



**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 RSBC c. 267***

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| Licensee: | R.G. Facilities (Victoria) Ltd. dba Save on Foods Memorial Arena 1925 Blanshard Street Victoria, BC V8T 4J2 |
| Case: | EH10-166 |
| For the Licensee: | Michael Mulligan Mulligan Tam Pearson Law Corp. |
| For the Branch: | Olubode Fagbamiye |
| Enforcement Hearing Adjudicator: | Sheldon M. Seigel |
| Date of Hearing: | October 26, 2011 |
| Place of Hearing: | Victoria, BC |
| Date of Decision: | December 15, 2011 |

INTRODUCTION

The Licensee holds Liquor Primary Licence No. 037093 for the sale and service of liquor at the Save on Foods Memorial Arena, located on Blanshard Street in Victoria. The liquor service is managed by a third-party operator as noted on the licence.

The arena is home to a wide range of events targeted at varying segments of the community. The events include children's entertainers, hockey and sporting events, speaking engagements, concerts, and family entertainment.

The terms and conditions on the face of the licence at the time of the alleged contravention were as follows:

- The terms and conditions to which this licence is subject include the terms and conditions contained in the publication 'A Guide for Liquor Licensees in British Columbia' as that publication is amended from time to time.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.
- Subject to terms and conditions specified in the restriction or approval letter(s). A copy of restriction or approval letter(s) to be kept with current liquor licence.
- Sale of liquor restricted to beer, wine, coolers and cider, unless otherwise approved by the LCLB.
- Patio area has been approved. The interior occupant load also includes patio seating.
- Minors are permitted within the licensed areas when liquor is being served and consumed by adults. Minors are not permitted in the ground floor Lounge Area.
- Hawking of alcoholic beverages in the tiered seating area is not permitted.
- Alcoholic beverage sales to the spectator bowl areas must end a half hour before the scheduled event end time.

ALLEGED CONTRAVENTION(S) AND PROPOSED PENALTY

By the NOEA dated March 4, 2011, the Branch alleged that the Licensee contravened s. 42(2) of the *Regulation*, by allowing liquor not purchased from or served by the Licensee to be consumed in the establishment. For a first contravention of this section, the range of penalties is four (4) to seven (7) days licence suspension and/or \$5,000-\$7,000 monetary penalty (item 28, Schedule 4 of the Regulation). The Branch proposes a seven-day suspension.

By the NOEA dated March 4, 2011, the Branch also alleged that the Licensee contravened s. 43 (2)(b) of the *Act*, by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served, or otherwise supplied.

For a first contravention of this section, the range of penalties is four (4) to seven (7) days licence suspension and/or \$5,000-\$7,000 monetary penalty (item 11, Schedule 4 of the Regulation). The Branch proposes a seven-day suspension.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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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.

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002**Consumption of liquor in licensed establishments**

42 (1) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

(2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.

ISSUES

1. Did the Licensee contravene the *Act and Regulation* as alleged?
2. If either of the contraventions occurred, is a penalty required for those contraventions under the circumstances of this case, and if so, what penalty is appropriate?

EXHIBITS

Exhibit No. 1: The Branch's Book of Documents (Branch), with the contents of tab 10 redacted to remove the notes of the inspectors who did not attend the hearing as witnesses.

Exhibit No. 2: ICM policies document (Licensee)

Exhibit No. 3: Printed email thread with *Trevor Thors* on top (Licensee)

Exhibit No. 4: Photocopy of sign (Licensee)

EVIDENCE

The Branch called two constables from the Victoria Police Department, and two liquor inspectors. All of the witnesses were in attendance at the establishment on the evening in question. The Licensee called no witnesses.

One liquor inspector testified that during the concert, he observed a female seated in the concert bowl drinking from a bottle that had a Smirnoff Vodka label affixed to it. Both of the inspectors testified that after the concert ended and the crowd left the area, the inspectors and two more liquor inspectors searched the section of the concert bowl in which the one inspector saw the female drink from the bottle for liquor bottles. The liquor inspectors said the four inspectors found five bottles including one with a Smirnoff Vodka label affixed to it. They lined up the bottles and one inspector took a photograph of the bottles. The photograph appears at Exhibit No. 1, tab 12. The inspectors did not approach the female or seize the bottles.

Both liquor inspectors testified that they observed a male patron who appeared to be intoxicated, stumble near to an employee of the establishment on his way to a seat in the concert bowl area. They also testified that they observed the male relocate among several seats in the same seating section over a period of approximately 10 minutes. The inspectors said they notified a police constable who was in the area as to their observations and two police constables approached the identified male and escorted him out of the building.

One of the inspectors identified the documents in Exhibit No. 1. He also testified that the terms of the licence prohibit the Licensee from hawking liquor in the stands. He defined "hawking" as selling. He said: "The Licensee cannot provide liquor in the concert bowl or in the stands." The inspector identified where the allegedly intoxicated patron was seated on the floor plan of the establishment at Exhibit No. 1, tab 4. He

confirmed that the patron was in the concert bowl in the area where patrons usually sit during a concert. He said that area is often referred to as "the stands."

One of the liquor inspectors testified that if the Licensee cannot guarantee 100% compliance with the liquor laws, they should not serve liquor for that event.

The police constables testified that they were hired by the Licensee to provide security support for the concert in a crew of 16 constables. They indicated that 16 was the greatest number of contracted officers they've known to be used for a special event and that it was certainly enough officers to do that job. They said they came upon the inspectors who pointed out a male patron who appeared intoxicated. One of the constables said he didn't know if the patron was pointed out to them for being intoxicated or for smoking in contravention of the rules. The constables said they approached the patron, who immediately responded violently toward them and they were forced to handcuff him and remove him from the premises. The constables each said the patron had bloodshot and/or glassy eyes. One constable said the patron exhibited slurred speech, the other did not observe that. One constable said he smelled alcohol on the patron's breath. The other had no notes or recollection of alcohol on the patron's breath. Both constables concluded that the individual was intoxicated.

One of the police constables testified that he was part of a team of police that were instructed by the Licensee to assist the Licensee's security staff in enforcing liquor laws and safety for the patrons. He said that he completed a briefing, and then he and another officer patrolled outside the establishment while patrons were arriving before the show. He said he put in two shifts patrolling outside for patrons who were "pre-drinking" outside the arena. He said that he and other members of the security for the event confiscated quite a number of bottles of liquor outside of the establishment. He also testified about the line-ups of patrons trying to enter the establishment. He said that the Licensee had stations set up at all of the doors where not only were tickets taken, but patrons were patted down for liquor and other substances and items that

were not permitted inside the venue. He said that the Licensee's stations each had a bin into which they dropped all of the things they confiscated from patrons entering the establishment including a bin that he noted "almost full of cigarettes." The constable testified that he was instructed by the Licensee's representatives prior to his assignment as to what assistance he was to provide.

Another constable testified that he spent more than an hour and a half prior to the concert outside the establishment monitoring the patrons entering for the concert. He also testified as to the long lines of patrons being patted down and being monitored for contraband. He said quite a number of bottles of liquor were confiscated from potential patrons outside or at the door and he doesn't believe "much of anything" made its way past security. The officer testified that security staff at the gates were monitoring patrons for potential intoxication before being allowed to enter the concert venue. He said that inside the venue, the security forces had stationed observers in most sections and roving security personnel moving between and among sections of the arena bowl in particular.

One of the constables testified that the arena does a good job of enforcing security and dealing with alcohol issues, but that the challenge is often that patrons drink outside and become intoxicated once in their seats. He also said that the licensee is doing all that it can to enforce the liquor laws. The same constable also said that after the liquor inspector pointed out the intoxicated patron out to him, he observed the male for a while and then he went down to the patron without knowing if he was going there because the patron was intoxicated or because the patron was smoking. He acknowledged that the intoxicated patron might not have been displaying any overt symptoms during the period that the constable was observing him.

SUBMISSIONS

The Branch submits that the elements of both contraventions have been made out and the recommended penalties are reasonable.

The Licensee submits that there is insufficient evidence that the bottle that the female was drinking from was vodka and if it were, there is insufficient evidence that it was obtained other than from the Licensee, as the Licensee sells bottled spirits in the private suites on the premises. The bottle may have come from one of those suites, says the Licensee.

The Licensee also submits that the language of s. 43(2)(b) requires that the offending individual be in the area of the licensed establishment where liquor is sold, served, or otherwise supplied. The licensee says that it did not sell, serve, or otherwise supply liquor in the concert bowl area where the patron in question was seated. Therefore, s. 43(2)(b) of the Act has not been contravened.

REASONS AND DECISION

Section 42(2) Regulation Contravention

Section 42(2) of the *Regulation* requires that the Licensee not permit consumption in the licensed establishment of liquor that was not purchased from or served by the licensee. An inspector testified that he observed a female drink from a bottle that had a Smirnoff Vodka label affixed to it in the stands of the concert bowl. This evidence is not controverted. There is no doubt that this female was a patron, was in the establishment, and did consume something. There is, however insufficient evidence that the contents of the bottle was liquor, notwithstanding the label. The evidence does not identify the female, state her age, or a description of the individuals with whom she was seated. The bottles recovered after the concert were collected from a considerable

area making up the section of the concert bowl in which the female was seated, and there is no evidence linking the female with the bottles collected but for the observation of a female with a bottle with a vodka label. The contents of the vodka bottle was not tested to confirm that it was indeed liquor and had not been filled with another substance. Further, the documentation at tab 15 of Exhibit No. 1 confirms that 12 bottles of liquor were served in the private suites on the night in question and there was no evidence of any physical barrier or impediment to patrons carrying such bottles out of the suites and into the stands. I can therefore not find on the balance of probabilities, that the contents of the bottle in the hands of the female was liquor and that the bottle originated outside of the licensed establishment and was not provided by the Licensee. This allegation has not been proven.

Section 43(2)(b) Act Contravention

A contravention of s. 43(2)(b) of the *Act* requires that the Licensee or its employee not permit an intoxicated patron to remain “in that part of a licensed establishment where liquor is sold, served or otherwise supplied.” At the hearing the Licensee conceded that the patron in question was intoxicated. The evidence confirms the location of the male patron in question; he was in the stands, or concert bowl, in the normal seating area in which those attending the concert would be expected to be seated. Although the patron moved from seat to seat within a period of 10 minutes, all of the seats were in the area so described. I note also that the place where the patron was first seen to stumble near to one of the establishment’s employees is also within the concert bowl. This is within the area described by the red line in the establishment’s floor plan at Exhibit No. 1, tab 4.

Section 12(2) of the *Act* provides that the General Manager may impose terms and conditions on a licence that authorizes a Licensee to sell alcohol. Section 12(3)(b) provides that the General Manager may determine where in the establishment liquor is sold or served. A copy of the licence in force and effect at the relevant date can be found at Exhibit No. 1, tab 3.

Counsel for the Licensee argues that s. 43(2)(b) does not apply in this case as the patron in question was not in an area where liquor is sold, served, or otherwise supplied because it is not sold, served, or otherwise supplied in the stands.

In the Terms and Conditions Guide, the area of a licensed establishment where a licensee may sell, serve and patrons may consume liquor is referred to as the “red-lined area”. Under the heading “Where customers may consume liquor” the Guide stipulates that a licensee may not permit customers to consume liquor outside of the red-lined area, or take liquor from the red-lined area to other parts of the establishment with a few stated exceptions.

In the context of the legislation and the emphasis in the terms and conditions on the Licensee’s responsibility to ensure intoxicated persons are not permitted to remain, it is untenable that any of the terms within the phrase “sold, served or otherwise supplied” can reasonably be read to exclude the stadium spectator bowl area which is contained within the red-lined area of this licensed establishment. The terms and conditions of the licence contemplate service to the spectator bowl area by the clear language on the face of the licence, which includes the requirement that “sale of liquor to the spectator bowl area must end a half hour before the scheduled event end time”.

The licensee’s interpretation is inconsistent with the Act as a whole, as well as the clear intention of the section which is to require the licensee to ensure that intoxicated patrons do not remain within the red-lined area, the part of the establishment where liquor is sold, served or otherwise provided.

Based on the evidence, I find that the patron in question was intoxicated and he was within an area of the licensed establishment where liquor may be served and consumed.

DUE DILIGENCE

The Licensee is entitled to a defence of due diligence if it can establish that it did all that it should reasonably have done to put in place systems and policies and implement those systems and policies in order to ensure compliance with the *Act, Regulation*, and the terms of the licence.

At the hearing, counsel for the Licensee submitted:

The Licensee does not dispute that an employee of ICM, probably an usher was standing where he could have seen it and didn't do anything. That is not controversial and the licensee acknowledges that an usher or employee of ICM did or could have seen the intoxicated patron but did nothing about it.

Both police constables testified that the Licensee's operator retained the services of 16 police constables in order to assist its regular security staff in monitoring and controlling patrons during this event. One of the constables said:

In my experience, the arena makes a good job of trying to enforce security and maintaining safety and putting ICM staff on and they do a reasonable job of keeping matters under control and dealing with alcohol issues. People will pound back outside and they are not intoxicated until inside and later.

And;

There is no scheme that is going to stop everyone all of the time. Within the laws that we have it is the best that you can do. I cannot think of anything that [the Licensee] is not doing. I don't see anything else they could do.

The other constable said:

The Licensee takes this seriously. They are tough on people and will evict people without hesitation if they are not following the rules. They are tough on people. I feel they hired enough. 16 [contract police officers] are quite a bit for a small arena and that is the most I have seen for that size of arena.

The officer also said that after the liquor inspector pointed out the intoxicated patron out to him, he observed the male for a while and then he went down to the patron without knowing if he was going there because the patron was intoxicated or because the patron was smoking. This indicates that the intoxicated patron might not have been displaying any overt symptoms during the period that the officer was observing him.

The police officers also testified as to a robust security regime that included significant police patrols outside the establishment to intercept potential liquor issues before they make their way inside the venue, and significant and effective security measures at the gates who were active in patting down patrons, checking for intoxicated patrons trying to enter the establishment, and confiscating illicit liquor and other contraband before patrons could bring such items inside the licensed establishment.

One of the inspectors said: "They need to know that the public is kept safe. If there is going to be an event on and you can't guarantee that you can be 100% compliant you need to consider whether to open liquor sales for that event." I do not agree. There were more than 6,000 persons in the stadium for a rock concert that reason would suggest might attract some issues related to alcohol service. While 100% compliance is certainly the goal, I do not accept that the absence of a guarantee of 100% success must lead to closure of liquor sales for that event. The existence of an enforcement hearing system must surely indicate that a degree of non-compliance, though undesired, is anticipated. The standard required is not perfection. The standard required is reasonableness; in particular, whether the Licensee did all that they reasonably could do to prevent the contravention from occurring.

A liquor inspector testified that an usher might not have authority to do anything about the intoxicated patron but would have an obligation to report it to the blue-jacketed security staff. So if the intoxicated male walked past an usher that person should call it in rather than personally confronting the patron. According to the evidence, the patron was gone within ten minutes of passing that usher. There is no evidence as to whether the usher did or did not radio the presence of the intoxicated male to the attention of security staff.

The question of reasonableness must be contained to the context of this concert. The patron stumbled by an usher. There is no evidence that the usher had an opportunity to see the patron's eyes, smell the patron's breath, or look for any indicia of intoxication other than the evidence that the patron was walking with instability or stumbling. That is not enough for a conclusion of intoxication but it is enough to require diligence in observation and a further investigation or assessment. There is no evidence as to whether the usher actually saw the patron, but there is sufficient evidence that the usher should have seen the patron. As I have indicated, we have no evidence as to whether or not the usher contacted security. Within less than a minute, the patron was seated. Once seated there is no evidence of the patron exhibiting any signs of intoxication until

sometime later, when he is noted moving to another seat, and then another. When he arose from his seat he exhibited observable signs of intoxication in the form of physical instability. But his movements were two or three in number and only seconds in duration and within 10 minutes the police had removed him from the premises. I find that a total of three or four windows of opportunity to observe a single indicia of intoxication in a single patron lasting only seconds each, in the context of a room containing up to 6,000 patrons does not serve to nullify a claim to due diligence.

I interpret and accept the evidence of the police officers that the Licensee and its operator had in place the systems and policies required for responsible service and monitoring of liquor service and security with the addition of an adequate force of police officers contracted to assist the in-house staff. This is particularly apparent in the evidence of comprehensive searches of patrons entering the establishment, monitoring of patrons for illicit liquor and cigarettes and other contraband before they were allowed to pass the front gates, and confiscation by the licensee's security staff of items not allowed in the premises. The evidence of pre-concert searches and supervision of potential patrons before they approached the venue, of police constables monitoring the security personnel for issues for which the officers could provide assistance, and the evidence of security staff in the concert bowl area sections and roving security personnel were persuasive. I find that the evidence of systems and procedures in place to enforce the liquor laws and to ensure a safe venue for patrons, and the evidence of the execution of those systems satisfies me that the Licensee was duly diligent.

In conclusion, the patron was intoxicated, was in an area where liquor is sold, served or otherwise provided, but as a result of establishing a defence of due diligence, the Licensee did not permit the intoxicated patron to remain.

CONCLUSION

I find that the allegations that the licensee contravened s. 42(2) of the Regulation and s. 43(2)(b) of the Act have not been proven.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: December 15, 2011

cc: Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Olubode Fagbamiye, Branch Advocate