



**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: Aztec Properties Company Ltd.
dba Bimini Neighbourhood Pub
2018 West 4 Avenue
Vancouver, BC V6J 1M9

Case: EH05-101

For the Licensee: Peter Uram

For the Branch: Sonja Okada

Enforcement Hearing Adjudicator: Edward W. Owsianski

Date of Hearing: November 25, 2005

Place of Hearing: Vancouver, BC

Date of Decision: January 17, 2006

Introduction

Aztec Properties Company Ltd. (dba Bimini Neighbourhood Pub) holds Licensee Retail Store (LRS) Licence No. 191347. The hours of sale are 9:00 a.m. to 11:00 p.m., seven days a week. It is subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia' ("the Guide"). The establishment is located in Vancouver, BC and operated in conjunction with a Liquor Primary Licensed establishment.

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (the "NOEA") dated August 11, 2005. The branch alleges that on July 8, 2005, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two pieces of identification from a person appearing to be under the age of 25 before allowing the person to enter the licensed establishment, or before selling or serving liquor to the person. The recommended enforcement action is a \$1000 penalty (Item 4, Schedule 4, *Liquor Control and Licensing Regulation*).

The licensee disputes the alleged contravention.

Schedule 4 at Item 4 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for one to three days and/or a monetary penalty of one thousand (\$1000) to three thousand (\$3,000) dollars.

The relevant sections of *Liquor Control and Licensing Regulation* are as follows:

- 45 (2)** A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before
- (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or
 - (b) selling or serving liquor to the person.
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Issues

1. Administrative fairness
2. Whether the licensee contravened Section 45(2) of the *Regulation* on July 8, 2005?
3. If so, what penalty, if any, is the appropriate penalty?

Exhibits

1. Letter of October 17, 2005 from the branch to the licensee
2. Book of Documents
3. Licensee Retail Store Licence No. 191347 dated May 13, 2005

Evidence - The Liquor Control and Licensing Branch

Testimony was received from an agent (agent #1) employed by the Liquor Control and Licensing Branch (the branch). [The branch employs persons as agents who are between the ages of 19 and 25 years of age to assist in determining whether a licensee is complying with Section 45 of the *Regulation*.]

The agent testified that on July 8, 2005, the date of the alleged contravention, she was twenty years of age and was working as an agent on behalf of the branch with another agent and a supervisor. She referred to a photograph of herself taken earlier that day (Exhibit 2, Tab 5) which depicts her appearance and clothing on that date. Acting as an agent on behalf of the branch she entered the LRS by herself at approximately 8:40 p.m. The female clerk located behind the counter did not greet her. She located the liquor of her choice and took it to the clerk for purchase. The clerk made brief eye contact with the agent but did not request, and the agent did not produce, any identification although she did have it available on her person if so requested. The agent left the establishment at approximately 8:42 p.m. and returned to the supervisor's vehicle where she completed an "Agent Observation Report" (Exhibit 2, Tab 4). She

testified that in her private life she is asked for identification all of the time in government liquor stores, nearly always in nightclubs and about 70 – 75 percent of the time in pubs.

A second agent employed by the branch (agent #2) testified that on July 8, 2005, the date of the alleged contravention, he was twenty-one years of age and was working as an agent on behalf of the branch with another agent and a supervisor. He referred to a photograph of himself taken earlier that day (Exhibit 2, Tab 7) which depicts his appearance and clothing on that date. Acting as an agent on behalf of the branch he entered the LRS by himself at approximately 8:45 p.m. The female clerk located behind the counter did not greet him. He browsed around, made his choice and took it to the clerk for purchase. There were a few other patrons in line at the time. The clerk looked up at him briefly but did not make eye contact or request any identification although he did have it available on his person if so requested. The agent left the establishment at approximately 8:48 p.m. and returned to the supervisor's vehicle where he completed an "Agent Observation Report" (Exhibit 2, Tab 6). He testified that in his private life he is asked for identification 90 – 95 percent of the time in government liquor stores and nightclubs and about 70 – 75 percent of the time in pubs and LRS's. He estimated that during his employment as an agent he was asked for identification just over 50 percent of the time.

A branch Compliance and Enforcement officer (C&E officer) testified that he is responsible for the geographical area in which Bimini Pub & LRS are located and is responsible for keeping the branch files for the establishment. He testified that the provisions of Section 45(2) of the *Regulation* came into effect in December 2002 requiring licensees to check the identification of all persons appearing to be under twenty-five years of age. All licensees were advised of the *Regulation*. The branch was concerned that the majority of licensees were not complying with the *Regulation* and developed the "three strike rule", a practice of not taking enforcement action unless there had been two previous incidents of non-compliance. This allowed licensees time to instruct staff and to comply with the requirements. Agents were hired by the branch to determine if licensees were checking identifications as required. The agents

recorded their observations in reports that were provided to the C&E officers responsible for the establishments.

The C&E officer testified that he received the agents' reports found at Exhibit 2, Tabs 4 and 6 approximately a week following their observations. He then attended at the establishment and spoke with the manager of the LRS, following up later by telephone with some further questions. The manager advised him that the establishment did not have a formal training program or policy manual for its staff. Management had discussed the requirements with staff and had posted a copy of a letter sent by the branch on the wall next to the staff schedules advising of the identification requirements. The C&E officer prepared a Contravention Notice (Exhibit 2, Tab 3) and delivered it to the manager. He completed an Enforcement Action Recommended Report (Exhibit 2, Tab 2) on August 2, 2005, and a Notice of Enforcement Action on August 11, 2005, (Exhibit 2, Tab 1) in which he recommended the minimum \$1000 monetary penalty. He believed that there is a public safety risk in not checking identification in that it may allow a minor access to liquor. The area in which this establishment is located has a high proportion of young persons as residents. A penalty was necessary to ensure future voluntary compliance.

The C&E officer provided a review of the branch records for this licensed establishment. The liquor licence has been issued to the same corporate licensee since February 1987 (Exhibit 2, Tab 10). The liquor licence dated March 29, 2005, shown at Exhibit 2, Tab 11 contained an error in the closing hours for the sale of liquor in that it read "11:00 AM" and should have read "11:00 PM". This was corrected in a subsequent licence dated May 13, 2005 (Exhibit 3). He testified that there had been previous Contravention Notices issued to the licensee when identification was not checked in the LRS on July 30, 2003, (Exhibit 2, Tab 13); November 6, 2003, (Exhibit 3, Tab 14); March 6, 2004, (Exhibit 2, Tab 16) and in the pub (liquor primary area) on November 6, 2003, (Exhibit 2, Tab 15). No enforcement action was taken on those Contravention Notices. Compliance Meetings were held with the licensee on

August 13th, 2003, (Exhibit 2, Tab 17); December 3, 2003, (Exhibit 2, Tab 18) and April 16, 2004 (Exhibit 2, Tab 19).

Evidence - The Licensee

A senior clerk testified that he has been employed at the LRS as a senior clerk since September 2004. On the job training was received from a senior staff member. While the training received was not extensive, it was adequate. He had previous experience working in licensed establishments in Ontario and had completed the "Serving it Right" program. He is aware that persons appearing to be 25 years and younger must be asked for two pieces of identification and he complies with the requirements. There are notices posted at the front of the store and by the staff schedule advising of the requirements. He is aware of a previous incident occurring at the establishment where the clerk on duty requested only one piece of identification. Staff was told to be vigilant and to request two pieces of identification. The establishment does not maintain a policy manual or an incident log. Communication between staff and management is done through face to face verbal communication, written records of meetings are not maintained. Company policy is to request two pieces of identification from people 25 years and younger and not to serve persons under 19 years of age. If it is suspected that a person is purchasing liquor for a minor, service is refused. Fake identification is seized from the person presenting it.

The witness testified that he was working the night of July 8, 2005, with a junior clerk. He was in the back area on a lunch break at the time the two agents were in the establishment and it was she, the junior clerk, who served them. The back area where he was taking his break has a video monitor showing the activities in the store and is connected by a bell to the front area which the clerk on duty may use to summon assistance. He believes that the junior clerk is aware of the identification requirements and follows them. As the senior clerk he watches her performance and if she didn't request identification when necessary he would intervene and request the identification himself and tell her that she should have done so. She would have received on the job

training when she commenced employment in May 2005. He believes that she completed the "Serving it Right" program after the date of the alleged contravention, approximately three months ago.

The manager of the LRS testified that he has been employed as the manager since June 2005. He has previous experience in liquor sales having worked as a clerk at a wine store for eight months and has management experience from previous employment and having operated his own company. He has not been involved in staff training as current staff were hired prior to his arrival. He is satisfied that they are adequately trained and perform their jobs within the requirements. He recalls receiving a notice from the branch in June advising that agents on behalf of the branch may visit the LRS. All staff were advised to check identification of persons appearing 25 years or younger and a copy of the notice was posted on the bulletin board next to the staff schedules. Notices of the identification requirements are posted inside the store including by the sales registers to advise customers and to remind staff.

It is his practice to deal with staff matters on a face to face basis as the need arises as opposed to written communications. His predecessor used verbal communication and also maintained a binder containing written notices and instructions. The binder contained materials on the identification requirements dated prior to his arrival and as recent as May 2005. He first became aware of the agents' visit of July 8, 2005, when the branch C&E officer came to see him and issued a Contravention Notice. The C&E officer phoned sometime later and asked about training procedures. He told him that there was no formal training by way of classroom sessions or brochures, however, requirements are discussed with staff and notices and signs are posted. Following the meeting with the C&E officer, he watched the video monitor for the date and time in question, however, could not identify the agents. He testified that at the time that he was hired he was not made aware of previous contraventions nor the attendance of the licensee at Compliance Meetings.

SUBMISSIONS

The licensee submitted that he was not able to be represented by legal counsel as the branch had insisted in setting the date for the hearing at a time when his lawyer of choice was not available. He was left with only five to six weeks to prepare for the hearing and was unable to find a lawyer knowledgeable in this area of the law who was readily available at a reasonable cost. The licensee also submitted that he wished to make a written legal submission on the point. A lawyer friend had promised to have it completed for him for the hearing date, however, had not done so.

He submitted that the establishment has a process in place sufficient to make staff aware of the regulatory requirements and the importance of complying with them. The incident was an isolated occurrence that did not warrant enforcement action by the branch. Junior employees cannot be supervised all of the time. The emphasis at the establishment is not to serve minors. The *Regulation* requires that the employee serving the person make a judgement call whether the person appears to be under 25 years of age. The "Guide for Licensees" does not provide any guidelines for complying with the *Regulation*. He submitted that the meetings he attended at the branch, which have been described as Compliance Meetings were informal and informational and the consequences were not explained.

Findings and Decision

1. Administrative Fairness

The timelines in this case, as I understand them, are as follows:

- July 8, 2005 Alleged contravention occurs
 - August 11, 2005 Notice of Enforcement forwarded to licensee
 - August 18, 2005 Pre-hearing conference held with licensee, hearing date to be determined once the licensee has retained and instructed legal counsel.
 - October 17, 2005 Branch sets the hearing date for November 25, 2005, after being advised that counsel for the licensee is not available until March 2006 (Exhibit 1).
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Administrative fairness requires that the licensee have a reasonable opportunity to retain, instruct and be represented by legal counsel. The requirement must be balanced by the public interest in the branch dealing with alleged contraventions in a timely and effective manner. In this case, I am satisfied that the licensee was given a reasonable and adequate amount of time to retain and instruct counsel. A proposed delay in the holding of the hearing until March 2006 until counsel of choice was available was neither warranted nor reasonable. In the circumstances of this case I am satisfied that the licensee had sufficient and reasonable opportunity to retain and instruct legal counsel knowledgeable in matters of administrative law who could either meet the hearing date or propose reasonable alternative dates. I am satisfied as well that the licensee had sufficient and reasonable opportunity to obtain a written legal submission on the issue prior to the date of the hearing.

In conclusion, I find that the conduct of the branch meets the requirements for administrative fairness.

2. Whether a Contravention has occurred.

The evidence given by the two agents is uncontested. On July 8, 2005, they were respectively 20 and 21 years of age. They separately entered the LRS and each purchased liquor. They were not requested nor did they produce any identification.

I have had the opportunity of observing the agents during their testimony at this hearing and viewing the photographs taken on the day of the alleged contravention. The licensee did not argue, nor is there any evidence that compels me to believe that either of the agents looked other than their real ages. I find that the agents were persons appearing to be under the age of 25 years.

Due Diligence

Although not raised directly in submission, the licensee is entitled to a defence to the allegations of the contravention if it can be shown that he was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not

only establish procedures to identify and deal with problems, he must ensure that those procedures are consistently acted upon, and problems dealt with. I am satisfied that has not occurred in this instance. The licensee attended three Compliance Meetings with C&E officers, yet the problem continued as noted by the evidence received at this hearing. There is no evidence that the licensee inquired into the circumstances leading to the previous Contravention Notices and took effective measures to prevent recurrence. The licensee is aware that the requirements of determining whether a person is under 25 years of age can be difficult for staff, yet has not sought advice or training which may be available through industry consultants or organizations. The licensee could have provided written instructions to all employees of the requirement to check the identification of all persons appearing to be under the age of 25 years and where there is any ambiguity of a person's apparent age to require identification. He could instruct staff and management that any employees not following the requirements would be subject to discipline. In conclusion, I am satisfied that a defence of due diligence has not been made out.

I find that: on July 8, 2005, the licensee contravened Section 45(2) of the *Liquor Control and Licensing Regulation* by failing to request two (2) pieces of identification from a person appearing to be under the age of 25, before allowing the person to enter the licensed establishment, or before selling or serving liquor to the person.

3. Penalty

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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;
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- impose a monetary penalty; and
- 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 *Regulation*.

There is no record of prior contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions.

There were, however, three previous Contravention Notices issued to the licensee. The branch did not pursue enforcement action, however, it did follow up with Compliance Meetings in an attempt to assist the licensee in bringing the operation of the establishment into compliance, to no avail. I have given weight to this compliance history not as proof of previous contraventions, but as proof that the branch has told the licensee in the past of its concerns and has attempted to assist the licensee in achieving compliance.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage voluntary compliance. Having considered the evidence, I am satisfied that a penalty for the contravention is necessary to ensure future voluntary compliance.

In the circumstances of this case, I find that the minimum one thousand dollar (\$1000) monetary penalty is appropriate.

Order

Pursuant to Section 20 (2) of the *Act*, I order the payment of a one thousand dollar (\$1000) monetary penalty by the licensee to the general manager on or before February 24, 2006.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

January 17, 2006

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Advocate
