide* in light of the 2006 decision revoking the liquor license, and the weight of evidence opposing the application.

65. This case is similar to *P.T. Edward Trading Post v. Alcohol and Gaming Commission*, [1999] O.A.G.C.D. no. 225 in which a liquor licence was denied due to the undisputed concerns of local residents. “The local residents consistently and passionately testified that they did not want a bar on their street, and *in the virtual absence of any local support whatsoever for this application*, the Board is prepared to listen to, and indeed to act on those concerns.” (Italics added).

Growth and change in a neighbourhood is relevant

66. In a 2009 case, the AGCO denied an application for a liquor licence because licenced premises would not be in keeping with all the developments in the neighbourhood, including a

⁴³ *Matador Corp (c.o.b Matador Ballroom)(Re)*, [2015] O.L.A.T.D. No. 265, 2015 CanLII 93617 (ON LAT) (“*Matador*”).

⁴⁴ *Matador*, paragraphs 133,195.

planned hospice for the terminally ill. As well, there had been a lack of effort on the part of the applicant to exist in harmony with the neighbourhood:

58 In the view of the Board, the existence of a bar should not preclude others from existing lawfully in the neighbourhood. In order to develop, neighbourhoods often go through change and growth. The hospice in the location on Christina Street appears to be a well thought out and necessary move. The Applicant's Representative agreed that the hospice was badly needed, but perhaps another location should have been considered. ...

59 A licenced 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 licenced commercial entity. Development of a neighbourhood cannot be jeopardized by the existence of a licenced premises...

62 ...The Board is of the view that if, on a balance of probabilities, a licence is granted to the Applicant at this location, it will cause significant disruption to the peace and lawful activities of the residents considering all the developments in the neighbourhood including the new hospice. In the view of the Board there has been a lack of effort on the part of the Applicant to exist in harmony with the neighbourhood.⁴⁵

Issue 4: If the Tribunal finds that the issue of a new licence is in the public interest, what conditions must be attached to any such licence under section 12 (10) to give effect to the purposes of the Act?

67. No resident of the municipality gave evidence that allowing the number of permitted patrons to increase from 2510 to 3500 outside (a 28.5 % increase), or from 3763 to 4565 inside (a 21% increase), or permitting live amplified musicians outside for the first time, or allowing amplified music outside to continue three hours longer than before (until 2 am on Friday, Saturday and long-weekend Sundays, rather than until 11 pm), nor allowing recorded amplified music outside (e.g. with a DJ) at any time is in the public interest having regard to the needs and wishes of the residents of the municipality.

68. Potential conditions attenuating the negative effect of such changes on residents, such as decibel-level limits, are not agreeable to the Registrar on the grounds they are unenforceable.

69. Allowing longer hours and more patrons therefore amounts to deciding Powerhouse should be trusted to look after the interests of local residents as it see fit. The evidence establishes this will not work, and is not in the public interest.

70. To the extent possible the existing conditions should be kept. If conditions on a new licence are to be different from those in the existing licence, a condition prohibiting amplified music on the patio would be appropriate, in accordance with the Act, and agreeable to and considered enforceable by the Registrar. If the Tribunal finds it has power to limit the number of

⁴⁵ *AGCO v. 1317596 Ontario Limited operating as or intending to operate as, Border Club 2000 (formerly known as Woody's Beach Bar), and Corporation of the City of Sarnia.* [2009] O.A.G.C.D. No. 302.

patrons, it should maintain or reduce the number of permitted patrons set out in the Existing License.

PART IV: ORDER SOUGHT

69. The Tribunal should:

- (a) direct the Registrar to refuse the licence, pursuant to section 23(10) of the Act;
- (b) in the alternative, direct the Registrar to issue the licence, attaching conditions under section 23(12) that amplified music is not permitted on the patio at any time, that the doors of the Premises be kept closed at all times, and, if the Tribunal finds it has the power to do so, maintaining or reducing the number of patrons permitted under the Existing Licence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 8, 2017

Edward Hore
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Solicitor for York Quay Neighbourhood Association