



**DECISION OF THE  
GENERAL MANAGER  
LIQUOR CONTROL AND LICENSING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of

***The Liquor Control and Licensing Act RSBC c. 267***

Licensee: Sky Bar Ltd.  
dba Skybar  
615 - 938 Howe Street  
Vancouver, BC

Case No. EH03-164

**APPEARANCES**

For the Licensee: Dennis Coates, Q. C.

For the Branch: Peter Jones, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Dates of Hearing: March 4 and 5, 2004

Place of Hearing: Vancouver, B.C.

Date of Decision: July 21, 2004

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**Ministry of Public  
Safety and Solicitor  
General**

Liquor Control and  
Licensing Branch

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## INTRODUCTION

The licensee, Sky Bar Ltd., operates a nightclub, two (2) restaurants and two (2) liquor lounges at 670 Smithe Street, in downtown Vancouver. The establishment opened in August 2003 and had been in operation for approximately one month at the time of this alleged contravention.

There is a restaurant and lounge on the ground floor; the nightclub is on the second floor, and the second restaurant and the VIP lounge are on the third floor.

### *The Liquor Licences*

#### Food Primary Licence No. 300601

- first floor restaurant, capacity 37 persons inside and 11 persons on the patio;
- third floor restaurant, capacity 35 persons inside and 95 persons on the patio; and
- permitted hours of liquor service 9:00 A.M. to Midnight
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#### Liquor Primary Licence No. 300593

- second floor nightclub, capacity 220 persons;
- permitted hours of liquor service 7:00 pm to 2:00 A.M. Sunday to Thursday and to 4:00 A.M. on weekends.
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#### Liquor Primary Licence No. 300594

- third floor VIP lounge, capacity 51 persons inside and 20 persons on the patio;
  - permitted hours of liquor service 11:00 A.M. to Midnight Sunday to Thursday and to 4:00 A.M. on weekends.
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The Maximum Occupant Load (OL) for the main floor is 48 persons; for the second floor is 220 persons including staff; and for the third floor is 205 persons with the retractable roof, including staff, or 104 persons without the covered roof, including staff (Exhibit No. 1, tab 8).

#### **ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION**

By Notice of Enforcement Action dated December 11, 2003, the branch alleged that on September 7, 2003 (business day of September 6, 2003; referred to in this decision as September 6/7, 2003), the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation*: overcrowding beyond person capacity greater than occupant load, in the nightclub, Licence No. 300593.

Previously, the branch served a Contravention Notice for over capacity on August 17, 2003. On October 16, 2003 (see Exhibit No. 1, tab 1, 4 pages from the back), the licensee signed a waiver admitting the contravention and agreeing to pay a monetary penalty of \$5,000.

Schedule 4 of the *Regulations* establishes prescribed penalties. For this contravention, for a first contravention, the range of penalty is four (4) to seven (7) days licence suspension and/or \$5,000 to \$7,000 monetary penalty. For a second contravention, which is defined as a contravention of the same type within the twelve (12) month period preceding the commission of the contravention, the range of penalty is ten (10) to fourteen (14) days.

The branch treated the September 6/7, 2003, contravention as a second contravention, being within one (1) year of August 17, 2003, and recommended an enforcement penalty of twelve (12) days licence suspension.

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**RELEVANT STATUTORY PROVISIONS**

See Appendix A

**ISSUES**

1. Does the licensed capacity apply to the establishment as a whole or to the individual areas?
2. Is the definition of 'occupant load' in the *Regulations* flawed?
3. Does section 6 of the *Regulations* give rise to the alleged contravention?
4. If it is found that the licensee contravened as alleged, for penalty purposes, is this a first or second contravention within the definition in the *Regulations*?
5. If it is found that the licensee contravened as alleged, is the branch's recommended penalty appropriate?

**EXHIBITS**

|               |                                                 |
|---------------|-------------------------------------------------|
| Exhibit No. 1 | Book of Documents                               |
| Exhibit No. 2 | Liquor Inspector floor Plan                     |
| Exhibit No. 3 | Fire Inspector floor plan                       |
| Exhibit No. 4 | Large scale plans, with witness markings        |
| Exhibit No. 5 | Thirteen (13) pages of photographs              |
| Exhibit No. 6 | March 3, 2004, letter from CFT Engineering Inc. |
| Exhibit No. 7 | Qualification of expert witness                 |

**EVIDENCE**

The branch's witnesses were the liquor inspector and a fire inspector who attended Skybar on September 6/7, 2003. The licensee's witnesses were the licensee's general manager, the head of door security and a Building and Fire Code Consultant.

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Skybar operates on three levels. At the main ground floor entrance, patrons who are going to the second floor nightclub pay a cover charge. Other patrons are directed to the first or third floor restaurants. There is a central stairway and elevator that provide access to all three levels. There is a west stairwell that provides access between the second floor and the VIP lounge, and provides egress to the ground floor street exit. There is also an east stairwell which provides egress to a ground floor lane exit.

As of the date of the hearing, there was only one coat check, located on the second floor. Although the coat check is outside the redlined area, patrons attending the coat check are in the redlined area. Patrons from the first or third floor restaurants would have to enter the nightclub to leave or retrieve their coats.

On September 6/7, 2003, the third floor patio did not have a roof. Subsequently, a retractable roof was installed. The patio is a modern décor with fireplaces, greenery, television sets, etc.

### ***The Branch's Evidence***

#### *Liquor Inspector*

The liquor inspector stated that she attended the Sky Bar on September 7, 2003, at approximately 12:10 A.M. (business day of September 6, 2003). The inspector attended with two City of Vancouver Fire Inspectors. The inspector testified that the stairwell leading from the first to second floor was crowded, with people coming and going. At the entrance to the second floor nightclub, there is a landing with fire doors on both sides which open into the nightclub. The inspector testified that the fire doors were open and patrons were using the area as a hallway to travel from one side of the nightclub room to the other. She said that one of the door security staff told her it was permissible to have patrons traveling back and forth. However, one of the licensee's managers who is known

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to her (a witness in this hearing) was behind her on the stairs and immediately told the door security staff to close the fire doors and stop people flowing across.

The inspector testified that she separated from her colleagues inside the nightclub and she immediately started a count, with a mechanical clicker. She said she first went toward the dance floor side of the room, but found she could not penetrate that crowd and turned back. She testified that the nightclub was absolutely crowded. She related that at least twice her cell phone was jostled out of her jacket pocket, simply from the pressure of the crowd, and the clip was either lost or broken. She circled the dance floor to the extent possible and then went to the other side of the room. Her count took approximately 6 - 7 minutes, whereas usually if the club is at capacity it has taken her 2 minutes. The inspector testified that as of the date of the hearing, she had inspected the Skybar about 20 times and was quite familiar with the layout and the view of the nightclub when it is not busy, moderately busy, and at capacity.

She completed her first count at 12:20 A.M.; the count was 498 persons. After the count, she went to the third floor and inspected the VIP lounge. She then returned to the nightclub and conducted another count which resulted in a count of 448 persons.

The inspector testified that she and the Fire Inspectors discussed the possibility of closing the nightclub because of the serious overcrowding. However, she said that because of the busy downtown location, the number of police officers that would have been required to monitor patrons leaving, and the potential for problems with patrons if they were ordered to vacate, they decided they could not shut it down. She received assurances from the Skybar manager that the numbers would be reduced.

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The inspector testified that the Maximum Occupant Load (OL) for the second floor of Skybar is 220 persons (Exhibit No. 1, Tab 7, second page), and that the licensee had a copy of the OL certificate.

*Fire Inspector*

The Fire Inspector testified that his mandate is to look for potential fire safety issues. When he first entered the second floor of Skybar on September 6/7, 2003, it was evident that the number of patrons exceeded the OL. At approximately 12:10 A.M., he conducted a count using a mechanical counter. He said it took about 15 to 20 minutes and that he was shoulder to shoulder with patrons and had to force his way around the room. He said that the hardest area to count was around the dance floor. He testified that the area around the coat check is narrow and becomes congested.

The Fire Inspector's count was 410 persons. He was aware that the OL was 220 and had seen the OL certificate at the Skybar nightclub.

The Fire Inspector testified that he was confident that management would reduce numbers. When he returned at 2:00 A.M. people were leaving and the numbers were coming down.

The Fire Inspector was not familiar with the way other municipalities calculated exit capacities for Occupant Loads. He testified that he has experience doing the calculation in the City of Vancouver and it is primarily a mechanical task, applying predetermined factors, without much room for discretion.

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***The Licensee's Evidence****Head of Door Security*

The head of door security testified that there are challenges for this licensee because of the placement of the restaurants, lounges and nightclub. Although traditionally restaurants do not require door security, at Skybar all patrons pass through the same entrance and the same security. In his view, Skybar is a single entity. On a typical night there are 12 door security employees who have radio contact. There are 18 security cameras throughout the club.

He testified that Skybar has a computer scanner and everyone is required to produce identification which is scanned for security reasons. Skybar targets an upscale, older clientele, encourages an evening dress code and limits the age on weekends to 25 years and older.

The head of door security described the Skybar's procedures for recording the number of patrons entering and leaving, the position and functions of the various door security personnel, and access to, and counting patrons in, the VIP lounge. He also described the 'roamer' who does cluster counts in all 4 areas, every 20 minutes, and reports the numbers back to the head of door security. He also testified that the door security on each level keep counts.

As a general situation, the licensee anticipates that there will be a turnover of people from the third floor, as people finish dinner and leave. The head of door security testified that they have no way to accurately estimate how many people will go to the nightclub rather than just pick up their coats and leave. However, as a general observation, he stated that the patrons on the third floor are more interested in a quiet, relaxing evening than going to the nightclub. The licensee does not stop patrons from going into the nightclub, unless the nightclub capacity

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exceeds 200 patrons. In his view, the main capacity issue is the coat check area and how quickly the staff can provide coats so patrons clear the area.

The head of door security was working on September 6/7, 2003. He testified that the third floor patio roof had not yet been installed. At approximately 11:20 P.M., it started to rain heavily and patrons rushed to get off the roof. Some went to the second floor for shelters, other to get their coats. They were not able to return to the rooftop even after the rain subsided. He also testified that when the rain started he was alerted to a capacity problem on the second floor. Further, he was told that the manager did a count on the second floor around 11:30 – 11:45 P.M. and reported his count, 220 patrons, to the liquor inspector.

The head of door security testified that the licensee keeps records of patron counts, times of police visits, etc., but he did not have any records with him. He was satisfied that the recorded count would not have exceeded the licensed overall capacity.

#### *Licensee's General Manager*

The licensee's general manager testified that he has been in the hospitality industry for 20 years and that Skybar presents the most difficult compliance configuration he has worked with. He described Skybar as an entertainment destination run as one business. The coat staff, security personnel, etc. are scheduled as one operation over the four venues. Generally, the aspect of having four venues on three levels, with access between them, is difficult. However, the most difficult aspect of the design is the coat check, which he testified has been much less of a problem since the retractable roof was installed. He considers it to be a continuing issue and indicated that it would have to be changed before next winter. He noted that one alternative is to be licensed for later opening on the rooftop.

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Concerning records, the general manager testified that he thought the type of records the head door security referred to were not being kept at the time of this incident. Subsequently, the licensee's counsel advised that the record keeping began September 18, 2003.

Concerning the waiver for the August 17, 2003 contravention, the general manager said he signed that without consulting counsel, wanted to be cooperative with the branch, and did not fully understand what 'second contravention' meant.

The general manager was on shift the night of September 6/7, 2003, and he stayed with the liquor inspector once the inspectors arrived. He disagreed with the inspectors' counts. Although he did not do a count, he estimated there were 315 to 350 people around 12:45 A.M. and patrons were being cleared out quickly.

The general manager noted that if this licensed establishment was in another municipality, the OL would be much higher.

*Building and Fire Code Consultant.*

The expert testified that the City of Vancouver requirements for OL calculation is different than the rest of BC, Ontario and the national codes. He testified that the usual way is to calculate the OL based on floor area factors and then compare to the exit requirements. However, in the City of Vancouver, the exit requirements for licensed beverage establishments are double other municipalities so that the designers have to find exit capacity first and then define the OL.

Another difference is that in the City of Vancouver, the floor area factor for licensed beverages establishments is 1.2 m<sup>2</sup> per person whereas other BC codes permit factors of 0.75 or 0.95 m<sup>2</sup> per person for stand up areas.

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The expert gave his opinion that calculations for OLs in the City of Vancouver are more restrictive than in other municipalities. He prepared a comparison chart in which he demonstrated that for the Skybar establishment, the OL for the City of Vancouver is 496 persons and outside Vancouver it would 777 persons. For the nightclub, second floor venue, the OL figures are 220 persons and 429 persons, respectively.

## **SUBMISSIONS**

1. The licensee submitted that under the newly amended *Act* and *Regulations*, the branch has moved from the concept of licensing by redlined area to the concept of licensing the 'establishment.' The definition of "licensed establishment" means the whole of the premises in the case of a single building, or all of the areas that relate to the business being conducted.

The licensee submitted that when there are multiple licences in one building, with common exiting, common owners, common operation, common employees, the licensed capacity and the issue of overcrowding must apply to the total of all licences. In this instance, the licences are within one building, adjacent to each other and share the entrance, stairwell, door security, and coat check. The licensee distinguished this from an establishment with a bar at one end and lounge at the other end. There are separate OL capacities because the food primary and the liquor primary are separate licences.

The licensee submitted that the coat check was approved by the City and by the branch. Because of the coat check there will be 'blips' of overcapacity, as occurs in other facilities such as theatres and hockey rinks. Because of the nature of this establishment, it is not possible to count by area. Patrons necessarily have to pass through the second floor to pick up coats and they have to pass through the common stairwell.

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2. The licensee submitted that the evidence does not support a contention that there is a fire or safety issue. The expert evidence showed that the safe OL, for the same establishment in another jurisdiction, is 777 persons. According to Vancouver calculations, it is 496 persons, overall. Further, having more than the OL capacity in one area does not create a safety hazard when it is lower than the overall permitted OL.

3. The licensee submitted that the definition of “occupant load” in the *Regulations* is wrong. Clearly, any reference to an occupant load is a reference to the ‘maximum’ number of people permitted, not the ‘least’ as the definition states.

4. Under section 6 of the *Regulation* there is only one contravention, that of being over the licensed capacity. Accordingly, there should not be a distinction between over licensed capacity less than or more than the occupant load. Counsel referred to *The Plaza Cabaret Ltd. v. General Manager, Liquor Control and Licensing Branch* (2004), B.C.S.C. 248, a decision by the Honourable Mr. Justice Pitfield. Although that case was addressing interpretation of the former *Regulations*, counsel referred specifically to Mr. Justice Pitfield’s comments at paragraphs 39, 45 and 47. I refer to the case and the arguments later in this decision.

5. According to Coke’s Rule, a person cannot be convicted of a third offence before he has been convicted of the second offence, and the third offence must have occurred after the conviction for the second offence. In other words, under Coke’s Rule, an accused must be convicted and sentenced of the earlier offence prior to the commission of the latter offence, in order for the latter to be treated as a subsequent offence for the purposes of imposing penalty (see *R. v. Skolnick*, (1982) 2 S.C.R. 47).

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The licensee acknowledged that Coke's Rule applies unless it has been modified by legislation. The licensee submitted that neither section 64(3)(d) of the *Regulation* nor the definition of 'second contravention' in Schedule 4 of the *Regulation* is sufficient to alter Coke's Rule. Therefore, the licensee urged me to find that, if proven, this is a first contravention for the purposes of penalty.

## **ANALYSIS AND DECISION**

### ***Does the licensed capacity apply to the establishment as a whole or to the individual areas?***

The licensee submitted that because this establishment is operated as one entertainment destination, one business, with common exiting and common employees, the licensed capacity is the total of all the capacities permitted under the liquor licenses. Counsel argued that the definition of 'establishment' means the whole of the premises.

I do not accept this submission. Clearly, the branch and the Office of the Fire Chief addressed the plans for each venue individually in calculating the permissible capacities. The Liquor Primary Licences were issued individually. The Food Primary Licence was issued to both food venues, but with the specific areas defined by licensed capacities.

The definition of 'establishment' is tied to the issuance of liquor licences. Section 6(1) of the *Regulations* requires the general manager to set the person capacity prior to issuing a licence. The license could be a Liquor Primary or a Food Primary. The general manager issues licenses with approved plans which outline the redlined areas in which liquor may be served. The licensee's procedure also indicates that the venues are distinct. The whole of the scheme argues against the licensee's contention that it is one big establishment with one overall capacity.

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I find that it is the licensee's responsibility to monitor and control the number of patrons in each venue. The licensed capacities do not meld together for the whole establishment.

***Is the definition of 'occupant load' in the Regulations flawed?***

This establishment opened in August 2003, with a Liquor Primary Licence for the nightclub that permitted a capacity of 220 persons. The approved floor plans accompanying the LPL show a maximum capacity of 220 persons in the redlined area. The City of Vancouver Office of the Fire Chief issued a Maximum Occupant Load certificate on April 23, 2003 [date plans approved] for 220 persons, staff included (see Exhibit No. 1, Tab 8).

Section 1 of the *Regulations* provides definitions:

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

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

Section 6(4) of the *Regulations* provides:

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

Items 14 and 15 of Schedule 4 of the *Regulations* provide the range of penalties for overcrowding, for the situations defined:

Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load

Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load

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The licensee referred to the *Plaza* case. Mr. Justice Pitfield found that the General Manager had improperly interpreted the previous section 4(7) in a way that effectively amended the section and found that the General Manager erred in finding that section 4(7) required compliance with the Building Occupant Load. Mr. Justice Pitfield also stated that the contravention was exceeding the licensed capacity, not exceeding the OL, and that it is incumbent on the General Manager to ensure that the proper administrative action is identified.

The licensee argues that the branch has been giving an unreasonable interpretation to the new definition of 'occupant load' because clearly the proper definition would capture the concept that OL is the maximum number of persons permitted, not the least. The branch rendered a decision on this argument, *613952 B.C. Ltd. dba Atlantis Club* EH03-086 & 096 March 3, 2004:

Counsel has argued that the definition of "occupant load" is flawed and as such there is no authority to impose a penalty under Schedule 4 of the *Regulations* for these contraventions. I cannot agree with counsel's position. I do not agree with counsel's assertion that the "least" number of persons, means the smallest number possible thus leading to an absurdity. The principles of statutory interpretation require that the words be given meaning in keeping with the intent of the statute and that they not bring about absurd consequences. In my view, the "least" number of persons should be interpreted as meaning the lowest number of persons that can be in the establishment in keeping within the limits of the provisions in paragraphs a, b or c of the definition. For example, if the Provincial Building Regulations as referred to in paragraph (a) in the definition, allowed a maximum of 350 persons in an establishment, and *The Fire Services Act* and British Columbia Fire Code Regulation as referred to in paragraph (b) of the definition, allowed a maximum of 375 persons in the establishment, and local government safety requirements as referred to in paragraph (c) of the definition, allowed a maximum of 400 persons in the establishment, the occupant load would be the "least" number of persons, i.e. the lowest number of persons, which in this example is 350, not one or zero, as submitted by counsel. In conclusion, I am satisfied that the penalty provisions at Schedule 4 (15) apply.

This reasoning was followed in the *Roxy Cabaret Ltd.*, EH-03-163, June 22, 2004.

Initially, I had some sympathy with the licensee's interpretation because it seemed clear that there would never be more one of the enumerated a, b, and c, so how could it be the *least*? However, having reviewed the evidence and

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considered the legislation further, I am satisfied that the section does read properly. The expert evidence given in this case provides an example of how the section operates. The expert calculated that under the BC Building Code, for areas outside of the City of Vancouver, the allowable OL for the Skybar nightclub would be 429 persons. Under the City of Vancouver bylaw, the allowable OL is 220 persons. The definition section applies to define the OL as being the least of those figures.

The licensee's interpretation is also plausible, in that the 'least' number could be zero, but it would defeat any purpose to the section and would result in an absurd consequence. I agree with the branch's statement in the *Atlantis* decision, above.

I find that the definition of occupant load is not flawed and that the licensed capacity and the Occupant Load are 220 persons, including staff, for the second floor Skybar nightclub.

***Does section 6 of the Regulations give rise to the alleged contravention?***

The licensee submitted that there is only contravention under section 6(4) and, accordingly, there can be no distinction between being over or under the OL.

I agree with Mr. Justice Pitfield in the *Plaza* case that the contravention is being over licence capacity. However, I find that his comments do not rule out different penalties. At paragraph 45 he states:

Schedule 4 makes it clear that the contravention in respect of which the General Manager must proceed in relation to capacity arises in respect of licensed capacity. To the extent that excess carries the licensee beyond the BOL, a greater penalty is specified. Be that as it may, the *Act* and the *Regulation* make it clear that exceeding licensed capacity is the offence under the *Act* and the *Regulation*. The offence is not exceeding building occupancy load.

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I find the branch was clear in alleging the contravention of overcapacity beyond person capacity, which is the licence capacity, and clarifying that it was also alleging capacity greater than the occupant load.

### ***Evidence of Capacity on September 6/7, 2003***

The evidence of the capacity on September 6/7, 2003, ranged from a low of 220 persons reported as hearsay evidence in this hearing, 315 – 350 estimated by the licensee's general manager, to 498 persons reported by the liquor inspector. Both the liquor and fire inspectors counted in excess of 400 persons. The licensee did not produce a log book or any other record of the evening counts. I accept the inspectors' counts over the estimate of the general manager.

The licensee submitted that one reason for the increased numbers was the rain that forced patrons off the top floor and resulted in overcrowding by the coat check. I have reviewed the evidence of the inspectors and I find that the congestion they referred to occurred throughout the second floor, particularly around the dance floor.

I find that there were not fewer than 400 patrons in the second floor Skybar nightclub when the inspectors arrived shortly after Midnight on September 7, 2003.

### ***Coat Check***

The issue of the coat check is problematic. The difficulties it presents go to whether there are extenuating circumstances, mitigating factors or evidence of due diligence that could affect either a determination of whether the contravention occurred or the level of penalty to be assessed.

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I have considered the difficulties from the licensee's perspective and the fact that the floor plan, and therefore the placement of the coat check, was approved by the branch and the office of the fire chief. The licensee indicated that the problem has somehow been resolved since there have not been recurring difficulties noted by the branch. I conclude that a major factor was having the roof installed. The licensee chose to start operating the top floor before the roof was installed and, therefore, took the chance this could occur without putting contingency plans in place.

I accept that some of the congestion and overcrowding could have been caused by patrons leaving the premises although the evidence on this was more conjecture than actual evidence. And I accept that the plans were approved with only one coat check, supposedly for the four venues. However, I find that the difficulty of handling the coat check is the licensee's problem, not the branch's nor the City's. The licensee knew that, regardless of the coat check location, the capacity could not exceed 220 persons. That was both licensed capacity and OL capacity.

The licensee testified that there was personnel at the entrance to the nightclub to regulate the flow of patrons. However, I find there was no evidence to demonstrate that patron flow was being controlled. The liquor inspector reported that when she first approached the nightclub, there was a stream of patrons across the stairwell going from one side of the nightclub to the other. In my view, the licensee could have implemented additional procedures to assist patrons in retrieving coats, to keep the numbers in the nightclub down and to keep the access and egress lines open.

I find that the evidence establishes that the licensee was permitting patrons to enter the nightclub, without adequate controls to keep the numbers to the licensed capacity. I find that the circumstances of the coat check may have been a cause for some of the overcrowding, but I find it does not amount to an

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extenuating circumstance, mitigating factor or evidence of due diligence affecting my decisions on whether the contravention occurred or the level of penalty to be assessed.

### **Summary**

I find that there were not fewer than 400 patrons in the second floor Skybar nightclub when the inspectors arrived shortly after Midnight on September 7, 2003. The licensed capacity and the OL were 220 persons, including staff.

I find that the definition of 'occupant load' in the *Regulations* is capable of reasonable interpretation and that it serves to establish the OL in this case at 220 persons.

I find that the licensee was responsible for maintaining the permitted capacity in each venue. The licensed capacity and the OL were 220 persons, including staff. I find that the licensee has not demonstrated the defence of due diligence through policies, procedures or actions of the staff on this occasion, or in any other way. I find that the licensee permitted overcrowding in the nightclub.

I find that the branch has established the contravention of overcrowding beyond licence capacity and that the overcrowding exceeded the occupant load.

### **PENALTY**

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

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- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

***First or Second Contravention: Lord Coke's Rule***

The branch has recommended a penalty as though this contravention was a second contravention. The first contravention occurred on August 17, 2003, but the waiver was not signed until October 16, 2003. This contravention occurred on September 5, 2003. The licensee argues that Coke's Rule applies, that October 16, 2003, is the operative date for defining the first contravention and, accordingly, the September 5, 2003, contravention cannot be treated as a second contravention.

I do not accept that Coke's Rule applies to contraventions under the *Liquor Control and Licensing Act* for the reasons that follow.

In *R. v. Skolnick*, (1982) 2 S.C.R. 47, the Supreme Court of Canada summarized Coke's Rule as follows:

- 1) The number of convictions per se does not govern in determining whether the Coke Rule applies.
  - 2) The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be.
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- 3) Where two offences arising out of the same incident are tried together and convictions are entered on both after trial, they are to be treated as one for the purpose of determining whether a severer penalty applies, either because of a previous conviction or because of a subsequent conviction.
- 4) The rule operates even where two offences arising out of separate incidents are tried together and convictions are entered at the same time.

The Court also stated:

The conclusion that I draw from the canvass of the authorities is that the Coke Rule, or if I may say so, the policy it reflects, has been too long embedded in our law to be ousted except by clear statutory provision or, at the most, by necessary implication.

In my view, it is questionable whether Coke's Rule applies to administrative proceedings. However, assuming it does, it is apparent that the scheme set out in Schedule 4 of the *Regulations* ousts the Rule.

Coke's Rule provides a method for determining when a subsequent contravention has occurred. Schedule 4 provides a definition of subsequent contravention which includes "within the 12 month period preceding the commission of the contravention." By that definition, two aspects of Coke's Rule are altered – the 'conviction' is replaced with the 'commission' and a time period is added, after which it can no longer be considered a second or subsequent contravention. In my view, it is clear that one intention of the legislature was not to impose a greater penalty for contraventions one year after the previous incident.

The BC Supreme Court recently commented on the interpretation of the Schedule 4 in *532871 B.C. Ltd. dba The Urban Well v. General Manager Liquor Control and Licensing Branch*, 2004, BCSC 127. That case concerned the branch's decision dated February 20, 2003. The branch had alleged a number of contraventions over a period of time. An earlier contravention had occurred on March 16, 2001, and the general manager's determination of that contravention was dated April 5, 2002. In the February 20, 2003 decision, the general manager treated contraventions that occurred on November 24, 2001, February 22, 2002,

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March 1, 2002, March 2, 2002 and March 8, 2002 as second contraventions. Clearly, these occurred within 12 months of the earlier contravention, but earlier than the branch's determination.

If Coke's Rule was applied to the previous scenario, the Court would have found that none of those contraventions could be treated as second contraventions because they did not occur after the conviction for the earlier contravention.

However, before the Supreme Court, the licensee agreed that the general manager's interpretation of the 'second contravention' was appropriate. The Court's only comment on this aspect is:

The parties to this application agree that the general manager acted properly in adopting the view that a contravention did not occur until there was a determination thereof at an enforcement hearing regardless of the number of separate, unconnected incidents.

The Court then left any further discussion of what constitutes first, second and subsequent contraventions until a case where the point is clearly raised.

I have reviewed the *Urban Well* decision and do not see the point referred to by the Judge. However, I was the adjudicator on that decision, and I agree that there does have to be a finding before it can be said that a contravention occurred. That finding is either through the licensee signing a waiver or through the general manager's determination.

By operation of the *Regulation*, the effect of a finding is that the contravention occurred on the date of the incident, not the date of the 'conviction.'

I find that the contravention on September 6/7, 2003, is a second contravention for the purposes of imposing penalty.

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***The Penalty***

The range of penalty for a second contravention is ten (10) to fourteen (14) day licence suspension. The branch recommended a twelve (12) day licence suspension.

The licensee submitted that there is no evidence that safety of the patrons was jeopardized, that the location of the coat check was a major reason for the overcrowding, that the branch approved the floor plans which contained an 'operational flaw' (i.e., the coat check location), that both contraventions occurred within one (1) month of the Skybar opening, and that once the roof was installed the situation did not recur.

I accept some of the licensee's submissions on mitigation of the circumstances and the penalty. Although it was the licensee's decision to open prior to the roof being in place, I have taken into consideration that the rain may have played a role in catching the staff off-guard. As noted above, I find that the physical location of the coat check is not a mitigating factor for the overcrowding nor the fact that branch approved the floor plans. It is the licensee's obligation to operate within the parameters of the licences.

Concerning the safety issue, I reiterate my comments in an earlier decision, *6003428 B.C. Ltd. dba Tonic Bar*, EH03-21/ 28/ 29/ 44/ 45/50, March 2, 2004, at page 24:

It is trite to say but I find that it is not the branch's function to second guess the OL capacities set by various municipalities. That is municipal responsibility. A licensee has choices it can make within the parameters of the municipal by-laws. The provincial legislation has defined contraventions and the range of penalty for each contravention. Clearly, municipalities impose requirements based on their standards for safety, etc. Although the licensee contends that the facts of this case do not give rise to any safety concerns, I find that the fact of overcrowding does give rise to safety concerns. Safety is one of the primary purposes of imposing capacity requirements. The branch's stated policy is directed to those overall, primary concerns and I find it is a legitimate statement.

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It is also trite to say, but I note that the range of penalty the legislature has imposed for contraventions of exceeding licence capacity in excess of OL suggests serious concerns about the effects of overcrowding.

This was a situation of excessive overcrowding – approximately twice the licensed capacity. The inspectors testified that there was a crush of patrons, elbow to elbow. And the contravention occurred within three (3) weeks of the earlier contravention. Both occurred within a matter of weeks of the opening of the establishment. This was a time when one might expect the licensee to be conscious of operating at a particularly high level of due diligence.

Although I have noted that there is some mitigation of the circumstances, in balancing the considerations for penalty and the seriousness of this contravention, I find that this level of overcrowding goes beyond the minimum of the range for a second contravention.

I find that the branch's recommended twelve (12) day licence suspension is an appropriate penalty.

## **ORDER**

Pursuant to section 20(2) of the *Act*, I order a suspension of the Primary Liquor Licence No. 300593 for a period of twelve (12) days to commence as of the close of business on Friday, August 27, 2004, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulations*).

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Since I do not know whether the Skybar would normally be open seven (7) days per week as of August 27, 2004, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the liquor licence No. 300593 for the Skybar be held by the branch or the Vancouver Police Department from the close of business on Friday, August 27, 2004, until the licensee has demonstrated to the branch's satisfaction that the Skybar nightclub has been closed for twelve (12) business days.

*Original signed by*

M. G. Taylor  
Enforcement Hearing Adjudicator

DATE: July 21, 2004

cc: Vancouver Police Department  
Attention: Liquor Coordinator

Liquor Control and Licensing Branch, Vancouver Regional Office  
Attention: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office  
Attention: Shahid Noorani, Advocate

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## APPENDIX A

### RELEVANT STATUTORY PROVISIONS

#### *Liquor Control And Licensing Regulation, B.C. Reg. 244/2002*

##### Section 1:

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

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

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

##### **Section 6: Capacity**

**6 (1)** Before the general manager

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

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

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

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

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

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

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**Notices of contravention**

**64** (1) If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

(2) If, after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice to the licensee

(a) specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree under subsection (3) that the licensee has committed the contravention, and

(b) notifying the licensee that, unless the licensee provides a notice of waiver in accordance with subsection (3),

(i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and

(ii) an enforcement hearing may be scheduled for that purpose.

(3) The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result, unless, within 14 days after the date of the notice referred to in subsection (2), or within such longer period as the general manager considers appropriate, the licensee provides to the general manager a notice of waiver, in form and content satisfactory to the general manager, by which the licensee expressly and irrevocably

(a) agrees that the licensee has committed the contravention,

(b) accepts the specified enforcement actions,

(c) waives the opportunity to have an enforcement hearing on the matter, and

(d) agrees that the finding of contravention and the specified enforcement actions will form part of the compliance history of the licensee.

**Schedule 4 [am. B.C. Reg. 437/2003, s. 3.] Enforcement Actions****Interpretation**

**1** (1) For the purposes of this Schedule,

(a) a contravention is of the same type as another contravention if each contravention is described by the same Item of this Schedule, and

(b) a contravention committed by a licensee is

(i) a first contravention if the contravention was committed at or in respect of an establishment and the licensee has not committed a contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention,

(ii) a second contravention if the contravention was committed at or in respect of an establishment and the licensee has committed one contravention of the same

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type at or in respect of that establishment within the 12 month period preceding the commission of the contravention, and

(iii) a subsequent contravention if the contravention was committed at or in respect of an establishment and the licensee has committed a second contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention.

| Item                | Contravention                                                                                                                                                                                                          | Period of Suspension (Days) |                      |                           | Monetary Penalty  |
|---------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|----------------------|---------------------------|-------------------|
|                     |                                                                                                                                                                                                                        | First Contravention         | Second Contravention | Subsequent Contraventions |                   |
| <b>Overcrowding</b> |                                                                                                                                                                                                                        |                             |                      |                           |                   |
| 14                  | Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load | 1-3                         | 3-6                  | 6-9                       | \$1 000 - \$3 000 |
| 15                  | Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load             | 4-7                         | 10-14                | 18-20                     | \$5 000 - \$7 000 |