



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF**

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

Licensee: 582583 British Columbia Ltd.
dba Urban Well Downtown
Unit G 3, 888 Nelson Street
Vancouver, BC

Case: EH03-023

APPEARANCES

For the Licensee: David Stewart, Licensee

For the Branch: Peter Jones, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: June 23, 2003

Place of Hearing: Vancouver, B.C.

Date of Decision: August 27, 2003

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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Introduction

The licensee, 582583 B.C. Ltd. operates The Urban Well Downtown ("Urban Well") under the food primary liquor licence #188092. The licence permits the sale and consumption of all types of liquor with meals and patron non-participation entertainment, other than games, such as a disk jockey providing music. The licensed hours for the sale of liquor are 12:00 Noon until 1:00 A.M. Wednesdays and 12:00 Noon until 2:00 A.M. every other day. The licence permits 26 patrons in Area 01, 190 patrons in Area 02, 45 patrons in Area 03, 35 patrons in Area 04, and 120 patrons on the patio.

Area 01 is separate from the other areas and is similar to a banquet room. The licensee uses it as an overflow area when the restaurant is full. Area 02 is the main dining room, with banquette seating around the walls and tables for 4 in the central area. There is a permanent disk jockey station in area 02 that is also used one night a week for a comedy performance. Areas 03 and 04, which are joined as one area, are separated from area 02 by glass doors, and are referred to in this decision as the 'back room'. In the back room, there are bar stools along the bar, tables and chairs against the walls, and there is another disk jockey station.

There is another Urban Well located on Yew Street in Vancouver.

Alleged Contraventions and Recommended Enforcement Action

By Notice of Enforcement Action (NOEA) dated March 20, 2003, the Branch alleged that on January 25, 2003, the licensee contravened section 50 of the Act by permitting prohibited entertainment. The alleged contravention occurred in the early morning of January 25, which is actually January 24, 2003 business day. The branch's recommended enforcement actions are

- a) a one day licence suspension, to be served on a Friday, and
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- b) a change to the terms and conditions of the licence to alter the hours of liquor service to reduce the hours of liquor sale to 12:00 midnight.

Compliance History

There is no record of prior contraventions, offences or enforcement actions (“compliance history”) for this licensee or this establishment within the year preceding this incident. Therefore, this contravention, if proved, would be considered a first contravention for the purposes of the Penalty Schedule.

As set out in the Enforcement Action Recommended form (Exhibit No. 1, tab 5, p. 2 and 3), during 2001 and 2002, there have been 3 occasions when the police indicated concerns with the operation of this establishment. The branch served Contravention Notices (CN) for alleged contraventions on November 11, 2001, November 26, 2001, January 10, 2003 and February 6, 2003. Additionally, on October 4, 2002, the branch served a CN for prohibited entertainment. The branch did not proceed to enforcement action on these alleged contraventions.

Issues

1. Should the adjudicator rescue herself on the basis of actual or perceived bias?
 2. Is the licensee entitled to an adjournment to retain counsel?
 3. Is the licensee entitled to have the hearing recorded?
 4. Does the evidence substantiate the branch’s allegation that there was prohibited entertainment (dancing)?
 5. If the contravention occurred, are the branch’s recommended enforcement actions appropriate?
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Exhibits

Exhibit No. 1	Book of Documents
Exhibit No. 2	Reporting Letter from Pre-Hearing Conference, dated May 28, 2003
Exhibit No. 3	March 5, 2003 NOEA
Exhibit No. 4	Rising Tide Consultants letter June 23, 2003

Preliminary Application

The licensee applied at the commencement of the hearing for an adjournment and for me to rescue myself on the basis of actual or perceived bias. The grounds for the adjournment were to retain counsel, to allow the branch time to appoint a different adjudicator and to arrange to have the hearing recorded.

I denied the application for the reasons that follow.

Background

The incident giving rise to this proceeding occurred on January 24/25, 2003. The branch initially served a Notice of Enforcement Action (NOEA) dated March 5, 2003, which recommended a one day licence suspension. The branch amended that notice on March 20, 2003, to include, as an additional enforcement action, a change to the terms and conditions of the licence.

On May 13, 2003, the branch registrar conducted a pre-hearing telephone conference (PHC). At the PHC, the branch was addressing the March 20, 2003, NOEA but the licensee had not received a copy. The registrar adjourned the PHC to May 23, 2003, to give the licensee an opportunity to consider the amended NOEA. The May 23 PHC proceeded, issues were canvassed, disclosure requirements were addressed, evidence and witnesses for the hearing were discussed and time frames were set.

Licensee's Submissions

The licensee submitted that he had been informed on Friday, June 20, 2003, that I would be the adjudicator and that until then he had assumed it would be another adjudicator. He submitted that he did not have the legal expertise to properly address the bias issue and wanted an opportunity to instruct counsel. He also submitted that the amended proposed enforcement action amounted to a radical change - from a nominal cost flowing from a one day suspension to approximately 1/3 of the revenue of the business.

The issue of bias arises from the fact that I conducted a hearing for the branch on a number of alleged contraventions concerning the Yew Street Urban Well. I made findings of contraventions and assessed penalties. In the course of my reasons, I rejected some of the licensee's evidence. The licensee has filed for judicial review of that decision and, in part, alleges that I was biased. In this hearing, the licensee voiced his concern that I would be biased, mainly because of the judicial review.

Reasons for denying the adjournment application

The main issue is the licensee's concern that the adjudicator will be biased. The fact that I have heard a previous case and ruled against the licensee is not a basis for concluding actual or perceived bias. Decision makers frequently hear cases involving the same parties. That I rejected evidence in a previous case has no bearing on how I will perceive the evidence in the present case. An adjudicator must decide each case on its own merits.

The fact that the licensee has filed for judicial review also does not cast a pall of bias over the adjudication. Judicial reviews or appeals are common in adjudication. They are part of the system of ensuring that justice is done. I am not aware of the grounds advanced in the licensee's judicial review application.

If an allegation of bias is one of the grounds, I accept that the licensee is entitled to raise it just as he is entitled to raise any number of other grounds for the Court's consideration. The fact that it is alleged is not a bar to me hearing other cases touching this licensee. Administrative justice could grind to a halt if all that a party had to do was file a judicial review or an appeal alleging bias to avoid a certain adjudicator. There is no 'right' to know in advance who an adjudicator will be, nor to an adjudicator of one's own choosing.

The licensee's other reason for asking for an adjournment was so he could retain counsel, in part to speak to the bias issue, but mainly because of the branch's recommended terms and conditions. I noted that the PHC on this case had been held a full month prior to the hearing date and there was ample opportunity to retain counsel in advance or to make a timely application for postponement, as set out in the branch's hearing Rules.

Concerning the request that the hearing be recorded, the branch is no longer recording hearings. There is no entitlement to have hearings recorded.

Applicable Statutory Provisions

Liquor Control and Licensing Act, RS Chap. 267

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.

Evidence

The branch called three witnesses, the liquor inspector and two police officers. The licensee called two witnesses, the owner and a manager.

The liquor inspector testified that she and the police officers were doing a routine inspection and went to Urban Well around midnight on January 24/25, 2003. When they entered she observed dim candle lighting on tables, a disk jockey and loud music in both the main dining room and the back room, a clear floor area in the main dining room although no one was dancing, and approximately 15 patrons dancing in the back room. She testified that the music was so loud she had difficulty conversing with the police officers. In total, there were approximately 150 patrons, and there was one table in the main dining room at which patrons were eating. She observed that the kitchen had been cleaned up. The inspector recalled seeing bartenders in the back room but had no specific recollection about seeing servers.

The inspector spoke with the on-duty manager, told him that the dancing was not permitted, reviewed what was permitted under the licence and requested that he provide her with receipts for food and alcohol sales. He immediately had the patrons stop dancing. Once she issued the Contravention Notice (CN), the inspector and the officers left. Subsequently, the inspector received the requested receipts and found the sales indicated were appropriate to the type of establishment.

The inspector testified that she assumed responsibility for this area of Vancouver in December 2002 and this was her second inspection. Before that, she had been in the Urban Well with another inspector 4 or 5 times. This was the first CN she issued for this establishment; she did not recall whether CNs had been issued on the previous inspections.

When the inspector wrote the NOEA, she recommended the licence suspension and the change to the terms and conditions. This is reflected in Appendix A of the March 5, 2003, NOEA although the recommended term and condition was not carried forward in the body of the NOEA. She testified that she made the recommendations based on the compliance history, as set out at p. 2 and 3 of the Enforcement Action Recommended form (Exhibit No. 1, tab 5). In particular, she noted a CN issued on October 4, 2002, for the same contravention.

The police officers testimony accorded with the inspector's, indicating approximately 15 patrons dancing in the back room and no evidence of food service.

The Urban Well manager testified that he was present on January 24/25, 2003, when the inspector and officers attended. Although he had some management functions, he was not the overall manager with whom the inspector spoke. He testified that there had been a private party in the back room and there had been a food buffet set up in front of the bar.

He testified that dancing is not permitted at the Urban Well and that it is part of his duties to patrol the restaurant, including the back room, to ensure that patrons are not dancing. He estimated that he has to ask patrons to stop dancing twice per month. He has observed liquor inspectors in the premises previously and on those occasions patrons were not dancing. On this night he stopped patrons dancing approximately 3 times, including at the request of the inspector, at which point he had the music turned off. He also testified that he patrolled the back room every 15 minutes and that patrons were not dancing every time he went in.

Concerning the layout of the back room, he testified that there is an open floor area where patrons mingle and talk; it is a walk through and it provides access to the disk jockey booth so that patrons can request songs. This is where patrons

were dancing. He acknowledged that there are no notices posted stating that dancing is prohibited by law.

The licensee testified and introduced the documents at tab 6 of Exhibit No. 1, concerning the private function (television production company) and staffing on January 24/25, 2003. The proposed costing estimate and menu indicate that 75 guests were expected, arriving anytime after 7:00 P.M., that food (tapas and pizzas) would be served from 7:30 to 9:00 P.M. with beverage service continuing until midnight, and that there could be a video projector, screen, microphone and stand. The licensee testified that during the night, the party showed "reels of bloopers" and gave out awards. The Urban Well provided the disk jockey, music and a full complement of staff. The licensee testified that there was no discussion about dancing and nothing that suggested to him that it was intended.

The licensee submitted that the Urban Well staff attempts, politely, to get customers to adhere to the policies and on this night the staff was endeavouring to ensure that patrons were not dancing. He stated that there are no written policies for staff about how to handle dancing but they have been orally advised. He has always been aware that dancing is not permitted and has been made aware of the branch's concerns that dancing has occurred over the years.

The licensee advised that the Urban Well has begun the application process for a Liquor Primary Licence at both locations (See Exhibit No. 4).

Submissions

The branch advocate submitted that there are sound and compelling community public interest reasons for requiring municipal approval before allowing certain types of entertainment. The Urban Well does not have an entertainment endorsement to allow dancing. The licensee has been aware of the branch's concerns since at least 2001, but has not taken steps to ensure that policies are

in place or to change the environment so that it is not conducive to dancing. As of the date of the hearing, the licensee had not placed notices around the restaurant advising that dancing was not allowed.

The branch advocate argued that I should take into account the compliance history of the Urban Well at both locations in determining an appropriate penalty, as per s. 20 (2.2) of the *Act*. The licensee argued against this. I ruled that I would not consider the enforcement history at the Yew Street location without further legal authority being cited. I noted that the liquor licences are issued to separate corporate entities. The fact that there is a common officer and director does not satisfy me that the two corporations constitute one licensee under the *Act*.

The licensee submitted that evidence demonstrates that staff take steps to ensure dancing does not occur. However, it is not possible to ensure 100% compliance, just as it is not possible to prevent patrons from lighting a cigarette – staff still have to tell patrons that smoking is not permitted. He submitted that the licensee applies due care by stopping prohibited activities.

There have been two occasions when the branch has indicated concerns about dancing. The first, in October 2002, did not proceed to enforcement action. Accordingly, this is a first contravention. He submitted that the branch's recommended term and condition is an exaggerated response to this situation. He noted that the licensee's staff took immediate steps to correct the situation. Precluding liquor sales past midnight would have a drastic effect on the business by eliminating approximately 1/3 of the revenue.

Reasons and Decision

As the licensee acknowledged, the evidence is clear that patrons were dancing and had been off and on during the night. It was not until the liquor inspector

raised a concern that the music was shut off to ensure that patrons got the message.

Penalty

Pursuant to ss. 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*.

I have taken into consideration that this is the first proven contravention, that the staff was cooperative with the Liquor Inspector, and that the staff took immediate action to have patrons stop dancing. I have given weight to the previous CN in October 2002, only to the extent that it demonstrates the branch has told the licensee in the past of concerns about prohibited entertainment. I have also taken into consideration that there are steps the licensee could have taken, but has not, to notify patrons that dancing is not permitted and to ensure that all staff are aware of the need to enforce the entertainment restrictions.

I find that imposing a licence suspension is warranted. The range for first contraventions is 1 to 3 day suspension. On the facts presented here, there were a reasonably small number of patrons dancing in the back room. There

was no problem activity in the main dining room. There is evidence that the branch and police have conducted inspections when there has been no dancing.

I am not satisfied that the facts of this case justify the imposition of the additional term and condition. I agree with the licensee that it appears unduly harsh in these circumstances. It is open to the general manager to impose terms and conditions when a licence is being renewed. The licensee is aware that poor performance during the year could affect the terms and conditions as of renewal. In my view, that possibility, along with a licence suspension should be sufficient deterrents to cause the licensee to strive for voluntary compliance.

Dancing at the Urban Well is encouraged by the disk jockey and the music, both of which are permissible under the entertainment endorsement. Given that they act as an encouragement, if the licensee is serious about wanting to curb the activity, there are some easily implemented actions, such as posting notices, having the service staff, bartenders and disk jockey working to enforcement, and shutting off the music at the moment dancing commences.

In my view, the licensee was well aware of the entertainment restriction and was not diligent in putting policies and procedures in place. The dancing had occurred on more than one occasion on this evening.

The main goal of enforcement action is achieving voluntary compliance. The penalty must be of sufficient impact to ensure that the licensee takes the matter seriously. In my view, these circumstances warrant more than the minimum penalty. Accordingly, I find that the imposition of a two day licence suspension, commencing on a Friday, is appropriate.

Order

Pursuant to section 20(2) of the *Act*, for the contravention of the terms and conditions of the liquor licence regarding prohibited or restricted entertainment on January 24/25, 2003, I impose a licence suspension of two (2) days, to be served commencing on Friday, October 3, 2003 and continuing on the next business day.

I order that the licence suspension take effect as of the close of business on Thursday, October 2, 2003, and continue through to the opening of business on Sunday, October 5, 2003.

The suspension order notice and suspended sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer. A member of the Vancouver City Police will be requested to attend the premises, take possession of the liquor license and hold it in safekeeping during the term of the suspension.

Original signed by

DATE: August 27, 2003

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, Victoria Office
Attention: Peter K. Jones, Advocate
