



**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: Second Lake Timber Co. Ltd,
dba Victoria Plaza Hotel
603 Pandora Avenue,
Victoria, BC V8W 1N8

Case: EH05-025/026/027

For the Licensee: Peter K. Jones
Jairo Rincon

For the Branch: Sonja Okada

Enforcement Hearing Adjudicator: M . G. Taylor

Date of Hearing: August 24, 25, & 26, 2005

Place of Hearing: Victoria, BC

Date of Decision: January 13, 2006

INTRODUCTION

The licensee, Second Lake Timber Co. Ltd, operates Monty's Pub ("the pub") in the Victoria Plaza Hotel, under Liquor Primary Licence No. 104803. The hours of operation are 11:30 a.m. to 1:30 a.m. Monday through Saturday and from 11:00 a.m. to midnight on Sunday. The licensed capacity is 225 patrons. The licence is subject to the terms and conditions set out in the publication "Guide to Liquor Licensees in the British Columbia" which was updated effective August 2004.

ALLEGED CONTRAVENTIONS

The Liquor Control and Licensing Branch's (the branch) allegations and recommended enforcement action are set out as follows:

1. **Notice of Enforcement Action EH05-025**, dated May 16, 2005. The branch alleges that on November 24, 2004, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The recommended enforcement action is a four (4) day suspension of the liquor licence (Item 11 of Schedule 4, *Liquor Control and Licensing Regulation*)
 2. **Notice of Enforcement Action EH05-026**, dated May 16, 2005. The branch alleges that on November 24, 2004, the licensee contravened Section 41(2) of the *Liquor Control and Licensing Regulation*, by free-pouring liquor. The recommended enforcement action is a four (4) day suspension of the liquor licence (Item 30 of Schedule 4, *Liquor Control and Licensing Regulation*).
 3. **Notice of Enforcement Action EH05-027**, dated May 16, 2005. The branch alleges that on December 3, 2004, the licensee contravened Section 36(2)(b) of the *Liquor Control and Licensing Act* by authorizing or
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permitting in the licensed establishment unlawful activities or conduct. The recommended enforcement action is a ten (10) day suspension of the liquor licence (item 8 of Schedule 4, *Liquor Control and Licensing Regulation*).

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUE(S)

1. Does the evidence substantiate the branch's allegations?
2. If yes, has the licensee substantiated the defence of due diligence to any or all of the contraventions?
3. If the allegations are proven, what penalties, if any, are appropriate?

EXHIBITS

- | | |
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| Exhibit No. 1 | The branch's Book of Documents, Tabs 1 – 35 |
| Exhibit No. 2 | Police Officer's notes |

EVIDENCE

The branch's witnesses were five police officers, a former liquor inspector ("inspector A") and the liquor inspector responsible for this area ("inspector B"). The licensee's witnesses were the licensee and the head of security for the hotel, who is also the assistant manager for the pub.

During November and December 2004 Victoria Police Department carried out an initiative called Operation Dencity. This operation involved the use of undercover police officers from Vancouver and the Lower Mainland, who were deployed in various licensed establishments over a period of two weeks. The primary focus

of these officers was to purchase drugs and to gather evidence of drug trafficking; their secondary objective was to gather evidence of contraventions of the *Liquor Control and Licensing Act*. The Victoria Police Deputy Chief Constable testified that, at the end of Project Dencity, the police had concerns about liquor violations and he expressed a need for a more vigorous response from the branch and its employees and a need for a stronger operating relationship with the branch.

Monty's Pub is generally known as a 'stripper' pub. Undercover police officers attended Monty's Pub on November 24 and 26 and December 1 and 3, 2004. The officers alleged that on November 24 they observed intoxicated patrons in the pub and observed a server 'free pouring' liquor directly into the mouths of patrons. Additionally, a police officer alleged that she purchased cocaine from a staff member on December 3, 2004.

After Project Dencity, inspector A reviewed the police notes and issued Contravention Notices found at Tabs 3, 6 and 9, on December 23, 2004. His recommendation for enforcement action and penalties for each allegation (Exhibit No. 1, Tabs 2, 5, and 8) are dated March 2, 2005. The inspector issued a Notice of Enforcement Action (NOEA) for alleged contravention No. 3 (Tab 7) on March 4, 2005. Although he drafted NOEAs for the other two allegations, he left the branch in March 2005 before they were issued. Inspector B took over the conduct of the investigation and issued two Notices of Enforcement Action (Tabs 1 and 4) on May 13, 2005.

The licensee, who is a shareholder and the general manager, testified that his company purchased the hotel nine years ago. There are three businesses in the hotel. The pub had been in operation for years with a well established business when he purchased. He testified that he is at the pub every day and in the evening he stays by the bar where he can see the room. He relies on the assistant manager to run the pub and they talk 15 to 20 times per night.

The pub staff are long term, experienced employees who he relies on to know how to sell liquor. Some staff who worked there when they purchased are still there. When he hires staff, he can be choosy so he insists on people with experience and he checks their references. Because the staff is experienced, he does not need to train them.

The assistant manager testified that he had worked for the hotel for approximately two and a half years and had been head of security for a year. He testified that most the employees have been employed at the hotel for more than two years. He is familiar with the local police and the liquor inspectors and testified that he has a good relationship with both departments.

He testified that he was aware of a concern in the downtown community concerning over service of liquor and that there had been some town meetings, which addressed issues such as minimum drink pricing. He was also aware of the concern about drug trafficking.

The assistant manager was not working on November 24, but was working on December 3, 2004.

Permitting An Intoxicated Person To Remain, November 24, 2004

On November 24, 2004, four undercover police officers attended Monty's in pairs. Two officers were seated in the lower area of the pub, to the left of the stage. The other two were seated in the upper area to the right of the stage, with a view of the stage, the patrons in front of the stage, and the other officers on the far side. There was an amateur wet t-shirt contest that night.

Each officer estimated there were approximately 300 – 350 patrons, and stated the pub was very crowded. They testified that they observed six to ten navy men seated in front of the stage who were extremely loud and boisterous, who

appeared very intoxicated. One officer testified that some of the men staggered when they left their table. He joined three of them in the smoking room. They told him they were from a submarine. The officer testified that he had 14 years experience dealing with impaired drivers, intoxicated people on the street and in bars, and domestic violence involving intoxication. He testified that he had a vivid recall that these navy patrons were unable to stand and walk without staggering, they were loud and swore a lot, and he considered them to be intoxicated. He continued to watch them during the evening. The pub staff continued to serve them liquor and the men were still there when he and his partner left at midnight.

Another officer testified that he watched six of the navy men become increasingly boisterous over a period of not less than two hours. He testified that he had eight and a half years experience working street patrol in Vancouver, including the downtown eastside, which involved dealing with intoxicated people on the street and in pubs. When he worked at the city jail for a year he had contact with numerous intoxicated individuals. He testified that he observed the patrons at this table consuming constantly throughout the evening and he was of the view that these six men were intoxicated and became increasingly intoxicated during the night. He described their unsteadiness, flushed faces, and beer sloshing from their glasses. Later in the evening two of the men started fighting. The fight was stopped by an unidentified man who escorted them out of the pub.

The licensee testified that there has never been any problem raised by the police about intoxicated patrons, minors or illegal activities. He said that over serving isn't a problem but that staff sometimes concentrate on the big tippers and under serve other patrons. The licensee testified that he believed the officers were exaggerating when they suggested 300 people in the bar. With that many it would be very difficult to move. There are usually only two servers for 160 to 170 patrons. Patrons can purchase from the beer tub, the bar, or from the servers. There were only two servers working and they could not handle more than 200

people. He stressed that he thought the police officers were exaggerating generally in their evidence.

The assistant manager testified, that he has never had either the police or liquor inspectors raise a concern about intoxicated patrons at the pub. He was not working on November 24, 2004.

The assistant manager described his criteria for determining whether someone has had too much to drink – red eyes, smell of liquor, slurring speech, hesitation in movements, overly aggressive, enthusiastic, loud – and said that when he determines that someone is reaching their limit, he notifies all the staff and cautions them that the patron could have only one or two more drinks and he tells them not to serve that patron any shooters.

Free-Pouring Liquor, November 24, 2004

All of the police officers described the 'shooter girl' ("server A") who wore a cowboy hat, holster belt with two bottles of different coloured liquids, and a bullet harness across her chest in which she had shooter glasses. They testified that on November 24, 2004, they observed her approaching patrons and encouraging them to buy shooters, which she served by tilting back the patron's head and pouring directly from both bottles in the patron's mouth. One officer testified to observing this transaction with a patron who was sitting beside him. The officer testified that he would not be able to accurately quantify the amount poured, but he was certain it was more than an ounce. Another officer testified that she saw the server pour four consecutive rounds in this fashion for one patron.

One of the officers testified, that he had been approached by server A on another evening when she aggressively asked him four times to purchase the shooters, to the point that he had to say to her – 'you don't get it'. He watched her free pouring into patrons' mouths, and then asking for the money.

Inspector A testified that after he had served the CNs, he met with the licensee in January 2005 to discuss the alleged contravention. The licensee advised that he had not known this conduct was unlawful and had since stopped it. The licensee told him that there was no apparatus attached to the bottles to control the quantity poured, rather the servers developed an expertise so they could pour with accuracy and that it was not in the servers' interests to pour more than a shot.

Inspector B testified that he had met server A in Monty's in the Fall of 2004 and observed her with the holster apparatus. He had not seen this before and was not sure if it was legal. He testified that he did some research by talking with other inspectors and looking at the legal terms and conditions. On November 22, 2004, server A contacted him to inquire about having a patent on the holster apparatus. He testified that he told her that free pouring was not legal and referred her to the Guide, p. 13 (Exhibit No. 1, tab 17). She indicated it was legal in Alberta.

Inspector B testified that the licensee told him during a meeting in April 2005 that server A's bottles usually contained tequila and another liquor and that the licensee had argued with her about the differences between Alberta and British Columbia. That she stopped free pouring once the CNs were issued; that management changed her shift from the weekend to weekdays and that she then left her employment.

The licensee testified that the liquor bottles are weighed each night so if server A was over pouring drinks, it would come out of her pocket. He testified that when she went behind a patron, she would pour the liquor into a shooter glass, which the patron couldn't see, and then pour from the glass and the juice bottle. The assistant manager had told him that she was not giving patrons a full ounce. The licensee testified that he had been concerned about whether the process was legal and asked the assistant manager to check into it and did not hear back on

that. He testified that when he met with inspector A in January 2005, there was very little conversation about server A. The licensee specifically denied telling the inspector that he had given her a couple of warnings.

The assistant manager testified that he had wondered about the legality of server A's practice and talked to two liquor inspectors who had been responsible for this geographic area. He testified that he was not told by either one that the practice was illegal although one of them said that 'it didn't sit right' in his mind. One inspector indicated he had to look into it and would get back to him, but he did not hear from him again on this.

The assistant manager described the shooter apparatus and testified that server A poured the liquor from one bottle into a shooter glass and then into the patron's mouth, and poured from the other bottle directly in the mouth. He said the second bottle was invariably lime juice. He testified that he had some complaints about her persistent sales strategy and he had spoken to her about that. He did not recall having read page 13 of the Guide but read it at the hearing:

"The general manager has also expressly prohibited the practice of pouring drinks into the mouths of customers laying or leaning over a bar. Establishments that permit such activities to occur can expect enforcement action."

(See Exhibit No. 1, tab 17)

Having read it, he said it was not the same activity since the Guide refers to patrons at the bar, whereas these patrons were sitting in their chairs.

Authorizing or Permitting Unlawful Activities Or Conduct, December 3, 2004

Two officers testified that while they were in Monty's on November 24, 2005, they engaged in conversation with a man who told them he could provide them with cocaine, and he gave them his phone number.

One officer ("officer A") testified that she and her partner returned to the pub on November 26, 2004. She spoke with a patron ("patron X") sitting close to her who said he was a regular at the pub. She saw him receive money from another patron and go to the DJ booth where she saw a hand to hand exchange. Patron X returned to his table and handed what she described as a 'flap' to the patron who had given him the money.

On December 1, 2004, officer A and her partner returned to the pub and she approached the DJ saying that she had purchased cocaine from patron X before and asked if the DJ 'could help her out.' She testified that the DJ said he did not have any flaps on him but he would have a look around. She told him she wanted ½ gram. She saw the DJ walk around the bar and talk with a few people. Later, officer A returned to the DJ booth and the DJ told her he hadn't been successful but said he would have some on Friday or Saturday. She testified that he told her the charge was \$35.00 and he made \$5.00 from the sale.

The officers returned to Monty's on December 3, 2004. Officer A testified that the DJ told her he had sold a couple of flaps and didn't have any but expected the dealer to come back. She told him she wanted a gram and asked about a special price of \$60. He said no, it was two ½ grams and cost \$70.00. Approximately five minutes later, as the DJ walked to the DJ booth he beckoned her over and invited her into the booth. She testified that he held out his palm with two flaps. She gave him \$70 cash which he pocketed. The transaction took no more than five seconds. She testified that the DJ told her that if she wanted more she could phone the hotel and ask to be put through to the DJ booth. The

officer testified that she gave the flaps to the police exhibit officer and was not aware of the results of analysis.

Officer A testified that she has received drug investigation and undercover training, drug recognition training, and specific training on giving expert testimony for cocaine, heroin and other drug prosecutions. Her police work has involved drug users and traffickers. She had made over 150 drug buys, including more than 100 for cocaine. This was her first project in a licensed premises. Based on her experience, she testified that she considered this DJ to be an experienced drug trafficker. She found that he was comfortable with drug transactions and the jargon associated with cocaine trafficking. He did not attempt to hide the transaction. He was well connected with the dealer who attended the bar. He appeared to know the clientele and was comfortable in his environment. She noted that the DJ booth has glass on two sides so it would not be difficult to observe the exchanges, particularly for people in the upper mezzanine.

“Officer B” who was providing cover for officer A on December 3, 2004, testified that he watched her talk with the DJ and return to the table. He then saw a doorman talking with the DJ at the DJ booth. As the doorman left the booth, he walked by the undercover officers and examine them from head to foot. He watched the doorman walk over to the main door where he spoke with the licensee. Again, he looked directly at the undercover officers. He testified that he saw officer A approach the DJ booth again, have a conversation with the DJ, and then she gave a pre-arranged signal to indicate she had completed a purchase which she confirmed when she returned to the table.

Officer B described the DJ as calm and relaxed, appeared to know many people in the pub and seemed comfortable in his environment. The officer testified that he has been in many undercover drug operations and has made no less than 30 purchases from street and mid level traffickers. He has observed at least 100 drug traffickers ranging from the novice to the very experienced. He has had

courses in drug investigations, has worked in the street level cocaine and marijuana trafficking in the downtown eastside. He observed that this DJ did not fumble or look nervous as he would expect of a novice.

The licensee had intended calling the DJ as a witness but his lawyer intervened on the day to stop him testifying.

The licensee testified that the DJ had worked at the club for about six years and he had not had any problem with him. He suspended him when this occurred. However, he then accepted that the DJ was innocent until proven guilty so he removed the suspension and allowed him back to work.

The licensee testified that because the bar is located downtown in the core of all the nightclubs, drug dealers could come into the pub without the staff knowing. If they know about a particular person, they keep a watch and try to ensure there is no illegal activity.

The assistant manager was working on December 3, 2004. He had no evidence about the alleged drug transaction. He testified that the policy was if anyone was caught selling or doing drugs in the pub, the staff were instructed to evict them. So if anyone in the smoking room was smoking marijuana, they would be evicted or if the staff saw patrons doing lines of cocaine, they would evict them. He testified that there was a policy against trafficking and that he had in the past barred a suspected trafficker.

The assistant manager expressed disbelief that the DJ would be involved in trafficking. However, after the CN was served, the DJ was suspended for two or three months but as of the date of the hearing he was working full time again.

Due Diligence

Inspector B testified that he met with the licensees in April 2005. The inspector had prepared a list of questions concerning the licensee's staff training and discipline, who was working on November 24 and December 3, 2004, the licensee's policy on shooters, whether there are security tapes and log books and what procedures were in place if staff were concerned about the activities of other staff members.

The inspector testified that he saw a number of employee resumes and recalled that most employees have three to four years experience. Although the licensee advised him that staff training had occurred, there was nothing to document that. The inspector testified that his impression was that prior to these incidents, the licensee had minimal training in place for staff, that it was general in house training and that there was no evidence of a structured training program. The inspector testified that the licensee provided him with a well written Procedures Manual that was produced after these incidents.

The licensee testified that he hires trained staff so is not so concerned about individual training. He puts copies of the Guide to Liquor Licensees in the staff room and there is a poster about drinking and driving and not over serving. The licensee had asked the assistant manager to inquire about server A's method of serving. Once the CN was served, he stopped the practice entirely. There were policies in place against allowing drug consumption or trafficking. If he had known that the police suspected his pub was attracting the drug trade, he would have taken action.

The licensee testified that he had not been provided with inspector B's notes from the meeting in April 2005. He took issue with the method of interview, which he suggested, was contradictory to the usual Compliance Meeting such as one evidenced by Exhibit No. 1, Tab 33.

The assistant manager testified that he had not seen a Policy and Procedures Manual prior to these enforcement actions by the branch.

SUBMISSIONS

The licensee submitted that the branch is required, by Section 20 of the *Act*, to take into account the compliance history and the particular circumstances in determining whether to take enforcement action. In this case, the incidents were referred to the branch by the police who believed that the branch had to provide a more 'vigorous response.'

The licensee suggested that given nine years without any complaints, if it were not for the police request, it is possible the branch would not have proceeded with the allegation of intoxicated patron. This is a stripper bar, a male environment, where one would expect loudness and boisterous behaviour. The licensee submitted that the evidence of intoxication is not strong.

Concerning server A, the licensee submitted that the assistant manager asked two liquor inspectors and their response amounted to – go ahead and do it. Inspector B took over after those inspectors and although he testified he told the server it was not legal, he did not pass that advice to the licensee. The licensee submitted that there was no evidence that this practice directly resulted in intoxication.

The licensee submitted that there is nothing in the evidence to suggest that the licensee was 'permitting' unlawful activity. The licensee stressed that in nine years of operation there have been no complaints from either the police or the branch, and there is no suggestion that this licensee is of 'bad character' or has acted in a manner that would have an adverse effect on public safety.

Concerning the proposed penalty, the licensee testified that an 18 day closure would cost about \$100,000 and could result in the pub closing for good.

ANALYSIS AND DECISION

Permitting An Intoxicated Person To Remain

I find that the evidence is insufficient to establish that the patrons in questions were intoxicated to the point that it was incumbent on the licensee to cease serving them and require them to leave. I find that the boisterous behaviour, staggering and other indicia of intoxication alluded to is not necessarily indicative of excessive intoxication. I have taken into consideration that there was a performance of sorts occurring which would attract loud audience response. The officers' evidence establishes a degree of intoxication but not beyond the level that one might expect in a pub. I find that the branch has not established that the licensee committed the contravention of Section 43(2)(b) as alleged.

Free-Pouring Liquor

The evidence about the way the shooters were poured varied. The licensee and the assistant manager described at the hearing their understanding that the server poured tequila into shot glasses which she then poured into the patron's mouth, along with a free-pour of a non-alcoholic beverage. This was at odds with the evidence of inspector A concerning his discussion with the licensee in January 2005 in which the licensee allegedly referred to free-pouring without a measure. The licensee's evidence was also at odds with the evidence of inspector B concerning his discussion with the licensee in April 2005 in which the licensee referred to alcohol in both bottles, to warnings he had given the server about free-pouring and arguments he had with her over her method of serving shooters. The police officers described free-pouring from two bottles, without the use of a shot glass.

I find as fact that on the occasions observed by the officers, server A was free-pouring from two bottles and that at least one contained alcohol. I have taken into consideration the licensee's rationale that it was not in the server's interest to pour more than an ounce at a time. However, I find that she was pouring unspecified quantities by failing to use a measuring device and that this method of serving drinks is contrary to Section 41(2)(a).

The licensee and the assistant manager testified that they asked two liquor inspectors about the method of pouring shooters and were not advised it was illegal. Neither of those inspectors testified, but from the testimony of the assistant manager, it is apparent that the inspectors were concerned about the practice. They reportedly indicated that they had to check into it and one said it did not 'sit right' with him. I find as fact that the description they were given to consider involved the use of a measuring device, which is different from the practice observed by the police officers. Neither inspector approved the practice.

The assistant manager testified that he had complaints about the server's persistent sales strategy and the licensee testified that he was concerned that she was not pouring a full ounce. And they were not sure whether the practice was legal.

I find that the licensee did not take appropriate action to confirm whether the practice was legal. Given the issues around this practice, it would have been prudent for the licensee to stop the practice until he verified the legalities. The assistant manager testified that he had not seen the most recent Guide, and the passage quoted above. From this, I find that the assistant manager did not undertake his own research or investigation of whether it was lawful. The fact that he did not have the most recent Guide indicates a lack of diligence in ensuring that Monty's Pub was being run properly.

Additionally, the licensee could have put a written policy in place for the liquor inspectors to review, and for the server to follow. It is apparent that by allowing the server to continue the practice without defined policy, the licensee left himself vulnerable to her adopting her own practice.

I find the licensee has not established a defence of due diligence.

Authorizing or Permitting Unlawful Activities Or Conduct

The burden of proof in hearings before the branch is on a balance of probabilities.

Cocaine is a Schedule 1 substance under the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19. Section 5 of that *Act* provides:

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

I find on a balance of probabilities that the police officers' evidence substantiates that there was purported trafficking in an illegal substance at Monty's Pub on December 3, 2004. Officer A's evidence was clear, uncontradicted by the licensee's evidence, and corroborated by her backup officer. I find as fact that she asked the DJ at Monty's Pub if he could sell her some cocaine, that he confirmed he had a source, that he obtained a substance in the form of two 'flaps' and that he sold it to her for \$35.00 per flap. Further, I find that the DJ held out the substance to be cocaine and that the officer paid the price quoted by the DJ for two flaps of cocaine.

The substance was not conclusively identified as cocaine at this hearing. I find that is not determinative since the illegal activity is the selling of the purported illegal substance.

The contravention under Section 36(2) is *permitting or authorizing* any unlawful activities or conduct.

It is well established in Liquor Control and Licensing Branch enforcement cases that the appropriate definition of "permit" is that endorsed by the Liquor Appeal Board in *Ed Bulley Ventures Ltd. (c.o.b. Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, June 28, 2001, LAB L-9905 which states at paragraph 61, in part:

The interpretation approved by the courts is as follows: 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 British Columbia Supreme Court considered the term "permit" and the defence of due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248 (February 23, 2004). The Court said the following:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: 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, and, if that proof is provided, that 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.

[27] ... If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so

that his lack of due diligence would necessarily be that of the employer. If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

Applying this criterion to this case, I first find that the DJ was not a directing mind of the licensee. Therefore, it is necessary to consider the next step of whether the licensee has established the defence of due diligence. Another way of considering this is whether the licensee 'permitted' the impugned activity by not exercising a high degree of due diligence or by turning a blind eye to the obvious. From the evidence of the licensee, I conclude that the directing mind was both the licensee and the assistant manager, who the licensee entrusted to run the pub.

Since the *Plaza* decision, in cases assessing the evidence of due diligence in relation to various contraventions, the branch has stated that a licensee must establish that there are procedures to identify and deal with problems, and that those procedures are consistently acted upon and problems dealt with. As a test of due diligence, the branch has considered whether there were more steps a licensee could have taken to ensure that staff were aware of the legislative requirements and were properly trained to do the job, and whether there were more preventative measures the licensee could have taken to prevent the occurrence of the contravention. (For a discussion of due diligence factors, see for example, *Haney Hospitality Ltd. (dba Haney Motor Hotel)*, EH01-170, July 27, 2004.).

The evidence of the police officers is that they attended Monty's Pub for the primary purpose of detecting drug trafficking activity. On four occasions,

November 24 and 26 and December 1 and 3, 2004, they found evidence that drugs were being sold inside the pub. Their evidence was an observation of an alleged drug transaction which involved two patrons and the DJ, conversations with two patrons on separate occasions concerning the possible purchase of cocaine, conversations with the DJ on two occasions concerning purchasing cocaine, and the purchase from the DJ on December 3, 2004. Their evidence included observations of the DJ in conversation with patrons and moving around the pub, the DJ's apparent comfort in his role and his surroundings, the DJ indicating that he made purchases from drug dealers in the pub, and the DJ providing the pub telephone number for contact for future sales.

I find that the drug activity at Monty's Pub as described by the police officers was overt and visible. There was no suggestion that the officers had to ferret out information about who had the drugs, or who to talk with to arrange a sale. If it was that obvious to the undercover officers, who were not regular patrons, I find that the licensee should have been aware of it also. Either the licensee or the assistant manager is in the pub when it is open and they testified to keeping an eye on what is happening.

The licensee acknowledged that there is a problem with drugs in the downtown area of Victoria. However, he submitted that the police did not give him any notice that they had concerns about drugs in his pub. If they had, he would have taken any steps required.

I find that the licensee's submission that he did not 'permit' unlawful activity in the pub to be lacking in substance and credibility. Given how obvious the drug availability was to the officers, I find it difficult to believe that the licensee would not have been aware that it was happening. The DJ booth is in a visible location and it is possible to see into the booth from the mezzanine level. I find that the licensee was either implicitly allowing the conduct to continue by not taking action, or had closed his eyes to the obvious. Licensee's have a responsibility to

control the activity in their licensed premises. They cannot just sit back and turn a blind eye.

There was no evidence from the licensee of any procedures he had put in place to monitor staff activities, such as Shop Watch or other surveillance method to test whether there were illegal activities occurring in the pub. The licensee candidly stated that he relied on his staff being experienced and knowing their duties and that it was not necessary for him to engage in training or regular meetings. Until these Contravention Notices were served, the licensee had no policies and procedures manual, no staff training, and no regular staff meetings.

I find that the licensee has not established the defence of due diligence.

PENALTY

I have found that the licensee contravened Section 36(2)(b) of the *Act* by permitting unlawful conduct, and contravened Section 41(2)(a) of the *Regulation* by pouring unspecified quantities of liquor.

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

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents (“compliance history”). Accordingly, pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions. The range for first contraventions of Section 36(2)(b), found in Item 8, is 10 to 15 day licence suspension and \$7,500 to \$10,000 monetary penalty. For the contravention of *Regulation* Section 41(2), Item 30, the range is 4 to 7 day licence suspension and \$5,000 to \$7,000 monetary penalty. The branch’s recommended penalties were the minimum for both contraventions.

The branch’s primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are usually 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 the public safety and the well being of the community.

Inspector A made the recommendations for enforcement action. At the hearing, he spoke to his reasons for recommending what he did. He stressed that the branch’s aim was to avoid enforcement action when possible, and that was dependent on whether they could expect voluntary compliance without taking enforcement action. From his discussions with the inspectors who had worked with this licensee he understood that the branch had a good working relationship with the licensee and that the licensee generally attempted to operate appropriately.

Concerning the free-pouring contravention, he testified that one of the public safety concerns with this type of sales strategy is that it promotes intoxication by providing unspecified amounts of alcohol. He was aware that the licensee had been using this sales strategy for many months and he was aware that server A

had been persistent with some reluctant patrons. He knew inspector B had given advice to server A that was ignored.

Concerning the drug related contravention, inspector A testified that he took into consideration that this was an on-going and consistent pattern of unlawful conduct by a member of staff to traffic in a substance that poses a serious risk to public safety. He noted that DJs hold a prominent position within establishments and can be influential on younger people. This DJ gave out the establishment's telephone number to assist in his trafficking. The DJ's actions could influence others to believe that trafficking is profitable and acceptable.

The licensee submitted that in nine years in business he has not had any contraventions and has had a good relationship with both the police and the branch. The police did not alert him to potential drug problems so that he did not have an opportunity to take action on his own. The proposed penalties are so serious that they could result in closure of his business. The licensee submitted that it is probable the branch would not have taken enforcement action if it had not been for the police intervention, suggesting that they expected a more vigorous response from the branch.

I have considered the licensee's evidence and submission and acknowledge that he did not have any proven contraventions on his record with the branch and that he has been cooperative with the police and the branch. I have also taken into consideration that both of these contraventions occurred on more than one occasion.

The licensee was not forthright in pursuing the issue of server A's method to determine whether it was in breach of the legislation. The assistant manager was not up to date on the Guide for Liquor Licensees. The licensee did not have a current policy manual for staff guidance and did not have regular staff meetings. I find that, generally, he was lax in his supervision of the staff and the activities within the establishment.

I find that the circumstances of these contraventions warrant the imposition of penalties. I have considered whether monetary penalties would be appropriate and I find that, for an establishment of this magnitude, monetary penalties could amount to the cost of doing business and would not have the intended effect of achieving voluntary compliance. I find that the circumstances warrant licence suspensions. I accept the branch's recommendations of the minimum penalties.

Accordingly, I order that the liquor licence be suspended for ten (10) days for the contravention of Section 36(2)(b) of the *Act* and for four days for the contravention of *Regulation* Section 41(2). These suspensions are to be served consecutively, commencing on a Wednesday.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 104803 for a period of fourteen (14) days to commence at the close of business on Tuesday, February 14, 2006, 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 Primary Licence No. 104803, be held by the branch or the Victoria Police Department from the close of business on Tuesday February 14, 2006, until the licensee has demonstrated to the Branch's satisfaction that the establishment has been closed for fourteen (14) business days.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: January 13, 2006

cc: Victoria Police Department

Liquor Control and Licensing Branch
Attn: Ron Rodrigue, A/Regional Manager
Vancouver Island/Okanagan/Kootenys

Liquor Control and Licensing Branch
Attn: Sonja Okada, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the "Act")

Drunkenness

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

(2) A licensee or the licensee's employee must not permit

(a) a person to become intoxicated, or

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Prohibition against gambling

36 (1) In this section, "**gambling**" does not include anything done under the authority of

(a) a licence issued under section 207 (1) (b) or (f) of the *Criminal Code*,

(b) an enactment referred to in section 207 (1) (a) of the *Criminal Code*, or

(c) section 204 (1) (c) of the *Criminal Code*.

(2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment

(a) gambling, drunkenness or violent, quarrelsome, riotous or disorderly conduct,

(b) any unlawful activities or conduct, or

(c) a device used for gambling to be placed, kept or maintained.

(3) An activity permitted under the authority referred to in subsection (1) may be restricted, cancelled or prohibited in a licensed establishment by order of the general manager.

*Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")***Liquor prices**

41 (1) A licensee must, at the beginning of each day, set the price at which liquor is to be sold during that day.

(2) A licensee must not

- (a) provide unlimited or unspecified quantities of liquor for a single price,
- (b) use a sales strategy that is likely to promote or encourage intoxication, or
- (c) alter the price of liquor during a day after it has been set for that day under subsection (1).

(3) A licensee must make available to patrons a list that shows, for all types of liquor sold in the licensed establishment, the quantities in which and prices at which the liquor is sold.
