BRITISH COLUMBIA

DECISION OF THE

GENERAL MANAGER

LIQUOR CONTROL AND LICENSING BRANCH

IN THE MATTER OF

A RECONSIDERATION OF A DECISION OF

A hearing pursuant to Section 20 of

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

Licensee:	532871 B.C. Ltd. dba Urban Well 1516 Yew Street Vancouver, BC V6K 3E4
Cases:	EH01-062 EH02-040
For the Licensee:	David G. Butcher
Enforcement Hearing Adjudicator:	M. G. Taylor
Dates of Hearing:	September 16, 17, 18, 19 & 20 and October 4, 7, 8, & 9, 2002
Date of Rehearing of Penalty:	Written submissions from the licensee received by the branch on September 19, 2005
Place of Hearing:	Vancouver, B.C.
Date of Decision:	December 5, 2005

This is a reconsideration of a decision I issued on February 20, 2003. By a decision dated August 17, 2005, *532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (Liquor Control and Licensing Branch, General Manager),* 2005 B.C.C.A 416, the Court of Appeal remitted the decision back for "a fresh determination of the appropriate penalties."

The Contraventions and Penalties

In my decision of February 20, 2003, I heard and determined the branch's alleged contraventions, as set out below, and imposed penalties, also set out below.

On November 24-25, 2001,

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

On February 22-23, 2002,

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

On March 1-2, 2002,

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

7. the licensee permitted an intoxicated person to remain in the establishment, contrary to Section 43(2)(b) of the *Act*;
8. *the licensee was not primarily engaged in the service of food, contrary to Sections 16 and 20 of the *Act* and Section 17(2) of the *Regulation*;

On March 2, 2002,

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

On March 8, 2002,

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

On March 16-17, 2002,

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

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

I imposed penalty suspensions totaling forty-five (45) days, as follows:

1. For contraventions #1, #3, #5, #9, #10, and #11, I imposed licence suspensions of three (3) days each, for a total of eighteen (18) days;

2. For contraventions #4, #6, and #12, I imposed licence suspensions of one (1) day each, for a total of three (3) days;

3. For contravention #7, I imposed a licence suspension of four (4) days; and

4. For contraventions #2 and #8, I imposed licence suspensions of ten (10) days each, for a total of twenty (20) days.

On Judicial Review, contravention #7 was quashed, reducing the total penalty to forty-one (41) days.

The Court of Appeal Decision

On appeal to the Court of Appeal, the majority of the panel found that I had erred in finding that imposition of a licence suspension was a 'default position' thus eroding the discretion granted in Section 20 of the *Act:*

> [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 Manager, 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.

Submissions on the Reconsideration

In submissions on the reconsideration, the licensee summarized its position advanced at the original hearing, that penalties should not be imposed for all contraventions because:

1. The "overcrowding" incidents mainly involved situations in which the number of patrons was between the liquor licence capacity and the Civic Building Load Capacity. Accordingly, in the licensee's submission, there were no public safety concerns arising from the crowding in the restaurant.
2. It would be inappropriate and unfair to impose multiple suspensions for the same day when there were related elements between the most serious charge of operating outside class, and the charges of exceeding capacity and prohibited entertainment.
3. The total suspension of 44 days [*sic*] was excessive.

The licensee's additional submissions on the reconsideration were that:

i) the general manager has discretion whether to impose any penalties for any particular contravention. When considering the exercise of that discretion, the general manager must consider the general principles of "sentencing."

ii) The general manager must be cognizant of the principle of progressive discipline.

iii) Concurrent sentences are appropriate for multiple contraventions where they arise out of one transaction and in any event should not exceed the maximum sentence for the most serious offences.

iv) The totality principle requires a Judge to arrive at the appropriate sentence for each offence, and to then look back to ensure that the total projected penalty is not excess. The objective is to ensure "that the total sentence is proper."

v) The general manager should impose a suspension which is just and appropriate, which must recognize the fundamental principle that the global sentence must reflect the overall culpability of the offender and the circumstances of the offence.

The licensee referred to a number of cases and to chapters from Clayton Ruby, *Sentencing*, 4th Ed., to which I make reference later. The licensee submitted that the total suspension should not exceed 14 to 21 days, based on the following considerations:

- the branch had a policy of not taking enforcement action if the number of persons did not exceed the Municipal Building Occupant Load; see *532871 B.C. Ltd. dba Urban Well,* EH04-051 and 061, March 14, 2005). Accordingly, there should be no penalty imposed for contraventions 3, 9, 10, and 11.
- Contraventions 2 and 8 are the more serious contraventions which occurred on the same days as contraventions 1, 5 and 6. As allegations of overcrowding and prohibited entertainment form part of the single transaction of operating outside class, concurrent sentences should be imposed, which would result in no additional suspension for #1, 5 and 6.
- If those submissions were accepted, "the total suspension would be 28 days" and that would offend the totality principle. The licensee's argument on the totality principle is that there were 6 occasions over a 4 month period of a "single kind of conduct which

lends itself to the imposition of concurrent, rather than consecutive, penalties.

ANALYSIS AND DECISION

In my February 20, 2003, decision I stated that "the branch's primary goal in determining appropriate penalties is achieving voluntary compliance" (p. 42) and "the branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance" (p. 46). I read the comments of the Court of Appeal, and approach this reconsideration, with that primary goal in mind.

In exercising discretion whether to impose any penalty, the Court of Appeal has indicated that it is appropriate to consider the circumstances of the individual contravention and other contraventions for which suspensions may be imposed. Also, the Court indicated it is appropriate to take into consideration that contraventions #2 and 8, 'not primarily engaged in the service of food' attract the highest penalties. The Court observed, at paragraph [64], that

> "… [the service of food issue]…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."

The licensee framed its submission on this reconsideration through criminal law sentencing principles. The Court of Appeal did not refer to or direct a consideration of those principles.

I have carefully examined the licensee's submissions on criminal law factors. I do not accept that those principles are to be incorporated into these proceedings. Obviously, there are significant differences between the principles of criminal sentencing and the enforcement regime under this *Act*, and I discuss some of those below. To the extent that the sentencing factors provide clarity for the Court's direction, I have applied them in this decision.

I set out here some of the considerations the licensee raised from the criminal law context.

Concurrent and Consecutive Sentences

As discussed below, concurrent sentencing is not permitted under this regulatory regime. Nonetheless, the licensee raised arguments directed to concurrent sentencing and totality of sentence, which I have considered.

Some of the factors to determine when to impose concurrent sentences are set out by Ruby, *Sentencing*, ch. 14, pp 351-356:

- is there a reasonably close nexus between the offences in time and place?
- is the subsequent offence part and parcel of the original offence and to be treated as an aggravation of it?
- was there a break in the transaction?
- do they constitute separate invasions of the community's right to peace and order?
- is it one multifaceted course of criminal conduct, one transaction or part of the same transaction or endeavour?
- are the offences closely linked together?
- is it one continuous criminal act?

Totality of sentence:

Paraphrasing Ruby, the purpose of the totality principle is to ensure that the aggregate sentence is just and appropriate and to establish proportionality between the offence, the sentence and the practice of mitigation.

> "The totality principle requires an assessment of the total impact of the sentence being imposed in relation to the seriousness of the conduct and impact upon the offender." (Ruby, Ch. 2, p. 44)

> "When two offences are committed on the same occasion, during the same venture, or during the course of a single incident, the consecutive sentences should not exceed the maximum penalty provided for one of these offences." (Ruby, p. 355)

R. v. Jewell and Gramlick (1995), 100 C.C.C. (3rd) 270 (Ont. C.A.) at p. 279:

> In my view, the appropriate approach in cases such as the two under appeal is to, first, identify the gravamen of the conduct giving rise to all of the criminal offences. The trial judge should next determine the total sentence to be imposed. Having determined the appropriate total sentence, the trial judge should impose sentences with respect to each offence which result in that total sentence and which appropriately reflect the gravamen of the overall criminal conduct. In performing this function, the trial judge will have to consider not only the appropriate sentence for each offence, but whether in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed.

Totality and global sentence

R. v. M. (A. C.), (1996) 105 C.C.C. (3rd) 327 (S.C.C.) at p. 349-350. The court explained that the totality principle

> requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender.

Criminal Sentencing Principles and the Regulatory Regime under the Act

Before proceeding further, I believe it is necessary to note some significant differences between criminal sentencing and imposing penalties under this regulatory regime.

First, it is not open to the general manager "to determine the total sentence to be imposed" other than by reference to the penalty schedule passed by the Legislature. The general manager cannot, therefore, determine the total appropriate sentence and "impose sentences with respect to each offence which result in that total sentence" as is suggested in *R. v. Jewell.*

Second, the general manager does not have the authority to determine whether penalties should be consecutive or concurrent. The *Regulation* directs that they are consecutive.

Regulation Section 66(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.

Third, under Section 20(2.2) the general manager is directed to consider the licensee's compliance history and the particular circumstances.

Section 20(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.

Fourth, under Schedule 4, for the purpose of determining the severity of penalties, the penalties 'expire' after one year for the purposes of applying the penalty schedule:

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.

Reconsideration of the Penalties

The Court of Appeal found I erred "in seemingly adopting a default position that assumes imposition of a sentence" [para 63] thus eroding the discretion granted in Section 20 of the *Act*. I have revisited the evidence and the arguments both at the original hearing and on this reconsideration with the Court's comments and directives in mind.

The branch bundled contraventions from six occasions to be heard in one hearing. In total, there were 12 alleged contraventions – one was dismissed on judicial review, leaving 11 contraventions that are part of this penalty consideration. The total penalty I imposed for the 11 contraventions was 41 days of licence suspension.

The task here is to determine whether licence suspensions should be imposed for any or all of the contraventions. The Court has framed that as – "whether the circumstances, both individually on the contravention and with other suspensions that may issue, justify a suspension for the particular infraction" [para 63].

In considering the Court's directions, the Section 20(2.) considerations, and bearing in mind the primary goal of achieving voluntary compliance, part of my consideration is whether the licensee knew, or ought to have known, that the impugned conduct was prohibited. In my view, that addresses factors raised by the licensee such as whether a penalty is required to achieve voluntary compliance, whether the contraventions were part and parcel of the original contravention, whether there was a break, whether they are separate invasions, whether they are closely linked and whether it is one continuous unlawful act.

I have looked at when the branch issued the individual contravention notices (CN), to determine whether the licensee would have been aware, before each occurrence, of the branch's concern over the unlawful conduct. I note that the

CN for November 24-25, 2001, was served at the time, for the alleged contraventions of being overcrowded and operating outside class. The CN for February 22-23, 2003, was also issued at the time, and alleged overcrowding and prohibited entertainment. On March 2, 2002, the licensee met with the branch personnel. The March 8, 2002, CN was issued at the time of the inspection. On March 16-17, 2002, the Compliance & Enforcement officer issued CNs for the occurrences on March 1-2, March 2 and March 16-17, 2002.

Additionally, I note the *Compliance History* and *Enforcement Record* information set out pages 5 and 6 of my decision. The branch conducted a hearing and imposed a 1 day licence suspension for overcrowding which occurred on March 1, 2001.

On page 42 of my decision I stated:

> 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.

And at page 46:

> 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.

The evidence of the licensee made it clear that the licensee knew what was required, disagreed with those requirements, and was knowingly breaching the Legislation on each occasion. There was, and is, no doubt in my mind that the

licensee knew that each of the impugned activities were contraventions. He intentionally operated outside the class of his licence. Even when the licensee was operating within his licence class, he was intentionally (by his own admission in testimony) breaching the licensed capacities.

A contravention of overcrowding was proven on each of the six occasions that were the subjects of this hearing. Similarly, on two occasions when the licensee was operating within his licence class, the prohibited entertainment contraventions occurred.

The totality of the evidence, including the licensee's evidence made it clear that the licensee was aware prior to each occasion what the licensed capacity was, that patron participation entertainment was not permitted, that he held a Food Primary Licence that required a primary focus on the service of food at all times, and that the branch was concerned that he was not abiding by the terms of the legislation and his licence.

I will now consider whether licence suspensions are required.

i) the individual contravention, as stand-alone

At page 43 of my decision, I concluded that overcrowding and prohibited entertainment were stand-alone contraventions and that it was "appropriate in this case for the branch to impose penalties for the occasions when they occurred without the additional contravention of operating outside class". The licensee raised two grounds for reconsideration of those findings.

First, the licensee submitted that the branch had a policy of not taking enforcement action if the number of persons did not exceed the Municipal Building Occupant Load; see *532871 B.C. Ltd. dba Urban Well,* EH04-051 and

EH04-061, March 14, 2005). Accordingly, there should be no penalty imposed for contraventions 3, 9, 10, and 11.

Second, contraventions 2 and 8, operating outside class, are the more serious contraventions, which occurred on the same days as contraventions 1, 5 and 6. The licensee submitted that allegations of overcrowding and prohibited entertainment form part of the single transaction of operating outside class and, therefore, concurrent sentences should be imposed. This would result in no additional suspension for #1, 5 and 6. The licensee made separate submissions on the totality principle, which I address later in these reasons.

Concerning the first submission, I find that the licensee has misconstrued both the branch's policy and the facts of the case referred to. For the licensee's argument to be well-founded, the licensee's application would have pre-dated the date of the contraventions. The facts are that the Municipal Building Occupant Load was increased for this licensee to 168 person effective September 20, 2002, which I note is approximately 6 months later than the last contravention date in this hearing. The licensee applied to the branch on February 10, 2004, for an increase in its licensed capacity to match the Occupant Load capacity. Once that application had been submitted the branch did not pursue enforcement action if the capacity was over the licensed capacity but below the Occupant Load capacity.

Referring to the second argument, I gave thorough reasons in my previous decision for finding that 'operating outside class' was not a compendious contravention – that is, whether the legislated penalty range was intended to capture penalties for constituent elements of the contravention - and that overcrowding and prohibited entertainment were not constituent elements of that contravention. I found they were stand-alone contraventions. See pages 44 – 46. I concluded with the following observations and findings:

> 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.

On each occasion at issue here, the licensed capacity was a total of 122 patrons, including the patio, and the licensee was aware of the licensed capacity and chose not comply with it. I have looked at all of the evidence and find that all the contraventions were stand-alone contraventions and that the licensee's conduct is deserving of individual penalties in keeping with the goal of achieving voluntary compliance, subject to my further deliberations flowing from the Court of Appeal directions.

ii) the totality of the contraventions and penalties on each occasion

In the original hearing, the licensee had argued that there should not be separate penalties for 'operating outside class', overcrowding and dancing which occurred on the same occasion. In my decision, at page 44, I stated that I would consider this from two aspects – the penalty schedule, and the general manager's discretion to impose penalties.

Under the penalty schedule consideration, I examined whether 'operating outside class' was a 'compendious' contravention and I considered whether imposing penalties individually amounted to double penalties. Under the second aspect, I looked at the totality of the penalties and considered whether "the mischief sought to be addressed is sufficiently caught by 'operating outside class'" (p. 45). I also considered whether there were mitigating circumstances to justify not imposing penalties.

The Court has suggested that instead of alleging 'operating outside class,' the branch could have alleged a contravention that carried a lesser penalty. Neither the Court nor the licensee elaborated on this. Under the Penalty Schedule Item

28, serving liquor without food would have attracted a first time penalty of 1 to 3 day licence suspension. If the branch had chosen to allege that, would it have been one allegation? How many such contraventions were occurring on these occasions? According to the licensee's submission, the number of patrons in the establishment on November 24-25, 2001, was between 208 and 219; and on March 1 -2, 2002, between 169 and 193.

At p. 40 of the decision, I stated:

> 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.

And at p. 41:

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

The branch decided to allege 'operating outside class' rather than 'serving liquor without food.' As the Court notes, that decision is not reviewable. Does that decision affect whether the general manager should then disregard other contraventions that were also occurring? Or not penalize for the other contraventions? If the branch had alleged the 'lesser' contravention, how many allegations would there be? And, what would the total recommended penalties have been?

One of the sentencing factors the licensee raised is that a penalty should not exceed the maximum for any one of the contraventions. The total licence suspension penalty for November 24-25, 2001, is 13 days and for March 1 -2, 2002, it is 14 days. In the Penalty Schedule Item No. 1, the penalty for 'operating outside class' ('not primarily engaged') is 10 to 15 days, although I am not bound by the maximum. With one exception, the branch recommended, and I imposed, the minimum penalties. Although I am of the view that the sentencing principle does not apply to these proceedings, I note that the imposed penalties for those two occasions do not offend this principle.

iii) the totality of the contraventions and penalties over the six occasions.

The branch bundled the contraventions from six occasions into one hearing rather than conducting individual hearings for each occasion. The suggestion from the Court of Appeal is that bundling could be a factor because of the volume of contraventions. I have considered this aspect bearing in mind that the Legislation specifically denies concurrent sentences.

The licensee's submission on 'totality' is that the penalties should not "exceed the overall culpability of the offender." At pages 46-47, I stated:

> I have concluded that it would not do justice to the intent of the penalty provisions and the branch's goal of voluntary compliance to fold additional, discrete penalties into 'operating outside class'. Each of the contraventions occurred independently of the others. They are separate contraventions and I find that imposing penalties for each is appropriate.
>
> The general manager is not bound by the penalty schedule nor by the branch's recommendations. This licensee has demonstrated conduct that is deserving of censure as a method of impressing upon the licensee the importance of voluntary compliance. The licensee argued that with new *Regulations* coming into force, these contraventions were not all that serious. That, to my mind, is indicative of the error that has brought the licensee to this eventuality. The new *Regulations* do not alter the substance of these contraventions. The licensee must still abide by the

> licensed capacity, no patron participation entertainment and must maintain a food primary focus. Some rules have changed. For example, it is permissible for patrons to stand and walk around the restaurant with drinks, provided the primary focus of the restaurant remains the service of food.
>
> Although the total suspension based on the minimums is considerable, I am left with an unsettled sense that the circumstances of this case militate in favour of imposing penalties in excess of the minimum. Imposing the minimums gives this licensee an undeserved break.

Although I did not use the language "overall culpability of the offender," these comments and findings are directed to that consideration. Nothing in the Court's decision nor in the licensee's submissions causes me to veer away from those findings.

The main goal of enforcement is achieving voluntary compliance. I have found that, prior to each of these six occasions the licensee knew or ought to have known that the impugned conduct was unlawful. I have found there was no evidence that the licensee was attempting to, voluntarily comply. I have also found that the licensee's conduct is deserving of individual penalties for each contravention, absent bundling.

Given the circumstances of these contraventions, the licensee's conduct, the branch's goal of achieving voluntary compliance, and the fact that the Legislation specifically denies concurrent sentences, I find there is no compelling rationale for different results based on 'bundled' hearings versus individual hearings.

The licensee submitted that the general manager should be cognizant of the principle of progressive discipline but did not provide me with any authority for this. I adopt the reasoning of the Supreme Court on the judicial review, quoted at paragraph [59] of the Court of Appeal decision, that "the principle of progressive discipline is not part of the statutory enforcement regime: see *Whistler Mountain* at para. 53."

Decision

The Court of Appeal's concern was that I had seemingly adopted a 'default position that assumes imposition of a suspension.' The Court did not say that the penalties were too severe and did not direct the imposition of different penalties.

I have considered the Court's comments relating to the contraventions alleged and suspensions issued, for each occasion and the six occasions that were subject of the hearing. I have considered sentencing factors raised by the licensee. I have also considered the branch's mandate of achieving voluntary compliance and the Legislated Penalty Schedule.

In my original decision, I noted that the branch's recommended penalties, in all but one instance, were at the minimum of the ranges established by the Legislature. At page 47, I stated:

> Although the total suspension based on the minimums is considerable, I am left with an unsettled sense that the circumstances of this case militate in favour of imposing penalties in excess of the minimum. Imposing the minimums gives this licensee an undeserved break.
>
> The branch's recommendations resulted in one penalty in excess of the minimum, contravention #11, which occurred exactly one day past the cut-off for being defined as a second contravention. Given the compliance history and the numerous contraventions that were the subject of this hearing, I find that imposing a three (3) day suspension is justified.
>
> Because of the magnitude of the total licence suspension, I am influenced to impose the minimum penalties permitted under the Schedule, with the exception of contravention #11. In some cases, this is the minimum for a first contravention; in others, it is the minimum for a second contravention. The total licence suspension is forty-five (45) days. I note that the suspension results from the application of the penalty schedule which is the reflection of the will of the legislature in dealing with these contraventions. The suspension is the sum of the suspensions for the individual contraventions, as required by ss. 53(3) of the regulation. I further note that the suspension affects only the sale of liquor, not the licensee's ability to remain open and operate as a restaurant.

My decision was based in part on a view that the licensee was breaching the Legislation because he had a principled opposition to being confined to operating within his licence class. Having reviewed my decision and the branch's mandate, with the Court's directive in mind, I find that each contravention is a separate violation and there is reason to impose penalties for each of the contraventions.

Unlike the criminal sentencing principles, there is no discretion under this *Act* for the general manager to impose concurrent penalties.

Although I am of the view that the sentencing principles do not apply to these proceedings, I have considered the submissions on the totality and global penalties principles and am of the view that the total penalty for these six occasions, forty-one (41) days of licence suspension, does not offend either principle.

ORDER

I confirm the Orders issued in my decision of February 20, 2003, with the exception of the four (4) day licence suspension for contravention #7, permitting an intoxicated person to remain contrary to Section 43(2)(b) of the *Act*. Accordingly, I Order a licence suspension of forty-one (41) days to commence as of the close of business on Friday, January 6, 2006, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Secton 54(1) of the *Regulation*). I direct that Liquor Licence No. 169305 for the Urban Well be held by the branch or the Vancouver Police Department from the close of business on Friday, January 6, 2006, until the licensee has demonstrated to the branch's satisfaction that the Urban Well has been closed for forty-one (41) business days.

M. G. Taylor Date: December 5, 2005
Enforcement Hearing Adjudicator

cc: Vancouver Police Department

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

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