



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:

Winfield Pub Ltd.
dba Woody's Pub
9882 Hwy 97
Lake Country, BC V4V 1V7

Case:

EH05-159

For the Licensee:

Maria Franz
Cory Jmaeff

For the Branch:

Shahid Noorani

Enforcement Hearing Adjudicator:

Edward W. Owsianski

Date of Hearing:

February 17, 2006

Place of Hearing:

Kelowna, BC

Date of Decision:

March 22, 2006

Introduction

Winfield Pub Ltd. (dba Woody's Pub) holds Liquor Primary Licence No. 030564. The hours of sale are 10:00 a.m. to midnight Sunday to Thursday and 11:00 a.m. to 1:00 a.m. Friday and Saturday. 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 Lake Country, BC. There have been changes in the ownership structure for this licensee. An internal share transfer has occurred which has not yet been finalized in branch records. As well, the establishment has been sold and is currently being operated by the purchaser. An application to transfer the liquor licence to the purchaser is in process with the Liquor Control and Licensing Branch (the branch).

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (the "NOEA") dated January 4, 2006. The branch alleges that on November 25, 2005, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The recommended enforcement action is a four (4) day suspension of the liquor licence (Item 11, Schedule 4, *Liquor Control and Licensing Regulation*).

The licensee disputes the contravention.

Schedule 4 at Item 11 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for four to seven days and/or a monetary penalty of five thousand (\$5000) to seven thousand (\$7,000) dollars.

The relevant section of *Liquor Control and Licensing Act*:

Drunkenness

43 (2) A licensee or the licensee's employee must not permit
(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

Issues

1. Whether the licensee contravened the *Act* as alleged?
2. If so, what penalty, if any, is appropriate?

Exhibits

1. Book of Documents
2. Document titled: "Pub Policies and Expectations"
3. Document titled: "Summer Staff Meeting. July 12. 9:00 AM!"
4. Document titled: "Reminder"
5. Letter dated February 2006 signed by the server/bartender of Woody's Pub

Evidence - The Liquor Control and Licensing Branch

Witness #1 testified that he has been a compliance and enforcement officer (C&E officer) with the branch for approximately six and a half years and a police officer for the 25 years preceding. He has received considerable training in identifying and dealing with intoxicated persons and has dealt with intoxicated persons in licensed establishments on hundreds of occasions. On Friday, November 25, 2005, he was on duty as a C&E officer and was engaged in making routine inspections of licensed establishments in the Kelowna and Lake Country areas. He entered Woody's Pub at approximately 10:45 p.m. On entering, he noted that there was no staff on duty at the front door entrance. Once inside he observed that there were approximately 50 patrons present with two servers and a bartender on duty. He walked through the non-smoking

area to the entrance of the smoking area. The two areas are separated by a wall, the top half of which is clear glass enabling anyone to see into or out of the smoking area (approved floor plan at Exhibit 1, tab 8). There were approximately 30 – 35 patrons in the smoking area. His attention was drawn to two males, one of whom was attempting to hug the other. The first male was pushed away by the other who then left the area, stopped at the bar to settle his tab and left the establishment. The first male appeared to be obviously intoxicated. The witness agreed that while there may be some similarities between the characteristics of a tired person and one who is intoxicated, in his opinion this person was clearly intoxicated.

The male had been sitting at a stool located alongside the separating wall and adjacent to the entrance. He was approximately 15 feet from the bar where the bartender was working and would have been visible to the bartender. He had a full glass of beer on the shelf in front of him. He got off the stool, standing beside it, swaying back and forth. His eyes were glazed and he had a funny grin on his face. The C&E officer testified that he continued to observe this individual for approximately ten minutes from a vantagepoint at the doorway, a distance of three to four feet. The male left the smoking area proceeded along a hallway to the washroom. He staggered as he walked to and from the washroom, passing the bar each way where a server and bartender were located. He returned a couple of minutes later regaining his seat on the stool. At one point the male got off the stool, standing in front of the C&E officer. The C&E officer asked him if he had been working in the bush. The male's reply was slurred and incomprehensible. The male pointed to a gym bag on the floor containing a thermos and proceeded to pick up the bag throwing it back onto the floor closer to himself. He was staring at two young women patrons and appeared to be making them uncomfortable. His antics were observed with amusement by nearby patrons. At one point a server came into the area and cleared away glasses from the shelf in front of the male. She did not speak to the patron. At this point the C&E officer went to the bar and spoke to the bartender who advised him that he was in charge of the establishment on that night. The C&E officer pointed out the male to the bartender who said that he had not noticed him, but that he would have the patron removed immediately. The

C&E officer cautioned the bartender not to allow the patron to drive. The bartender said that the patron would either be put into a taxi or that someone would drive him. The C&E officer left the establishment at approximately 11:00 p.m. and sat in his vehicle in the parking lot making notes for approximately ten minutes. He saw the male leave the establishment through the front door then return to the foyer where he appeared to be using the telephone.

The witness testified that on November 29, 2005, he contacted the purchaser whom he knows as the licensee for another establishment located within his jurisdiction. He asked the purchaser about policies in place at Woody's for staff in dealing with intoxicated persons. The purchaser advised that he had policies in place and had held meetings with staff at his other establishment, but had not yet done so for Woody's. He advised the C&E officer that the bartender on duty during the C&E officer's visit had previously worked at his other establishment and was familiar with the policies. The C&E officer mailed a copy of the Contravention Notice (CN) to the purchaser on that date and also spoke with one of the shareholders of record of the licensee.

The C&E officer spoke with the purchaser again on January 4, 2006, and advised him that a Notice of Enforcement Action was being mailed to him concerning the incident. In the ensuing conversation, the purchaser told the C&E officer that he had contacted the Solicitor General to express displeasure about the law. The purchaser said that he told the Solicitor General that as an adult, the amount of liquor consumed by a person is the adult's business and if the person proceeds to get drunk that's his decision. The licensee only supplies the liquor and the licensee's responsibility should be limited to seeing that the person gets home safely and doesn't drive. The C&E officer testified that he told the purchaser that the law prohibited a licensee from permitting a person to become intoxicated and from permitting an intoxicated person to remain in a licensed establishment. The C&E officer was alarmed at the attitude of the purchaser and made a note of the purchaser's comments in his notebook (Exhibit 1, tab 5).

The witness testified that he is the C&E officer responsible for the geographical area in which Woody's Pub is located and is responsible for keeping the branch files for the establishment. He testified that the liquor primary licence (Exhibit 1, tab 6) for the pub allows liquor service seven days per week and is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees". A copy of the Guide has been provided to all licensees. The Guide in effect at the time of the alleged contravention is found at Exhibit 1, tab 7. He referred to excerpts from the Guide dealing with: "Updates" (page 2); "Your Role as a Licensee" (page 3), and "Over-service and Intoxicated Patrons" (page 13).

The C&E officer provided a review of the branch records for this licensed establishment. The liquor licence has been issued to the same corporate licensee since December 1992 (Exhibit 1, tab 9). There had been two previous Contravention Notices issued to the licensee. On November 1, 2004, a CN was issued for failing to clear patrons within one-half hour after closing and permitting liquor consumption beyond one-half hour after closing, (Exhibit 1, tab 10). No enforcement action was taken on this CN. On March 18, 2005, a CN was issued for permitting an intoxicated person to remain in the establishment. No enforcement action was taken for this CN, however a Compliance Meeting was held with the licensee on March 22, 2005, (Exhibit 1, tab 12).

The C&E officer completed an Enforcement Action Recommended report (EAR) on November 29, 2005, (Exhibit 1, tab 2) in which he recommended a four-day licence suspension. His reasons for recommending enforcement action were that he had dealt with both the licensee and the purchaser about permitting intoxicated persons to remain in a licensed establishment within the past year. He was concerned that intoxication can lead to public disturbances, property damage, spousal assault and impaired driving. He testified that he was unaware of any such problems occurring in the area of Woody's Pub.

Evidence - The Licensee

Witness #2 testified that he has purchased Woody's Pub and is currently operating it under the previous owner's liquor licence while he waits for that licence to be transferred. Shortly after taking over the operation of the pub he held a staff meeting on July 12, 2005, (staff meeting agenda at Exhibit 3) where he introduced the "Pub Policies and Expectations" (Exhibit 2). Included in the policies is the requirement that customers not be served to the point of intoxication and intoxicated patrons are not permitted in the premises. He agreed that dealing with intoxicated patrons can create an awkward situation for staff, straining their relationship with the customer and is not something anyone prefers to do. While cutting-off a patron can create difficulty at the time, the person often appreciates it the next day. He believes that the policy document is kept at the bar of the pub. He has posted a reminder to staff on the requirement to check for two pieces of identification from persons appearing younger than 30 years of age (Exhibit 4). All staff at the pub hold "Serving It Right: Responsible Beverage Certificates". He is familiar with the Guide for Licensees, having last read it following an incident involving patrons from another establishment that he owns. The Guide has not yet been made available to staff at Woody's. He was not working at the pub on November 25, 2005. The bartender was in charge as the night-time supervisor and apprized him of the C&E officer's visit the following day.

The witness agreed that he had told the C&E officer of his conversation with the Solicitor General wherein he expressed his views that as adults it is the responsibility of each patron as to how much liquor they consume. He believes that most licensees hold the same point of view. He testified that host liability is a very controversial topic. However, quite aside from those views he is aware of his responsibility to obey the law regarding overservice. He agreed that he expected the establishment to operate profitably and that liquor sales constitute the major portion of the business. Maintaining a good relationship with customers is important both to the business and to the staff. This is reflected in the statement in the pub policies "the more money you make the more money we make". He introduced into evidence a statement provided by a server

who was on duty the night of November 25, 2005, but was unable to attend the hearing (Exhibit 5). The statement indicates that the server saw the person enter the establishment and order two beer from the bartender and that in her opinion "the patron was not in a state in which we should have refused him service".

Witness #3 testified that she has been an employee at the establishment for the past six years, however was not working the night of November 25, 2005. She has been the bar manager since March 2005 and as such is responsible for the training and scheduling of staff and ensuring that they act within the pub policies. She has attended the three staff meetings held by the purchaser since he took over the operation of the pub. Staff are told that intoxicated persons are not permitted on the premises. Staff are aware that they can speak to the purchaser if they have any questions or issues.

Witness #4 testified that she has been an employee of the pub for the past 16 ½ years. The licensee requires staff to behave like professionals, greet every person on their arrival and required a uniform dress. She was not working the night of November 25, 2005. She has attended three meeting since the purchaser has taken over the operation of the establishment. They have discussed the requirement that patrons are not permitted to become intoxicated and remain in the establishment and have discussed steps to deal with intoxicated persons.

Witness #5 testified that she has been employed as a server at Woody's for approximately six months. During the course of her employment she has attended two staff meetings. The topic of intoxication has been dealt with at the meetings and she is aware of the signs of intoxication. She is familiar with the pub policy document. She was working the night of November 25, 2005. She recalls seeing the male patron go into the designated smoking area with two glasses of beer which he put onto the ledge counter and sat down by himself. She believes that he had just arrived at that time as he was wearing work clothes and she does not recall seeing him earlier. She did not serve him any liquor. She does not recall clearing away glasses from the area where he was sitting. The hallway to the washrooms is behind the server's station, thus she

would have had her back to the hallway and did not see the person going to the washroom. The bartender later told her that the branch C&E officer had required him to have the person leave.

Witness #6 testified that he has been employed at Woody's since September 2005. He was previously employed at another establishment owned by the purchaser for about two and a half years. He was the bartender on duty and the person in charge of the establishment on the night of November 25, 2005. There were also two servers on duty that night. He recalls the person coming into the pub and ordering two beer. He asked him how he was doing, served him his beer and took his money. The person then carried his beer into the smoking room. He is familiar with the signs of intoxication and doesn't believe the person to have been intoxicated. The person had been in the pub for approximately one hour when the branch C&E officer pointed him out. He had not seen the person sitting in the smoking room near the door earlier. He has within the past week just realized that there is blind spot there caused by a post and thus one cannot see that location from the bar area where he was working. When the C&E officer pointed out the person to him, the person had moved to an area at the back of the smoking room. At the request of the C&E officer, he asked the person to leave, although in his opinion he was not intoxicated. The person said that he understood, he was not happy to go, but would leave. At the time the person had one nearly full glass of beer left. The bartender was certain that he had not been served by either of the servers on duty. He testified that he is familiar with the pub policies. The pub maintains a book for the purpose of logging incident reports. He did not complete one for that night nor make any notes, as he didn't feel that it was warranted. He contacted the purchaser the following day and advised him of what had occurred. He did not make any walks throughout the pub that night, as it was a busy night and there was no time to do so.

SUBMISSIONS

The purchaser on behalf of the licensee submitted that the policies for the establishment are clear that intoxicated patrons are not permitted to remain on the premises. The evidence of the employees on duty on the night in question was that the patron did not exhibit any signs of intoxication. On the evidence, it was not reasonable that the staff could have identified a problem and dealt with the person. Nonetheless, the patron was required to leave by the bartender upon the request of the C&E officer. There have not been previous incidents of this type in establishments operated by the purchaser in the past 12 years. A good relationship is maintained with the C&E officer. A four-day licence suspension is unwarranted, previous problems identified have been dealt with through Compliance Meetings. From the evidence it appears that the person consumed only one glass of beer. This is not sufficient to create intoxication.

Findings and Decision

1. Whether the contravention, as alleged has occurred.

Having considered all of the evidence and submissions I find that on November 25, 2005, the patron, subject of the hearing, was intoxicated. In reaching this decision, I accept the evidence provided by the branch C&E officer. The C&E officer has considerable experience and training in identifying and dealing with intoxicated persons. He observed the patron for 10 – 15 minutes and made notes of his observations shortly thereafter. The licensee's employees on duty at the time, namely the bartender and the two servers, did not observe the patron during the approximate one-hour period elapsing from the time he picked up his beer and entered the smoking area until being requested to leave. The C&E officer described the patron as being clearly and obviously in a state of intoxication. The patron was not required to leave the establishment by staff until requested to do so by the C&E officer. I am satisfied that the condition of the patron would have been obvious to the staff on duty had they been diligent in their responsibilities. Thus, I find that the intoxicated person was permitted to remain in the licensed establishment.

Due Diligence

The licensee is entitled to a defence to the allegations of the contraventions if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, he/she must ensure that those procedures are consistently acted upon, and problems dealt with. I am satisfied that has not occurred in this instance. The licensee has policies that prohibit intoxicated persons from remaining in the establishment. However, it does not outline procedures for staff to ensure that that does not occur. There is, for example, no requirement of the person in charge to make a regular walk through of the establishment to observe whether there are problems occurring or whether staff are carrying out their responsibilities. I am left with the clear impression that the operation of the establishment under the guidance of the purchaser on behalf of the licensee is oriented towards customer service at the expense of compliance with the regulatory requirements. In conclusion, I am satisfied that a defence of due diligence has not been made out.

I find that the licensee has contravened Section 43(2)(b) of the *Act*.

2. 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.

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 purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage voluntary compliance. The record indicates that this licensee has received a Contravention Notice and attended a Compliance Meeting for a similar matter within the year preceding the incident creating this contravention. Having considered the evidence, I am satisfied that a penalty for the contravention is necessary to ensure future voluntary compliance.

In the circumstances of this case, I find that the recommended minimum penalty of a four-day suspension is appropriate.

Order

Pursuant to Section 20(2) of the *Act*, concerning Liquor Primary Licence No. 030564, I suspend the liquor licence for a total of four (4) days starting as of the close of business Thursday, April 27, 2006, and continuing on successive business days until the suspension is completed. “Business Day” means a day on which the licensee’s establishment would normally be open for business (Section 67 of the *Regulation* to the *Liquor Control and Licensing Act*.)

Since I do not know whether the establishment would normally be open seven days per week as of April 28, 2006, I do not know what the "business days" will be. To ensure that this order is effective, I direct that the liquor licence be held by the branch or the Kelowna Detachment of the R.C.M.Police from the close of business Thursday, April 27, 2006, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for four (4) business days. A suspension sign notifying the public shall be placed in a prominent location by a C&E officer or police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

March 22, 2006

cc: R.C.M.Police Kelowna Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Russell Boucher, A/Regional Manager
Vancouver Island/Okanagan/Kootenay

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