



**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. 1966, c. 267

Licensee:	532871 B.C. Ltd. dba Urban Well 1516 Yew Street Vancouver, BC
Case:	EH04-051 and EH04-61
For the Licensee:	David Stewart, Licensee
For the Branch:	Shahid Noorani, Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Dates of Hearing:	September 21, 22 & 28, and November 2, 2004
Place of Hearing:	Vancouver, B.C.
Date of Decision:	March 14, 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 terms and conditions of the licence, as stated on the face of the licence, are:

- This licence is subject to the terms and conditions contained in the publication ‘Guide to Liquor Licensees in British Columbia’.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the Liquor Control and Licensing Branch (LCLB).
- Patio extension permitted as outlined in red on the official plan.
- Patron non-participation entertainment other than games permitted within the premise Monday and Tuesday only.

The Urban Well is located in the Kitsilano neighbourhood, in a mixed residential and commercial area, close to Kitsilano Beach Park.

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. The licence permits 82 patrons in Area 01, 16 patrons in Area 02 and 24 patrons in the patio, Area 03. The Occupancy Load capacity (OL) issued by the City of Vancouver Fire Chief is 163 persons, including staff.

Alleged Contraventions and Recommended Enforcement Action

The branch’s alleged contraventions and recommended enforcement actions are set out in two Notices of Enforcement Action dated June 4, 2004 (EH04-051) and June 1, 2004 (EH 04-061).

EH04-051

- 1) On March 27, 2004, the licensee contravened Section 20(1)(d) of the *Liquor Control and Licensing Act* and Section 11(1) of the *Liquor Control and Licensing Regulation* by operating the licensed establishment in a manner that was contrary to the primary purpose of the Food Primary License.

The recommended enforcement action is a fifteen (15) day suspension of the liquor licence.

- 2) On March 27, 2004, the licensee contravened Section 50 of the *Liquor Control and Licensing Act* by permitting prohibited entertainment (patrons dancing).

The recommended enforcement action is a three (3) day suspension of the liquor licence.

- 3) On March 27, 2004, the licensee contravened Section 12 (2) of the *Liquor Control and Licensing Act* and Section 71(2)(b) of the *Liquor Control and Licensing 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 is more than the occupant load.

The recommended enforcement action is a seven (7) day suspension of the liquor licence.

EH04-061

May 2, 2004 (business day of May 1, 2004, referred to in this decision as May 2, 2004, unless otherwise noted):

- 4) On May 2, 2004, the licensee contravened Section 50 of the *Liquor Control and Licensing Act* by permitting prohibited entertainment (patrons dancing).

The recommended enforcement action is a three (3) day suspension of the liquor licence. This is the maximum licence suspension for a first contravention for this violation.

The branch had also alleged that the licensee had permitted overcrowding on this occasion but subsequently withdrew that allegation.

The total recommended penalty is twenty-eight (28) days.

Relevant Statutory Provisions**Licences**

12 (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

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:

(d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;

Entertainment

50 (1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.

(2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued.

Issues

1. On March 27, 2004, was the licensee operating the restaurant with a primary focus on the service of food?
2. On March 27, 2004, were there more people in the restaurant than permitted by the OL?
3. Were patrons dancing on March 27 and May 2, 2004?
4. Has the licensee established a defence of due diligence to all or any of the alleged contraventions?
5. If the contraventions are found to have occurred, are the branch's recommended penalties appropriate?

Exhibits

Exhibit No. 1	Branch's Book of Documents 1 and 2, tabs 1 – 64
Exhibit No. 2	Floor Plan
Exhibit No. 3	Letter dated August 11, 2004 re EH04-061
Exhibit No. 4	Letter September 27, 2004
Exhibit No. 5	Computer printout of expense claims
Exhibit No. 6	Seating floor plan

Preliminary Application

The letter contained at Exhibit No. 4 results from the licensee's preliminary application concerning aspects of the covert inspection on March 27, 2004. I noted in that letter that I would hear further from the licensee on one aspect of the application concerning the approval process for a covert inspection. At the

reconvened hearing, I heard the licensee's submissions. I determined that the licensee's application was based entirely on surmise, that he had not asked for the documentation in advance, that he had not satisfied me that the evidence of the covert inspection was tainted, and that he had not made a case for dismissing the alleged contraventions. I noted that he would still be at liberty to pursue his line of inquiry with the deputy general manager or through the Freedom of Information process.

Having completed the hearing process, I note that there was considerable evidence from the branch inspectors about the approval of the covert inspection. Although it is not 100% clear whether the regional manger attended the briefing meeting before the inspection, there is no requirement of that in the branch's policy manual. There is also no requirement that the approval process be documented.

Evidence and Findings

The restaurant is approximately 3,000 square feet. Area 01 is the main dining area. It has tables and chairs, a fireplace, an area with sofas, and a 10' x 15' hardwood floor area used as a stage. Area 02 has a dispensing bar with stools for seating. It is separated from Area 01 by a 4' pony wall that is open at both ends to allow people to pass through. There is a step up from area 02 to area 01.

The building is strata title with two floors of residences above the restaurant. The licensee described the establishment as a small, popular, full service restaurant, employing 30 people, focused on providing an environment and format for a neighbourhood meeting place, offering great food, a wide selection of alcoholic beverages, and varied entertainment including comedy shows with top billing performers.

On September 3, 2003, the licensee submitted an application to the branch to change the licence from Food Primary to Liquor Primary. As of this hearing, the licensee had not heard from the branch on the progress of the application.

On February 10, 2004, the licensee submitted an application to increase the licensed capacity from 98 patrons to the OL of 163 persons. As of this hearing, the licensee had not heard from the branch on the progress of the application. However, the branch had advised that it would not take enforcement action for overcrowding if the capacity was below 163.

On July 2, 2004, the licensee presented the branch with an application to transfer the licence to a prospective purchaser. On July 26, 2004, the branch advised that all orders of the general manager would be imposed on the licence, whether or not it was transferred. According to the licensee, this action by the branch quashed the sale, dissuaded prospective purchasers and caused “insurmountable damage to our financial continuity and reputation.”

Five liquor inspectors testified for the branch concerning the March 27, 2004, allegations. Three of them had attended the restaurant as undercover, or ‘covert’, inspectors. The other two were ‘overt’ inspectors. In this decision I refer to these as covert and overt inspectors and as covert and overt inspections. For the May 2, 2004, allegations, two inspectors testified.

The corporate licensee was represented throughout the hearing by the current president (“the licensee”). He has been involved with the company since 1998, initially as a consultant, then as an officer, and as of October 1, 2001, as the president. He has been involved in the food and wine industry for the past 15 years. He is involved with all operations and finances of the corporate licensee. In addition to his evidence, the licensee’s general manager testified.

Prohibited entertainment

The facts surrounding the alleged contraventions of prohibited entertaining on March 27 and May 2, 2004, are much the same. The branch and licensee witnesses agree that approximately 20 or 25 patrons were dancing on the floor space used as a stage. Music, provided by a disk jockey, was up-beat, modern, played loudly designed to create a happy, party atmosphere. Also on both occasions, once the licensee was aware of the liquor inspectors' presence, staff directed the disk jockey to lower the volume, perhaps change the beat, and staff stopped patrons dancing.

On March 27, 2004, three covert inspectors entered the restaurant around 9:00 p.m. They were in telephone communication with the outside, overt, inspectors. The overt inspectors entered around 11:20 p.m. and left about 11:50 p.m. The covert inspectors left at about 12:20 a.m.

On March 27, 2004, shortly after the overt inspectors entered, the licensee's staff turned on a spot light which shines on the stage area. There was considerable testimony about this light because the liquor inspectors were of the view that it was designed to alert patrons to their presence. One inspector testified that he felt his safety was jeopardized. I do not find it necessary to address the intentions of the licensee's staff in turning this on. However, the further evidence of the covert inspectors is that once the overt inspectors left, the light was turned off, the music resumed at a loud level, and within 15 minutes patrons were dancing again.

I find that on both March 27 and May 2, 2004, the floor was bare, not covered by carpet, and that there were no tables and chairs set up in the area. I find that a contravention of prohibited dancing occurred on both occasions. For the March 27, 2004, allegation, I find that prohibited dancing occurred before and after the overt inspection.

The licensee contended that it never promoted dancing and, in fact, has signs posted around the stage area and in or near the washrooms advising that dancing is not permitted. The licensee's submissions are directed to establishing the defence of due diligence which I will deal with later in this decision.

Overcrowding

The branch alleged that on March 27, 2004, the restaurant was overcrowded beyond the licence capacity, and beyond the OL of 163 persons. The licensee did not present independent evidence of the capacity on this night, but challenged the credibility of the branch's witnesses and the veracity of the counts, and made submissions on due diligence.

The covert inspectors testified that the restaurant was busy when they arrived at 9:00 p.m. and they had a forty-five minute to one hour wait in the bar area 02, until they secured a table in the restaurant area. They kept the table from approximately 10:00 p.m. until they left at approximately 12:20 a.m. They consumed a fruit martini each in the bar and another one each in the restaurant, and they shared a pizza. The covert inspectors conducted patron counts from their table and when they went to and from the washroom, which indicated to them that the restaurant was overcrowded. They contacted the overt inspectors who arrived at about 11:20 p.m.

There were three overt inspectors, two of whom testified at the hearing. They conducted two counts each and reported first counts of 173, 191 and second counts of 180 and 182, respectively. The front door staff had told them his mechanical clicker showed 159 patrons. A staff member conducted a count while the inspectors were doing their second counts; his count, as testified to by the liquor inspectors and the licensee's general manager was 170.

The licensee testified that he had instructed staff that optimal capacity was 150 patrons and that was what they should strive for.

Based on the evidence of the inspectors and the licensee's general manager, I find that on March 27, 2004, the capacity in the restaurant exceeded the OL of 163 persons and, accordingly, that the branch has proven the contravention. The licensee raised the defence of due diligence which I will deal with later in this decision.

Operating Contrary to Primary Purpose

For many years in his dealings with the branch, the licensee has maintained that he provides a type of service that is outside the usual 'box' of restaurants the branch deals with, but nonetheless is a proper Food Primary Licence operation. He submitted in this hearing that a few years ago he, and many others in the industry, made submissions to the provincial government which resulted in some changes to the liquor laws. He suggested that some branch personnel took exception to his activity and, for that reason or other reasons, some branch personnel are biased against him and his establishment. Additionally, he submitted in his view the branch has not conformed to the intention of the legislature in the way it applies the new regulations.

The licensee also submitted that he believes the branch inspectors are not adequately trained to understand how the food industry operates and he believes his establishment has been the victim of unchecked enforcement action. He described his relationship with the branch as a David and Goliath struggle.

A Food Primary Licence has certain terms and conditions attached to it, which are outlined in the Guide. The main condition is that the establishment must maintain the service of food as its primary purpose at all hours of operation. One of the conditions set out in the Guide, at page 5, is, "There must be enough

tables and chairs, and/or counters and stools to seat everyone. The tables must be big enough to hold the plates, cutlery and glassware associated with a full meal.” On page 6: “As long as you are running your business properly, as a restaurant, you may *occasionally* serve liquor to a customer, without food, at any table within the dining area. Remember, though, your liquor inspector will look closely at exactly how many people are being served liquor without food, and how often.”

On page 5 of the Guide, there is the caution: “Failing to meet *any* operating requirements is sufficient for the general manager to conclude that a licensee is operating his or her restaurant as a bar.”

The licensee acknowledged that the Guide sets out operating requirements for Food Primary Licensees. He was familiar with the terms and conditions contained in the Guide and was familiar with the requirements for capacity and entertainment. He was aware, prior to March 27, 2004, that he could apply for an endorsement to permit dancing and that it would require that liquor service to end at midnight. The business licence from the City also does not permit patron participation entertainment, such as dancing.

The licensee contended that service of food is the primary purpose and pointed to the quality of the food, the menus, and mentioned awards and commendations. The menu includes small plates, tapas, salads, as well as dinner entrees. After 11:00 p.m., the regular menu changes to a smaller tent card menu on each table, offering a selection of tapas, burgers, salads, soups but not the main entrees. The kitchen is available to provide a full range of menu items until closing time.

The licensee submitted that all patrons are provided with a menu. However, the covert inspectors testified that, although they had announced their intention to have dinner and were shown to the bar as a waiting area, they had to find their

own table in the restaurant and had to ask their server for menus. Their observations were that although food was being served, by far the majority of patrons were not eating food, and many patrons did not have seats at a table or in the bar. During the overt inspection, the inspectors observed that the kitchen was fully operational, that some food was being prepared, but they did not notice food being served or patrons eating.

The branch's evidence included some of the licensee's receipts and statements showing that sales on Friday and Saturday nights run at 70% alcohol and 30% food. The licensee submitted that is not unusual for a Food Primary establishment. On March 27, 2004, the restaurant opened at 5:00 p.m. and closed at 2:00 a.m. and the receipts indicated approximate ratio of 70:30 alcohol to food. I agree that the ratio is not determinative although it provides some evidence of the nature of the service.

The licensee's evidence was that he instructed the staff to operate the capacity at approximately 150 patrons. He submitted that the room is far too large for the licensed capacity of 98 and that the restaurant would go out of business if it operated at that level.

The licensee's general manager testified that there are 25 tables with approximately 85 chairs and 12 bar stools, for total seating capacity of 97 seats. He acknowledged this is insufficient seating for capacity of 150 or 163 but noted that the licensee is attempting to change the capacity. He also stated that the licensee has been taking steps over the past year to operate more as a Food Primary. Meanwhile, the licensee encourages patrons to have a seat and order food, however, patrons frequently walk around having drinks.

Contrary to the general manager's evidence, the licensee testified that there was seating for 120 to 130 patrons, including the couches. He stated that since

May 2, 2004, he has carpeted the stage where patrons used to dance, and installed two tables with chairs.

The licensee acknowledged that although minors are permitted in restaurants, he restricts minors after 9:00 p.m. because there is an adult environment with adult conversation and, sometime, adult comedy. He would not want minors in a situation they shouldn't be in. The licensee's general manager explained that they do not want people under 19 years old in the establishment after 9:00 p.m. because it is too hard to control whether someone is just there to consume food. The door staff and the serving staff are instructed to check identification for anyone who appears under age 25 and to not permit minors entry.

The covert inspectors testified to their observations and conversations with a couple of staff members before, during and after the overt inspection. One inspector testified that a staff member, who she identified by name, told her the liquor inspectors were present and referred to them as "persistent little buggers." Another inspector testified that at one point she was accosted by a male patron who appeared to have had too much to drink, who asked her why she was on her own and if she wanted to dance. She testified that this establishment reminded her of a party area, not what she envisions as a restaurant. She also testified that she was told by a staff member, also identified by name, that the liquor inspectors were present and that once they left, they could "party harder." The inspectors testified that they saw no attempts by staff to stop patrons dancing before or after the overt inspection.

The branch's witnesses described the ambience of the establishment as resembling a cabaret or bar. They referred to door staff checking identification to restrict minors, dim lighting, loud music, dance floor, patrons dancing, tables not re-set with cutlery after patrons left, patrons walking about, patrons purchasing drinks directly from the bartenders and walking around the establishment with

their drinks, servers who were carrying trays of drinks, and not much food being prepared or consumed.

The licensee characterized the establishment as a neighbourhood meeting place offering great food and quality alcohol, operating as a new style of restaurant. He testified that he expects patrons to come in, have some food and then stay for a number of hours having cocktails. The licensee also described the licensee's community involvement, good rapport with the neighbours, and that they host charity events, corporation events and industry events.

There was considerable evidence from both the branch and the licensee directed to the issue of whether the licensee was operating contrary to the primary purpose of the licence on March 27, 2004. I have looked at the evidence as a whole from the consideration of - what were the patrons primarily doing? what were the staff primarily doing?

In answer, I find it apparent that patrons primarily were milling around, buying drinks from the bars or the servers, dancing, and visiting with each. There was minimal evidence of patrons sitting down and ordering food and drinks. If I accept the licensee's staff count of 170 and the general manager's evidence of 97 available seats, there was no seating available for approximately 40% of the patrons. Using the licensee's best estimate of 130 available seats, approximately 24% of the patrons would be without seating. Clearly, there was not enough seating for the 150 patrons he had authorized as the optimal capacity.

The staff were maintaining a line up of patrons outside, checking for identification, pouring drinks, carrying serving trays of drinks, and serving some food. The kitchen staff was preparing food. I find that the staff were not trying to stop patrons from dancing, were not concerned with showing patrons to tables and were only minimally engaged in taking food orders and serving food.

The view of the evidence that would be most favourable to the licensee is that patrons came in earlier, had a meal, then left their tables and enjoyed cocktails for the rest of the night standing and walking around. Patrons danced despite the posted signs. When some patrons left, others were admitted, keeping to an optimal capacity of 150 patrons. The new patrons would not necessarily have been able to find a table to sit down but they could still order small plates of food.

On the totality of the evidence, I find the licensee's best case scenario does not fit within the terms and conditions of the licence which require a food primary focus throughout all hours of operation.

I accept the licensee's contention that the décor, including the couch seating area, is consistent with a restaurant, albeit somewhat out of the ordinary. I find that the kitchen is full service and was capable of providing a wide selection of menu items. I also find that there was minimal food being prepared and served from approximately 10:00 p.m. onward. At that hour, it is perhaps not unusual that there would be a paucity of food being ordered. However, that consideration has to be tempered by the fact that the licensee was allowing entry to patrons, and was intending to maintain an optimal capacity of 150, in an establishment that is licensed as a Food Primary, where there is a legal expectation that patrons are being allowed entry for the primary purpose of eating food.

In my view, the evidence describes an operation in which food was available and being served as an adjunct to the service of alcohol, rather than the other way round. I find that the overall operation was not directed primarily to the service of food and I conclude that the licensee was operating contrary to the terms of the Food Primary Licence.

The licensee made additional submissions which go to due diligence, discussed below.

Due Diligence

Due diligence refers to conduct or activity designed to prevent the commission of the contravention. If the licensee can demonstrate that the operating mind of the business had policies and procedures in place to ensure that the impugned conduct did not occur, then a defence can be established, resulting in a finding that the contravention did not occur. I am satisfied that the personnel who could be considered as the operating mind of the licensee for the two occasions were the licensee and the general manager.

To my understanding, the licensee presented due diligence in two ways: first, the licensee pointed to the fact that he has been attempting to change his licence and the legal capacity; second, the licensee submitted that he and the staff have taken some steps to prevent the impugned conduct. In my view, the former consideration is not due diligence although it may be viewed as an attempt to mitigate the circumstances that gave rise to the contravention, by fixing the problem. The latter is more properly due diligence in that it is designed to prevent the contravention.

Dealing with the specifics of due diligence, the licensee pointed to the notices posted around the stage floor area and in the washrooms advising patrons they were not allowed to dance. The licensee also noted in his submissions that he never considered the dancing to be a safety concern.

For the contravention of overcrowding, I understand the licensee's evidence to have been that he gave instructions to staff to operate at the optimal capacity of 150 patrons. This was not written down. Generally, the licensee did not refer to any written policies and procedures. However, he referred to oral policies and stated that he tells staff they must adhere to the *Act* and the licence.

For the contravention of operating contrary to primary purpose, the licensee did not have additional evidence of due diligence.

I find the licensee has not demonstrated a defence of due diligence through policies, procedures, training, or the actions of its staff. I find that instances he submitted of having policies or notices in place were minimal steps that fall far short of establishing that he acted with due diligence. One test of whether a licensee has established a defence of due diligence is whether there is anything further the licensee could have done to guard against the commission of the contravention. For all of these contraventions, there was considerably more the licensee could have done. He could have ensured that no more patrons were admitted than there were seats for. He could have instructed staff to follow the terms and conditions in the Guide, such as the one requiring that the majority of patrons must consume food. He could have instructed staff to stop the dancing as soon as it started. He could have set an atmosphere to impress upon patrons that this is a restaurant where the primary purpose is consuming food.

Penalty

I have found that the licensee contravened as alleged and has not established a defence of due diligence.

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

- impose a suspension of the liquor licence for a period of time
 - cancel a liquor licence
 - impose terms and conditions to a license or rescind or amend existing terms and conditions
 - impose a monetary penalty
 - order a licensee to transfer a license
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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 branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of contraventions, whether the licensee has been told by the branch and/or the police of concerns about similar occurrences, the seriousness of the contravention, the threat to the public safety and the well being of the community.

Compliance History

The branch has conducted hearings on this establishment for similar issues and rendered decisions dated April 5, 2002, February 20, 2003, May 6, 2003 and May 5, 2004. The following is a summary of the contraventions and resulting enforcement actions reflected in those decisions.

	Date	Findings of Contraventions	Enforcement Action
1.	January 24, 2004	overcrowding beyond patron capacity less than or equal to occupant load s. 12(2)	3 day suspension
2.	March 14, 2003	Permit intoxicated person to remain s.43(2)(b)	4 day suspension
3.	March 14, 2003	Prohibited Entertainment s 50	6 day suspension
4.	October 18, 2002	Prohibited Entertainment s 50	3 day suspension
5.	March 16, 2002	Overcrowding s.12	3 day suspension
6.	March 16, 2002	Prohibited entertainment s.50	1 day suspension
7.	March 8, 2002	Overcrowding s. 12	3 day suspension
8.	March 2, 2002	Overcrowding s.12	3 day suspension
9.	March 1, 2002	not primarily engaged in the service of food s.20(1)(d)	10 day suspension

10.	March 1, 2002	Overcrowding s.12	3 day suspension
11.	March 1, 2002	Prohibited entertainment s.50	1 day suspension
12.	Feb. 22/23, 2002	Overcrowding s.12	3 day suspension
13.	Feb. 22/ 23, 2002	Prohibited entertainment s.50	1 day suspension
14.	Nov.24/ 25, 2001	not primarily engaged in the service of food s.20(1)(d)	10 day suspension
15.	Nov. 24/25, 2001	Overcrowding s.12	3 day suspension
16.	March 16, 2001	Overcrowding Reg. s. 38(3)(b)	1 day suspension
17.	March 16, 2001	Serve liquor without food, Reg. 17	1 day suspension
18.	March 1, 2001	Advertising s. 24.2	No penalty

Penalty Schedule

Schedule 4 of the *Liquor Control and Licensing Regulation*, BC Reg. 608/76, *Enforcement Actions*, provides a range of licence suspensions and monetary penalties for contraventions. The penalties increase for second and subsequent contraventions. A second contravention is defined as one that was committed within 12 months of a prior contravention of the same type. In this case, all of the alleged contraventions occurred later than one year from any similar proven contraventions. Accordingly, the branch has treated all of the contraventions as first contraventions in recommending penalties. However, the branch has recommended the top of the range for all of them.

For the contravention of operating contrary to primary purpose, Item 1 provides a penalty range of ten (10) to fifteen (15) day suspension or seven thousand, five hundred (\$7,500) to ten thousand (\$10,000) monetary penalty for a first contravention.

For the contravention of prohibited entertainment (dancing), Item 35 provides a penalty range of one (1) to three (3) day suspension and a one thousand (\$1,000.00) to three thousand (\$3,000.00) monetary penalty for a first contravention.

For the contravention of overcrowding, Item 15 provides a penalty range of four (4) to seven (7) day suspension or five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty for a first contravention.

As noted above, the licensee submitted that there were mitigating circumstances because he has been trying to bring about changes to the licence and the capacity. He hired a consultant to assist with his applications, resulting in considerable expense. The branch has not made decisions on the applications. The licensee also submitted that he fired two of the employees who worked on March 27, 2004, because of the allegations of the branch.

The licensee reiterated that he has established a good rapport with neighbours, the strata council, and the residential tenants. He submitted that he has no problems with any stakeholders, with the exception of the branch. He submitted that he has been unfairly victimized and doubts that the branch is being as assiduous in its enforcement of other similar operations.

The licensee submitted that his operation is a civilized, modern restaurant that benefits the community and harms no one. He voiced his concern that the liquor laws have been liberalized further than the branch is prepared to acknowledge. Further, in his view, branch personnel have developed biases against him and the restaurant.

The licensee's allegations against the branch are serious. I have had his comments in mind throughout the hearing process and this review of the evidence. I have been on guard to detect bias in the inspectors' testimony and to weigh issues of credibility to ensure that the licensee is treated with due process and accorded every fairness.

In the end, I find that the difficulties facing the licensee arise from his failure to operate his establishment as a Food Primary Licensee. The branch has said

many times over, as indicated in the decisions rendered, that this is a restaurant and that it needs to operate within the confines of its licence. That includes obeying the licence capacity, even though the branch has indicated it will not take enforcement for overcrowding if it is below the OL. That includes not permitting dancing. That includes ensuring that patrons, including minors, know they are welcome to the restaurant, as a restaurant, not as a late night drinking establishment.

The licensee submitted there is no harm done and, in fact, he is providing a service the community wants. It is not for the licensee to determine what the community wants and then provide it. That is a municipal function and a branch function.

The licensee's applications to change the nature of the licence and the capacity are not, to my mind, examples of mitigation. It has been within the licensee's power to change his conduct to comply with the requirements. That would be mitigation. As example, I consider the fact that the licensee has carpeted the stage floor to be mitigation, because he is no longer inviting patrons to dance, rather he is making it clear that dancing is not permitted.

In my decision dated February 20, 2003, I stated at page 46:

The general manager is not bound by the penalty schedule nor by the branch's recommendations. This licensee has demonstrated conduct that is deserving of censure as a method of impressing upon the licensee the importance of voluntary compliance. The licensee argued that with new *Regulations* coming into force, these contraventions were not all that serious. That, to my mind, is indicative of the error that has brought the licensee to this eventuality. The new *Regulations* do not alter the substance of these contraventions. The licensee must still abide by the licensed capacity, no patron participation entertainment and must maintain a food primary focus. Some rules have changed. For example, it is permissible for patrons to stand and walk around the restaurant with drinks, provided the primary focus of the restaurant remains the service of food.

Although the total suspension based on the minimums is considerable, I am left with an unsettled sense that the circumstances of this case militate in favour of

imposing penalties in excess of the minimum. Imposing the minimums gives this licensee an undeserved break.

Nonetheless, I imposed the minimum penalties. In this hearing, the branch has recommended penalties at the upper range.

I see nothing in the licensee's evidence or submission that argues in favour of reduced penalties. The legislature has provided a range of penalties for a reason and in my view this is a prime example of when the maximum of the range should be imposed.

Order

Pursuant to Section 20(2) of the *Act*, concerning Food Primary Liquor Licence No. 169305 for the Urban Well, I impose penalty suspensions totaling twenty-eight (28) days, as follows:

1. For the contravention on March 27, 2004, of contravening Section 20(1)(d) of the *Liquor Control and Licensing Act* and Section 11(1) of the *Liquor Control and Licensing Regulation* by operating the licensed establishment in a manner that was contrary to the primary purpose of the Food Primary Licence, I impose a licence suspension of fifteen (15) days; and
 2. For the contraventions on March 27, 2004, and May 2, 2004, of contravening Section 50 of the *Liquor Control and Licensing Act* by permitting prohibited entertainment (patrons dancing), I impose licence suspensions of three (3) days each, for a total of six (6) days; and
 3. For the contravention on March 27, 2004, of contravening Section 12 (2) of the *Liquor Control and Licensing Act* and section 71(2)(b) of the *Liquor Control and Licensing Regulation* by permitting more patrons in the licensed establishment than the patron capacity set by the general manager, and the
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number of persons in the licensed establishment is more than the occupant load, I impose a licence suspension of seven (7) days.

I order the licence suspension of twenty-eight (28) days to commence as of the close of business on Friday, April 15, 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 54(1) of the *Regulation*).

Since I do not know whether the Urban Well would normally be open seven (7) days per week as of April 16, 2005, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the liquor licence for the Urban Well be held by the branch or the Vancouver Police Department from the close of business on Friday, April 15, 2005, until the licensee has demonstrated to the branch's satisfaction that the Urban Well has been closed for twenty-eight (28) business days.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: March 14, 2005

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Shahid Noorani, Branch Advocate
