



**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 RSBC c. 267

Licensee: 532871 B.C. Ltd.
dba Urban Well
1516 Yew Street
Vancouver, BC

Case: EH01-62
EH02-40

APPEARANCES

For the Licensee: David Houston, Counsel
David Stewart, Licensee

For the Branch: Robert G. Payne, Counsel
Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Dates of Hearing: September 16, 17, 18, 19 & 20
and October 4, 7, 8, & 9, 2002

Place of Hearing: Vancouver, B.C.

Date of Decision: February 20, 2003

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
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Introduction

The licensee, 532871 B.C. Ltd. operates The Urban Well ("the restaurant") under a class "B" dining lounge liquor licence #169305. The licence permits the sale and consumption of all types of liquor with meals and patron non-participation entertainment, other than games. The Urban Well is located in the Kitsilano neighbourhood, in a mixed residential and commercial area, close to Kitsilano Beach Park. Particularly in the summer, this is a vibrant, busy area with a lot of pedestrian and vehicle traffic. There is another Urban Well located in downtown Vancouver.

The restaurant occupies 2 ½ of the 5 strata units on the main street level and there are 2 floors of residences above street level. There is a park across the street. The neighbouring businesses are a Japanese restaurant and a gelato bar. There is a licensed establishment on another corner, and a cluster of small shops, restaurants, video stores and offices in the vicinity.

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 patio capacity differs from that noted on the redlined floor plan (10 seats) but the branch confirms that the licensed capacity at the relevant times was 24 patrons.

The total licensed capacity without the patio was 98 patrons. The Building Occupancy Load capacity (BOL) was 125 persons, including staff.

Area 01 is the main dining area. It has tables and chairs, a fireplace, an area with sofas, and a 14' x 14' hardwood floor area used as a stage and a dance floor. Area 02 has a dispensing bar with stools in front. It is separated from Area 01 by a 4' pony wall that is open at either end to allow people to pass through.

There is a step up from area 02 to area 01. A floor plan is contained at tab 16, Exhibit No. 5.

Alleged Contraventions and Recommended Enforcement Action

The branch has alleged the following contraventions, and has recommended the following enforcement actions:

By Notice of Enforcement Action dated December 20, 2001, as amended in part by Notice of Enforcement Action dated July 26, 2002, the branch alleged the following (hyphenated dates indicate that the alleged contravention was observed after midnight):

On November 24-25, 2001,

1. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;
2. the licensee was not primarily engaged in the service of food, contrary to sections 16 and 20 of the *Act* and section 17(2) of the *Regulations*;

By Notice of Enforcement Action dated April 26, 2002, as amended in part by Notice of Enforcement Action dated July 26, 2002, the branch alleged the following;

On February 22-23, 2002,

3. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;
4. the licensee permitted entertainment that was prohibited, contrary to section 50 of the *Act*;

On March 1-2, 2002,

5. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;
 6. the licensee permitted entertainment that was prohibited, contrary to section 50 of the *Act*;
 7. the licensee permitted an intoxicated person to remain in the establishment, contrary to section 43(2)(b) of the *Act*;
 8. the licensee was not primarily engaged in the service of food, contrary to sections 16 and 20 of the *Act* and section 17(2) of the *Regulations*;
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On March 2, 2002,

9. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;

On March 8, 2002

10. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;

On March 16-17, 2002

11. the number of patrons in the establishment exceeded that permitted by the liquor licence, contrary to section 12 of the *Act*;
12. the licensee permitted entertainment that was prohibited, contrary to section 50 of the *Act*;

Throughout this decision a reference to 'operating outside class' refers to the alleged contraventions #2 and #8, not primarily engaged in the service of food.

The branch recommended the following penalties, respectively:

For the overcrowding contravention #1:

a licence suspension of 1 day;

For the overcrowding contraventions #3, 5, 9, 10 and 11:

a licence suspension of three (3) days for each contravention;

For the prohibited entertainment contraventions #4, 6 and 12:

a licence suspension of 1 day for each contravention;

For the intoxicated patron contravention #7:

a licence suspension of 4 days; and

For the not primarily engaged in the service of food contraventions #2 & 8:

a licence suspension of 10 days for each contravention.

Licensee Admissions

The licensee admitted the overcrowding contraventions in allegations #1, 3, 5, 9, 10, 11 but disputed the branch's recommended penalty. The licensee effectively waived prohibited entertainment contraventions in allegations #4, 6 and 12, agreeing to the recommended penalties. Those contraventions will be included in the Order flowing from this decision.

The licensee disputed the alleged contraventions and recommended penalties for the contraventions in allegations #2, 7 and 8.

Compliance History

The branch's previous decision on this licensee (See Exhibit No. 7) included a finding that the licensee had exceeded the licensed capacity on March 16, 2001 and imposed a one (1) day licence suspension.

Schedule 4, Enforcement Actions, BC Reg. 608/76, s. 1(b)(ii) defines a second contravention:

1 (1) For the purposes of this Schedule,

(b) a contravention committed by a licensee is

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, ...

By operation of this Schedule, contraventions #1, #3, #5, #9, and #10 are automatically second contraventions, and fall within the licence suspension range for second contraventions, 3 to 6 day suspensions. Contravention #11 occurred on March 16/17, 2002 and, therefore, is outside the 12 month period, by 1 day. Consequently, the range of penalty for that occurrence is 1 to 3 day suspension or \$1,000 to \$3,000 monetary penalty.

There are no other prior proven contraventions, offences or enforcement actions ("compliance history"), within the year preceding these incidents, for the other contraventions alleged in this proceeding, for this licensee or this establishment. Therefore, the contraventions, other than overcrowding, if proved, would be considered first contraventions for the purposes of the Penalty Schedule.

Taking into account the proven contravention and the penalty schedule, the branch's recommended penalties were amended from 43 days to forty-five (45) days licence suspension.

Enforcement Record

The Regional Manager (the "manager") testified to the branch's records for this establishment, found at Exhibit No. 5. The documents date from March 1997, prior to the current owner, and include concerns about noise, serving alcohol without food, prohibited entertainment – amplified music and dancing, and overcrowding.

One of the inspectors testified that, since the time of these alleged contraventions, she is aware that the branch has served Contravention Notices (CN) on April 20, 2002, for overcrowding and prohibited entertainment, April 22, 2002, for service of liquor without food, April 27, 2002, for overcrowding beyond the licensed capacity, prohibited entertainment, June 4-5, 2002, for overcrowding beyond the licensed capacity and reduced pricing for staff liquor purchases.

In response to the branch's evidence, the licensee testified that the branch's allegations on April 20, 2002, were based on counts of 121, 125, 126 and 127 and dancing. On April 22, 2002, there had been a comedy show that ended at 11:00 P.M.; the alleged contravention was service of liquor without food and standing and drinking and there were less than 98 patrons. On April 27, 2002, the inspection was at 0030 hours and alleged overcrowding was in area 02 only. On the CN, the inspector noted counts of 27 and 31 patrons in area 02. The licensee testified that the total patron count was 101. On June 4-5, 2002, the inspector issued two CNs. The first was for overcrowding in area 02, and the count was 29 patrons. The total number in the restaurant was below 98 patrons. The second CN was for staff being given a discount on drinks. The licensee

testified that he thought as long as the full taxes were remitted it was legal to give staff discounts.

The licensee testified that branch and/or police attended, without concern, on April 5, 12 and 28, 2002, May 9 and 10, 2002, and June 10 and 15, 2002. He said that since June 2002, there have been weekly or biweekly inspections with no problems noted.

Issues

1. Does the conduct in this case constitute the contravention of not primarily engaged in the service of food, contrary to ss. 16 and 20 of the *Act* and s. 17(2) of the *Regulations*?
 - a) Can it occur on a one time basis, or does it involve a major shift that occurs over time?
 - b) Are there constituent elements of the contravention that, on their own, would also be contraventions?
 - c) Is it appropriate to apply penalties for overcrowding and prohibited entertainment in addition to penalties for not primarily engaged in the service of food?
2. Does the evidence support a finding that the licensee permitted an intoxicated person to remain in the premises, contrary to s. 43(2)(b) of the *Act*?

Exhibits

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|----------------|--|
| Exhibit No. 1 | Notice of Enforcement Action, dated Dec 20, 2001 |
| Exhibit No. 2 | Notice of Enforcement Action, dated July 26, 2002 |
| Exhibit No. 3 | Notice of Enforcement Action, dated April 26, 2002 |
| Exhibit No. 4. | Notice of Enforcement Action, dated July 26, 2002 amending the April 26, 2002 Notice (Ex. No. 3) |
| Exhibit No. 5 | Common Book of Documents |
| Exhibit No. 6 | Liquor Licence Dated 1 Feb 2001 |
| Exhibit No. 7 | Decision of the General Manager |
| Exhibit No. 8 | Memo dated March 4, 2002 from [] |
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Exhibit No. 9	Appendices A and B of the Notice of Enforcement Action dated December 20, 2001
Exhibit No. 10	Excel Spreadsheets for November 24 &25, 2001 and March 1, 2002
Exhibit No. 11	Transfer of the Liquor Licence Cover Sheet, dated Feb 20, 1997
Exhibit No. 12	Package of documents concerning company records for 532871 BC Ltd.
Exhibit No. 13	Application for permanent change to liquor licence dated October 14, 1997
Exhibit No. 14	Letter dated July 21, 1997 from []
Exhibit No. 15	Letter dated July 21, 1997 from [], re patio
Exhibit No. 16	Letter dated May 8, 2001 from []
Exhibit No. 17	Floor Plan
Exhibit No. 18	Package of menus and liquor lists
Exhibit No. 19	City of Vancouver Maximum Occupant Load dated September 20, 2002
Exhibit No. 20	Package of 5 Contravention Notices
Exhibit No. 21	Vancouver Fire and Rescue Services, Notice of Violation, September 13, 2002
Exhibit No. 22	Document titled "For Release" dated September 11, 2002

Evidence

November 24-25, 2001

The branch's regional manager ("manager") testified that the first time he visited The Urban Well was at approximately 12:40 A.M., on January 25, 2001. He observed a line up that wound up the street and around the corner on Yew Street. There was an employee at the door controlling admittance. The manager identified himself and entered the restaurant. He testified there was loud music that he had heard from across the street, the lighting was low, patrons were wandering about with drinks and it looked crowded. He performed a count with a mechanical clicker, walking around the restaurant. He testified that some patrons were sitting and a large number were standing, talking, walking around and, in his view, there were not enough places for people to sit around the

restaurant tables. He described the capacity as shoulder to shoulder and that he had to push his way through to do the count.

He testified that the dance floor was packed with dancers. He did not see any food being served, nor did he see any dishes, cutlery or menus. In his view, it would not have been possible to have a normal conversation across a dining table because of the volume of music. The primary light source was candle light.

Looking at the floor plan at tab 16, Exhibit No. 5, he testified that there was an individual operating sound equipment in the area at the end of the dance floor called the 'bus station', which looked similar to a disk jockey's booth.

The manager described area 02. All of the bar stools were occupied and patrons were standing 3 to 4 deep between the pony wall and the bar, which he estimated was 5 feet wide. He testified that he had to elbow his way through. He said that patrons were standing with drinks, ordering drinks from the bartender and some were paying the bartender directly. He did not see anyone eating in this area, nor did he see any dishes, cutlery, crockery or any food being served.

The manager testified that he counted 219 patrons. He was not familiar with the differentiation between areas 01 and 02 and did not record separate counts. He said there was no one on the patio. He testified that in his view it would have been extremely difficult for the number of patrons in The Urban Well to leave safely had there been an emergency.

The manager spoke with the restaurant general manager who had the door staff perform a count, reported at 208 patrons. The manager and the restaurant manager went into the kitchen where the manager wrote up a Contravention Notice (CN). He testified that the kitchen had been wiped down, the floor was wet, there were no pots or pans on the stove, the stove burners were cool to the

touch and there was no evidence of food being prepared. However, he assumed if he had ordered food, the staff would have tried to provide something for him.

February 22/23, 2001

At approximately 12:55 A.M. hours, the branch's regional manager ("manager") and a liquor inspector attended the premises. The manager testified the music was audible across the street and that there was a line up of 12 to 15 people. He identified himself and went inside. He said patrons were standing with their drinks, the area between the bar and the pony wall in area 02 was congested, people were dancing, a disk jockey was at the table at the back of the dance floor, the lighting was dim, and he saw no food service or place settings. He testified that servers were carrying trays of drinks to serve patrons and patrons were ordering drinks directly from the bar in area 02. At approximately 1:00 A.M., using a mechanical clicker he counted 176 patrons. He recalled the inspector's count had been 156.

The manager told the restaurant manager what their counts were. The door staff then did a count and reported 147. At 1:05 A.M., the door staff count was 129. The manager recalled that the door staff had been keeping a running count of patrons as they entered and left. The manager issued a Contravention Notice for overcrowding, prohibited entertainment (dancing) and breach of terms and conditions (standing and drinking) which was withdrawn.

The manager observed that the kitchen appeared to be shut down. He said there were no pots on the stove, no food being prepared, no clean up being done other than one person putting dishes away. He asked the restaurant manager to provide patron bills for the preceding hour but was told their system did not print receipts.

March 1-2, 2002

At approximately 12:45 A.M., the branch's regional manager ("manager") and two inspectors ("inspectors #1 and #2") attended The Urban Well and parked across the street. Inspector #1 testified that he gained entry under the pretext of looking for a friend. He testified that people inside were standing shoulder to shoulder, the crowd was quite animated, there was loud music and people dancing. In his view, it looked more like a cabaret than a restaurant. Using a mechanical counter he counted 193 people, including staff.

The inspector testified that area 02 was congested with people sitting at stools and standing. He said people were about 3 to 4 deep between the bar and pony wall. Drinks were being served over the bar and staff were circulating with drink trays. He testified that he did not notice any food in area 02. In area 01, he observed that almost every table was occupied, people were sitting, standing and moving about. He did not notice any food service or any indication of food service such as cutlery or dishes. The inspector left and returned to his colleagues.

After the inspector's report to the others, all three branch staff identified themselves as liquor inspectors and entered The Urban Well. Inspector #1 testified that he saw the manager giving directions to the staff and that he knew the manager eventually issued an immediate suspension of the liquor licence. The inspector testified that the establishment's overcrowded condition was a definite public safety issue. He reported that his second count was 169 not including staff.

The inspector stated that once the order had been given to suspend liquor service, some patrons demonstrated animosity to the inspectors to the point that he was concerned for the inspectors' safety. He located his partner and they went into the kitchen. The inspector testified that the kitchen appeared to be

operating on a skeleton crew. He notice a plate of pasta, some staff working with an appliance, other staff engaged with the branch manager in the kitchen, and he noted that some servers were coming and going.

His third count was 115 patrons; he did not record the time of that count.

Inspector #2

Inspector #2 testified that this was the first time she conducted a full inspection of The Urban Well. Prior to attending she reviewed the licence and the floor plan. The manager informed her that the branch had been concerned about overcrowding and service of liquor without food. When she approached the restaurant she noticed a line up of approximately 20 people and two door staff at the entrance.

The inspector testified that her initial observation inside was that the restaurant was dimly lit, the music was loud, people were dancing at the back of area 01, and area 02 was extremely congested. Using a mechanical counter, she counted 61 people in area 02. She testified that it was so difficult to move through the crowd she was concerned about being burned by cigarettes. She said the area is only about 5' wide and it was so congested she made special note, including a diagram, in her note book. She testified that patrons were standing 4 persons deep from the bar to the pony wall all the way along area 02 and that it became more congested at the end farthest from the entrance. She testified that she did not see any indication of food service. Patrons where standing and drinking, mainly cocktails. Inspector #2 followed Inspector #1 as he made a path through the patrons.

In area 01, the inspector observed that the dance floor was full and the music was being played by a disk jockey who had equipment set up on a table in a corner. She testified that it was more like being in a cabaret or dance club than a

restaurant. Patrons were dancing, standing, sitting, drinking but she did not see any eating. She testified she did not see any remnants of food service such as cutlery, crockery, or crumbs.

She said the noise was too loud for normal conversation and the restaurant was dimly lit, like a cabaret. She described the area in front of the fireplace, with couches, intimate décor and candle light. She considered the lighting to be too low for most people to determine whether meals were properly cooked.

The inspector said the number of people in the restaurant exceed the number of table settings. She counted 125 people in area 01 for a total count of 186, including staff. She recalled having seen 4 servers but stated that the restaurant manager subsequently told her there were 17 staff that night.

Inspector #2 conducted her first count just after arriving at 12:35 A.M. She conducted a second count at 12:50 A.M. of 157 people, including staff which she noted as '2 staff' in her notes. At this point she and inspector #1 realized there was a time difference of 10 minutes on their watches. This is the reason for the time discrepancy in the branch's documents, such as the Enforcement Action Recommended form. At 12:55 A.M., the manager suspended the liquor licence.

The inspector testified that she heard the restaurant manager tell some staff members that the liquor inspectors had shut them down. She heard one of the door staff shout to the restaurant manager that the count was 140.

After her second count, inspector #2 moved back to the area by the washrooms where there was more light, to write up some notes. She observed an intoxicated male being assisted by his friends coming from the direction of the washroom. She testified that he had difficulty supporting himself, had an exaggerated stagger, had difficulty holding his head upright, but then he broke away from his friends and staggered hurriedly back to the washroom. She

testified that he was too intoxicated to be permitted entry to a licensed premises. She went into the kitchen and reported the condition and whereabouts of the intoxicated patron to the restaurant manager who, apparently, went to the washroom to check it out.

In the kitchen inspector #2 noted that a caesar salad was in the pass through window, one dish was being prepared and a pot of pasta was put on to cook while they were there. She could not recall whether the deep fryer was operational. Otherwise, the kitchen had been cleaned and there was no other food being prepared. The cook was wiping down the kitchen. The only other kitchen staff was a dishwasher.

The inspector testified that she was concerned about safety that night. The licensed capacity in area 02 was only 16 and she thought there was a potential safety hazard in that area particularly. She said she felt vulnerable to patron conduct because of the numbers and the congestion and because there were too many people for the restaurant staff to manage and control. She testified that some patrons had started making comments about the liquor inspectors and some were becoming agitated. One patron came into the kitchen and directed aggressive statements at the branch manager. The restaurant manager intervened and escorted him out. The inspector knew the manager had called for police assistance but they were not available because they were dealing with another incident.

Inspector #2 testified that the restaurant lights were turned up at 1:10 A.M. While the inspectors were in the kitchen, around 1:15 A.M. a patron put his head through the pass through window and screamed at the inspectors. Inspector #2 said she did not go back out into the main part of the restaurant until 1:20 A.M. at which point she observed 6 patrons inside. The police had arrived outside and the inspectors went out to speak with them. Looking back on the incident, she

said that most patrons left in an orderly fashion. However, that did not alter her view that there had been legitimate safety concerns.

Inspector #2 wrote up a Contravention Notice for this night and served it on March 16-17, 2002, with two other CNs. She testified that in her view, this establishment was not primarily engaged in the service of food on this occasion. She testified that The Urban Well clearly is a restaurant in design and that some of the activities she observed were consistent with a restaurant operation. For example, there is nothing wrong with patrons remaining in a restaurant after a meal to continue drinking alcohol. Likewise there is nothing wrong with servers clearing a table after the patrons have finished a meal. However, in her view the situation on this night was not consistent with a restaurant. She noted that at 0045 hours there were two staff on door control and people lined up waiting to gain entry, the kitchen was not actively preparing food despite there being people waiting to enter, the licensee was permitting dancing despite it being prohibited entertainment, there were 186 patrons who were mainly dancing, standing and drinking, and the number of patrons exceeded the number of available seats.

She testified that it is not common to have staff on door control at a restaurant. That is consistent with a cabaret or neighbourhood pub.

The Branch Manager ("manager")

The manager testified that there were about 15 people in a lineup outside and there were 2 door staff, one outside and one just inside the door. He also testified that the premises were extremely crowded inside and, in particular, area 02 was so congested that the area between the bar and the pony wall was totally blocked with patrons about 5 deep, and the exits were blocked. He spoke to the restaurant manager as soon as they entered and instructed him to take immediate steps to get the numbers down and to have patrons seated. At

approximately 0050, the two inspectors completed counts and reported 182 and 169 respectively. One inspector reported a count of 61 patrons in area 02.

The restaurant manager instructed staff to move patrons out of area 02 to area 01 and to get people seated. However, the patrons would not cooperate, some moved to area 01 and sat on each others' laps, some refused to move, and some patrons jeered the inspectors. The manager testified that the door staff were still admitting patrons.

At 12:55 A.M., the manager told the restaurant manager that he considered the situation to present a public safety risk, that he was suspending the liquor licence immediately, and that the licensee had to cease liquor service and clear the restaurant immediately. When patrons found out what was happening, some became verbally abusive. The manager telephoned the Vancouver Police Department for assistance because of the number of people being put out onto the street and to assist with the safety of the inspectors.

The branch staff went into the kitchen and observed the restaurant through a service window. The manager recalled that the kitchen appeared to have been shut down, with no pots on the stove, no food visible, and food preparation areas clean. He testified that one patron came into the kitchen, appearing intoxicated, and made abusive comments to the branch staff.

By 12:58 A.M., the inspectors' counts were 138, not including staff, and 157, including staff, respectively.

At approximately 1:10 A.M. the manager went outside to move the branch's vehicle which was parked in front. When he returned at 1:15 A.M. he told the manager the police had telephoned and were on their way. The manager testified that by 1:20 A.M., the numbers had reduced to approximately 8 patrons. The manager could not say what time the police arrived or whether they were

outside before the patrons dispersed. However, he testified that the patrons left in a reasonably orderly fashion and the incident did not escalate.

The branch's Contravention Notice alleged overcrowding, prohibited entertainment, intoxicated patron and not primarily engaged in the service of food. The manager testified that one of the branch's factors used to gauge whether the latter contravention has been committed is the ratio of food to alcohol. As a rule, the branch will expect to see food to alcohol ratios of about 60% to 40% for restaurants. If the alcohol sales are higher, the branch will take that as a possible indicator that the restaurant has ceased being a food primary establishment. The manager testified that in his view, the sales reported for this night (Exhibit No. 5, tab 35) were not consistent with a food primary establishment.

March 2, 2002

Inspector #2 attended The Urban Well again the following night at 10:20 P.M. She testified there was a line up of approximately 25 people and a door control employee who told her the capacity was 122 patrons. The inspector went inside and spoke with the restaurant manager and asked him to permit the door control employee to accompany her on a count. They counted 37 people in area 02. At the end of the count, her counter showed 132 people, including staff, and his showed 129.

The inspector instructed the restaurant manager to reduce the numbers in area 02 and not allow any more patrons in until numbers had been reduced. She testified that the restaurant manager was cooperative, as he always has been, he took responsibility for the overcrowding, and he did not seem concerned about the fact that the restaurant was over capacity.

The inspector testified that there was no disk jockey or dancing, food was in evidence, there was cutlery and condiments on the tables, patrons were eating and the kitchen was producing food. Everyone in area 01 was seated.

March 8, 2002

Meeting with licensee

The manager testified that he contacted the licensee to discuss his concerns that problems at The Urban Well were escalating, to the point that he had imposed an immediate suspension. The licensee came to a meeting at the branch office, in the company of a consultant; the manager and a liquor inspector attended on behalf of the branch. The manager testified that his objective was to see what plans the licensee had for bringing the establishment into compliance.

The manager testified that the licensee indicated he would take steps to reduce the overcrowding. In his view, the licensed capacity was much lower than the capacity of the establishment and he intended to apply for an increase. The manager said that the licensee repeatedly asked what capacity would be acceptable and the manager repeated that the licensed capacity was the limit, at 98 patrons.

Concerning the other problems - standing and drinking, entertainment, dancing, service without food – the licensee indicated that the way he intended to run the establishment did not fit into a branch model and that he thought the terms of his licence were restrictive. The manager testified that he told the licensee he could apply for dancing to be permitted, but it would mean closing at midnight; the licensee said he was not going to apply.

The manager testified that he told the licensee the branch would inspect the premises that night. The licensee advised that a different restaurant manager would be working that night, and provided his name.

Premises inspection

The manager testified that he attended The Urban Well at approximately 11:45 P.M. He testified that Area 02 was again congested and the exit was blocked. In Area 01, patrons were standing and wandering about with drinks. He said the lighting was dark and he did not recall if there was music, whether patrons were eating or whether there was evidence of food service. However, he did not record any contraventions of service of alcohol without food.

Using a mechanical counter the manager counted 121 people in area 01 and 46 in area 02, for a total of 167. He reported this to the restaurant manager who had the door staff do a count, which was reported to be 15 less than the manager's.

The restaurant manager told patrons to move out of area 02 and some moved to area 01 but there was not enough seating for everyone. The manager testified that the staff did not require anyone to leave. He also testified that the restaurant manager told him he thought the licensed capacity was 129 patrons.

March 16/17, 2002

City Inspector

A Property Use Inspector ("city inspector") from the City of Vancouver testified. His duties include enforcement of permits and licences for property use, including liquor licences, business licences and bylaws regarding licensing and zoning. The city inspector testified that he attended The Urban Well in the early morning

hours of March 17, 2002, as part of the 'flying squad', a multi-agency inspection team. He had attended twice previously as part of the flying squad. On this occasion there were 2 police officers, 1 fire inspector, a liquor inspector and the city inspector. His stated his purpose for being there was to ensure the licensee had a valid City business licence and was operating within the requirements of that licence.

The city inspector testified the inspection was from approximately 12:45 A.M. to 1:15 or 1:20 A.M. He noted the time of his inspection as 1:00 A.M. When he arrived, he noticed people arriving by taxi and going into the restaurant. There was a door staff, which he said are common at cabarets or neighbourhood pubs, but not at restaurants. When he entered he identified himself to the restaurant manager. He then went into area 01 where a disc jockey was playing loud music and about 12 people were dancing. He observed that one or two tables had dirty dishes but otherwise he saw no food service or consumption. He noted that patrons were drinking. He testified that he thought there were more people than table seating.

The city inspector went to the bartender and was shown the business licence and the liquor licence. He testified that dancing is not permitted under the bylaw. He walked through area 02 where he counted approximately 25 people. He had a mechanical counter with him but did not record his counts. As he was approaching a staff person to talk about the dancing, the music and the dancing stopped.

He described the kitchen as closed, no food being cooked or served, and he recalled seeing one employee doing clean-up. He observed that there was a full food menu with appetizers, and that it was a fully equipped commercial kitchen. He also observed that when empty, with the exception of the dance floor and the disk jockey table, The Urban Well would look like an ordinary restaurant.

The city inspector testified that he had reviewed the city files for this establishment. He was aware of concerns the city had in 1997 and 1998 about service of liquor without food and overcrowding; and in June 2000, for operating as a cabaret or neighbourhood pub. The inspector had brought documents that had not been given to the branch prior to the hearing. I declined the branch counsel's request to have them entered as exhibits on the grounds that they had not been disclosed in advance of the hearing.

The city inspector did not keep a note of his counts but testified that he recalled his counts were within 2 or 3 of the other squad member counts. He testified that on the other two occasions he had inspected this premises, there were more patrons, with people standing shoulder to shoulder. He considered this occasion to be more moderate. As the squad was leaving, people were arriving and being turned away. The fact that people were wanting to gain entry at that time of the morning suggested to him that they were not going for a meal and that at some point this restaurant had turned from a restaurant to a cabaret or neighbourhood pub.

Liquor Inspector ("Inspector #2")

This is Inspector #2, referred to above under March 1/ 2 and March 2, 2002. She testified that the multi-agency inspection team was conducting inspections of problem premises, of which The Urban Well was one. She testified that when they arrived at approximately 12:50 A.M., there was a small line up outside, and her count was 116 patrons. The police officer's count was 122 patrons. She counted 42 patrons in area 02; her second count of that area was 39 patrons.

She testified that there was disc jockey playing music and most of the patrons in area 01 were dancing. Shortly after she arrived she told the restaurant manager to stop the music and the dancing. He was aware that music and dancing were not permitted under his licence. She testified that she had the impression he was

“smiling her off”, as though this is the way of doing business and he will continue until told to stop.

She did not recall seeing food. The kitchen had been cleaned and the cook was present but there was no cooking activity. She had brought the CNs for March 1-2 and March 2, and she wrote up another CN for March 16-17; she served the restaurant manager with all three CNs. For the March 16-17 CN, she testified that she did not include an allegation of ‘not primarily engaged in the service of food’ because she knew the branch manager had met with the licensee about this issue and she thought it was not appropriate for her to allege that when it was in the process of being addressed. However, she testified that there was a line-up but no kitchen activity, which suggested to her that the restaurant was not expecting new arrivals to order food.

Evidence – The Licensee

Officer and Director of 532871 B.C. Ltd. (the ‘Licensee’)

This witness was initially involved with the Yew Street establishment as a food and beverage consultant in 1997 and became a director of the company on December 31, 1999. He became more active in the operations of the company and as of December 12, 2001, he assumed responsibilities of an officer and he has been in charge of the day to day operations. [

].

[

].

He stated that there has been a restaurant at this location since the early 1980s. The original restaurant was a notorious night spot for drugs and was probably closed by the police or the LCLB. Subsequently, there were a variety of small operations that did not succeed. In 1994/95 the space was reconfigured to the present size. As of January 1997, The Urban Well opened.

The licensee noted that there are 3 or 4 residences immediately above the restaurant who have not complained about noise from music, dancing, or clientele. The licensee stated he is on good terms with the strata council. He also stated that over the years there have been no incidence of violence and the police have not had problems with their clientele. He is involved with the Kitsilano Beach Merchants Association to provide security in the neighbourhood and to consider community issues.

He described the dance floor/stage as primarily a performance area of approximately 14' x 14', used for comedy shows on Mondays and Tuesdays and frequently for a disk jockey on the other nights. There is sound equipment for the comedy performances and for the disc jockey. The disc jockey equipment is set up on a table in the corner, usually curtained off. The floor space is used for restaurant seating only during busy times, such as Christmas. Otherwise, it is clear.

He described the decor of the restaurant as subdued casual, elegant, with wood furniture, carpeting and velvet curtains. Patrons are greeted by a hostess. There is pot lighting that highlights the walls, displaying local artists. There are candles on each table. In area 01 there is a mix of round and rectangular tables in the middle of the room and raised seating by the walls. Area 02 is a bar with stools, separated from area 01 by a pony wall that is approximately 5' from the bar.

He also described the layout in the kitchen. On a typical Friday night, the licensee employs a minimum of 4 cooks plus a chef. All kitchen staff wear

kitchen whites. The menu includes appetizers, tapas, pizza, pasta, sandwiches and full entrée items. The current theme of the cuisine is West Coast Global. The appetizer and tapa servings are generous. With the exception of bread, all menu items are made in-house. The licensee testified that all items on the two page standard menu and the one page feature menu are available all hours. He also testified that The Urban Well has been written up in many magazines and newspapers and has been commended for the quality of food and service.

The Urban Well has an extensive liquor list including specialty and premium products. The licensee testified that he believes the liquor prices at The Urban Well are higher than other similar establishments and that the food prices are lower. The bar list contains a variety of martinis, at a starting price of \$7.00. He compared the liquor service as similar to hotel lounges. The Urban Well offers a more extensive and higher end selection of spirits than most liquor primary establishments such as pubs and cabarets.

The licensee was aware that one factor the branch considers in whether a restaurant is operating outside its class of licence, is whether the ratio of food sales to liquor sales exceeds the guideline of 60% food to 40% liquor. He acknowledged that on November 24, 2001, and March 1, 2002, the ratios were in the order of 25% food to 75% liquor. He pointed out that if a patron had a \$10.00 menu item and 2 martinis, the sales would always be out of line with the ratios. He testified that sales differ and that the restaurant business does not conform to the branch's expected ratios.

The licensee testified that this is a very popular restaurant and it is common to have people queuing. The door staff is responsible to moderate the flow of patrons to the hostess and to maintain order in the queue. The licensee attempts to maintain an amiable, vibrant atmosphere to attract patrons to come and stay for a few hours. The clientele is in the 25 to 40 age group, young professionals and office workers, and about 75% of their business are regulars from the

neighbourhood. The licensee encourages this restaurant as a meeting place for neighbours. The licensee encourages that by having comedy acts and the disc jockey. He said it is usual for patrons to arrive for dinner between 7:00 to 9:00 P.M. and stay until 12:30 or 1:00 A.M. There is not a high table turnover, except for the summer beach traffic.

He testified that all patrons are given menus and are seated. Most patrons order something small from the menu. If a patron just wants a drink, the staff refuse. Frequently, patrons move around the restaurant after they eaten, to sit with other patrons, or to move to the patio. He testified that in area 01 there is seating for approximately 135 people.

The licensee testified that he is aware patrons sometimes dance. He suggested that usually it is women, late at night, and only on Fridays and Saturdays. The licensee does not stop people from dancing although he knows it is prohibited by both the liquor licence and the city business licence. He testified that he has impressed upon the staff that this is not a dancing club. The licensee does not promote dancing. However, the licensee acknowledged that dancing contributes to a vibrant atmosphere.

Concerning the overcrowding issues, the licensee testified that the situation on November 24-25, 2001, occurred because of inadequate communication between the door staff, hostess and management staff about the number of people on the patio and the numbers who had entered and left. He said that after this error, he increased the door staff to 2 and provided mechanical counters.

The licensee was candid in saying that he had not instructed staff to maintain the capacity permitted by the licence. He testified that holding the occupancy to 98 patrons would cause the restaurant to look very quiet and that he could not operate the restaurant at that capacity. He instructed staff to maintain a level

that is 'comfortable' for the guests. In his view, it would be possible to continue providing proper service with a capacity of 150 to 155 patrons. He acknowledged that the restaurant managers could have assumed they were acting on his instructions if they kept the capacity below 155 patrons. The managers would have correctly assumed they would not be disciplined if they maintained that level. The licensee testified that he would not have authorized capacities of 42 or 47 patrons in area 02 and said that it would be difficult to get that many people in there.

At the meeting with the branch on March 8, 2002, the licensee continued to indicate that he could not operate at a capacity of 98 patrons. He told the branch manager that he thought the licensed capacity should be higher. He testified that he told the regional manager he would work to getting the numbers down to a workable number, but he couldn't do it in one day because it would be drastic financially.

The branch manager's count on March 8, 2002, was 167 patrons. The licensee said he had transferred a manager from the other location, with the idea that it would be easier for him to introduce changes to the clientele. However, he did not maintain the numbers. A large party showed up late for their reservation, after their tables had been given to other patrons, and the manager allowed them in.

The licensee testified that he was very angry about the March 8, 2002, incident because he had wanted to show a different view to the branch regional manager when he came for his inspection. The licensee acknowledged that the two managers involved in these alleged contraventions were not fired or docked salary because of the contraventions. However, for the March 8, 2002, incident, he let the manager know how angry he was during a discussion that lasted about an hour.

On March 16, 2002, the counts were 116 by the branch inspector and 122 by the police officer. The door staff count was 103.

In July 2001, the licensee submitted an application to increase the building occupancy load capacity (BOL). Effective September 20, 2002, the BOL capacity was increased to 163 persons. The licensee testified that in order to achieve that BOL he was required to put a 6" step at the north end of the patio at the street level and to install a new fire door between the laundry and storage rooms.

In September 2002, the licensee wrote a press release, which was never published, but which he sent to the Ministry of Public Safety and Solicitor General (Exhibit No. 22). The licensee is a member of the Restaurant Advisory Committee and was aware of the pending legislation to implement recommendations from the Surich Review. In his intended press release, he was venting against the branch for continuing to prosecute restaurants and night spots. He testified that he was speaking on behalf of the struggling hospitality industry which the government wants to revitalize, but the branch apparently does not. He stated that his reference to bureaucrats not wanting to let go and to "treason" were not intended to reflect on this pending hearing (commencing one week later) but were his attempts to let the Minister know his state of mind.

The licensee submitted that the branch's total recommended suspension of forty-five (45) days would cause the financial ruin of the business. He testified that it is now operating in total compliance, with drastically reduced numbers from what is needed financially. If the suspension is imposed, the licensee would have to lay off the entire staff. As of the end of September 2002, the licensee employed 26 staff at this location.

Witness A

The licensee provided evidence from a vice president of the Canadian Restaurant and Food Services Association. He has had a connection with the restaurant business throughout his life. He testified that it is usual for a restaurant to commence kitchen clean up around 10:00 P.M. He said that after the dinner rush, typically 7:00 to 9:00 P.M., one third of kitchen operating expenses are labour costs so it is not prudent to keep staff working.

He acknowledged that there are different expectations in different locations. For example, in the West End of Vancouver it would not be unusual to see line ups at restaurants late at night. The timing of clean up and the extent of early clean up depend on the level of business.

This witness testified about his involvement in the Surich review process and his understanding of the intended outcome. In his view, the point was to simplify rules so it would be easier to understand what was permitted in, for example, a restaurant. The number of liquor licence classes was reduced to two – food primary and liquor primary. He acknowledged that many of the former rules continue to apply to restaurants and that for some of the substantial changes, such as an increase to the patron capacity, it is necessary to apply to the municipality.

Witness B – []

This witness is a []. []. He described the restaurant's daily routine. On a usual day, there are 10 to 15 dinner reservations, of 4 to 25 patrons per group. He testified that 90% of the menu items are created on site. The 'fresh' sheet and the menu are available all day. There are 4 or 5 other employees in the kitchen. He described the tasks of the cooks in food

preparation and the operation of the kitchen. He testified that of the approximately 30 tables, usually there will be a turn over of 10 to 15 tables during the dinner rush, from 7:00 P.M. to 10:30 P.M. He also testified that most of the patrons seated at the bar stools order food.

[] described the point of sale system whereby the server enters the patrons' orders and the kitchen receives a copy of the printed food order. Those food chits remain in the kitchen until the end of the night. It is not possible to retrieve the beverage order to match up the food chit. He indicated that servers keep the credit card receipts and file them at the end of the night. On occasion he has had to resort to those receipts when a patron questioned a bill.

This witness testified that he usually leaves around 11:00 P.M. and probably left at his usual time on each of the nights in issue here. He said the kitchen remains open for service of all menu items until closing. The cooks leave for the night on a staggered shift. Before leaving, they give their stations an initial clean up, repackage food, and do some general kitchen cleaning. He testified that on average, after the dinner rush, the kitchen receives a food order about every 10 minutes. In the last hour, there is typically a rush particularly for appetizer items such as tapas, nachos and pizzas. He said that the portion sizes are generous and he described a plate of nachos as containing about 2 pounds of food. The last cook leaves at 2:15 to 2:30 A.M.

[] testified about the atmosphere in the restaurant. He said that the music carries but is not so loud that patrons cannot converse at a table. The lighting is subdued, with candles on tables, but is bright enough to see whether the food is properly cooked. Some patrons dance on Friday and Saturday nights, with between 2 and 20 on the dance floor. He acknowledged that he knew dancing was not permitted. He also knew that the licensed capacity was 98 patrons.

Submissions - *The Branch*

Branch counsel submitted that I could draw adverse inferences from the licensee's failure to submit evidence that touch on these alleged contraventions and find that the licensee did not contradict the branch's evidence. During the licensee's evidence, witnesses spoke about log books, incident files, and the reservation book. All of those apparently contain information relevant to the issues to be decided here, but they were not produced.

Counsel submitted that the licensee's evidence was clear that he authorized the staff to breach the terms and conditions of the licence and that he had no intention of following the legal requirements. These contraventions did not arise through mistake or accident; the licensee took a calculated risk. The September 10, 2002, press release, Exhibit No. 22, shows this licensee's hostile view of the legislation and the enforcement regime.

Alleged contraventions #2 and #8, not primarily engaged in the service of food, arise by operation of ss. 17(2) and (2.1) of the *Regulations*. Counsel for the branch submitted that is not enough for a class B licensee to say I have a kitchen and therefore I am operating as a restaurant. Further, a class B licensee is not entitled to become a cabaret or a pub some 3 hours prior to closing time, as occurred on these occasions.

Branch counsel submitted that when patrons enter at 1:00 A.M. and see no sign of food service or regular restaurant operation, they would not be expected to understand they had just entered a class B licensed restaurant. Referring to s. 17(2)(c), (k), (l), and (n), counsel submitted that the evidence demonstrated the licensee was serving liquor to patrons who had not ordered food and who the licensee could not reasonably expect would order food, the licensee was serving

liquor to patrons who were not seated, and there was an absence of flatware, china, etc.

Referring to s. 17(2.1), he submitted that an essentially shut down kitchen is not consistent with a 'restaurant' that was full of patrons and had a queue waiting to gain entry. On March 1-2, 2002, there was one salad and one noodle dish, but 192 patrons. Patrons were not there to eat; they were there to drink and dance, and the establishment was operating in cabaret mode. Regardless of the time of day, this has to be a restaurant during all hours of operation.

Counsel pointed to the décor, the extensive beverage menu, the dance floor, the low table turn over, management's encouragement for patrons to stay for the night and drink, and the financial records showing sales ratios of 25% food to 75% liquor. He submitted that those factors are indicative of a liquor primary establishment rather than a food primary establishment. The licensee admitted that he wants patrons to come in and stay for the night. The point of that is that he wants patrons to stay and drink in a way that is not connected to the service of food.

The branch's counsel submitted that although the licensee admitted that dancing was prohibited entertainment, it is clear that this licensee was not going to stop voluntarily. It was a contravention of both the liquor and business licences. The licensee could easily have stopped the dancing by turning down the music or closing the dance floor. However, the licensee deliberately persisted.

It would be a simple task in this restaurant to control the numbers. It was not a matter of miscommunication that led to overcrowding, that occurred because it was the licensee's intent to exceed the licensed capacity. Even after the branch suspended the liquor licence, the licensee was not serious in trying to comply. At best, was bringing numbers down, but not complying. The licensee could easily have complied.

Branch counsel submitted that there is nothing in the new *Regulations* that would alter this situation. A restaurant still has to be primarily engaged in the service of food, still has the licence capacity, and the penalty schedule still applies. Regardless of the new *Regulations*, this licensee was required to comply with the regulations in place.

Branch Submissions on Penalty

Counsel for the branch submitted that although the licensee argues that the branch's proposed penalties will create financial hardship, that argument cannot stand in the absence of financial records to demonstrate financial hardship. Although the branch requested receipts the licensee did not produce them, saying they could not be produced by their system. However, [] testified that food receipts are kept on a spike in the kitchen and that there is some ability to deal with patron inquiries of overcharging on a bill. During the hearing, VISA receipts were produced, but not in advance of the hearing. The licensee was asked for financial records and did not produce them.

Concerning the overcapacity contraventions, branch counsel submitted that the numbers were grossly over capacity, regardless of which numbers are considered. The only issue is whether there is something in the evidence to suggest that the scheduled penalties should not be imposed. The evidence again indicates that this licensee was persistent in contravening the terms and conditions of the liquor licence. Exhibit 20 contains NOEAs issued after these contraventions, indicating that the branch had ongoing concerns.

The licensee's evidence was that he thought 155 patrons was a comfortable level. He did not give specific instructions to the staff on the number to maintain. However, by his own admission, he continually authorized breaches. Even after a meeting with the branch's regional manager and the licensee's advisor, the

licensee did not comply with the licensed capacity. That same day, the regional manager attended and counted 167 patrons.

Branch counsel submitted that the licensee cannot point to the new BOL capacity to say there were no safety concerns with the capacities on these occasions. The new BOL capacity was granted only after changes were made to the premises. Further, on some occasions, the numbers were above the new BOL figure. The issuance of the increased BOL capacity does not eradicate safety concerns on these occasions.

Concerning the contravention 'not primarily engaged in the service of food', counsel submitted that the branch was lenient in recommending the minimum penalties for these incidents, particularly given the licensee's willful contraventions. Overcrowding and dancing are discrete contraventions that carry separate penalties.

For the intoxicated patron contravention, counsel also submitted that the minimum penalty showed leniency.

Submissions – *The Licensee*

In response to branch counsel's invitation for me to draw adverse inferences, counsel submitted that only VISA receipts are available and they do not show a breakdown between food and liquor. He also submitted that the licensee had not called certain witnesses, such as the manager, because the licensee was admitting some of the contraventions. The licensee called [] who was familiar with how the restaurant operates and who addressed those evidentiary issues.

Counsel submitted that the mode of operation for this restaurant is to endeavour to get people in to eat, and then have them stay for the rest of the night. There is

nothing illegal about patrons eating and then staying to drink. Patrons stand, move around, visit friends. The clientele is largely local. Counsel took issue with the timing of the branch's inspections noting that most people do not go out for a meal at those hours. The evidence was that the busy meal period is between 7:00 to 9:30 P.M. On March 2-3, 2002, the inspection occurred at 10:20 P.M. which is the tail end of the dinner rush. On that occasion, patrons were seated, food was being served, no one was dancing. On the other occasions, at the times of the inspection, one would not expect to see a busy kitchen. What is required is that the kitchen is able to produce food. On March 1-2, 2002, the inspectors reported that the kitchen was still open, a caesar salad was being served and a noodle dish was being cooked. The kitchen had been partially cleaned, but all the witness agreed that is not uncommon.

Counsel referred to the branch's 60:40 ratio and urged that it is only one consideration. Looking at the menu, the most expensive food item costs \$20.00. The average food item is about \$15.00. He submitted that for a couple, with one pre-dinner drink at \$7.00 each and a modest bottle of \$30.00 wine, the result is \$30.00/\$44.00. There is no reason why a patron could not order an \$8.00 hamburger and three \$7.00 martinis. He submitted that the ratio is only one factor and it doesn't always work, particularly not in a restaurant that encourages patrons to stay and drink. He further submitted that the actual ratio from the two nights in question, close to 25:75, is not surprising.

Counsel noted that the menu includes an assortment of hot and cold appetizers, entrees, and specials. The kitchen is a fully operational commercial kitchen and the evidence shows that there are 4 to 5 cooks each day and the kitchen and food preparation are run like any other restaurant. The licensee does not advertise itself as anything other than a restaurant. Additionally, there are no beer posters on the walls or neon liquor signs and there are no strobe lights or mirrors or any other indicia to suggest that this is a cabaret or bar.

The licensee admitted allowing dancing. That occurs sometimes on Friday and Saturday nights, late at night.

Concerning the contravention 'operating outside class', counsel submitted that this describes something that happens over time, not something that could occur on a single day. So, if a restaurant removed the kitchen and turned the establishment into a cabaret, that would be operating outside class. Therefore, if I find that there was a shift and this licensee was operating outside class, that would constitute only one contravention and consideration of only one 10 day penalty.

The branch based the contravention on indicia of patrons standing, drinking and dancing, no evidence of food service, overcrowding, etc. Initially, the branch included separate allegations of standing and drinking, removing liquor from the red lined area and recommended separate penalties for those as well as recommending a 10 day penalty. Currently, the branch alleges overcrowding and dancing as separate contraventions and says they are elements of 'operating outside class'. It is not proper to suggest penalties for both. That results in suspensions twice for the same thing.

The licensee's counsel submitted that it is appalling for inspectors to show up consistently at 1:00 A.M., say no food is being eaten and then seek a 20 day suspension. The regional manager did not inspect the kitchen, open refrigerator doors, etc. In 20 minutes he came to a conclusion that this was operating like a cabaret, or something other than a Class B restaurant. The crux of this case is that restaurants permit patrons to stay and drink. There is nothing wrong with that. The ratio of 60:40 is patently unreasonable but it is in the *Regulations*.

Concerning the intoxicated patron allegation, licensee's counsel submitted that the inspector's evidence is insufficient. She did not speak with the patron or with

his friends, did not see him have a drink and, even though she was within two feet of him, she did not smell alcohol.

Licensee's Submissions on Penalty

Counsel submitted that the evidence shows the licensee took action to reduce the numbers, following November 24-25, 2001. He was angry with the manager and told him to get the numbers down. Admittedly, the licensee never told the staff to hold the capacity to 98 patrons. The evidence shows that the licensee was restricting the numbers – there were line ups when the capacity was considerably reduced.

The licensee took steps to resolve the problem by applying for an increase in the BOL capacity. Until that was granted, he could not apply to the branch to increase the licensed capacity. But, it took 15 months to get the BOL capacity increase.

Counsel submitted that the proposed press release shows the licensee's tremendous frustration. He had been trying to get his liquor licence capacity increased. Everyone knew the liquor laws were changing, including the constituent elements of the main contravention. Counsel submitted that as of December 2, 2002, the constituent elements of standing and drinking, dancing, ordering from the bar, not eating, and 60:40 ratio would be repealed. The licensee has admitted that he contravened and he has demonstrated that he wants to comply. These events occurred while he was attempting to get the establishment into compliance.

Counsel acknowledged that a lengthy suspension would be in order but submitted that the branch's recommendations amount to overkill. He referred to other decisions that had been rendered before the new Penalty Schedule came

into effect since there were no recent reported decisions dealing with numerous contraventions.

He suggested that the 10 day penalty could be reconciled by taking out the constituent elements or making those penalties concurrent.

Counsel submitted that if I find that the intoxication occurred, it is not necessary to impose a penalty. There is no history of allowing intoxicated patrons. Alternatively he submitted if I find a penalty is necessary, I could make it concurrent with the licensed capacity penalties.

Reasons and Decision - *Substantive Allegations*

Given that the licensee admitted all counts of overcrowding and prohibited entertainment, in this section I will deal solely with intoxicated patron (#7) and not primarily engaged in the service of food (#2 and #8).

#7 *Permitting an Intoxicated Person to Remain, March 2, 2002*

The total evidence for this alleged contravention comes from Inspector #2. Her observations were made at approximately 12:50 A.M., after her second count of 155 patrons (157 total, less 2 staff), from a reasonably well lit area where she had gone to write up her notes.

Inspector #2 reported the patron's condition to the manager and, apparently, the manager went to check. The evidence does not disclose what steps the licensee took after that. The manager did not testify. There is no evidence to suggest that the staff were heeding this patron's condition or taking steps to have him leave. The licensee says that the inspector needed to do more to confirm that the patron was intoxicated. I find that the condition described by the inspector is consistent with over consumption of liquor. It was open to the licensee to present contrary evidence if the patron's condition had been caused by something other

than liquor. I accept the inspector's evidence and find that her description of the patron establishes that he was intoxicated beyond the ability to walk steadily, to hold his head up, to talk to his friends or to care for himself.

In the absence of evidence to the contrary, I find that the evidence establishes the branch's alleged contravention that the licensee permitted an intoxicated patron to remain in the premises, contrary to s. 43(2)(b) of the Act.

*#2 and #8 Not primarily engaged in the service of food
November 24 - 25, 2001, and March 1-2, 2002*

Considerable testimony and submissions were directed to the operation of this establishment, particularly the kitchen. I have considered the totality of the evidence and conclude that this establishment is capable of operating as a full service restaurant. I accept that the kitchen is a well equipped commercial kitchen, that the licensee employs appropriate chefs, cooks and other kitchen staff, and that work schedules are staggered to meet the various tasks required in running a restaurant. I also accept the licensee's evidence that it is not unusual, indeed it is usual, for a restaurant to do some kitchen clean up after the dinner rush. This has the advantage of being able to send staff home on a staggered basis, thus saving some labour costs and, obviously, it reduces the time required for final clean up. However, there is always the chance that large orders will come in necessitating making the kitchen fully operational again.

The licensee's [] testified that, after the dinner rush, there are food orders on average every 10 minutes. In the last hour before closing, there is usually a rush – for appetizers, nachos, etc. [] was not present during that last hour on these two occasions. From all of the evidence, I find that there was no 'rush' on food orders. The inspectors testified to some food being prepared. However, it was minimal and does not suggest that orders were being received every 10 minutes or that there was a 'rush' of orders.

I find that the licensee offers a reasonable selection of menu items and that the menu items are available at all times. I accept that the décor – lighting, wall art, fire place – is consistent with a restaurant.

Another area that generated considerable evidence and submissions is the relevance and reasonableness of the branch's food to liquor ratio guideline. The 60:40 ratio is one factor set out in the *Regulations*, s. 17(2.1). I accept the licensee's contention that this is but one factor and that it will not always be determinative of whether an establishment is primarily engaged in the service of food. The licensee submitted that in this restaurant, because of the wide selection of liquor and the high-end premium liquor, it is not usual for liquor bills to equal or exceed the food bills. Particularly at night, this could be true. On these two occasions, the food to liquor ratio was about 25:75. The daily sales records from which the ratios were determined included sales from the whole day. One could anticipate that the night sales would be somewhat balanced by daytime sales that would not include large quantities of alcohol.

The ratio does not define the alleged contravention. However, it is a factor and on these occasions it is a factor that tends to support the inspectors' observations that liquor sales exceeded food sales.

The inspections for these alleged contraventions occurred in the early morning hours. I agree with the licensee that one would not necessarily expect to see a busy kitchen at that time of night. However, I find that one would expect a busy kitchen if patrons were being permitted entry because, according to the terms of the liquor licence, there is an expectation that restaurant patrons will be seated and will order food. I find as fact that the conduct of the restaurant (discussed below) was not directed to providing seats and food, and I find that is indicative of a licensee not intending to operate as a restaurant.

Licensee's Counsel submitted that a restaurant cannot be said to be 'operating outside class' on a single occasion. I disagree. What the *Regulations* address is the definition of a dining establishment that is 'primarily engaged in the service of food during all hours of its operation'. An establishment could change from 'primarily engaged in the service of food' during the course of an operating day. I find there is no merit to the licensee's submission that it involves more fundamental changes.

Conduct of the Licensed Premises

The licensee testified that he wanted The Urban Well to be a neighbourhood meeting place. He did not instruct staff to maintain the legal capacity, to require patrons to remain seated, or to prevent dancing. The licensee had a dance floor which was always available for dancing (save exceptional occasions) when there was no comedy performance. I find that the licensee used music and dancing as an enticement for patrons to come to the establishment.

I find as fact that most patrons within the establishment at the time of the inspections on November 24-25, 2001, and March 1-2, 2002, were not eating. The licensee submitted that the crux of the case is that restaurants permit patrons to stay after dinner to drink. I do not accept that characterization of these facts. Some of the patrons may have had a meal and stayed on. However, there was insufficient table seating for the number present and there was a queue which was being managed by door control. Those facts are inconsistent with the licensee's simplified statement of the crux of this case. I find the scenario does not support the licensee's contention that patrons were just having a few drinks after dinner.

Some other facts that give definition to the conduct of the establishment are the crowded bar in area 02, patrons standing and ordering directly from the bartender, servers circulating with drinks trays, minimal, if any, evidence of food

accoutrements (cutlery, dishes, condiments), patrons dancing, patrons waiting to enter, and there being insufficient seating for the number of patrons.

The licensee testified that every patron was shown to a seat and given a menu. I do not accept that evidence. The preponderance of evidence is to the contrary. I find that potential patrons were prepared to stand in line late at night, early morning hours, in anticipation that they would enjoy the ambience of a night-club/cabaret/neighbourhood pub style orientation. Nothing in the evidence about the operation of the establishment supports a suggestion that potential patrons were waiting in line for a food primary experience.

Based on the totality of the evidence, I find that the licensee altered the character of the restaurant from a food primary focus to a liquor primary focus on November 24-25, 2001, and on March 1-2, 2002.

Reasons and Decision – Penalty

The overcrowding allegations are not disputed, except to a slight degree on the total numbers. I find that contraventions #1, 3, 5, 9, 10, 11 are made out. The licensee disputed the branch's proposed penalties.

The licensee admitted the prohibited entertainment contraventions (#4, 6 and 12) and accepted the branch's proposed penalties of one (1) day licence suspension per occurrence (total 3 days).

I have found that the licensee permitted an intoxicated person to remain on March 1-2, 2002, and that the licensee was not primarily engaged in the service of food on November 24-25, 2001, and March 1-2, 2002. The licensee disputed the branch's recommended penalties for all of these.

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

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a 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 *Regulations*.

The branch's primary goal in determining appropriate penalties is achieving voluntary compliance. The licensee submitted that he has turned things around at the restaurant and now is in compliance. He also says that these events occurred while he was attempting to get the establishment into compliance. I do not accept that submission. The evidence shows a licensee who objected to operating as a restaurant subject to the legislated terms and conditions, and who purposely acted contrary to the law. The licensee admitted as much during his meeting with the regional manager on March 2, 2002. Consistently, the licensee permitted overcrowding and prohibited entertainment.

Intoxicated Patron

For the intoxicated patron contravention, the minimum penalty in the Schedule is 4 days licence suspension. The licensee argued that since this was the first time this contravention had occurred I could consider not imposing a penalty. There have been occasions when the adjudicators, under the new enforcement regime,

have not imposed penalties. Those have been characterized as exceptional, extenuating or unusual circumstances or there have been mitigating factors.

I find the degree of overcrowding that the licensee not only allowed but encouraged, resulted in the licensee's staff being unable to control and monitor the patrons. This does not speak to a situation deserving leniency. Rather it suggests that stiff penalties are required to encourage this licensee onto a path of voluntary compliance.

Overcrowding, prohibited entertainment, & 'operating outside class'

The penalty considerations for these contraventions involve issue statement 1(b) and (c):

- (b) Are there constituent elements of the contravention that, on their own, would also be contraventions?
- (c) Is it appropriate to apply penalties for overcrowding and prohibited entertainment in addition to penalties for not primarily engaged in the service of food?

The licensee submits that the branch would be double penalizing if I impose penalties for 'operating outside class' as well as for the constituent elements - overcrowding and prohibited entertainment. I appreciate the licensee's submission to an extent. I note that the licensee does not suggest that it would be improper to found contraventions for all three, just to penalize for all three.

Clearly, overcrowding and prohibited entertainment are stand alone contraventions. I find that it is appropriate in this case for the branch to impose penalties for the occasions when they occurred without the additional contravention of operating outside class, i.e. contraventions #3, 4, 9, 10, 11 and 12.

However, that leaves the question of whether overcrowding and dancing are constituent elements of 'operating outside class' for penalty purposes in the way the licensee suggests. I find that there are two aspects of this question.

1. Consideration of the penalty schedule

i) In the vernacular of the criminal law, the licensee's suggestion is that overcrowding and dancing are similar to included offences of the contravention of 'not primarily engaged in the service of food'. Although that terminology may not belong in the context of administrative law, it is descriptive of the argument. In my view, it does not arise here. An example in which it might arise is overcrowding beyond BOL capacity, where that capacity is greater than the licensed capacity. A finding of a contravention of the BOL capacity necessarily means that the licensed capacity has also been exceeded.

A finding of the contravention of 'not primarily engaged in the service of food', does not necessarily mean that the establishment was overcrowded or that there had been dancing.

ii) Another way of looking at this issue is – are overcrowding and dancing factors that might lead to a conclusion of operating outside class? Both are, to an extent. Dancing is a factor because it points to a non-eating activity. Overcrowding is a factor because it points to there being insufficient seating to operate purely as a food primary establishment. Both could be interpreted as indicative that the licensee is not focused primarily on food service. However, both could occur without a finding that the licensee is not focused primarily on food service.

In this instance, were those factors so important to the conclusion of operating outside class that they should be treated as part of that contravention rather than as separate penalties?

The penalty imposed for not primarily engaged in the service of food is substantial. The licensee's argument suggests that part of the intention behind legislating such a large penalty is that other contraventions are constituent elements. Or, the penalty is compendious. Therefore, the argument goes, since this attracts a minimum 10 day suspension, it is wrong to also impose suspensions for overcrowding and dancing. Or, I could order that the penalties be concurrent.

Section 53(3) of the *Regulations* directs that if the general manager finds more than one contravention for which suspensions should be assessed, the period of the suspension must be the sum of the suspension periods determined for each of the contraventions. This seems to rule out the licensee's proposal that I make penalties concurrent.

I have looked at some of the other 10 day suspension items in the penalty schedule to see if there might be some guidance. I see that some, such as gambling device (item 5), unlawful activities (item 7) and illicit liquor (items 15 and 17), seem to anticipate a single element, not a combination of elements. In my view, the scheme of the penalty schedule supports a conclusion that each contravention is to be considered as a separate penalty item.

I have considered the licensee's submissions and the scheme of the penalty schedule and I conclude that imposing separate penalties for multiple contraventions that occurred at the same time does not amount to double penalties.

2. The general manager's discretion to impose penalties

I have taken into consideration the totality of the penalties and considered whether it is necessary to impose penalties for each contravention of overcrowding and prohibited entertainment, or whether the mischief sought to be

addressed is sufficiently caught by 'operating outside class'. I have also considered whether there are mitigating circumstances to justify not imposing penalties.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. In this case, the licensee admitted to blatantly violating the legislation because his view of what he wanted to operate did not fit within the definitions the province offered licensees. He knowingly violated the legislation that prohibited dancing and imposed patron capacities, and he operated the establishment in a manner that was not consistent with his Class B licence. I have found it appropriate to impose penalties for these contraventions on the other occasions – contraventions #3, 4, 9, 10, 11 and 12.

Then the question is – on the two occasions when I impose penalties for 'operating outside class', is it appropriate to impose additional penalties?

I have considered the licensee's evidence and submissions and I find there are no mitigating circumstances to justify not imposing penalties on these occasions also. The fact that the licensee had gone further and was committing a more aggressive contravention (operating outside class) does not strike me as good reason not to impose penalties for other contraventions that occurred contemporaneously.

I have concluded that it would not do justice to the intent of the penalty provisions and the branch's goal of voluntary compliance to fold additional, discrete penalties into 'operating outside class'. Each of the contraventions occurred independently of the others. They are separate contraventions and I find that imposing penalties for each is appropriate.

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.

The branch's recommendations resulted in one penalty in excess of the minimum, contravention #11, which occurred exactly one day past the cut-off for being defined as a second contravention. Given the compliance history and the numerous contraventions that were the subject of this hearing, I find that imposing a three (3) day suspension is justified.

Because of the magnitude of the total licence suspension, I am influenced to impose the minimum penalties permitted under the Schedule, with the exception of contravention #11. In some cases, this is the minimum for a first contravention; in others, it is the minimum for a second contravention. The total licence suspension is forty-five (45) days. I note that the suspension results from the application of the penalty schedule which is the reflection of the will of the legislature in dealing with these contraventions. The suspension is the sum of the suspensions for the individual contraventions, as required by ss. 53(3) of the

regulation. I further note that the suspension affects only the sale of liquor, not the licensee's ability to remain open and operate as a restaurant.

Order

Pursuant to s. 20(2) of the *Act*, concerning Class "B" dining lounge liquor licence #169305 for The Urban Well, I impose penalty suspensions totaling forty-five (45) days, as follows:

1. For contraventions #1, #3, #5, #9, #10, and #11, exceeding the licenced capacity contrary to s. 12 of the *Act*, which occurred on November 24-25, 2001, February 22-23, 2002, March 1-2, 2002, March 2, 2002, March 8, 2002 and March 16-17, 2002, respectively, I impose licence suspensions of three (3) days each, for a total of eighteen (18) days;
2. For contraventions #4, #6, and #12, permitting prohibited entertainment, contrary to s. 50 of the *Act*, which occurred on February 22-23, 2002, March 1-2, 2002 and March 16-17, 2002, I impose licence suspensions of one (1) day each, for a total of three (3) days;
3. For contravention #7, permitting an intoxicated person to remain contrary to s. 43(2)(b) of the *Act*, I impose a licence suspension of four (4) days; and
4. For contraventions #2 and #8, not primarily engaged in the service of food contrary to ss. 16 and 20 of the *Act* and s. 17(2) of the *Regulations*, I impose licence suspensions of ten (10) days each, for a total of twenty (20) days.

I order the licence suspension of forty-five (45) days to commence as of the close of business on Friday, April 25, 2003, 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 (s. 54(1) of the *Regulations*).

Since I do not know whether The Urban Well would normally be open 7 days per week as of April 26, 2003, 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 City Police from the close of business on Friday, April 25, 2003, until the licensee has demonstrated to the branch's satisfaction that The Urban Well has been closed for forty-five (45) business days.



M. G. Taylor
Enforcement Hearing Adjudicator

Date: February 20, 2003

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

APPENDIX A

The Urban Well, Yew Street

B.C. regulation 608/76

Section 17 Licence Categories

- (2) A B licence may be issued, renewed or transferred in respect of a dining establishment that is primarily engaged in the service of food during all hours of its operation, and the following general regulations apply:
- (a) all types of liquor may be sold, subject only to limitation by the general manager in the licence;
 - (b) subject to paragraph (f), minors are permitted to be present in the establishment but must not be served or consume liquor;
 - (c) liquor must not be served unless the establishment is open for service of a reasonable selection of menu items including appetizers and entrees, or their equivalent, and
 - (i) the patron to whom the liquor is served has ordered one or more of those menu items, or
 - (ii) subject to paragraph (d), the licensee has communicated to the patron the requirement that liquor is to be served only to patrons who order and consume one or more of those menu items at the establishment and the licensee has reasonable grounds on which to conclude that the patron to whom the liquor is served will order and consume one or more of those menu items at the establishment;
 - (d) the licensee may serve liquor to a patron even though the patron does not intend to order food if
 - (i) the patron is seated in the designated food-optional area, or
 - (ii) if the patron is seated at a table, other than in the designated food-optional area, at least 75% of the persons seated at that table comply with paragraph (c) (i) or (ii);
 - (e) the designated food-optional area must be visibly distinguishable from the principal area of the dining establishment in the manner and to the extent satisfactory to the general manager;
 - (f) minors seated in the designated food-optional area must be accompanied by an adult;
 - (g) no game, other than a game that had been approved for use in the establishment by the general manager before the coming into force of this section, is permitted and, for the purposes of this section, a game is any form of competition against another person or oneself either with or without an electronic device, but does not include a diversionary activity such as a crossword puzzle or a children's game played by children;
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- (h) games must not be available in an unlicensed area adjoining the licensed area of the dining establishment unless that unlicensed area is separated from the licensed area by a physical barrier satisfactory to the general manager;
 - (i) subject to limitation by the general manager in the licence, hours of sale must be a maximum of 14 hours between 9:00 a.m. and 2 a.m. of the following day;
 - (j) movement of liquor by patrons from the designated food-optional area to any other portion of the establishment, or from any portion of the establishment to the designated food-optional area, is prohibited;
 - (k) liquor may be served only to patrons who are seated;
 - (l) only patrons who are seated may consume liquor in the establishment;
 - (m) paragraphs (k) and (l) do not apply in regard to a banquet room, or if a private party at which the public do not have access to the establishment is approved by the general manager, in any other place in the establishment used for that private party;
 - (n) an adequate supply of flatware, china and table facilities must be available and provided.
- (2.1) For the purposes of subsection (2), the general manager may, in determining whether a dining establishment is primarily engaged in the service of food, consider the following:
- (a) kitchen equipment;
 - (b) décor;
 - (c) menu;
 - (d) type and hours of games and entertainment offered by the licensee;
 - (e) advertising;
 - (f) hours of operation;
 - (g) financial records of the establishment;
 - (h) whether the ratio of monetary receipts from food sales in the establishment to monetary receipts from liquor sales in the establishment is equal to or greater than 60:40 as measured in relation to one or both of
 - (i) a table of patrons, and
 - (ii) the entire establishment;
 - (i) the past compliance history of the licensee or of the applicant for the licence, as the case may be;
 - (j) any other relevant consideration that may assist in the determination of the primary business focus of the establishment.
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