



**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: | Regional District of North Okanagan dba Wesbild Centre 3445 43 rd Avenue Vernon, BC V1T 8P5 |
| Case: | EH11-164 |
| For the Licensee: | David Sewell |
| For the Branch: | Peter Mior |
| Enforcement Hearing Adjudicator | George C.E. Fuller |
| Place of Hearing: | Written Submissions |
| Date of Decision: | June 6, 2012 |

INTRODUCTION

The Corporate Licensee, The Regional District of Okanagan (RDNO) (the "Licensee") owns a recreational facility in Vernon, British Columbia. The facility is known as the Wesbild Centre (the "Centre") and is operated by the City of Vernon on behalf of the RDNO. The Licensee holds Liquor Primary No. 213867 (the "Licence"). The authorized representative of the Licensee is David Sewell, the Chief Financial Officer of the RDNO.

According to the terms of its Licence the Licensee may sell liquor from 10:00 am until midnight, seven days a week. Other terms and conditions attached to the Licence provide 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 letters(s) to be kept with current liquor licence.
- Hours of sale limited to one hour prior to, during and one hour after a sporting or concert event unless otherwise approved by the LCLB.
- Sale of liquor restricted to beer, wine, coolers and cider, unless otherwise approved by the LCLB.

- With the exception of Viper Hockey games, liquor may not be served at those live events that are primarily aimed at youth or where the event participants are primarily minors.
- Liquor service is restricted to scheduled live events featuring professional or major amateur activities. Liquor service during televised events is not permitted.
- Spirits are permitted in the Board Room ((Area 4) and Hospitality Area (Area 3).

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated January 30, 2012.

The Branch alleges that on October 30, 2011, being the business day of Saturday, October 29, 2011, the Licensee contravened section 44(3) of the *Liquor Control and Licensing Regulation* (the "Regulation"), by allowing a person to consume liquor in the licensed establishment beyond ½ hour after the time stated on the licence for the hours of liquor service. The proposed penalty is \$5,000 (item 26, Schedule 4, of the *Regulation*).

The Branch also alleges that on October 30, 2011, being the business day of Saturday, October 29, 2011, the Licensee contravened section 44(1)(a) of the Regulation by failing to ensure that patrons were cleared from the establishment within ½ hour after the time stated on the licence for the hours of liquor service. The proposed penalty is a six day licence suspension (item 24 of Schedule 4, of the Regulation).

The Branch further alleges that on October 30, 2011, being the business day of Saturday, October 29, 2011, the Licensee contravened section 42(2) of the Regulation by allowing consumption in the licensed establishment of liquor that was not purchased from or served by the licensee. The proposed penalty is a four day licence suspension (item 28 of Schedule 4, of the Regulation).

The Licensee does not dispute that the contraventions took place, but is does dispute the proposed penalties. It has been agreed that the hearing to address what penalties, if any, are warranted would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Time

44 (1) Unless otherwise authorized by the general manager,

(a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within 1/2 hour after the time stated on the licence for the hours of liquor service, and

(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

Consumption of liquor in licensed establishments

42 (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 contraventions occur?
2. If so, has the Licensee successfully established a defence of due diligence?
3. If not and the contraventions are proven, what penalties, if any, are warranted under the circumstances?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1:** The Branch's book of documents, Tabs 1 to 15, inclusive.
- Exhibit 2:** The Branch Registrar's letter, dated February 27, 2012, summarizing the pre-hearing conference.
- Exhibit 3:** Branch Advocate's letter to the Licensee dated March 21, 2011.
- Exhibit 4:** Branch Registrar's letter to the Licensee dated April 5, 2012, laying out the submission procedure.
- Exhibit 5:** Licensee's submission to the Branch dated April 30, 2012, consisting of four attachments, as follows:
- a) February 27, 2012 Letter from Justin Pandos (1 page)
 - b) March 1, 2012 Memorandum (4 pages)
 - c) March 14, 2012 Memorandum (1 page)
 - d) April 30, 2012 Memorandum (3 pages)

EVIDENCE

As previously noted, the Licensee does not dispute that the contraventions occurred as alleged, and, therefore, it is deemed to accept the facts as put forward by the Branch with respect to the issue of whether the contraventions occurred. The Licensee has, however, made submissions in respect to the appropriateness and fairness of the penalties which the Branch has recommended.

Accordingly, the evidence may be summarized as follows. The Centre is located at 3445 43rd Avenue, Vernon, B.C. It has been issued Liquor Primary Licence No. 213867, which is in effect until October 31, 2012. The Licence is issued to the Regional District of North Okanagan.

At 8:00 pm on October 29, 2011, Inspectors 1 and 2 attended at the Centre and upon entering were met by Cpl. T, of the RCMP Vernon Detachment. Cpl. T advised the inspectors that he had been advised by management of the Centre that they intended to remain open until 6:00 am the following morning.

At approximately 8:05 pm, Inspectors 1 and 2 and Cpl. T met with the Centre's Manager, who explained that he did not agree with the decision of the Branch requiring the closure of the event and the removal of patrons by 12:30 am. He felt that the Centre had the right to stay open until 6:00 am the following day, as long as the Centre was not selling liquor. Inspector 1 reminded the Centre's Manager that he had been told both in writing, and by phone, that it was necessary to have the patrons out of the building by 12:30 am, in accordance with the terms and conditions of its licence. Inspector 1 also advised the Manager that he had contacted the Centre's resident manager by email on October 6, 2011, in order to discuss the matter, but had not heard back from her. Inspector 1 further explained to the manager that failure to comply with the terms and conditions of the Liquor License could result in enforcement consequences. Cpl. T then recommended to the manager that he should discuss the matter with the Licensee prior to making a final decision concerning the closing time. Inspectors 1 and 2 toured the facility and left the establishment at 8:50 pm.

At 9:15 pm Cpl. T met with the Centre's manager who advised that he had discussed the situation with a representative of the Licensee, and that the Centre planned to continue with its plan to stay open until 6:00 am. The Centre's manager then indicated that he was expecting to receive documentation from the Branch advising that the conditions of the Licence had been violated. Given this development, Cpl. T contacted Inspector 2 and advised him of the Centre's plans.

At 12:30 am on Sunday, October 30, 2011, Inspectors 1 and 2 returned to the Centre and noted that the ticket office was still open and that tickets were being sold. Once inside the Centre, the Inspectors observed that the lights in the Centre's arena were still turned down and that a large screen was still projecting images. Music was being played and the arena floor had 300 to 400 hundred patrons dancing. The Inspectors noted that there was no evidence that the Licensee, the Centre's manger, or security were attempting to close down the event. The Inspectors proceeded to walk around the establishment with Cpl. T and at 12:46 am several patrons were noted walking around and consuming an amber liquid, which was later determined to be beer. At 1:30 am the inspectors left the facility and at this time patrons were still entering the Centre.

At 1:30 am Cst. S and Aux Cst. W were conducting foot patrols and noticed patrons entering locker room 6. The constables forcibly gained entry to the locker room and upon entering noted patrons consuming bottled beer and drinking from cups. Cst. S spoke with one of the promoters who advised that he would lock the room and not allow anyone enter the room. Upon exiting that room, the officers observed a male exiting a referee room and on upon entering that room, observed two unopened cases of beer. The promoter was advised of this matter and told that the room needed to be locked and that the beer remain in the room.

At 2:10 am the constables again attended at locker room 6 and gained entry by way of force and noted that several patrons were consuming bottled beer and drinking from cups. Cst. S again informed the promoter that this was a violation of the *Liquor Control and Licensing Act* and the promoter, once again, promised that he would lock the door and not allow anyone inside. Upon leaving the room, Cst. S observed that the beer being consumed was not a brand provided by the Centre.

At 2:20 am, Cpl. T noted that there were still 1000 patrons in the facility. At 2:50 am the RCMP were alerted, by a security firm, to a disturbance in the lighting control area located in the middle of the arena floor. Upon arrival, Cpl. T observed liquor in plain view on the tables. Cpl. T noted liquor consisting of three different types of beers and a bottle of spirits, none of which were purchased from the Centre. Upon arriving at the site of the disturbance, Cst. S noticed a belligerent male kicking at the security gate fence which fell and hit one of the security staff. This aggressive male was then removed from the establishment by the RCMP members. At 6:00 am the RCMP members left the Centre as the event was then ending.

In addition to the above, it should be noted that prior to the event described above occurring, there had been an exchange of correspondence between the arena food and beverage co-ordinator of the Centre on behalf of the Licensee, and the Manager, Licensing Administrator, Liquor Control and Management Branch and the Deputy General Manager, Licensing and Local Government, on behalf of the Branch. The Branch had made it very clear that the Centre could not hold the event as described to the Branch. Specifically, the Branch had denied the application to extend its hours from closing at midnight to closing at 2:00 am based on the fact that the Centre had not made the application within the required 14 days prior to the event. Furthermore, the Branch had advised the Centre that it could not use its facility for any other purpose between the time that it should have shut down, at 12:30 am, and 6:00 am. In other words, patrons would have to leave the facility within ½ hour of liquor service ending, in accordance with the terms of the licence.

SUBMISSIONS OF THE BRANCH

The Branch submits that the contraventions have been proven and that the recommended penalties for each of those contraventions are appropriate in the circumstances, in order to bring the Licensee into voluntary compliance with the Act and Regulations. With particular reference to the contraventions of section 44(3) and 44(1)(a) of the Regulation, the Branch notes that the hours service for an establishment are determined, in part, by community standards and, therefore, patrons who consume liquor and leave an establishment after licensed hours of service may disturb nearby residences and businesses. In addition, the sale of liquor after hours also leads to unfair competition with other licensed establishments. Furthermore, the Licensee in this case, through its agent, the City of Vernon, and more specifically management of the Centre, had received specific advice from both the Branch and the RCMP that their intended actions were unlawful; however, that counselling was ignored. Accordingly, the Branch recommends a monetary penalty of \$5,000 for the contravention of section 44(3) of the Regulation, which monetary penalty falls within the penalty range set out in Schedule 4, item 26 of the Regulation, for a first time contravention of this type. With regard to the contravention of failing to clear patrons by the time required, section 44(1)(a) of the Regulation, the Branch recommends a six day licence suspension, which falls outside of the penalty range set out in Schedule 4, item 24 of the Regulation, for a first time contravention of this type.

With regard to the contravention of section 42(2) of the Regulation, the Branch notes that there was a significant amount of alcohol brought into the establishment that was not purchased from the Licensee, and some of that alcohol was in plain view of the patrons and made available to some patrons. In these circumstances, a four day licence suspension is proposed, which suspension falls within the penalty range set out in Schedule, item 28 of the Regulation, for a first time contravention of this type.

SUBMISSIONS OF THE LICENSEE

The Licensee submits that, notwithstanding the admitted contraventions in this case, the event was generally well managed. Liquor service had ceased at 12:00 am as required by the terms of the liquor licence and there was no concern with respect to the cessation of liquor service.

With regard to the contraventions of section 42(2) of the Regulation, the Licensee says that reasonable efforts were made to deal with offenders. A number of confiscations were made throughout the night and when informed, the security firm took action to respond. With specific reference to the incident in locker room 6, the Licensee notes that neither the security company nor the staff of the Centre were notified of that violation.

With respect to the violation concerning consumption beyond the time limits as required by section 44(3) of the Regulation, the Licensee says that the RDNO made immediate efforts to reduce the consumption of alcohol past the permitted time by ceasing liquor sales and having staff and members of the security firm inform patrons of the requirements. Due to the large number of participants, the Licensee says that, even with reasonable efforts, it is possible that not everyone would be reached within the time frame required.

The Licensee submits that the contravention regarding the failure to clear patrons within the time required by section 44(1)(a) of the Regulation, constitutes its major concern. The Licensee sets out a number of factual situations in an attempt to demonstrate that there existed sufficient ambiguity with regard to the application of the Regulations, particularly to stadium/arena operations.

The Licensee acknowledges that it obviously erred by failing to communicate effectively with the Branch. However, the Licensee hopes there is some recognition that its understanding was largely that of an event driven facility and it was largely focused on the sale of alcohol confined to between 10:00 am and 12:00 am as stated on the liquor licence. The Licensee emphasizes that the Centre is not a "bar" and, consequently, the service of alcohol is an augmentation to the community benefit, rather than the sole reason for its being. The Licensee submits that it takes very seriously its obligations for public safety and event management and is vigilant in its efforts to comply with the Regulations.

In conclusion, although the Licensee takes full responsibility for the breaches of the Regulation, its submits that the recommended penalty of a total of a ten day licence suspension and a \$5,000 monetary penalty are inconsistent with the facts in this case and in particular, the ambiguity which exists regarding, the operation of section 44(1)(a) of the Regulation. Accordingly, the Licensee submits that a total penalty comprised of a ten day licence suspension and a \$2,000 monetary penalty would be a more appropriate sanction in all of the circumstances.

ANALYSIS AND DECISION

The Licensee has admitted to the contraventions. Having considered all of the evidence and submissions filed in these proceedings, I find that on October 30, 2011, being the business day of Saturday, October 29, 2011, the Licensee contravened sections 44(1)(a), section 44(3), and section 42(2) of the Regulation and the terms and conditions of its licence, when it first, failed to ensure that patrons were cleared from the establishment within ½ hour of the time stated on the licence for the hours of liquor service, second, when it allowed a person to consume liquor in the licensed establishment beyond ½ hour after the time stated on the licence for the hours of liquor service and third, when it allowed consumption in the licensed establishment of liquor that was not purchased from, or served by, the Licensee.

DUE DILIGENCE

The Licensee is entitled to a defence 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, it must ensure that those procedures are consistently acted upon and problems are dealt with.

Here there is virtually no evidence upon which I can find that the Licensee was duly diligent. Although the Licensee has made a number of proposals, generally for the purpose of enhancing communications between the Licensee and the Branch, which is commendable, at the end of the day that can only be interpreted as being an admission that at the time of these contraventions, the Licensee was not operating in accordance with the Act and Regulations and there was more it reasonably could have done to prevent them. Furthermore, when inquiries were made of Branch personnel with regard to the Branch's interpretation of the pertinent sections of the Regulations, the responses were clear and unequivocal and were not, in any way, supportive of the Licensee's position. However, the Licensee continued on its intended path. Accordingly, I have concluded that the Licensee, in this case, is not entitled to the benefit of the defence of due diligence.

PENALTY

Pursuant to section 20(2) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalties proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

Here, there is no record of proven contraventions, offenses or enforcement actions of the same types for this Licensee, at this establishment, within the preceding 12 months of these incidents. Therefore, I find these to be first contraventions for the purpose of determining appropriate penalties.

Schedule 4 provides a range of penalties for contraventions of the Act or Regulations. For a first contravention of section 42(2) of the Regulation, the range of penalties is a four to seven day licence suspension and/or a \$5,000 to \$7000 monetary penalty. For a first contravention of section 44(1)(a) of the Regulation, the range of penalties is a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty. For a first contravention of section 44(3) of the Regulation, the range of penalties is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty. The Branch has recommenced a total licence suspension of ten days and a monetary penalty of \$5,000.

The Licensee's main contention is that there consists an ambiguity, particularly with regard to provisions of section 44(1)(a) of the Regulation, and therefore, the Licensee should receive the benefit of the doubt when a penalty is selected. The difficulty which I have in accepting that analysis, is that the wording of the provisions of section 44(1)(a) are very clear and are certainly capable of supporting the interpretation held by the Branch. Quite simply, all patrons attending the event should have been removed from the Centre by 12:30 am on October 30, 2011.

This may not have been a popular interpretation in the circumstances of this case, but, in my view, it is the only reasonable interpretation that can be taken from the language chosen by the Legislature. The most troubling aspect of these contraventions is the fact that they could have been easily avoided in their entirety, had the agent of the Licensee, the Centre manager, heeded the advice of Liquor Inspectors 1 and 2 and the RCMP to the effect that there would be a consequence if patrons failed to be removed prior to 12:30 am.

In fact, the Licensee was given a "last chance" opportunity to comply when it was suggested to the arena manager that he discuss his position with the Licensee prior to making a final decision concerning the closing time. Notwithstanding these clear indications of expectations, the arena manager elected to ignore them and allowed the event to continue five and a half unlawful hours.

Whereas I might ordinarily be more lenient in fashioning an appropriate penalty for these contraventions because they constitute first contraventions, I am not prepared to reward the recalcitrant actions of the arena manager in this case. In my view, therefore, a licence suspension of six days for the contravention of section 44(1)(a) of the Regulation and a licence suspension of four days for the contravention of section 42(2) of the Regulation, together with a monetary penalty of \$5,000 for section 44(3) of the Regulation are necessary and appropriate in order to demonstrate to other, similar Licensees and the public that the Branch will not tolerate such flagrant contraventions.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Liquor Primary Licence No. 213867, for a period of ten (10) days to commence at the close of business on Friday, July 6, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor licence be held by the Branch, or the Vernon RCMP detachment, from the close of business on Friday, July 6, 2012, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of Five Thousand Dollars (\$5,000) to the general manager of the Liquor Control and Licensing Branch on or before July 6, 2012.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: June 6, 2012

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Peter Mior, Branch Advocate