



**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., c. 267

Licensee:	Twymar Holdings Ltd. dba Harewood Arms Pub 508 - 8 Street Nanaimo, BC
Case:	EH04-185
For the Licensee	Harry J. Beck
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Edward W. Owsianski
Date of Hearing	April 15 & July 7, 2005
Place of Hearing	Nanaimo, BC
Date of Decision	August 23, 2005

Introduction

Twymar Holdings Ltd. (dba Harewood Arms Pub) holds Liquor Primary Licence No. 036278. The hours of sale are 10:00 a.m. to Midnight, Monday to Thursday, 11:00 a.m. to 1:00 a.m. Friday and Saturday, and 11:00 a.m. to Midnight on Sunday. It is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia' ("the Guide"). The establishment is located in Nanaimo, BC.

Alleged Contravention and Recommended Enforcement Action

The Liquor Control and Licensing Branch's (the branch) allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated December 29, 2004.

The branch alleges that on November 24, 2004, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two (2) pieces of identification from a person appearing to be under the age of 25 before allowing the person to enter the licensed establishment, or before selling or serving liquor to the person.

The recommended enforcement action is a \$1000 penalty.

The licensee disputes the alleged contravention.

Schedule 4 at Item 4 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for one to three days and/or a monetary penalty of one thousand (\$1000) to three thousand (\$3,000) dollars.

The relevant sections of *Liquor Control and Licensing Regulation* (the Regulation) are as follows:

- 45** (2) 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

1. Whether there has been administrative fairness?
2. Whether the licensee contravened Section 45(2) of the *Regulation* on December 2, 2004?
3. If a contravention is found is the recommended penalty appropriate in the circumstances?

Exhibits

The following Exhibits were presented:

1. Book of Documents
2. Agent Performance Report
3. Substituted page 10 of Agent Performance Report
4. Serving It Right: Server Program Manual
5. Serving It Right: Licensee Program Manual
6. Contravention Notice B000258: Copy 1 Establishment Copy
7. Contravention Notice B000258: Copy 2 Licensee Copy

Evidence - 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 in determining whether a licensee is complying with Section 45 of the *Regulation*. Testimony was received from three such agents, two females 19 and

20 years of age and a 20 year old male. The three agents testified that on November 24, 2004, the date of the alleged contravention, they were employed as agents of the branch assigned to check licensed establishments in the Nanaimo area. Photographs of each agent were taken during the morning prior to commencing their duties for the day. The photographs, copies of which are found at Exhibit 1, tabs 5, 7 and 9, accurately depict their appearance and clothing on that date. They were driven to the Harewood Arms in a vehicle operated by their supervisor.

The two female agents entered the establishment at approximately 3:40 p.m. and took a seat at a table. They were immediately approached by a female server who greeted them and took their liquor order. Both ordered a liqueur and coffee. The server then proceeded to obtain their drinks from the bar and served them to the agents.

The male agent went first into the Licensee Retail Store (LRS) where he purchased a bottle of liquor and then into the pub area, entering at approximately 3:43 p.m. and taking a seat at the table occupied by the two female agents. He was soon approached by a female server who took his liquor order a beer and served him within a few minutes of his arrival.

The agents testified that during their time in the establishment they were not questioned about their age nor requested to produce identification by the server or any other staff member, although they did have identification available, if so requested. They testified that the establishment had a sign posted at the bar advising of the requirement to produce identification. None of the agents observed any similar signage posted at the entrance. After approximately 10 to 15 minutes they left the pub. The two female agents had taken only a few sips of their drinks and were asked by the server whether they had not liked their drinks. They responded that there was no problem with their drinks but they had to leave for commitments elsewhere.

The two female agents went into the LRS and then got into their vehicle in the parking lot where they each completed an "Agent Observation Report" (Exhibit 1, tabs 4 and 8). The male agent went directly to the vehicle and completed his Agent's Observation Report (Exhibit 1, tab 6). They testified that in their private lives they are asked for identification 80 - 90% of the time, however, when they act as agents for the branch they are asked for identification less than 50% of the time. They were of the opinion that the difference may be due to the types of establishments frequented on their own time, which are mostly night-clubs which cater to younger persons than do other types of establishments such as neighbourhood pubs.

During cross-examination the three agents were questioned on the number of establishments they visited as agents and the number of times they were requested/not requested for identification. Each provided an estimate on the approximate number. Each agent was questioned concerning the nature of his or her activities on January 24, 2005, at 3:45 p.m. The first agent as witness was unable to provide a response whereas the remaining two agents did. The agents were cross-examined on whether they recognized the server among the licensee's witness waiting to appear. One of the female agents testified that she did, the male agent stated that he believed that he recognized one of the persons as the clerk in the LRS at the time of his visit.

The male agent was asked whether he had facial hair at the time of the inspection. He advised that he had some stubble from not having shaved for a couple of days. He agreed that facial hair could make a person appear older.

The agents were asked whether they felt comfortable in the establishment during their visit. They advised that they felt comfortable but out of place as they were noticeably younger than the other patrons.

The Project Manager for the branch Identification Compliance Project testified that as project manager she was responsible for the hiring, training and supervision of the agents employed by the branch for the project. The selection criteria were for young

looking students, at least 19 years of age with an interest in enforcement programs. Each agent was provided training on the scope of the project, applicable legislation, note taking, use of the agent observation forms and exhibit documentation. Agents were told to dress youthful and comfortable for travel. They were told not to wear a lot of makeup and not to attempt to appear older than their ages.

The project was carried out through all areas of the province. She travelled with the agents, facilitating transportation, co-ordinating the establishments to be visited, funding the liquor purchases, collecting the liquor exhibits and the Agent Observation Reports. She was provided with a list of establishments to be visited from the areas' liquor inspectors. Once an establishment had been visited the Agent Observation Reports were provided to the regional manager and the liquor inspector responsible for the area in which the establishment was located. The inspector had the responsibility to review the report and determine the course of action to be taken. She produced an overall report on the project (Exhibit 2). The report contains statistical information for the project and each individual agent.

She testified that she was at the Harewood Arms with the agents on November 24, 2004, but remained outside of the establishment and collected the agent Observation Reports and collected and documented the liquor exhibits.

A liquor inspector testified that he is one of the inspectors for the Nanaimo area. Although the Harewood Arms is not within his geographical area of responsibility, he is familiar with the establishment through inspections he has conducted there. He testified that the provisions of Section 45(2) of the *Regulation* came into effect in December 2002 requiring licensees to check the identification of all persons appearing to be under twenty-five years of age. All licensees were advised of the *Regulation* and the branch developed a practice of not taking enforcement action unless there had been two previous incidents of non-compliance and a Compliance Meeting held with the licensee to ensure that the licensee was aware of the requirements.

The Inspector provided a review of the branch records for this licensed establishment. The liquor licence has been issued to the same corporate licensee since 1991 (Exhibit 1, tabs 13 and 14). There had been two previous Contravention Notices issued to the licensee when identification was not checked on March 30, 2003, (Exhibit 1, tab 15) and November 15, 2003, (Exhibit 1, tab 17). A Compliance Meeting was held with the licensee on April 15th, 2003 (Exhibit 1, tab 16). No enforcement action was taken on those Contravention Notices. Contravention Notices were issued on December 9, 2004, (Exhibit 1, tab 3; Exhibits 6 and 7) as a result of the agents' visit to the establishment on November 24, 2004.

He testified that the branch has provided information to licensees regarding their responsibilities under Section 45(2) of the *Regulation* requiring two pieces of identification from persons appearing under 25 years of age. The requirements are outlined in the "Guide for Licensees" (Exhibit 1, tab 11 at pages 11 and 12). Inspectors also attend Compliance Meetings with licensees such as that held with this licensee on April 15, 2003, (Exhibit 1, tab 16) which provides a forum for discussion between licensees and inspectors on how to improve their operating practices. He agreed on cross-examination that the branch has not provided training for licensees or their staff on how to determine if a person is apparently less than 25 years of age. The "Serving It Right:" "Server" (Exhibit 4) and "Licensee" (Exhibit 5) Program Manuals as well as the "Guide" discuss the need to check identification and the authenticity of identification, however, do not provide information on determining whether a person appears under 25 years of age. He testified that liquor inspectors are not given the mandate to train licensees or their staff. That is a licensee's responsibility.

Witness A testified that he had been employed as the liquor inspector responsible for the area in which the Harewood Arms is located for the period from mid-October 2004 until March 2005. Whilst so employed he was provided with the results following the November 24, 2004, visits by agents of the branch to establishments located within his geographical area. The agents had visited a total of 29 establishments for which Contravention Notices were subsequently issued for 19 of those visited.

In following branch procedures he completed Contravention Notices to the Harewood Arms on December 9, 2004, (Exhibit 1, tab 3 for the pub area; Exhibits 6 and 7 for the LRS) and met with two of the Harewood Arms representatives on December 10, 2004. Discussion centered on the *Regulation* requiring that all persons appearing to be under 25 years of age produce two pieces of identification. The representatives for the establishment considered that the branch had employed unfair tactics, amounting to entrapment and that the agents may have appeared to be over 25 years of age. They discussed that the establishment had a good record with this the only contravention. The representatives considered that the requirements would be very difficult to put into effect and advised him that they would be taking political action with the Premier.

The witness agreed on cross-examination that he had some sympathy for their position as it can be difficult to assess a person's age and 19 of 29 establishments within his area were not in compliance with the requirements when visited by the agents. He agreed that while some establishments may pose a risk to public safety the Harewood Arms was not one of them. He testified that the representatives did not request any tips from him in assessing age. He did not provide any assurances to the licensee that enforcement action would not be taken on the Contravention Notices.

In determining what course of action to follow he consulted with his regional manager who outlined the branch's criteria for taking enforcement action only after there had been two previous Contravention Notices and a Compliance Meeting with the licensee. As the establishment met the criteria, he completed an Enforcement Action Recommended Report (Exhibit 1, tab 2) in which he recommended that enforcement action be taken and the minimum \$1000.00 monetary penalty be imposed. It was his opinion that enforcement action with the minimum monetary penalty was necessary to ensure compliance by this licensee.

Evidence - The Licensee

Witness B testified that she has been an employee at the Harewood Arms for 13 years, 11 years as a clerk in the LRS and the past two years as a server in the pub. She was working November 24, 2004, however, could not recall whether she started at 3:00 or 5:00 p.m. She does not recall serving three persons apparently under 25 years of age without asking for identification and did not recognize the persons in the photographs at Exhibit 1, tabs 5, 7 and 9. She testified that she is familiar with the *Regulation* that requires her to request two pieces of identification of persons appearing to be under 25 years of age, always does so and there is no reason why she would not do so. Staff work together as a team, assisting each other with their opinions when necessary. The owners and managers of the establishment take the *Regulation* seriously and have impressed its importance to employees at staff meetings and through the placing of notices at the bar and front door. They have become more obsessed about compliance since the alleged contravention of November 24, 2004, and now check identification of persons appearing under 30 years of age. It is part of her job description not to serve minors and she has received a letter to that effect with her pay cheque.

She testified on cross-examination that she is not familiar with the branch publication "A Guide for Licensees", nor has she ever been tested by the licensee on her knowledge of the law or signed a statement that she understands the rules. She was unaware that the establishment had received Contravention Notices previous to November 2004. The alleged contravention of November 24, 2004, was brought to her attention sometime in the new year and she was shown the photographs at Exhibit 1, tabs 5, 7 and 9 at that time. She was not requested by the owners to prepare a report concerning the alleged contravention of November 24, 2004.

Witness C testified that she is the bar manager at the Harewood Arms and has been employed there for the past 13 years. Staff records show her as working November 24, 2004, but she has no recollection of the day. It is part of her job to check two pieces of identification for persons appearing to be under 25 years of age and there

is no reason why she would not do so. The owners and managers take the requirement seriously and it has been stressed with staff, moreso following the alleged contravention of November 24, 2004. The establishment has not changed its policy for checking persons appearing to be under 25 years of age, the same persons are asked as would have been previously. Staff meetings are held 5 – 6 times a year and it has been brought up on a regular basis. Signs have been placed at the front door and the bar for approximately 1 ½ years advising of the requirement. The establishment maintains a book of need to know information for all staff which is regularly up-dated and within which the requirements for checking identification have been written up on several occasions. She is not familiar with the “Guide”, however, has been tested on her knowledge of the laws and has signed a document that she agrees to abide by them.

She testified that she does not recall when she was advised of the November 24, 2004, incident. She has not been asked to prepare a statement of her recollection of that date. She had previously seen the photographs depicted in Exhibits 1, tabs 5, 7 and 9 at a staff meeting, however cannot recall when that occurred. She had not been made aware of Contravention Notices issued by the branch prior to the alleged contravention of November 24, 2004.

LICENSEE SUBMISSIONS

Administrative Fairness

The licensee representative made a number of submissions that I will deal with under the general heading of Administrative Fairness: Timeliness, Delay, and Bias.

He submitted that the branch has not followed its own rules regarding the timeliness of the hearing process. He drew attention to the branch publication “Enforcement Hearing Rules”. The Rules state at 8 (3): “The enforcement hearing will be held within 60 days of the Notice of Enforcement (NOEA) unless the enforcement hearing adjudicator and the licensee agree to a later date or the enforcement hearing adjudicator determines that a later date is appropriate.” He submitted that the NOEA is dated

December 29, 2004, which then requires that a hearing be held prior to the end of February 2005. In this case, the hearing was not scheduled to commence until a date in March which was subsequently changed to April 15 as the branch had failed to meet the disclosure requirements. Following the day of hearing on April 15, the case not being completed, was adjourned to a date in May and further adjourned to July 7, 2005, due to illness of the branch advocate.

He submitted that the case has taken 225 days from the date of the alleged contravention, November 24, 2004, until the completion of the hearing on July 7, 2005. It is not reasonable for the staff on duty at the time of alleged contravention to remember what occurred on the date of the alleged contravention.

He submitted that the adjudicator appointed by the general manager is a former long-term employee of the branch.

Credibility of the Agents for the Branch

The licensee representative submitted that the agents for the branch were not credible witnesses in that their evidence was unreliable and that they had been "schooled" prior to giving their evidence. He raised the following points:

- During his cross-examination of the three agents he questioned them on the number of establishments visited as agents and the number of times they were requested/not requested for identification. He submitted that the responses given varied greatly with the project statistics in the "Agent Performance Report" (Exhibit 2) and as such their evidence was not credible.
 - None of the agents saw the sign at the front entrance that was in place on the date of the alleged contravention.
 - The agents were cross-examined on whether they recognized the licensee's witness waiting to appear. He submitted that the evidence of the agents was inconsistent
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with the times during which the licensee's witnesses were in attendance and waiting to appear, this, he submitted, affected the credibility of the agents.

- The male agent broke the law by carrying liquor purchased from the LRS into the pub area.
- During cross-examination he questioned each agent as to his or her activities on January 24, 2005. The first agent as witness was unable to provide a response whereas the remaining two agents did. He submitted that that was evidence of the agents being "schooled" in their testimony.

Contravention and Penalty

The licensee representative submitted that the establishment did not break the law as all agents were at least 19 years of age. The licensee's witnesses testified that they work hard to comply with the requirements. The *Regulation* is poorly worded. The determination of a person's apparent age is a subjective requirement and difficult to assess. The branch is aware that the compliance rate is low yet does not provide training for licensees and there is no guidance provided in branch publications.

He has been in business for 30 years and this is the only time that he has been required to attend at an enforcement hearing. He submitted that the contravention has not been proven. The establishment has complied and will continue to comply in the future.

Findings and Decision

1. Administrative Fairness

(a) Timeliness

The timelines in this case, as I understand them, are as follows:

- November 24, 2004 – alleged contravention occurs
 - December 9, 2004 – Contravention Notice issued to licensee followed by a meeting with the liquor inspector on December 10th.
 - December 29, 2004 – Notice of Enforcement forwarded to licensee
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- January 20, 2005 – Pre-hearing conference held with licensee, hearing date of March 18, 2005 agreed upon. This was later changed at the request of the licensee to April 15 due to the late disclosure of documents by the branch
- April 15, 2005 – hearing commenced, adjourned to May 2, 2005, for completion. This was later changed at the request of the branch due to illness of the advocate
- July 7, 2005 – Hearing completed.

The Enforcement Hearing Rules provide a set of guidelines for managing the hearing process. They are subject to the exercise of discretion by the general manager or her delegate, the adjudicator appointed to conduct the hearing and who has the ultimate responsibility for the conduct of the hearing.

While there is room for improvement in the speed in which this case made its way through the system, I am satisfied that the timeliness with which it proceeded is reasonable in the circumstances of the case. Adjournments and changes in dates were reasonable, necessary and agreed upon by the licensee and branch representatives.

(b) Delay

Delay may be a factor to be considered in determining if there has been administrative fairness. Any delay should not be unreasonable or be prejudicial to the licensee. As stated above I do not consider that the delay here has been unreasonable. If there was prejudice to the licensee by employees being unable to recall their activities on November 24, 2004, the date of the alleged contravention, it was preventable by the licensee. The licensee representatives were advised of the contravention on December 9, 2004. They could have alerted their staff to the allegation and made inquiries of them and obtained statements of their recollection of their activities on the date in question while it remained in their memories. The incident of the server asking the two agents if there was a problem with their drinks when they were left mostly unconsumed may have been sufficiently unusual for a recollection. Additionally, the youthfulness of the agents compared with other patrons on the date in question may have been sufficiently unusual to assist recollection.

I am satisfied that the delay was not unreasonable, nor in itself, responsible for prejudice to the licensee.

(c) Bias

Although not raised directly by the licensee's representative, he did in his submission make the point that the adjudicator was a former branch employee. There is within that comment the implication of bias, so I address it directly. The legislation provides the authority to conduct hearings to the general manager, an employee of the branch. The general manager has the authority to delegate and has done so in this case. If the general manager is not systemically biased, its hard to imagine why a past branch employee would be biased by the reason of past employment, unless real bias is alleged and proven which is not the case here.

In conclusion, I find that the conduct of the branch meets the requirements for administrative fairness.

2. Whether a Contravention has occurred.

I have carefully considered the evidence provided by the branch's agents. There are some points in their evidence, which give rise to a question of the accuracy of the evidence on those points. In particular, evidence concerning the statistics of the agents participation in the project and whether there was a sign at the entrance of the establishment outlining the requirement for two pieces of identification. I accept that the agent's evidence on the statistics were estimates or perhaps even "guesstimates" and caution should be exercised in the use that is made of their evidence on that point. The evidence of the agents differs from that of the licensee's witnesses concerning the existence of a sign at the entrances. I accept that it is entirely possible that a sign exists and all three agents failed to notice it. I do not accept that that is determinative of the credibility of the agents. On the point whether the agents could identify the server from those persons waiting to provide evidence, I am not satisfied that the evidence taken during the hearing is sufficiently clear to make a finding. Further, I am not satisfied that the matter is of sufficient relevance that it would affect the credibility of the witnesses.

Additionally, that a contravention may have occurred when the male agent took liquor into the licensed pub area is not relevant to these proceedings and does not affect the credibility of his evidence. The branch has alleged no such contravention.

Having heard to all of the evidence provided by the branch's agents, I am satisfied that their evidence reflected their observations and I accept the veracity of the evidence. I am satisfied that the agent's were not coached in their evidence. There is no indication that any interaction between the agents and branch representatives went beyond what prudent counsel would do in preparing a witness. .

In conclusion, I am satisfied that the agent's evidence on the salient points of the alleged contravention, evidence which was uncontested by the licensee, is unassailable and reliable. Simply put, the three agents entered the licensed establishment, ordered and were served alcoholic beverages.

I have had the opportunity of observing the agents during their testimony at this hearing and viewing the photographs taken on the day of the alleged contravention. The male agent testified that that he had some stubble from not having shaved for a couple of days. That is evident in the photograph. It was not argued by the licensee, nor is there any evidence that compels me to believe that any of the agents looked other than their real ages. I am satisfied that the male agent looked no older than a 20-year-old male with a couple of days of beard stubble. I find that the agents, who were 19 and 20 years old at the time of the alleged contravention, were persons appearing to be under the age of 25 years.

I find that: on November 24, 2004, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two (2) pieces of identification from a person appearing to be under the age of 25 before allowing the person to enter the licensed establishment, or before selling or serving liquor to the person.

Due Diligence

Although not raised directly in submission, the licensee is entitled to a defence to the allegations of the contravention if it can be shown that he was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, he must ensure that those procedures are consistently acted upon, and problems dealt with. I am satisfied that that has not occurred in this instance. The licensee attended a Compliance Meeting with liquor inspectors, yet the problem continued as noted by the evidence received at this hearing. There is no evidence that the licensee inquired into the circumstances leading to the previous Contravention Notices. The evidence is that he did not advise staff, including the bar manager, of the notices. The licensee is aware that the requirements of determining whether a person is under 25 years of age can be difficult for staff, yet has not sought advice or training which may be available through industry consultants or organizations. The licensee has at best given lip service to his responsibilities concerning the issues raised regarding the contravention. In conclusion, I am satisfied that a defence of due diligence has not been made out.

Penalty

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; and
 - order a licensee to transfer a licence.
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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 contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, section 1(1)(b), the branch has treated the allegations as first contraventions.

There were, however, two previous Contravention Notices issued to the licensee. The branch did not pursue enforcement action, however, it did follow up with a Compliance Meeting in an attempt to assist the licensee in bringing the operation of the establishment into compliance, to no avail. I have given weight to this compliance history not as proof of previous contraventions, but as proof that the branch has told the licensee in the past of its concerns and has attempted to assist the licensee in achieving compliance.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage voluntary compliance. Having considered the evidence, I am satisfied that a penalty for the contravention is necessary to ensure future voluntary compliance.

I find the recommended minimum one thousand dollar (\$1000) monetary penalty appropriate.

Order

Pursuant to Section 20 (2) of the Act, I order the payment of a one thousand dollar (\$1000) monetary penalty by the licensee to the general manager on or before Thursday, September 29, 2005.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

August 23, 2005

cc: R.C.M.Police Nanaimo Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager
Vancouver Island/Okanagan/Kootenys

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