# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***532871 B.C. Ltd. dba. The Urban Well v. General Manager Liquor Control and Licensing Branch,*** 2004 BCSC 127

Date: 20040203
Docket: L031166
Registry: Vancouver

Between:

**532871 B.C. Ltd. dba. Urban Well**

Petitioner

And

**General Manager Liquor Control and Licensing Branch**

Respondent

Before: The Honourable Mr. Justice Pitfield

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner: | Dale B. Pope, Q.C.<br>Robyn Jarvis |
| Counsel for the Respondent: | V. Nerys Poole |
| Date and Place of Hearing: | December 4-5, 2003<br>Vancouver, B.C. |

***Introduction***

[1] The petitioner carries on business as the Urban Well in Vancouver's Kitsilano area. It is licensed under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 as an establishment that is primarily engaged in the service of food during all hours of operation. The General Manager, Liquor Control and Licensing Branch, ordered the suspension of the Urban Well licence for a period of 45 days after finding that it operated in contravention of conditions associated with its licence on 12 occasions between November 24, 2001, and March 17, 2002.

[2] The General Manager found contraventions and imposed suspensions as follows: the number of patrons exceeded licensed capacity on six separate occasions resulting in a suspension of 18 days; unauthorized entertainment in the form of dancing had been permitted on three occasions resulting in a suspension of three days; an intoxicated patron had been permitted on the premises on one occasion resulting in a suspension of four days; and the licensee was not primarily engaged in the service of food during all hours of its operation on two occasions resulting in a suspension of 20 days.

[3] The 45 day suspension was to be enforced commencing at the close of business on Friday, April 25, 2003, and continuing thereafter on successive business days until fully completed. At the request of Urban Well, the imposition of the suspension was stayed pending judicial review.

[4] Urban Well seeks relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, in relation to the General Manager's enforcement action, advancing a number of arguments in support of its claim that some of the decisions of the General Manager should be set aside and, in any event, that the aggregate period of suspension should be reduced.

[5] Although it does not dispute the General Manager's findings of over-crowding and prohibited entertainment, the licensee says, in respect of those contraventions and any others that are not quashed on judicial review, that the General Manager erred when exercising her discretion to take action in respect of all contraventions resulting in an aggregate suspension of 45 days.

[6] With respect to the claim that it was not engaged primarily in the service of food during all hours of its operation, Urban Well claims the General Manager improperly construed the meaning of the operating requirement stipulated by the *Act* and the regulations and, in any event, misconstrued the evidence with the result that the finding of contravention was incorrect and should be quashed.

[7] Finally, Urban Well says the General Manager's finding that it permitted an intoxicated person to remain on the premises was neither correct nor reasonable and should be quashed.

[8] This case marks the second occasion on which this court has been required to consider an application for judicial review following upon extensive amendments to the *Liquor Licensing and Control Act* effective January 15, 2001. The current regulatory and enforcement regime was first considered by Blair J. in *Zodiac Pub Ltd. v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 96 released January 22, 2004, an application for judicial review in respect of an intoxication contravention.

[9] This application raises important issues including the standard of review applicable in respect of enforcement action and the court's capacity to interfere with the General Manager's decision to proceed with enforcement action or the penalties imposed.

[10] At the outset, I will describe the Urban Well licence, the licensing and enforcement regime, and the findings of the General Manager in respect of the various contraventions alleged in this case.

***The Urban Well Licence***

[11] In the period from November 2001 through April 2002, when the contraventions are alleged to have occurred, Urban Well held a "B" licence as a dining establishment primarily engaged in the service of food during all hours of its operation. That category of licence permitted the sale of liquor daily for a maximum of 14 hours from 9:00 a.m. to 2:00 a.m. the following day. The hours of operation actually specified in the Urban Well licence were 11:00 a.m. to 1:00 a.m. on Monday and Tuesday, 12:00 noon to 2:00 a.m. from Wednesday through Saturday, and 11:00 a.m. to midnight on Sunday. Other restrictions applied to the category of licence. Specifically, patron-participation entertainment such as dancing was prohibited.

[12] At the relevant time, by way of contrast, a "C" licence could be issued to a cabaret primarily engaged in providing entertainment. A "C" licence-holder was permitted to sell liquor from 7:00 p.m. to 2:00 a.m. the following day. A "D" licence could be issued to a neighbourhood pub which was permitted to sell liquor for a maximum of 14 hours between 9:00 a.m. and 1:00 a.m. the following day. Part of the problem in this case derives from the fact that the licensee appears to have wanted some or all of the benefits associated with a "C" or "D" licence including the capacity to provide entertainment and a reduction in the extent of its food service.

***Legislative History***

[13] The legislative history and enforcement regime relevant to this judicial review are described in the *Zodiac* decision, *supra*. A summary will suffice for present purposes in order that the issues central to this application may be placed in context.

[14] By virtue of s. 3(2) of the *Act*, the General Manager must administer the *Act* and supervise all licensed establishments. Section 12 provides that part of that responsibility is to issue licences for the sale of liquor. Section 20, parts of which are reproduced in Appendix A to these reasons, permits the General Manager to take action in respect of any of the matters enumerated in s. 20(1). Section 20(2) permits the General Manager to impose sanctions where she has taken action under s. 20(1).

[15] In addition to the enforcement action that may be taken by the General Manager, Section 48 of the *Act* provides that a person who contravenes the *Act* or a regulation commits an offence for which one may be prosecuted.

[16] Until May 30, 2002, ss. 30 and 31 of the *Act* permitted a person aggrieved by decisions of the General Manager under s. 20 to appeal to the Liquor Appeal Board. Section 30(9) permitted an appeal from a decision of the Board to the Court of Appeal with leave of a judge of that Court.

[17] Effective May 30, 2002, the rights of appeal to the Board and the Court of Appeal were repealed and the Board was dissolved. Neither an alternative appeal procedure nor a privative clause was enacted as a substitute. It follows that any relief in respect of a decision of the General Manager must now be pursued by judicial review.

[18] The *Act* and the *Liquor Control and Licensing Regulations*, B.C. Reg. 608/76, as amended (up to B.C. Reg. 34/2001), specify numerous requirements with which a licensee is expected to comply. As previously noted, s. 20 of the *Act* empowers the General Manager to take any of a number of enumerated actions in respect of a contravention of any provision of the *Act* or *Regulation*. Prior to January 15, 2001, the discretion conferred on the General Manager with respect to kind of penalty to be imposed in respect of a contravention was very broad. No limits or ranges of monetary penalties or periods of suspension were specified in the *Act* or the *Regulation*.

[19] The enforcement regime changed in material respects effective January 15, 2001, when the *Regulation* was amended to add a division entitled "Enforcement". Sections 51 to 53 (now ss. 64-66) in the division, reproduced as Appendix B to these reasons, provided direction with respect to the manner in which the enforcement process should proceed. Included in the division was Schedule 4 which specified minimum and maximum sanctions in respect of contraventions. The Schedule prescribed a monetary fine and period of suspension within a specified range for a "first contravention" and period of suspension within a specified range for a "second contravention" and "subsequent contraventions" of the same type.

[20] The portion of Schedule 4 that pertains to the contraventions found by the General Manager as against Urban Well is reproduced as Appendix C to these reasons.

[21] Such is the skeleton of the legislative and regulatory scheme that applied to Urban Well in the period November 24, 2001, through March 2, 2002. I turn to a description of the incidents and a discussion of the General Manager's decisions.

***Urban Well Contraventions***

*Over-Crowding*

[22] In the period from November 2001 through April 2002, the Urban Well licence permitted 98 patrons inside the premises and 24 patrons on a patio. At the same time, the building occupancy load fixed by the Fire Marshall of the City of Vancouver was 125 persons including staff. The building occupancy load restriction limits the number of persons permitted in a structure at any one time regardless of the licensed capacity.

[23] Urban Well admitted to over-crowding on November 24-25, 2001, February 22-23, 2002, March 1-2, 2002, March 2, 2002, March 8, 2002 and March 16-17, 2002. The reference to an incident occurring over a two-day period results from the fact that inspectors were present on the premises before midnight on the first-mentioned day, to the early morning hours of the next day during permitted hours of operation. By

its admission, Urban Well acknowledged that it was subject to enforcement action under s. 20.

[24] In an earlier enforcement proceeding, Urban Well was found to have contravened the licensed patron limit on March 16, 2001.

[25] Quite likely because of the licensee's admission to over-crowding, the General Manager did not make a finding of fact with respect to the number of patrons on site at the time of the contraventions. It would have been preferable for that finding to be made in order that the extent of the excess could be known with certainty.

[26] In relation to the contravention alleged on November 24-25, 2001, the regional branch manager of the licensing branch testified that he had observed a number of individuals in a line-up outside the Urban Well waiting for admission and he counted 219 persons inside the establishment.

[27] The regional manager testified that during an inspection on February 22-23, 2002, he counted 176 patrons. He testified that another inspector reported a count of 156 patrons while an Urban Well staff count carried out around the same time suggested 147 patrons.

[28] At the inspection on March 1-2, 2002, the regional manager's first count totalled 193 patrons while a second count indicated 169 patrons. Another inspector testified that she initially counted 186 patrons on that occasion, while her second count identified 155 patrons. The same inspector testified that when she inspected the premises again on the next evening on March 2, 2002, she and the licensee's door control employee counted 132 patrons.

[29] The regional manager testified that he counted 167 patrons during his attendance on March 8, 2002.

[30] A city inspector visited the Urban Well on March 16-17 but did not perform a count. The inspector, who performed earlier counts on March 1 and 2, testified to counting 116 patrons on March 16 and 17.

[31] In her reasons, the General Manager said the following of the licensee's testimony in relation to the over-crowding:

> 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.

*Prohibited Entertainment*

[32] A condition attached to Urban Well's licence prohibited patron-participation entertainment, such as dancing. The General Manager recounted the evidence but did not find facts in relation to entertainment, likely because of the licensee's admission to the contraventions. The licensee acknowledged that it had acted in contravention s. 50 of the *Act* so as to be subject to enforcement action.

[33] The evidence was that the establishment contained a 14 foot by 14 foot hardwood floor area used as a stage and dance floor. A disk jockey table was located in the vicinity of the floor area.

[34] The regional manager testified that the dance floor was packed with dancers at the time of inspection on November 24-25, 2001. Patrons were dancing at the time of inspection on February 22-23, 2002, and again on March 1-2, 2002. The regional manager testified that a disk jockey was in attendance on each occasion.

[35] The licensee testified that the dance floor was used for comedy shows on Mondays and Tuesdays and for a disk jockey on the other nights. The floor space was used for restaurant seating only during busy times, such as Christmas.

*Permitting an Intoxicated Individual on Site*

[36] Section 43(2)(b) of the *Act* provides that a licensee or a licensee's employee must not permit a person to become intoxicated, nor permit an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

[37] The General Manager summarized the evidence in respect of the alleged intoxication contravention on March 1-2, 2002, as follows:

> 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.

[38] The cross-examination of the inspector was not described in the reasons. The relevant portion thereof, in relation to the intoxication contravention, is the following:

> Q Now, this intoxicated patron -- alleged intoxicated patron
> A Mm-hmm. Fair enough.

Q Did you get his name?
A No, I did not.
Q Did you speak to him at all?
A No, I did not.
Q You didn't smell alcohol on him?
A I didn't get that close.
Q How long had he been in there?
A I don't know.
Q When did he leave?
A I don't know.
Q I assume you don't know if -- well, how many drinks he had?
A The intoxicated patron you're talking about is the gentleman that was staggering back to the washroom.
Q Yes.
A No, I didn't follow all his movements in the premise [sic].
Q Well, did you talk to his friends?
A No, I didn't.
Q So you don't know if he was ill?
A We, as inspectors, as a rule we don't have exchanges with patrons. We deal with the staff and management.
Q Now, did you go and tell Mr. McCahey about this fellow?
A Yes, I did.
Q And what did you tell him?
A I just informed him that there was a gentleman that was, in my opinion, extremely intoxicated and he was located in the back washroom.
Q And did you attend with Mr. McCahey and point him out?
A No, I didn't. Shawn [McCahey] attended on his own.
Q Now, after you left -- or I gather you left the premises without issuing a licence premises check?
A A contravention notice.
Q Yes. Sorry.
A Yes.

[39] The General Manager reached the following conclusions based on that evidence:

> The total evidence for [the intoxication contravention] came 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.

*Not Primarily Engaged in the Service of Food During All Hours of Operation*

[40] Section 17(2) of the *Regulation* requires that Urban Well, as the holder of a "B" licence be a "dining establishment that is primarily engaged in the service of food during all hours of its operation". Inspectors alleged that the licensee was not so engaged in the early morning hours of November 25, 2001, and March 2, 2002.

[41] Evidence was adduced at the enforcement hearing with respect to the configuration of the premises and that which was observed by branch personnel on the dates and at the times in question. The premises consisted of two areas. One of the areas contained approximately 30 tables that would seat a total of approximately 135 persons, a fireplace, an unidentified number of sofas, and the 14 square foot floor area used as a stage and dance floor as described earlier in these reasons. The second area, elevated somewhat from the first and separated from it by a pony wall, contained a service bar in front of which were an unidentified number of stools. A kitchen adjoined the food service area.

[42] The Branch's regional manager testified that during his inspection at 12:40 a.m. on November 25, 2001, he counted 219 patrons. A large number were walking around, some were seated, and there was not enough seating capacity for the number of patrons on the premises. The manager testified that he observed dancing, he did not see any food being served, and he did not see any cutlery, dishes or menus. He testified that all the stools in the service bar area were occupied, and patrons were standing three or four deep in front of the bar drinking or ordering drinks for which they paid directly. The manager testified that he went to the kitchen to write up the contravention notice along with the restaurant manager. He testified that the kitchen had been wiped down, the floor was wet, there were no pots or pans on the stove, the burners were cool to the touch, and there was no sign of food being prepared.

[43] Two inspectors and the regional manager testified with respect to their findings on March 2, 2002. One of the inspectors testified to seeing patrons standing shoulder to shoulder, standing three to four deep at the bar, and to seeing no food, cutlery or dishes. Another inspector testified to observing a line-up of approximately 20 persons outside the door and patrons inside standing four deep in the bar area; seeing patrons standing and drinking; and observing a caesar salad on the pass-through to the kitchen. This inspector testified that she observed one dish being prepared, a pasta pot on the stove, a cook who was wiping down the kitchen, and another individual working as a dishwasher.

[44] An individual identified in the General Manager's reasons as a director and officer of the licensee testified that on an ordinary Friday night the establishment employed a minimum of four cooks and a chef, patrons arrived and dined between 7:00 and 9:00 p.m. and stayed on the premises until 12:30 or 1:00 a.m. the next morning. He testified that there was not a high table turnover.

[45] The licensee's chef testified that he usually left the premises at 11:00 p.m.

[46] The General Manager recounted other evidence, including food to liquor revenue ratios, which I need not summarize. On the basis of all of the evidence she heard, the General Manager made the following findings of fact in relation to the issue of the licensee's primary purpose during the hours in which it was inspected by Branch personnel:

1. The establishment was capable of operating as a full service restaurant.

2. The kitchen was a well-equipped commercial kitchen.

3. It was not unusual to do some kitchen clean up after the dinner rush.

4. The licensee offered a reasonable selection of menu items that were available at all times.

5. One would not necessarily expect to see a busy kitchen at the time of day when the inspections were conducted but one would expect a busy kitchen if patrons were being permitted entry because, according to the terms of the licence, there was an expectation that restaurant patrons would be seated and order food.

6. The conduct of the restaurant was not directed to providing seats and food.

7. Most patrons within the establishment at the time of the inspections were not eating and the scenario did not support the licensee's contention that patrons were just having a few drinks after dinner.

8. 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.

***Analysis***

*Overview*

[47] Urban Well claims that:

1. The General Manager made a reviewable error by incorrectly interpreting s. 17(2) of the *Regulation* requiring the holder of a "B" licence to be engaged primarily in the

service of food during all hours of operation and s. 43(2)(b) of the *Act* prohibiting a licensee from permitting or authorizing an intoxicated person to be on the premises.

2. The General Manager made a reviewable error by unreasonably concluding that Urban Well had contravened section 17(2) of the *Regulation* and section 43(2)(b) of the *Act*.

3. The General Manager made reviewable errors by unreasonably deciding to initiate enforcement action in respect of all of the alleged contraventions and unreasonably determining the penalties to be imposed.

[48] Each claim requires identification of the applicable standard of review and the consideration of the General Manager's decision in light of that standard.

[49] It is settled law that the same standard of review need not apply to every decision a regulatory authority is authorized to make: see *Pushpanathn v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982. The appropriate standard may vary depending upon the issue resulting in the regulator's decision. In its reasons at paras. 28 and 48, the Supreme Court said the following:

> [28] ...,the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others,... .
>
> ...
>
> [48] As has been emphasized above, the 'pragmatic and functional' approach allows differing standards of deference even within different sections of the same Act, and with regard to different types of decisions taken by the tribunal in question.

[50] In *Pushpanathan,* the Supreme Court of Canada identified four factors to be considered in deciding upon the standard of review that should apply to an administrative decision: the presence or absence of a privative clause or statutory right of appeal; the expertise of the decision-maker; the purpose of the legislation in general and the specific provision in particular; and the nature of the problem, in particular whether it raises a question of fact, law, or mixed fact and law. I will consider the appropriate standard and the result of its application in relation to each of the decisions challenged by Urban Well.

*Interpretation of s. 17(2) of the Regulation and s. 43 of the Act*

[51] Section 17(2) of the *Regulation* provides as follows:

> 17(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,...

[52] Urban Well says that the standard of correctness should apply to the interpretation of s. 17(2). Having regard for the factors identified in *Pushpanathan,* I have concluded that the preferable standard in respect of the meaning of s. 17(2) is reasonableness. In that regard, I adopt the reasoning of Blair J. in *Zodiac, supra,* and apply it in the context of statutory interpretation. Notwithstanding that interpretation is a question of law sometimes warranting less deference, or none at all, I am persuaded the General Manager's interpretation of s. 17(2) warrants deference.

[53] There are two components of s. 17(2): the requirement that the establishment be primarily engaged in the service of food, and the requirement that it be so engaged during all hours of operation. The phrase "during all hours of its operation" is not one in respect of which the General Manager's expertise assists in interpretation. The words are plain in meaning. In that regard, one could say that the appropriate standard of review in respect of the meaning of that phrase should be correctness. At the same time, the phrase "primarily engaged in the service of food" is one which imports the expertise of the regulatory authority. That is evident from the fact that the *Regulation* enumerates a number of criteria related to the consumption and availability of food in conjunction with liquor such that the expertise of the General Manager is relevant and reasonableness should be the standard. In my opinion, the section should not be parsed into phrases to which different standards of review should apply. The need to draw on expertise in relation to the meaning of part of the *Regulation* favours deference in respect of the meaning of the entire section.

[54] The General Manager stated her understanding of the phrase "primarily engaged in the service of food during all hours of its operation" as follows:

> 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.

[55] Urban Well submits that the General Manager did not expressly discuss the appropriate interpretation of s. 17(2) of the *Regulation* or correctly construe the legal test to be applied in determining whether a licensee was primarily engaged in the service of food. The submission that one should focus on the meaning of "primarily engaged in the service of food" overlooks the qualifying phrase that it be so engaged "during all hours of its operation". The General Manager reasonably construed that phrase to mean that if there were a period of time during hours of operation when, as a matter of fact, the licensee was not primarily engaged in the service of food, notwithstanding its

capability to be so engaged, the licensee had violated a condition of the licence. The phrase cannot be construed to mean that the licensee must be found to have shifted its focus so that, generally, the serving of food had ceased to be its primary undertaking on an ongoing basis. In my opinion there was no need for the General Manager to say more than she did in support of her conclusion. The interpretation of s. 17(2) was reasonable and not subject to variation on judicial review.

[56] With respect to intoxication, s. 43(2)(b) provides as follows:

> 43(2) A licensee or the licensee's employee must not permit
>
> ...
>
> (b) an intoxicated person to remain in that part of licensed establishment where liquor is sold, served or otherwise supplied.

[57] I would apply the standard of correctness to the General Manager’s interpretation of s. 43(2)(b).

[58] Urban Well’s objection in relation to interpretation centers on the meaning the General Manager gave to the word "permit". Urban Well asserts that the onus was on the Branch to adduce evidence that the licensee had "shut its eyes" to the obvious, or allowed the patron in question to become intoxicated, not caring whether an offence was committed. For reasons I will discuss in relation to the reasonableness of the General Manager’s decision with respect to the intoxication contravention, the onus is on the licensee to adduce evidence of its due diligence. The onus to prove a lack of due diligence does not rest with the Branch.

[59] Urban Well also alleges that the General Manager incorrectly interpreted s. 43(2)(b) because she failed to consider whether the patron had been permitted to remain in "that part of a licensed establishment where liquor is sold, served or otherwise supplied". I can see nothing in the General Manager’s reasons to suggest she made any interpretation of that phrase, correct or incorrect. It may be that she did not consider that element of the contravention. If that is the case, the omission is a factor that affects the reasonableness of her decision. It does not amount to an error in interpretation.

[60] I reject the Urban Well claim that the General Manager incorrectly interpreted s. 43(2)(b).

*Standard of Review Applicable to Determinations of Contravention*

[61] The next concern is to identify the standard of review that should apply to the General Manager's determination that Urban Well contravened s. 17(2) of the *Regulation* or s. 43(2)(b) of the *Act*. For the reasons expressed by Blair J. in *Zodiac, supra,* I concur in the proposition that the appropriate standard in relation to the General Manager’s determinations of contravention is reasonableness. In that regard, the concern is to consider whether the General Manager’s decision was reasonably made in the context of relevant or governing factors. Because the judicial review before me requires the standard of reasonableness to be applied in a number of contexts that were not

at issue in *Zodiac*, I will set forth my observations with respect to the factors that govern enforcement decisions generally.

[62] The enforcement regime is complex and, with respect, not artfully drafted. The primary directives are contained in s. 20 of the *Act*, ss. 51 through 53 of the *Regulation*, and Schedule 4 of the *Regulation*, set forth in Appendices A, B and C to these reasons.

[63] In substance, the enforcement regime amounts to this. Acting on her own initiative or upon receipt of a complaint, the General Manager is granted the discretion to "take action" against a licensee for any of the reasons specified in s. 20(1). The nature of that action, at first instance, is prescribed by s. 51(1) of the *Regulation* which provides that an inspector who forms the opinion that a licensee has committed a contravention must notify the licensee of his opinion in relation to a specified contravention. In this case, the inspectors did so by writing up, and providing to Urban Well, notices of contravention at or about the time the alleged contraventions were identified.

[64] Section 51(2) of the *Regulation* provides that an inspector who, after considering the alleged contravention, decides that enforcement action should be taken, must provide the licensee with a written notice specifying the enforcement action that the General Manager believes should be taken against the licensee. The inspector must notify the licensee that unless it accepts the fact of contravention and agrees to comply with the proposed enforcement action, the General Manager will determine whether the alleged contravention occurred and determine the enforcement action to be taken. The inspector must advise that a hearing may be scheduled for that purpose. While s. 51(2) permits the conduct of an enforcement hearing to determine whether a contravention was committed and to determine what enforcement action should be taken in respect of it, a formal hearing is not mandatory.

[65] Section 52 of the *Regulation* appears to provide an alternative to the course set by s. 51. The section stipulates that if a licensee does not acquiesce to the determination of contravention and sanction, and if the General Manager has determined that a contravention has occurred, the General Manager may take the enforcement action of which the licensee was notified by the inspector. Section 53(2) stipulates that the determination of contravention and the determination of sanction may be made without a hearing.

[66] While the current practice is to convene an enforcement hearing, that need not be done. Therefore, with or without a hearing, the General Manager must "determine" whether there has been a contravention of the *Act* or *Regulation*. Having done so, the General Manager must "determine" what enforcement sanction will be imposed. There is no direction in the statute regarding the basis on which either determination should be made or the degree of proof that should be required in respect of it.

[67] Because of my appreciation of direction previously provided by the Court of Appeal, I must depart from the reasoning of Blair J. in *Zodiac, supra,* in one regard. I am of the view that it is not appropriate to consider reasonableness solely in the context of proof

on a balance of probabilities or proof beyond a reasonable doubt. Rather, the reasonableness of the determination of contravention must be assessed by reference to proof of the *actus reus* beyond a reasonable doubt (whether the *actus* be over-crowding, the presence of an intoxicated patron in the premises, or not being primarily engaged in the service of food during all hours of operation) and proof of due diligence on the balance of probabilities.

[68] In *Whistler Mountain Ski Corporation v. General Manager, Liquor Control and Licensing Branch,* 2002 B.C.J. No. 426, [2002] BCCA 1604, the Court of Appeal determined that, in the regulatory context of the *Act,* contraventions defined by the *Act* should be regarded as strict liability offences as opposed to absolute liability or full *mens rea* offences. That being the case, the defence of due diligence was available to a licensee alleged to have dispensed liquor in its premises other than from the original container in which the liquor was purchased from the Liquor Distribution Branch in contravention of the *Act* or the *Regulation*, a fact of which there was no doubt. The Court relied on *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, as authority for its conclusion and did so notwithstanding the absence of the word "cause" or "permit" in the statutory provision defining the contravention.

[69] I do not understand the *Whistler Mountain* decision to be restrictive in nature such that it would apply to some contraventions under the *Act* and not others. Rather, the decision casts all contraventions when subject to regulatory enforcement under the *Act* as strict liability offences to which the defence of due diligence applies.

[70] Because *Sault Ste. Marie* is the foundation for the Court of Appeal's decision in *Whistler Mountain*, it is reasonable to conclude that the determination of strict liability should proceed as outlined in the *Sault Ste. Marie* case. In that regard, the Supreme Court of Canada said the following in respect of the offence under consideration in *Sault Ste. Marie* at p. 1325:

> While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

[71] Applying the *Whistler Mountain* and *Sault Ste. Marie* cases in the context of the regulatory enforcement of strict liability contraventions, the initial requirement should be that the General Manager have evidence, derived from a hearing or otherwise, sufficient to establish the *actus reus* at the heart of the contravention beyond a reasonable doubt. If the evidence supports that determination, the onus shifts to the licensee to establish, on a balance of probabilities, that it took the steps a reasonable and prudent person would have taken to prevent the contravention. The Supreme Court of Canada stated the comparison of the proof applicable in relation to full mens rea, strict liability and absolute liability offences, as follows at pp. 1325-26:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

[72] Because the question to be considered on a judicial review under the *Act* is the reasonableness of the General Manager's conclusion that the evidence supported the determination of the occurrence of the *actus reus* beyond a reasonable doubt, and the reasonableness of the General Manager's conclusion that the defence of due diligence was not made out on a balance of probabilities, an unreasonable decision in respect of either matter must result in the General Manager's decision being varied or quashed, depending upon the circumstances.

[73] The authorities referred to me by counsel are consistent with the approach I have outlined. While the cases do not discuss the burden of proof in relation to the *actus reus*, there was sufficient evidence in each case to establish the *actus reus* beyond a reasonable doubt. In *410363 B.C. Ltd. (c.o.b. Juke Box Jive) v. General Manager*, [2002] B.C.L.I No. 1 (Liquor Appeal Board) the Board found that the fact of over-crowding was established on the evidence before it. The *actus reus* was made out. To like effect is the case of *518231 B.C. Ltd. v. General Manager*, [2001] B.C.L.I. No. 9 (Liquor Appeal Board).

[74] In *Calais Investments Ltd. (c.o.b. Flamingo Hotel) v. General Manager* (1996), 81 B.C.A.C. 309, the Court of Appeal considered the degree of deference to be accorded a decision of the Board on the question whether a licensee had authorized or permitted its employees to traffic in drugs on its premises. No due diligence defence was advanced by the licensee. Proof of trafficking was not in dispute. Of interest is the fact that the Court adopted the reasoning in *Gordon*

*Capital Corporation v. Ontario Securities Commission* (1991), 1 Admin. L. R. (2d) 199 in concluding that the liquor legislation was regulatory rather than penal so that the licensee should not be afforded the benefit of the doubt in relation to the question whether trafficking was "disorderly conduct" within the meaning of the *Act*. The Court of Appeal refused to follow *Gordon* in deciding the *Whistler Mountain* case.

[75] In *Ed Bulley Ventures Ltd. (c.o.b. Planet Sports Lounge) v. General Manage*r, [2001] B.C.L.I. No. 5, the Board found the licensee to have permitted violent or disorderly conduct but found that the evidence did not support a finding that any of the patrons alleged to have been intoxicated was in fact intoxicated. While the Board did not state that it required proof of intoxication beyond a reasonable doubt, its reasons are cast in terms which imply as much.

[76] In *General Manager v. Lonsdale Hotel Inc. (d.b.a. Lonsdale Quay Hotel*) (2002), 17 B.C.A.C. 258, 2002 BCCA 436, there was no doubt that minors had been found on the premises. The Board determined that the licensee had made out the defence specifically afforded by the *Act* in relation to the presence of minors in that it had taken reasonable measures to prevent minors from gaining admission. The General Manager's appeal from the Board's decision was dismissed.

[77] The approach I have outlined is appropriate. The range of sanctions available to the General Manager is extensive, ranging from a monetary fine which may be up to $50,000, to licence suspension for periods prescribed by regulation, cancellation of the licence, and orders for the divestiture of the licence. Those options compare to prosecution for contravention of the *Act* on summary conviction under s. 48 where the maximum sentence in the case of an individual is $10,000 and imprisonment for six months, or both, and the case of a licensee, whether corporate or otherwise, a fine of not more than $50,000. Although the *Act* is regulatory rather than penal, the administrative sanctions are onerous. Indeed, the severity of the regulatory sanctions was a factor that influenced the Court of Appeal's decision to apply the concept of strict liability to the regulatory enforcement of sanctions under the *Act*. In the *Whistler Mountain* decision, the Court said the following:

> While it is true that there is no possibility of imprisonment of the facts of the case before us, the General Manager has the power under s. 20(2) to fine, suspend and even cancel licenses. There are no limits on these powers prescribed by this section. These actions can have very serious consequences for a licensee, including the loss of their livelihood. As stated in *Sault Ste. Marie*, the importance - which I take to mean significance - of the penalty is an important consideration in determining whether an offence is one of absolute liability.

[78] With respect, I do not find judicial pronouncements made in relation to administrative decisions not concerned with strict liability contraventions to be of assistance. In such cases, due diligence is not a defence. That being the case, it is perfectly appropriate to assess the reasonableness of the administrator's decision in the context of the balance of probabilities.

[79] For example, in *Mohammed v. British Columbia (Liquor Control and Licensing Branch* (1994), 51 B.C.A.C. 62, the Court of Appeal entertained an appeal from the General Manager's decision that Mr. Mohammed displayed a wilful disregard for the requirements of operating his licensed establishments in accordance with the applicable statute; he was not a fit and proper person to hold an interest in a licence as contemplated by the statute; the licences of his two hotels should be suspended for a two month period; and he should divest himself of his interest in the two licensed establishments within six months after the end of the two months' suspension. In respect of the divestiture order, Lambert J.A. said the following at para. 13:

> ...the order of divestiture of the ownership interest in the two establishments is also a very severe penalty on Mr. Mohammed personally and he will already have borne the financial losses from the two license suspensions. But, if it has been established to the requisite degree of proof, which in a case such as this should be higher than a simple balance of probabilities, that Mr. Mohammed is not a fit and proper person to hold a license then there is truly no alternative but to order the divestiture by Mr. Mohammed of the premises with which the license is associated. In my opinion, on the facts of this case, there is no basis on which we can conclude that the decision of the Deputy General Manager and the decision of the Liquor Appeal Board that Mr. Mohammed was not a fit and proper person to hold a license could be interfered with. This Court owes an appropriate degree of deference to those involved in the day to day administration of the liquor licensing system. In any event, having regard to the nature of the offence I would not be disposed to think that it is an unreasonable finding that Mr. Mohammed is not a fit and proper person to hold a license.

[80] Legg J.A. concurred in the result but dissented on the issue of proof of fitness stating his opinion that the test was balance of probabilities. Wood J.A. also dissented on that point saying that the issue should be left to another day when it was squarely before the Court.

[81] *Mohammed* was not concerned with the determination of contravention in respect of which a due diligence defence could be advanced. The case was not concerned with a contravention at all. It was concerned with the question whether, in the opinion of the General Manager, Mr. Mohammed was a suitable licensee. The case does not assist in settling upon the identification of the burden that should apply in respect of the proof of contravention in the regulatory context.

[82] In a similar vein, the defence of due diligence was not available in the following cases: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, a case concerned with the reasonableness of the College's finding that a member had taken physical and emotional advantage of one of his female patients and was guilty of infamous conduct; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a case concerned with the reasonableness of a

ministerial decision not to facilitate the admission to Canada of a person having regard for humanitarian and compassionate considerations; and *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20, a case concerned with the reasonableness of the Law Society's decision to disbar a member whose conduct amounted to an egregious departure from professional standards of practice.

[83] Finally, I must have regard for the recent decision of Blair J. in *Zodiac, supra.* I am bound by, and endorse in any event, his conclusion that the overall test on review of a determination of contravention is reasonableness. Our difference arises in relation to the manner in which reasonableness should be assessed and our differing understanding of the effect of the Court of Appeal's decision in *Whistler Mountain*. With respect, I do not regard the *Zodiac* decision as obliging me to apply the principle of judicial comity in circumstances where I have a different appreciation of the significance and meaning of the *Whistler Mountain* decision. I am also mindful of the fact that Blair J. clearly stated in his reasons at para. 34 that if the standard of proof beyond a reasonable doubt applied in any respect, it had been satisfied in relation to the General Manager's finding of intoxication, the *actus reus* at issue in the case before him. On that basis, the application of my interpretation of the *Whistler Mountain* case would not result in a different outcome on the facts in *Zodiac*. I also observe that the licensee in *Zodiac* claimed that the Branch should be required to prove beyond a reasonable doubt that the licensee permitted the intoxicated person to be on the premises. I concur in the conclusion stated by Blair J. in that regard. Such a requirement of proof does not arise in respect of a contravention under the *Act* because, where the *actus reus* is proved, guilt will be inferred if due diligence is not established by the licensee on the balance of probabilities.

*Determination under s. 17(2): Not Primarily Engaged in the Service of Food*
*During all Hours of Operation*

[84] On the facts before the General Manager, I find nothing unreasonable about the determination that Urban Well was not primarily engaged in the service of food during all hours of its operation as required by s. 17(2) of the *Regulation*. The nature of the contravention alleged was that during the late night and early morning hours of operation on two occasions the licensee was not so engaged. There was abundant evidence on which to base the finding that the licensee was not primarily engaged in food service, if it was so engaged at all, on the occasions when Branch personnel inspected the premises. That being the case, the fact it was not so engaged "during all hours of its operation" was proved beyond a reasonable doubt. The licensee did not advance a due diligence defence. To the contrary, the licensee testified to the fact that it did what it did because the business was not otherwise financially viable. The General Manager made no reviewable error in relation to the interpretation or application of s. 17(2) of the *Regulation*.

*Determination Under s. 43(2)(b): Intoxication*

[85] In so far as the intoxication contravention is concerned, the record of the proceedings before the General Manager indicates that she had no evidence of the name of the patron alleged to have been intoxicated, no evidence of the patron's extent or duration of consumption, no evidence of difficulty in speech or conversation, and no evidence of the detection of alcohol on the patron's breath. There was no evidence that the inspector observed the patron in a portion of the establishment where liquor could lawfully be sold, served or otherwise supplied. The evidence that was adduced, as summarized by the General Manager and as derived from the transcript, did not provide the basis from which a trier of fact, properly instructed and acting reasonably, could be sure that the patron was intoxicated and the *actus reus* was not proved beyond a reasonable doubt. As a result, there was no need for an explanation of due diligence by the licensee.

[86] A determination of intoxication would not be difficult to justify against a background of evidence of the name of the patron, the nature and content of conversations and the ability to engage in conversation, the detection of the smell of liquor on the patron's breath, observations of balance and awareness, and evidence of consumption. Given the evidentiary base from which one could be sure an individual was affected by alcohol to the level of intoxication, a licensee would be hard-pressed to make out a due diligence defence.

[87] Should I be in error is saying that standard of review should be the reasonableness of the General Manager's decision that a patron was intoxicated by reference to the balance of probabilities, I would nonetheless conclude that the determination of intoxication was not reasonable. As I have noted, the inspector did not speak to the patron, she did not smell or attempt to smell alcohol on the breath of the patron, she did not establish how long the patron had been on the premises, she did not know if the patron left the establishment, or if the patron had been drinking, or if the patron was ill. The lack of evidence on these points compels me to conclude that the decision was not based on reasons that can stand up to a somewhat probing examination, to use the words of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam*, [1997] 1 S.C.R. 748. In that regard, the situation is comparable to that considered by the Board in the *Bulley* case, *supra.*

[88] The determination of contravention under s. 43(2)(b) must be quashed.

*The Decision to Commence Enforcement Proceedings*

[89] Urban Well claims that the General Manager erred in exercising her discretion to take enforcement action in respect of all, as opposed to some, of the alleged contraventions. Urban Well claims that neither the *Act* nor the *Regulation* compelled the General Manager to take enforcement action in respect of every alleged contravention identified by Branch staff. Although separately stated, this complaint is related to the principal objection that the aggregate suspension of 45 days is of unreasonable length.

[90] In the context of the decision whether or not to proceed with enforcement action and the facts of this case, I regard the presence or

absence of a privative clause or statutory right of appeal to be relatively unimportant. The General Manager is charged with the responsibility of administering and enforcing the *Act.* Section 20 of the *Act* and s. 51 of the *Regulation* confer a wide discretion on the General Manager. It is what is done, as opposed to the decision to do something, that is reviewable in the context of enforcement action to which no jurisdictional objection has been taken, and for which no order in the nature of prohibition was sought.

[91] The expertise of the General Manager, relative to that of the Court on the issue of whether enforcement action should be taken, persuades me that great deference should be accorded the administrative decision. The General Manager is aware of the nature and extent of compliance issues and problems to a degree that the Court should not be expected to achieve.

[92] Moreover, the purpose of the legislation, which is to vest in the General Manager authority for the licensing and regulation of liquor consumption in establishments throughout the province coupled with the grant of the extensive enforcement powers contained in s. 20 of the *Act* and ss. 51 through 53 of the *Regulation*, should compel the Court to accord the decision of the General Manager to proceed with enforcement action great deference.

[93] Finally, the nature of the question that is being reviewed, namely whether the General Manager should proceed with enforcement action in respect of more than one alleged contravention, is neither a question of mixed law and fact nor a question of law. It is purely a question of fact. Several alleged contraventions have been identified. Staff issued several contravention notices. The only question was whether enforcement action should be taken in respect of each incident.

[94] I am satisfied that the appropriate standard of review in respect of the General Manager's decision to proceed with enforcement action in respect of any or all contraventions that might be identified by an inspector is patent unreasonableness. That test restricts review to situations in which it may be said that the exercise of discretion was perverse or capricious or where, on the face of the decision, some defect is apparent on the face of the record. There is no material on this application to suggest that the decision to proceed was perverse or capricious. Indeed, the opposite is the case. There is no reason why a licensee who has acted in contravention of its licence conditions and requirements of the *Act* to the extent admitted by it, should expect the General Manager to take action in respect of some, but not all, transgressions.

[95] The licensee in this case was fully aware that its actions were in contravention of the *Act* and *Regulation*. Urban Well was the subject of prior enforcement action in respect of over-crowding and food service contraventions that occurred in March 2001. It was penalized following an enforcement hearing. In her reasons in the case now under review, the General Manager remarked that other contraventions, not yet the subject of enforcement hearings, were alleged to have been committed by Urban Well after March 2002. Urban Well’s claim that the

decision to initiate the enforcement process in respect of all alleged contraventions should be quashed must fail.

*Determination of Enforcement Action*

[96] The final matter in respect of which the standard of review is relevant is that of penalty. Having regard for the factors identified in *Pushpanathan,* I am satisfied that reasonableness should be the test. Urban Well agrees that is the appropriate standard but says that the General Manager's decision was unreasonable because she omitted to consider the contraventions in the context of their effect on public safety, the requirements of the public interest, the likelihood of future infractions, and the principle of progressive discipline. Urban Well says that the General Manager focused on the need to promote voluntary compliance with the *Act* and the *Regulation* to the exclusion of other relevant principles. In support of its submission, Urban Well relies principally on the case of *Small House Ventures Inc. v. BC (Liquor Control and Licensing Branch, General Manager*, [2002] B.C.L.I. No. 5 (Liquor Appeal Board), colloquially known as the "Lucky Bar" case, a decision of Board before its dissolution.

[97] The principle of progressive discipline is not part of the statutory enforcement regime: see *Whistler Mountain* at para. 53. The General Manager is given a broad discretion with respect to the enforcement action that may be taken. The former option of providing a warning has been repealed. Section 20(2) should not be construed to permit the General Manager to do nothing in respect of contraventions found to have been committed. There would be little point in making a determination of contravention and then doing nothing in respect of it. The discretion conferred on the General Manager once a determination of contravention has been made, is to decide which of the enumerated sanctions of revised terms and conditions, fine, suspension, cancellation of licence or order of divestiture should be imposed. The General Manager is only directed to make the public interest a specific issue of concern when considering the incorporation of a greater monetary fine than prescribed in respect of a first contravention, or a suspension of greater duration than that prescribed by the *Regulation* as permitted by s. 20(2.1).

[98] As I stated at the commencement of these reasons, the suspension imposed in respect of the six over-crowding contraventions was three days for each contravention which is the minimum specified by Schedule 4 of the *Regulation* in respect of second contraventions, but the maximum in respect of a first contravention. The General Manager found five of the contraventions to be "second contraventions" but found the last infraction to be a first contravention as it occurred more than one year from the March 2001, over-crowding incident for which Urban Well had been previously penalized.

[99] The penalty imposed for the prohibited entertainment contravention was the minimum specified in Schedule 4 of one day for each of three contraventions.

[100] The penalty in respect of the operating contraventions was ten days for each of two contraventions, the minimum specified by regulation.

[101] Urban Well does not challenge the lawfulness of the *Act* or the *Regulation* which, in combination, oblige the General Manager to impose a suspension where suspension is appropriate, and to make the periods of suspension consecutive or cumulative, as opposed to concurrent. That being the case, it cannot be said that the application of the minimums permitted in the circumstances, and of the duration required by the *Act* and *Regulation*, is unreasonable. I point out that it was not open to the General Manager to consider whether to impose a fine, rather than a suspension, in respect of the "operating out of class" contravention. Urban Well had committed an earlier contravention of like kind for which a licence suspension and fine had been imposed. Even if it were open to the General Manager to impose a fine, there is nothing in the circumstances of this case from which one conclude her decision not to do so was unreasonable.

[102] The application to quash, vary or remit for reconsideration any of the enforcement sanctions is dismissed.

*Meaning of First, Second and Subsequent Contraventions*

[103] In the course of the hearing, I invited counsel to address the question of whether the General Manager correctly interpreted the *Regulation* in relation to the meaning of first, second and subsequent contraventions to construe the five over-crowding incidents from November 25 through March 2 as a "second contravention", the March 16 over-crowding incident as a "first contravention" and the two service of food contraventions as a "first contravention".

[104] Section 1 of Schedule 4 defines the word "contravention" as follows:

> 1(1) For the purposes of this Schedule,
>
> (a) a contravention is of the same type as another contravention if each contravention is described by the same Item of this Schedule, and
>
> (b) a contravention committed by a licensee is
>
> (i) a first contravention if the contravention was committed at or in respect of an establishment and the licensee has not committed a contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention,
>
> (ii) a second contravention if the contravention was committed at or in respect of an establishment and the licensee has committed one contravention of the same type at or in respect of that establishment within the 12 month period

preceding the commission of the contravention, and

(iii) a subsequent contravention if the contravention was committed at or in respect of an establishment and the licensee has committed a second contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention.

[105] In this case, separate notices of contravention and notices of enforcement action were provided by an inspector to Urban Well for all incidents observed on November 24-25, 2001, February 22-23, 2002, March 1-2, 2002, March 2, 2002 and March 16-17, 2002. The nature and duration of the recommended sanctions were identified in the notice of enforcement action as required by the *Regulation*. As a consequence of the hearing process, the General Manager determined that the sanctions were appropriate. The parties to this application agree that the General Manager acted properly in adopting the view that a contravention did not occur until there was a determination thereof at an enforcement hearing regardless of the number of separate, unconnected incidents.

[106] I have considered the very helpful written submissions of counsel in response in relation to this point. In the circumstances, I conclude that any discussion of the interpretation of the meaning of first, second and subsequent contraventions as the terms are used in the *Regulation* should be left until the point is clearly raised by action on the part of the General Manager. I would say, however, that if the General Manager is of the view that the approach adopted in relation to Urban Well is the appropriate course, she should encourage amendment of the *Regulation* to clearly reflect the importance of determination as opposed to commission.

[107] It follows that the application to quash the determination of intoxication and the four-day suspension in relation thereto is granted. Otherwise, the application is dismissed.

[108] In the absence of agreement, the parties may address the issue of costs by written submissions through the registry.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield

**Appendix A**

*Liquor Control and Licensing Act,* R.S.B.C. 1996, c. 267

20(1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

(b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

(c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;

(c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;

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

(e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(a) [Repealed 1999-36-13.];

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

(e) cancel all or any part of the licensee's licence;

(f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

(a) impose a monetary penalty under subsection (2)(c) that is greater than the amount provided for in the prescribed schedule of penalties, or

(b) suspend the licensee's licence under subsection (2)(d) for a period longer than that provided for in the prescribed schedule of suspensions.

(2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account

(a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and

(b) the particular circumstances giving rise to the taking of action by the general manager.

(2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1)(a) that is greater than the following amounts:

(a) $50,000 for a contravention of section 38(1), and

(b) $25,000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.

## Appendix B

*Liquor Control and Licensing Act Regulations*,
B.C. Reg. 608/76, as amended

51(1) If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

(2) If after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice to the licensee

(a) specifying which enforcement actions the general manager believes should be taken against the licensee should the licensee agree under subsection

(3) that the licensee has committed the contravention, and

(b) notifying the licensee that, unless the licensee accepts and complies with the enforcement actions specified under paragraph (a) of this subsection in accordance with subsection (3),

(i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and

(ii) an enforcement hearing may be scheduled for that purpose.

(3) the general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result, unless within 14 days after the date of the notice referred to in subsection (2), or within such longer time as the general manager considers appropriate, the licensee provides to the general manager a notice of waiver, in form and content satisfactory to the general manager, by which the licensee expressly and irrevocably

(a) agrees that the licensee has committed the contravention,

(b) accepts the specified enforcement actions,

(c) waives the opportunity to have an enforcement hearing on the matter,

(d) waives the right to appeal to the Liquor Appeal Board the finding of contravention and the specified enforcement actions, and

(e) agrees that the finding of contravention and the specified enforcement actions will form part of the compliance history of the licensee.

52(1) If, under section 20 of the Act, the general manager determines that a licensee has committed a contravention as a result of which one or more enforcement actions may be taken against the licensee, and if the licensee has not, in respect of that contravention, provided to the general manager a notice of waiver in accordance with section 51(3), the general manager may, under section 20 of the Act, take the enforcement actions, if any, against the licensee that the general manager considers appropriate as a result of the contraventions an, in so doing, may but need

not take the enforcement actions specified under section 51(2)(a).

(2) Nothing in this section requires the general manager to hold an enforcement hearing, or any hearing, before making either or both of the determinations referred to in subsection (1).

53(1) If, in relation to a contravention, the enforcement actions specified under section 51(2)(a) or referred to in section 52(1) include a suspension, the period of the suspension must subject to subsection (2) of this section, fall within the range established for the contravention under Schedule 4.

(2) If, in the circumstances of a contravention and the compliance history of the licensee, the general manager considers that a longer period of suspension is warranted than that established for the contravention under Schedule 4, the suspension period may extend as far beyond the range established under Schedule 4 as the general manager considers appropriate.

(3) If the general manager determines that a licensee has committed more than one contravention for which suspensions should be assessed, the period of the suspension determined in relation to those contraventions must be the sum of the suspension periods determined for each of the contraventions.

**Appendix C**

*Liquor Control and Licensing Act Regulations*
*Enforcement, Schedule 4*

| Item | Contravention | Period of Suspension | | | Monetary Penalty |
|---|---|---|---|---|---|
| | | First Contravention | Second Contravention | Subsequent Contravention | First Contra. |
| **OPERATING OUTSIDE OF LICENCE CLASS** | | | | | |
| 14 | A failure to comply with this regulation, or with the terms and conditions of licence, respecting capacity of the licensed establishment or of licensed premises | 1-3 days | 3-6 days | 6-9 days | $1000-$3000 |
| 33 | Permitting in the licensed establishment any other entertainment that is prohibited or restrict under section 50 of the Act | 1-3 days | 3-6 days | 6-9 days | $1000-$3000 |
| 10 | A breach of section 43(2)(b) of the Act by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold, served or otherwise supplied | 4-7 days | 10-14 days | -18-20 days | $5000-$7000 |
| 1 | Operating the licensed establishment in such a way that it differs in nature from the class or category of the establishments to which the licence is intended to apply | 10-15 days | 20-30 days | 30-60 days | $7500-$10000 |