



**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:	Winfield Pub Ltd., dba Woody's Pub 9882 Hwy. 97 Lake Country, BC
Case:	EH04-092
For the Licensee	Nick Franz, Licensee
For the Branch	Shahid Noorani, Branch Advocate
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	December 3, 2004
Place of Hearing	Kelowna, BC
Date of Decision	January 28, 2005

INTRODUCTION

The Liquor Control and Licensing Branch (the branch) employs persons as agents who are between the ages of 19 and 25 years of age to assist the general manager in determining whether a licensee is complying with section 45 of the Liquor Control and Licensing Regulation.

The licensee operates a Licensee Retail Store (LRS) under LRS licence No. 191248 at a premise known as Woody's Pub, 9882 Hwy. 97, Lake Country, BC.

During a Compliance check on June 10, 2004, a 24 year-old agent of the branch entered the LRS and purchased a single can of Okanagan Spring Pale Ale. He paid \$2.60 for the product and was provided with a receipt. The agent left the LRS with the beer. He was not asked to produce any identification (ID).

ALLEGED CONTRAVENTIONS

The branch alleges that on June 10, 2004, the licensee contravened section 45(2) of the *Liquor Control and Licensing Regulation* (B.C. Reg. 244/2002) (Regulation) by failing to request two pieces of identification from a person appearing to be under the age of 25 before allowing him to enter the licensed establishment, or before selling or serving liquor to him. The recommended enforcement action is a \$1,000 monetary penalty.

RELEVANT STATUTORY PROVISIONS

Section 45(2) of the Regulation states:

A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before

- (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or
-

(b) selling or serving liquor to the person.

ISSUES(S)

1. Did the licensee fail to request two pieces of identification from a person from a person appearing to be under the age of 25 before selling liquor to the person?

EXHIBITS

Exhibit No.1:

Liquor Control and Licensing Branch Book of Documents, including;

- Notice of Enforcement Action Letter dated October 14, 2004
- Enforcement Action Recommended Report dated July 19, 2004
- Contravention Notice B002818
- Agent Observation Report
- Woody's Cold Beer and Wine Store Receipt dated June 10, 2004
- Photograph of the Branch Agent
- Licensee Retail Store License 191248
- Pages 3,9, from the Guide for liquor Licensees in BC
- Contravention Notice B002805
- Agent Observation Report dated June 20, 2003
- Compliance Meeting C001254 dated June 30, 2005
- Contravention Notice B002831
- Agent Observation Report dated December 13, 2003
- Letter from the Liquor inspector to the Licensee dated December 23, 2003
- Final Inspection Report dated December 9, 1992

EVIDENCE

The Branch:

The branch advocate provided the agent to establish that the agent appears to be under the age of 25.

The branch advocate provided a photograph of the agent taken within hours or days of June 10, 2004, to establish his appearance at the time of the contravention.

The branch advocate provided excerpts of the LRS Licence Terms and Conditions (Guide), which had been provided to the licensee, to establish that the licensee knew or ought to have known of his obligations under the Regulation.

The agent testified as to his date of birth, and confirmed that he was 24 years and one month old at June 10, 2004. He said that he is often asked for ID when in bars or when purchasing liquor in his private life (i.e. not while acting as an agent for the branch). At the time of the inspection he was wearing "jeans and a T-shirt", and did not recall whether or not he was wearing his glasses or a baseball cap. He indicated that he entered Woody's Pub alone. The lighting was typical of a LRS from his experience, and there were no other customers on the premises. There was one clerk visible, and she was the individual that served him. He ascertained her name and this was confirmed in the printed receipt. The agent indicated that he did not rush the purchase, and the clerk had time to both greet him (which she did) and "take in" his appearance.

The agent confirmed that in the past year he has been to many bars and clubs as well as LRSs and not asked for ID. He testified that he is asked for ID more often than are his friends, which in LRSs is "more often than not" but in bars and pubs is less frequently". He indicated that while acting as branch agent he was in the Kelowna area for about five days. During that time he visited 50 or 60 establishments and was asked for ID "perhaps 50 per cent of the time".

The local liquor inspector testified that he was in the R.C.M. Police for 25 years before joining the branch as an inspector. He was responsible for the Kelowna area at the time of the alleged contravention. He described Woody's LRS with familiarity. He indicated his knowledge of the *Liquor Control and Licensing Act* (R.S.B.C. 1996, c.267) (Act) and the Regulation. He described the thrust of his job as being to "help licensees understand the rules, and conform voluntarily". He indicated that he was aware of the agents program, and typically was advised

when a team of branch agents were to appear in his area. He described the Branch Policy as to infractions as follows:

In the first instance, I issue a Contravention Notice. I hold a Compliance Meeting with the licensee, but no enforcement action is taken. In the second instance, I issue a further Contravention Notice, but there is no Compliance Meeting and no enforcement action is taken. If there is a third contravention, I would recommend enforcement action be taken.

The inspector confirmed that in this case there were Contravention Notices issued on two previous occasions (June 20, 2003, and December 13, 2003) and one Compliance Meeting held (June 30, 2003). He said that in the Compliance Meeting and discussions with the licensee, the licensee was aware of the Regulation regarding persons who appear under 25 but was concerned about the subjective nature of that requirement. The inspector's view was that the licensee would continue to try his best to comply and would further educate his staff.

The inspector confirmed that he was one of two such inspectors in the area. He received four agent reports from LRSs in his area regarding ID checks in accordance with section 45(2) of the Regulation. Two of them were in compliance (checked ID) and two of them were not (did not check). He believed that the other inspector had "four or five" reports from LRSs, of which two were non-compliant (did not check). He agreed with the licensee that it is difficult to determine who appears to be under the age of 25 and suggested that if he was the licensee, he would instruct his staff to "ID everyone unless it is completely obvious that they are over 25". The inspector testified that although he thought the agent appeared to be under 25, to others the agent would appear over 25. "If you were 19 and working in an LRS, you might think he was 25".

The Licensee:

The licensee testified that he has been in this business for a long time. He has a good relationship with the inspectors. He understands the need to comply with the Regulation and had never had a Contravention Notice served in 12 years of operation of Woody's Pub until the first of these section 45(2) matters. He is trying his best. Woody's is a small establishment. He operates the LRS himself with two or three young employees. He is rarely far from them. Although he holds no formal meetings, he talks to and with his staff "all the time". They discuss procedures and have signs posted in the LRS and at the cash to remind his employees to check for ID if they think customers are under 25 years of age. He routinely refuses to over-serve, and "put[s] patrons in a taxi as required". His is a well run and responsible establishment.

The licensee says he does not like the wording of the Regulation. He thinks it is unworkable. He is prepared to continue to use his best efforts to comply, but says it is difficult to establish how old someone appears. He testified that it is his view that to older people, like the inspector and himself, most people under 35 "appear under 25" while to a 22 year-old, or a younger person, a 25 year-old looks much older. He says people can better guess the age of someone close in age to themselves. As it does not matter how old the customer is under this Regulation, but rather only how old they "appear" the younger clerk is at a disadvantage. The licensee pointed out that it is not illegal for someone over 19 to buy beer, but just for the licensee to sell it to them if they look under 25 [without requiring the production of ID].

Licensee also said that he considered telling his staff to ask for ID "of everyone who does not appear to be over 30", but ultimately, he did not do so.

The clerk who sold the beer to the agent, was called as a witness for the licensee. She testified that she had worked at the LRS for a year at the time of

the alleged contravention. She confirmed the presence of relevant signage in the LRS and that she had been talked to by the licensee several times-"constantly, in fact" about the need to request ID from people who appear to be under 25. She said that she does so. She testified that she greeted the agent and "sized him up" on entry. She did not suspect that he was less than 25 years old. She said she sees "a hundred" customers each day and asks for ID "everyday - maybe of half of the customers". She said that she was 24 years old. Her birthday is October 7, 1980. She said she is able to estimate ages of people close to her age. She saw the agent again at the hearing, and she believes he looks her age or older.

SUBMISSIONS

The licensee submitted that the wording of the Regulation is unworkable. He said that whether someone appears under the age of 25 is subjective and unenforceable.

He pointed out that the agent was asked for ID in his personal life only half of the time by his own evidence and therefore only half of the people who had an obligation to decide whether he appeared under 25, thought he did. Half of the people, therefore, thought he appeared over 25. The licensee said; "50 per cent of the people is not enough".

Further, the licensee said, the inspector confirmed that only 50 per cent of the LRSs that were checked by the team of agents in Kelowna on that occasion were in compliance again indicating that perhaps half of the people who addressed their minds to this determined that this agent and his fellow agent did not look under 25.

Lastly, the licensee indicated that his clerk decided that the agent did not look under 25, and she is entitled to make that call having been briefed and educated in the requirement of making that call.

ANALYSIS AND DECISION

The test stipulated in the Regulation may be a difficult one to interpret. The difficulty, however, does not invalidate a properly deposited Regulation. The Regulation was designed to protect the public interest by setting requirements for licensees as to when there is a positive obligation to require the production of specified ID.

Objective test:

If the test is an objective test, one must ask if a reasonable person would determine that the agent appears to be under the age of 25. The licensee submits that the age and experience of the observer is critical to this analysis. He says that a middle-aged man is likely to believe the 24 year-old agent is younger than he is, while a younger observer is likely to estimate the agent to be older. I accept this as part of the human condition but with reservations. One's social and cultural background, as well as gender and age may all conspire against a universal expression of this quality.

Subjective Test:

If the test to be applied is a subjective test, one must ask; To whom must the agent appear to be under the age of 25? The Regulation speaks to the licensee, for it is he to whom the Regulation applies. The licensee has testified that, to him the agent appears youthful. But the licensee was not in a position to ask for, or choose not to ask for ID on June 20, 2004. The licensee's observations are based upon his experience and his observations at the hearing of this matter

some six months after the alleged contravention. I find that the licensee, *in personam*, was not in a position to make the determination on the date of the alleged contravention.

The licensee has the right to delegate the commercial activities of running the LRS to his employees. Although he does remain ultimately responsible for compliance with the Act and Regulation, he may pass along the obligation of compliance in practical terms to those employees. This principle is indeed supported by the branch, which promotes a regime of supervision, education, and information to be instituted as between licensees and their employees.

The clerk on duty on June 20, 2004, was required to evaluate the agent and determine if he was a "person appearing to be under the age of 25." The clerk was empowered by the licensee with the decision to sell or not to sell liquor to the agent. I find that section 45(2) of the Regulation imposes a subjective test on the licensee or his employee who at the time of the event in question is empowered to make the decision as to whether or not to accommodate the patron or to refuse entrance or service.

Reasonableness:

The test is subjective and it rests in the eyes of the clerk. The clerk is empowered to make a judgment call as to whether a patron appears to be under the age of 25. She made the judgment in good faith, with an understanding of the Regulation and its purpose, and with direction and education from the licensee. She must also be reasonably capable of making the determination. The clerk provided evidence that she would have "sized up" the agent upon his entering the LRS, as is her custom. She demonstrated knowledge of the Regulation and its purpose, and she indicated that she would have turned her mind to the agent's appearance of age. She stated that although she did not remember the agent from June 20, 2004, she could easily assess his age as

equivalent to hers or older as he sat with her outside of the hearing. She was 24 at all material times.

I accept the evidence of the clerk and find that she did turn her mind to the agent's age before deciding to serve him.

Finally, I cannot overlook that the agent was present before me. The branch advocate has produced him, in part, as evidence that the agent appears to be under the age of 25. Having found that the test is a subjective one to be applied by the decision-making representative of the licensee, my observations speak to the reasonableness and credibility of the clerk's judgment and testimony. I am able to evaluate the agent and determine whether it is reasonable that the clerk might have determined the agent to be under the age of 25 on the date of the alleged contravention. I am also able to consider the clerk's testimony in light of the tangible evidence of the agent's age as he appears before me.

My conclusion is that the clerk's testimony is credible and I find it reasonable that she believed that the agent was not under the age of 25 on June 20, 2004.

I find on a balance of probabilities, that on June 20, 2004, the agent was not "a person appearing to be under the age of 25" as required by the Regulation. Therefore I find that no contravention of Section 45(2) did occur.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: January 28, 2005

cc: R.C.M.Police Kelowna Detachment

Liquor Control and Licensing Branch
Attention: Gary Barker, Regional Manager,

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