



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

Licensee:	Rhodes Enterprises Ltd., dba Inn of the West 4620 Lakelse Avenue Terrace, BC
Case:	EH04-017
Appearances:	
For the Licensee	Kirsten Tonge, Mair Jenson Blair
For the Branch	Peter Mior, Branch Advocate
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	August 5, 2004
Place of Hearing	Terrace, B.C.
Date of Decision	August 12, 2004

INTRODUCTION:

[1] The licensee operates a pub known as Hankey Pankey's (Hankey's) within a hotel known as the Inn of the West at 4620 Lakelse Avenue in Terrace B.C. Hankey's operates under a Liquor Primary Licence No. 008660, Monday through Saturday from Noon until 2:00 A.M. and Sunday from 11:00 A.M. to Midnight. There are two areas identified in the licence; No. 1 with a capacity of 125 patrons and No. 2 with a capacity of 75 patrons. Hankey's has street front access.

ALLEGED CONTRAVENTIONS:

[2] By Notice of Enforcement Action (the "NOEA") dated April 5 2004, the Branch alleged that on December 13, 2003, at 1:00 A.M., the licensee contravened section 43(1) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "Act"): selling liquor to an intoxicated person.

[3] Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "*Regulation*") establishes prescribed penalties. For a first contravention of this type, the range of penalty is four (4) to seven (7) days license suspension and /or \$5,000-\$7,000 monetary penalty.

[4] The Branch has recommended that a four (4) day suspension to be served starting on a Friday and continuing on successive business days until completed is warranted.

RELEVANT STATUTORY PROVISIONS:

Section 43(1) of the *Act* states:

A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

PRELIMINARY MATTERS:

[5] The Branch Advocate provided a Book of Documents to Counsel for the Licensee at the beginning of the enforcement hearing. Counsel for the Licensee objected to the inclusion of materials at Tab 8 and 10 of the Book of Documents and sought a ruling as to the relevancy of those materials.

[6] The Branch Advocate indicated that the materials were produced following an unrelated previous Licensed Premises Check ("LPC") relating to an allegation which was not pursued by the Branch.

[7] Counsel for the Licensee argued that as the allegation was not acted upon in any way and, therefore, it is irrelevant to both the history of compliance for penalty purposes and to the establishment of the nature of the relationship between the Licensee and the Branch.

[8] Tab 8 and 10 are to be excluded from the Book of Documents.

ISSUES(S):

1. Did the Licensee contravene section 43(1) of the *Act* by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor?
 2. Can the Licensee exonerate itself from responsibility for section 43(1) the *Act* as a result of due diligence relating to the particular allegation?
 3. Is the recommended penalty appropriate?
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EXHIBITS:

Exhibit No. 1. Book of Documents including:

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| Tab 1 | Notice of Enforcement Action dated April 5, 2004 |
| Tab 2 | Enforcement Action Recommended Report dated Feb. 10, 2004 |
| Tab 3 | Police Licensed Premise Check dated Dec. 13, 2003 |
| Tab 4 | Contravention Notice B000084 dated Feb. 4, 2004 |
| Tab 5 | Police Narrative Report dated Jan. 13, 2004 |
| Tab 6 | Liquor Primary Licence dated Aug. 1, 2003, and Licence Terms and Conditions (the "Guide") |
| Tab 7 | Red line floor plans for establishment |
| Tab 8 | Excluded |
| Tab 9 | Police Licensed Premise Check dated Aug. 18, 2002 |
| Tab 10 | Excluded |
| Tab 11 | Contravention Notice A003477 dated Sept. 4, 2002 |
| Tab 12 | Police Licensed Premise Check dated Sept. 8, 2002 with Officer's notes attached |
| Tab 13 | Compliance Meeting Form dated Oct. 3, 2002 |
| Tab 14 | Police Licensed Premise Check dated Feb. 21, 2003 with Police Report attached |
| Tab 15 | Contravention Notice A003481 March 14, 2003 |
| Tab 16 | Letter to Inn of the West dated April 1, 2003 |
| Tab 17 | Compliance Meeting Form dated May 21, 2003 |
| Tab 18 | Contravention Notice B000129 dated June 13, 2003 |
| Tab 19 | Contravention Notice B000087 dated Dec. 1, 2003 |
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Exhibit No 2. Statements

Two statements of the Bar Server; one typewritten and undated, and one handwritten and dated July 15, 2004.

EVIDENCE:

[9] The Branch's witnesses included an Officer of the R.C.M.Police author of LPC A112677, and the Liquor Inspector author of the NOEA. The Licensee's witnesses included three employees: the Bar Server, the Bar Manager, and the General Manager of the establishment. All were administered a form of oath.

[10] Hankey's is in a commercial area. It is a pub in close proximity to other bars in downtown Terrace. During a routine inspection of the premises, several Officers of the R.C.M.Police observed an individual known to them, seated in the smoking section of the pub. One of the Officers began a dialogue with the individual, during which time a server put a full bottle of beer in front of the patron. The individual was removed and taken to the police station where he was arrested and lodged in cells overnight. A contravention notice was served on the establishment as a result.

Branch's Evidence:

[11] The Branch called an Officer of the R.C.M.Police. She had been assigned to Terrace since becoming a member in May of 2000. She had been specifically trained to identify signs of intoxication during her R.C.M.Police training and has much experience doing so, both in the contexts of driving offences and public drunkenness. She indicated that doing inspections of licensed establishments is part of her duty and she has done many such

inspections at Hankey's as well as all of the other pubs and liquor establishments in Terrace.

- [12] She identified the documents of which she was the author, in Exhibit No. 1. On December 12, 2003, she was working on a regular uniformed shift. She attended at Hankey's just before 1:00 A.M. on December 13, 2003. There were Christmas parties going on and it was her duty to make a police presence known in the community to minimize problems. She indicated that she had visited Hankey's as part of her shift on a Friday or Saturday night a hundred times or more over the past four years. On this occasion, she was accompanied by two other Officers of the R.C.M. Police. They entered the establishment, passed by the door staff and split-up as part of their usual routine. She said "Hello" to the front door staff and then to the Bar Manager. She inspected the women's washroom and followed her usual route through the smoking area. She noticed the pub was quite busy but there was plenty of space to move. It was an hour before closing and the patrons had started to thin out. She noticed an individual (the "Patron") in the smoking area who is well known to her. He had been in police custody the night before for being intoxicated in a public place and had left his tote bag at the police station. The Officer knew the bag was in the trunk of her police cruiser and went to so advise the individual. When she spoke to him he did not immediately reply. His chin was resting on his chest and he was slouched down in his chair. She got his attention and advised that his bag was in her patrol car. He replied to her, but he couldn't keep his eyes open and he was slurring his speech. The member indicated that she was no more than one foot away from the Patron at this time. She kept talking to him but in her opinion he was not comprehending. She wanted him to get his bag from the car. She observed him for one or one-and-a-half minutes. Then a Server attended with a beer and put it in front of the Patron. The Officer then moved away to get the attention of one of the other Officers. The Patron got up and tried to move. The Officer observed the Patron stumble and hold himself up by
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grabbing two chairs. The two other Officers removed the Patron from the establishment while the Officer told the Bar Manager that the Patron was being removed for being intoxicated in a public place. The Officer then joined the other members outside. She observed the Patron unable to walk on his own. He could not balance his head, and he had about him a strong odour of alcohol. The Patron was arrested and charged with being intoxicated in a public place. He was lodged in cells for the remainder of the night. The Officer testified that it was very easy to see that the Patron was intoxicated. She also noted that this individual has a serious problem with alcohol. The Officer indicated that she sees him in custody or involved with Police on approximately three of every four shifts that she works. She said that the Patron is well known in the community to have a problem with alcohol.

[13] The Liquor Inspector testified that she has been an Inspector for seventeen years in B.C. She is responsible for all of the Northwest of B.C. which includes Terrace and the Licensee's establishment. She confirmed the license, and the documents that she authored in Exhibit No.1.

[14] The inspector said that following the events of early morning December 13, 2003, she spoke to the R.C.M. Police Officer (Branch's witness), the Licensee, interviewed the employees and issued the Contravention Notice and had it signed by the Licensee in accordance with her obligations. She described the past history of contraventions supported by Tabs 9-12, 14-16, 18, and 19 involving supplying liquor to minors, not properly checking ID, minors in a licensed premises, patrons consuming liquor in an unapproved area, etc. She also identified documents confirming compliance meetings and education sessions that she has held with the Licensee. She testified that although the Licensee seemed to be interested in cooperation with the Branch with respect to meetings and discussions, she is doubtful that she is "getting the results [she] want(s)." She also testified that although she has not seen them over-serving, she thinks "it is happening".

Licensee's Evidence:

[15] The Bar Server testified that she had been working in Hankey's for a year and a half. She works shift every week. She was working on the night in question and she did serve a beer to the Patron while he in the smoking area.

[16] She has completed her "Serving It Right" course. She was trained by the Bar Manager as follows:

[17] They talked at the interview. She did her first shift on a Thursday because it is slow. She worked with another person for a couple of shifts and in a small section of the bar. She got used to carrying a tray and taking orders in front of the bar where she could ask questions of the Bar Manager if she had to. She says two servers (or one and the Bar Manager) keep an eye on each other and it is called the Buddy System.

[18] As to the Patron on the night in question, she says she remembers him because the Bar Manager got mad at her. "He said to watch my tables better". This happened "after the cops left". She testified, that she "recalled the guy-antisocial, quiet, no fuss. He came in alone." Then a woman sat down with him and they ordered a pitcher of beer (about four sleeves) which they shared. He did not drink before that. She testified that he did not look drunk. He was in her section (the smoking area). She said that she watched him because she has to watch all of the tables carefully. She indicated that it was busy and so she had to be very alert to what was going on in her section. But it was not so busy as to make moving around difficult. The witness indicated that she did not hear him talk except to order the beer which he paid for in advance. It took her fifteen minutes to get the beer to him. She was confident that she did not see any signs of intoxication, he did not show any when he walked in, or when he got up. She did not see him stumble. She did

not see the police in the establishment at any time. She said it was easy to lose your balance because of the strobe lights on the dance floor and even if he stumbled, it was not because he was drunk. "The Police are wrong," she said. She said they must have been in and out pretty quick while she was filling an order. She said that she had never seen this Patron before. The witness also testified that she knows how to identify an intoxicated person because she took the "Serving It Right" test. She quoted the observable symptoms in order from the Guide.

[19] She testified that the R.C.M. Police witness must have gotten the time "all wrong". It was not near last call, she did not so advise her customers, and the Patron simply passed her some money and said, "When you get a minute, bring me a Bud." That is why she took so long to deliver the beer.

[20] On cross examination the witness indicated that there is no education for telling if one is intoxicated "you just learn on the job. If he starts to look loopy, I should be concerned about serving him another". She also said, "It is perfectly in my right to serve a guy two beers". She also said: "The other night, I told someone he couldn't have another beer unless he had pretzels, he had been in the hot sun. I took three bucks from him and got him three bags of pretzels."

[21] When asked why there were two similar but different statements from her, she indicated that she did the first one (hand written) four days after the event when she was told to prepare a report by the Bar Manager, and then when she gave it to him, he re-wrote it for typing and then she edited it for content, because she was unhappy with the Bar Manager's version of her statement. The typed copy was prepared by her from the edited version of the Manager.

[22] The Bar Manager testified that he has been working at Hankey's for ten years, the last six years as Manager. He is in charge of hiring, training,

scheduling, disciplinary action, etc. In terms of hiring and training he is the responsible one. He trains by having a "sit down" then making sure their certificates are in place, goes over the rules and makes sure they know the computer system, and walks through their first couple of tables with them. Then he places them in a section close to him (the Buddy System) and watches "pretty closely" for a while. He said that there is no written policy with respect to how to interact with customers. If someone is intoxicated service will be cut off.

[23] On the night in question he did not notice the Patron until the R.C.M. Police Officers arrived. Then he noticed one of them talking to the Patron and he watched from the bar. He said that the Patron started walking to the door and the Officers followed him out. The Bar Manager said that he doesn't know the Patron personally, but from inside the bar he does. He said the Patron is not a regular, but one week out of each month when the Patron gets his welfare cheque he drinks it until it is gone. "He comes in, he drinks, he leaves."

[24] On cross examination, the Bar Manager couldn't remember when he last sat down with the Guide. He said that the Police talked to him and gave him the citation. He said he was not concerned about getting it and had no further discussions with the Police. He testified that he told the Server about the citation and asked if the Patron was drunk. When she advised that he was not, he confirmed with the other staff, all of which said the Patron did not stumble. He said he had no reason to be unhappy with the Server, because he was certain the Patron was not intoxicated. He also testified that the Server told him she was having trouble getting through the crowd to serve her customers. The Bar Manager indicated that the room was 120% as busy as a usual for a Friday and 90% as busy as its busiest day.

[25] The General Manager testified last. He had observed the whole of the hearing as the Licensee's representative. He indicated that he took over

management in 1994. There are department heads at the establishment and the Bar Manager is the department head of Hankey's. The Bar Manager reports to the General Manager. He said that if there is a problem in the Pub, he gets a visit from the Liquor Inspector. Her then calls in the Bar Manager and says he does not want this to happen again. He said "the R.C.M.P. does not want to come in here and clean up our mess, so if someone has too much, we give them back their money and tell them to get out." He said the Servers have clear rights to refuse service to customers. "It's their obligation and their right to refuse." He said that when he heard about the incident, "first I was tough on [the Server], but then once I found out what really happened and what a good employee she was, I apologized." He finished by stating on cross examination that the Bar Manager was not disciplined because he was not yet proven guilty.

SUBMISSIONS:

Branch

[26] The Branch submitted that service of the beer was acknowledged by the witnesses for the Licensee and therefore the only issue is whether the Patron was "an intoxicated person or a person apparently under the influence of liquor." The Branch argued that the Patron was clearly both of the above.

[27] The Branch also argued that the Bar Manager did not exercise due diligence in either training the Bar Server or observing the activities in the pub that night. He either did not see the Patron or did nothing about his presence notwithstanding that he knew of the Patron's problem with liquor. He also did not alert the Bar Server or act as a diligent Bar Manager would have under the circumstances.

[28] The Branch Advocate cited *Whistler Mountain Ski Corporation v. General Manager Liquor Control and Licensing Branch*, 2002 BCCA 426, for the proposition that due diligence must be applied to this section of the *Act* and any defence by the Licensee must display that it took all reasonable measures to prevent such infractions. The Branch Advocate added that there was no evidence by the General Manager of training manuals, minutes of meetings, or reason to believe that any precautions were taken by way of policy to minimize the likelihood of over-service occurring.

[29] The Branch argued that the standard of proof for whether the infraction had occurred is on "the Balance of Probabilities"

[30] The Branch must take such contraventions seriously as the consequences of "over service" are significant to the community. The inspector ensured that all was done that could reasonably be done to educate the licensee. The recommended penalty is the minimum suspension and a suspension is the appropriate penalty to impose.

The Licensee

[31] The Licensee argued that the standard of proof of the *Actus Reas*, is "beyond a reasonable doubt". The Branch has an obligation to meet that standard. The licensee however, only must establish due diligence as a defence on "the balance of probabilities."

[32] The Licensee argued that a four (4) day license suspension was harsh and could devastate the Licensee. The consequences of such a suspension could top \$15,000 in revenue.

[33] The establishment had previous problems with minors and fake ID at the door and took the initiative to set up compliance meetings to improve on this situation. This is indicative of a cooperative and appropriate-acting licensee.

[34] The Licensee cited the case *Ed Bulley Ventures LTD. doing business as Planet Sports Lounge v. General Manager, Liquor Control and Licensing Branch*, Liquor Appeal Board, June 28, 2001, Vancouver. It says the case stands for the proposition that a licensee is not an insurer or guarantor for their patrons. A contravention can only be established if due diligence was not established in the conduct of the Licensee.

[35] Finally, the Licensee says there was no reasonable opportunity to appraise the Patron before serving the beer which led to the allegation of contravention and so no challenge to the Licensee's due diligence is available to the Branch.

ANALYSIS AND DECISION:

Was the Patron an "intoxicated person"?

[36] I find that he was. To find otherwise would be to determine that three Officers of the R.C.M. Police participated in the arrest and detention of the Patron, had him charged with being drunk in a public place, and lodged him in cells until sober, all wrongly.

[37] I accept the evidence of the R.C.M. Police Officer, that she is well trained in identifying intoxicated persons and did so identify this Patron. I also accept the evidence of that Officer as to the conduct and disposition of the Patron while in "conversation" with her and while trying to make way to the door of the pub. The Patron's history of alcohol related problems, which I also accept as evidence of both the R.C.M. Police Officer and the Bar Manager, though

not determinative of the issue, does nothing to dissuade me from this conclusion.

Was the Patron "apparently under the influence of liquor?"

[38] I find that he was. I accept the evidence of the R.C.M. Police Officer that the Patron was unresponsive, slumped over, slurring his speech and unstable on his feet. I accept the evidence from the R.C.M. Police Officer, the Bar Manager, and the Bar Server that these are among the observable characteristics one looks for to make such a determination. I do not accept the evidence of the Server or the Bar Manager that there were no observable symptoms to be seen.

Did the Licensee "sell or give liquor" to the Patron?

[39] I find that the Server, under the employment of the Licensee and supervision of the Bar Manager did do so. The evidence was consistent and admitted by all witnesses that a bottle of beer was served to the Patron. The timing of this service is consistent with the testimony of the R.C.M. Police Officer, though the Server does not admit to seeing the Officer present.

[40] I therefore find that the contravention has been proven. It is not necessary to comment on the arguments presented relating to the standard of proof as I find that any of the standards would in this case have been satisfied.

Is the defence of due diligence available to the Licensee?

[41] No. The Licensee has not established due diligence, to any standard of proof.

[42] I find the evidence of the Bar Server to be self serving and not credible. She testified that she watched her tables with care at all relevant times, that she kept busy monitoring the room and her section and that she observed the behaviour of the Patron in some detail. She did not, however, notice any of the three R.C.M. Police Officers enter, walk through, or talk to the Patron. She did not see the Officer talking to the Patron in her section or see two other Officers escort him out of the Pub. She did see the Patron walk to the door, however, without stumbling, contrary to the evidence of the R.C.M. Police Officer. I do not accept her evidence in this regard.

[43] Further, the Bar Server testified that she was yelled at for not watching her tables closely enough. I find this to be credible, and consistent with the accepted evidence of the Branch witnesses.

[44] The written statements of the Bar Server (Exhibit No. 2) were completed four days after the event, are inconsistent with one another and were prepared in conjunction with a third version, edited for content by the Bar Manager and not presented at the hearing. To the extent that these statements are inconsistent with the evidence of the R.C.M. Police Officer, I find them to be of no value.

[45] Lastly, the Bar Server indicated that she had to know a patron to determine if he was intoxicated, and she did not know this Patron. She listed the reference points from the Guide as to how one is to recognize intoxication, but also stated that "you just learn on the job" and indicated that she had every right to serve a patron two beers.

[46] I find that the Bar Server was not properly or adequately trained or introduced to policy that would enable her to evaluate the Patron for his level of intoxication. I find further that the Bar Server was not diligent in watching

her tables or observing the signs of intoxication or a person under the influence of liquor, which were there to be seen.

[47] I find that the Bar Manager was not diligent in watching the floor or the activities of the Bar Server. He did not see the R.C.M. Police Officers come into the Pub. He was busy behind the bar and had abdicated his responsibilities to keep an eye on the activities of his staff in the pub. The Bar Server was inadequately trained and/or supervised and was not receiving the support or direction that the Bar Manager should have provided.

[48] He claimed he watched the Patron get up and head to the door but did not see the Patron stumble, or any other signs of intoxication. He also denied that he told the Server to watch her tables more closely, or got upset with her for not doing so. This is consistent with his re-drafting of her written statement in being self-serving and deserving of discredit. I find the Bar Manager's testimony to be not credible.

[49] *The Plaza Cabaret Ltd. v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248, ("*Plaza Cabaret*") was cited by the Licensee to establish that the "directing mind or will" is the source to which due diligence must be attributed. Presumably this was designed by the Licensee to direct the onus to the Bar Manager or General Manager, and away from the Server. The Bar Manager however, carries in this case, the independent obligation to hire, train, and supervise the staff of the Pub, including the server. To that extent, the Server's inadequacy is the Bar Manager's inadequacy. Due diligence cannot in this matter be seen to have been done by either the Server or the Bar Manager.

[50] The General Manager testified that he appoints department heads, to be responsible for sections of the establishment. He stated that the Bar Manager is responsible for the Pub, hiring and supervising of the Pub staff,

and reporting back to the General Manager. I accept that this is the Bar Manager's responsibility. He is the "controlling mind" in the context of *Plaza Cabaret*, for the purposes of this case. The General Manager has effectively delegated the *authority* for the proper running of the Pub in accordance with the liquor primary license, but he cannot delegate the *responsibility* for compliance with the applicable *Act* and *Regulation*, or license terms and conditions.

PENALTY:

[51] 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 the 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

[52] 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 *Regulation*.

[53] The range of penalty for a first contravention of section 43(1) of the *Act* in accordance with item 9 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$4,000-\$7,000.

[54] I find the evidence of compliance history of this Licensee to be relevant. It appears that the General Manager is quick to appease the Inspector with correspondence or the invitation to a compliance meeting, but not so quick to implement policy or procedures, which would limit contraventions. The establishment has had its share of relevant contraventions, alleged, or proven and yet there is still not a formalized and disciplined approach to controlling the conduct of the staff and servers in the Pub. Over service is a significant issue for the community, and one which must be taken seriously. I find that the imposition of this penalty, notwithstanding the hardship that it carries with it, is necessary in this case to alert the Licensee of the significance and import of the issue of over-service.

[55] I find that the Branch's recommendation of a four (4) day licence suspension is an appropriate penalty.

ORDER:

[56] Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 008660 for a period of four (4) days to commence at the close of business on Thursday September 9, 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*). I direct that the liquor licence No. 008660 be held by the branch or the R.C.M. Police Terrace Detachment from the close of business on Thursday September 9, 2004, until the licensee has demonstrated to the Branch's satisfaction that Hankey's has been closed for four (4) business days.

Original signed by

Date: August 12, 2004

Sheldon Seigel
Enforcement Hearing Adjudicator

cc: R.C.M.Police Terrace Detachment

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

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Peter Mior, Branch Advocate,
