



**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: The Bounty Management Group Inc.
dba Bounty Cellars
7 – 364 Lougheed Road
Kelowna, BC

Case: EH14-003

For the Licensee: Ronald Pennington

For the Branch: Peter Mior

General Manager's Delegate: Edward Owsianski

Date of Hearing: Written Submissions

Date of Decision: June 17, 2014

Ministry of Justice

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
4th Floor, 3350 Douglas Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

The Licensee, The Bounty Management Group Inc. (the "Licensee") operates a winery known as Bounty Cellars located in Kelowna BC. The Licensee holds Winery Licence number 301437 (the "Licence").

Bounty Cellars is classified by the Province of British Columbia Liquor Distribution Branch (LDB) as a commercial winery. As a commercial winery it is not required to produce fruit, as is the case for land-based wineries. It may purchase fruit, juice, or bulk wine for use in the production of their products. It must produce a minimum of 4500 litres of wine annually for the renewal of its licence.

The authorized representative of the Licensee for the purpose of this hearing is Ronald Pennington, a principal of the corporate Licensee.

The Licence is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the publication, "A Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated March 27, 2014.

The Branch alleges that on January 8, 2014, the Licensee contravened section 12 of the *Liquor Control and Licensing Act* (the "Act") by contravening a term and condition of the winery licence. The proposed enforcement action outlined in the NOEA is a \$10,000 monetary penalty.

The proposed monetary penalty is greater than the penalty range set out in item 46, Schedule 4, of the *Liquor Control and Licensing Regulation* (the "Regulation") for a first contravention of this type. The range of penalties set out in the Schedule for a first contravention of this type is a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty. Section 20 (2.1) of the Act allows for a penalty greater than the penalty range where it is in the public interest to do so.

The Licensee does not dispute committing the contravention, nor is the Licensee pursuing a defence of due diligence. The Licensee disputes the proposed penalty and proposes that a \$1,000 monetary penalty be imposed instead.

RELEVANT STATUTORY PROVISIONS

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

- 12 (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).

ISSUES

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

EXHIBITS

The following documents were submitted and were considered:

Exhibit 1: The Branch's book of documents, tabs 1 to 19 inclusive.

Exhibit 2: The licensee's written submission.

EVIDENCE

As previously noted, the Licensee does not dispute that the contravention occurred as alleged, nor does it seek to claim the benefit of the defence of due diligence. It is deemed, therefore, to accept the facts as put forward by the Branch with respect to the issue of whether the contravention occurred. The Licensee has, however, made submissions in respect to the appropriateness of the penalty which the Branch has recommended.

Accordingly, the evidence may be summarized as follows:

Bounty Cellars has been licensed as a winery since May 5, 2005. Its licence contains an endorsement for an on-site store. The Licence is subject to the terms and conditions contained in the "Guide".

The Guide (Exhibit 1, tab 14) states at page 7:

This guide outlines the requirements of the Liquor Control and Licensing Act and Regulations for all licensed wineries and their agents, and requirements for those wineries that hold an endorsement to operate an on-site retail store.

It also imposes further terms and conditions, in addition to those found in the Liquor Control and Licensing Act and Regulations.

Licensees must follow these terms and conditions – and any further terms and conditions that might be printed on the face of your license or contained in letters issued to you by the general manager of the Liquor Control and Licensing Branch or the General Manager of the Liquor Distribution Branch – at all times.

It is your responsibility to operate your business so that it complies with the law and with the terms and conditions of your license.

The Guide further states at page 18:

Complying with your LDB Manufacturer's Agreement

The Liquor Distribution Branch requires all BC manufacturers to enter into a Manufacturer's Agreement which deals with issues such as registration of products, who the manufacturer can sell liquor to, reporting sales and remitting monies for those sales and record keeping. You must comply with the terms of this agreement as a condition of your manufacturer's license.

Prior to the Licence being issued a principal of the Licensee met with the local liquor inspector and reviewed the requirements for operating a licensed winery.

On August 4, 2005 the LDB acknowledged in a letter to the Licensee that all of the LDB requirements had been met and confirmed that the Licensee could commence operation as a commercial winery as of that date. The requirements included the execution of a Manufacturer's Agreement (the "Agreement") with the LDB. The Agreement allowed the licensee to sell and deliver its wine directly to customers. Under the Agreement the Licensee must report and collect the sale proceeds and remit them to the LDB daily. The Licensee is subsequently paid by the LDB for the product it has sold plus a commission and a rebate.

On July 4, 2007 the Licensee attended a compliance meeting with the local liquor inspector arising out of the Licensee contravening a term and condition of the Licence by failing to produce a minimum of 4500 litres of wine for the previous business year as required by section 16 of the Regulation. The Licensee committed to comply with the requirement. The Branch did not pursue enforcement action.

As a result of non-compliance by the Licensee with the original LDB Agreement, a new Agreement was drawn and executed by the Licensee and the LDB, taking effect on April 1, 2008. The new Agreement contained similar obligations and liabilities to that of the original Agreement.

On August 5, 2008 the LDB advised the Licensee that, as a result of the Licensee's failure to comply with the aforementioned Agreements on a consistent basis going back to June 2006 and the failure of the licensee to meet its financial obligations to the LDB, the current Agreement was being immediately suspended. The Licensee was, therefore, prohibited from selling any of its wine to wholesale customers or transferring/selling wine to its winery retail store.

On September 1, 2009 the LDB Agreement was re-instated with clear direction from the LDB to the Licensee on reporting requirements, the collection and remittance of the proceeds of sales, and instalment payments toward the debt owed to the LDB.

The Licensee subsequently failed to meet the aforementioned requirements leading to a meeting between the Licensee and the LDB on August 26, 2013, during which the Licensee committed to meet the reporting requirements, the collection and remittance of the proceeds of sales, and making payments toward the debt owed to the LDB.

On December 6, 2013, the LDB advised the Licensee that the Licensee continued to be in non-compliance with the Agreement and had failed to meet the commitments made during the August 26th meeting. A deadline of January 3, 2014 was set for the payment by the Licensee of all monies owed to the LDB. The Licensee was advised that, should payment not be made, it could result in the suspension of the Agreement which would continue until the financial obligations to the LDB were paid in full and the LDB assured that the sales reporting was complete and accurate. The Licensee was advised that should the Agreement be suspended the Licensee would be prohibited from selling its wine.

On January 8, 2014, the LDB served on the Licensee a Notice of Suspension of the Agreement as a result of the Licensee's non-compliance. The liquor inspector issued a Contravention Notice to the Licensee for contravening a term and condition of the Licence.

SUBMISSIONS—BRANCH

The Branch's submission is found in the NOEA and is summarized as follows:

The contravention has been proven. The recommended \$10,000 monetary penalty is greater than the penalty range set out in item 46 of Schedule 4 of the Regulation. It is warranted in the circumstances of the Licensee's consistent non-compliance and is necessary to encourage the Licensee to meet its obligations with the LDB and operate in compliance with the terms and conditions of its Licence.

SUBMISSIONS—LICENSEE

The Licensee's submission is found at Exhibit 2 and is summarized as follows:

- The Licensee representative confirms that there have been contraventions.
- The Licensee has maintained compliance in the proper sales channels for its products and services and has never knowingly sold, advertised, or marketed a product without the appropriate licensing in place.
- While the revenue history is poor, the accounting for production and inventory of wine is excellent and the Licensee can account for all of the wine produced.
- While past marketing and business strategies to generate necessary revenues have mostly been unsuccessful, the current strategy appears to be sound.
- While cash flow has always been a struggle, the new plan and restructuring will alleviate non-compliance issues. The Licensee has operated in complete compliance since the suspension of the Agreement was lifted in April and will continue to do so.
- The Licensee has been proactive in dealing with all issues regarding compliance, including: meeting with the local liquor inspector, reducing expenses, and establishing a third party system to monitor compliance.
- A Trustee is in place to oversee compliance and to assist in restructuring of the company.
- Cash flow is monitored and a business plan executed to assure no issues of non-compliance.

- Reduction of financial stakeholders and business partners will streamline decision making and provide a single point of contact.
- Revenue owing to the LDB is being reviewed by the Licensee's accounting firm and in cooperation with the LDB.
- The current strategy and business plan will allow all funds owing to be paid in full.
- As a result of tight cash flow the minimum monetary penalty of \$1,000.00 is proposed.
- It is understood that further non-compliance will be dealt with swiftly and sternly.

ANALYSIS AND DECISION

Contravention

The Licensee has admitted to the contravention. Having considered all of the evidence and the submissions filed in these proceedings, I find that on January 8, 2014 the Licensee contravened section 12 of the Act by contravening a term and condition of its Licence.

Due Diligence

The Licensee is entitled to a defence to the contravention, if it can be shown that it was duly diligent in taking responsible steps to prevent the contravention from occurring. The Licensee must not only establish the existence of procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with accordingly.

The onus is upon the Licensee to prove this defence on the balance of probabilities. The Licensee here did not present a defence of due diligence. I find, on the evidence before me, that the Licensee has not established a defence of due diligence.

Accordingly, I find that the Licensee contravened section 12 of the Act by contravening a term and condition of its Licence.

PENALTY

Pursuant to Section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation or the terms and conditions of the Licence, I have discretion to order one or more of the following enforcement actions:

- Take no enforcement action
- 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
- Order a licensee to transfer a licence

Imposing any penalty is discretionary; however, if I find that either a Licence suspension and/or a monetary penalty are warranted, I am bound by 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. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve compliance with the Act, the Regulation, and the terms and conditions of the Licence. Among the factors that I have considered in determining the appropriate penalty in this case are: whether there is a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to public safety, and the well-being of the community.

The manufacture for sale of all types of liquor and the sale of all types of liquor is strictly regulated within this province, as it is within all provinces and territories in the country. Statutory and regulatory systems allow for the licensing and oversight of the manufacturing for sale and the sale of liquor and its distribution. The systems are designed to protect public safety and the collection of revenue by the province. Provincial authorities consisting of the Liquor Control and Licensing Branch and the Liquor Distribution Branch administer the statutory and regulatory schemes.

Licensees are obligated to comply with the Act, Regulations and the terms and conditions of their licences. Enforcement actions are intended to both address the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee within the 12 months prior to this incident. I find, therefore, this to be a first contravention for the purposes of reviewing the range of applicable penalties under Schedule 4 of the Regulation.

Item 46 in Schedule 4 of the Regulation provides that the penalties for a first contravention of this type are a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty. Section 20 (2.1) of the Act allows the General Manager to impose a monetary penalty greater than the amount provided for in the Schedule if the General Manager is satisfied that it is in the public interest to do so. The General Manager must take into account the licensee's entire compliance history and the particular circumstances giving rise to the taking of action by the General Manager.

In this case, the Licensee has consistently and repeatedly failed to meet its obligations under the Agreement with the LDB since the commencement of its business in 2005. It has repeatedly failed to comply with the LDB's reporting requirements and has failed to remit the sale proceeds due and owing. The Licensee incurred a significant debt of monies owed to the LDB. The Licensee's non-compliance resulted in the suspension of the LDB Agreement on several occasions. Promises and commitments made by the Licensee to the LDB allowed for the reinstatement of the Licence. The most recent suspension of the Agreement on January 8, 2014 gave rise to this enforcement action.

It is apparent that this Licensee has been either unable or unwilling to meet its obligations and the requirements of its liquor Licence.

The Licensee has submitted that it has never sold, advertised, or marketed product contrary to its licensing. While revenue deposit has been poor, it has a good record system and can account for all wine produced. Past business plans have been unsuccessful in generating necessary revenues resulting in cash flow problems. A restructuring with a new business plan and a Trustee to oversee compliance has been successful since the reinstatement of the Agreement in April of this year. Continued compliance and the payment of the monies owed is expected. Due to tight cash flow the Licensee has proposed the minimum \$1,000 monetary penalty.

The penalty provisions for this contravention fall under Item 46 of Schedule 4 of the Regulations. Item 46 is the general provision for contraventions not found within the specific contravention enumerated in items 1 to 45. It normally deals with relatively minor administrative contraventions, such as a failure by a licensee to display the current liquor licence. It attracts the lowest range of penalties, one to three day licence suspension and/or \$1,000 to \$3,000 monetary penalty. In my view such range of penalties is not appropriate in the circumstances.

The penalty must be sufficient to encourage voluntary compliance and to provide a deterrent not only to this Licensee but to all other licensees within the same category of licence. I am satisfied that, in the circumstances here, it is in the public interest to impose a greater penalty than that found in item 46 of Schedule 4 of the Regulation. I find that a monetary penalty of \$10,000 is necessary, appropriate, and reasonable.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$10,000 to the General Manager of the Liquor Control and Licensing Branch on or before Monday, July 21, 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 and must remain in place during the period of time ordered by the General Manager.

Original signed by

Edward W. Owsianski
Hearing Delegate

Date: June 17, 2014

cc: Liquor Control and Licensing Branch, Victoria Office
 Attention: Jay Blackwell, A/Regional Manager

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