



**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: 0749038 B.C. Ltd.
dba Level
275 Leon Avenue
Kelowna, BC V1Y 6N4

Case: EH08-077

For the Licensee: Robert Audy & Sean Wilson

For the Branch: Tania Cogan

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: October 30, 2008

Place of Hearing: Kelowna, BC

Date of Decision: November 26, 2008

**Ministry of Housing
and Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

Corporate Licensee 0749038 B.C. Ltd. dba Level holds Liquor Primary Licence No. 017187 for the operation of a nightclub in Kelowna, BC. The hours of sale are 7 p.m. to 2 a.m. Monday thru Sunday. The licensed capacity is 232 persons in area 1 and 232 persons in area 2. The establishment is operated by 0753580 B.C. Ltd. by way of a third party agreement that has been approved by the branch. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia.'

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated August 12, 2008.

The branch alleges that on June 29, 2008, the licensee contravened section 35 of the *Liquor Control and Licensing Act* by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale.

The proposed penalty is \$5000 (item 3 of Schedule 4, *Liquor Control and Licensing Regulation*).

Item 3 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

The licensee disputes the alleged contravention.

RELEVANT STATUTORY PROVISIONS

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

Minors on licensed premises

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

- (a) if the minor is accompanied by a parent or guardian on premises where liquor is sold exclusively for consumption off the premises,
- (b) with lawful excuse, or
- (c) in prescribed circumstances.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit No. 1 Branch Book of Documents #1, tabs 1 – 20

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

An RCM Police Constable testified that on June 29, 2008, he was in uniform working the evening shift in Kelowna BC. He and several other officers were making routine inspections of licensed establishments. They entered the Level nightclub at approximately 11:45 p.m. and proceeded to check the identification of several young appearing patrons. One young female patron produced a driver's licence that the officer

examined. He noted that the face of the person in the photograph differed from that of the female patron in that the face in the photograph appeared to be slimmer. To determine whether it was the same person he asked the young woman for her date of birth. She provided the same date as shown on the licence. He asked for her address. She was unable to provide the address or postal code. He escorted her outside and questioned her further about her identity. She admitted that she was 18 years old and provided her correct name. The constable using the police data access system determined that she held a valid driver's licence and that she was 18 years of age.

The constable spoke with the manager of the nightclub, advising him that the female patron was a minor. He showed the female to the manager and showed him the driver's licence that she had produced. The manager agreed that the person in the photograph on the driver's licence and the minor were not the same person. The officer showed the driver's licence to the doorman at the entrance to the nightclub and pointed out the difference in appearance between the minor and the person in the photograph and advised him of steps to take to confirm that identification produced belonged to the person presenting it. The constable issued a Licensed Premises Check (LPC) (Exhibit 1, tab 3) form to the manager. He prepared a report prior to completing his shift (Exhibit 1, tab 4).

A branch liquor inspector testified that he has been employed as a liquor inspector for approximately 10 years and is responsible for the geographical area in which the Level nightclub is located. He received a Licensed Premises Check Form (Exhibit 1, tab 3) from the Kelowna RCMP detachment advising that a female minor had been found in the nightclub the night of June 29, 2008. He later received the police occurrence report (Exhibit 1, tab 4) and the driver's licence that the minor had used to gain entry to the nightclub (Exhibit 1, tab 9). The inspector met with the principals of the corporate licensee on July 8, 2008, discussed the matter with them, issued them a Contravention Notice (CN) (Exhibit 1, tab 6) and advised them that he would be recommending enforcement action.

The inspector contacted the minor and received an email message in which she provided a statement regarding the incident (Exhibit 1, tab 7). She also provided a current photograph (Exhibit 1, tab 8).

The inspector reviewed the branch file for the establishment. In his testimony he referred to copies of documents from the branch file:

- Exhibit 1, tab 16; the liquor primary licence in effect at the time of the alleged contravention. It is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees" (the "Guide").
- Exhibit 1, tab 17, floor plan of the establishment.
- Exhibit 1, tab 19; a copy of the Guide in effect at the time of the alleged contravention. He referred to excerpts from the Guide dealing with minors (p11).
- Exhibit 1, tab 15; on October 27, 2006, the principals of the corporate licensee met with the liquor inspector and signed the branch Interview Sheet. They committed to operating the establishment in compliance with liquor licence requirements.
- Exhibit 1, tab 18; on April 19, 2007, the principals of the corporate licensee and the third party operator met with the liquor inspector and signed the branch Interview Sheet. They committed to operating the establishment in compliance with liquor licence requirements.
- Exhibit 1, tab 14; CN dated July 7, 2006, for staff drinking while on duty. No enforcement action taken.
- Exhibit 1, tab 13; CN dated August 21, 2006, for permitting an intoxicated person to remain in the establishment. No enforcement action taken.
- Exhibit 1, tabs 10 & 11; CNs dated April 17, 2008, 17 year old minor in the premises on April 4th and 5th, 2008. No enforcement action taken.
- Exhibit 1, tab 12; On March 20, 2008, a compliance meeting was held with a principal of the licensee and operator as a result of the 17 year old minor being in the premises on two separate occasions. The requirement to check identification was discussed and understood.

The inspector subsequently prepared a Notice of Enforcement Action (NOEA) (Exhibit 1, tab 2) wherein he alleged the contravention and recommended penalty. He was concerned that the alleged contravention was the third incident of minors being permitted to be in the establishment within a three month period. The two previous incidents were dealt with by a compliance meeting, which he felt was sufficient at the time to deal with the matter. He agreed that the staff at the establishment is always co-operative. He recently received 71 false identifications they had taken from persons at the establishment.

EVIDENCE - THE LICENSEE

Licensee witnesses A & B testified that are both employed at the Level nightclub as doormen. Their job is to check the identification of persons wishing to enter the nightclub. Typically they will check several hundred identifications per night. They will ask for two or three pieces of identification if the person appears to be under 25 years of age. When false identification is presented it is confiscated and given to the manager.

They were working the night of June 29, 2008. They both recalled the minor, subject of the hearing, and recalled that she produced three pieces of identification, a driver's licence, a SIN card and a Care card. They examined the identification closely for two to three minutes. It appeared to be genuine. The photograph on the driver's licence appeared to be of the same person. She was allowed to enter the premises. They later observed the police officer speaking with the minor and checking her identification. She appeared to be arguing with the officer that the identification was hers. Shown the photographs at Exhibit 1, tabs 8 and 9, they testified that they believed them to be of the same person.

They each had approximately two years experience as doormen. Their training consisted of learning on the job from other doormen and managers. They were not aware whether the establishment maintained an incident logbook. Staff meetings were held on occasion. They were unaware of the two previous contravention notices or the compliance meeting held as a result of a 17 year old minor alleged to in the premises on two occasions in April.

Licensee witness C testified that he works at an affiliated nightclub as the promotions manager and at the Level nightclub on busy nights as assistant manager handling cash receipts. He was working the night of June 29, 2008. He observed the police officer questioning the minor for approximately 15 to 20 minutes. She was unable to provide the correct answers to his questions about the identification she had produced. Shown the photographs at Exhibit 1, tabs 8 and 9, the witness testified that he believed them to be of the same person.

The policy at Level is for the doormen to require patrons to produce two pieces of government issued identification, one with a photograph. All doormen follow this. Hundreds of identification are checked nightly, several are confiscated where they are found to be false and are turned over to the liquor inspector. New doormen receive training from the head doorman and must read a government issued publication known as the "Bouncers Bible." If there is an incident in the nightclub, a staff meeting is held the following day with management.

Licensee witness D testified that he is employed at the nightclub as the manager and was working the night of June 29, 2008. It is his responsibility to organize and supervise all staff on duty for the night. He ensures that the nightclub is ready for business and that security is in place. New staff receives on the job training by shadowing experienced staff. The establishment has a policy and procedures manual that is read by all staff. Staff meetings are held on Thursday nights in preparation for the weekend. Staff not performing their jobs are fired by him. There is no second chance. He is satisfied that the doormen were diligent in performing their duties on

June 29th. They had checked the identification of the minor and were satisfied that it was authentic.

He recalls the police officer arriving at the nightclub the night of June 29th. The officer told him that he was going inside to check identification of patrons. He wasn't concerned with the officer's presence as the doormen on duty had been checking the identification of persons entering the nightclub. He observed the officer questioning the minor for approximately five minutes. She produced identification and he overheard her tell the officer that it was her identification. He is not certain how the officer determined her real identity. The officer showed the minor and the identification to him. He agreed with him that the photograph was not her. He wouldn't argue with the officer.

Shown the photographs at Exhibit 1, tabs 8 and 9, the witness testified that he believed them to be of the same person. He produced two boxes containing various types of identification that had been confiscated by the doormen during the course of their duties. These were to be turned over to the liquor inspector. He produced a book that provided photographs and identifying characteristics of government identification used in different provinces and other countries. He produced a copy of a photograph taken from Facebook of four underage young women bragging about getting into another nightclub. This was posted for the information of the doormen working at Level. He was aware that a principal of the corporate licensee and operator had attended a compliance meeting with the liquor inspector regarding a minor being permitted into the establishment on two separate occasions in April, and that a commitment had been made to ensure that minors were not allowed into the nightclub.

SUBMISSIONS – LICENSEE

The licensees' representative submitted that they are diligent in checking identification. On a busy night the doormen will check up to 1000 identifications. False identification is confiscated and turned over to the liquor inspector. Doormen receive on the job training. They co-operate with the police and liquor inspector. They may not be perfect, but they do their best.

The doormen were diligent in checking identification the night of June 29th. They checked the three pieces of identification of the minor carefully to ensure that it was authentic. The photographs at exhibit 1, tabs 8 and 9 show a person with similar hair and nose.

REASONS AND DECISION

The evidence is that on June 29, 2008, a minor was found in the licensed premises by a police officer during a routine inspection. The minor had been checked prior to entering by the doormen on duty. She produced three pieces of government issued identification, which were checked by the doormen. They were satisfied that the identification was authentic and she was permitted entry. Sometime later a police officer concerned that she may be underage, asked for her identification. She produced a driver's licence. The officer believed that there was sufficient difference in the facial features of the minor from the photograph on the driver's licence, that he asked her questions about the information contained on the face of the driver's licence. While she provided the correct date of birth, she was unable to provide the address or postal code. The officer took the minor outside where she admitted that the driver's licence was not hers. She provided her real name and admitted that she was only 18 years old. The officer confirmed her real age and identity using the police data access system.

The licensee is entitled to a defence to the allegations of the contraventions, 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 dealt with.

Here the licensee has hired doormen and has provided some training and instructions on how to perform their duties including the necessity of checking identification of young patrons. The licensee has hired a manager who has responsibility for operating the nightclub including supervising the staff on duty. The manager was present at the time of the alleged contravention. I find that he was the directing mind of the licensee at that time.

While the doormen did check the identification for its authenticity, they did not sufficiently check the photograph against the person before them to determine whether it was the same person. The police officer observed differences in facial structure between the photograph and the minor. Having heard his evidence and observed the photographs at Exhibit 1, tabs 8 and 9, I find that there was a sufficient difference to cause a prudent person to inquire further into the minor's identity. The police officer did so through simple questions about the information contained on the driver's licence and quickly established a doubt about the minor's identity. I am satisfied that his course of action was open to the doormen on duty at the time, was reasonable and should have been undertaken in the circumstances. There was no evidence that this procedure of secondary questioning about suspected identification was part of the licensee's security system.

I find that the licensee has not been duly diligent, and thus may be said to have "permitted" the contravention.

In conclusion, on the evidence, I find on a balance of probabilities, that June 29, 2008, the licensee contravened section 35 of the *Liquor Control and Licensing Act* by permitting a minor to enter on or to be on premises where liquor is sold or kept for sale.

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 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
- 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 *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining whether a penalty is necessary and the appropriate penalty are whether there is 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.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. The range of penalties for a first contravention of section 35 of the *Act* pursuant to the *Regulation*, Schedule 4, item 3 is a four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

I acknowledge that minors are attracted to nightclub establishments. Voluntary compliance requires that a licensee ensure that there are reasonable safeguards in place to prevent minors from entering or remaining in the establishment. Here the doormen systematically checked the identification of young appearing persons attempting to enter the establishment. They did not however take the extra step in this case of conducting secondary questioning to ensure that the identification belonged to the person presenting it. On the evidence it would have been reasonable and prudent to do so. The emphasis on the management of the establishment must always be on operating within the requirements the *Act*, *Regulations* and the terms and conditions of the liquor licence.

This contravention occurred less than three months following a compliance meeting with the liquor inspector regarding an allegation that a minor had been permitted entry into the establishment on two separate occasions. This should have lead to a tightening of the procedures regarding the checking of identification of young appearing persons such as; conducting secondary questioning where it is reasonable and prudent to do so. A minor entering a liquor primary licensed establishment can lead to the minor obtaining and consuming liquor, a serious matter that can lead to dire consequences to the minor, friends, family and the community.

I find that a penalty is necessary to ensure future voluntary compliance. Any penalty imposed must be sufficient to ensure compliance in the future. In the circumstances, I find that the minimum \$5000.00 monetary penalty is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20 (2) of the *Act*, I order the payment of a Five Thousand Dollar (\$5000) monetary penalty by the licensee to the general manager on or before December 26, 2008.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: November 26, 2008

cc: RCMP Kelowna Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Dave Deimling, A/Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Tania Cogan, Branch Advocate