

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Aztec Properties Company Ltd. v.  
General Manager of the Liquor Control  
and Licensing Branch ,***  
2005 BCSC 1465

Date: 20051019  
Docket: 36621  
Registry: Kamloops

Between:

**Aztec Properties Company Ltd. dba Bimini Neighbourhood Pub**  
Petitioner

And

**General Manager of the Liquor Control and Licensing Branch**  
Respondent

Before: The Honourable Mr. Justice Melnick

## **Reasons for Judgment**

Counsel for the Petitioner: J. Barry Carter and K. Tonge

Counsel for the Respondent: Diane Roberts

Date and Place of Trial/Hearing: September 12, 2005  
Vancouver, B.C.

[1] The petitioner (“Aztec”) brings this application for judicial review of the decision of an adjudicator, the nominee of the respondent (the “General Manager”), who concluded that Aztec had more persons in its licensed premises than was permitted pursuant to the applicable legislation and the terms of its licence. Aztec seeks to quash the decision of the adjudicator or have the matter remitted for reconsideration by her. Aztec also takes issue with the penalty imposed upon it.

## **I. ISSUES**

[2] In its petition, Aztec raises the following issues:

- (1) The adjudicator erred in law in finding that the appropriate standard of proof of the alleged contravention was a balance of probabilities.
- (2) The adjudicator erred in law in her interpretation of the term “occupant load”.
- (3) The adjudicator erred in law in determining that “being over person capacity greater than occupant load” is an offence under the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the “**Act**”), or the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the “Regulation”).
- (4) The adjudicator erred in law in the application of the defence of due diligence.
- (5) The adjudicator erred in law by not considering that the contravention, once proven, was a first offence.

## **II. BACKGROUND**

[3] Aztec operates Bimini Neighbourhood Pub on West 4<sup>th</sup> Avenue in Vancouver. The maximum person capacity stated in its liquor primary licence is 185 persons.

That “person capacity” is the same as the “occupant load” approved by the Vancouver City Fire and Rescue Services Department.

[4] At about 12:20 a.m. on September 26, 2003, three liquor inspectors checked the person capacity of Bimini Neighbourhood Pub. They were shown a mechanical counter by a doorman which indicated the figure 197. Two of the inspectors did head counts in the premises. On a first count, one inspector counted 199 persons, the second inspector counted 217 persons. Another count was carried out. This time the first inspector counted 206 in the premises, the second inspector counted 228. The inspectors were informed that at the time there were 15 staff on duty.

[5] The managing partner of Aztec arrived just as the inspectors were leaving. At the hearing before the adjudicator, he gave evidence that Aztec has a policy directed to its staff contained in an undated memorandum to ensure that the staff do not permit Aztec’s limit of 185 persons to be exceeded. The policy directs that door staff should operate two mechanical counters, one for persons entering the premises and another for those leaving. The difference between the two counters should equal the number of patrons in the establishment. Persons who wish to leave to smoke are to be stamped before leaving the premises and are “clicked” out when they leave to smoke and “clicked” back in when they return. At no time were the inspectors advised that there were two mechanical counters.

[6] At the hearing before the adjudicator, the doorman gave evidence that he, in fact, had two mechanical counters but had not produced them to the liquor inspector nor had he discussed with his manager the fact that he had only shown one counter

to the inspector. His evidence was that if one took the difference between the totals on the two counters, the result was 185.

[7] The position of Aztec before the adjudicator was that the adjudicator was bound to assess the evidence as if the contravention issue before her was a criminal or quasi-criminal offence, thus, to be determined beyond a reasonable doubt or at least on a higher balance of probabilities. Further, it was argued that the description of the alleged contravention notice “over crowding beyond occupant load” or, as otherwise stated “over crowding beyond person capacity greater than occupant load”, was not an offence known to the law; that Aztec had not, in any event, exceeded its person capacity; that it had made out the offence of due diligence which the adjudicator was bound to accept; and, in any event, the adjudicator imposed too high a penalty given that the contravention was, in law, considered a first offence (Aztec had a record of prior contraventions, but in a different category of the Regulation).

[8] The adjudicator found that the applicable standard of proof for the General Manager to make out the alleged contravention was proof on a balance of probabilities. She did not accept the argument of Aztec with respect to the description of the contravention and did not accept that Aztec had established the defence of due diligence. She did take into account Aztec’s record in respect to other contraventions in assessing a 7 day licence suspension, the highest sanction that she could impose within the range available to her under the Regulation for a first offence.

### III. DISCUSSION

#### (1) Standard of Review

[9] The standard that I must apply for my review of the adjudicator's interpretation of the statute is that of "correctness". The appropriate standard of review for questions of mixed fact in law is "reasonableness". (See **532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (General Manager, Liquor Control and Licensing Branch)**, 2005 BCCA 416 [*The Urban Well*]).

#### (2) Standard of Proof Before the Adjudicator

[10] Aztec relies on the decisions of Mr. Justice Pitfield in **Urban Well** (2004), 25 B.C.L.R. (4<sup>th</sup>) 353, 12 Admin. L.R. (4<sup>th</sup>) 203, 2004 BCSC 127 and **Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch**, 2004 BCSC 248 [*Plaza*]. However, Mr. Justice Blair in **Zodiac Pub v. General Manager, Liquor Control and Licensing Branch**, 2004 BCSC 96 [*Zodiac*] concluded that the standard of proof in an enforcement hearing under s. 20 of the **Act** (such as this case) is proof on a balance of probabilities. **Zodiac** was followed in a number of subsequent cases: **New World Entertainment Investments Ltd. (c.o.b. Richard's on Richards) v. British Columbia (Liquor Control and Licensing Branch, General Manager)**, 2004 BCSC 616; **Sentinel Peak Holdings Ltd. (c.o.b. No. 5 Orange Street Hotel) v. Liquor control and Licensing Branch, General Manager**, 2004 BCSC 885; and **Roxy Cabaret Ltd. (c.o.b. The Roxy Cabaret) v. British Columbia (General Manager Liquor Control and Licensing Branch)**, 2005 BCSC 459 [*Roxy*].

[11] In my view, the adjudicator was correct in determining that the standard of proof of the alleged contravention was proof on a balance of probabilities. Such a standard of proof is applicable because of the regulatory nature of the proceeding. In the event, judicial comity compels me to that view (*Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 13 W.W.R. (N.S.) 285). I should add that I do not find that the consequences to Aztec of its contravention of the limit on its person capacity warrants a higher level of proof than the balance of probabilities. As noted by Mr. Justice Blair at para. 22 of *Zodiac*, cases that warrant a higher standard of probabilities are restricted to those that involve more serious consequences such as disciplinary proceedings against professionals. In any event, the consequence of losing one's licence for a period of days, even though that necessarily imports the loss of considerable net revenue, is not of such severity as to warrant any change to the usual standard of proof on a balance of probabilities.

**(3) Description of Contravention**

[12] It was argued on behalf of Aztec that the alleged contravention, "overcrowding beyond person capacity greater than occupant load," is not a contravention known to the **Act** or the Regulation and, therefore, the enforcement proceedings taken against Aztec are nullity. Mr. Carter, on behalf of Aztec, argued that s. 6(4) of the Regulation sets out the contravention as being over "person capacity" and that it creates no offence of being "overcrowded greater than occupant load".

[13] The Regulation provides:

**1. Definitions**

“Occupant load” means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

**6 Capacity**

(1) Before the general manager

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend, or transfer the license for that establishment after reducing the person capacity to equal the occupant load.

- (4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

The relevant provision of the *Act* states, in part:

## 1 Definitions

“establishment” means a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served.

[14] Interestingly, Mr. Carter on behalf of Aztec made the same argument he advanced before me to Mr. Justice Burnyeat in two recent hearings before the court: ***Skybar Ltd. (c.o.b. Skybar) v. British Columbia (General Manager Liquor Control and Licensing Branch)***, 2005 BCSC 235 [***Skybar***] and ***Roxy***. His argument in this case cannot succeed for the same reasons as it did not succeed in ***Skybar*** and ***Roxy***.

[15] Both ***Skybar*** and ***Roxy*** contain a complete analysis of this issue. (See paras. 14-20, 25-27 and 30 of ***Skybar***.) I therefore conclude that the adjudicator was correct in determining that the description of the contravention was not deficient.

[16] Counsel for Aztec also argues that the General Manager should have established that the occupant load was calculated correctly. In my view there is no provision in the ***Act*** or the Regulation that requires the General Manager to confirm the method by which occupant load is calculated. There is certainly nothing in the ***Act*** that requires the General Manager to establish that the occupant load was



calculated in accordance with the definition of “establishment” as argued on behalf of Aztec. Further, although the plan associated with the occupant load certificate of Aztec shows a red-lined area, there is nothing more that suggests that the occupant load was calculated with reference to the red-lined area only. It was reasonable for the adjudicator to rely on the occupant load certificate in evidence before her.

**(4) Defence of Due Diligence**

[17] Aztec argued that the adjudicator did not properly consider the evidence when she concluded that the managing partner had not demonstrated in his evidence before her that Aztec had fulfilled the requirements for the defence of due diligence. The managing partner gave evidence that he takes part in the training of door staff and that Aztec has a policy against overcrowding. As noted above, he provided in evidence an undated memorandum to his door staff that outlines that policy.

[18] An establishment may well have a general policy, but if the directing mind on site at the relevant time ignores it, or makes no effort to see that it is enforced, it can hardly be said that the mere existence of a policy is sufficient to demonstrate due diligence. In fact, that is what happened here. The adjudicator just did not accept that, on the day in question, Aztec, through the steps that it had taken to prevent being over person capacity, had exercised due diligence.

[19] Both ***Zodiac*** at para. 39 and ***Sandman Hotel Langley Inc. (c.o.b. Sandman Hotel (Langley)) v. British Columbia (General Manager Licensing Branch)***, 2005 BCSC 197 at para. 37 held that the defence of due diligence is a question of mixed

fact and law and is reviewable on a standard of reasonableness *simpliciter*. This requires me to show deference to the adjudicator in her assessment of the evidence before her and the credibility of those who gave that evidence. Giving that due deference to the decision of the adjudicator, I conclude that there was evidence before her from which she could reasonably conclude, as she did, that Aztec did not demonstrate due diligence.

(5) **The Penalty**

[20] On behalf of Aztec, Mr. Carter submitted that the adjudicator was bound to consider the contravention as a first contravention as previous contraventions of the same type had not occurred within a 12 month period. Section 1(1) of Schedule 4 of the Regulation reads in part:

- 1 (1) For the purposes of this Schedule,
- (a) a contravention is of the same type as another contravention if each contravention is described by the same Item of this Schedule, and
  - (b) a contravention by a licensee is
    - (i) a first contravention if the contravention was committed at or in respect of an establishment and the licensee has not committed a contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention,

[21] The adjudicator found that there were no contraventions, offences or enforcement actions of the same type as the one at issue. She concluded that it

was therefore a first contravention for the purposes of Schedule 4 of the Regulation.

The relevant part of Schedule 4 provides:

| Item | Contravention  | Period of Suspension (Days) |                      |                           | Monetary Penalty  |
|------|--|-----------------------------|----------------------|---------------------------|-------------------|
|      |  | First Contravention         | Second Contravention | Subsequent Contraventions |                   |
| 15   | Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load | 4-7                         | 10-14                | 18-20                     | \$5 000 – \$7 000 |

Thus, the range of suspension open to the adjudicator was four to seven days as was the option of a monetary penalty between \$5,000 and \$7,000.

[22] It is the position of Aztec that s. 1(1)(b) of Schedule 4 of the Regulation “mandates” that previous contraventions are not to be considered if the contravention at issue is a first contravention. I do not accept that interpretation. Section 1(1) begins with the introductory phrase “For the purposes of this Schedule”. I interpret that to mean that only the range of penalties under the column titled “First Contravention” are available for contraventions that have been classified as first offences. It does not mean that the previous contravention history cannot be considered at all.

[23] In essence, Aztec's argument boils down to an assertion that the **Act** and Regulation require a system of progressive discipline within the range of penalties available under each column heading. In ***Whistler Mountain Ski Corp. v. British Columbia (General Manager, Liquor Control and Licensing Branch) (2002)***, 171 B.C.A.C. 231, 43 Admin. L.R. (3d) 294, 2002 BCCA 426, at para. 53, the Court of Appeal found that:

Section 20, the source of the General Manager's authority, states that the General Manager "may do any one or more of the following" and then goes on to specify various actions, such as fines or suspensions. There is nothing in the *Act* that constrains the General Manager's discretion by specifying any factors that the General Manager must consider above others in determining an appropriate penalty. There is no requirement that "progressive discipline" be applied. Additionally, there are the warning letters referred to above, which are significant in this case.

[24] In that case, the licensee argued against a suspension it considered excessive for a first offence. Clearly, the Court of Appeal did not find that a system of progressive discipline was required by the **Act**. In my view, the issue of progressive discipline is addressed by the different column headings and ranges of suspension applicable to first, second and subsequent offences.

[25] Aztec further argued that the adjudicator should not have justified the higher penalty by concluding that previous monetary penalties had failed to achieve voluntary compliance. In fact, voluntary compliance is a legitimate objective of the **Act**. In ***600428 B.C. Ltd. (c.o.b. Tonic Bar) v. British Columbia (Liquor Control and Licensing Branch, General Manager)***, 2004 BCSC 1422 at para. 25, the court confirmed that both public safety and voluntary compliance are at issue when

determining penalties for overcrowding. The adjudicator makes this same point at para. 61 of her reasons.

[26] In my opinion, it would not make sense if it had not been open to the adjudicator to consider the previous contravention history when determining the penalty for the “first contravention”. The Legislature prescribed a range of penalties for a first contravention; however, they did not prescribe mandatory factors that should be considered when determining where within the range the penalty falls. If previous contraventions cannot be considered then what factors, other than the severity of the contravention, would be permitted when determining where within the range the penalty falls? In my view, the adjudicator may consider a variety of factors as long as they are reasonable and relevant. Considering the objective of the **Act**, the previous contravention history is a relevant consideration. Aztec still benefits from section 1(1)(b) because it was not open to the adjudicator to impose a suspension of more than seven days.

[27] Counsel for Aztec also argued that the previous contravention history was not the same as the contravention at issue because the earlier infractions were only contraventions for being over person capacity and not over occupant load. Therefore, he argues, the adjudicator’s consideration of the previous contraventions was improper. I do not agree. It would have been improper if the previous contraventions had been considered with respect to determining the appropriate range of penalty under Schedule 4; this much is clear from section 1(1)(a). However, this is not the purpose for which they were considered. Aside from the ranges available under Schedule 4, by which the adjudicator abided, there is nothing

in the **Act** which prohibits the consideration of previous contraventions that are similar to the one at issue. In fact, the adjudicator did not conclude that Aztec had a history of being overcrowded beyond occupant load, she determined that Aztec had a history of non-compliance with the “overcrowding provisions of the legislation.” This was not a misstatement of the circumstances and was not an improper conclusion to reach.

#### **IV. CONCLUSION**

[28] For the reasons stated above, Aztec’s application for judicial review of the decision of the adjudicator is dismissed. The General Manager is entitled to the costs of defending the application on Scale 3.

“THE HONOURABLE MR. JUSTICE MELNICK”