



**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:	Snowshoe Sam's Restaurant & Lounge Ltd. dba Snowshoe Sam's PO Box 2097 Stn Rutland Kelowna, BC V1X 4K5
Case:	EH05-041
For the Licensee:	Brian H. Spence & Glenn W. Spence
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	November 8, 2005
Place of Hearing:	Kelowna, BC
Date of Decision:	November 22, 2005

INTRODUCTION

Snowshoe Sam's is a liquor primary establishment operating in the Big White ski village near Kelowna, B.C. It is independently owned and operated and is not part of the Big White commercial entity.

On January 26, 2005, the bar had a patron capacity of 225 inclusive of the smoking room but exclusive of the patio. The maximum allowed by the general manager in this case, was the same as the occupant load prescribed under the *Liquor Control and Licensing Regulation (Regulation)* for the applicable date.

On January 26, 2005, two constables from the Kelowna Detachment R.C.M. Police and a security guard employed by Big White together counted more patrons than the person capacity and occupant load. They so informed management on site. The manager conceded that the establishment was over its person capacity, but disputed the number count.

The licensee did not dispute that the establishment was beyond patron capacity on January 26, 2005, but disputed the extent of the overcrowding, and accordingly, the size of the penalty recommended by the Liquor Control and Licensing Branch (the branch).

The licensee also disputed that they were over the occupant load in effect at the time, and that there were any adverse safety issues with respect to the overcrowding.

ALLEGED CONTRAVENTIONS

On January 26, 2005, the licensee allegedly contravened Section 12(2) of the *Liquor Control and Licensing Act* (the *Act*) and Section 71(2)(b) of the *Regulation* by permitting more patrons in the licensed establishment than the patron capacity

set by the general manager and the number of persons in the licensed establishment was *more than* the occupant load.

ISSUES(S)

The licensee acknowledged that the facility was overcrowded beyond its patron capacity on the relevant date. The issues therefore, are whether the extent of the overcrowding requires a penalty and if so what that penalty should be. The licensee has also indicated that it was unaware of what the occupant load was at the time and therefore contests the penalty on that basis.

EXHIBITS

Exhibit No. 1 Branch's Book of Documents

EVIDENCE

The branch called the district building inspector to testify as to the occupant load at Snowshoe Sam's.

The building inspector indicated that he was familiar with the establishment. He confirmed that on January 26, 2005, the occupant load for Snowshoe Sam's was 225 patrons.

A security guard employed for Big White was called as a witness. He testified that his job is to make sure that the properties in the Big White ski area are secure and that a visible presence is maintained. He attended at Snowshoe Sam's in the ordinary course of his duties on January 25 and 26, 2005. Aussie Days celebration was going on at the ski resort and there was partying at both the ski resort owned and the independently owned establishments.

He attended on the 25th at Snowshoe Sam's and noted, "it was packed". He did not do a count on that occasion.

On the 26th, there was a large party at one of the ski resort establishments. It closed down early because it was over-attended and management was concerned about control. The security guard contacted the R.C.M.Police, and advised of the crowd and recommended a check of Snowshoe Sam's. Two constables responded to the call. He met up with the constables at approximately 11:40 p.m. and entered Snowshoe Sam's.

He testified that the establishment was very full and it was difficult to ease through the crowd. One constable advised him to count patrons in the smoking room, and he did so. He counted 60 patrons. He provided his count to the constable who added it to his counts and then presented a LPC to the manager of the bar. The total count was 460 patrons. The security guard heard the manager said that there were no more than 375 patrons in the bar.

Two R.C.M.Police constables were called as witnesses. They identified their notes and documents in Exhibit No.1. The first member testified as follows:

- He has done hundreds of LPC inspections.
 - He had attended at Snowshoe Sam's earlier in the month of January and did a rough count of approximately 325 persons. He so advised the manager and he and the manager acted together to empty some patrons out of the establishment. He did not present the bar with a LPC on that occasion.
 - He was contacted by the Big White security guard on January 26, 2005, and did attend at Snowshoe Sam's with another R.C.M.Police member as a result.
 - They met the security guard outside of the establishment.
 - It was difficult getting in the bar through the patrons.
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- The manager advised him that the bar was overcrowded.
- He advised the manager that he was going to do a head count.
- He asked his R.C.M.Police co-member to count patrons in the main bar area, and the security guard to count the smoking room.
- He counted the back area where the pool tables were situated.
- The security officer counted 60, the other member counted 200, and he counted 200 patrons.
- He told the manager that they had counted 460 in total and the manager disputed that there were that many patrons in the establishment. The manager indicated that there were 375. The constable wrote that figure down in his notes (Exhibit 1, tab 7).
- He advised that the crowd should be thinned out and no new patrons allowed in until the bar was below its capacities, and then he left the establishment.
- When he returned after 12:20 a.m., the bar was no longer overcrowded.

A second R.C.M.Police member was called and testified as follows:

- She attended with the first officer at approximately 11:30 p.m. on January 26, 2005.
 - There was a line-up of patrons waiting to get into the bar.
 - She observed but did not hear a conversation between the first officer and the manager of the bar.
 - She thought the club was "way to busy to be safe. Waitresses had a hard time getting through the people".
 - She counted the area to which she was assigned. It was difficult to get through the people, but once there was easy to count, as it was too crowded for the patrons to move around much while she was counting.
 - She counted 200 patrons.
 - The total count was 460 patrons.
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- The first constable explained the count and the overcrowding with the manager.
- She heard the manager dispute the count and say, that he thought there were 375 patrons in the bar.
- She heard the manager say he would dispute the count because there were no more than 375 patrons in the bar. The manager admitted that the bar was overcrowded.

The branch called the Compliance and Enforcement Officer (C&E officer). He identified all of the documents in Exhibit No. 1 and testified as follows:

- He was notified by telephone that the constables had issued an LPC on January 26, 2005.
 - He met with the manager and the two owners on January 27, 2005, at Snowshoe Sam's.
 - The manager advised that he believed they had "between 300 and 325 patrons" in the bar when the R.C.M. Police attended the night before.
 - One of the owners indicated that they "do push it over capacity sometimes".
 - The C&E officer felt the owners were not concerned with the bar being over capacity. He said: "I had the distinct feeling that it was not a big issue for them".
 - The owners indicated that parking had played a part in the occupant load being so low and they thought it should be higher.
 - He made notes of the meeting (Exhibit No. 1, tab 11).
 - He recommended the maximum monetary penalty because a serious penalty was in order in light of the magnitude of the overcrowding and the fact that the owners did not seem to take the infraction seriously. He bypassed the possibility of a suspension penalty because it would have impacted the bar very adversely in the short ski season in which it operates.
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- Snowshoe Sam's had been over capacity on several occasions previously, though they were not served with LPCs. He personally witnessed at least one of those occasions.

Two "owners" testified for the licensee. They provided the following evidence:

- They agree the establishment was overcrowded on January 26, 2005.
- Big White advertised an event and then shut it down early. That was the source of the extra patrons.
- "We had two doormen and two managers, but we could not keep up with the people coming in."
- There were several different occupant loads at several different times. The fire marshal calculated it wrong.
- There are many fire exits in the building and safety was not affected by the overcrowding.
- There have been no previous contraventions and in light of the good compliance history, the bar should get the minimum penalty.
- They had no reason to expect it to be particularly busy that night.

The licensee called the manager of the establishment. He testified as follows:

- He spoke to the constables when they arrived. It was very loud when they presented their count. He said there were probably 275 people in the bar, not 375 as the constables indicated.
 - Nobody talked to him about occupant load or advised him to close the doors or to lower the lights or to turn down the music.
 - He knew it was going to be a very busy night as Aussie Day traditionally is.
 - The front of the bar has a double door. Sometimes a patron pulls it open and the staff cannot stop the patrons from entering.
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- He read the *Regulations* several years ago, but probably has never read the *Act*. He thinks he has read the Liquor Guide for Licensees, but he is not sure. There is no Guide in Snowshoe Sam's.
- He knows the patron capacity is 225, and he thinks the occupancy load is 371.
- He knows the maximum patron capacity is 225, and he believes that "226 is overcrowded".
- He didn't turn up the lights, turn down the music, or stop serving liquor after the LPC was served.
- The constable asked if he wanted to count himself, to confirm the 460 patron count. He declined.
- He did not consult with the doormen after being advised of the count.

SUBMISSIONS

The branch submitted that Snowshoe Sam's was overcrowded beyond person capacity greater than occupant load, and the establishment knew they were overcrowded. They were not unaccustomed to being overcrowded and demonstrated a willingness to continue to overcrowd the establishment.

The licensee submitted that the occupant load was incorrectly calculated and the overcrowding on January 26, 2005, did not result in any safety risks for the patrons. Administrative errors within the municipality led to the current published occupant load.

The licensee said that the situation on the ski hill is distinct from that in other licensed establishments. Patrons cannot be controlled in the same way and sometimes they cannot control them. "Sometimes it is going to blip over 225 patrons, and when it does we are going to shut the door and wait until it gets down."

The licensee also submitted that the count was not reliable and not done in accordance with usual technique where one individual counts the whole of the establishment.

ANALYSIS AND DECISION

Capacity

The licensee has admitted that the licensed establishment was over patron capacity on the night in question. This is supported by considerable evidence. I find that Snowshoe Sam's was overcrowded on January 26, 2005.

Occupant Load

The licensee indicated that it did not know what the occupant load was on the relevant occasion. I do not accept this evidence. I find that the controlling mind of the licensee did not believe that the occupant load was correctly calculated, and had some disputes with the municipal administration that awarded that occupancy load. I find, however, that the owners did know what the occupancy load was on January 26, 2005. This figure is easily confirmed and the licensee had an obligation to know the figure and to comply with that figure. I note that had the licensee not actually known its occupant load, that ignorance would not have exonerated it from culpability for exceeding the occupant load.

I accept the evidence of the R.C.M. Police officers and the security guard, that the manager of the bar estimated 375 patrons in the establishment following the count. While there is no merit in evaluating the accuracy of an employee's estimate, this estimate clearly confirms that the acting manager on the night of the contravention was aware of the facts supporting the allegation.

The Count

I find the count of 460 was an estimate of the number of patrons present in Snowshoe Sam's at the time of the count. In light of the evidence of the R.C.M. Police members and the security guard, I accept that these are the result of estimates, rather than precise figures. I find, however that those estimates are reasonable ones. This is not a situation where the number of excess patrons is a single digit or a dozen. This is a situation where the estimate is more than 200% of the maximum patrons permitted.

The licensee argued that typical counting procedure was not followed in that there was but one count and that count consisted of components provided by each of three participants. I find that while there may be a typical counting procedure, none is legislated or mandated by case law. No particular methodology must be followed for a finding of a credible count. The object is to satisfy the goal of evaluating the magnitude of the attendance in the establishment, and I find on the facts that this was done in this case.

The manager testified that he did not estimate the patron attendance at 375 when talking with the R.C.M. Police, but rather at 275. Both figures are well above the maximum permitted by patron capacity or occupant load, and to that extent, there is no practical difference except as to how it relates to penalty. I find however, that the evidence of the manager is inconsistent with the evidence of two police officers, the security guard, and the C&E officer- all of which are consistent with one another in respect to the manager's comments. I find the manager to have less credibility than the others and accordingly I find that the manager did state that his estimate of patrons was 375.

I also find that the manager's actions, or lack thereof, after being advised of the extent of the overcrowding is indicative of the licensee's acquiescence of the

situation. The manager refused the opportunity to do his own count, and did not consult with his doormen.

Occupant Load

The published occupant load is not open for discussion. The licensee is free to apply for a different occupant load, but the current and effective one is known and irrefutable. The fact that the licensee was not happy with the published occupant load is not relevant to compliance with that number.

Safety

The licensee argued that the overcrowding was not a safety issue as a result of miscalculations of the fire department and as a result of undisclosed parking issues. The licensee is not at liberty to evaluate occupant loads for the purpose of establishing public safety. This is a task reserved to municipalities and their assigns. The licensee has neither the expertise nor the authority to make decisions regarding occupant load. I therefore disregard all evidence so related as produced by the licensee as it is not relevant.

Control

The licensee's manager testified that by virtue of the door design, patrons come in the door and cannot be controlled. Controlling the door is a paramount obligation of the licensee. If they cannot do it, they cannot maintain the conditions of their licence. There is no answer to failure to control the door. Failure to do so is no answer to allegations of overcrowding.

I find the contravention has been proven.

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 the 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*.

The range of penalty for a first contravention of this section of the *Act* in accordance with item 15 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$4,000-\$7,000.

The licensee advised the C&E officer, and testified before this adjudicator, that the establishment does occasionally operate beyond patron capacity. This is not acceptable. The licensee has obligations that are attached to his licence. Neither patron capacity nor occupant load is expressed as a guideline. Compliance with these requirements is clearly stipulated and enforceable. The manager testified that the person capacity is 225 and; "226 is overcrowded." Yet he was on duty and allowed the patron attendance to swell to figures far in excess of that number.

The branch witnesses testified that after being alerted to the overcrowding, management of the bar did not raise the lights, lower the music, or close liquor sales. The licensee replied by asserting that they were not advised to do so. These are known techniques for thinning out a crowd in a bar. The responsibility to act to reduce overcrowding once it is brought to their attention lies with the licensee. I find that simply closing the doors to incoming patrons is insufficient to rectify an overcrowding issue of this magnitude. In this way, I find the licensee to have chosen to continue to profit financially from the significant excess of patrons rather than to honour its obligations under the terms of its licence.

Although the licensee has no proven history of contravention of this nature, the controlling minds of the licensee knew the bar was overcrowded and took no action to rectify the matter before being served with an LPC, and insufficient action to rectify it in a timely fashion thereafter. They had been warned in the past and had by all reasonable evidence not taken that warning seriously.

I find on the evidence that the penalty recommended is appropriate within the *Regulation* and required to obtain voluntary compliance.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the licensee to pay a monetary penalty a total of seven thousand dollars (\$7,000) relating to Liquor Primary Licence No. 129241. The monetary penalty must be paid no later than the close of business December 22, 2005.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 22, 2005

cc: R.C.M.Police Kelowna Detachment

Liquor Control and Licensing Branch,
Vancouver Island/Okanagan/Kootenay Regional Office
Attn: Jim Booth, A/Regional Manager

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