COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (Liquor Control and Licensing Branch, General Manager),*** 2005 BCCA 416

Date: 20050817

Docket: CA032081

Between:

532871 B.C. Ltd. d.b.a. Urban Well

Appellant
(Petitioner)

And

General Manager Liquor Control and Licensing Branch

Respondent
(Respondent)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders

D.G. Butcher — Counsel for the Appellant

N. Poole — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
March 16, 2005

Place and Date of Judgment: Vancouver, British Columbia
August 17, 2005

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Huddart

Dissenting Reasons in Part by:
The Honourable Madam Justice Prowse (Page 32, Paragraph 66)

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The Urban Well is a restaurant in Kitsilano, Vancouver that has been found to have violated its liquor license by functioning from time to time as a local watering hole rather than always as a dining establishment.

[2] Its class "B" liquor license permits the "sale and consumption of all types of liquor with meals", with a designated maximum capacity.

[3] The General Manager, Liquor Control and Licensing Branch, found contraventions of conditions associated with the licence at various times between November 2001 and March 2002, for which she assessed a suspension of the licence for an aggregate period of 45 days.

[4] The Urban Well brought judicial review proceedings which were largely unsuccessful. The reasons for judgment of the learned reviewing judge are cited as 2004 BCSC 127 and may be found at 25 B.C.L.R. (4th) 353 and [2004] B.C.J. No. 169 (QL).

[5] On this appeal, Urban Well seeks to quash the findings of two instances of contravention by not being primarily engaged in the service of food, for which it was given a ten day suspension for each contravention, and the suspensions assessed for the contraventions.

The Statutory Enforcement Scheme

[6] Central to this appeal is the scheme of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 and its Regulation, which at the relevant time was the ***Liquor Control and Licensing Regulation***, B. C. Reg. 608/76. The ***Act*** is the vehicle for the administration of the manufacture and sale of liquor in British Columbia. The responsibility for the administration of the ***Act*** and supervision of all licensed establishments is assigned to the General Manager.

[7] By s. 12 of the ***Act***, the General Manager is given the power to licence establishments for the sale of liquor and to impose, in the public interest, terms and conditions that vary or add to (in a way not inconsistent with the ***Act*** or regulations), the conditions to which the licence is subject under the regulations.

[8] The ***Act*** provides for the licensing of establishments by the General Manager:

> 12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
>
> (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
>
> (a) that vary the terms and conditions to which the licence is subject under the regulations, or
>
> (b) that are in addition to those referred to in paragraph (a).

And:

> **16** (1) A licence must not be issued, renewed or transferred if, in the general manager's opinion, the applicant

. . .

(d) is disqualified under this Act or the regulations or has not complied with the requirements of this Act or the regulations.

. . .

(3) A licence must not be issued, renewed or transferred if, in the general manager's opinion, it would be contrary to the public interest.

[9] Section 20 of the ***Act*** provides the statutory vehicle for the General Manager to take action for a licensee's contravention of the ***Act***:

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;

. . .

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

. . .

(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:

…

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

[Emphasis added.]

[10] Section 38 prohibits sale of liquor except in accordance with the ***Act***, ***Regulation*** and licence:

38 (3) A licensee must not sell liquor except

…

(b) in accordance with this Act, the regulations and the terms and conditions of the

licence.

[11] Section 84 of the ***Act*** authorizes the promulgation of regulations:

> **84** …
>
> (2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> …
>
> (h) without limiting the powers of the general manager to impose conditions and restrictions on licences and on establishments, providing for types of entertainment and other activities that may be carried on in licensed establishments, and setting criteria by which the general manager may implement his or her powers under section 50 (2);
>
> …
>
> (t) prescribing a schedule of licence suspensions for the purposes of section 20 (2) (d);
>
> …
>
> (2.3) Regulations made under subsection (2) (s) or (t) may provide for different monetary penalties or licence suspensions according to
>
> (a) the class or category of licence held,
>
> (b) the nature of the circumstances referred to in section 20 (1) on which the monetary penalty or licence suspension is based, including the type or category of contravention of this Act or the regulations involved, or
>
> (c) the number of occurrences of the circumstances referred to in paragraph (b).

[12] Pursuant to s. 84, the ***Liquor Control and Licensing Regulation***, B.C. Reg. 608/76, fleshes out the licensing scheme by establishing different classes of licence and setting out penalty provisions.

[13] Section 17 sets out the regulations applicable to the "B" licence possessed by Urban Well:

> **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, and the following general regulations apply:
>
> …
>
> (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;

...

(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;

…

(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) types and hours of games 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.

[Emphasis added.]

[14] The ***Regulation*** deals as well with enforcement, in these terms:

1.(1) **…**

"contravention" means a matter referred to in the "Contravention" column of Schedule 4;

…

50 In sections 51 to 56, **"finding of contravention"** means, in respect of an alleged contravention of a licensee:
…

(b) a determination of the general manager, referred to in section 52, that the contravention occurred.

…

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 contravention and, in so doing, may but need not take the enforcement action specified under section 51(2)(a).

…

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.

…

(3) If the general manager determines that a licensee has committed more than one contravention for which suspension 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.

[Emphasis added.]

[15] Schedule 4, referred to in s. 53, sets out a table of contraventions and penalties:

SCHEDULE 4

Item	Contravention	Period of Suspension			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	First Contravention
OPERATING OUTSIDE OF LICENCE CLASS					
1	Operating the licensed establishment in such a way that it differs in nature from the class or category of establishment to which the licence is intended to apply	10-15 days	20-30 days	30-60 days	$7 500 - $10 000

…

OVERCROWDING					
13	A breach of section 4(7) of this regulation by failing to comply with the British Columbia Building Code or the Vancouver Building Bylaw, as the case may be, or regulations under the Fire Services Act or under the Health Act.	4-7 days	10-14 days	18-20 days	$5 000 - $7 000
14	A failure to comply with this regulation, or with the terms and conditions of the licence respecting capacity of the licensed establishment or of licensed premises	1-3 days	3-6 days	6-9 days	$1 000 - $3 000

LIQUOR SERVICE

...

28	If the establishment is one in respect of which a B licence has been issued, a breach of the regulations under section 17(2) of this regulation by serving liquor in the establishment to a person, other than a person described in section 17(2)(d) of this regulation, who does not intend to order and consume food in the establishment	1-3 days	3-6 days	6-9 days	$1 000 - $3 000

[16] The notices provided to Urban Well all had the same language:

Notice of Enforcement Action

ALLEGED CONTRAVENTION

The purpose of this letter is to inform you that the general manager will be reviewing whether to take enforcement action for the following alleged contravention(s) of the *Liquor Control and Licensing Act*, the regulations, and/or the terms and conditions of the license(s) noted above:

Specifics of the allegations followed. The two allegations that it was not engaged in serving food during all hours of operation were set out thus:

No.	**Contravention Name**	**Section of Act/ regulation and term and condition of the licence**	**Date of alleged contravention**
3.	Not primarily engaged in the Service of Food	s. 12	November 25, 2001

And:

10.	B not primarily engaged in the service of food	LCLA s. 20(1)(a); s. 20 (1)(d), s. 16, Reg. s. 17 (2)	March 2, 2002 Saturday (Friday business day)

[17] The specifics of five of the six allegations of overcrowding were framed identically in these terms (the sixth making reference only to s. 12):

No.	**Contravention Name**	**Section of Act/ regulation and term and condition of the licence**	**Date of alleged contravention**
	Overcrowding Beyond Licence Capacity	LCLA s. 12; s. 38(3)(b)	

[18] The notices concerning food service said further:

> (10) For the alleged contravention of not primarily engaged in the service of food … the enforcement hearing advocate will recommend to the general manager at an enforcement hearing that a suspension penalty of 10 (ten) days is warranted. The suspension will be served starting on a Friday and will continue on successive business days until completed.
>
> This proposed suspension penalty falls within the penalty range set out in schedule 4 to the regulations for a second incident of the alleged contravention.

[19] The notice concerning overcrowding said, as to the first date:

> For the alleged contravention of Overcrowding Beyond License Capacity … the enforcement hearing advocate will recommend to the general manager at an enforcement hearing that a suspension penalty of 1 (one) day is warranted. The suspension will be served starting on a Saturday and will continue on successive business days until completed.
>
> This proposed suspension penalty falls within the penalty range set out in schedule 4 to the regulations for a first incident of the alleged contravention.

[20] As to the other five dates, the notices said:

> (2) For the alleged contravention of overcrowding beyond licence capacity … the enforcement hearing advocate will recommend to the general manager at an enforcement hearing that a suspension penalty of 3 (three) days is warranted. The suspension will be served starting on a Friday and will continue on successive business days until completed.

> This proposed suspension penalty falls within the penalty range set out in schedule 4 to the regulations for a first incident of the alleged contravention.

[21] At the hearing of the appeal, the question was raised as to the apparent difference between the description of the allegation on the Notice of Enforcement Action of "not primarily engaged in the service of food" and the item of the Schedule under which the penalty was assessed, which reads: "operating in such a way that it differs in nature from the class or category of establishment … to which the licence is intended to apply."

[22] We asked for and received submissions from counsel on the language of s. 17(2) of the ***Regulation***, as to whether it could give rise to a contravention and as to the impact of that language, in conjunction with the Notice of Enforcement Action, upon the finding that a penalty should have been assessed under Schedule 4 for operating outside of the licence class. Urban Well submitted that the Notice of Enforcement Action, in referring to the allegation of "not primarily engaged in the service of food", did not disclose a contravention, particularly not one listed in Schedule 4.

[23] The respondent submitted that s. 17(2) established a general requirement of a holder of a Class "B" licence that it comply with that section's qualifying description, that the Notice was good, and that the General Manager was entitled to pursue Urban Well on the allegations for the non-compliance listed on the Notice of Enforcement Action. She submitted that s. 20(1)(d) of the ***Act*** permits the General Manager to take action for the existence of a circumstance that, under s. 16, would prevent the issue of a licence, and that, as s. 16 provides that a licence must not be issued or renewed if, in the General Manager's opinion, it would be contrary to the public interest, the General Manager was within her mandate in pursuing Urban Well for these violations.

[24] Section 17(2) of the ***Regulation*** provides that a class "B" licence is for issuance to "a dining establishment that is primarily engaged in the service of food during all hours of its operation" and requires that, subject to certain exceptions, the patron who orders liquor is served food from a reasonable selection of menu items available at all hours of operation.

[25] I have no doubt that the General Manager may take enforcement action under s. 20(1)(a) of the ***Act*** for not being primarily engaged in service of food during all hours of operation. Section 38(3) prohibits selling liquor not in accordance with the ***Act, Regulation*** and terms and conditions of the licence. The general criteria of a licence are, in my view, terms of the licence. Selling liquor in contravention of the general criteria is a contravention of s. 38(3) and permits action under s. 20(1)(a). Further, under s. 20(1)(d) the General Manager may take action for a circumstance that would prevent a licence from issuing or being renewed. The allegation here is that Urban Well has not complied with the requirements of the ***Regulation***, a condition which, if it prevailed at the time of renewal, could preclude renewal.

[26] I do not agree with Urban Well, therefore, that s. 17(2) of the ***Regulation*** does not permit an allegation of contravention of its general language. The General Manager was, by s. 20(2)(d) of the ***Act***, entitled to suspend the licence for the contraventions she found to exist.

[27] As to the wording of the Notice of Enforcement Action, the charge described the contravention as, "not primarily engaged in the service of food". The Notice particularized the potential jeopardy of Urban Well and referred to item 1 from Schedule 4 which, under the heading "Operating Outside of Licence Class", describes item 1 as "Operating the licensed establishment in such a way that it differs in nature from the class … to which the licence is intended to apply". That phrasing of item 1 catches, in my view,

the described violation "not primarily engaged in the service of food during all hours", the general descriptive of an establishment with a Class "B" licence.

[28] In my view, the penalty provision of the ***Regulation***, referred to in the Notice of Enforcement Action by item number is applicable to those two contraventions.

[29] That being so, I would not give effect to Urban Well's submissions in response to our request. In my view, the General Manager was entitled to penalize as allowed by item 1 of Schedule 4.

The Service of Food Issue

[30] The General Manager found, after a hearing before her delegate, that when inspected on 24-25 November 2001 and 1-2 March 2003 (both days on which there was admitted overcrowding), Urban Well was not engaged primarily in the service of food, contrary to ss. 16 and 20 of the ***Act*** and the conditions imposed by s. 17(2) of the ***Regulation***. She found "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".

[31] More must be said of the circumstances. The restaurant was divided into two areas, one with about 30 tables that could seat approximately 135 persons, with a fireplace, sofas and a small dance floor, the second with a service bar and a number of stools.

[32] The Liquor Control Branch's regional manager testified that at about 12:40 a.m. on 25 November 2001, he counted 219 patrons, more than allowed by the licence. A large number were not seated, and there were not enough seats for all patrons. He did not see cutlery, dishes, menus or food being served. Patrons were standing three to four deep in front of the bar and ordering drinks, for which they paid directly.

[33] The evidence of the situation on 2 March 2002 was similar. There was evidence of patrons three to four deep before the bar, of a line-up outside and of patrons drinking while standing. On that occasion, one dish was being prepared, a pot was on the stove and minimal kitchen staff were present.

[34] The licence established the restaurant's liquor selling hours as 11:00 a.m. to 1:00 a.m., Monday and Tuesday, 12:00 noon to 2:00 a.m., Wednesday through Saturday, and 11:00 am. to midnight Sunday. As the nights in question were Fridays, the restaurant was allowed to operate to 2:00 a.m.

[35] Witnesses testified that on Friday nights there was a minimum of four cooks and an assistant chef working at the restaurant. Patrons generally dined between 7:00 and 9:00 p.m., and stayed on the premises until 12:30 or 1:00 a.m. The chef testified he usually left at 11:00 p.m.

[36] From the evidence, the General Manager found the following as summarized by the reviewing judge:

> [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.

[37] Urban Well challenged the decision of the General Manager, saying that the General Manager misinterpreted s. 17(2) of the ***Regulation***, or incorrectly construed the legal test to be applied in determining whether it was operating within the conditions established by the ***Regulation***. It focused upon this paragraph of her decision:

> 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.

[38] The reviewing judge did not agree. He found, first applying ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, reasons modified, [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130, and the analysis in ***Zodiac Pub Ltd. (c.o.b. Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)***, 2004 BCSC 96, [2004] B.C.J. No. 119 (QL), that he was bound to review the decision of the General Manager as to lack of compliance with s. 17(2) on the standard of reasonableness. He then concluded that the decision of the General Manager was reasonable. In so deciding he held:

> [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.
>
> …
>
> [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.

[39] Before us, Urban Well submitted that the reviewing judge erred in his determination of the applicable standard of review, and that he should have applied a standard of correctness. On that standard, it said, the decision of the reviewing judge and the General Manager should be set aside as based upon an incorrect interpretation of the ***Regulation***. In the alternative, it contends that the General Manager's conclusion on these two contraventions is both incorrect and unreasonable, and that the reviewing judge erred in failing to find as such.

[40] The General Manager urges upon us the standard of review selected by the reviewing judge: reasonableness. Further, she says the interpretation of s. 17(2) was correct, and the finding of a contravention was both correct and reasonable.

a) The Standard of Review

[41] The four ***Pushpanathan*** factors relevant to determining the standard of review are: (1) the existence, or not, of a privative clause; (2) the relative expertise of the statutory delegate; (3) the purpose

of the legislation and provision in issue, and (4) the nature of the question in dispute.

[42] There are two different questions pertaining to the food service issue, the meaning of the words in s. 17(2) ("primarily engaged in the service of food during all hours of operation") and the question whether the activities of Urban Well contravened that section. The first question is a question of law; the second is a question of fact.

[43] The reviewing judge applied the reasoning of Blair J. in ***Zodiac***. The question in ***Zodiac*** arose from a finding that an intoxicated person had remained in a licensed establishment contrary to s. 43(2)(b) of the ***Act***. The reviewing judge found that the question for him, in that context, was whether the decision was reasonable. In reaching that decision he looked at, as he was bound to do, the four ***Pushpanathan*** factors: (1) there was no privative cause, a factor he said was neutral; (2) the scheme of the ***Act*** supported a conclusion that the General Manager had expertise in the matter of enforcement and, in particular, concerning the serving of alcohol to persons alleged to be intoxicated; (3) the purpose of the ***Act*** to control alcohol sales and consumption largely through the administration of the General Manager and her appointee suggested greater deference; and (4) the issue was mixed fact and law involving issues of credibility.

[44] I have come to a different conclusion than that reached by the reviewing judge on the standard we should apply in reviewing the issue of interpretation. In my view, the proper question is: was the interpretation of the section of the ***Regulation*** by the General Manager correct? And, in answer to that question, I would say yes. Thus, although I consider that a different standard applies than that selected by the reviewing judge, I conclude it makes no difference to the result.

[45] My selection of the standard of review depends largely upon the view I take of the expertise of the General Manager, and the consequences for a licensee of a contravention of the ***Regulation*** so interpreted.

[46] There is little doubt that the General Manager is constituted by the ***Act*** as a person with expertise in administering its several facets***.*** In her adjudicative capacity, this expertise is displayed by her application of the facts that are found to exist to the provision in issue. However, that does not make her, in my view, expert in matters of pure statutory interpretation. In ***Barrie Public Utilities v. Canadian Cable Television Assn.***, [2003] 1 S.C.R. 476, 2003 SCC 28, Gonthier J., for the majority, said this, concerning the expertise of the CRTC in interpreting the phrase "the supporting structure of a transmission line" (at para. 16):

> Deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise (*Dr. Q*, at para. 28). In my view, this is not such a case. The proper interpretation of the phrase "the supporting structure of a transmission line" in s. 43(5) is not a question that engages the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. This is not a question of telecommunications policy, or one which requires an understanding of technical language. Rather, it is a purely legal question and is therefore, in the words of La Forest J., "ultimately within the province of the judiciary" (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28). This Court's expertise in matters of pure statutory interpretation is superior to that of the CRTC. This factor suggests a less deferential approach.

[47] And at para. 18 he said concerning the nature of the question:

> As I noted in my consideration of relative expertise, above, the problem before us is a purely legal one: what did Parliament intend by the phrase "the supporting structure of a transmission line"? This is a question of general importance to the telecommunications and electricity industries. I note Bastarache J.'s observation in *Pushpanathan* (at para. 37) that even pure questions of law may be granted a wide degree of deference where other factors suggest the legislature so intended. That is not the case here.

In my view, these comments are apposite to this case.

[48] Further, the consequences to the licensee of the interpretation afforded the provision are significant: in this case, for these two contraventions, a licence suspension of 20 days was imposed. I do not consider that a licensee should be subject to such a penalty on anything less than a correct interpretation of the statute.

[49] In my view, these two factors weigh heavily against a standard of anything less than correctness as to the interpretation given to s. 17 of the ***Regulation*** by the General Manager.

[50] On the other hand, I agree that on the findings of fact and their application to the correct interpretation, the appropriate standard of review is the standard of reasonableness. The expertise of the General Manager as demonstrated by the duties assigned to that office by the legislation, and the interest of the public in the sound regulation of the liquor trade reflected by the legislation, persuade me that the Legislature intended the courts to give the General Manager a wide degree of deference.

b) The Interpretation of Section 17(2) of the Regulation

[51] Having settled on the appropriate standard of review, I conclude, nonetheless, that s. 17(2) was correctly interpreted by the General Manager.

[52] The General Manager did not propound at length as to the meaning of s. 17(2), but did say:

> 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.
>
> …
>
> 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.
>
> …
>
> 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 nightclub/ 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.

[53] Urban Well contends that the interpretation of s. 17(2) of the ***Regulation***, implicit in those passages, means that a licensee must be primarily engaged in the service of food during each and every hour of operation. Its contention before the reviewing judge and before us was that the requirement of s. 17(2) did not contemplate **all** hours, and that such an interpretation is not reasonable, using as an example the time immediately before closing when, it is said, patrons always will be lingering over non-food items.

[54] I do not agree. The reviewing judge said, correctly in my view, "[t]he words are plain in meaning." The words "all hours of its operation" mean that patrons, for all hours of its operation, are primarily those to whom food is, or has been, served. This meaning is inherent in the decision of the General Manager.

c) The Application of the Facts to the Regulation

[55] Given that interpretation, I would not interfere with the decision of the General Manager. There was ample evidence on which she could conclude that patrons, at the times in question, were present for the liquor and entertainment, and were not, even incidentally, there as consumers of food. Her conclusions of fact and application of them to the section were, without question, reasonable. and the reviewing judge was correct, in my view, in declining to interfere with her decision on these allegations.

The Penalties Issue

[56] I turn then to the issue of the penalties imposed. This issue was presented mainly in the context of the overcrowding allegations, but my conclusion is equally applicable to the penalties assessed on the service of food issue. The ***Regulation*** provides:

> **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 appropriated as a result of the contravention and, in so doing, may but need not take the enforcement action specified under section 51(2)(a). …
>
> **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.

…

(3) if the general manager has determined that a licensee has committed more than one contravention for which suspension 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.

[Emphasis added.]

[57] In imposing six suspensions for overcrowding the General Manager first observed: "Imposing any penalty is discretionary". She then imposed penalties for four overcrowding occasions and turned to the question of penalties for overcrowding on the two occasions on which Urban Well was not primarily engaged in the service of food during all hours of operation. On the issue of penalties, she said:

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 where there have been mitigating factors.

...

[Emphasis added.]

And:

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.

[Emphasis of the General Manager.]

And:

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.
>
> …
>
> 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 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.
>
> …
>
> 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 minimum gives this licensee an undeserved break.
>
> [Emphasis added.]

In the result, she assessed three day suspensions for each of the overcrowding contraventions.

[58] Urban Well contends that the General Manager misinterpreted the ***Regulation***, concluding in error that each violation required a suspension and that they were required to be cumulative, and submits that the conclusion of the reviewing judge that her decision was reasonable is in error.

[59] On this question the reviewing judge said:

> [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.
>
> …
>
> [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. …

[60] For the reasons expressed earlier, I consider that the appropriate standard of review of the interpretation issue is correctness, but that the court must give deference to the General Manager's application of the ***Act*** to the circumstances; that is, her decision must be reasonable.

[61] The General Manager, while saying that the schedule of penalties is not binding upon her, appears to have approached the issue of penalty, absent mitigating factors, as if the ***Regulation*** required suspensions. The reviewing judge concluded that a sanction was required once a contravention was established. In so concluding, he considered s. 20(2) of the ***Act***:

> 20(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:
>
> …
>
> (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

The reviewing judge did not, however, refer to the permissive language in s. 52 of the ***Regulation***, or its contrast with the mandatory language of s. 53 (both *supra*).

[62] In my view, read correctly, the General Manager has discretion whether to impose any suspension for a contravention; that is, she has the opportunity to decline to assess a suspension for a particular contravention. I consider that the permissive language of s. 20 of the ***Act*** and s. 52 of the ***Regulation*** permit such a result, and that in the interest of fairness and the avoidance of abuse, the permissive

language in both of those sections should be read so as to maintain the discretion of the General Manager to decline to impose a penalty.

[63] The General Manager appears to have recognized, in her decision, this flexibility, but then referred in the passages underlined above in para. 57, to the absence of mitigating circumstances, seemingly adopting a default position that assumes imposition of a suspension. This approach seriously erodes the full exercise of discretion open to the General Manager who is, I consider, bound to ask as her first question in imposing a penalty, whether the circumstances, both individually on the contravention and with other suspensions that may issue, justify a suspension for the particular infraction. The first question in the exercise of her discretion is whether a suspension or fine should be imposed, not whether such a penalty should not be imposed.

[64] This observation applies equally to the two separate suspensions on the service of food issue, both of which, on the facts found by the General Manger, could have been treated as other contraventions capable of attracting lighter penalties. While the decision to proceed on the more serious allegation is not reviewable, it is a circumstance that is relevant to the decision whether to suspend for each violation proved in the hearing. Also relevant is the presence of numerous other allegations, which are to be dealt with in the same hearing.

[65] It follows that I would allow the appeal to the extent of quashing the suspensions and would remit the matter to the General Manager for a fresh determination of the appropriate penalties.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Madam Justice Prowse:

[66] I have had the privilege of reading, in draft form, the reasons for judgment of Madam Justice Saunders. I agree with her analysis and conclusions with respect to all issues except "The Penalties Issue" commencing at para. 56 of her reasons. With respect, I am not persuaded that the General Manager erred in her approach to the issue of penalties, nor that the penalties she imposed, either individually, nor collectively, are unreasonable.

[67] The General Manager began her discussion of penalties by noting that the appellant admitted the "prohibited entertainment" contraventions and accepted that a suspension of one day for each of the breaches would be appropriate. In approaching the question of penalty with respect to the other contraventions, the General Manager made the following observations with respect to the nature of her discretion and the circumstances of the contraventions (at p. 42):

> 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: [list of penalties omitted]
>
> 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.
>
> [Emphasis added.]

[68] The General Manager then went on to deal with a contravention under s. 43(3)(b) of the Act of permitting an intoxicated person to remain on the premises. Although this contravention was set aside on judicial review, the General Manager's comments with respect to it reinforce her earlier statement that it was open to her not to impose a penalty despite a contravention, with reference to the circumstances in which it may be appropriate not to do so. In that regard, the General Manager stated (at pp. 42-43):

> 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 where there have been mitigating factors.

[69] After discussing (and rejecting) the appellant's submission that the contraventions involving overcrowding and prohibited entertainment amounted to "included offences" in "operating outside class", the General Manager returned to the subject of her discretion under the heading "The general manager's discretion to impose penalties". In so doing, the General Manager emphasized the circumstances which, in her view, justified the imposition of penalties in the case of each contravention. At p. 45 of her reasons, the General Manager stated:

> 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. The licensee has demonstrated conduct that is deserving of censure as a method of impressing upon the licensee the importance of voluntary compliance.
>
> …
>
> 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.
>
> [Emphasis added.]

[70] It is apparent from these extracts from her reasons that the General Manager clearly understood that she had a discretion in each case of a contravention, not to impose a penalty. She referred to circumstances in which adjudicators had declined to impose penalties where there were exceptional, extenuating or unusual circumstances or where there were mitigating factors. Another circumstance would be where the totality of the individual penalties would give rise to an overall penalty which was unreasonable, a factor which was also considered by the General Manager.

[71] In the result, the General Manager found that the nature of the offences, and, more importantly, the blatant nature of the circumstances in which they were committed, justified a penalty for each contravention and an overall penalty of a 45 day suspension (reduced on judicial review to 41 days because of the reversal of the finding of contravention under s. 43(3)(b) of the Act). In her view, this penalty was in keeping with the overall purpose of the Act including the need to ensure voluntary compliance with the Act and Regulations, not only by the appellant, but by other licence holders who might be tempted to put profit ahead of compliance.

[72] As earlier stated, I am not persuaded that the General Manager erred in her approach to the issue of penalties or that the penalties she imposed were unreasonable.

[73] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Prowse"