



**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:	Six Mile Pub Ltd. dba Six Mile Pub 494 Island Highway Victoria, BC
Case:	EH04-183
For the Licensee	Kirsten Tonge
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	March 11, 2005
Place of Hearing	Victoria, BC
Date of Decision	April 8, 2005

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Liquor Control and Licensing 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 pub under Liquor Primary Licence No. 006657, in Victoria, BC. The pub is known as the Six Mile Pub.

During a compliance check of the pub on December 2, 2004, two agents of the branch entered the pub and purchased Liquor. They were not asked for identification.

ALLEGED CONTRAVENTIONS

The branch alleges that on December 2, 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.

ISSUE(S)

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?

EXHIBITS

Exhibit No. 1:

Liquor Control and Licensing Branch Book of Documents, including;

- Notice of Enforcement Action letter dated December 23, 2004
 - Enforcement Action Recommended Report dated December 23, 2004
 - Contravention Notice B003356 dated December 22, 2004
 - Agent Observation Report dated December 2, 2004
 - Liquor Licence No. 006657
 - Pages 3,11,12, from the Liquor Primary Licence terms and conditions as a Guide for Liquor Licensees in B.C. (August 2004)
 - Floor plan for Six Mile Pub
 - Application for Liquor Licence or Licence Transfer
 - Inspection Interview Information Sheet
 - Contravention Notice A012848 dated February 3, 2003
 - Compliance Meeting form C001218 dated April 11, 2003
 - Contravention Notice B003318 dated December 2, 2003
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Exhibit No. 2:

8"X10" colour photograph of agent #1

Exhibit No. 3:

8"X10" colour photograph of agent #2

EVIDENCE

The branch advocate provided both of the agents to establish that they appeared to be under the age of 25 years.

Agent #1 testified that she was twenty years of age on the date of the alleged contravention. She attended at the pub with agent #2 at approximately 3:00 p.m. The reason for their attendance was a work contract with the branch, which required that the agents attend at a list of licensed establishments to purchase liquor and report on whether they are asked for identification. The pub was on such a list.

She confirmed that the photograph which is Exhibit No. 2 was taken the morning of the alleged contravention, at approximately 10:00 a.m. and that she did not change her clothes, hair or makeup between the photograph and the inspection of the pub.

She and agent #2 entered the pub and went directly to a table near the bar. The pub was not busy, and she saw a server and a bartender. Her evidence is that the agents were at the table two-three minutes before the server approached them. The server immediately asked what she could get the agents to drink. Agent #1 was making eye contact with the server. The server did not take any time to make conversation or to "size up" either of the agents. Agent #1 ordered

a Polar Bear Coffee consisting of Peppermint Schnapps and Kahlua. Agent #2 ordered a Sleeman's Beer.

The server returned with drinks and placed them on the table without further comment.

The agents remained in the pub for about fifteen minutes, drank some of but not all of their drinks, and then agent #2 paid the server at a remote cash register terminal near the bar. Agent #1 waited at the door as agent #2 paid the server.

At no time did the server ask for identification from either of the agents.

Agent #2 testified that he was also twenty years of age at the date of the inspection. He confirmed that he attended the pub with agent #1, that they passed no door staff, and that they went directly to the table. His evidence is identical to that of agent #1 with respect to the actions of the server, the actions of the agents and the timing of the events.

His view is that there were perhaps four staff members on duty when they arrived, one of which was the bartender. They had no interaction with any staff but for the server.

He confirmed that once seated, neither of the agents left the table before exiting the pub and paying on the way out. He confirmed that he made eye contact with the server on two occasions, once when she took his order and once when she delivered it to him. He noted that the server did not take any time to evaluate the agents or to engage them in conversation prior to serving them.

He testified that the photograph of him, which is Exhibit No. 3, was taken of him between 9:30 and 10:00 a.m. on the date of the inspection. He was wearing the

baseball cap as indicated in the Exhibit on the inspection and did not change his clothes or appearance between the photograph and the inspection.

He paid the server on the way to the door at a "squirrel station" near the bar, while agent #1 waited by the door. The server asked him why he had not finished his drink and he replied that they had another engagement. They both left the pub without ever having been asked for identification.

He said they were in the bar for "not much more than fifteen minutes".

After they left, the agents went to agent #1's car and agent #2 completed an Agent Observation Report in compliance with his board training. He confirmed that Exhibit No. 1 tab 4 is a copy of that report.

The liquor inspector also testified. He confirmed familiarity with the pub and its management. He identified the liquor licence (Exhibit No. 1 tab 5), the provisions of the Guide that were applicable to the pub relating to the checking of identification (Exhibit No. 1, tab 6), and the history of alleged contraventions of the pub (Exhibit No. 1 tabs 10, 12). He also indicated that there was a Compliance Meeting held with the licensee relating to the previous contraventions (form at Exhibit No. 1 tab 11).

The Inspector testified that branch policy dictated that no enforcement action is typically taken on matters of this nature until there has been two previous contraventions and a compliance meeting. He confirmed that all of these had indeed occurred and therefore he recommended enforcement action be taken by the branch.

The general manager of the establishment testified on behalf of the licensee. He is a shareholder of the pub. He indicated that all new staff of the pub go through four or five days of training in all stations in the pub. They go through a

management orientation session regarding the liquor *Regulations*. They have regular meetings with management and staff present, and staff is directed to the posted signage requiring checking of identification of persons appearing under the age of 25 years.

He was working on December 2, 2004, but does not remember the agents.

The general manager testified that he did not see the Contravention Notice at tab 10 of Exhibit No. 1 because it was sent to the previous owner of the pub. The inspector has since confirmed this.

He said staff members are told to look critically at the dress of patrons, their demeanour, and to engage them in conversation in order to get a feel for their age, in order to make a determination.

The server also testified on behalf of the licensee. She has worked with this manager for seventeen years including many years at another of his pubs. She has received training from the general manager, and regular updates as to the liquor *Regulations*. She has attended the *Serving it Right* program and is aware of the requirement to check for ID for persons appearing under 25 years of age.

She testified that she remembered both of the agents and that she engaged them each in conversation. Agent #1 went to the washroom while the server was talking to agent #2. She commented on agent #1's haircut and shoes. She testified that she decided not to ID them because they were both very comfortable when they came in. They were not the usual crowd. She indicated; "They did not try to avoid me. They took a table and they made eye contact when I got to the table. When I got there they looked very calm."

She said that the agents did not want to order right away. Agent #1 was in the washroom and they were taking their time.

SUBMISSIONS

The branch advocate submitted that the tests in *Winfield Pub Ltd.*, a decision of the general manager dated January 28, 2005 (EH04-092), being subjective and reasonable, are not challenged by this case, but rather are distinguishable. Here, the agents were both five years younger than the apparent age at which they are to be required to produce ID. In *Winfield*, the agent was twenty-four years old.

He argued that it would not be reasonable to accept that the server could conclude that each of the two twenty year old agents appeared to be twenty-five or older.

He also argued that a distinguishable feature of *Winfield* is that the clerk was there found to have evaluated the age of the patron and decided that he was of acceptable age. In this case, the advocate says that there was no such subjective decision made. The server simply sold the liquor to the patrons without consideration of the *Regulation*.

The licensee submitted that the server was well trained by the licensee, and well versed in the requirements of the liquor licensing scheme.

The licensee argued that Section 45(2) of the *Regulation* is subjective and completely unenforceable.

In the alternative, the licensee submitted that the server did make the observations required and allowed herself ample opportunity to evaluate the patrons in compliance with Section 45(2) of the *Regulation*. She simply decided not to demand identification because in her view the patrons were older than 25.

ANALYSIS AND DECISION

Where the evidence of the agents and the server are inconsistent, I accept the evidence of the agents. They were two in number, and I find their evidence corroborating. They were present in the pub with full knowledge that their observations would be tested. They also made notes contemporaneously with the event (in the car immediately after exiting the pub). The server, by contrast, has a long history of serving patrons in the pub and there was little to distinguish the agents from other patrons but for their alleged youthfulness. I find therefore, that the recollections of the agents are more reliable than those of the server.

The agents testified that there was little if any discussion between themselves and the server. The server claimed to have engaged the agents in brief conversation but decided not to ask for identification because of the agents' demonstrated comfort level in the pub. I do not accept the evidence of the server. Further, had I accepted this evidence, I would have found it insufficient to establish that the server had fairly and sufficiently evaluated whether the patrons appeared over the age of 25.

I find that there was little if any conversation between the server and the agents and that the server did not take sufficient or any time to evaluate the mannerisms, appearance, or age-related characteristics of the agents.

Did the server commit the substantive contravention by serving a person appearing under the age of 25 without checking for identification as required by the legislation?

I find the server was in position to use her judgement as to the apparent ages of the agents, and could have done so. But I find she did not turn her mind to the task. The subjective test, the allowance of which was put forth in *Winfield Pub Ltd.*, was therefore not applied.

I find that the server, and therefore the licensee, did not fulfill her obligation to evaluate the apparent age of the agents, and therefore acted without regard to whether or not a person appeared under 25 years of age.

As the server did not take up the responsibility of making that assessment, I must do so in order to determine whether the substantive contravention occurred.

Based on the evidence before me; in particular, the attendance of the agents, and the photographs taken on the day of the alleged offence, I conclude that on December 2, 2004, the agents each looked their respective ages or younger. They were each twenty years old.

Therefore, I find the substantive requirements of a contravention of Section 45(2) have been satisfied.

If the licensee can establish that it acted with due diligence, this is a full defence to the contravention.

Due diligence refers not only to the training of the staff, but the implementation of that training by the staff member in the position to use her judgement. As I have found that the server did not fulfill her obligation to evaluate the apparent ages of the agents, and acted without regard to whether or not a person appeared under the age of 25, she cannot have acted diligently on behalf of the licensee.

I find therefore, that notwithstanding a concerted effort by the licensee to adequately train and educate his staff, the server in this instance was not up to the standards required of a defence of due diligence.

Finally, I find that the issue of a misdirected notice is of no relevance. The licensee knew of all previously alleged contraventions in a timely manner relative to the contravention of December 2, 2004. The branch administered this matter

consistently with the evidence of the inspector with respect to taking enforcement action.

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 a 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*.

The minimum penalty for a first contravention of Section 45(2) of the *Regulation* is a suspension of one (1) to three (3) days and/or a monetary penalty of \$1,000 - \$3,000. The branch recommended a \$1,000 monetary penalty.

I am satisfied that the management of the Six Mile Pub is serious about compliance. The recommended penalty is the minimum and not significant in terms of operation of the establishment. A penalty is, however necessary to continue to demonstrate the importance of public safety and the commitment of the branch to its mandate. I expect the licensee will continue to enhance his

systems, training, and follow-up testing of his staff to ensure compliance in the future.

ORDER

I order the licensee to pay a monetary penalty of \$1,000 on or before May 8, 2005.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 8, 2005

cc: Victoria Police Department

Liquor Control and Licensing Branch, Vancouver Island
& the Okanagan Kootenays
Attention: Gary Barker, Regional Manager

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