



**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:	Sooke River Hotel Ltd. 6309 Sooke Road Sooke, BC
Case:	EH04-182
For the Licensee	Gordon M. Lidstone Don Rittaler
For the Branch	Sonja Okada
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	March 23, 2005 and June 20, 2005
Place of Hearing	Victoria, BC
Date of Decision	June 29, 2005

INTRODUCTION

The licensee, Sooke River Hotel Ltd. operates a Liquor Primary establishment and a Licensee Retail Store (“the LRS”) in Sooke. It holds Licensee Retail Store Licence (“LRS”) No. 192253, which is the subject of this hearing. One of the terms and conditions set out on the face of the licence is that it is subject to the terms and conditions contained in the publications ‘Guide for Liquor Licensees in British Columbia’ (“the Guide”).

ALLEGED CONTRAVENTIONS AND RECOMMENDED ENFORCEMENT ACTION

By Notice of Enforcement Action (“NOEA”) dated December 23, 2004, the Liquor Control and Licensing Branch (“the Branch”) alleged that on December 2, 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 who were 20 years old purchased liquor from the LRS on December 2, 2004, and that the licensee's employee did not request two pieces of identification from them. The issue then is whether these 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 of the branch
Exhibit No. 2	Correspondence dated June 20, 2005, with attachments

EVIDENCE

The branch called as witnesses two agents who were involved in these incidents, a project manager, and a liquor inspector. The licensee called as witnesses an employee ("the clerk") who was involved in this incident and the president of the corporate licensee ("the licensee").

Subsequent to the hearing, I was advised by the branch registrar that the branch had discovered an error in a report included in Exhibit No. 1, Tab 14, and was planning to make a further submission. As of June 20, 2005, I received correspondence requesting an amendment be accepted appending the proposed amendment, and advising that counsel for the licensee did not want to make a submission on the branch's request. The amendment concerned an agent who was not involved in this case. However, I have included the correspondence as Exhibit No. 2.

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 LRSs.

There were two agents, a woman and a man, who attended this LRS on December 2, 2004. In Exhibit No. 1, tabs 5 and 7, 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 1:50 p.m. They both completed the branch's forms following this compliance check. Both agents were 20 years old and both worked for the branch for approximately 1 month in November/December 2004. The licensee's employee who testified is the clerk who served them.

Branch's Evidence

The project manager testified that the purpose of employing the agents was to test compliance with the *Regulation*. Initially, the branch was approached by the Liquor Distribution Branch asking that compliance at their outlets be tested. The branch decided to do an industry-wide compliance check. The project manager testified that the agents were hired, trained and supervised. In hiring, the branch looked for young people who, preferably, were students in programs related to enforcement work.

The project was conducted between May and December 2004. On May 19, there was a compliance check at this LRS. According to the agent report, the licensee's staff did not ask for the required identification. After the initial province wide project, the LDB asked for a re-sampling on Vancouver Island. The branch then hired these agents for approximately one month.

The project manager accompanied the agents except for three days, one of which was December 2, 2004. She testified that the agents brought her their photographs, camera, reports and receipts for the day.

The branch compiled the Agent Performance Report 2004 from all of the reports (Tab 14). The statistics for these two agents for all of their compliance checks indicated that the female agent

- was asked for 2 pieces of identification 31%,
- was asked for 1 piece of identification 24% and
- was asked for no identification 45%.

This means she was asked for some identification 55% of the time.

The male agent

- was asked for 2 pieces of identification 42%,
- was asked for 1 piece of identification 24% and
- was asked for no identification 34%.

This means he was asked for some identification 66% of the time.

On pages 14 and 15 of the Agent Performance Report are compilations of the statistics for the Government Liquor Stores (GLS), Rural Agency Stores (RAS) and Licensee Retail Store (LRS), for all of the agents. The rate of compliance at the GLS is considerably higher. For these agents, statistics show they were asked for 2 pieces of identification 70% of the time at GLSs but only 44% (female) and 37.5% (male) at the RASs and 33% (female) and 43.75% (male) at the LRSs. At the LRSs, no identification was requested of the female 49% and of the male 38%.

The male agent testified that they had travelled to Port Renfrew that morning; this was probably their fourth location. He recalled that this LRS was quiet, with one

other customer and one female clerk. He recalled that there was signage about requiring two pieces of identification. The two agents entered the LRS together. The clerk greeted them, the male agent ordered Captain Morgan's Spiced Rum, the clerk gave him the bottle, he paid cash, got a receipt and left. He testified that he usually ordered the Rum because it is his personal favourite.

He testified that in his private life, when he goes to a night club he is asked for identification about 90% of the time. When he goes to liquor stores or pubs, he is asked 80-85% of the time.

The female agent testified that in her private life, when she goes to a night club she is asked for identification 100% of the time. Overall, when she attends a liquor establishment, she is asked for identification about 90% of the time. In her experience, she has found that she is asked less frequently in restaurants and in rural communities.

The female agent testified that they entered the LRS together, that there was a female clerk and a male behind the counter, and possibly as many as three customers. The female clerk was socializing with the other staff person; she greeted them and made eye contact. The female agent selected her purchase, a bottle of Captain Morgan's Spiced Rum, which she recalled was on a stand, took it to the counter, paid cash and got a receipt.

The liquor inspector testified that the requirement for the two pieces of identification took effect in December 2002. He said that originally licensees were notified through mail-outs. The branch employed the agent program to monitor compliance.

The branch's policy is to not take enforcement action against licensees until there have been two Contravention Notices (CN) issued and a Compliance Meeting held. The reason for the policy of not proceeding on the earlier alleged

contraventions is to give licensees time to become accustomed with the new *Regulation*, put policies and procedures in place, and train staff. For this establishment, the branch had issued a CN for an alleged contravention on January 31, 2003, conducted a Compliance Meeting on April 11, 2003 and issued a CN for an alleged contravention on November 28, 2003.

Licensee's Evidence

The president of the company ("the licensee") testified that the Sooke River Hotel is a family business that he has been involved with for over 35 years.

He testified that he found it was a considerable training curve to go from looking for the 15 – 18 year old range to the 25 year old range. Although he works in the LRS every day, he no longer works cash because he finds it too difficult to stay focused on the 'under 25' aspect. The Compliance Meeting the liquor inspector referred to was a meeting called by the previous liquor inspector for many hotel owners who had a lot of questions of what was expected of them with the new *Regulation*.

The licensee testified that he works with the employees and that he has seen a '1000% improvement' in staff checking for identification since December 2002. Each night he closes the store and he asks all the patrons present if they have identification.

The licensee testified that he has fully read the Guide and that he understands his role and responsibilities. The first point he discusses with new staff is identification requirements. He has them work with experienced cashiers as an orientation. He trains them, and expects them, to remain focused on identification. He noted that the BC Driver's Licences do not state on the face "under the age of ..." and he is aware that people attempt to alter identification. Therefore, it is important to ask for two pieces. He has instructed his employees

that if they are not satisfied with the identification produced, they can ask the patron to provide a sample signature, and can refuse service.

When the 'under 25' *Regulation* came in he had many staff meetings to discuss how to impose the *Regulation*, particularly on their regulars. He said the government did not say much to the public so the licensees were the front line, without guidance from the branch. It was hard to educate and retrain staff who found it a big transformation to move from the 19 – 21 year focus to the 25-year focus. However, he estimated that the branch has noted a problem in 1 of 10 inspections, which is 90% success rate.

The licensee testified that staff meetings were expensive and now he works directly with the employees. The number of staff has reduced from a high of about 40 to less than 20 full and part time. He has a House Rules policy manual that he gives to each employee.

The licensee testified that an average day's business in the LRS is 200 to 400 patrons and that it goes as high as 800 per day. No patrons are exempt from producing identification and if they don't have it they must go home to get it. He gave an example of his nephew; he had told staff they did not need to check his identification. However, he realized if the R.C.M.P. came in they could charge him, so he told staff they had to ask everyone.

As an example of refusing service, the licensee recounted a young man who they refused to serve on 3 occasions and then they telephoned his father. He also stated that it is policy that if a group comes in and one is under age, the whole group is refused service.

He testified that his staff have worked hard to make this *Regulation* work.

The licensee recalled the female agent on December 2, 2004, because he thought she was someone he knew. Then he realized it was a different person. Although he did not pay much attention, from a distance, he thought she was 28 to 30 years old based on her hair style and body language. He said that if she had appeared as she did at the hearing, he would require identification. He recalled that he was involved with the product delivery in the back room and could not properly see the front of the store. He did not recall seeing the male agent. Concerning their purchases, he testified that in all his years in the industry he has never seen anyone under 25 years old purchase Captain Morgan's Spiced Rum.

The clerk is the licensee's daughter. She testified that she has been employed in the liquor industry since she was 19 years old and is now the manager of the LRS. She first saw the branch's NOEA and other documents concerning this alleged contravention in January 2005.

As manager, the clerk is responsible for the buying and receiving of product, the daily routine of the store and maintenance of the computer work. The government-issue signage re:identification is posted around the store and at the cash register.

The clerk testified that the expectation of staff is that they will require identification from everyone who appears under 25 years, without exception. She said when people enter the store she watches for body language, conduct and maturity, clothing fashion – whether it is an old fashion, or whether the clothes are tight fitting, lines around the eyes, sagging jowls, and other physical characteristics.

She helps train new employees. As of the hearing date, she was training someone who had started 4 weeks ago. She stated that people have different views of appearance and age and that the staff are instructed to ask for

identification if the person looks young. She is aware that some patrons in the 35 to 40 years range have been asked. She estimated that in the winter months she knows about 75% of the patrons who come in each day.

She recalled the two agents coming into the store, hearing the bell ring, and greeting them. She thought they looked like an established couple. They asked for Captain Morgan's Spiced Rum and she showed them where it was. They chatted a bit about the weather. The male was wearing a baseball cap pulled down. He stood tall, seemed confident and asked for hard liquor. She compared him to her husband, who is 35 years old. The female had her hair down, had lines around her eyes and mouth, and looked like a fairly mature woman. She was also confident and both were friendly. She testified that the liquor they ordered is not a young person's drink. She testified that she also remembered regulars who came in that day, but did not remember any other particulars.

The clerk testified that she turned her mind to their ages and would have put the female at approximately 29 years and the male about 2 years younger than that. She knows many people who are under 25 years old. Seeing the agents at the hearing, she would have put the female at 25 or over and the male as borderline.

SUBMISSIONS

The licensee submitted that the *Regulation* is a quasi-criminal regulation and is awkward since it is based on appearance. It is the appearance to the cashier that matters, not the opinion of the adjudicator, and that the issue is the reasonableness of the cashier's human perception.

The licensee submitted that there are policies in place to enforce the regulation and that staff take the responsibility seriously. The evidence established that the clerk took a careful note of the agents who she thought looked like a couple. They were not nervous or skittish, were confident, and were not shy. She looked

them in the eyes and judged that she did not have to ask them for identification. The agents looked different at the hearing. One consideration on December 2, 2004, was that they had been up early and they may have looked tired by the time they arrived at this LRS.

Considering the statistics, 45% of the time licensees judged the female agent to be over 25 years and 34% of the time they judged the male agent to be over 25 years. Looking at the LRS statistics (p. 15), the percentages rise to 49% and 38%, respectively.

The licensee submitted that two defences had been made out. Firstly, the evidence shows that the clerk applied her mind to assessing the agents and how she exercised her judgement. Secondly, the licensee has a policy that employees understand and employ. The licensee has demonstrated due diligence in carrying out the responsibility of this regulation.

ANALYSIS AND DECISION

The licensee's counsel submitted that the section is awkward because of the word "appearing" and that it is the clerk's opinion that is crucial, not the adjudicator's. Counsel also noted that issue comes to whether the clerk's assessment was reasonable.

I agree that there has to be an objective test. 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." There has to be an ability to assess the evidence to determine, after the fact, whether that was a reasonable assessment.

Based on the evidence as a whole, I find as fact that these agents were young people who did not disguise their youthful appearances. While one cannot be positive that they are under 25 years old, there can be no doubt that they appear young. There was nothing in the evidence that compels me to believe that they

tried to look older than their actual ages. I am not prepared to give substantial weight to the statistical report because there are a number of figures that could be interpreted variously. However, giving some weight to those statistics, I note that both agents where asked for identification more often than not.

The licensee submitted that the agents appeared older than 25 years, in part, because they appeared like an established couple and were confident when they entered and ordered. That illustrates a confusion with the tests for determining whether someone is a minor. There is no reason the agents should not appear confident - they were fully entitled to be there, were not doing anything illegal and may have had experience purchasing alcohol for a couple of years.

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.

It is not an answer to the *Regulation* to say that it is impossible to tell whether someone is 19 or 29, which is what the licensee's submission boils down to. The clerk testified that even as of the hearing, she would have put both agents at 25 or older. The fact is they were 20 years old at the hearing. The licensee admitted that he cannot tell the difference, so he does not work at the cash registers. If servers who are responsible for dispensing alcohol are unable to tell that difference, then it is incumbent upon them to ask for identification. One doesn't need to conclusively decide whether someone is over or under 25. There are government issued signs that tell patrons to expect to produce two pieces of identification. The cautious approach is to ask.

I find that the two agents appeared to be their ages, 20 years old. Accordingly, I find that the clerk 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 not only establish procedures to identify and deal with problems, it must ensue 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.)

On the evidence, I find that the clerk who served the agents was not the 'directing mind' of the licensee. Therefore, I have considered whether the evidence establishes the defence of due diligence.

I find that the licensee has taken considerable steps through staff meetings, orientation sessions, and one-on-one training with staff to ensure that staff are complying with the 'under 25' requirement. He testified that staff is trained to require additional identification, ask for signatures, and refuse service. There is a policy manual that each employee receives. The required signage is posted. The training of staff is extensive and long, as evidenced by the new person being trained as of the date of the hearing. The licensee testified that he personally attends to closing the LRS each night and raises the issue of identification. He had thought through the issues of dealing with patrons who are well known to be of legal age, but are under 25 years or appear young, and instructed staff they had to ask for identification each time.

I found the licensee's evidence to be sincere and credible. It is apparent that he has worked diligently to ensure that the 'under 25' requirement is being applied by his staff. Applying the test of whether there is more the licensee could do by way of preventative measures, I have not been able to discern any additional measures. It is apparent that the licensee will have to work with staff on continuing training and to encourage staff not to be hesitant to ask young looking people for identification.

I find that the licensee has demonstrated a defence of due diligence.

Accordingly, I find that the branch has not established the contravention of Section 45(2) of the *Regulation* as alleged.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: June 29, 2005

cc: R.C.M.Police Sooke 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, Advocate
