



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH**

IN THE MATTER OF

**A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267**

Licensee: 532871 B.C. LTD.
dba URBAN WELL
1516 Yew Street,
Vancouver BC

Case: EH02-113

Appearances:

For the Licensee David Stewart, Licensee

For the Branch Peter K. Jones

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing April 1, 2003

Place of Hearing Vancouver, B.C.

Date of Decision May 6, 2003

INTRODUCTION

The licensee, 532871 B.C. LTD. operates the URBAN WELL under a Class "B" Dining Lounge Liquor Licence, No. 163905. The Urban Well is located in the Kitsilano area of Vancouver. The licence permits the sale and consumption of all types of liquor with meals and patron non-participation entertainment, other than games. The licensed hours for the sale of liquor are 11:00 A.M. – 1:00 A.M. on Mondays and Tuesdays, 12:00 Noon – 2:00 A.M. Wednesday through Saturday, and 11:00 A.M. – 12:00 Midnight on Sundays. The licence permits 82 patrons in Area 1, 16 patrons in Area 2 and 24 patrons in the patio.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Liquor Control and Licensing Branch has alleged: that on October 18, 2002, prohibited entertainment (patrons dancing) occurred within the licensed establishment, contrary to section 50 of the *Liquor Control and Licensing Act*, (the *Act*) and has recommended a suspension of the liquor license for three (3) days to commence on a Thursday and continuing for successive business days until completed.

Section 50 of the *Act* states as follows:**Entertainment**

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

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

ISSUES

1. Whether the licensee contravened Section 50 of the *Act* on or about October 18, 2002?
2. If so, is the recommended penalty an appropriate penalty in the circumstances?

EXHIBITS

The following exhibits were presented:

- Exhibit 1** Book of Documents
- Tab 1** Notice of Enforcement Action (NOEA) letter of November 21, 2002 with appendices, regarding the contravention of section 50 of the Act.
 - Tab 2** Contravention Notice No. A013802 regarding the alleged contravention of section 50 of the Act.
 - Tab 3** Notes of Liquor Inspector Mark Tremblay regarding the alleged contravention
 - Tab 4** Enforcement Action Recommended form regarding the alleged Contravention
 - Tab 5** Documentation referred to in the NOEA at Appendices A & B.
 - Tab 6** Liquor Licence issued to the Urban Well.
 - Tab 7** Floor Plan of the Urban Well.
- EXHIBIT 2** Written Preliminary Statement, prepared by Peter K. Jones, Advocate.
- EXHIBIT 3** Floor plan of the establishment submitted by the licensee.
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EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two Liquor Inspectors testified that on October 18, 2002. at approximately 1:39 A.M. they attended at the Urban Well for the purpose of supervising the suspension of the liquor licence which was to occur following the expiration of the liquor licensing hours at 2:00 A.M. Management of the establishment had been made aware that they would be attending at approximately that time.

At the time of their arrival the establishment was approximately half full. Immediately upon entering they noted a male and female couple dancing on what appeared to be a dedicated dance floor area to music played by a disc-jockey. The couple were both holding bottles of beer, neither were wearing jackets. The inspectors described the music as rock-and-roll style being played at what they considered to be louder than typical background music but not so loud as to prevent conversation within the establishment. They expressed surprise at finding this activity as the liquor licence for the establishment did not permit dancing (patron participation entertainment), the establishment had been previously warned for allowing this activity and their arrival was expected.

Within approximately two to three minutes of their arrival they were greeted by the duty manager. It was their opinion that he could not have missed seeing the two patrons dancing however did nothing to prevent the activity from continuing. At their request he spoke with the patrons and the dancing ceased. The manager made no comment about the dancing. The licensee was contacted later that day regarding their observations and a Contravention Notice issued on October 20, 2002.

The liquor inspectors described the area in which the Urban Well is located as being a mix of residential and commercial usage with several other establishments in close proximity. The area is particularly busy on weekends and is the hospitality centre for the neighbourhood. They advised that they were unaware of any complaints of disturbances or violence emanating from the Urban Well nor were they aware of it having an adverse impact upon the neighbourhood.

EVIDENCE - THE LICENSEE

The licensee representative (the licensee) testified that he is an officer of the corporate licensee and has been involved in the food and hospitality industry for 12 – 15 years. He advised that there has been a restaurant in this location since 1984. The Urban Well is a full service restaurant and serves as a meeting place for the community. It is located in a mixed residential and small business area which serves as the entertainment and hospitality area for the neighbourhood. He is a supporter of the community and is involved in activities beneficial to the community. While it is said that patron participation entertainment negatively impacts on the community, that is not the case here. The restaurant does not have a dance floor. It does have a stage area which is used for non-patron participation entertainment. At the time of the inspectors' visit the staff on duty were a manager, a bartender, a bar porter, a cook, a server and perhaps a disc-jockey.

The licensee advised that he was not present during the time of the alleged contravention. He was aware of the liquor inspectors' proposed arrival and had arranged for the manager on duty to meet with the inspectors. The manager is currently residing outside the country and is not available as a witness.

The licensee advised that he spoke with one of the attending liquor inspectors following the event and with the duty manager as well. He advised that he was unable to dispute the occurrence of the prohibited entertainment, two persons dancing, as the manager apparently stopped it. He described the manager as being studious and quietly capable of getting the job done. The manager advised the licensee of the inspectors' visit and said that all went well except that they threatened to write up the dancing contravention. The manager advised that two persons had begun to dance without his knowledge as he attended to other management business. His sole concern at the time was the anticipated visit by the liquor inspectors. He advised that if he had seen the dancing he would have stopped it and did so once advised by the inspectors.

The licensee testified that he was aware of the prohibition against patrons dancing in the restaurant. He advised that people residing in the area want to go out and dance. To minimize the problems with dancing he has changed the style of music played to rock-and-roll as people don't dance to that. Carpet is laid down on the stage area most of the time and tables have been placed in the area on occasion in an attempt to discourage patrons from dancing, however despite this people will dance between the tables. When people are seen dancing, they are stopped from doing so. They don't post signs within the restaurant as it is felt that the patrons would not understand the rule.

The licensee advised that he is aware that the restaurant may apply for patron-participation entertainment however to do so would limit the hours of liquor service to cease at 12 Midnight. Patrons, knowing this would leave even earlier. Further the restaurant does not wish to promote dancing as it would take away from its focus as a restaurant.

SUBMISSIONS

Liquor Control and Licensing Branch

The Branch advocate submitted that to permit patron participation entertainment in a licensed establishment approval must first be obtained from local government. This allows concerns of the community regarding any negative impacts to be addressed. When a licensed establishment proceeds without obtaining approval the needs and concerns of the community are not addressed.

He submitted that on the evidence presented during the hearing, the contravention of prohibited entertainment (persons dancing), contrary to section 50 of the Act, was proven. The Branch in recommending the maximum penalty of a three day suspension took into account the compliance history of the establishment. Had this been the first time that the problem occurred it was unlikely that enforcement action would have been taken. The problem was brought to the attention of the licensee on four separate and previous occasions during 2002. The licensee had the opportunity to stop the

prohibited entertainment or to make application to amend the liquor licence to permit dancing and did neither.

The Branch Advocate drew our attention to the Notice of Enforcement Action (NOEA) dated November 21st, 2002, (Exhibit 1, tab 1) wherein on page 2 under "Proposed Enforcement Action", in addition to the recommended suspension of three days, it states at the bottom of the page: "For the alleged contravention of prohibited entertainment (dancing) set out in this letter, the enforcement hearing advocate will recommend to the general manager at an enforcement hearing the following regarding the terms and conditions of the licence: Impose a 12:00 Midnight closing time to the hours of operation." The advocate advised that this recommendation had been overlooked in Pre-hearing discussions with the licensee however the licensee had written notification in the NOEA and as such it formed part of the recommended penalty.

The Licensee

The licensee submitted that on what had been described as a busy night, two persons were found dancing for a very short period of time, no other problems were identified. The manager was primarily concerned with dealing with the liquor inspectors. He dealt with the dancing problem as soon as advised of it. He submitted that patrons will try and dance while at the establishment and they will have to remain diligent to it. Initiatives are taken to discourage the activity. The establishment does not operate as a dance club, nor do they wish to do so. A dance club would have a negative impact on the community. They currently have an excellent relationship with their neighbours including those residing in the same building which is of mixed use, residential and commercial.

The licensee advised that he was only today made aware that the branch in addition to recommending a three day suspension was seeking to restrict the liquor licence to require a 12:00 Midnight closure. While a three day suspension would be onerous the restriction would represent the end of the business given the number of other restaurants within the same area. He advised that he was challenged to respond to the

recommendation and perhaps would have found a better way to represent himself at this hearing had he known that the Branch was proceeding on that recommendation.

In addressing the recommended penalty of a three day suspension the licensee directed our attention to previous enforcement decisions. In the Hotel Douglas Ltd. Case (EH01-12) it was found that the presence of a minor in a licensed establishment for no more than 2-3 minutes was insufficient to demonstrate that the licensee authorized or permitted the minor to be present. He argued that was similar to this case in that the manager would have dealt with the dancing had he had time to notice it was occurring. In the Baja Grill case (EH01-30) overcrowding occurred because of circumstances beyond the control of the licensee and as such no penalty was warranted. He equated that case to here where the couple dancing were beyond the control of the manager but was immediately stopped on being made aware of the activity. The licensee also brought our attention to the British Columbia Court of Appeal decision in the Whistler Mountain Corporation (dba Dusty's) case. He argued that the case stood for the principle that in assessing a penalty the financial impact of the penalty must be considered. Here the recommended penalty of a three day suspension to be served during Thursday, Friday and Saturday would amount to a \$15,000 loss of sales penalty. The activity of persons dancing was not permitted or condoned, it could not be controlled.

Finding of Fact

Having considered all of the evidence I find that the licensee permitted prohibited entertainment (dancing) and in so doing contravened Section 50 of the Liquor Control and Licensing Act.

REASONS AND DECISION

In finding that the licensee permitted the prohibited activity I took into consideration that the licensee, whilst made aware by way of the previously issued Contravention Notices that patrons dancing was not allowed and that greater supervision was necessary, did not take all reasonable steps to prevent the activity from occurring. For example, there was neither carpeting nor tables placed on the stage area to discourage patrons from dancing, none of the employees on duty advised the patrons that dancing was not allowed until requested to do so by the liquor inspectors. Further, employing a disc-jockey to play danceable music at a level above a normal background level, if not encouraging the activity certainly enables it.

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

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

In the circumstances, I find that a penalty is not warranted. While there are allegations of the prohibited activity having occurred previously, none had been proven at the time of this contravention. Thus this is treated as a first contravention for the prohibited activity. The incident is low on the scale, one couple dancing for what may have been a short period of time.

During the hearing I gave consideration to the Branch Advocate's submission that the recommendation to impose a 12:00 Midnight closing time to the hours of operation be considered. I was present during the pre-hearing discussions, had a copy of the NOEA containing the intended recommendation and also overlooked it as forming part of the recommended enforcement action. My correspondence reporting the Pre-hearing discussions dealt only with the recommended suspension penalty. I determined during the hearing and hereby confirm that in the circumstances it would be unfair to the licensee to require him to address this recommendation or for me as adjudicator to consider the recommendation in determining the appropriate penalty.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 6, 2003

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter Jones, Branch Advocate
