



**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:	532871 B.C. Ltd. dba Urban Well 1516 Yew Street Vancouver, BC V6K 3E4
Case:	EH05-058
For the Licensee:	David G. Butcher
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	September 12, 2005
Place of Hearing:	Vancouver, B.C.
Date of Decision:	November 17, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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Introduction

The licensee, 532871 B.C. Ltd., operates the Urban Well ("the restaurant") under a Food Primary Liquor Licence No. 169305. The licensed hours for the sale of liquor are 11:00 a.m. - 1:00 a.m. on Mondays and Tuesdays, 12:00 Noon - 2:00 a.m. on Wednesday through Saturday and 11:00 a.m. - 12:00 Midnight on Sundays.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action (NOEA) dated June 16, 2005, the branch alleged the licensee failed to clear liquor within ½ hour after liquor service hours, contrary to Section 44(1)(b) of the *Regulation*. The branch recommended enforcement action of a four (4) day suspension of the liquor licence.

Relevant Statutory Provisions

Time

44 (1) Unless otherwise authorized by the general manager,

(b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

Issues

1. Does the evidence demonstrate that the licensee failed to remove liquor from a patron by 2:30 a. m.?
 2. If yes, has the licensee substantiated a defence of due diligence?
 3. Does the doctrine of *de minimis non curat lex* – the law does not concern itself with trifles – apply to either the substantive allegation or the imposition of penalty?
 4. If a contravention is found is the branch's recommended penalty appropriate?
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Exhibits

Exhibit No. 1	Branch's Book of Documents, tabs 1 - 49
Exhibit No. 2	Contravention Notice No. B009286
Exhibit No. 3	Licensee's witness notes

Evidence - The Branch

Two Compliance & Enforcement Officers (C&E officers) who were involved in this incident testified for the branch. C&E officer #1 stated that they met at the office around 6:00 p.m. on April 23, 2005, for an evening of routine inspections. He testified that at the beginning of the evening he would have verified his watch against a known source, usually his cell phone, which is programmed by Telus. He was the lead C&E officer for the night.

C&E officer #1 testified that they arrived at the Urban Well at 2:40 a.m. and that he had made note of the time as he was crossing the street from another establishment. He noted there were 10 to 15 people milling about in front of the Urban Well. He looked through the front window and saw the manager and a patron at the bar. He testified that the patron was consuming a drink and the two appeared to be chatting. When the manager saw him through the window, he jumped up and told the patron he had to leave. The C&E officer entered, went to the bar, and picked up the patron's half-full glass and smelled the contents, which he thought was rye whiskey and ginger ale. The manager stated that the patron was just leaving. The patron made a comment to the effect – "not only are you kicking me out, this guy is stealing my drink."

The C&E officer testified that he told the manager he would issue a Contravention Notice (CN) and started to write it out. The C&E officer denied the suggestion that he had inspected the washrooms or the rest of the restaurant prior to writing the CN. The CN is at Exhibit No. 1, tab and states "patron consuming liquor @ 2:45 am." The C&E officer stated he saw the patron at 2:40 a. m. and 2:45 was the time when he wrote the CN. The manager argued

with the C&E officer about the time. The C&E officer recalled that their dispute was about a 2 minute difference between their respective watches. Although the manager showed him his watch, the C&E officer said he didn't pay attention. He testified that in his mind it was a moot point because it was after 2:30 a. m. according to either watch.

The C&E officer had issued a CN at the previous establishment, which the branch produced (Exhibit No. 2), on which he had noted the time as 2:37 a.m.

The C&E officer testified that his workbag, including his notebook, was stolen from his vehicle thus he did not have any notes from this occasion.

C&E officer #2 testified that this was a routine inspection night, which the C&E officers began at approximately 6:15 p.m. At 9:00 p.m. they joined a multi-agency inspection team until 2:14 a.m. The Urban Well was on their list of establishments to check that night along with other Yew Street establishments. C&E Officer #1 was the lead officer therefore C&E officer #2 was responsible for making observations, taking notes, and providing assistance. He testified that he did not verify his watch that night against another source, but stated it is always within 1 minute of the official time. He did not see C&E officer #1 verify his watch and did not recall them comparing their watches.

C&E officer #2 testified from his notes (Exhibit No. 1, tab 4), that "2:35" refers to the time they left the previous establishment and that he made the notation "2:40" when he was inside the Urban Well. When they arrived at the Urban Well, he followed his colleague in and saw the manager and a patron with a glass in his hand. He stated that they appeared to be having a conversation. He recalled the manager telling the patron he had to leave and the patron being reluctant to leave. He recalled the patron saying something to the effect that he was being kicked out and his drink was being taken.

Concerning the dispute over time, the C&E officer recalled that C&E officer #1 and the manager compared their respective time pieces and that there was a 2 minute difference they argued about. C&E officer #2 told the manager as far as they were concerned, a patron had been drinking in the Urban Well after 2:30 a.m. and, if the manager did not agree with that, he should make notes. He recalled the manager referring to his own cell phone, but C&E officer #1 did not see the time on it.

C&E officer #2 testified that the manager did not dispute that it was after 2:30 or that the patron was drinking. Rather, he wanted C&E officer #1 to change the time on the CN and he seemed frustrated that the inspectors had shown up.

Both C&E officers testified that there were other staff members at the Urban Well, doing cash, working behind the bar, cleaning up and preparing to leave. They did not recall any staff showing them time pieces or referring them to the computer. Both C&E officers described the patron, but neither had notes of his age or appearance.

Evidence – The Licensee

The manager of the Urban Well testified. He had been the manager for approximately three and half years as of the hearing date. He was working that night and he was responsible for the operation. He had worked at the Urban Well previously as a bartender for about one and a half years. Overall, he had worked in the industry for over six years.

The manager testified to the licensee's usual practice and procedures for ensuring that staff cleared liquor within ½ hour of closing time. He testified that at approximately 1:45 a.m. staff give 'last call' and at 2:00 a.m. the lights are turned up and the music is turned off. One of two door staff move into the restaurant to let patrons know it is time to finish their drinks and leave. On Friday

nights, the bar is always busy until last call. He makes the decision when to announce 'last call' and he did that on this occasion. Between 2:00 and 2:30 a.m., staff collect glassware, put out candles, close up the bar, and move patrons out. Patrons who are finishing drinks are encouraged to move from the restaurant to the bar. Sometimes the staff will turn on a flood light as a further incentive for patrons to leave. Staff are eager for patrons to leave so they can go home. After the patrons leave, staff have to work for almost 2 hours to get ready for the morning.

On this occasion, one door staff was working. Most patrons had left by 2:15 a.m. The manager testified that he knew the patron who was there when the inspectors arrived. He is a fairly regular patron. The manager's description of the patron's age and appearance was considerably different that the C&E officers' recollections. The manager testified that the patron's drink of choice is rum and coke and that was what he was drinking that night, not rye and ginger ale. The manager testified that when he first saw the C&E officers, he was working at the Point of Sale System mid-way down the bar. The patron was sitting at the end of the bar, with another patron who did not have a drink.

The manager testified that the kitchen clock is visible from the bar and that there is other equipment that indicates time - televisions are mounted above the bar, the Point of Sales (POS) system has a clock, there are computers in the office, and staff have cell phones.

The manager testified that when the C&E officers entered he got up and greeted them. He stated that C&E officer #1 smelled the patron's drink, said 'failure to clear,' inspected both washrooms and returned to the bar. By then, the manager had removed both patrons and locked the door. The C&E officer sat at the bar and drew up the CN. At that point, the manager's watch read 2:37 and the inspector had written 2:45 a.m. He argued with the C&E officer that they had entered 5 to 7 minutes earlier, which could take the time back to 2:30 a.m., and

he argued that if this was to proceed to hearing, it was very important that the time of the alleged contravention be accurately stated. The C&E officer was adamant that it had been after 2:30 a.m. when he entered and that was all that mattered. The manager refused to sign the CN because the C&E officer would not alter the time.

The manager testified that C&E officer #2 looked at the point of sale system which indicated 2:31 a.m. The manager debated with the C&E officers and said they were being unfair. The C&E officer refused to correct the time on the CN. The manager testified that he had no recollection of the alleged discrepancy of 2 minutes between their time pieces. After the C&E officers left, the manager checked the time on the bartender's cell phone and confirmed that it was one minute slower than his own watch.

The manager testified that the recommended penalty of four (4) day licence suspension would result in a loss of approximately \$14,000 and would affect 30 employees.

Submissions

The licensee submitted; that I should disregard the evidence of C&E officer #1 as being unreliable because he was not able to produce notes, was not relying on a sophisticated time piece, could not substantiate whether or how he verified the time on his watch that evening, and made no attempt to ascertain the correct time when he was challenged by the manager. The fact that he was not able to properly describe the client or the drink indicates that his evidence is not reliable. Further, although he noted the time on the CN as 2:45 a.m., he was clear in his evidence that was not the time of the contravention, but he nonetheless refused to change the time on the CN.

The licensee submitted that the evidence of C&E officer #2 is more reliable, but he was not able to say how long he had been inside the Urban Well when he made the notation of 2:40 a.m.

The manager's evidence was that at the time C&E officer #1 completed the CN noting the time as 2:45, the bartender's time showed 2:36. If the C&E officer had been present for 5 to 10 minutes by then, it means they entered almost exactly at 2:30 a.m. or as early as 2:27 a.m. The range of time for the arrival of the C&E officers is between 2:27 and 2:35 a.m.

The licensee submitted that there are appropriate policies and practices in place to ensure that staff clear patrons within ½ hour of closing time. The evidence indicates that this was a busy Friday night and that all but 2 patrons had been cleared. The facts show that the lights were on, the music was off, all but 2 patrons had been cleared, staff were cleaning up and cashing out, and liquor was not being served. The 2 patrons were about to leave when the C&E officers arrived. The facts show that there may have been an error in time - possibly, the manager's watch was incorrect. The licensee submitted that the defence of due diligence was established because the facts demonstrate the licensee took all reasonable care. (*R. v. Rio Algom Ltd. (1988)*, 46 C.C.C. (3rd) 242, Ontario Court of Appeal; reference at p. 248.)

De minimis

The licensee referred to the Supreme Court of Canada decision in *R. v. Canadian Pacific Ltd. (1995)*, 99 C.C.C. (3rd), 97 at p. 134:

In particular, because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision. In this respect, the absurdity principle is closely related to the maxim, *de minimis non curat lex* (the law does not concern itself with trifles). The rationale of this doctrine was explained by Sir Walter Scott in

the case of *Reward* (1818), 2 Dods. 265 at pp. 269-70, 165 E. R. 1482 at p. 1484:

The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. – Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

Penalty

The licensee submitted that the comments concerning *de minimis* apply equally to penalty considerations. The licensee argued that there were no public policy issues raised and there was discrepancy in the times. Additionally, the licensee argued that a loss of approximately \$14,000 is not justified by the fact of one patron finishing a cocktail.

Reasons and Decision

This alleged contravention is based on the CN No. B008287 on which the C&E officer stated, “patron consuming liquor @ 2:45 a.m.” on April 23, 2005. According to the C&E officer’s evidence, this was not accurate as 2:45 was the time when he completed the CN, not when he observed the contravention. Although the licensee disagreed with the time stated, the C&E officer did not change it.

The dispute over time was obvious from the beginning of the inspection. All of the witnesses reported the dispute, but with differing recollections and emphases. The C&E officers’ evidence was that it was obviously beyond 2:30 a.m. and therefore the dispute was irrelevant. The licensee’s evidence suggests that the C&E officers might have entered prior to 2:30 a.m.

The evidence about time is varied. The C&E officers did not compare their respective time pieces and I observe that the times they noted when they were in, or leaving, the previous establishment appear to differ. C&E officer #1 issued a CN on which the time of the contravention is stated to be 2:37 a.m., and C&E officer #2 noted that they left the previous establishment at 2:35 a.m. This suggests either that their notes were not precise or that their watches differed. If 2:37 was the time of the contravention as is stated on the face of the CN, presumably the C&E officer would then have spoken with the licensee and written the CN. I surmise that could have taken about 5 minutes, taking the time on his watch to 2:42. That would mean the difference between the C&E officers' watches would be close to 7 minutes. It is possible that 2:37 was the time the C&E officer wrote the CN, but that was not the evidence before me. In testimony, C&E officer #1 stated he looked at his watch when crossing the street from the previous establishment to the Urban Well and it was then 2:40 a.m. C&E officer #2 testified, it was 2:35 a.m. when they left the previous establishment. These are considerable differences in time.

There was also the discrepancy between the manager's time and the C&E officer's. The C&E officers maintained that the dispute was over a 2 minute difference but the manager maintained it was a difference of 8 minutes. The manager's evidence was that after the C&E officers left he continued to check the time and to find discrepancies with the C&E officer's watch.

I find the C&E officers' imprecision over time problematic. C&E officer #1 was not able to say with certainty how he had verified his watch earlier in the evening. In my view, when the manager raised the dispute about the time, the C&E officer would have been well advised to correct the misquoted time on the CN. Additionally, I think he would have done well to examine and investigate the time and, if necessary, to contact a source to determine the correct time and record the differences between that official time and his watch and the manager's watch.

He could also have compared his watch against his colleague's and they could each have made notes about their watches at that point.

The onus is on the branch is establish the facts of the contraventions. Given the contravention alleged, time was the major factor and I find that I am not able to rely on the C&E officers' evidence to establish an accurate time. Undoubtedly, the licensee was cutting it very close to the legal time. He may have exceeded the legal time, but I cannot found the contravention on the uncertain evidence of the inspectors.

I find that the branch has failed to establish the alleged contravention.

Order

The alleged contravention is dismissed.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: November 17, 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: Shahid Noorani, Branch Advocate
