



**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, R.S.B.C. 1996, c. 267

Licensee:	532871 B.C. Ltd. dba Urban Well 1516 Yew Street Vancouver, BC
Case Number:	EH04-033
Appearances:	
For the Licensee	David Stewart
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Suzan Beattie
Date and Place of Hearing	July 20, 2004 - Vancouver July 22, 2004 – Teleconference
Date of Decision	November 2, 2004

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, 532871 B.C. Ltd., doing business as Urban Well, is located at 1516 Yew Street, Vancouver, BC. It holds a Food Primary Licence No. 169305 with hours of operation in which liquor may be sold, purchased and consumed being 11:00 A.M to 1:00 A.M. on Mondays and Tuesdays, 12:00 Noon to 2:00 A.M. Wednesday to Saturday, and 11:00 A.M. to 12:00 Midnight on Sundays. The licence permits patron non-participation entertainment other than games within the premises on Monday and Tuesday only.

The maximum license capacity is 82 patrons in Area 1 and 16 patrons in Area 2 for a total licensed capacity of 98 patrons with 24 patrons on the patio. The occupant load for the establishment is 163 persons.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Liquor Control and Licensing Branch alleges that on January 24, 2004, the licensee contravened section 12 (2) of the *Liquor Control and Licensing Act* and section 71(2) (b) of the *Liquor Control and Licensing Regulation* by permitting overcrowding beyond patron capacity less than or equal to occupant load.

Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for each contravention. For the alleged contravention of section 12(2) of the *Act* and section 71(2) (b) of the *Regulation*, the penalty range is one (1) day to three (3) days or one thousand (\$1,000.00) to three thousand (\$3,000.00) dollars for a first contravention. In this case, the branch is recommending the maximum suspension penalty of three (3) days.

The relevant statutory provisions of the *Liquor Control and Licensing Act and Regulation* state:

12 Licences

- (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)

71(2) (b) Licence categories, terms and conditions and endorsements

- (2) The following apply to a licence converted under subsection (1) unless and until rescinded or amended by the general manager:
 - (b) the hours of liquor service and the patron or person capacity of the licensed establishment in effect immediately before December 2, 2002.

ISSUES

1. Whether the licensee contravened section 12(2) of the *Liquor Control and Licensing Act* and section 71(2) (b) of the *Liquor Control and Licensing Regulation* by permitting overcrowding beyond patron capacity less than or equal to occupant load.
2. If so, is the recommended maximum penalty of a three (3) day suspension appropriate in the circumstances?

WITNESSES

The branch called two liquor inspectors as its witnesses. The witness for the licensee was its President.

EXHIBITS

The branch and the licensee presented the following exhibits:

Exhibit 1**Book of Documents**

- Tab 1 Notice of Enforcement Action letter dated April 22, 2004
- Tab 2 Enforcement Action Recommended Report dated February 10, 2004
- Tab 3 Contravention Notice B001257
- Tab 4 Handwritten notes of Inspector
- Tab 5 Handwritten notes of Inspector
- Tab 6 Food Primary Liquor Licence dated February 24, 22003
- Tab 7 Occupant load certificate
- Tab 7 Red-lined floor plans

Exhibit 2**Book of Documents**

- Tab 1 Application for a Liquor License dated Jan. 22/97
 - Tab 2 VPD Miscellaneous and Supplementary Report - Mar 13, 1997
 - Tab 3 Warning letter dated March 21, 1997A
 - Tab 4 Inspection and Interview Report dated May 30, 1997
 - Tab 5 Permits and Licenses Dep. Inspection Report – July 16, 1997
 - Tab 6 Permits & Licenses Dept., Inspection Report – October 5, 1997
 - Tab 7 Application for a permanent change to liquor licence dated Oct. 10, 1997
 - Tab 8 Permits & Licenses Dept. Inspection Report dated Sept. 18, 1998
 - Tab 9 VPD Miscellaneous and Supplementary Report -March 12, 1999
 - Tab 10 Letter from T.M. Tait to Ivo Staiano dated Mar. 23, 1999
 - Tab 11 Police LPC dated July 23, 1999
 - Tab 12 Letter from T.M. Tait to Ivo Staiano dated Mar. 23, 1999
 - Tab 13 LPC dated May 13, 2000 & LPC dated April 21, 2000
 - Tab 14 VPD LPC dated Dec. 12, 2001 and LPC dated June 24, 2001
 - Tab 15 Warning Letter dated Feb. 26, 2001
 - Tab 16 Contravention Notice A0000452 dated March 16, 2001
 - Tab 17 Police LPC A0769327 dated July 7, 2001
 - Tab 18 Contravention Notice A00421 and A000404
 - Tab 19 Contravention Notice A012602 dated February 6, 2002
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- Tab 20 Contravention Notice A000409 dated February 23, 2002
- Tab 21 Contravention Notice A0122261dated March 1,2002
- Tab 22 Contravention Notice A0122262dated March 22002
- Tab 23 Contravention Notice A0000411dated March 8,2002
- Tab 24 Contravention Notice A012624 dated March 16, 2002
- Tab 25 April 5, 2002 Decision of General Manager re: Urban Well
- Tab 26 Suspension letter dated Oct. 3, 2002
- Tab 27 Contravention Notice A002502 dated April 20, 2002
- Tab 28 Contravention Notice A012747dated April 22, 2002
- Tab 29 Contravention Notice A013536 dated April 27, 2002
- Tab 30 Contravention Notice A013580 dated June 5, 2002
- Tab 31 Contravention Notice A013581 dated June 5,2002
- Tab 32 Contravention Notice A013802dated October 18, 2002
- Tab 33 Contravention Notice B004481 dated March 14, 2003
- Tab 34 Feb. 20, 2003 Decision of General Manager re: Urban Well
- Tab 35 Suspension Letter dated April 8, 2003
- Tab 35A May 6, 2003 Decision of General Manager re: Urban Well

Exhibit 3

- Tab 36 Contravention Notice B004801 dated Nov. 22, 2003
- Tab 37 Compliance Meeting Form dated Dec. 18, 2003
- Tab 38 Compliance Meeting Form dated Feb. 5, 2004
- Tab 39 May 5, 2004 Decision of General Manager re: Urban Wells
- Tab 40 Suspension Letter dated May 12, 2004

Exhibit 4 Letter from Rising Tide Consultants dated September 3, 2003

Exhibit 5 Executive summary and letter of intent re: application for liquor primary licence by Urban Well

Exhibit 6 Letter from Rising Tide Consultants dated April 7, 2004

Exhibit 7 Operations Manual - Doorman

Exhibit 8 Operations Manual - Hostess

Exhibit 9 Letter from Rising Tide Consultants dated July 2, 2004

Exhibit 10 Letter from Rising Tide Consultants dated July 19, 2004

PRELIMINARY ISSUE:

At the commencement of the hearing the licensee raised an issue with respect to branch policy not to take enforcement action if a licensee has applied to increase its license capacity to its occupant load. The licensee's Food Primary Licence has a capacity of 98 patrons in area 1 and area 2 with 24 patrons on the patio. Its occupant load is 163.

On September 2, 2003, the licensee's agent wrote to the branch advising that he was assisting the licensee in an application for a Liquor Primary Licence. The requested capacity in the letter of intent was for 163 persons inside the establishment with 24 persons on the patio.

The alleged contravention of overcrowding beyond patron capacity less than or equal to occupant load took place on January 24, 2004. On February 4, 2004, two liquor inspectors, the licensee and its agent held a compliance meeting. It was at this meeting that the licensee became aware that its application to increase its capacity to that of its occupant load in its Liquor Primary application was not the same as applying to have its current Food Primary Licence increased to its occupant load. On February 10, 2004, as a result of the compliance meeting, the licensee's agent filed an application to increase the licensee's current Food Primary Licence capacity of 98 patrons to that of its occupant load of 163 persons.

There is a branch policy that, if a licensee has applied to increase its licence capacity to its occupant load, the branch will not take enforcement action for overcrowding beyond the patron capacity less than or equal to the occupant load. In this case such an application had not been made prior to the alleged contravention. The Liquor Primary and the Food Primary are two separate and distinct liquor licenses. The licensee currently holds a Food Primary Liquor Licence. It is the Food Primary Licence that must be the subject of an application to increase its licence capacity to that of its occupancy load. At this point in time the licensee does not have a Liquor Primary Licence. I am therefore unable to consider its application for a Liquor Primary Licence as satisfying

the policy precondition of an application to increase its Food Primary Liquor Licence capacity to its occupant load.

I therefore find that the branch's policy did not apply to this case.

EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS

Evidence

The relevant evidence in this matter was uncontested. The two liquor inspectors arrived at the establishment at approximately 22:55 hours on January 24, 2004. After speaking with the two door staff, the liquor inspectors entered the premises and made a number of observations. Of interest in this hearing is their observation that the establishment appeared overcrowded.

The second liquor inspector conducted a count while the first liquor inspector located a doorman. The first inspector found a doorman who was currently conducting a count of his own. The doorman advised the first liquor inspector that he recorded 138 patrons. The second liquor inspector advised the first liquor inspector that he recorded 147 patrons.

The two liquor inspectors then spoke with the manager on duty who informed them the capacity of the establishment was 163 patrons. The first liquor inspector advised the manager on duty that, in fact, the licence capacity was 98 patrons. After discussion, the manager on duty did take measures to reduce the number of patrons in the establishment.

The licensee admitted it operates above its capacity from time to time. There is no conscious decision to overcrowd beyond its licence capacity although a comfortable operating level for the establishment is between 135 - 145 patrons. In fact, at the licence capacity of 98 patrons the establishment is half full and will lose money in its operations.

The licensee entered excerpts of its operations manual outlining the staff responsibilities and duties for its door staff and hostess. While the responsibilities mention the restaurant being “at its capacity” there is no numerical number attached to that phrase.

Submissions

The licensee submits that it has made valid efforts to comply with the legislation including interactions with senior members of the branch. It also argues that public safety issues only arise if the establishment operates beyond its occupant load. It points to the fact that it employs door staff to monitor the number of patrons in its restaurant.

Finding of Fact and Due Diligence

I find, on a balance of probabilities, based on the evidence of the licensee’s doorperson’s count of 138 patrons and the second liquor inspectors count of 147 patrons that the licensee has contravened the *Liquor Control Act and Regulation* by overcrowding beyond its capacity of 98 patrons less than or equal to its occupant load of 163 persons.

As with all contraventions under this *Act and Regulation*, having found the contravention occurred, it is necessary to consider due diligence. In *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 the court set out criteria for a licensee to meet in demonstrating due diligence. Initially the licensee must show that “the employee was not the directing mind of the licensee in relation to that part of the licensee’s operations in connection with which the unlawful conduct arose”. In this case, there was no suggestion that the manager on duty was not the individual responsible for the licensee’s operation. I therefore find that the directing mind of the licensee in this case was that of the manager on duty.

The next question posed in the *Plaza Cabaret (supra)* case is whether “those who were in fact responsible for that part of the licensee’s operations were duly diligent in

attempting to prevent the occurrence of unlawful conduct or activities.” I find the evidence of the licensee falls short of establishing a sufficient degree of due diligence. I accept the licensee’s evidence that, once it realized it needed to apply for an increase in its Food Primary Liquor Licence capacity, it did so as soon as possible. As noted earlier I have found such an application was too late to allow for an application of the branch’s policy not to take enforcement action for overcrowding beyond the patron capacity less than or equal to the occupant load.

I also accept that the licensee has staff operations manuals. As noted, nowhere in the staff manual is there a specific reference to its food primary licence capacity of 98 patrons. As well, the manager on duty was unaware of the licence capacity of 98 patrons. I also note the evidence that, for the establishment to be a viable operation, it must operate beyond the patron capacity on its food primary licence.

On balance, I find the licensee has not demonstrated a defence of due diligence through policies, procedures or the actions of its staff on the business day of January 24, 2004.

Finding on Contravention

In summary, I find that the branch has proven that the licensee was overcrowded beyond patron capacity less than or equal to its occupant load.

PENALTY SUBMISSIONS AND DECISION

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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 licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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 minimum set out in Schedule 4 of the *Regulation*.

Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of overcrowding beyond licence capacity less than or equal to occupant load, the penalty range is one (1) to three (3) days or five thousand (\$5,000.00) to seven thousand (\$7,000.00) dollars for the first contravention. In this case, the branch is recommending the maximum suspension penalty of three (3) days.

The *Regulation* provides for a graduated scale of penalties for contraventions of the *Act*. The graduated nature of the penalties is necessary for the consistent and vigorous enforcement of the provisions in the *Act* and *Regulation*.

COMPLIANCE HISTORY

The licensee's file indicates a number of complaints and contraventions during the period from 2001 to the present. The list of complaints, contraventions and compliance meetings appearing in the Notice of Enforcement Action dated April 22, 2004, is as follows:

Findings of contravention and enforcement action under the LCLA and Regulations

	Date	Findings of Contraventions	Enforcement Action
1.	October 18, 2002	Prohibited Entertainment s 50	3 day suspension
2.	March 16, 2002	Contravening a term and condition s.12	3 day suspension
3.	March 16, 2002	Prohibited entertainment s.50	1 day suspension
4.	March 8, 2002	Licence capacity Reg.	3 day suspension
5.	March 2, 2002	Contravening a term and condition s.12	3 day suspension
6.	March 1, 2002	B not primarily engaged in the service of food s.20(1)(d)	10 day suspension
7.	March 1, 2002	Contravening a term and condition s.12	3 day suspension
8.	March 1, 2002	Permit intoxicated person to remain s.43(2)(b)	4 day suspension
9.	March 1, 2002	Prohibited entertainment s.50	1 day suspension
10.	February 23, 2002	Contravening a term and condition s.12	3 day suspension
11.	February 23, 2002	Prohibited entertainment s.50	1 day suspension
12.	November 25, 2001	B not primarily engaged in the service of food s.20(1)(d)	10 day suspension
13.	November 25, 2001	Contravening a term and condition s.12	3 day suspension
14.	March 16, 2001	Licence capacity Reg.	

Submissions

The licensee submits that, if a contravention is found, that no penalty be imposed as a result of its extensive attempts to solve its operating issues. It also argues that overcrowding beyond its licence capacity less than its occupant load is not a situation of public safety.

Decision

The branch's primary goal in determining the appropriate penalty along the scale is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch

and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

As noted earlier, I find the licensee has not demonstrated a defence of due diligence through policies, procedures or the actions of its staff on the business day of January 24, 2004. The licensee argues that the facts of this case do not give rise to safety concerns. I find safety is one of the primary purposes for the branch imposing patron capacity in its licences. The fact of overcrowding beyond patron capacity, even though less than or equal to the occupant load, does give rise to safety concerns. The branch's policy and penalty schedule is directed toward broad, overall, primary safety concerns.

The next question is whether the licensee should receive the recommended maximum three (3) day licence suspension penalty for a first contravention. I look first to the licensee's demonstrated attempts at compliance. Since 2001, the licensee has had a number of proven contraventions, including this contravention of overcrowding (see: Appendix "A"). This is not a licensee that voluntarily complies within the current legislative framework. As a result, I reject the licensee's argument that no penalty should be imposed for this contravention. I find that a suspension penalty is appropriate in these circumstances.

The next question is what level of suspension penalty is required on these facts to achieve voluntary compliance. This is a serious contravention that the licensee has been made aware of by past compliance notices. I do not agree that, in this case, the licensee should receive the minimum suspension penalty.

I am sympathetic to the licensee's misunderstanding of the branch policy not to take enforcement action if a licensee has applied to increase its license capacity to its occupant load. As soon as it was aware it had not made such an application for its Food Primary License, it filed the necessary application with the branch. However, balancing that view is the fact that the licensee is an experienced operator who candidly

agreed that, to operative at the licensed capacity, is not economically viable. It is also a licensee who has demonstrated it is not capable of voluntary compliance.

For these reasons, I find that the recommended maximum suspension penalty for this first contravention will address the issues of voluntary compliance as well as the public safety and well being of the community.

I find that a three (3) day license suspension is appropriate in these circumstances.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Food Primary Liquor Licence No. 169305, for a period of three (3) days to commence as of the close of business on Saturday, November 27 2004, 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 (section 67 of the Regulation).

Since I do not know whether the establishment would normally be open seven (7) days per week as of November 27, 2004, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that Food Primary Liquor Licence No. 169305 be held by the branch or the Vancouver Police Department from the close of business on Saturday November 27, 2004 until the licensee has demonstrated to the branch's satisfaction that it has been closed for three (3) business days.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: November 2, 2004

cc: Vancouver Police Department

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

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