



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

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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

Case: EH04-064, EH04-081, EH04-088,
EH04-095, EH04-096, EH04-097

For the Licensee: J. Barry Carter

For the Branch: Laurie J. Soloway

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing : February 8-11, 14, 2005
March 1-3, 7-9, 2005
and Written Submissions

Place of Hearing: Vancouver, B.C.

Date of Decision: April 27, 2005

INTRODUCTION

The licensee operates an establishment known as Skybar. It consists of a nightclub, restaurants and bars, all in a single location. Skybar is located at 670 Smithe Street, Vancouver, BC.

Skybar has three floors and three separate liquor licenses.

These floors are connected by an elevator, which runs up the centre of the establishment, and three stairwells. The main stairwell, most commonly used by patrons, is located in the centre of the establishment, beside the elevator.

The stairwells and the elevator are not within the redlined areas of any of the licenses within this establishment.

The only coat-check for the entire facility is located on the 2nd level, outside of the redlined areas.

The Food Primary Licence "lounge" (Licence No. 300601) is located on the main floor and has a person capacity of 37 inside and 11 on the patio.

Liquor Primary Licence No. 300593 is located on the second floor. The person capacity is 220. This floor is divided in the centre by the stairwell and elevator; there is free space on either side which allows movement between the east and west side of the floor. There is a dance floor on the east side. The coat-check (just outside the stairwell and elevator entrances) is on the south side in the middle of the walkway between the east and west sides of the room.

The third floor has two licenses, a Food Primary Licence and a Liquor Primary Licence. Food Primary Licence No. 300601 is located on the east side of the third floor with the patio running the full length of the floor on the north side of the room. The patio has no physical separation from the seating area of the

restaurant. The person capacity is 37 in the interior. The person capacity is 95 for the patio. The total person capacity indicated on the licenses for the third floor is 132 persons.

Liquor Primary Licence No. 300594 (know as the VIP room) is located on the southwest portion of the third floor. The person capacity is 51 inside with a patio person capacity of 20. The patio is located just outside the VIP room on the west side. There is a physical separation between the patio for the Food Primary and Liquor Primary Licenses.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA), dated November 29, 2004, the branch alleged that over a period of approximately five weeks, between March 31, 2004, and May 7, 2004, the licensee contravened The *Liquor Control and Licensing Act* (RSBC 1996] Chapter 267) (*Act*), and the *Liquor Control and Licensing Regulation* (B.C. Reg. 244/2002) (*Regulation*), and recommended suspensions and/or monetary penalties as follows:

Contravention Number	Contravention Name	Section of the Act/ Regulation and/or Licence Terms and Conditions	Date and Time of Contravention	Recommended Enforcement Action
1. CN B000804 Licence No. 300593 2nd floor LP*	Contravening a Term and Condition (liquor removed from red-lined area)	Act s. 12	March 31, 2004	\$3,000.00 monetary penalty
2. CN B000804 Licence No. 300593 2nd floor LP	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	March 31, 2004	18 day licence suspension

3. CN B000804 Licence No. 300593 2nd floor LP	Licensee or employee consuming liquor while working	Reg. s. 42(3)	March 31, 2004	\$1000.00 monetary penalty
4. CN B000804 Licence No. 300593 2nd floor LP	Contravening a Term and Condition (containers and the mixing of drinks)	Act s. 12	March 31, 2004	\$1000.00 monetary penalty
5. CN B000804 Licence No. 300593 2nd floor LP	Dancer Prohibited Acts	Act s. 50	March 31, 2004	4 day licence suspension
6. CN B000805 Licence No. 300601 3rd floor FP*	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	March 31, 2004	4 day licence suspension
7. CN B000805 Licence No. 300601 3rd floor FP	Contravening a Term and Condition (liquor removed from red-lined area)	Act s. 12	March 31, 2004	\$3000.00 monetary penalty
8. CN B000803 Licence No. 300594 3rd floor LP	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	May 3, 2004	4 day licence suspension
9. CN B000802 Licence No. 300593 2nd floor LP	Fail to produce a document /record or thing	Act s. 73	April 13, 2004	10 day licence suspension
10. CN B000806 Licence No. 300593 2nd floor LP	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	May 6, 2004	18 day licence suspension
11. CN B000744 Licence No. 300601 3rd floor FP	Contravening a Term and Condition (liquor removed from red-lined area)	Act s. 12	May 7, 2004	\$3000.00 monetary penalty
12. CN B000744 Licence No. 300601 3rd floor FP	Overcrowding beyond person capacity greater than occupant load	Reg. s. 6(4)	May 7, 2004	10 day licence suspension

* FP = Food Primary LP = Liquor Primary

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUES(S)

Contravention No. 1, 4, 5, 7, and 11:

- Does Section 20(1)(a) of the *Act* empower the general manager to convene a hearing for an alleged contravention of the *Guide for Liquor Licensees in British Columbia (Guide)*?
- Is the *Guide* in evidence in this hearing?
- Have each of the substantive contraventions been proven on the evidence?

Contraventions No. 2, 6, 8, 10, and 12:

- Does the contravention exist in law (occupant load vs. person capacity)?
 - Has proper notice of the alleged contraventions been given?
 - Is Item No. 14 or Item No. 15 of Schedule 4 of the *Regulation* applicable to the alleged contraventions?
 - Have each of the substantive contraventions been proven on the evidence?
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Contravention No. 3:

- Has the substantive contravention been proven on the evidence?

Contravention No. 9:

- Are surveillance images in electronic form a *document, prescribed document, record, or other thing* in accordance with the *Act*?
- Is there a distinction between whether the general manager has the authority to *request production* or *inspect* the surveillance images?
- Has the substantive contravention been proven on the evidence?

Are the branch's recommended penalties appropriate?

In the event that a suspension is ordered by way of penalty, can and should an allowance be made for the timing of the suspension in light of scheduled events at the establishment?

PRELIMINARY MATTERS

The licensee objected to the introduction of evidence of past contraventions in the branch's Book of Documents. It argued that this evidence would prejudice the licensee, as it would colour the objectivity of the adjudicator in his findings with respect to the issues of substantive contravention.

I ruled against the objection. It is acceptable in this forum for the branch to provide evidence of past contraventions, by way of witness testimony and exhibit documentation. By legislative mandate, the adjudicator is sitting as general manager in an enforcement hearing. Although there is a requirement

of administrative fairness that does not in this context require complete and distanced neutrality. The adjudicator, as general manager has actual knowledge of the past history of alleged and proven contraventions. It would be an extreme administrative fiction for the general manager in a branch enforcement hearing to attempt to disabuse herself from the full knowledge of the contravention history of the licensee. An adjudicator will be able to identify the components required to make a finding of substantive contravention and determine on the evidence if those components have been proven. Further, the history of past contraventions is, by the operation of statute and regulation, relevant and required in order to determine the appropriate penalty. Under these circumstances it is not appropriate in this forum for a decision to be made on substantive contravention and then to hear submissions on penalty.

The licensee objected to the inclusion of police officers notes as evidence. It argued that as the officers would be attending to provide *viva voce* evidence, their hand-written notes and reports were inappropriate and not required.

I ruled against the objection. The notes and records of the police officers may be used to refresh the officers' memories during *viva voce* testimony. They may also be used as evidence of the understanding of the authors at the time the notes and records were created. The inclusion of the notes and records is not evidence of the truth of the matters referred to therein. Counsels are invited to examine the witnesses who refer to notes and records and to speak to weight and relevance of the evidence in submissions.

Several days into the hearing, the branch sought two amendments to the recommended penalties:

1. The information on Contravention No. 12 indicated that this was a second contravention as defined in the *Regulation*. Indeed, the branch admitted a processing error and proposed that Contravention No. 12
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should be administered as a first Contravention. The penalty recommended should therefore be reduced from ten (10) days to four (4) days.

2. The information on Contravention No. 8 indicated that this was a first Contravention as defined in the *Regulation*. Indeed the branch admitted a processing error and proposed that Contravention No. 8 should be administered as a second contravention. The penalty recommended should therefore be increased from four (4) days to ten (10) days.

With respect to proposed Amendment No. 1 above, I find this to be reasonable. The change is in favour of the licensee and not opposed by him. There is no evidence that the error was other than inadvertent, and the amendment has no administrative or legal implications. The branch's recommended penalty for Contravention No. 12 is hereby reduced to four (4) days.

With respect to proposed Amendment No. 2 above, I do not find this to be reasonable. The proposed change is contrary to the interest of the licensee. The licensee does not agree to the amendment. Although similar to Amendment No. 1, in that there is no evidence that the error was other than inadvertent, increasing the recommended penalty at this juncture would offend the notice provisions of the principles of administrative fairness. The licensee has a right to know the case it has to meet, both substantively and as to the potential consequences if the contravention is proven. It is based upon this irrefutable principle that the licensee is able to make choices as to the nature and quantity of resources that it may choose to mobilize in his defence. It is not an answer to this notice requirement that the licensee would not have materially changed his case in light of the relative magnitude of the change to the overall proposed penalties. The branch's proposed Amendment is denied and the recommended penalty for Contravention No. 8 remains at four (4) days.

EXHIBITS

- Exhibit No. 1 Book of Documents, tendered by the branch
- Exhibit No. 2 Book of Documents part 2, tendered by the branch
- Exhibit No. 3 Doorman Training Manual, tendered by the licensee

EVIDENCE

General:

The Branch called two liquor inspectors, nine Vancouver Police Department (VPD) constables, and a VPD sergeant.

The licensee called a bartender, the manager (club manager) of Skybar (at all relevant times), and a managing partner of the licensee.

There was uncontroverted evidence from the VPD witnesses that the alleged contraventions were witnessed during an undercover operation. Several officers attended Skybar on the dates in question, dressed in plain-clothes. They did not identify themselves as VPD members. They made observations, and communicated with a VPD member on the street outside, by way of cellular phones on a regular basis during their stay in Skybar. The outside VPD member kept notes of the content of the calls, and the observing members recorded their notes upon returning to the VPD station sometime thereafter.

The liquor inspector who was responsible for the area in which Skybar is located testified as to the origins and content of the documents in Exhibits No. 1 and No. 2 and was subjected to cross-examination regarding them. I accepted all of the contents of those exhibits into evidence. The inspector also testified

as to her personal knowledge of and/or participation in the previous alleged and proven contraventions relating to this licensee, and the history of Compliance Meetings and correspondence between the branch and the licensee.

The inspector confirmed that the Contravention Notices were the ultimate result of an initiative of the Crime Suppression Unit of the VPD. The branch did not solicit the police involvement but rather cooperated and pursued enforcement after the VPD sought out the branch's involvement and provided reports.

Contraventions No. 1, 7, and 11:

A constable testified that on the evening of March 31, 2004, at approximately 11:00 p.m. she bought a beer in the second floor Liquor Primary area and carried that drink out of the redlined area and up the stairs to the third floor. While doing so she observed other patrons carrying drinks outside the redlined areas. She understood that liquor was not allowed in the stairwells or hall areas outside the redlined areas.

A second constable testified that she too purchased liquor in the bar on the second floor on the evening of March 31, 2004, and carried that liquor up and down the stairwell and outside the redlined areas without being intercepted by Skybar staff. She testified that she observed patrons moving between floors and outside redlined areas between the second and third floors with liquor and that staff could plainly see this happening. She also testified that she entered the third floor Liquor Primary area with the drink and then exited outside the redlined area and in doing so stopped to talk to Skybar staff to make sure she was being observed with the drink outside the redlined area.

A third constable testified that she purchased liquor on March 31, 2004, in the second floor primary area and carried it out of the redlined area and approached a Skybar staff member. She asked about the third floor and

showed her drink. She was directed up the stairs by the staff member and was not advised against, or stopped from, moving between licenses with her beer. She also observed patrons drinking and walking with their liquor between the third floor Food Primary Licence area and the second floor Liquor Primary Licence area outside the redlined areas.

A fourth constable bought a bottle of beer on the third floor and carried it down the stairs into the second floor bar, after travelling outside the redlined areas of the two licenses. He testified that he observed many patrons drinking and carrying liquor outside of the redlined areas and on the stairs.

A fifth constable testified that on March 31, 2004, he entered Skybar and walked to the third floor on the staircase. He noted many patrons passing from the second floor Liquor-Primary area to the third floor Food Primary area and from the third floor to the second floor with drinks, in plain sight of Skybar staff. He observed no patrons being stopped from so doing.

Another constable testified that on May 7, 2004, he attended at Skybar in the early hours of the morning and observed people in the stairwell with beer and glasses of drinks outside of the redlined areas. He observed patrons leaving the third floor redlined area and also taking drinks between the second and third floors.

The licensee's managing partner testified that he was aware of the *Guide* that was in effect at the relevant time. He testified that the *Guide* allows patrons to take their liquor to the washroom as long as they don't pass outside a redlined area to get there. He said:

We did not ask everyone who was going through the staircase if they were going to the washroom. Our view was that we did not stop people

from travelling through the staircase area from one area to another. Right or wrong, that is the way we saw it.

Contravention No. 3:

One constable testified that on March 31, 2004, she witnessed the bartender drinking with some patrons. She saw the bartender shake up a drink in a shaker, pour it out into glasses for two patrons and one for himself, and they all drank together. She testified that the patrons ordered the beverage and paid for it. The constable asked the bartender what it was and he advised it was "Vodka and Red Bull".

Another constable testified that on March 31, 2004, she witnessed a staff member, walking through the establishment with a belt of shot glasses and bottles around his waist and that he identified the drinks as "Mudslide Shooters". She purchased two; one for herself and one for the staff member. He poured two shots and drank his shooter in front of her. She drank the other one.

The bartender testified that he did not have specific recollection of the night of the allegation, but that he does not drink regularly, and never while on duty. He indicated that his job is to entertain the customers and make them feel comfortable. He said with respect to the Vodka Red Bull that he will routinely "party with the customers" by "doing a shot" but that the shot will be Red Bull, which is an energy drink and used as a mix. It does not contain any alcohol and is not a controlled substance. There is no difference in appearance between a Red Bull, and a Red Bull and Vodka. He indicated that he occasionally pours Red Bull for the customers and drinks with them. The shaker is simply entertainment. He said he does not tell the customers that it is non-alcoholic, and he does not charge the customers for it. He is allowed to buy his customers drinks. If he bought them liquor he would have to pay for it

out of his pocket and he is not so inclined. He said that buying them a drink and doing a shaker show makes them feel special. He does this with his regular customers.

He also indicated that he would have lied to the plain-clothes officer (thinking her another patron) about the Vodka in the drink. "If I [told them I] just gave them a Red Bull, it would take away from making the customer feel special- you need to lie so you keep the situation going. It is showmanship."

The club manager testified that the bartenders are not allowed to drink liquor while on duty. He confirmed the entertainment function of bartenders, and that the bartenders are allowed to buy drinks for the patrons. The cost of the drinks comes out of the bartenders' own pocket. He said that the bartender's actions, including lying to the under-cover officer were not problematic, as he was "selling up" his drinks. He said "There is nothing wrong with lying to customers as long as you don't ask them to pay for it." It is good business to advise another patron that the drink had Vodka when it did not, in order to sell more drinks. As the bartender paid for the Red Bulls, he had no obligation to the patrons- they would drink what he gave them.

Contravention No. 4:

A constable testified that when she attended on March 31, 2004, she observed a table with pre-poured drinks set up. The drinks looked like Crantinis. Crantinis contain Vodka and cranberry juice and are served in Martini glasses. She inquired as to the availability of the drinks and was told she could not have one, as they were prizes for a competition. There was a "ladies night" going on and there was entertainment on a small stage set up in the room.

A second constable testified that she also attended that evening and observed the table of "Crantinis." She asked the staff member tending to the table of

drinks what they were, and was advised that they were Martini prizes. This constable then observed a staff member walking through the bar with a belt around his waist with shooter glasses and bottles. She asked what they were and was told "Mudslide Shooters" She asked if she could buy him one and he answered in the affirmative. She paid for the drinks. They drank together.

A third constable testified that she attended on March 31, 2004, saw the table of "Crantinis" and was told they were prizes to be given away. She asked if she could buy one and was directed to the bar. She ordered a Crantini and received a drink visually undistinguishable from those on the table. She did not confirm the contents of the "Crantinis" on the table.

The managing partner testified that Mudslide is a drink purchased from the Liquor Distribution Branch already mixed, labelled, and ready to drink. He said the staff member dispensing it from his belt was doing so from the original container. It was not mixed at Skybar.

The club manager testified that the Martinis on the table were not prizes but complimentary drinks for some of their guests who were transported into town from outlying areas in limousines. The package included the limousine ride, a "pamper package" a gift certificate, and a complimentary drink. The Martinis represented the complimentary drink.

Contravention No. 5:

Several constables testified that on March 31, 2004, Skybar was having a "ladies night". There were male strippers or exotic dancers present for entertainment. Only female patrons were allowed into the area of the second floor licence where the entertainers were performing.

The entertainers were observed removing "stripper tippers" from patrons clothes, cleavage, and hands, with their mouths. "Stripper tippers" were identified to the VPD members as strips of paper bought from Skybar staff with which patrons could tip the entertainers.

Entertainers were also observed picking patrons to come on stage and simulate sex with them; "one woman was lying down and [the entertainer] had his penis dangling right above her face". One entertainer picked up a patron and put her on his shoulders facing opposite to him "burying [the entertainer's] face in the patron's crotch". One entertainer "smacked the ass of a woman", and one "buried his face in [a patron's] breasts". One of the entertainers was observed licking a patron's chest and neck. He was also seen to take a patron's hand and put it on his penis.

The managing partner testified that the entertainment on March 31, 2004, was not provided by the usual dance crew. He did not know why the usual crew was not performing. He said:

"If they had done things inappropriately, that is not our regular mode... That is what girls want. We try to give it to them as a fun enhancing night I understand that it is not appropriate. I understand the rules. I do not know if it happened or not, but I know it is not supposed to. It was a different crew."

Contraventions No. 2, 6, 8, 10, and 12:

March 31, 2004:

One under-cover member of the VPD did a count of 200 patrons on the second floor, at 11:00 p.m. She then went to the third floor where she spent 20 minutes and counted 180 persons on the east side. On her return to the

second floor it was so congested she could not walk. Her testimony was that there were considerably more patrons there. She did a rough count and estimated 400 patrons. She said the crowd determined where she was going, as it was "elbow to elbow". She felt unsafe and decided to leave.

A second under-cover member of the VPD did a count of 190-200 people alongside the first member, and then some time later she counted approximately 400 persons on the second floor. She counted again. The second count was at approximately 11:45 p.m. and she counted 420 persons. She felt "very uncomfortable, had trouble breathing, was agitated and felt unsafe." She testified that she "could not get out of there if she had to". She testified that the undercover officers felt unsafe with the crowd and so "pulled the plug" on the investigation because of safety concerns.

A third VPD member, also undercover, did a count of patrons on the third floor at 10:45- 11:00 p.m. with the result of 50 persons in the patio area and 20 in the VIP room and 200 persons on the second floor.

A fourth under-cover officer, counted 50 persons on the patio, 20 persons in the VIP lounge on the third floor, and 200 persons on the dance floor of the second floor. She also counted at approximately 10:30-11:00 p.m.

A fifth under-cover officer counted 258 persons on the third floor in total. He testified that it took five minutes to get from the third floor to the mid-landing and another five minutes to make it from there to the second floor, through the crowd. By the time he got to the second floor, the crowd near the coat-check was impenetrable. He testified that he first counted approximately 360 persons on the second floor, but later it was "too crowded to do another count" as he could not move around adequately to do so.

Another officer counted 250 persons on the third floor exclusive of the VIP room and at 11:45 p.m., counted 320 persons on the second floor excluding staff and whoever might have been in the washrooms. At midnight he attempted to do another count on the second floor and gave up after estimating at least 400 persons. His testimony was that the crowd was such that it was impossible to do a complete count because he could not move around freely to do so. He testified; "I absolutely felt that [the crowd represented] a safety hazard or danger".

A uniformed VPD officer attended and testified that it took him as much as five minutes to get to the second floor with the help of door staff. He said: "Had there been an emergency or incident or fire situation it would have been extremely difficult for emergency services to attend the second floor, or for patrons to exit." He estimated there were between 300 and 400 persons on the second floor, and he counted approximately 75 persons on the third floor.

May 3, 2004:

The evidence relating to Contravention No. 8 consists of counts of 76, 81, by members of the VPD, and a count of 67 by Skybar staff.

May 6, 2004:

An officer testified that he attended Skybar on May 6, 2004, with his partner. They took turns counting from opposite sides of the second floor. They knew the capacity was 220 persons and they each stopped counting when they reached 300 persons. They did two counts each on two occasions for a total of four counts. Each count produced the same result. The officer advised a staff member of his count and asked what the staff member's count was and the staff member advised that it was 230 persons.

His partner testified that they had entered Skybar at 12:30 a.m. and confirmed four counts of 300 patrons before they stopped counting.

May 7, 2004

The VPD member, who attended on May 6, 2004, with his partner, confirmed that he returned on May 7, 2004, and proceeded to the third floor where together they counted 266 persons in the restaurant and 38 in the VIP area; well over the total capacity of 205 allowed.

The licensee called the managing partner and the club manager, each of whom disputed all of the police counts and indicated that there were procedural polices in place which would prohibit overcrowding, including front door staff with mechanical counters. These witnesses testified that there may occasionally be temporary overcrowding in the stairway area near the coat-check as the third floor closes down and the patrons empty down the stairs and to the coat-check before leaving Skybar.

Contravention No. 9:

The liquor inspector testified that as a result of the police investigation, she inquired as to the availability of video data from the surveillance cameras which are located throughout Skybar. She visited with the club manager together with the second liquor inspector, and the club manager showed her the recording hardware. He indicated that he did not know how to make a copy at that time but that he would do so the following Monday. On the following Monday, the club manager advised the inspector that he had been instructed by Skybar's counsel not to produce the data. The inspector told him she could demand it and Skybar would have an obligation to produce the "tapes". The club manager replied that he would seek further instructions from counsel. The

inspector testified that as a result she requested the tape in writing (Exhibit 1, Tab 7) and she received nothing in response.

The managing partner testified that he believes the surveillance system produces information that is kept for one week only. He also said that he knows there is a practice of using the system to monitor the bar, but he does not know if there is any practice of keeping the tapes or CDs. He testified:

The problem was that in any issue, we talk to our lawyer. When we needed to produce it, I didn't get it. The time frame is seven days. Nobody came and said we wanted to see the video- they said we needed to produce the video.

The club manager testified that there are seventeen surveillance cameras throughout the establishment. He stated that the images are digital and are stored on the hard drive in the main office on the first floor. Although he has recovered "short bursts" of images from the hard drive, it has been so infrequently as to require him to call a "tech guy" in Edmonton to find out how to do it. The club manager indicated that there was limited storage capacity and that the hard drive was recorded over, after a period of time. He said; "it is about a two week phase, until it loops over."

He testified that he met with the liquor inspector on April 2, 2004, and told her he would record the images for her. Then soon afterward, he called her back but she was not there.

He stated:

I did not hear anything after this letter or my message for [the inspector]. Next it was too late. The information would not have been there any

more. Nobody ever showed up and requested to see the system. If they had, I would have let them view it.

SUBMISSIONS

Contraventions No. 1, 7, and 11:

The licensee submitted that Contraventions No. 1, and No. 7 occurred on the same night and so are duplicitous. It says that as the liquor was all purchased in the second floor bar, there cannot be two separate contraventions for the same event.

The licensee also submitted that both of the licenses in question are endorsed as follows: "liquor may only be sold served and consumed within the areas outlined in red on the official plan". There is no endorsement on the licenses that prohibits the *carrying* of liquor outside of the redlined areas. The licensee points to the provisions of the *Guide* as the only prohibition against taking liquor out of the red-lined areas, and it submits that the *Guide* is has not been entered into evidence in this hearing and is therefore not available for use in establishing these contraventions. Further, the licensee submitted that there is no evidence that any of the liquor carried outside of the redlined areas was indeed consumed there, in contravention of the terms on the face of the licence.

The licensee argued that Section 20(1)(a) of the *Act* does not empower the general manager to convene a hearing for an alleged contravention of the *Guide for Liquor Licensees in British Columbia*. It said that the *Guide* does not constitute part of the *Act* or *Regulation* or make up terms of the licence.

Contravention No. 3:

The licensee argued that the bartender served only a Red Bull, a non- alcoholic drink to patrons, and he drank one too. He paid for the drinks himself, and he committed no contravention by lying to "another patron" about the contents of the drink. He did not drink any liquor while on the job.

The licensee did not dispute that a staff member drank a Mudslide shooter as was the evidence, but argued only that it was not evidence of a lack of due diligence on the part of the licensee as "It was well known to all employees that drinking on the job was not permitted..."

Contravention No. 4:

The licensee submitted that the terms of the *Guide* did not apply.

The licensee submitted that the Mudslide that the server was dispensing from his belt, on March 31, 2004, was a drink purchased from the Liquor Distribution Branch in the form that it was dispensed and that no pre-mixing had occurred. It was dispensed from its original container in accordance with all applicable *Regulation*.

With respect to the prepared "Crantinis", the licensee submitted that the drinks were being given away and not paid for by patrons, and that there is no evidence as to the content of the drinks, how they were made, or that they were not mixed in front of the patrons in accordance with Section 40 of the *Regulation*.

Contravention No. 5:

The licensee argued that there is "nothing endorsed on the face of the licence that restricts or limits the type or form of entertainment." It was submitted that it is incumbent upon the branch to prove precisely what the term and condition of the licence was that was breached or the section of the *Act* or *Regulation* that was contravened. It further submitted that; "what is offensive to some, is not necessarily offensive to others."

Contraventions No. 2, 6, 8, 10, and 12:

The licensee submitted that the Contravention Notices and Notices of Enforcement Action allege "overcrowding beyond person capacity greater than occupant load" and that the authority is Section 6(4) of the *Regulation*. The hearing has been conducted pursuant to Section 20 of the *Act* for failure to comply with the terms and conditions of the licence. As *occupant load* is not a term and condition of the licence, but rather *person capacity* is, there is no such contravention of being over occupant load. The licensee argued that it is therefore not open to the branch to argue that they have proven that the licensee was over their person capacity and impose a penalty, as the branch has not clearly identified by Notice, the action that they were taking. The licensee cites *Plaza Cabaret Ltd. v. General Manager of the Liquor Control and Licensing Branch* 2004, BCSC 248 in support of that position.

Further, the licensee submitted that Items No. 14 and No. 15 of Schedule 4 of the *Regulation* demonstrate a redundancy with respect to the issue of overcrowding, and the penalty assessed- if any- should be under the lesser requirements of Item No. 14 rather than Item No. 15 as sought by the branch.

With respect specifically to alleged Contraventions No. 2, 6, and 10, the licensee argued that there was no evidence that the whole of the

establishment, including all licenses was beyond its "total capacity for three floors" of 476. The licensee argued that the establishment was temporarily congested in some areas, consistent with the closing of the Food Primary area on the third floor, which occurred while the other licensed areas were still open.

The licensee also argued that in these circumstances which include consideration of the unusual multiple licensing layout, that Contraventions No. 2 and No. 6 be considered as one offence, not two, as the establishment was within its "total capacity" and both occurred at the same time. The licensee was simply "not able to successfully manage the flow of patrons from one licensed area to another," after the closing of the third floor Food-Primary area.

With respect to Contravention No. 8, the licensee argued that Skybar was not open on May 3, 2004, as the club does not open on Mondays, and that the alleged contraventions must have occurred on another date. The evidence of the witnesses of the branch was unequivocal that the inspections occurred on that date. Further, the licensee argued that these counts relate to the whole of the licence, including the patio area, which capacity totals 71. The witness testimony confirms that counts are not precise, and accordingly, as the alleged overcrowding is minimal at worst, the margin of error should be interpreted in favour of the licensee.

The branch argued that the counts of the witnesses in regard to this contravention did not include the patio and therefore the capacity is 51, rather than 71.

Contravention No. 9:

The licensee submitted that the language of Section 73 of the *Act* authorizes the general manager in two distinct ways: Subsection (1)(a) allows the general

manager to *request* from the licensee a "prescribed document". Subsection (1)(b) allows the general manager to *inspect* "records" and "other things".

The licensee submitted that there was no evidence provided that established that surveillance tapes or CDs were considered to be a "document" or in the alternative, that they were a "prescribed document". The digital images, argued the licensee, could only be described as "other things" under Section 73 (1)(b) and as such, the general manager has no authority to request production of them. The only authority granted to the general manager in this regard is to inspect the establishment.

The licensee identified the letter of the inspector, which requests production of the surveillance tapes or CDs, as being misdirected in terms of the request. It argued that the inspector did not demand inspection of "other things" under Subsection (1)(b) and therefore the licensee made no refusal.

The branch submitted that the failure or refusal to comply with Section 73 is a very serious matter. It argued that it is possible to characterize the recorded footage as a "record of any incident or record of events that occurred in or adjacent to the licensed establishment" which constitutes a prescribed document under Section 73, as that term is defined in Section 34(j) of the *Regulation*. The branch also identified the term "record" as being defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238 as including;

"books, document, maps, drawings, photographs, letters, vouchers, papers, and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise."

The branch also argued that Section 2(1) of the *Interpretation Act* confirms that the definitions therein apply to the *Act* and *Regulation*. The branch submitted

that the inspector, on behalf of the general manager, properly made both verbal and written demands for production of the data, and did attempt to view the data on the inspection of the licensee's premises on April 2, 2004.

Due diligence

The licensee argued that in all of its activities it had demonstrated due diligence. With respect to the overcrowding issues, the licensee pointed to timing issues relating to the closing of the third floor. It submitted that as the third floor closed before the second floor, the patrons had no choice but to descend the staircase to the second floor to give them access to both the coat-check and ultimately the street level below. During that migration, staff could do no more than it did in ensuring an orderly passage. The licensee argued that the unusual layout of the premises constituted an unprecedented patron management issue, which deserved special consideration.

With respect to the allegations of liquor being removed from a red-lined area, the licensee argued that washrooms were not available on all floors and as the new enforcement policies allowed drinks into washrooms for security reasons, patrons must surely be entitled to pass through and outside of red-lined areas to get there.

The licensee submitted that they operated in a responsible manner with respect to the control of employees' drinking and demonstrated that Skybar's policy is that drinking while on duty was grounds for immediate dismissal. Therefore, any singular incident of an employee drinking contrary to that policy does not in itself eliminate the defence of due diligence.

Regarding the allegations of exotic dancer or stripper "prohibited acts" the licensee submits that the dancers were not part of their "usual crew" retained

for such purposes, and such they could not have known that the dancers would act inappropriately.

Timing of penalty:

The adjudicator became aware, through radio advertisements during the course of the hearings, of a large-scale scheduled event being promoted at the licensee's establishment. Submissions were sought as follows:

- a) Does the general manager have jurisdiction to consider the dates on which a suspension, if any, should start, in light of a scheduled special event in the licensed premise?
- b) If the general manager has such jurisdiction, should she exercise it in these circumstances?

The licensee submitted that the only restriction on the timing of a licence suspension is that provided by Section 67(2) and (3) of the *Regulation*. Subsection (2) provides that a suspension should start on the same day of the week that the contravention occurred and run on succeeding business days. Subsection (3) allows that the general manager may determine the date on which the suspension begins- subject to Subsection (2).

The licensee therefore submitted that the general manager does have jurisdiction to consider such matters in the timing of any suspension ordered.

The general manager submitted that such a special event should be only considered as such "in the most unusual of circumstances and then only if specifically raised by the licensee, not on the initiative of this or any adjudicator."

ANALYSIS AND DECISION

General:

I accept fully the evidence the testimony of the members of the VPD except where specifically noted otherwise. The VPD members bought and drank liquor in the context of undercover work but I find that the amount consumed did not impair their professional judgement.

Contraventions No. 1, 7, and 11:

I disagree that Contravention No. 1, and No. 7 are duplicitous. I accept the evidence that liquor was removed from each of the redlined areas (2nd floor Liquor Primary and 3rd floor Food Primary) on March 31, 2004. It seems that in the course of the inspections, one of the constables did purchase a bottle of beer on the third floor. Although this is not entirely certain from the evidence, it seems reasonable from the surrounding facts and I do so find. Had I not so found, the contravention would nonetheless be established by the carrying of the opened bottle out of the redlined area of the third floor even though it had been purchased at and wrongly removed from the second floor redlined area. Two contraventions may be committed with the same bottle of beer as surely as two crimes may be committed with the same weapon.

The licensee submitted that the *Guide* is not in evidence in this hearing. I disagree. I find that the *Guide* is in full force and effect as to the terms and conditions of each of the licenses by reference. Each licence stipulates on its face that: "This licence is subject to the terms and conditions contained in the publication '*Guide for liquor Licensees in British Columbia*' ". This term has the same significance as the one quoted by the licensee ("liquor may only be sold served, and consumed within the areas outlined in red on the official plan...")

which appears immediately below it on each licence. The terms of the *Guide* confirm that patrons may not "take liquor from the red-lined areas".

In light of the finding above it is not required that I find that liquor was *consumed* outside of the redlined areas. The evidence however, paints a clear picture of uninhibited ingress and egress from the redlined areas of the second and third floor. I accept that there were regular sightings of volumes of patrons passing through and lingering outside of the redlined areas with liquor in hand. I find on the evidence, this to be a normal occurrence in Skybar on the dates in question. I must conclude therefore, that liquor was also consumed outside of the redlined areas, as to fail to so recognize would be an affront to common sense.

I find that Section 20 (1)(a) of the *Act* does empower the general manager to convene a hearing for an alleged contravention of the *Guide for Liquor Licensees in British Columbia*, as I have already determined that by reference, the terms of the *Guide* are part of the terms and conditions of the licence.

I find that the substantive components of Contraventions No. 1, 7, and 11 have been proven.

Contravention No. 3:

The allegation that the bartender drank with the patrons on the date indicated is uncontroverted. I accept that he so did.

There is no evidence as to the content of the drink, but for the bartender's own statement as to his usual practice (as he had no specific recollection of that event), and the constable's uncontroverted evidence as to the bartender's answer to what was in the drink.

I find the explanation provided by the bartender and supported by the club manager (Red Bull in a shaker) to be believable, if not creditable. Accordingly, I am unable to find on the evidence that the beverage contained liquor. Accordingly, I find that the alleged contravention has not been proven with respect to the bartender.

As to the Mudslide, I accept the evidence of the constable that a staff member did consume this liquor and accordingly the contravention has been proven.

Contravention No. 4:

I have already found that the terms of the *Guide*, by reference are included in the terms and conditions of the licence. The terms found therein do therefore apply.

I find on the evidence, that the Mudslide was purchased pre-mixed form from the Liquor Distribution Branch, and was poured from the original container. There was no pre-mixing or decanting done in Skybar. There is no contravention of any term or condition of the licence with respect thereto.

As for the table of "Crantinis" there is no direct evidence as to the contents of the drinks. The evidence of the club manager is that a complimentary drink was included in the limousine package, but no further description of the drink was made. The best indication of the contents of the "Crantinis" is the reference to them as "Martinis" by the club manager. Although that might lead to an inference that they were indeed made with liquor and pre-mixed at Skybar, this language was not put to the test in evidence.

There was evidence of visually similar drinks having been provided upon demand of a Crantini, and of the licensee's staff identifying the drinks on the table as Crantinis, but in light of the evidence that the licensee considers there

is "nothing wrong with lying to customers", I cannot use this information to conclusively determine the contents of the drinks. On the available evidence no contravention has been proven in this regard.

Contravention No. 5:

The licensee argued that there is no restriction on entertainment on the face of the licence. There is a reference to the provisions of the *Guide* being part of the terms and conditions of the licence. The provisions of the *Guide* are clear, capable of identification in practice, and available to the licensee. The evidence of the managing partner of the licensee was clear that he understood the rules with respect to strippers or exotic dancers, and he knew what was "not supposed to" happen. I find that the provisions of the *Guide* apply to this contravention, that the licensee knew of the provisions in the *Guide* and that the licensee knew that the *Guide* applied to add terms and conditions to the licence.

The evidence of multiple constables is consistent with respect to the alleged contraventions of touching members of the audience, and engaging in live, realistic or simulated sex acts. There was no evidence presented to dispute these allegations.

I find this evidence to be conclusive of the facts alleged. I find the strippers or exotic dancers did touch members of the audience, did engage in realistic or simulated sex acts and did, accordingly contravene the provisions of the *Guide*, and by reference, the conditions of the licence. Contravention No. 5 has been proven.

Contraventions No. 2, 6, 8, 10, and 12:

With respect to contraventions No. 2 and No. 6 specifically, the licensee argued that the total capacity of the establishment was not exceeded and therefore the specific overcrowding issues related to these individual licenses should be disregarded, or in the alternative, seen as one contravention. I disagree. Each licence exists as an individual one, with privileges and responsibilities attached thereto. The contraventions are individual and relate to specific licenses. The fact that both contraventions occurred at the same time is not relevant to the individual findings. I find Contraventions No. 2 and No. 6 to be independent of each other, and properly constituted.

The submission that the licensee is not able to control the flow of patrons after the earlier closing down of the third floor Food Primary area is not an answer to the overcrowding contraventions. The licensee's ability to control flow between licenses within the establishment is the responsibility of the licensee.

With respect to both the person and patron counts, I accept in full, the evidence of the members of the VPD, that the allegations of overcrowding relating to Contraventions No. 2, No. 6, No. 10, and No. 12 were in excess of the maximum number allowed.

I find that the patron or person capacity set by the general manager had been in each of these contraventions, been exceeded by permitting more persons in the licensed establishment than the patron or person capacity.

I find also, that in addition to permitting more persons than the patron or person capacity set by the general manager, the number of persons, in each case, was more than the occupant load.

With respect to Contravention No. 8, I find that the evidence calls into question the date upon which the alleged contravention took place, the area in which the counts were restricted, and potentially, the accuracy of the counts, which would for a finding of contravention require accuracy to within as few as five individuals. Accordingly, I find that the effect of the totality of these questions is that the burden of proof of the alleged contravention has not been met. I find that this contravention has not been proven.

With respect to whether these contraventions exist in law, and whether Item No. 14, or Item No. 15 of Schedule 4 of the *Regulation* is applicable to the alleged contraventions, I find the matter to have been recently and clearly decided. In the Judicial Review case *Skybar Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2005 BCSC 235, dated February 25, 2005, these issues were considered. The applicant and counsel in that case were the very same as in this case. Both the issue and the argument are identical.

The Honourable Mr. Justice Burnyeat described the issue and determined the matter as shown in the following excerpts:

There are no definitions of “contravention” other than as set out in the ***Regulation***. In this regard, a “contravention” is defined under s.1 (1) of the ***Regulation*** to mean a matter referred to in the “Contravention” column of Schedule 4 and not to anything, which may be set out in s.6 of the Regulation. Section 6(4) of the ***Regulation*** does not establish a contravention. Rather, that section merely establishes that it is a term and condition of the license that there not be at any one time more persons than the person capacity established under s.6 (1) and (3) of the ***Regulation***.

While it may well be that it is a “term and condition” of a license that there not be more persons than the “person capacity” as set out under s. 6(1) or s. 6(3) of the **Regulation**, contraventions are limited to what are defined under s. 1(1) of the **Regulation**, being matters referred to in the “Contravention” column of Schedule 4 of the **Regulation**.

Under items 14 and 15 of Schedule 4, the General Manager must find that a licensee permitted more persons in the licensed establishment than the “patron or person capacity” set by the General Manager permitted, and the number of people present was either less than or equal to the “occupant load” (Item 14) or was more than the “occupant load” (Item 15). Each of the terms “occupant load”, “patron capacity”, and “person capacity” are defined in the **Regulation**. I take from the fact that those terms are defined in the **Regulation** that it was the intention of the Legislature to permit one or more of those terms to be included within the contraventions which are set out in the “Contraventions” column of Schedule 4 of the **Regulation**.

Accordingly, the use of the phrase “Overcrowding beyond person capacity greater than Occupant Load” in the September 7, 2003 Contravention Notice and the phrase “Overcrowding beyond person capacity greater than Occupant Load” set out in the December 11, 2003 Notice of Enforcement contain words which are set out Items 14 and 15 in Schedule 4.

Because the contravention provides a conjunctive requirement, it is also necessary to ascertain whether the number of persons at Skybar was “more than the occupant load”.

While not repeating exactly the “contravention” set out in Item 15, I am also satisfied that the Contravention Notice and the Notice of Enforcement nevertheless clearly set out the contravention defined by Item 15.

In establishing the two criteria for the contravention set out in Item 15, the Legislature was providing for a situation where the patron or person capacity set by the General Manager is greater than the occupant load. The contravention is then permitting more persons in the licensed establishment than the patron or person capacity and more persons in the licensed establishment than allowed by the occupant load which have been set. In enacting Item 14, the Legislature was providing for a situation where the patron or person capacity set by the General Manager is less than the occupant load. The contravention is also permitting more persons in the licensed establishment than the person or patron capacity set by the General Manager and more persons than the occupant load, which had been set.

Mr. Justice Burnyeat then determined that Skybar's submissions were incorrect. I agree with the learned Justice and find that the licensee's submissions in the current case are in all relevant ways identical to those in the February 25, 2005, decision. I am guided by and follow the wisdom of the court and find accordingly, that the alleged contraventions are properly constituted, as is the recommended penalty.

Contravention No. 9:

Section 73(1)(a) of the *Act* authorizes the general manager or her designate to demand production of any prescribed document relating to the operation of the business licensed under this *Act*.

Section 73(1)(b)(iii) of the *Act* authorizes the general manager to inspect both establishments licensed under the *Act*, and "records... and other things associated with the operation of the establishment.

I find that Subsection 73(1)(b)(iii) does anticipate and capture the concept of digital surveillance data relating to the licensed establishment, which the licensee possesses. Therefore, I find the general manager has the authority to inspect the data.

I find that as a practical matter, in order for the general manager or her designate to inspect the data, she must make a request for production of it.

I find that the correspondence of the liquor inspector, dated April 7, 2004, (Exhibit 1, Tab 7) does make request for production of that data.

The club manager testified that he made reasonable efforts to obtain the data for the inspector. I do not accept his testimony. I find that the club manager made little or no timely effort to produce this data.

The managing partner testified that the inspector did not ask to *look* at the data, but rather *for production* of the data. He found this to be a significant distinction and on that basis did not produce the data in a timely fashion.

There was no credible evidence presented as to the storage capacity of the surveillance system, or as to how long the data contained therein remains

accessible. The only evidence regarding the amount of storage capacity in the system, and therefore the potential for an untimely overwriting of the digital information is hearsay. I give it no weight.

I am drawn to conclude that the licensee knew of the substantive contraventions of March 31, May 3, and May 6, 2004, and that his thorough surveillance data would be visually incriminating. I find that the licensee had the ability to comply with the request of the liquor inspector, and it chose not to produce the data.

Although the general manager has the authority to demand production, she does not have the ability to compel production of the data under Section 73 of the *Act*. However, failure to comply with the *Act* does attract a penalty in accordance with Schedule 4 of the *Regulation* for a contravention.

It would be no answer to this finding that the licensee had reasonably concluded as a result of the wording of Section 73 that it had no obligation to produce the data. I find that the evidence confirms that the licensee consulted with counsel and decided not to comply with the request in a timely fashion.

Also, I find that on a reasonable interpretation of Section 34 (j) of the *Regulation*, the data recorded by the surveillance system is a *prescribed document*, as referred to in Section 73 as it falls within the definition of "records of any incidents or events that occurred in or adjacent to the licensed establishment".

I find the substantive contravention of Section 73 of the *Act* has been proven for purposes of Contravention No. 9.

Due diligence:

I find that the licensee did not establish due diligence with respect to any of the contraventions such as to provide a defence thereto.

The licensee has the obligation to control of the number of patrons in the establishment at any time. There are several licenses in the establishment and for each there is a specific maximum of persons or patrons allowed. The layout and design of Skybar may indeed provide unique challenges for supervision and control, but those challenges are entirely the responsibility of the licensee. None of the branch or any of the other authorizing administrations can be held in any part accountable for the licensee's failure to comply with such requirements.

The rules with respect to redlined areas are to be strictly enforced. The softening of the washroom prohibition carries with it a specific provision that liquor may not be carried through non- redlined areas to get to a washroom. The evidence discloses no evidence of an attempt to prohibit or control such movement. There was also insufficient evidence of management or staff actions to prevent the movement of liquor between licensed areas through the stairwell and corresponding redlined areas for a finding of due diligence in that regard.

With respect to employees drinking while on duty, I do not accept the argument that the policy in place in the establishment calling for immediate dismissal if caught, is in itself sufficient to prove a defence of due diligence. There was no testimony produced speaking to enforcement of this policy and inadequate or no reference made to action by the licensee to ensure compliance with this restriction.

The licensee submitted that the dancers or strippers were not part of the usual crew of employees so retained. I find this to be irrelevant. The licensee hired these entertainers and the licensee had the ability and obligation to control the activities of these entertainers. It chose not to do so. I find on the evidence that the licensee knew or ought to have known that the activities of the entertainers on the dates in question were inappropriate and did little or nothing to prevent the continuation of those activities.

Timing of penalty:

I find that the general manager has jurisdiction to consider the dates on which a suspension should start in light of a special event scheduled in a licensed premise. It is open for the licensee to bring to the attention of the adjudicator in a hearing that there is a scheduled event outside of the ordinary course of business for which particular arrangements have been made, which should be accommodated by any penalty ordered. The general manager may consider the evidence and determine in her discretion the appropriateness of a timing allowance. She may then order a suspension to coincide with the scheduled event or to avoid conflict therewith.

The branch also argued that this matter could only be considered if raised by the licensee, and "not on the initiative of this, or any adjudicator." I disagree. In this case, the adjudicator became aware of the event by radio advertisements concurrently with, but outside of, the hearing process. The adjudicator, seized of this information, had a duty to disclose his knowledge of the scheduling of the event and seek submissions from the licensee. To fail to do so would be to leave a determination in the hands of the adjudicator, without allowing the licensee the opportunity to speak to it. If a penalty was ordered, the adjudicator would be confronted with the issue of whether to choose a date in conflict with the upcoming event, or to choose a date which does not conflict with the event. I have found that the general manager has this jurisdiction. The impact of this

decision, could profoundly affect the gravity of the penalty served by the licensee. It would be contrary to the principles of administrative fairness to allow the general manager the discretion in this regard without the licensee having an opportunity to first address this issue.

As a result of extending the hearing of this matter, the question has in this instance become moot. The suspension will not conflict with the known scheduled event.

PENALTY

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

- Impose a suspension of the liquor licenses for a period of time
- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

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 *Regulation*.

I have carefully reviewed the licensee's compliance history with respect to each individual licence in issue in these proceedings. The branch has recommended penalties in each of the contraventions that I have found within the range of penalties provided by the *Regulation* for a first contravention. I find each of the recommended penalties to be reasonable and appropriate with respect to the contraventions found as follows:

Contravention No. 1: \$3,000 monetary penalty

Contravention No. 2: 18 day licence suspension

Contravention No. 3: \$1,000 monetary penalty

Contravention No. 4: No contravention found

Contravention No. 5: 4 day licence suspension

Contravention No. 6: 4 day licence suspension

Contravention No. 7: \$3,000 monetary penalty

Contravention No. 8: No contravention found

Contravention No. 9: 10 day licence suspension

Contravention No. 10: 18 day licence suspension

Contravention No. 11: \$3,000 monetary penalty

Contravention No. 12: 4 day licence suspension

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 300593 for a period of fifty (50) days, to commence as of the close of business on Monday May 30, 2005, 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 *Regulation*). (Contraventions No. 2, No. 5, No. 9, No. 10)

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 300601 for a period of eight (8) days, to commence as of the close of business on Monday May 30, 2005, 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 *Regulation*). (Contraventions No. 6, No. 12)

To ensure this Order is effective, I direct that the Liquor Licence No. 300593, and 300601, be held by the branch or the Vancouver Police Department from the close of business on Monday May 30, 2005, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

Pursuant to Section 20(2) of the *Act*, I order the licensee to pay a monetary penalty a total of ten thousand dollars (\$10,000) relating to Liquor Primary Licence No. 300593 and Food Primary Licence No. 300601. (Contraventions No. 1, No. 3, No. 7 and No. 11). The monetary penalty must be paid no later than the close of business on Wednesday, June 1, 2005.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 27, 2005

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Doug Dyck, A/Regional Manager

Ministry of Attorney General, Legal Services Branch
Attn: Laurie J. Soloway, Barrister and Solicitor

APPENDIX A

LIQUOR CONTROL AND LICENSING ACT**[RSBC 1996] CHAPTER 267**

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

(c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,

(d) designate the areas within an establishment where minors are permitted,

(e) approve, prohibit or restrict games and entertainment in an establishment,

Action against a licensee

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

Entertainment

50 (1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.

(2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued.

Power to retain documents and inspect books and premises

73 (1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager or a person designated by the general manager may

(a) require the licensee to produce any prescribed document relating to the operation of the business licensed under this Act, and

(b) inspect any of the following:

(i) records in the possession of any person that may contain information relating to goods shipped, carried or consigned or received for shipment or carriage in British Columbia,

(ii) premises of any person set apart or used as a warehouse for the storage of liquor, and

(iii) establishments licensed under this Act and records, liquor and other things associated with the operation of the establishment.

(2) A person commits an offence if the person neglects or refuses to do any of the following under this section:

(a) produce a document required to be produced;

(b) produce and submit a record or thing for inspection or a sample of liquor;

(c) allow premises to be inspected.

Liquor Control and Licensing Act**LIQUOR CONTROL AND LICENSING REGULATION**

[includes amendments up to B.C. Reg. 406/2003]

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;

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).

Production of records

34 For the purposes of section 73 (1) of the Act, the following documents are prescribed in relation to a licensee:

- (a) liquor purchase records;
 - (b) liquor sales records;
 - (c) liquor disposal records;
 - (d) food sales records;
 - (e) sales records respecting other merchandise or services provided by the licensee that are incidental to the business of the licensed establishment;
 - (f) agreements and contracts between the licensee and a liquor manufacturer or its agent or representative;
 - (g) invoices and purchase receipts for all equipment and other inventory used in the operation of the licensed establishment;
 - (h) lease and management contracts related to the licensed establishment;
 - (i) employee records including names, addresses, salaries, primary job responsibilities, shift schedules and dates of employment;
 - (j) records of any incidents or events that occurred in or adjacent to the licensed establishment;
 - (k) records of court orders and judgments against a licensee respecting the sale, service or manufacture of liquor;
 - (l) records of the quantity and price of liquor servings.
-

42 (1) A person must not consume **liquor** in a licensed establishment unless that **liquor** has been purchased from or served by the licensee of that licensed establishment.

(2) A licensee must not allow consumption in the licensed establishment of **liquor** that was not purchased from or served by the licensee.

(3) A licensee, and the employees of the licensee, must not consume **liquor** while working in the licensed establishment.

(4) All **liquor** sold or served in a licensed establishment must be consumed there, and the licensee must not allow **liquor**, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) **liquor** that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

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...

Schedule 4

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 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	

Overcrowding					
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

Liquor Service					
27	A breach of section 42 (3) of this regulation as a result of an employee or the licensee consuming liquor while working on the licensed premises	1-3	3-6	6-9	\$1 000 - \$3 000

Production of Records					
31	A breach of section 73 (1) (a), 73 (2) (a) or 73 (2) (b) of the Act [<i>Failure to produce a document or record or thing</i>]	10-15	20-30	30-60	\$7 500 - \$10 000

Entertainment					
34	Permitting in the licensed establishment entertainment by one or more exotic dancers or strippers that is prohibited or restricted under section 50 of the Act	4-7	10-14	18-20	\$5 000 - \$7 000
35	Permitting in the licensed establishment any other entertainment that is prohibited or restricted	1-3	3-6	6-9	\$1 000 - \$3 000

	under section 50 of the Act				
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General					
46	Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specifically referred to in Items 1 to 45	1-3	3-6	6-9	\$1 000 - \$3 000

Liquor- Primary Licence

Terms and Conditions

A Guide for Liquor Licensees in British Columbia

Excepts from P1, 2:

This Guide

This guide outlines the requirements of the Liquor Control and Licensing Act and Regulations for serving and consuming Liquor in Liquor-primary establishments (such as bars, pubs, night clubs, recreation centres, and stadiums) and in liquor-primary clubs (private clubs). It also imposes further terms and conditions in addition to those found in the Liquor Control and Licensing Act and Regulations**.

**Section 12 of the Liquor Control and Licensing Act provides the general manager with the authority to impose, in the public interest, terms and conditions on licenses.

Like the requirements contained in the Act and Regulations, these additional terms and conditions- and any further terms and conditions that might be printed on the face of your license or contained in letters issued to you by the general manager of the Liquor Control and Licensing ranch—must be followed at all times.

As a licensee, it is your responsibility to operate your business so that it complies with the law and with the terms and conditions of your license.

"Occupant Load" means the number of persons, including staff, who may be in a licensed premises at one time. The number is calculated by local fire and building officials or other designated professionals, such as architects and engineers. The occupant load calculation must be the least number of people allowed under the relevant provincial regulations or municipal bylaws."

"Patron Capacity" means the maximum number of persons not counting staff, who may be in a licensed premises at one time.

"Person Capacity" means the maximum number of persons, including staff, who may be in a licensed premises at one time.

"Red-Lined area" refers to the area within a licensed establishment where you may sell, serve, and consume liquor."

Excerpts from P7, 8:

Dispensing and Mixing Drinks

You must always dispense liquor from the original containers, unless you have applied to the general manager for an exception. You may not refill containers or add liquor to a bottle or container purchased from the Liquor Distribution Branch.

You must dispense and mix drinks at a liquor service bar, in full view of customers, and you may not pre-mix drinks; all drinks must be mixed at the request of a customer.

Where customers may consume liquor

Customers may not bring their own bottles of liquor to consume in your establishment, and you may only sell and serve liquor in the licensed area of your establishment (commonly referred to as the "red-lined area" of your floor plans).

You may not permit customers to consume liquor outside of the red-lined area, or to take liquor from the red-lined area to other parts of your establishment, except:

- Patrons may take liquor into the washroom as long as they are not walking through an unlicensed area (such as a hotel lobby), and you are properly supervising the washrooms.

Excerpts from P. 17

Performances by Strippers or Exotic Dancers

A stripper is an entertainer who strips off clothing during a performance; an exotic dancer is a performer who does not necessarily strip clothing during a performance

Performances must be confined to the stage or other approved areas (these areas will be noted on your liquor license). No performing is allowed in the audience area.

Exotic dancers/strippers may not:

- Engage in live, realistic or simulated sex acts, or in any acts involving coercion or violence, either simulated or real.
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- Insert any object into, or extract any object from, the vagina or anus
 - Urinate or defecate while performing
 - Touch, share food and beverages, or pass objects to members of the audience
 - Consume liquor immediately prior to a performance, during a performance or between performances
 - Dance/perform on table tops or other areas outside the approved areas.
 - Touch, or share food and beverages with other performers
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Food- Primary Licence

Terms and Conditions

A Guide for Liquor Licensees in British Columbia

Excerpt from P1:

This Guide

This guide outlines the requirements of the Liquor Control and Licensing Act and Regulations for serving and consuming Liquor in food-primary establishments (restaurants). It also imposes further terms and conditions in addition to those found in the Liquor Control and Licensing Act and Regulations**.

**Section 12 of the Liquor Control and Licensing Act provides the general manager with the authority to impose, in the public interest, terms and conditions on licenses.

Like the requirements contained in the Act and Regulations, these additional terms and conditions- and any further terms and conditions that might be printed on the face of your license or contained in letters issued to you by the general manager of the Liquor Control and Licensing ranch—must be followed at all times.

As a licensee, it is your responsibility to operate your business so that it complies with the law and with the terms and conditions of your license.

"Occupant Load" means the number of persons, including staff, who may be in a licensed premise at one time. The number is calculated by local fire and building officials or other designated professionals, such as architects and engineers. The occupant load calculation must be the least number of people allowed under the relevant provincial regulations or municipal bylaws."

"Patron Capacity" means the maximum number of persons not counting staff, who may be in a licensed premise at one time.

"Person Capacity" means the maximum number of persons, including staff, who may be in a licensed premise at one time.

"Red-Lined area" refers to the area within a licensed establishment where you may sell, serve, and consume liquor."

Excerpt from P 10:

Dispensing and Mixing Drinks

You must always dispense liquor from the original containers, unless you have applied to the general manager for an exception. You may not refill containers or add liquor to a bottle or container purchased from the Liquor Distribution Branch.

You must dispense and mix drinks at a liquor service bar, in full view of customers, and you may not pre-mix drinks; all drinks must be mixed at the request of a customer.

Where customers may consume liquor

Customers may not bring their own bottles of liquor to consume in your establishment, and you may only sell and serve liquor in the licensed area of your establishment (commonly referred to as the "red-lined area" of your floor plans).

Patrons may stand or walk around within the redlined area with their drinks, but you may not permit customers to consume liquor outside of the red-lined area, or to take liquor from the red-lined area to other parts of your establishment except:

- Patrons may take liquor into the washroom as long as they are not walking through an unlicensed area (such as a hotel lobby), and you are properly supervising the washrooms.
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