



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

A hearing pursuant to Section 20 of

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

Licensee:	Sky Bar Ltd. dba Skybar 670 Smithe Street Vancouver, BC V6B 1E3
Case:	EH05-086
For the Licensee:	J. Barry Carter
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Edward W. Owsianski
Date of Hearing:	February 27, 2006
Place of Hearing:	Vancouver, BC
Date of Decision:	April 7, 2006

INTRODUCTION

The licensee, Skybar Ltd. operates an establishment known as Skybar. It is located at 670 Smithe Street in the City of Vancouver in what is known as the entertainment district of the downtown area of the City. It is an area of the City in which liquor licensed establishments have been encouraged to locate. Skybar has three floors and three separate liquor licenses, consisting of a food primary licence and two liquor primary licenses. The floors are connected by an elevator and stairwells. The elevator and main stairwell are located in the centre of the establishment. The only coat check for the establishment is located on the second floor adjacent to the liquor primary area.

The second floor liquor primary area which is the main liquor primary area for the establishment operates as a night club under Liquor Primary Licence No. 300593. It is the subject of this hearing. The licensed hours for the sale of liquor are 7:00 p.m. – 2:00 a.m. on Monday through Saturday and 7:00 p.m. – Midnight on Sunday. The licence permits a maximum capacity of 220 persons in the licensed area. The licence is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia'. The maximum occupant load as set by the City of Vancouver, Office of the Fire Chief, is 220 persons.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Liquor Control and Licensing Branch's (the branch) allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated October 26, 2005. The branch alleges that on the business day of May 28/29, 2005, the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation* by permitting more persons in the licensed establishment than the person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load.

This contravention is being treated as a second for the purpose of penalty and the recommended enforcement action is a twelve (12) day suspension of the liquor licence (Item 15, Schedule 4, *Regulation*).

Schedule 4, Item 15 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for this contravention. For a first contravention of this type the penalty range is a four (4) to seven (7) day licence suspension and a five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty. For a second contravention the penalty range is a ten (10) to fourteen (14) day licence suspension. For subsequent contraventions the penalty range is a eighteen (18) to twenty (20) day licence suspension.

The licensee disputes the allegation.

Section 6 of the *Regulation* to the *Act* states as follows:

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.

Issues

1. Contemporaneous submissions.
2. Whether the licensee contravened the *Regulation* as alleged?
3. If so, what penalty, if any, is appropriate?

Exhibits

1. Book of Documents.
2. Book of Precedents.
3. Document titled: "Skybar Compliance History".

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two branch compliance and enforcement officers and two City of Vancouver police constables testified that during the late night/early morning hours of May 28/29, 2005, they were part of a multi-agency team assigned to check licensed establishments located in the Vancouver downtown area. They arrived at Skybar at approximately 12:05 a.m. All had previous experience in counting persons in licensed establishments and all used mechanical counters on this occasion. They separately conducted counts of persons within the establishment, recording their counts in their notebooks (Exhibit 1, tabs 4 – 7) before leaving the establishment at approximately 12:50 a.m.

C & E officer #1 as the branch representative responsible for the geographical area in which the Skybar is located, took the lead during the inspection of the establishment and it was at her request that the counts were made of the persons in the establishment. She testified that upon their arrival at the front entrance she spoke with the manager on duty at the establishment and asked him the number of persons on the second floor. He advised her that he did not know but upon checking with the front entrance doorman told her that the count was 253. She was surprised at the number provided as it exceeded the authorized maximum capacity for the second floor. She proceeded to the second floor where she observed "massive overcrowding" and requested the constables and the other C & E officer to make counts of the number of

persons. She proceeded to make two counts, one made by walking clockwise through the second floor area, the other made in the opposite direction. She testified that it was difficult making her way through the crowd, having to push persons aside and at times being unable to continue moving because of the congestion. Her first count was 392 persons, the second 412. The counts were completed by 12:35 a.m. and she proceeded to a quiet area on the first floor to speak with the manager and to write up her observations. She asked the manager to have his staff make a count. This was done by the front entrance doorman who produced a count of 213 persons. This number surprised her given her own counts and observations. She told the manager that the number of persons on the second floor must be immediately reduced. She wrote out a Contravention Notice (CN) and provided a copy to the manager. This was replaced by an amended CN mailed to the licensee on October 26, 2005 (Exhibit 1, tab 3).

She testified that as the C & E officer responsible for the geographical area in which the Skybar is located she is responsible for keeping the branch files for the establishment. She testified that the liquor primary licence for this establishment (Exhibit 1, tab 8) is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees". The Guide in effect at the time of the alleged contravention is found at Exhibit 2, tab 9. She referred to excerpts from the Guide dealing with: "Your Role as a Licensee" at page three and "Overcrowding" at page 12. The second floor plan is found at Exhibit 1, tab 10. The Maximum Occupant Load Certificate (Exhibit 1, tab 11) for the second floor sets the maximum occupant load at 220 persons for the second floor. Approval-in-Principle for the licence was given on May 29, 2003 (Exhibit 1, tab 12). An interview was conducted with the licensee representative on July 25, 2003, (Exhibit 1, tab 13) and the liquor licence was issued on that date (Exhibit 1, tab 14). An internal share transfer was approved on February 5, 2004 (Exhibit 2, tab 15).

The C & E officer introduced Exhibit 3 which outlines the compliance history for the licensee; the following relate to issues of overcrowding of the second floor area:

- Contravention Notice (CN) and waiver for overcrowding on August 17, 2003, (Exhibit 2, tab 16) this resulted in a five thousand dollar (\$5,000.00) monetary penalty;
- CN and compliance meeting report for overcrowding on September 7, 2003, resulting in an order for a 12 day suspension. (Exhibit 2, tab 17);
- CN for overcrowding on March 31, 2004, resulting in an order for an 18 day suspension (Exhibit 2, tab 19);
- CN for overcrowding on April 25, 2004, resulting in an order for an 18 day suspension (Exhibit 2, tab 21);
- CN for overcrowding on May 6, 2004, resulting in an order for an 18 day suspension (Exhibit 2, tab 22).
- CN for overcrowding on February 27, 2005. [I pause to note that since the evidence was given a determination has been made resulting in an order for an 18 day suspension, see *GM LCLB decision in Skybar EH05-047 dated April 6, 2006*]

The C & E officer testified that on June 23, 2005, she prepared an Enforcement Action Recommended Report (EAR) and completed a NOEA on October 26, 2005, which was mailed to the licensee. In recommending that enforcement action be taken, she was concerned that the establishment had prior contraventions for overcrowding and the doorman was aware and admitted that it was over capacity at the time of their visit. She recommended a twelve (12) day liquor licence suspension, mid-range suspension for a second contravention. In making the recommendation for a mid-range penalty she considered that the establishment has an extensive history of overcrowding, and this most recent incident was shortly after the previous incident on February 27, 2005.

C & E officer #2 testified that he proceeded directly to the second floor where he conducted two counts, one count made while walking counter-clockwise through the second floor area, the other made clockwise. He had to push his way through the crowd. He counted a total of 356 persons on the first count completed at 12:30 a.m and a total of 335 on the second count completed at 12:39 a.m.

The two police constables testified that they went first to the third floor VIP room where each counted 28 persons. They then proceeded to the second floor where they each conducted a count. **Constable #1** described the conditions as being very crowded. He had difficulty in pushing his way through the crowd and was unable to complete his count due to the extreme congestion on one of the dance floors. At the time that he was unable to proceed any further, his count was 345 persons which included the 28 persons previously counted on the third floor. **Constable #2** did not count those persons who appeared to be staff. He counted a total of 394 persons which included the 28 persons previously counted on the third floor. The constables completed their counts at 12:41 a.m.

EVIDENCE - THE LICENSEE

Witness #1 testified that he is currently the general manager of the establishment and as such has responsibility for the total operation of the business. The establishment targets 25 – 45 year old professionals as patrons with higher drink prices and cover charges than other establishments. It has a strict dress code. It consists of three floors. The first floor has the main entrance and a small food primary lounge with a capacity of 48 persons. It closes at midnight. The second floor has the main liquor primary area with a capacity of 220 persons. It also has the coat check for the entire establishment. The third floor has two areas, a food primary area with a capacity of 120 persons which closes at 11:00 p.m. and a liquor primary VIP lounge with a capacity of 71 persons. The total capacity for the entire establishment is over 400 persons.

Saturday nights are the busiest night of the week for the entire operation. The third floor food primary area is open for dinner from 7:00 p.m. – 11:00 p.m. with 100 – 110 patrons. These patrons must leave the food primary area by midnight, moving either to the VIP area, the second floor liquor primary area or departing from the establishment. This creates a lot of movement and congestion in the coat check area of the second floor for a period of 30 – 45 minutes.

He testified that he has worked as security within the hospitality industry for approximately 10 years. At the time of the alleged contravention he was employed part-time at the establishment and was working on May 28/29, 2005, as the front door doorman. As the front entrance doorman, he keeps track of the number of persons in the whole of the establishment. He recalls the manager asking him for the count, and he told him 253, which was the total number of persons for the third floor VIP room and the second floor liquor primary area. He took into account that the food primary area was closed and the patrons were leaving. Approximately one-half hour later the manager requested that he do a count of the second floor area. He went to the second floor where he counted 213 persons. He conducts counts by dividing the room into four areas and counting each area. A proper count takes from 10 – 12 minutes to be accurate. The room looked good and he believed that they were within their capacity. He is aware that there have been previous problems with overcrowding at the establishment.

Witness #2 testified that she works at the establishment on Thursday, Friday or Saturday nights. She was working May 28/29, 2005, either at the coat check or at the beer sales tub. She testified that Saturday nights are the busiest, particularly at midnight for 30 – 45 minutes as persons are leaving from the third floor food primary area and getting their coats from the second floor coat check. This leads to crowding in front of the coat check from both sides as persons move from the centre stairwells to the coat check area.

Licensee Submissions

1. Contemporaneous Submissions

Counsel submitted during the course of the hearing that it was not appropriate to require the licensee to address both the substantive allegation and submissions on penalty at the same time, that the hearing on penalty should be adjourned until after the decision was made on whether a contravention had occurred. Further, the evidence of the licensee's compliance history should only be tendered after a decision is reached on whether a contravention has occurred, to do otherwise is prejudicial to the licensee.

2. Whether the licensee contravened the *Regulation* as alleged?

Counsel submitted that the values for the numbers of persons counted on the second floor must be considered. There is a large discrepancy in the numbers provided by the branch's witnesses. Constable #1 counted 317 (345 – 28), constable #2 counted 366 (394 – 28), C & E officer #1 had counts of 392 and 412, and C & E officer #2 counted 335 and 356. These counts were conducted between 12:05 and 12:35 a.m. The licensee's witness counted 213 at 12:50 a.m. Thus there was a significant drop of more than 120 persons. The problem with the establishment is that the food primary licenses on the first and third floors have to get their coats from the coat check on the second floor. This creates a very busy half hour after midnight in the area of the coat check.

Counsel submitted that the licensee has been duly diligent by taking all reasonable steps to prevent the contravention. The configuration of the establishment with the only coat check on the second floor was approved by the branch. The branch was cognizant of the issues which could arise because of the configuration. Due diligence must be considered in the circumstances of this establishment not as compared to other licensed establishments. The persons within the establishment did not exceed the total capacity for the three floors, for a brief time it was over capacity for one area.

3. Penalty

Counsel submitted that if a contravention is found, the penalty should be mitigated by the licensee's actions. With the exception of the overcrowding, the licensee is a good corporate citizen.

REASONS AND DECISION

1. Contemporaneous Submissions

Counsel has objected to making submissions on penalty, prior to a determination that a contravention has been found. This position has been taken in several hearings. It has consistently been held that the hearing process allows for penalty submissions to be made during the course of the hearing prior to a determination on the alleged contravention and that that process does not prejudice the licensee. The adjudicator in

Greater Vancouver Professional Driver's Association, EH01-035/036, April 29, 2002, provided her reasoning for this position, which I accept:

“In this venue it is not necessary to obtain the decision on the substantive allegations first for reasons that follow. The branch provides ample advance notice of both the substantive allegations and the recommended penalty. The licensee knows “what offences he is answerable for at the time he is making his submission on the question of penalty.” The range of penalty is set by *Regulation*. The licensee is able to lead evidence on, and speak to, penalty factors including the degree of culpability, the nature of the contraventions and mitigating circumstances or conduct.

Further, it is open to the licensee to make alternative submissions on penalty. For example, the licensee can argue there should be no penalty and give reasons. And the licensee can argue, in the alternative, if the adjudicator finds a penalty is appropriate, it should be other than what the branch has proposed – this is not affected by the branch’s practice of proceeding directly to penalty submissions following the substantive case.”

Counsel has argued that the evidence of the licensee’s compliance history should only be tendered after a decision is reached on whether a contravention has occurred, to do otherwise is prejudicial to the licensee. I disagree that this is prejudicial to the licensee. It is incumbent upon the adjudicator to ensure that in considering the elements necessary to a finding of a contravention that he/she does not take into consideration evidence respecting the compliance history of the licensee. I accept that responsibility.

2. Whether the licensee contravened the *Regulation* as alleged?

There are vagaries involved in the counting of large number of persons in crowded licensed establishments making it impossible to achieve complete accuracy. That is reflected by the difference in the number of persons counted by each of the branch’s witnesses. The witnesses were all experienced in counting persons in crowded licensed establishments. All used a mechanical counter to assist in making the counts. While there are some differences in the totals arrived at by the branch’s witnesses, they are all consistent in that the number of persons in the licensed area greatly exceeded the authorized capacity. The witness for the licensee counting within 10 to 15 minutes later counted 213 persons, which is over 100 persons less than the counts made by the branch’s witnesses. Counsel submits that the difference is due to persons having

retrieved their coats and leaving. This does not meet with the description of the area as provided by the branch's witnesses who described the overall second floor as being very crowded, particularly the dance floors, one of which was so crowded that it prevented one of the constables from completing the count. I am satisfied that the crowding on the second floor was general in nature and not confined to the coat check area. Even if I am wrong on this point, the maximum occupant load for the second floor licensed area does not permit an increase in the number of persons allowed based on their activities and the duration of their stay. In conclusion, I prefer the evidence provided by the branch's witnesses and find that on May 29, 2005, at approximately 12:30 a.m. there were more persons in the licensed establishment than the person capacity of 220 set by the general manager and the number of persons in the licensed establishment was more than the occupant load of 220.

Counsel has argued that the licensee has been duly diligent by taking all reasonable steps to prevent the contravention and that the configuration of the establishment with the only coat check on the second floor was approved by the branch. He argued that the branch was cognizant of the issues which could arise because of the configuration.

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. I am not satisfied that that has occurred in this instance. If I accept that the problem is due to the configuration of the establishment having only one coat check, which is located in the second floor licensed area, a doubtful proposition on the evidence, even thus that is a circumstance which has existed from the beginning and there is no evidence of what action the licensee has taken to prevent it from occurring. The licensee could provide a coat check on the third floor to alleviate the problem. The licensee could operate the second floor liquor primary area at a level which would allow the 100 to 110 dinner guests to make their way out without going over the maximum capacity permitted. The licensee has not taken either course of

action in the two years of operation. In the result, I am satisfied that the defence of due diligence has not been made out by the licensee.

Thus, I find that the licensee "permitted" the overcrowding constituting the alleged contravention.

In conclusion, I find that on May 29, 2005, the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation*.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* and/or the 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 licence 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*.

In considering whether a penalty is necessary, I note that at the time of this contravention the establishment had been operating for less than two years. It had during that period of time accumulated a less than stellar compliance record. Contraventions for overcrowding of this licensed area were found to have occurred on August 17, 2003, September 7, 2003, March 31, 2004, April 25, 2004, May 6, 2004 and most recently February 27, 2005. A Compliance Meeting was held with the general

manager of the establishment on October 1, 2003. In light of the record for this licensee, I am satisfied that a suspension penalty is necessary to ensure future voluntary compliance.

The branch has recommended a twelve (12) day suspension penalty. This is a mid-range suspension penalty for a "second contravention" of this type. Schedule 4 provides for a suspension penalty of ten (10) to fourteen (14) days.

Counsel for the licensee has submitted that the penalty should be mitigated as this licensee is a good corporate citizen, the overcrowding did not exceed the total capacity for the whole establishment, and there were no other problems noted. I cannot agree. This licensee has consistently contravened the capacity provisions of its liquor licence responsibilities. Its compliance record, as noted above, speaks for itself. This contravention, falling within a 12 month period from the preceding contravention, is considered a second contravention for the purposes of the Penalty Schedule. The previous contravention took place approximately three months previous, in the circumstances of this contravention I find that the twelve (12) day mid-range penalty for a second contravention of this type is appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, concerning Liquor Primary Licence No. 300593, I suspend the liquor licence for a total of twelve (12) days starting as of the close of business Friday, June 16, 2006, and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (Section 67(1) of the *Regulation to the Liquor Control and Licensing Act*.)

Since I do not know whether the establishment would normally be open seven (7) days per week as of June 17, 2006, I do not know what the "business days" will be. To ensure that this order is effective, I direct that the liquor licence be held by the branch or the Vancouver Police Department from the close of business Friday, June 16, 2006, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for twelve (12) business days. A suspension sign

notifying the public shall be placed in a prominent location by a C & E officer or police officer.

A member of the Vancouver Police Department or C & E officer will be requested to attend the premises, take possession of the liquor licence and hold it in safekeeping during the term of the suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: April 7 2006

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Branch Advocate
