



**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
Case No.	EH04-057
For the Licensee:	J. Barry Carter, Counsel Dennis Coates, Q. C.
For the Branch:	Peter Mior, Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Dates of Hearing:	October 19 & November 10, 2004
Place of Hearing:	Vancouver & Teleconference
Date of Decision:	February 3, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Sky Bar Ltd., operates a nightclub, two (2) restaurants and two (2) liquor lounges at 670 Smithe Street, in downtown Vancouver. The establishment opened in August 2003.

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

The Liquor Licences

Food Primary Licence No. 300601

- first floor restaurant, capacity 37 persons inside and 11 persons on the patio;
- third floor restaurant, capacity 35 persons inside and 95 persons on the patio; and
- permitted hours of liquor service 9:00 A.M. to Midnight seven days a week.

Liquor Primary Licence No. 300593

- second floor nightclub, capacity 220 persons;
- the hours of operation authorized by the liquor licence are 7:00 P.M. to 2:00 A.M. Monday to Saturday and to Midnight on Sunday.

Liquor Primary Licence No. 300594

- third floor VIP lounge, capacity 51 persons inside and 20 persons on the patio;
 - the hours of operation authorized by the liquor licence are 11:00 A.M. to Midnight Monday to Thursday and Sunday and to 1:00 A.M. Friday and Saturday.
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The maximum Occupant Load (OL) for the main floor is 71 persons; for the second floor is 220 persons; and for the third floor is 205 persons with the retractable roof or 104 persons without the covered roof, including staff (Exhibit No. 1, tab 8).

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

By Notice of Enforcement Action (NOEA) dated June 9, 2004, the branch alleged that on April 25, 2004 (business day of April 24; referred to in this decision as April 24/25, 2004), the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation*: overcrowding beyond person capacity greater than occupant load, in the nightclub, Licence No. 300593.

Initially, the branch recommended a ten (10) day license suspension, but subsequently increased that to eighteen (18) days.

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUES

1. Is the definition of 'occupant load' in the *Regulation* flawed?
 2. Does the alleged contravention exist in law?
 3. If the alleged contravention exists in law, has the branch proven
 - a) the occupant load? and
 - b) that the establishment was overcrowded as alleged?
 4. If it is found that the licensee contravened as alleged, is the branch's recommended penalty appropriate?
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EXHIBITS

Exhibit No. 1	Book of Documents
Exhibit No. 2	List of Contraventions appended to the branch's book of Contravention Notice forms

PRELIMINARY APPLICATION

The licensee raised a preliminary objection arguing that the contravention as alleged does not exist in law and, therefore, is unenforceable. The appropriate remedy, in the event the licensee was correct, would be for the branch to withdraw the allegation.

The licensee submitted that there is no contravention in *Regulation* Section 6(4) of overcrowding beyond person capacity "greater than occupant load." The only contravention is being over person capacity. The only reference in the Legislation to "greater than occupant load" is in the Penalty Schedule, which does not create an offence and only comes into play after the contravention has been proven. Within the 46 sections of the Penalty Schedule, most relate back to sections in the *Act* or *Regulation*. The two sections dealing with overcrowding do not relate back to other sections because, in the licensee's submission, there are no corresponding contraventions of overcrowding beyond person capacity "lesser than" or "greater than occupant load."

The licensee referred me to the arguments advanced in the judicial review of the branch's decision in *613952 B.C. Ltd (dba Atlantis Club)* [EH03-086 & 096, March 3, 2004] Vancouver Registry, L040849, in which the licensee is seeking to have the definition of 'occupant load' in the *Regulation* struck down. The licensee submitted that the branch should not proceed with enforcement action or hearings based on overcrowding beyond occupant load until the definition has been addressed by the Courts.

The licensee also referred to the branch's decisions in *Sandman Hotel Langley, Inc. v. General Manager, Liquor Control and Licensing Branch*, EH03-189 & 190, dated June 24, 2004 and August 20, 2004. The licensee argued that case for the proposition that the contravention as alleged does not exist and submitted that I was bound to follow that decision since a delegate of the general manager should follow previous decisions of the general manager.

The licensee also submitted that the branch is bound by the terms of the NOEA and must establish the elements of the NOEA.

Oral Reasons

I stood down and then delivered oral reasons. I have had recourse to the transcript of that portion of the hearing in writing this decision. I note that I was transcribed as saying that I had not referred to the Plaza decision (*The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248). Clearly that was incorrect transcription; I reviewed the *Plaza* decision prior to rendering the oral decision and I referred to it in the decision.

On the judicial review aspect, I declined the application that the branch should suspend its enforcement proceedings pending judicial reviews, noting however that the branch's proceedings could be affected by a decision of the Court, in which case the branch might have to alter its proceedings.

On the second aspect, I fully considered the branch's decision in the *Sandman* case and came to a different conclusion than the licensee on what the adjudicator had decided. In my view, the adjudicator found that there was no evidence of an occupant load having been established by the Municipality, determined that the alleged contravention was overcrowding beyond person capacity, found that the licensee had contravened by being over the person capacity, but determined that there was no corresponding penalty provision

because both Penalty Schedule items 14 and 15 refer to occupant load: “lesser than” or “greater than occupant load.” Since there was no occupant load, the adjudicator found there was no prescribed penalty. Accordingly, the adjudicator did not impose a penalty.

I determined that the contravention was overcrowding beyond person capacity. The onus is on the branch to prove overcrowding beyond person capacity, which is the capacity authorized in the liquor licence, and then the focus shifts to how much over and which penalty provision applies.

I considered whether the licensee had been prejudiced by the way the branch presented the alleged contravention and recommended penalty in the NOEA. I was unable to see how there could be a prejudice. Clearly, the licensee was advised of the alleged contravention and the proposed administrative action. In my view, the branch’s process conforms to the decision of Mr. Justice Pitfield in the *Plaza* case, particularly his comments at paragraphs 45 and 47.

In my view, the crucial first question in this case is whether the evidence establishes the branch’s allegation that the number of persons in the premises exceeded the licensed person capacity.

The licensee also applied to have the substantive portion of the hearing conducted separately and decided prior to the penalty portion. I reiterated what I have said before, as quoted in the *Sandman* decision, at page 28:

Counsel has objected to making submissions on penalty prior to a determination that a contravention has been found. Counsel has taken this position 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, and most recently in *Tonic Bar* 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.”

Although the branch advocate had requested an adjournment to consider the licensee’s argument, as outlined above, I declined to adjourn.

EVIDENCE

The branch’s witnesses were the liquor inspector and a Vancouver Police constable who attended Skybar on April 24/25, 2004, and a City of Vancouver fire inspector. At the end of the branch’s case, the licensee elected not to call evidence.

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

or third floor restaurants enter the second floor nightclub to retrieve their coats. At the entrance to the second floor nightclub, there is a landing with fire doors on both sides which open into the nightclub.

The Branch's Evidence

Liquor Inspector

The liquor inspector stated that he attended the Skybar on April 24/25, 2004, at approximately 2:05 A.M., as part of an inspection team which included the Vancouver Fire Services, Vancouver Property Services, and the Vancouver City Police. He testified that the permitted capacity for the second floor nightclub indicated on the liquor licence (Exhibit No. 1, tab 2) is 220 persons, which includes staff, and from that he knew that the occupant load approved by the City was also 220 persons. He also referred to the Occupant Load Certificates at Exhibit No. 1, tab 8 and to the statutory definitions of "occupant load," "patron capacity" and "person capacity" at Exhibit No. 1, tab 7.

The inspector testified that when the inspection team arrived they were met at the entrance by the general manager (the "manager"). He told the manager that the team would be inspecting the second floor and counting the number of patrons. The inspector told the manager that he would need the flow of patrons into and out of the nightclub stopped while the count was conducted. He recalled that the manager stopped the flow at the coat check side and another member of the team stopped the flow at the stairwell side.

The inspector conducted one count which he recorded in his notebook as 297 persons. He testified that his count may have included some staff, but did not include any obvious bartenders or servers. He estimated that it would have taken him between six and ten minutes to do the count. He also recorded the counts of the other team members and the manager. The inspector wrote a

Contravention Notice (CN) which he served on the manager who signed acknowledging delivery. The CN records four counts of 297, 264, 254 and 270, and the manager's count of 237.

The inspector testified that the second floor looked busy, that he saw some patrons dressed in airline uniforms and that the manager told him that it was a theme night. He testified that servers were holding trays over their heads and bumping into patrons as they moved through the room. He was concerned about the level of congestion and how people could exit safely in an emergency.

The inspector was not aware that there was only one coat check for all three floors. However, in his view that was not important because, regardless of their purpose for being there, there were more than the permitted number of people on the second floor when he did his counts. Before the team arrived at the Skybar it was their intention to do a count on the second floor because there had been problems in the past. He testified that when he finds a licensed premise is over the legal capacity, he has no discretion but to issue a CN. So, in this case, whether the count was 221 or 331, he was bound to issue a CN.

The inspector reviewed documents contained in Exhibit No. 1 from the branch's file concerning a meeting with the licensee prior to the issuance of the Liquor Licence, the letter provided the liquor licence, contravention notices, compliance meeting forms, a temporary extension of operating hours, and other documents relating to administrative matters.

The inspector testified that one of the branch's primary concerns with overcrowding is public safety and whether people would be able to leave the building safely if there was a shooting, fire, bomb threat, et cetera. He also testified that he had no expertise in construction of buildings or safety and no experience with emergency situations. Further, he was not familiar with the City

of Vancouver's method of calculating an occupant load, or whether there are different OLs for stairwells, and he restricted his count to the redlined area.

Fire Inspector

The fire inspector testified that his main area of responsibility with the Fire Prevention Division is reviewing applications for building permits and issuing OL permits required under the Fire Bylaw for assembly occupancy over 60 persons.

The purpose of the Regulation of occupancy is to determine the maximum number of people who can safely occupy an area, regardless of whether the sale of liquor is licensed. However, the use of the area affects the calculation of the OL. He testified that the OL for the Skybar's second floor nightclub was set out in the certificate at Exhibit No. 1, tab 8, 220 persons. He distinguished between permits and certificates and noted that it is the certificates that are required to be posted in an establishment. The information on the OL certificates is taken from the OL permit which explains what is on the plan. The certificates are delivered with the permit. There would be one permit issued for all three of the Skybar areas. He reviewed the file before attending the hearing but could not locate a copy of the large scale plan.

The fire inspector was not involved in approving the OL for the second floor. He reviewed the stamps on the second floor plan (Tab 9) and noted that one, signed on behalf of the Fire Prevention Chief, is not a permit and that another is a stamp he uses only when the occupancy is less than 60. He was not able to provide clarity on the wording or purpose of the stamps because the size had been reduced so much in photocopying that they were not legible. The main stamp on the reduced plan shows that the OL calculation for the floor area was 302 persons and the total OL calculation for the exiting capacity was 220 persons, which became the OL.

In general terms, the inspector testified that the OL applies to the assembly areas and, therefore, does not include areas to which patrons do not have access. The applicant provides the calculations for the occupant load and the fire inspectors either approve or reject the calculations.

Police Constable

The constable testified that he had been with the force since May 2003, had conducted approximately 30 to 40 licensed premises checks and had performed about six patron counts in licensed premises. The other police officer in attendance on this night was ill and not able to attend to the hearing.

The constable attended Skybar as part of the inspection team on April 24/25, 2004. This was his first inspection of Skybar. While the liquor inspector did a count, he assisted to stop the flow of patrons and did not allow patrons to enter to pick up coats. He testified that after the liquor inspector did his count, he decided to do a patron count because he thought the area looked crowded. He performed two counts on the second floor. He testified that he stood on the rungs of a barstool to count the area around the circular bar, and he confirmed that he counted the area by the coat check. He said that the area by the circular was extremely crowded although the dance floor was less so.

His first count was just under 270 and his second was 270, not including staff. He testified that it was difficult to move through the patrons during the counts and he had to push his way through. He estimated that it took 10 – 15 minutes to do the counts. He said that he considered the level of crowding to be dangerous and that it would have been difficult to escort emergency personnel had there been a problem.

Licensee's Evidence

The licensee elected not to call evidence on the basis the branch had not proved its case - that there is no such offence as the branch has alleged, and if there was, the evidence does not prove the offence.

SUBMISSIONS, ANALYSES AND FINDINGS

The following is a statement of the licensee's five submissions, with my analysis and findings.

1. "Occupant Load" is a meaningless concept in the enforcement scheme as a result of its definition in Section 1 of the *Regulation*.

Counsel referred to the argument advanced in the preliminary objection and noted that since our hearing on October 19, 2004, the B.C. Supreme Court rendered a decision in the *Atlantis* case (above).

Although counsel did not advance this argument strenuously because of the recent decision, I think it will be of assistance to quote from the decision of Mr. Justice Barrow in the *Atlantis* case, handed down October 29, 2004:

[15] In my view, there is a difficulty in the petitioner's position. It argues that, on a literal meaning of the definition, all licensees would be in breach of the provision if they had anyone in their establishment. According to the petitioner, that renders the provision "incapable of application" presumably because the result would be absurd. On the other hand, the petitioner argues that "[w]here by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, however, harsh or absurd or contrary to common sense the result may be". These two propositions are difficult to reconcile. The provision is not "incapable of application" if given the literal meaning the petitioner urges; rather, it could be applied albeit with obviously absurd results. Moreover, if applied literally, the allegations against the petitioner would be established.

[16] That said, however, the issue remains as to whether the adjudicator was correct in the conclusion he reached. I find that he was. The definition is poorly worded and if interpreted literally it would mean what the petitioner suggests, namely, that any licensed premise with either no occupants or only one occupant would be in breach of the occupant load restriction. The alternative construction urged by the respondent and adopted by the adjudicator would be the most favourable to licensees. It would give effect to the obvious intention of the legislature. Finally, it would avoid the absurd result that would follow from the literal interpretation.

[17] The only potential bar to application of the modern rule of statutory interpretation is whether there is an ambiguity in the legislation. While it is not entirely free from doubt, I find that there is. The legislation might mean that the minimum number of people allowed in an establishment is the aggregate of the minimums under the three regulatory schemes referred to (this follows from the use of the word "and" between subparagraphs (b) and (c)). On the other hand, it might mean that which the petitioner suggests. Finally, and while admittedly strained, it might mean what the adjudicator found that it means. I am satisfied that the provision is reasonably capable of bearing the interpretation ascribed to it by the adjudicator. On that approach, the conclusion reached by the adjudicator is the correct one.

[18] I note also that nowhere is it suggested that the petitioner was misled as to the meaning of this provision. Indeed, they agreed before the adjudicator that the "occupancy load" applicable to their establishment was 466. I assume that is the lowest maximum number permitted under the three regulatory schemes incorporated by the definition.

In the result, Mr. Justice Barrow affirmed the adjudicator's interpretation and application of the definition of occupant load, which was stated as:

In my view, the "least" number of persons should be interpreted as meaning the lowest number of persons that can be in the establishment in keeping within the limits of the provisions in paragraphs a, b or c of the definition. For example, if the Provincial Building Regulations as referred to in paragraph (a) in the definition, allowed a maximum of 350 persons in an establishment, and *The Fire Services Act* and British Columbia Fire Code Regulation as referred to in paragraph (b) of the definition, allowed a maximum of 375

persons in the establishment, and local government safety requirements as referred to in paragraph (c) of the definition, allowed a maximum of 400 persons in the establishment, the occupant load would be the "least" number of persons, i.e. the lowest number of persons, which in this example is 350, not one or zero, as submitted by counsel.

In my view, the preceding provides a summary of the arguments surrounding the definition of "occupant load" and determines that the definition is operational.

2. There is no known offence as "overcrowding patron or person capacity greater than occupant load" under the Statutory scheme.

In the CN and NOEA the branch stated the offence as "overcrowding patron or person capacity greater than occupant load" and cited the *Regulation* Section 6(4) as the authority.

The licensee submitted that there is no reference to "occupant load" in that subsection and the only reference to "occupant load" is in Schedule 4 of the *Regulation*. The licensee submitted that the Schedule does not create the offence as it is accessed only after the offence is established. Accordingly, the branch can provide authority for the contravention of being over patron or person capacity, but cannot establish that there is a contravention for being over patron and person capacity and beyond occupant load.

I disagree with the licensee's reasoning and interpretation. In my view, what the Schedule is addressing is penalty according to the degree of the contravention. The contravention is being over capacity and if the level of over capacity exceeds the occupant load then the penalty is higher.

The licensee raised this argument in the previous hearing I conducted. My decision is dated July 21, 2004. At page 16, I stated the following:

Does Section 6 of the Regulation give rise to the alleged contravention?

The licensee submitted that there is only *one [sic]* contravention under Section 6(4) and, accordingly, there can be no distinction between being over or under the OL.

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

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

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

I draw attention to the Court's finding of what the contravention is – it is **not** exceeding OL; it **is** exceeding licensed capacity.

The licensee drew attention to paragraph 47 of Justice Pitfield's reasons:

[47] "In my opinion, it is incumbent upon the General Manager to ensure that Administrative action is identified and determined to be appropriate in relation to the defence and specified by the Act and Regulation. That was not done in this case".

Although the licensee quoted this passage for other purposes, I find it is appropriate to quote in conjunction with the earlier paragraph in the context of this argument. The Court is saying that the offence is exceeding licensed capacity, that different penalties apply to the offence, and it is incumbent on the general manager to then specify what penalty (administrative action) is proposed.

3. The Branch cannot seek to enforce the "lesser included offence".

It was in relation to this submission that the licensee quoted Mr. Justice Pitfield at paragraph 47 and referred to paragraphs 40 to 44 of that decision. As I understand the licensee's submission, since "overcrowding patron or person capacity greater than occupant load" is not a contravention, the branch might be tempted to look to the included contravention of 'over person capacity' which carries a lesser penalty under the Schedule. However, as Mr. Justice Pitfield has ruled that the branch must identify the administrative action, it is not now possible to consider the lesser contravention.

Since the branch has not suggested imposing the lesser penalty and given my reasons in the preceding section, I find it is not necessary to address this argument. However, I want to add one observation from Mr. Justice Pitfield's decision. At paragraph 44 he states, last sentence, "Given the range of suspension that might be imposed in respect of exceeding capacity, it is evident that the degree of non compliance with a term or condition can affect the sanction that is imposed." To my reading, this adds support to the view that the offence is exceeding licensed capacity, and the Schedule addresses the degree of penalty.

4. Occupant load has not been proven.

The licensee noted that the OL certificate (Exhibit No. 1, Tab 8) refers to the approved plans but the plans were not tendered in evidence. The only plan is contained at Tab 9. The fire inspector testified that he was not able to locate plans in the file. He testified that the stamps on the Tab 9 plan would not be used if the occupancy load exceeded 50 persons.

Further, there was testimony that the permit posted at the establishment, not submitted in evidence, is one permit containing all three licences. If that is the case, the OL would be 496.

I have a different view of the fire inspector's evidence, as is clear from my statement of the inspector's evidence, above. I have carefully reviewed my notes, in light of counsel's statement of his testimony. I find that the inspector referred to both OL permits and certificates and noted that the certificates are the ones at Tab 8, that are required to be posted. The information on the certificates is taken from the permit.

I have closely reviewed the fire inspector's testimony concerning the plan at Tab 9 and the stamps on the plan. Because we did not have a full scale plan, two of the stamps were not legible. I have used a magnifying glass and managed to read some of the words, but others just are not legible. The main stamp, which is legible, confirms that the total occupant load by exit is 220 persons.

I find as fact that the documents at Tab 8 are copies of the official certificates to the licensee certifying the OL for each floor of the Skybar. I also find as fact that the branch has proven that the occupant load for the second floor of Skybar was 220 persons. It is clear from the evidence that the OL is calculated and assigned per floor. The fact that one occupant load permit is issued for the whole establishment is not material to my determination.

5. The evidence of the counts conducted is not reliable.

The licensee submitted that there was a significant variance in counts and noted that the two witnesses who testified had the highest counts. The principal issue is the scheme of three licenses over three floors with a central stairwell and a coat check on the second floor, plans which were approved by the branch. These counts occurred at a time when people likely would have been preparing

to leave, getting their coats. The liquor inspector said he was not aware that there was only one coat check. But his evidence was that he noted most congestion around the stairwell. The evidence for this night is that the second floor was crowded in the immediate vicinity of the stairwell but was less crowded elsewhere. All of the evidence is consistent with the congestion having been created by patrons from other floors queuing to get their coats.

The licensee submitted that both the liquor inspector and the constable used poor methodology for counting and that the liquor inspector acknowledged that his count would have been more efficient, presumably more accurate, if it had been conducted by two people.

The licensee submitted that the evidence regarding the counts was unreliable and should not be accepted.

Again, I have a different view of the evidence than counsel. My view of the liquor inspector's evidence is that there was congestion generally in the room, as noted by his reference to the servers having to raise trays and bumping into patrons and his stated concern about safety in the event of an emergency. The constable testified to congestion around the circular bar. I do not see that either of them testified that the congestion was mainly around the coat check or the stairwell.

I take the licensee's point that two of the witness who conducted counts did not attend the hearing. There is nothing before me to indicate that the licensee asked for any particular witness to be present for cross examination or asked for an adjournment for that purpose. It is not normally expected that the branch will produce every witness who attended and I find that it is not fatal to the branch's case. The branch is electing to rely solely on the evidence of the two counts.

There is a considerable difference between the two counts, from 297 to 270 persons. However, it is apparent that the constable's counts would have been conducted after the liquor inspector's count, and after the flow of patrons had resumed. I say this because he was one of the people engaged in stopping movement. He performed two counts. It is likely that some patrons had left the floor after movement resumed.

I find that the evidence of the two individuals who performed counts is credible and I accept their evidence as reliable. I find that the branch has established that the second floor of the Skybar was overcrowded and, giving the benefit to the licensee, that there were approximately 270 patrons.

Coat Check

The licensee suggested there should be some allowance made for the fact of the coat check and the attendant movement of patrons in and out. I considered this in the previous decision also. At that time I noted the difficulties presented by the coat check location could go to "whether there are extenuating circumstances, mitigating factors or evidence of due diligence that could affect either a determination of whether the contravention occurred or the level of penalty to be assessed." I noted although some of the second floor congestion could have been caused by the coat check that was more conjecture than actual evidence. I reiterate that here. I found that regardless of the plans having been approved by the branch and the City, handling the logistics of the coat check is the licensee's problem. I adopt the same reasoning in this case.

Summary of Findings

1. Is the definition of 'occupant load' in the *Regulation* flawed?

The statutory definition of "occupant load" has been considered by the Supreme Court and found to be operational.

2. Does the alleged contravention exist in law?

The alleged contravention under Section 6(4) is exceeding licensed capacity. Schedule 4 applies different degrees of penalties to the offence depending on the degree of non compliance.

3. If the alleged contravention exists in law, has the branch proven
- a) the occupant load? and
 - b) that the establishment was overcrowded as alleged?

I find as fact that the branch has proven that the occupant load for the second floor of Skybar was 220 persons.

I find that the branch has established the contravention of overcrowding beyond licence capacity and that the overcrowding exceeded the occupant load. I find that the location and logistics of the coat check do not provide a defence to the licensee.

Since the licensee did not present evidence, I have no further evidence or submissions on whether the licensee might have been able to demonstrate the defence of due diligence.

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
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- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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

The licensee did not make submissions on penalty.

Compliance History

The branch served a Contravention Notice for over capacity on August 17, 2003. On October 16, 2003 (see Exhibit No. 1, tab 16), the licensee signed a waiver admitting the contravention and agreeing to pay a monetary penalty of \$5,000. A subsequent Contravention Notice for alleged overcrowding on September 6, 2003, went to hearing. By decision dated July 21, 2004, I found that the licensee had contravened and I ordered a twelve (12) day licence suspension. The licensee applied for judicial review of that decision and the branch has stayed the suspension pending the outcome of the judicial review. This is the third overcrowding contravention proven against this licensee within its first year of operation.

Penalty Schedule

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

contravention, the range of penalty is ten (10) to fourteen (14) days. For subsequent contraventions, the range of penalty is eighteen (18) to twenty (20) days.

The branch originally treated the April 25, 2004, contravention as a second contravention, and recommended an enforcement penalty of ten (10) days licence suspension. Subsequently, the branch amended that to eighteen (18) days licence suspension. I note that when the NOEA was issued, my decision had not been rendered. Once my decision issued, the April 25, 2004, incident became the third contravention.

Reasons and Determination

The range of penalty the legislature has imposed for contraventions of exceeding licence capacity in excess of OL suggests very serious concerns about the effects of overcrowding. Municipalities set OL requirements based on their standards for safety and other issues. In this case there is evidence from the Fire Prevention Division that the municipal standards are based, in large part, on safety concerns. It is not necessary to have evidence of the egress, width of stairwells, etc. within any particular establishment. Overcrowding in licensed premises gives rise to safety concerns. This is reflected in the Penalty Schedule.

The evidence clearly establishes that there have been two prior contraventions within one year of the date of this contravention. The licensee did not suggest otherwise. The last penalty for overcrowding that the branch imposed on this licensee was a twelve (12) day licence suspension. By operation of the Penalty Schedule, the minimum penalty is eighteen (18) days. Given that this licensee commenced business in August 2003, and this is the third contravention for overcrowding within the first year, an argument could be made that a penalty in excess of the minimum is warranted.

I find that the branch's recommended eighteen (18) day licence suspension is an appropriate penalty. As the contravention occurred on the business day of Saturday, April 24, 2004, the suspension will commence on a Saturday (*Regulation* Section 67) and continue for eighteen consecutive business days.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Primary Liquor Licence No. 300593 for a period of eighteen (18) days to commence as of the close of business on Friday, March 11, 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*).

Since I do not know whether the Skybar would normally be open seven (7) days per week as of March 12, 2005, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the Liquor Licence No. 300593 for the Skybar be held by the branch or the Vancouver Police Department from the close of business on Friday, March 11, 2005, until the licensee has demonstrated to the branch's satisfaction that the Skybar nightclub has been closed for eighteen (18) business days.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

DATE: February 3, 2005

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Peter Mior, Advocate

APPENDIX A

RELEVANT STATUTORY PROVISIONS

Liquor Control And Licensing Act [RSBC 1996] CHAPTER 267

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;

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

Section 1:

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

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

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

Section 6: Capacity

6 (1) Before the general manager

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

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

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

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

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

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

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

Interpretation

1 (1) For the purposes of this Schedule,

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

(b) a contravention committed by a licensee is

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

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