



**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:	Lotus Hotel Ltd. dba Lotus Hotel (Honey Lounge) 455 Abbott Street Vancouver, BC V6B 2L2
Case:	EH08-035
For the Licensee:	Dennis Coates, QC
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	October 29, 2008
Place of Hearing:	Vancouver, BC
Date of Decision:	November 21, 2008

INTRODUCTION

The Honey Lounge is a liquor primary establishment in the Lotus Hotel. The hotel is situated in Vancouver. The Lounge operates under Liquor Primary Licence No. 078737. The hours of operation are 11:00 a.m. to 2:00 a.m. Monday to Thursday, 11:00 a.m. to 3:00 a.m. Friday and Saturday and 11:00 a.m. to 2:00 a.m. Sunday. The Honey Lounge has a licence person capacity of 103 persons and an occupant load capacity of 142 persons. The licence is subject to terms and conditions, including those contained in the 'Guide for Liquor Licensees in British Columbia' (Guide).

Late on the night of Saturday, March 15, 2008, a multi-agency inspection team attended at the Lotus Hotel and conducted an inspection of the Honey Lounge. The inspection team concluded that early in the morning of March 16 (the business day of March 15, 2008) the licensed Honey Lounge was overcrowded.

ALLEGED CONTRAVENTION

By Notice of Enforcement Action (NOEA), dated April 11, 2008, the Liquor Control and Licensing Branch (Branch) alleged that on March 16, 2008, the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (*Regulation*), by allowing the establishment to be overcrowded beyond person capacity greater than occupant load.

The branch proposed a seven (7) day suspension of the liquor licence in accordance with Schedule 4 of the *Regulation*.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation B.C. Reg. 244/2002

Definitions

1 (1) In this regulation:

...

"**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).

(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.

Schedule 4
To the
Liquor Control and Licensing Regulation

Enforcement Actions

Overcrowding					
Item	Contravention	Period of Suspension (Days)			Monetary
		First Contravention	Second Contravention	Subsequent Contraventions	
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

ISSUE

1. Was the licensed premises overcrowded as alleged by the branch?
2. If so, is a penalty appropriate, and what is the appropriate penalty?

EXHIBITS

Exhibit No. 1: Branch's *Book of Documents*

Exhibit No. 2: *Calculation Package, Occupant Load calculations (Fire & Rescue Services).*

EVIDENCE

Counsel for the licensee did not dispute that the number of people in the licensed establishment was beyond occupant load on the business night of March 15, 2008 (including the early morning of March 16, 2008).

Four witnesses testified for the branch. Each was part of the inspection team that attended at the Honey Lounge on March 16, 2008.

A police constable testified that when the team drove by the location of the Honey Lounge, she saw lots of people covering the sidewalk in front of the establishment. The people filled the sidewalk from the building to the street. She said that she and other team members were in uniform and entered the establishment from the main entrance. She noted that the door from the establishment to Pender Street was fenced off and there was no access to, or exit from the establishment at that door. She approached the two doormen that tended the main entrance. There

was a disorganized line-up there. The doormen pushed people aside so she could approach them. The doormen each had one mechanical counter. She asked one of the doormen how many people were inside the club. He said 246. She went into the club with the liquor inspector. The inspector did a room count while the constable followed and provided a safety backup. She testified: "I could only see three feet in front of me. On my tippy-toes I could see a little further. We walked through the crowd like that - pushing people aside." She said she knew there were a lot more than the number of people there were supposed to be inside the club. The inspector's count was 239 people. She and the inspector had a discussion with the club manager. They told the manager to get the numbers down. The people on the street were going to be told to go somewhere else. The doormen were going to disburse the crowd on the sidewalks. Thereafter, the team left to inspect other nearby establishments and returned to the Honey Lounge approximately 40 minutes later.

The constable said that on returning she asked the manager how many people there were in the club and he said 161. She asked the doorman what the occupancy limit was and he told her "he did know that he was allowed 180 people inside." She followed the liquor inspector through the club again as the inspector did another count. His count was under 200. The constable testified that the police are concerned about the safety of people inside the clubs as a first priority. She said:

There are stabbings and fights and ODs and drugs – over consumption and people passed out...if a fire were to break out and any of these things take place, emergency services could not get to theses people in time. If a fire breaks out, people die. They don't get out.

The constable identified the photographs of the blue fences blocking off the fire exits at tab 14 of Exhibit 1, page E, and the chain on the fire exit door at page I. The constable also identified the police notes, the police report, and the establishment floor plan in Exhibit 1.

The liquor inspector testified that she was part of the inspection team that attended at the establishment on the business night of March 16, 2008. She said that on arrival, she too noticed that there were a large number of people blocking the sidewalks outside of the establishment. She had a conversation with the doorman who advised her that his count indicated that there were 246 people inside the club. She also spoke to the club manager, who indicated that he did not know what his maximum capacity was. She confirmed that the team left after a period of time and then returned approximately 45 minutes later. She said that when she returned she did a count of the room with a mechanical counter and found 162 patrons. She said she did not count employees. She observed the police constable do another count. She asked the constable what her second count was and was told it was 161 people. The inspector indicated that she did not count people in the washrooms because it was obvious that even without those patrons the club was well over its capacity. The inspector identified her notes at tab 10 of Exhibit 1 and testified that she took all of the photographs at tab 14 of Exhibit 1. The inspector said that the fences appeared to be set up at the fire escapes to enclose an area of the sidewalk for "a smoking section" and they prevented any escape in case of a fire.

A second liquor inspector testified that he was also part of the inspection team in attendance at the relevant time and place. He identified the establishment's licence, a copy of which is in Exhibit 1 at tab 3. He said that on arrival it was clear that there were large numbers of people in or around the establishment. There were fences on the sidewalk. He identified the fences as those shown in Exhibit 1 at tab 14. He was present when one of the officers or the other liquor inspector asked the doorman what the count was, and the doorman held out his counter.

The liquor inspector could read the counter. It showed 246. This witness indicated that he asked the doorman what the maximum occupant load was and the doorman hesitated and then said: "all combined it is about 300". The witness indicated that he counted the people in the establishment twice with his own mechanical counter. The first count produced 199 persons in the room. Then he asked the bartender for the liquor licence. The bartender produced it and the inspector pointed out the person capacity indicated on it was 103 persons. The inspector said he then began another count and found the room more crowded than before. He counted 259 people. He also did not count any people in the washrooms. He concluded that part of the team had informed the manager to clear the fire exits - causing the people in the smoking areas to return to the main room. This liquor inspector testified that the smoking areas were formed by barricading off the areas of the sidewalk outside the fire exits. They were on public property but patrons could only get into or out of the smoking areas through the club. He said the fire personnel that were part of the inspection team were extremely concerned about the makeshift smoking areas that blocked off the fire exits, and at midnight the barricades were being removed. This inspector identified all of the remaining documents in Exhibit 1. He said that the overcrowding and the blocked fire exits caused a very dangerous situation. "If there was an emergency, injuries would have been severe." The inspector also indicated that at some time the doorman who had indicated 246 people were in the club reconsidered in light of the other doorman's count and concluded the number was 231.

The Fire Prevention Captain with the Vancouver Fire and Rescue Service testified by conference call. He testified that the occupant load for the Honey Lounge was 134 occupants based on a certificate in force on March 15, and 16, 2006, which was issued on April 3, 2006. He confirmed that he approved the occupant load under Vancouver Fire Bylaw No. 8191 himself and that there has been no application to increase this occupant load. He said that the occupant load was fixed after checking the plan provided by a certified professional (on behalf of the

applicant), checking the floor plate, clearing approval with the building department, and making the calculations based on fire and building bylaws. He testified that for the fire department, there is no red-lined area. The net floor area is that occupied by the public, with deductions for stairs, structural posts etc. Then a nationally approved number of persons per square foot is applied.

The licensee called the managing partner of the corporate licensee. He indicated that he runs three licensed retail liquor stores, one marine licensed establishment, five liquor primary establishments and six food primary establishments in British Columbia. He testified that he writes the policy and hires management teams and is responsible for location meetings. He confirmed that the manager of the Honey Lounge is the person whom the branch witnesses thought it was. As to the Lotus Hotel, he said that the staff is 45 strong for the Lotus Hotel, and that the entire facility including the hotel the Honey Lounge and another licensed establishment is run as one business and the staff move among the different licensed rooms and facilities. As to the night in question, he indicated that the Honey Lounge had a promoter working the establishment. He confirmed that the establishment uses a different promoter each night of the week. He said that the promoter is not an employee of the licensee, but the relationship between the promoter and the manager is one of mutual trust. He said "the promoter operates the business under the direction of the manager on duty." He also said:

There is a licence capacity of 103. It is the responsibility of the promoter, the doorman that is on, and the manager of the business. On a specific night the door people are in control. By and large you are at the mercy of the intestinal fortitude of the promoter. You can't candy coat it. If you have someone who is on his own agenda... you can't be on everyone all the time.

The managing partner said that March 16, 2008, was hip-hop night, and that attracts a certain clientele. He said he had some issues with the promoter and shortly after March 16, 2008, gave the promoter notice that their relationship was at an end. When the promoter left, he took three people with him including the doormen who were on duty on March 16. The manager said:

The three people who were left to ensure the numbers were in line had a stronger relationship with the promoter rather than the manager. They had an interest in letting more people in.

The managing partner indicated his knowledge of the 103 person capacity on the licence and the occupant load of 134 as required by the Vancouver fire service.

The managing partner also provided evidence that the establishment has pre-shift meetings with the staff, and that although he does not recall when, he has used mystery shoppers to check out the Honey Lounge. He said the company does discipline employees when it becomes necessary, and that there are policies in place, though there is no written policy and procedures manual for the Honey Lounge.

SUBMISSIONS

The branch submits that the licensee permitted more patrons entry to its licensed establishment than are permitted, as evidenced by the counts performed on the night of the alleged contravention, and the licensee knew or ought to have known that the establishment was overcrowded, as evidenced by the doorman's count among other things.

The branch submits that the evidence is clear that on the date in question, the establishment had more than 200 patrons in an area where the Person Capacity is 105 patrons, and the maximum Occupant Load is 134 persons.

The branch submits that the licensee did not exercise as high a degree of diligence as it should have as it did not articulate and enforce adequate policies for door control, and did not adequately train identifiable employees to supervise the implementation of those policies.

The branch also submits that the security training manual presented at the hearing represented an insurance agency paper without any input or modification from the licensee to suit the particular circumstances of the Licensed Establishment, and that the licensee showed inadequate evidence of written and enforced house policies of the nature that would tend to enforce a claim of diligence on behalf of the licensee.

Counsel for the licensee submits that its position is predominantly technical and made up of three arguments:

1. The wording of section 6(4) of the *Regulation* sets out a contravention that is not set out in the NOEA. As Schedule 4 of the *Regulation* does not define an offence, but rather provides the penalty for the offence, no offence under the *Regulation* was actually alleged by the branch.
2. The meaning of occupant load is vague. The *Act* says one thing, the Municipality says another thing and the branch says a third thing. There are also differences in the actual area being covered by the various occupant loads, including “the establishment” and “the area in which liquor may be served or sold.” The result is that there is no proven occupant load under the *Act* and so there can be no offence for exceeding it.

3. The evidence discloses that the licensee was duly diligent in attempting to comply with the *Regulation* and this is a complete defense to the allegation. In the alternative, the evidence indicates that no penalty is warranted.

ANALYSIS AND DECISION

The evidence is that at the relevant time there were more than 134 people in the establishment. I accept the evidence that the doorman indicated he had a count of 246. I accept the evidence that the liquor inspector counted 259. The only evidence contrary to those numbers is the doorman's reconsideration of his position, and his resulting conclusion that there were 231 people inside. I find that there were at least 231 people in the establishment at 12:05 a.m. on March 16, 2008.

With respect to the licensee's three arguments:

1. Section 6(4) of the *Regulation* spells out an offence. The NOEA clearly sets out the date and time of the contravention and the section of the *Regulation* that is alleged to have been contravened. I find the addition of the name of the contravention to be instructive rather than determinative. As in the *Regulation* itself, the content of each section is described in that section notwithstanding that the section or group of sections may have a title or name. Where that title or name is apparently inconsistent with the content of the section, the content of the section is the active text and will prevail.

2. This issue has been before the branch before. In the case of Skybar (EH04-088, EH04-064, EH04-081, EH04-095, EH04-095, EH04-097, EH04-096), April 27, 2005, the General Manager considered an earlier Supreme Court decision involving the same establishment and said at pp. 32-34:

With respect to whether these contraventions exist in law, and whether item #14, or item #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 Feb 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 licence 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.

Once again, I find the Supreme Court's words to be determinative of this issue. I find that occupant load is a clearly defined term, quantified by reference to certain conclusions made by municipal authorities and utilized by the language of the *Regulation*.

3. With respect to the licensee's claim of due diligence, I find that the licensee was not duly diligent in attempting to comply with the *Regulation*. The evidence establishes that a manager was in charge of the club and he was on site at the time of the contravention. The manager was therefore the controlling mind of the licensee at the relevant time. The evidence is unclear as to whether the manager knew the occupant load, or the person capacity. The doormen certainly did not know. The doormen were counting patrons, but without any knowledge of how many patrons were allowed in, that information is of little value. The establishment was overcrowded by a considerable amount. Several witnesses indicated that it was clear that the establishment was overcrowded even before counting. The managing partner indicated that as many as 45 people work in the club or elsewhere in the hotel and each of them sometimes works in the Honey Lounge. Yet there is no evidence that any employee working that night noticed the fact that the club was so overcrowded.

The evidence discloses that the manager of the establishment had lost control over the loyalty and therefore performance of the door staff and took no steps to rectify that situation until after the fact. I do not accept that the manager was ignorant to the fact that the establishment was overcrowded, that the manager was ignorant to the fact that the door staff had re-aligned its allegiance to a promoter, or that the manager had lost control of the establishment on this occasion despite his best efforts. Rather, I find that the manager either wilfully accepted that the establishment was overcrowded to a significant degree or intentionally turned a blind eye to the obvious. In either case, the manager did not take reasonable steps to comply with the *Act* and *Regulation*. Further, I have been presented with very little evidence to indicate that the licensee takes compliance with the person capacity or occupant load of this establishment seriously. There appears to be no policy and procedures manual for the door staff, insufficient training for door staff, and little in the way of a system of monitoring and supervision to ensure performance of the door staff.

The establishment has a person capacity of 103 persons (licence, Exhibit 1, tab 3). The premise has a maximum occupant load of 134 persons (Bylaw certificate, Exhibit 1, tab 5). I find the premises as described in the occupant load certificate, is the licensed establishment for the purposes of compliance with the *Act* and *Regulation*.

I find the licensee contravened section 6(4) of the *Regulation* as alleged.

PENALTY

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

- 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 by the minimums set out in Schedule 4 of the *Regulation*. However, I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the NOEA.

The branch submitted that a seven-day suspension was warranted for the contravention.

Licensees that exceed their capacity by overcrowding are operating contrary to the public interest. Specifically, they are operating contrary to the community's interest in public safety and the preservation of community standards.

The issue of public safety is most apparent when the overcrowding exceeds the occupant load. Getting out of a building safely during a fire or other threat is difficult in a place where liquor is served, loud music is playing, and lighting is dim. The risk of death or serious injury is greater when the building is overcrowded.

Fencing off the fire escapes and overcrowding the establishment shows a disregard for public safety. Whether this instance of overcrowding was caused by poor door control or lack of leadership by management and staff, it could have led to serious injury if an emergency had occurred. This type of contravention and the extent of the overcrowding warrants a significant suspension.

The public interest in community standards is also relevant to the contravention of overcrowding. The maximum capacity established for a liquor-primary licence is the result of community input during the licensing process. The maximums are set out so as to reduce the risk of negative impacts on neighbourhoods and communities. These negative impacts include late night disturbances, parking problems, and traffic flow problems. Allowing licensees to exceed their approved capacity effectively negates this community input and puts undue pressure on community resources.

A penalty is designed to promote voluntary compliance in the future.

I find that a penalty is warranted to help to direct the licensee toward voluntary compliance and greater diligence in staff training and supervision.

The penalty schedule, sections 14 and 15 provide a distinction between two levels of non-compliance of the same contravention. I find that a licence suspension of seven (7) days is an appropriate penalty.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 078737 for a period of seven (7) days, to commence as of the close of business on Friday, December 19, 2008, 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*).

I direct that Liquor Primary Licence No. 078737 is to be held by the branch or the local Police Department from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 21, 2008

cc: Vancouver Police Department - Cst. Peter Ryan

Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional office
Attn: Olubode Fagbamiye, Branch Advocate