



**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***

<b>Licensee:</b>	Wenwood Holdings Ltd. dba Monkey Tree Pub 4025 Borden Street Victoria, BC
Case:	EH04-179
For the Licensee:	Gordon Card
For the Branch:	Shahiid Noorani
Enforcement Hearing Adjudicator:	Edward W. Owsianski
Date of Hearing:	March 9, 2005
Place of Hearing:	Victoria, BC
Date of Decision:	June 20, 2005

## Introduction

Wenwood Holdings Ltd. (dba Monkey Tree Pub) holds Licensee Retail Store (LRS) Licence No. 191339. The hours of sale are 9:00 a.m. to 11:00 p.m., seven days a week. 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 Victoria, BC adjacent to and operated in conjunction with a Liquor Primary Licensed establishment.

## Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated December 24, 2004.

The branch alleges that on December 2, 2004, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* (the *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.

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 licensee disputes the alleged contravention.

The relevant sections of *Liquor Control and Licensing 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.
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**Issues**

1. Whether the licensee contravened Section 45(2) of the *Regulation* on December 2, 2004?
2. If so, is the recommended penalty appropriate in the circumstances?

**Exhibits**

The following exhibits were presented:

1. Book of Documents; [The branch in correspondence dated June 9 and 16, 2005, attached hereto as Appendix 1, advised the adjudicator and the licensee that it wished to withdraw the agent's performance report which is found at tab 11. The licensee was provided with the opportunity of making a submission on the request and declined to do so. Accordingly, the report at tab 11 has not been considered in this decision.]
2. Hand-written statement of Monkey Tree Pub LRS employee;
3. Copy of general manager's decision in Winfield Pub Ltd., dba Woody's Pub, January 28, 2005.

**Evidence - The Liquor Control and Licensing Branch**

**Testimony was received from an agent employed by the Liquor Control and Licensing Branch (the 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*.]

The agent testified that on December 2, 2004, the date of the alleged contravention, he was twenty years of age. He referred to a photograph of himself taken earlier that day (Exhibit 1, tab 5) which depicts his appearance and clothing on that date. Acting as an agent on behalf of the branch he arrived at the LRS at approximately 5:41 p.m., entered and was greeted by the clerk located behind the counter. There were no other persons in the LRS. He purchased a bottle of spiced rum. The purchase was made in cash and took approximately 30 seconds to transact. He was given a receipt (Exhibit 1, tab 4).

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The clerk did not request and the agent did not produce any identification although he did have it available on his person if so requested. He left the establishment and got into a vehicle in the parking lot where he completed an "Agent Observation Report" (Exhibit 1, tab 4), leaving at approximately 5:44 p.m. He noted that the LRS had signs advising of the requirement to produce identification, which were posted on a window and behind the counter. He testified that he had been in the LRS on four previous occasions when he was not acting on behalf of the branch. He recalls being asked for identification on one of those occasions and of not being asked on one of those occasions and cannot recall whether he was asked on the remaining two occasions. He testified that in his private life he is asked for identification 100% of the time in bars, less often in other types of establishments. When he acts as an agent for the branch he is asked for identification approximately 65% of the time. He was unable to account for the differences.

**A liquor inspector testified** that he is the inspector responsible for the geographical area in which the Monkey Tree Pub & LRS are located and is responsible for keeping the branch files for the establishment. 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 were provided with signs outlining the requirements for display in their establishments. Inspectors discussed the requirements with licensees during their inspections, particularly those licensees with LRS's, as they tended to have a high turnover of employees. The branch was aware that it would take a period of time for the licensees to adjust to the requirements so developed a practice of not taking enforcement action unless there had been two previous incidents of non-compliance. Students were hired as agents by the branch to determine if licensees were checking identifications as required. On the first instance where non-compliance was indicated a Contravention Notice would be sent to the licensee. Should a second incident occur a Compliance Meeting would be held with the licensee to ensure that he was aware of the requirements. The inspector testified that that practice was followed

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with this licensee. There had been two previous Contravention Notices issued to the licensee when identification was not checked on February 5, 2003, (Exhibit 1, tab 8) and November 28, 2003, (Exhibit 1, tab 10). Another branch inspector held a Compliance Meeting with the licensee on March 24, 2003, (Exhibit 1, tab 9) and a further Meeting was held by himself with the licensee following the issuance of the November Contravention Notice.

### **Evidence - The Licensee**

**Witness 1** referred to his written statement (Exhibit 2) that he prepared in late December and testified that on December 2, 2004, he was 22 years old and was working in the LRS at the time that the agent came into the establishment. He did not request the agent to produce identification as he believed that he was 25 years or older. He has only a vague recollection of the event. He believes that there was another clerk also working at the time who was busy with another customer. He believes that the agent purchased a 15 pack of beer. He is aware of the rules requiring that all persons appearing to be under 25 years of age produce two pieces of identification prior to purchasing liquor. He is familiar with checking identification and as a result of his employment at the LRS and previous employment at a grocery store where identification of young appearing persons purchasing cigarettes was checked. He does not have any particular practices to determining whether a person appears under 25 years of age other than of observing their size, their body language and whether they appear familiar and comfortable in the LRS. He is familiar with persons under and over 25 years through his friends and through having an older brother and sister, both near 25 years of age. He has been employed at the LRS since September 2004. He did not receive any formal training but was told the rules and learned on the job. He often checks identification in the LRS, particularly on weekends when younger persons are purchasing liquor. He has checked identification of persons up to 32 years old.

**The owner/licensee testified** he has owned and operated the Monkey Tree Pub and the LRS for the past 18 and a half years. There has been little need for the training of

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new employees as there is little staff turnover. Senior staff and the LRS manager train new LRS employees. Any problems are immediately directed to himself as the owner. He reminds staff every morning and night to check identification. He has in the past had a book of policy and procedures but is not certain that it still exists. He recalls attending the Compliance Meeting in March of 2003. The inspector at that time told him that the Contravention Notice was issued because the employee only checked one piece of identification but otherwise was doing a good job. Although he does not recall receiving the Contravention Notice at Exhibit 1, tab 10, he does recall meeting with the inspector and discussing the incident. He testified that the *Regulation* is difficult to enforce as it is difficult to look at a person and determine their age, different people may see different ages for the same person. The only way to enforce the *Regulation* is by asking everyone to produce identification.

## **SUBMISSIONS**

The licensee submitted that during the 18 years that he has owned and operated the LRS there has not been a contravention. He runs a tight ship and works closely with local schools and the police to alleviate problems with liquor. Persons known to purchase liquor for underage kids are barred from the establishment. Staff is reminded every day to check for two pieces of identification. The liquor inspector for his area has told him that they do a good job and that the inspector has never had a problem with the establishment. He referred to the general manager's decision in *Winfield Pub Ltd. (dba Woody's Pub)*, EH04-092, January 28, 2005, (Woody's Pub) (Exhibit 3). He submitted that the *Regulation* is unworkable as it is difficult for clerks to evaluate the age of a person. Persons of different ages see the appearance of age differently. He submitted that the agent's evidence was not corroborated as is normally the case. In this incident, another agent was available, waiting in the vehicle and could have gone into the LRS with the agent to corroborate his evidence.

The licensee referred to the branch's statistical report (Exhibit 1, tab 11, last page) which indicated that the agent was only asked for two pieces of identification 41% of the

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time while employed as an agent for the branch. In his testimony the agent indicated that when he was on his own time he was asked 100% of the time. This is unexplainable and difficult to believe. He submitted that the clerk watched the agent as he entered and walked through the LRS before deciding whether to request Identification. The incident occurred on a Friday night, which is not a time when young persons are purchasing liquor. He submitted that the recommended \$1000 monetary penalty was too steep.

### **Findings and Decision**

The general manager has considered and published several decisions on Section 45(2) of the *Regulation*. Woody's Pub (supra) was published prior to this hearing and was referred to by the licensee. The adjudicator acting on behalf of the general manager 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". The adjudicator also looked at the reasonableness and credibility of the clerk's judgement and testimony. I have not been requested, nor do I have cause to depart from the reasoning of the learned adjudicator.

In considering, the evidence heard in this case, I accept the evidence presented by the agent. He went into the establishment knowing that he was required to make observations on the liquor purchase transaction and that he may be required to recount those observations at a later date in a hearing. Upon leaving the establishment, he immediately recorded his observations in an "Agent Observation Report" (Exhibit 1, tab 4). His testimony was corroborated by the report and the liquor purchase receipt. Witness 1, the clerk on duty at the time of the liquor purchase was much less clear in his testimony. While he testified that he recalled the agent and the purchase transaction and only sold the liquor to him after having determined that the agent was at least 25 years old, I am much less certain of his recollection and do not find it credible. He was unable to recall the details of the transaction, nor the circumstances under which it was made. I find that the server likely considered the agent to be of legal age, i.e. 19 years or older and consequently did not take the time to evaluate the apparent age of the agent and therefore acted without regard to whether or not he was a person

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appearing under 25 years of age. I have had the opportunity of observing the agent during his testimony at this hearing and viewing the photograph taken on the day of the alleged contravention. I find that the agent, who was 20 years old at the time, was a person appearing to be under the age of 25 years. I find that a contravention of Section 45(2) has been established.

### **Due Diligence**

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 Compliance Meetings with liquor inspectors yet the problem continued as noted by the evidence received at this hearing. The licensee could have provided written instructions to all employees of the requirement to check the identification of all persons appearing to be under the age of 25 years and where there is any ambiguity of a person's apparent age to require identification and that any employees not following the requirements would be disciplined. In conclusion, I am satisfied that the licensee was not duly diligent.

### **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
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- 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.

There were, however, two previous Contravention Notices issued to the licensee. The branch did not pursue enforcement action; however, it did follow up with Compliance Meetings 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.

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**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 29, 2005.

*Original signed by*

Edward W. Owsianski  
Enforcement Hearing Adjudicator

June 20, 2005

cc: Saanich Police Department

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

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

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