



**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:	Frontiersman Pub Inc. dba Frontiersman Cold Beer & Wine Store 2280 Alberni Highway Coombs, BC
Case:	EH04-180
For the Licensee	Robert G. Garrett, Counsel Robert Lloyd, Director
For the Branch	Sonja Okada, Advocate
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	March 16 & April 12, 2005
Place of Hearing	March 16, 2005 Nanaimo, BC April 12, 2005 Teleconference
Date of Decision	June 14, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Frontiersman Pub Inc., operates the Frontiersman Pub and the Frontiersman Cold Beer & Wine Store in Coombs. It holds a Licensee Retail Store Licence ("LRS") No. 195100 with hours of operation from 9:00 a.m. until 11:00 p.m. seven days a week. As with all LRS licenses, it is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia' ("the Guide").

ALLEGED CONTRAVENTIONS AND RECOMMENDED ENFORCEMENT ACTION

By Notice of Enforcement Action ("NOEA"), the Liquor Control and Licensing Branch ("the branch") alleged that on November 23, 2004, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002, (the "*Regulation*") by failing to request two pieces of identification from a person appearing to be under the age of 25 before selling liquor to the person.

Schedule 4 of the *Regulation* provides a range of licence suspensions and monetary penalties for contraventions. For the contravention of Section 45(2), Item 4 of the Schedule, the penalty range is a one (1) to three (3) day licence suspension or a one thousand (\$1,000.00) to three thousand (\$3,000.00) dollar monetary penalty for the first contravention. The branch recommended a monetary penalty of \$1,000.

RELEVANT STATUTORY PROVISIONS

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

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

The evidence is uncontroverted that two people, both age 20, purchased liquor from this LRS on November 23, 2004 and that the licensee's employee did not request two pieces of identification from them.

The issue then is whether either or both of the people were "appearing to be under the age of 25 years?"

2. If yes, is the branch's recommended enforcement action appropriate?

EXHIBITS

Exhibit No. 1 Book of Documents

EVIDENCE

The branch called as witnesses two agents who were involved in this incident and a liquor inspector. The licensee's witness was the employee who was involved in this incident.

During 2004, the branch employed young people, between the ages of 19 and 25 years, as agents to conduct compliance checks to assist the general manager in determining whether licensees were complying with Section 45(2) of the *Regulation*. The agents attended many licensed premises in a day, including lounges, pubs, restaurants and licensee retail stores.

There were three agents, 2 women and 1 man, who attended this LRS on November 23, 2004. Two of the agents attended the hearing. In Exhibit No. 1, tabs 8 and 9, there are photographs of the two agents, which they testified were taken on the morning of this incident and represented their appearances throughout the day. They attended this LRS at approximately 3:30 p.m. Both agents were 20 years old. They both completed the branch's forms following this compliance check.

The Branch's Evidence

The two agents testified there were homemade signs posted in the lobby advising people of the need for two pieces of identification. They testified that they each purchased liquor in the LRS without being asked for identification. They said that they went to the counter, ordered what they wanted and paid cash. The LRS clerk engaged the women in conversation about their purses, during which time the clerk had eye contact with them.

The female agent 'guessed' that she is asked for identification about 90% of the time. She said that she is asked for identification more often in her personal life than when doing compliance checks for the branch. She also observed that in small towns she was asked for identification less frequently than in larger centres and that she is asked most frequently in nightclubs. She testified that when the agents went into licensed establishments, they were role playing, acting younger, trying to get the staff to ask for identification. She testified that she did not wear extra make up to make herself look older; and she wore 'kiddish' clothing of bright colours to make herself look younger, although she qualified that these are the same clothes she wears in her personal life.

In a hearing the previous week, this agent had been presented with statistics the branch prepared based on her reports from her compliance checks. These indicated the percentage of times she was asked for 2 pieces of identification and for 1 piece, and when she was not asked. The agent could not recall these figures.

The male agent also had been presented with the statistics in the previous hearing and recalled the figures. He recalled that 41% of the time he was asked to produce 2 pieces of identification and 24% of the time he was asked to produce 1 piece.

Concerning his photograph, the male agent acknowledged that he had not shaved for a couple of mornings and that the stubble gave him an older appearance.

The liquor inspector reviewed the establishment's licences, other documents in Exhibit No. 1, the Guide, and the establishment's past history from the branch's file. He testified that the branch policy concerning this type of contravention is that no enforcement action

would usually be taken until there were 2 previous alleged contraventions and, probably, a Compliance Meeting between the inspector and the licensee. The reason for the policy of not proceeding on the earlier alleged contraventions was to give licensees time to become accustomed with the new *Regulation*, put policies and procedures in place, and train staff.

The branch had issued Contravention Notices to the licensee on March 28, 2003 and November 27, 2003, and conducted a Compliance Meeting on April 14, 2003.

The liquor inspector testified that he recommended the penalty of \$1,000 because he thought that was sufficient to achieve voluntary compliance with this licensee.

The Licensee's Evidence

The licensee's clerk who served the agents testified that he and the other LRS employees assess age by look and demeanour and by greeting patrons. He said that his personal benchmark is to compare people with the appearance of his 23-year-old brother and his friends. He recalled the two women agents and the discussion about their purses.

The clerk testified that he recalled checking the identification of a couple of patrons that day and being very wrong about their ages. Some days he may ask 5 to 10 patrons for identification, and others day there may be none. He said that if staff aren't sure about a piece of identification, they confer amongst themselves. There is a staff policy manual but he did not have it at the hearing.

The clerk testified that the licensee has training for staff in false identification and how to ask for identification. For about one year, the policy was to ask for identification for everyone who appeared under the age of 30. He recalled that the sign was still posted indicating the law for minors is 19 years, the *Regulation* for identification is 25 years, and the licensee's policy is 30 years. However, he said staff and patrons were confused by the 30-year policy because it wasn't clear what they were looking for and they have discontinued it.

The clerk saw the agents at the hearing. He noted that the man was not wearing his hat and the woman had her hair tied up. He testified that given their appearances at the hearing, he might have asked for identification.

SUBMISSIONS

The licensee pointed to the difficulty of determining age and of defining methods or factors for doing that. In the absence of any training or guidelines from the branch, the sales clerk's method of considering demeanour, body features and comparing with his younger brother and his friends is an appropriate way to assess age.

The licensee referred to the branch's decision in *Winfield Pub Ltd. (dba Woody's Pub)*, EH04-092, January 28, 2005 ("Woody's Pub"). The adjudicator in that case stated that the test required by Section 45(2) of the *Regulation* is subjective and "rests in the eyes of the clerk." However, he also applied an objective element by looking to the reasonableness and credibility of the clerk's judgment and testimony. The licensee submitted that the subjective test was correct but the additional objective test was in error. Further, that it was an error for the adjudicator to substitute his impression for the clerk's and to use the actual age as part of the objective test.

The licensee compared the task in this case with the tests required of police officers in impaired driving cases and referred to *R. v. Shimell* [1982] B.C.J. No. 713, Nelson Registry No. 1/82 [182]. The Criminal Code requires that an officer have reasonable and probable grounds for believing that a person is committing the offence of 'drinking and driving' before demanding a breath sample. Similarly, the Criminal Code requires an officer to have reasonable and probable grounds for believing a person has committed an offence in order to arrest the person. The wording "reasonable and probable grounds" clearly establishes an objective test.

In contrast, Section 45(2) does not include the requirement of reasonable and probable grounds or any other wording that could suggest that the test is objective. Therefore, the licensee submitted, the test is entirely the subjective belief of the licensee.

The licensee submitted that this offence requires *mens rea*. That is, that the branch must demonstrate that the server knowingly or willingly committed the offence.

In the alternative, the licensee submitted that if the test is objective, the evidence still establishes that the sales clerk acted reasonably, given the branch's statistics. The licensee submitted that the sales clerk at the Frontiersman cannot be faulted when it is apparent that he fell in with 50% of his colleagues in the industry.

The licensee also pointed to the testimony that the agents disguise themselves and whether that is done to make them look younger or older, it is a factor in altering their natural appearances. The licensee noted there is a credibility issue because the branch admittedly is using disguise and deceit but is asking that the agents' evidence be treated as credible.

ANALYSIS AND DECISION

Statistics

The licensee and the branch were at odds over the interpretation of the male agent's statistics. The licensee interpreted his evidence as meaning that the 41% of the time when he was asked to produce 2 pieces of identification included the times he was asked to produce 1 piece (24%). This would mean that 59% of the time he was not asked to produce any identification.

The branch advocate understood the evidence as cumulative, meaning that 35% of the time he was not asked to produce any identification.

The report of the statistics was not provided at the hearing. Although the advocate initially intended to produce it, she advised the licensee at the commencement of the hearing that there were some problems with the report and, therefore, she was not putting it in evidence. The evidence came into the hearing through the licensee's questions to the agents. Neither agent had a copy of their statistics. Rather, their evidence was based on having seen the report and having been questioned about the

statistics in a previous hearing. I find that the statistical evidence in this hearing was hearsay, confusing and unreliable. Accordingly, I attach no weight to it.

Mens Rea

One import of the *mens rea* submission is that the branch would have to prove the case beyond a reasonable doubt, the criminal burden of proof. In many cases under this *Act*, the courts have considered the nature of the contraventions along with the issues of burden of proof and the defence of due diligence. The Courts have held that the standard of proof is balance of probabilities, and that the defence of due diligence is available. See *Zodiac Pub Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2004] B.C.J. (Q.L.) No. 119 (B.C.S.C.); *New World Entertainment Investments Ltd., doing business as Richard's of Richards v. The General Manager Liquor Control and Licensing Branch*, April 23, 2004, Kamloops Registry No. 34055 *Sentinel Peak Holdings Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2004] B.C.J. (Q.L.) No. 1352 (B.C.S.C.).

I do not accept the licensee's submission that this alleged contravention is to be decided as a *mens rea* offence.

Subjective/Objective Test

I do not accept the licensee's submissions based on the *Shimell* case for two reasons. First, it is questionable whether the *Shimell* case remains authoritative in B.C., having been distinguished in *R. v. Daggitt*, [1991] B.C.J. No. 3210, in which Madame Justice Ryan states:

I must therefore conclude that the test in *Shimell* is no longer the law in this province. The test is therefore: whether the circumstances that the peace officer believes to be true are such that would give rise in the mind of a reasonable person the belief in the likelihood that the accused has committed an offence under s. 253.

Secondly, and more importantly, the *Shimell* case concerned criminal law, *mens rea* offences, and the discussion of reasonableness was directed at the peace officer's actions, not at the actions of the accused. I find that the cases interpreting the Criminal

Code standard for police officers in impaired driving case have no bearing on the interpretation of this *Regulation*.

The licensee submitted that the test to be employed is subjective only. I do not accept that. It is not sufficient for the employee who served the young person to come to the hearing and say – “the person looked over 25 to me.” In my view, there has to be an ability to assess the evidence to determine, after the fact, whether that was a reasonable assessment.

The licensee submitted that the agents had attempted to disguise themselves. I do not accept that view of the evidence. The female agent testified that she dressed to appear young, but then qualified that she wears the same clothes in her everyday life.

The *Regulation* had been in effect for almost 2 years at the time of this incident. The licensee and the staff were well aware of the requirement of asking for 2 pieces of identification and were very much aware, as they testified, of the difficulties of determining whether someone is over 25 years. The licensee’s clerk said he recalled asking other people for identification that day and was very wrong about their ages, that is, that they were much older than 25 years.

The fact is these two agents were 20 years old. The clerk had a clear recollection of the three agents and he testified that if they had appeared on November 23, 2004, as they did at the hearing, maybe he would have asked them for identification. That suggests they appeared much different on November 23 than at the hearing. However, I find the evidence does not suggest much difference between the appearances of the agents that day and at the hearing. The woman’s hairstyle was different; the man had stubble and wore a cap. They were still young people, well under the age of 25 years. There is nothing in the evidence that compels me to find that the agents would have appeared older than their ages on November 23, 2004.

I acknowledge that telling age is a difficult task. However, the *Regulation* places a requirement on people serving alcohol and if that results in asking people who are older than 25 to produce identification, so be it. There are people 25 years and older who appear younger. The fact that they are older does not detract from the requirement of

asking for identification. It will not be possible to know precisely who is over or under 25 years. It does not offend the legislation to require identification from someone who is older. Servers are not asked to guess the age so much as to ensure that persons of young appearance are asked for identification. If servers are unable to distinguish between 19 years and 29 years, then it is incumbent on them to ask.

The evidence establishes that the licensee has training and policies in place to assist employees in determining whether identification is valid and whether a person is a minor. Those assessments are far different than that required for determining whether someone is under 25 years. The purpose remains the same – to ensure that minors are not purchasing alcohol.

I am left with the impression that this employee did not truly turn his mind to whether to ask for identification. It is likely that he automatically assessed the young people as being old enough to purchase liquor, and then did not continue the assessment for the additional requirement. He said there were other people from whom he required identification. It is not credible to me that he could have considered the question with these young people and not have concluded that he should ask for identification. I find that the employee's assertion that these young people appeared older than 25 years to lack credibility.

I find that both of the agents appeared to be under the ages of 25 and that the server failed to request two pieces of identification, contrary to Section 45(2) of the *Regulation*.

DUE DILIGENCE

It is well accepted that the defence of due diligence applies to contraventions under the *Act*. The B.C. Supreme Court addressed due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248, a case involving alleged illegal conduct:

[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.

Since the *Plaza* decision, in cases assessing the evidence of due diligence in relation to other contraventions, the branch has stated that a licensee must establish procedures to identify and deal with problems, and ensure 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 the 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.)

In this hearing, the licensee did not make submissions on due diligence. However, I have considered the evidence to determine if there is an obvious defence available. On the evidence I find that the employee who served the agents was not a 'directing mind' of the licensee. There was evidence that the licensee has signs posted advising the public of the identification requirements. There was also evidence from the employee that the licensee has a policy manual, that employees have certain criteria they consider in assessing age, and that employees confer amongst themselves if there is an issue about a piece of identification. The policy manual was not produced and I was not provided evidence about the contents of the manual *vis a vis* this legislative requirement. Although there was some evidence of employee training, it concerned checking identification for possible minors, and for fake identification, but not specifically related to the 'under 25 years' requirement.

I find that the evidence falls short of establishing a defence of due diligence.

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
- 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 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. The range for first contraventions is 1 to 3 days, or \$1,000 to \$3,000 monetary penalty.

The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are 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.

The branch issued two previous Contravention Notices and conducted a Compliance Meeting with the licensee, specifically on this issue. 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.

I am satisfied that the branch's recommendation of \$1,000 monetary penalty is 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 July 12, 2005.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: June 15, 2005

cc: R.C.M.Police Parksville Detachment

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Branch Advocate,
