



**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: Liverpool Hotels Ltd.
dba Hilltop Inn
1869 Main Street
Smither, BC

Case Number: EH03-018

Appearances:

For the Licensee Harvey Teufele

For the Branch Peter Jones

Enforcement Hearing Adjudicator Suzan Beattie

Date of Hearing May 21 & 22, 2003

Place of Hearing Smithers, B.C.

Date of Decision November 5, 2003

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Liverpool Hotels Ltd. operates the Hilltop Inn located at 1869 Main Street, Smithers, B. C. It holds Liquor Licence No. 101294 for an "A" Pub - Liquor Primary with hours of operation Monday to Saturday from 11:00 A.M. to 1:00 A.M. and on Sunday from 11:00 A.M. - 12:00 Midnight.

The maximum licensed capacity is 81 patrons inside area 1, with 31 patrons on the patio and 44 patrons in the designated smoking area.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

The Liquor Control and Licensing Branch alleges that on December 19, 2002, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain, contrary to the *Act*.

Schedule 4 of the *Liquor Control and Licensing Regulations*, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of section 43(2)(b), the penalty range is four (4) to seven (7) day license suspension or five thousand (\$5,000) to seven thousand (\$7,000) monetary penalty for the first contravention. In this case, the branch is recommending a four (4) day licence suspension. It recommends the suspension be served starting on a Thursday and continue on successive business days until completed.

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

43 Drunkenness

- (2) A licensee or the licensee's employee must not permit:
 - (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Whether the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act*.
2. If so, is the recommended penalty appropriate in the circumstances?

COMPLIANCE HISTORY

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

WITNESSES

The branch called two R.C.M. Police Constables as its witnesses. These witnesses are identified by virtue of their roles in the incident as the first Constable and the second Constable. The licensee called the individual then employed as its bartender as its witness.

EXHIBITS

The branch and the licensee presented the following exhibits:

Exhibit 1	Book of Documents
Tab 1	Notice of Enforcement Action letter dated February 21, 2003
Tab 2	LPC No. A128926 dated December 19, 2002 and CN No. A003480 dated January 14, 2003.
Tab 3	Continuation Report from the Smithers RCMP dated December 19, 2002.
Tab 4	Enforcement Action Recommended dated March 13, 2003
Tab 5	LPC No. 128552 dated December 16, 2001
Tab 6	Licensee disclosure documents

Tab 7 Liquor Licence No. 101294

Tab 8 Official floor plan

EVIDENCE, SUBMISSIONS AND FINDINGS ON CONTRAVENTIONS

Evidence

The evidence of the three witnesses was not substantially in dispute. Where there is a difference in the evidence it is noted and a factual finding made. The chronological sequence of events, as testified to by the three witnesses, is as follows:

The bartender testified that, on December 19, 2002, he was the only employee on shift. At approximately 8:00 P.M. a male patron entered the establishment and the bartender served him a pint. The bartender did not know the male patron and has not seen him since the evening of December 19, 2002. He recollected that at 8:00 P.M. the male patron was sober and had good hand-eye co-ordination. He served him one pint of beer and the male patron left the premises at approximately 8:30 P.M.

The male patron re-entered the premises at approximately 9:00 P.M. The bartender did not see the patron enter the premises but noticed him sitting in the smoking section. There were approximately 10 patrons in the establishment at this time with at least four patrons in the smoking section. The bartender, recalling the patron, had a brief conversation and served him a second pint. Again, he noticed nothing unusual about the male patron.

The designated smoking section is separated by a combination wood & glass wall partition. From the bar, the bartender can see the heads of patrons in the smoking section. The male patron was sitting facing away from the bar. At approximately 9:10 P.M. the bartender was in the smoking section and noticed the male patron holding ½ pint of beer and sleeping. The bartender touched the male patron's shoulder and woke him up. The male patron seemed disoriented, had slurred speech, and said he was tired from working. The bartender told the male patron he had to leave the

establishment and asked if he wanted a taxi. The male patron said yes and the bartender left him, with his ½ pint of beer, to return to the bar to call a taxi.

The bartender admitted it was poor judgement on his part to leave the ½ pint of beer on the male patron's table and agreed that it should have been removed when he told him he had to leave the premises. The bartender testified that he had reached the conclusion the male patron should not be served and would have to leave the premises. In the bartender's opinion the patron was disoriented but not in any danger to himself or others

At approximately 9:15 P.M., shortly after the bartender had telephoned for a taxi, the two R.C.M. Police Constables entered the premises. The Constables noted there were only about 10 patrons in the establishment as they walked by the bar. Both Constables acknowledged the bartender behind the bar but did not stop to talk to him. The first Constable stated he noticed the male patron in question sitting at a table facing a table with three patrons, two males and a female. The first Constable, noticing the male patron appeared to be passed out or asleep, asked the other three patrons if the male was part of their group. He was not.

The first Constable attempted to wake up the male patron by talking loudly to him and then placed his hand on the male patrons shoulder and used a "pain compliance" technique to arouse him. To this Constable, based on the length of time it took the male patron to respond, he was definitely under the influence of alcohol. When he woke, the male patrons speech was slurred and his eyes were red and watery. There was a strong odour of liquor and he had a burnt out cigarette in his hand with ashes along the front of his shirt. When he stood he was unsteady on his feet.

The first Constable formed the belief the male patron was intoxicated and placed him under arrest because he felt he was incapable of taking care of himself and a danger to himself or others. The first Constable decided to take him into custody until he could take care of himself.

Both constables escorted the male patron outside and, while walking with him, advised him he was under arrest. The second Constable transported the male patron to the Police Station in his vehicle. The first Constable returned to the establishment to talk with the bartender.

The first Constable wrote Police Licensed Premises Check (LPC) No. A128926, while talking with the bartender. The LPC signed by the bartender stated, "Male passed out @ table. Beer @ table. Lodged in cells".

The bartender's testimony differed from the Constables on two issues. The first issue is when the bartender knew the male patron had been arrested. The first Constable testified that he advised the bartender the male patron was arrested while he was writing out the LPC. The bartender testified he did not know until the hearing that the male patron was arrested.

On this issue of whether the bartender knew the male patron was arrested, I prefer the evidence of the bartender. I note that the Continuation Report states that the male patron was arrested for being drunk in a public place. However, neither the LPC which the bartender signed, nor the CN mailed to the establishment referenced the arrest. I find, based on the verbal and documentary evidence, that the bartender was not aware until the hearing that the male patron was arrested by the Constables and escorted to the police station.

The second issue involves the request for a taxi. The R.C.M. Police Continuation Report noted that the bartender stated he had telephoned for a taxi for the male patron, but that no taxi arrived while the first Constable was present. The bartender testified he did not cancel his request for a taxi because while he knew the Constables escorted the male patron out of the premises, he assumed the taxi he requested picked up the male patron outside the establishment. The bartender agreed that no taxi driver entered the establishment.

Both Constables agreed there was only one taxi service in Smithers. The second Constable explained that it is the Terrace "telecomps" that call the taxi for the R.C.M. Police and, in his opinion; individuals do not have a long wait for a taxi. The bartender testified that, contrary to the Constables experience, he often waited some time for a taxi to respond to his request.

On this issue I conclude on a balance of probabilities that the bartender did telephone for a taxi for the male patron.

One other matter raised in evidence was whether the male patron should have been placed in the foyer. The first Constable estimated the foyer to be approximately 5 feet by 7 feet and the second Constable guesstimated it was about 5 feet x 5 feet. The foyer is a windowless area in the main entrance and outside the redlined area. The second constable agreed that to place the male patron outside the establishment in December in Smithers could cause health problems but that the male patron could have been left in the foyer. The first constable agreed that it would have been safe to place the male patron in the foyer while waiting for a taxi.

Submission

The branch argues that the male patron was intoxicated and was permitted to remain on the premises. The branch relies on the definition of "permit" established in the *Ed Bulley Ventures Ltd (c.o.b. Planet Sports Lounge) vs British Columbia (Liquor Control and Licensing Branch, General Manager)* [2001] BCLI No. 5 June 28, 2001 which states, in part:

A licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not.

The branch submitted that the bartender ought to have removed the ½ pint of beer from the male patron when he asked him to leave. Further, the bartender ought to have placed the male patron in the foyer outside the red lined area while he was waiting for the taxi to arrive.

The licensee admits the male patron was intoxicated but argues that it did not "permit" him to remain on the premises. It admits it was an error not to remove the ½ pint of beer after the bartender told the male patron he had to leave the premises.

However, it says the bartender showed compassion in allowing the male patron to remain on the premises while waiting for the taxi to arrive. It is cold outside in Smithers in December. Further, as there are no windrows in the foyer, the bartender could not monitor the safety of the intoxicated patron while standing in the foyer.

Finding

I find, as the licensee has agreed, the male patron was intoxicated. The next question before me is whether the male patron was permitted to remain in that part of the establishment where liquor is sold, served or otherwise supplied.

On the facts before me I find an intoxicated patron was permitted to remain in that part of the establishment where liquor is sold, served or otherwise supplied, in contravention of Section 43 (2)(b) of the Liquor Control and Licensing Act.

PENALTY SUBMISSIONS AND DECISION

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 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 *Regulations*.

Submissions

The branch submits that intoxication is a serious public interest issue as intoxicated patrons may be a danger to themselves or a member of the public. It is the responsibility of the licensee to manage and control their establishment in a manner that does not negatively affect the other patrons or members of the community. Intoxication is associated with behaviour that can have a negative impact on communities.

The licensee argues that the time frame prevented a desirable ending. Had the Constables arrived later the taxi would have arrived and the male patron would not have been on the premises.

Decision

The *Regulations* provide 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 *Regulations*.

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.

In these circumstances, I find the unique circumstances of this case justify the use of my discretion not to impose a penalty. In this case the licensee demonstrated an awareness of the concerns regarding permitting an intoxicated person to remain in that part of the establishment where liquor is sold, served or otherwise supplied.

I find the bartender did advise the male patron he had to leave the premises. It was admittedly an error for the bartender to leave the ½ pint of beer on the table while telephoning for a taxi. Once a decision is reached that a patron must leave the premises, all alcoholic beverages must be removed. However, in the totality of the circumstances I do not find this error warrants imposition of a four (4) day minimum penalty.

This licensee and establishment have no prior convictions, offences or enforcement actions. I am persuaded that the branch's primary goal of achieving voluntary compliance will be achieved by the finding of a contravention in this matter. I therefore exercise my discretion and decline to impose a licence suspension.

ORDER

Pursuant to section 20(2) of the *Act*, concerning the LP Licence #101294, I order as follows:

For the contravention of section 43(2)(b) of the *Liquor Control and Licensing Act* on December 19, 2002, I exercise my discretion and decline to impose a penalty.

Original signed by

Suzan Beattie
Enforcement Hearing Adjudicator

Date: November 5, 2003

cc: R.C.M.Police Smithers Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Mike Clark, Regional Manager

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