



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: Verta Holdings Ltd.
dba Desert Arms Hotel
36041 – 97th Street
Oliver, BC V0H 1T0

Case: EH13-085

For the Licensee: Lynda Botkin
Licensee's Representative

For the Branch: Peter Mior

General Manager's Delegate: A. Paul Devine

Date of Hearing: Written Submissions

Date of Decision: December 5, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

Verta Holdings Ltd. (the "Licensee") operates a Licensee Retail Store (LRS) under the name "Desert Arms Hotel" in Oliver, B.C. under Licence Number 194663 (the "Licence"). The Licensee is represented in these proceedings by Ms. Lynda Botkin, Manager for the LRS.

The LRS operated by the Licensee is licensed to sell packaged liquor to the general public. In accordance with the terms of its Licence, the LRS operates from 9 a.m. to 11 p.m. seven days per week.

The Licence issued to the Licensee is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" (the "Guide"). Under the terms set out in the Guide, minors are only allowed in the premises of the LRS when accompanied by an adult parent or guardian. Further, it is against the law for the Licensee to sell, serve or supply liquor to a minor.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch (the "Branch") issued a Notice of Enforcement Action (NOEA) on June 12, 2013. In the NOEA, the Branch alleges that on April 20 2013, the Licensee was in breach of section 33(1)(a) of the *Liquor Control and Licensing Act* (the "Act"), which prohibits selling, giving, or otherwise supplying liquor to a minor.

A monetary penalty of \$7,500 was proposed by the Liquor Inspector who prepared the NOEA. This is within the penalty range set out in Schedule 4, item 2 of the *Liquor Control and Licensing Regulation* (the "Regulation"). The penalty range for a first contravention (no prior contravention within the previous year) is a \$7,500-\$10,000 monetary penalty and/or a licence suspension of 10 to 15 days.

The Licensee does not dispute the fact that liquor was sold to a minor as alleged by the Branch in the NOEA.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267***

Supplying Liquor to Minors

33(1) A person must not

- (a) sell, give or otherwise supply liquor to a minor.

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

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proved, what penalty, if any, is appropriate?

EXHIBITS**Exhibit 1:** Book of Documents of the Branch.**Exhibit 2:** Written submission and statement of income of the Licensee.**EVIDENCE – BRANCH**

As was noted previously, the Licensee does not dispute the contravention. The evidence of the Branch set out in Exhibit 1 consists of the NOEA and supporting documents related to the contravention. In view of the Licensee's admission, the evidence contained in Exhibit 1 is accepted for the purpose of determining the facts surrounding the contravention.

The Licensee raises issues with the penalty proposed by the Branch. Accordingly, it is necessary to set out the evidence of the Branch in greater detail.

The Branch began a "Minors as Agents Program" (MAP) in 2011. The Act was amended to allow the Branch to employ minors for the purpose of testing compliance with the requirement of the legislation against selling liquor to minors. Licensees were notified about the program by the General Manager of the Branch in February 2011, and again in March 2011.

On April 20, 2013, a MAP inspection was conducted at several licensed establishments in the South Okanagan Region. A minor, who was 18 years of age at the time, and who was identified by the Branch as "Agent # 29", was engaged by the Branch for the purpose of testing compliance of the Licensees in the Region.

The Branch alleges that, at about 10:50 p.m. on April 20, 2013, Agent # 29 entered the LRS and purchased a six pack of canned beer. A female store clerk working inside the licensed premises rang up the purchase, put the beer in a bag, and provided change for the purchase. Agent #29 was not asked for identification by the store clerk.

Subsequently, Contravention Notice number B009740 was issued to the store clerk by one of the two Liquor Inspectors who was working with the Agent #29. The store clerk acknowledged she was aware of the MAP, and would advise the Licensee of the incident.

EVIDENCE – LICENSEE

The Licensee provided a written submission and a statement of income and retained earnings for 2010-2012 inclusive (Exhibit 2).

SUBMISSIONS – BRANCH

The Branch submits that the monetary penalty is appropriate in this case to encourage future compliance with the legislative prohibition against the sale of liquor to minors. The proposed penalty is the minimum monetary penalty for a first contravention.

SUBMISSIONS – LICENSEE

In a brief submission, the Licensee acknowledged that the contravention occurred as alleged. The Licensee submits that it has adopted new strict policies and procedures for identifying underage customers. Anyone that appears to be under the age of 30 is to be asked to produce ID.

The Licensee also submits that the amount of the penalty is too high given the financial state of its business. A financial statement which accompanied the submission (Exhibit 2) shows the income and expenses of the business over the past three years. The Licensee proposes that it be allowed to pay the penalty off over six months.

ANALYSIS AND DECISION

Contravention

The provision of the Act which deals with the sale of liquor to minors provides: 33 (1) A person must not (a) sell, give or otherwise supply liquor to a minor...

The Licensee does not dispute the contravention as alleged, so the evidence set out in the NOEA is admitted for the purpose of this decision. Since the person identified as Agent #29 was supplied liquor by a sales clerk employed by the Licensee, and as the individual who purchased the liquor was 18 years of age at the time, the contravention as alleged in the NOEA is proven.

It is apparent that there was no effort made by the Licensee's store clerk to ask Agent #29 for identification. Further, the Licensee had been apprised of the MAP some time prior to the events in question.

The issues that remain are whether the Licensee acted with due diligence despite the contravention, and if not, what penalty, if any, is appropriate in all of the circumstances.

Due Diligence

The Licensee is entitled to raise the defence of "due diligence" if it can be shown it took reasonable steps to prevent the alleged contravention from occurring. The Licensee must not only establish it had procedures in place to identify and deal with problems in enforcing the applicable liquor laws, it must ensure that those procedures are consistently acted upon so that problems are dealt with.

The Licensee has not raised the defence of due diligence, and did not present any evidence to demonstrate that it acted with due diligence at the time of the contravention. While the Licensee presented some evidence about steps it has taken since the contravention occurred, these do not reflect due diligence for the contravention that occurred on April 20, 2013. Evidence of due diligence is based on steps taken by a Licensee to enforce the provisions of the Act and the Regulation prior to the occurrence of a contravention.

Since the onus is on the Licensee to establish this defence, I find that the Licensee did not act with due diligence on the date and time in question. I next turn to consider the question of penalty.

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 its 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 penalty 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 factors that I have considered in determining the appropriate penalty in this case 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the Licensee's non-compliance, and to encourage future compliance by way of deterrence.

The sale of liquor to minors is considered a serious contravention, as the range of possible monetary penalties and licence suspensions attests. The Branch recognizes that minors as a group are unable to metabolize alcohol in the same manner as an adult, and so may more readily become intoxicated. In this condition, a minor may be at personal risk or constitute a public danger.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the twelve months prior to this incident. Therefore, I find this to be a first contravention for the purposes of reviewing the range of applicable penalties under Schedule 4 of the Regulation. Item number 2 in Schedule 4 of the Regulation provides that the penalties for a first contravention of this type are a 10-15 day licence suspension and/or a \$7500 – \$10,000 monetary penalty.

The Licensee has raised an issue of ability to pay the monetary penalty, and has requested time to pay. The financial information provided, however, does not establish that the Licensee is without means to manage this payment. As well, some time has passed since the NOEA was issued, and the Licensee has been aware of the likelihood that this obligation would be forthcoming.

As noted, there is no history of non-compliance during the one year prior to the contravention in question. There is also no earlier record of this kind of contravention. I therefore find that a penalty of \$7500 is appropriate in the circumstances to inspire future compliance by the Licensee.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the General Manager of the Liquor Control and Licensing Branch. In all of the circumstances, I direct that the monetary penalty be paid to the general manager on or before January 8, 2014.

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

A. Paul Devine
General Manager's Delegate

Date: December 5, 2013

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

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