

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Millner Road Foodtown
Licensee:	Tancor Nominees Pty Ltd
Nominee:	Carlos Manuel Demelo Pinheiro
Licence Number:	80902951
Proceeding:	Complaint pursuant to s48(2) of the <i>Liquor Act</i>
Complainant:	Snr Sgt Lance Godwin
Heard Before:	Mr Peter Allen (Chairman) Mr John Withnall Ms Jill Huck
Date of Hearing:	5 November 2003, 16 December 2003
Date of Decision:	19 December 2003
Appearances:	Mr Rob Burgoyne, for Complainant Mr Ted Sinoch, for Licensee

1. The Commission's role in complaints against licensees by police was considered by the Supreme Court of the Northern Territory in *O'Neill Hotel Management Services P/L v NT Liquor Commission [1999] NTSC 124* in which Thomas J confirmed that

The Commission does not make a finding of criminal guilt. However, the Commission can find a section of the Act has been breached in order to consider regulatory action under the Act or in relation to (a condition of the licence)

2. The Commission's approach to complaints of breach of s.102 of the *Liquor Act* has been documented in several of its earlier decisions in the following manner:

Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together (we would add) with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that the customer was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred.

...the Commission concedes, however, that as a matter of law the reverse onus is able to be discharged on the balance of probabilities.

3. The charge which is colloquially described as "serving intox" could therefore be referred to more accurately as serving a person who was other than non-intoxicated.
4. In the present case there is no issue as to the sale of liquor having been made to Mr Hook by an employee of the licensee, and the police evidence made out a strong case for the licensee to have to answer in terms of the purchaser's non-intoxication. The licensee has responded by providing its relevant surveillance videos.
5. Mr Burgoyne dwelled on the different approaches of various jurisdictions in trying to arrive at a satisfactory definition of intoxication. The three main alternative concepts of intoxication would seem to be, in simplified summary:

- materially affected by liquor;
 - inability to act in an unaffected normal fashion; or
 - visible impairment of faculties
6. The need with the first two approaches to still have to determine a contextual meaning for “affected” or “unaffected” would seem to lead inexorably to the third approach as being more immediately practical, and more susceptible to the usual evidentiary case. The Commission has historically equated intoxication to the showing of visible indicators of impairment of bodily faculties as a probable consequence of, or in conjunction with, the consumption of liquor.
 7. The police evidence emphasised the visible indicator of Mr Hook’s staggering, in conjunction with smelling strongly of liquor, having blood-shot eyes, and registering an extraordinarily high Draeger reading.
 8. Constable Joy gave evidence of commencing to activate the police video camera after he saw that Mr Hook “staggered heavily” after alighting from a car outside the store and was “still staggering” as he entered the store.
 9. Constable Scott said that Mr Hook was “staggering from side to side” as he entered the store, that after paying at the till he “staggered his way over” to the port casks “and grabbed one”. The shop assistant placed the cask in a plastic bag whereupon, says Constable Scott, Mr Hook then “staggered out of the liquor section”.
 10. The police video camera then captured part of Mr Hook’s exit from the store and short walk to the car, by this time bearing white plastic bags of shopping in both hands. Much of the actual walk was obscured by Constable Scott’s occupation of the foreground at that point. What the police video does clearly show is Mr Hook walking slowly between two cars and slowly placing the shopping bags firstly on the ground and then in the car, before getting into the car himself.
 11. The car then reversed and began to travel south along Milner Road, but was signalled to a stop by Constable Scott, and the driver directed to a laneway adjacent to the store where they awaited the arrival of Constables Pethick and Beer. Upon his arrival, Constable Pethick required Mr Hook to alight from the vehicle and administered a Draeger test. On the evidence of the police video, it is a moot point whether Mr Hook should be taken to have freely consented to such a test being administered to him.
 12. Constables Scott, Beer and Pethick then escorted Mr Hook back into the store to identify the sales attendant who had sold him the port, and an interview with that employee then took place. Constable Pethick noted that as they all walked back into the shop, Mr Hook “was staggering when he walked”.
 13. On the police evidence the prima facie case against the licensee was strong. Certainly it unavoidably triggered the licensee’s onus to demonstrate the probability that Mr Hook was not intoxicated.
 14. The licensee’s in-house surveillance videos are in “real time”, which is to say at the full frame rate, and are remarkable in how clearly they fail to confirm the police evidence. Mr Hook is not shown to be staggering at any stage of his progress through the store.
 15. The surveillance video does not show Mr Hook alighting from the car prior to entering the store, but does show him approaching and coming through the front entrance. No “staggering from side to side” is to be seen. Only after much rewinding and freeze-framing, Mr Hook can be seen to make a small sideways correction of direction as he reaches the automatic door which was in motion at that point. His progress from there towards the liquor section is unremarkable.

16. Once in the liquor section, attendant Damien Sargent clearly asks Mr Hook if he had been drinking that day, and receives a clear enough reply in the negative. Mr Hook's posture is quite steady as he pays for his purchase and picks up many coins individually from the counter without a fumble. There is nothing remarkable about his walk across to the shelves from which he selects his cask and returns with it to the till. He then exits the liquor section equally unremarkably. Constable Scott's obstinate adherence, in the face of this video, to his evidentiary descriptions of Mr Hook as having staggered across to the shelves and having staggered out of the liquor section was, to put it at its kindest, an unmaintainable te position.
17. Outside the liquor section, Mr Hook can be seen to meet up with his wife who had been shopping in the meantime in the general section of the store. He takes up the multiple shopping bags she had accumulated and exits the front of the store slowly but not unsteadily. After Constable Scott has moved out of the police camera's view, Mr Hook is shown to slowly approach a car, slowly deposit the many shopping bags on to the ground, and then slowly lift them into the car. His movements are slow, but no unsteadiness or clumsiness is noticeable. Constable Joy had described Mr Hook as having "attempted to get into the vehicle with difficulty". In cross-examination he said that what he meant was that the difficulty was not so much in the way Mr Hook got his body into the vehicle but the way he dealt with the shopping bags.
18. In the Commission's view the weight of the shopping bags and the nature of the contents must be factors in the sustainability of any criticism of how Mr Hook handled them, yet no evidence was offered by any police witness as to the weight or contents of the shopping bags. Visibly it appears to have been fairly heavy, and we can only presume that it was, in which case there is nothing particularly revealing in the careful and measured way in which Mr Hook was dealing with the multiplicity of shopping bags he carried out of the store.
19. Once Mr Hook was back inside the liquor store while the police interviewed Mr Sargent, it is particularly noteworthy from the surveillance video that Mr Hook stands rock-steady for some considerable period of time. No swaying is discernible at all.
20. Nominee Mr Carlos Pinheiro gave evidence of the store's zero tolerance policy, and he, his duty manager Mr Arthur Pereira and Mr Sargent all testified that they were aware that the store was under police surveillance at that time. All three knew Mr Hook as a regular, and were adamant that the way he is shown in the surveillance video was his "normal self". Mr Pinheiro said that he "had his own way of walking", but did not stagger.
21. The surveillance video confirms that there was no staggering by Mr Hook at any time he was in the store on the occasion the police complain of, nor upon his return under escort.
22. The Draeger reading took the matter no further for the police. As Constable Scott explained, the Draeger did not necessarily measure the actual blood alcohol level, but was an indication only of the consumption of alcohol. A person can of course have been drinking without being intoxicated. If Mr Hook had taken a mouthful from the opened port cask on the back seat of the car immediately prior to the reading that was taken, that alone could account for the high Draeger reading. Such a positive indication of consumption in relation to a traffic matter would normally have led to a breath analysis being done, but such was not the case with Mr Hook on this occasion.
23. The written statement of Mr Hook is also seen by the Commission as being of little assistance to the police case. His statement of being "a bit drunk" was not taken until almost eight months after the event, and remains untested; he was not produced at the hearing for cross-examination. It will surely be no surprise to the police that the Commission gives no effective weight to such a statement in the circumstances.
24. In the Commission's view the licensee has successfully discharged its onus of persuading the Commission that Mr Hook was not necessarily intoxicated. The licensee's surveillance video shows nothing noteworthy about Mr Hook's conduct within the store, and the police evidence in that respect only adds their own descriptions of Mr Hook's portrayed behaviour,

descriptions which Mr Burgoyne was reduced to summing up as “literary licence”. It is too unsafe for the Commission not to assume that the same literary licence pervaded the police evidence of Mr Hook’s movements outside the reach of the surveillance video.

25. The video taken by the police is not of itself persuasive of Mr Hook being intoxicated.
26. We have no doubt that the police on the spot were genuinely convinced of Mr Hook’s intoxication, and we are aware that there can be subtleties of body language and experience in observation that elude effective expression by way of formal evidence. Nevertheless, the evidence that is presented is all that we can go on. When so much of that evidence is dispassionately revealed by a camera to be such colourful exaggeration on the part of many of the police witnesses, it erodes the weight and credibility of the more subjective elements that may have played a part in forming their opinion as to Mr Hook’s intoxication.
27. On the whole of the evidence, the Commission has no decision open to it other than to find that the complaint has not been sustained, and accordingly it stands dismissed.

Peter R Allen
Chairman