IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***C.P. White Holdings Inc. v. Liquor Control and Licencing Branch,*** 2007 BCSC 1810

Date: 20070801
Docket: 07-2320
Registry: Victoria

Between:

C.P. White Holdings Inc. dba Plan B Nightclub

Petitioner

And:

General Manager, Liquor Control and Licencing Branch

Respondent

Before: The Honourable Mr. Justice R.D. Wilson

Oral Reasons for Judgment

In Chambers
August 1, 2007

Counsel for Petitioner	A. Rafuse
Counsel for Respondent	S. Martorana
Place of Hearing:	Victoria, B.C.

[1] **THE COURT:** All right. I follow Mr. Justice Burnyeat. I confirm the determination of contravention, but send the matter back for reconsideration of the appropriate penalty. I do that for the following reasons.

[2] The petitioner, C.P. White Holdings Inc., is a licencee under the ***Liquor Control and Licencing Act***, R.S.B.C. 1996, c. 267. That corporation came into that status as a licencee, pursuant to a transfer of ownership of an existing licence, on an application by C.P. White Holdings Inc. to the Liquor Control and Licencing Branch on 18 April 2005. On the application for that transfer, the petitioner, C.P. White Holdings Inc., identified itself as the applicant. It defined a mailing address of 1318 Broad Street, Victoria, British Columbia.

It also reflected an "office of record" address. This "office of record" designation was a provision of the standard form application for transfer, to be inserted if different from the mailing address referred to above. The office of record address is given as Browne Associates, Barristers and Solicitors, 1633 Hillside Avenue, in Victoria, British Columbia. The transferee is identified as a private corporation.

[3] On 29 December 2005, Licence Number 113949 was issued to C.P. White Holdings Inc., which licence was set to expire on 31 December 2006. Among other things, that licence reflects that the capacity of the Plan B Nightclub, located at 1318 Broad Street, was identified as, “Person 01 292”. The mailing address of Plan B Nightclub was, as well, 1318 Broad Street, Victoria, B.C.

[4] In the early morning hours of 2 July 2006, members of the Victoria Police Department and a representative of the General Manager attended the Plan B Nightclub premises and made observations, upon which, they concluded, there were between 300 and 400 people in attendance at that time. A representative of C.P. White Holdings Inc. was then told that there was a contravention. On 4 July 2006 a contravention notice, on a form headed with the "British Columbia Liquor Control and Licencing Act and Regulation, 244/ 2002", was prepared.

[5] The establishment name in that contravention notice is Plan B Nightclub. The licencee name is given as Plan B Nightclub. The contravention is said to be overcrowding beyond person capacity, greater than occupant load. The contravention is said to be of s. 6(4) of the Regulations. The contravention notice is endorsed with the words “Registered mail and copy one and two, mail registered”.

[6] At a subsequent hearing, it was apparently said that the contravention notice had been sent by registered mail to C.P. White Holdings Inc. at Browne Associates, Barristers and Solicitors, at the address which had been provided in the application for the transfer, which I referred to above.

[7] There was then prepared another form document called Notice of Enforcement Action. It is dated 6 November 2006. It is addressed to C.P. White Holdings Inc., Browne Associates, Barristers and Solicitors, 1633 Hillside Avenue. At the subsequent hearing I referred to, it appears that it was common ground that the licencee was in receipt of a Notice of Enforcement Action. It was also, apparently, common ground that there was, included as an attachment, to that Notice of Enforcement Action documentation, a copy of the contravention notice of 4 July 2006.

[8] In result, a hearing was convened, and held, on 20 March 2007 and 8 May 2007. The adjudicator issued her decision in which she found, among other things, that there had been a contravention; that it was a contravention which attracted a minimum penalty of four days suspension of the licence.

[9] The licencee has made an application for a review of that decision, by that adjudicator, under the provisions of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241.

[10] There are two branches to the application for review in which error is alleged, within the meaning of the notion of error, in the context of a judicial review proceeding. First, says the petitioner, the adjudicator fell into error in finding that there had been compliance with the notice provisions prescribed in the Regulations, particularly, -- or specifically, Liquor Control and Licencing Regulation No. 64(1) which prescribes as follows:

> If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

[11] That objection was made to the adjudicator. The argument was that the Legislature, by using the word “provide” must have meant that written notice must go into the hands of the licencee. Mailing the notice, goes the argument, is not sufficient if the licencee did not receive it. The adjudicator rejected that argument by the now petitioner. She said, among other things [as read in]:

> I interpret the word “provide” broadly to include all reasonable and acceptable methods of providing written notice, and registered mail is such a method.

[12] I am not persuaded by the petitioner that there is any error in that conclusion of law. Notably, the Legislature did not say that this notice had to be "served" on the licencee. It said the inspector must provide written notice. I am not persuaded by Mr. Rafuse that a more "appropriate" method of registered mail is available to the inspector. That is to say by either the mailing address which, on the evidence, apparently had been used at least on one other occasion by the General Manager, as the mailing address and the business address of the licencee; or, by registered mail to the registered and records office of the company. However, according to the information before the adjudicator, there was a mailing address of Broad Street and an office of record address which was different from the address identified by the licencee as Browne Associates.

[13] I am not persuaded the adjudicator committed error in finding that provide does not mean that the notice must be personally served, or that there is any requirement under the legislation for the licencee to be shown to have, in fact, received it.

[14] If I am wrong in that conclusion, then I find that it would be what the Legislature defined in the ***Judicial Review Procedure Act*** as a “defect in form or a technical irregularity”, in that the registered mail did not go to address A and instead went to address B, because it is clear on the evidence before the adjudicator, that the licencee did receive the notice of the intention to enforce or Notice of Enforcement Action. I do not know if there is any evidence of the date of delivery to the licencee but certainly the notice is dated in November of 2006.

[15] The hearing, as I said, was conducted 20 March 2007. The licencee appeared, apparently with witnesses and represented by counsel who made submissions on the licencee’s behalf.

[16] I find that there was no substantial wrong if I am incorrect in my interpretation of the statute providing for the necessity of notice. I am also satisfied that there was no miscarriage of justice.

[17] I agree with Ms. Martorana that the licencee received a fair hearing. It was given adequate notice; was able to prepare; was able to attend; make submissions and lead evidence on its behalf. Therefore, I would confirm the adjudicator’s decision that notice had been perfected.

[18] The adjudicator then went on to make some findings of fact relative to the penalty to be imposed upon the determination that there had been a contravention. First, she made the finding of fact that a representative of the licencee, normally the door person, acknowledged that the number of persons in the premises, as counted by police officers, was over the licenced capacity of 292. She found further that even if the people outside of

the room itself, namely those persons on a landing, were excluded, the number of persons in the nightclub, on the night of the investigation, exceeded the licenced capacity of 292. Finally, she found that the licencee contravened s. 6(4) of the Regulation by allowing more persons in the Plan B Nightclub than the licenced capacity.

[19] I pause to state that the licence number 113949, printed 29 December 2005, has included in it the words “capacity persons 01 292”. That much is clear.

[20] Having made the finding, the adjudicator turned her mind to the penalty to be imposed. What she said about that is:

> There is no record of prior contraventions, offences, or enforcement action of the same type for this licencee or this establishment within the year prior to this contravention. Accordingly, pursuant to the Regulations, Schedule 4, Item 15, the range of penalties for a first contravention is a four to seven day suspension and/or monetary penalty of $4,000 to $7,000.

[21] In result, the penalty of four days suspension was imposed. That is the second error, says the petitioner, into which the adjudicator fell. This is so because the Regulation prescribes the penalties that may be imposed; and those penalties, among other things, are dependent upon the nature of the contravention.

[22] Schedule 4, Item 15, permits the levy of a penalty for a first contravention of not less than four, nor more than seven days, and it is attracted in the following circumstances:

> 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.

[23] The petitioner says that where the adjudicator fell into error was imposing that penalty without finding as a matter of fact what the occupant load was; and that is important because under Schedule 4, Item 14, a different penalty is prescribed under the general heading, “Overcrowding”. Item 14 reads as follows:

> 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 less than or equal to the occupant load.

In which event the penalties for first contravention are not less than one nor more than three days suspension, or not less than $1,000 or more than $3,000.

[24] Nowhere in her reasons for decision does the adjudicator make a finding of what the occupant load is. It seems to me that in the application of Item 14 or 15, the necessary and sufficient condition is a definition of the occupant load.

[25] I am not persuaded by Ms. Martorana that this is simply a matter of wording and that I am offending the principles of law which prohibit trial judges meticulously parsing the wording used by an administrative tribunal. I think this is more substantial than that. As I say, the necessary and sufficient condition for the application of either 14 or 15 is dependent upon the occupant load.

[26] There was, arguably -- I agree with Ms. Martorana on this -- some evidence before the adjudicator of an occupant load in a plan in which somebody has endorsed the words “March 25, 2003, maximum occupant load is 292 persons”, but the adjudicator did not turn her mind to that. I think that the finding of what the occupant load was, was essential in determining which of the items in the schedule were to be applied.

[27] I, therefore, quash the penalty provision and remit the matter back to the adjudicator for reconsideration as to the appropriate penalty.

[28] In coming to the conclusion I did, I have relied upon a decision at the trial level of ***Skybar Ltd. v. General Manager, Liquor Control and Licencing Branch***, 2005 BCSC 235, affirmed by the Court of Appeal in 2006 BCCA 62, and ***The Plaza Cabaret Ltd. v. General Manager, Liquor Control and Licencing Branch,*** 2004 BCSC 248. In both of those cases as I understand them, this court found that there had not been compliance as a matter of law with the provisions of the statute.

[29] There has been divided success in this matter, as there was in ***Skybar*** and, therefore, I make no order as to costs.

[30] Now, Mr. Rafuse, that concludes an explanation of my disposition of the petition and the reasons therefore. Is there anything else I need to deal with?

[31] MR. RAFUSE: Yes, there is a stay at the present of the penalty, but possibly my friend and I can discuss that, rather than involve this court; is that correct?

[32] MS. MARTORANA: I agree with that. I'm just wondering if the court has quashed the penalty provision of the decision and resubmitted it. There is no suspension --

[33] THE COURT: There is nothing left then for it.

[34] MS. MARTORANA: -- right now. Yes.

[35] THE COURT: Until you get the reconsideration.

[36] MS. MARTORANA: Yes.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson