



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING 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:	C.P. White Holdings Inc. Plan B Nightclub 1318 Broad St. Victoria, BC V8W 2A9
Case:	EH06-138
For the Licensee	Malcolm McMicken McMicken & Bennett 303-1111 Blanshard Street Victoria, BC V8W 2H7
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	K. McIsaac
Date of Hearing	March 20, 2007
Date of Decision	May 8, 2007

INTRODUCTION

Plan B Nightclub (“club”) in Victoria, is owned and operated by C.P. White Holdings Inc., under Liquor Primary Licence, No. 113949. The licence stipulates that the club’s hours of sale are from 7 p.m. to 2 a.m. seven days per week, and the licensed capacity is 292 persons. The licence is also subject to terms and conditions, including those contained in the Guide for Liquor Licensees in British Columbia (“Guide”).

ALLEGED CONTRAVENTION

By Notice of Enforcement Action (“NOEA”), dated November 6, 2006, the Liquor Control and Licensing Branch (“branch”) alleged that on July 2, 2006, the licensee contravened section 6(4) of the *Liquor Control and Licensing Regulation* (“*Regulation*”), B.C. Reg. 244/2002, by “overcrowding beyond person capacity greater than occupant load.”

The branch proposes a penalty of a four (4) day suspension of the liquor licence

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUE

1. Whether the licensee contravened section 6(4) of the *Regulation*?
2. If so, what is the appropriate penalty, if any?

EXHIBITS

- Exhibit No. 1 Liquor-Primary Licence Application of C.P. White Holdings Inc. dated April 5, 2005
- Exhibit No. 2 Branch's Book of Documents
- Exhibit No. 3 Licensee's Book of Documents
- Exhibit No. 4 ' Liquor-Primary Licence Terms and Conditions' from the Guide

PRELIMINARY MATTER

Counsel for the licensee submits that when the licensee did not receive the Contravention Notice, sent by registered mail, the branch failed to provide written notice pursuant to *Regulation* s. 64(1), and therefore, the enforcement hearing is a nullity.

Section 64(1) reads:

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.

Counsel for the licensee submits the term "provide" does not define by what methods written notice can be provided, for example, by mail. Therefore, the logical interpretation is that the branch must get the written notice into the hands of the licensee, and mailing the notice is not sufficient if the licensee does not receive it. Counsel acknowledges that the licensee was informed of the contravention by the liquor inspector and received a copy of the Contravention Notice attached to the NOEA sent November 6, 2006.

The branch advocate submits that the Contravention Notice was sent to the licensee by registered mail to the address on record. That address was given to the branch when the licence was transferred in 2005 and the branch has not been informed of a change of address.

I find the branch satisfied the requirements of the *Regulation* s. 64(1) when it sent the Contravention Notice by registered mail to the licensee's address on record at the time of the contravention.

I do not interpret s. 64(1) as imposing on the branch an obligation to provide written notice to the extent that if the licensee does not receive notice, for any reason, further proceedings would be a nullity.

I interpret the word; "provide" broadly to include all reasonable and acceptable methods of providing written notice, and registered mail is such a method. The onus is on the licensee to notify the branch of any change of address and as the branch did not receive any change of address, sending the notice to the address on record sufficiently fulfilled the branch's obligations. As the licensee was verbally informed of the contravention, as well as receiving the Contravention Notice with the NOEA, I am satisfied there was no prejudice to the licensee.

EVIDENCE

These are the facts as I determined.

On the evening of July 2, 2006, the liquor inspector and four Victoria police officers teamed up to conduct routine checks of establishments in the downtown Victoria area. The lead officer ("constable") that evening, and the liquor inspector had conducted many licensed premises checks in the downtown area and were familiar with the Plan B Nightclub. The group arrived at the club at approximately 12:45 a.m. The constable asked the doorman for his door count of persons in

the club and he informed her the count was 304. He acknowledged that the count was over the licensed capacity of 292. The doorperson used two mechanical counters: one to count patrons in and one to count patrons out. The constable commented that the club was over capacity and the doorperson replied, "No, not really". Although the doorperson could not recall that conversation, I accept this conversation took place. He did not deny it and I find no reason to disbelieve the constable.

After informing the liquor inspector of the doorperson's count, the constable, accompanied by another police officer, and the liquor inspector, proceeded up the stairs to the establishment. Using their own mechanical counters, they conducted separate counts of persons in the club. The constable's initial observations were that the establishment was not overly crowded. However, by the time she counted half the persons on the dance floor her counter was up to 360 persons and she stopped counting. The constable recorded the number in her notebook. She testified that compared with past visits, the dance floor was far more crowded. The liquor inspector testified there were approximately 100-125 patrons on the dance floor and this estimate was not challenged. The inspector counted 335 persons and also recorded the number in his notebook. Both counts did not include staff but did include patrons on an outside landing. The inspector testified he observed approximately 15-20 patrons on an outside landing. This differs substantially from the doorperson's estimate of 40 persons; however, the inspector acknowledged there could have been more.

After advising the liquor inspector of her count, the constable waited until he conducted a second count. The inspector's second count was 381. I accept the inspector's testimony that he was not influenced by the constable's count and makes his own observations and judgments.

The constable and liquor inspector exited the club, proceeding down the outside stairs. The doorperson conducted a separate floor count and informed the inspector he counted 320 persons.

The general manager testified that it was a crazy atmosphere outside that evening as it was Canada Day. He also testified that he had a conversation with a female police officer that indicated that it did not appear there would be a problem. The constable denied that she had this conversation and I accept her testimony. The evidence indicates there was a second female officer present that night and, even if the officer had such a conversation with the manager, I find nothing turns on this evidence as she remained outside and did not observe or conduct a count of the persons in the establishment.

Although the licensee was at the club, he did not see or speak with the liquor inspector or police officers during the inspection as he was busy working behind the bar. He confirmed that the general manager was in charge of door staff that night. I accept the licensee's evidence there was 20 staff rather than the general manager's evidence there was 14 staff as the manager under cross-examination, said he could not recall telling the liquor inspector but said that is what he would say.

SUBMISSIONS

Licensee

Counsel for the licensee submits the constable's count is grossly at variance with other evidence, and considering she only counted ½ the dance floor, her total could be over 400. He says the discrepancy does not resolve the issue of numbers and says the only cogent evidence was that of the doorperson as his count was the only attempt to resolve the discrepancy in numbers.

Counsel submits that patrons in the smoking area should not be included in the count. He says the *Regulation*, section 6(4) states there must not be, in the licensed establishment at any one time, more persons than the person capacity. As the smoking area is outside the licensed area, described by a red line on the plans, patrons in the smoking area should be excluded from any floor count as they are outside the licensed area at that time. Counsel for the licensee submits that deducting 20 staff and 40 persons in the smoking area from the doorperson's count of 320 would bring the club below capacity.

Branch

The branch submits the patrons on the landing or smoking area should be included in the count as they are included in the floor counts.

Alternatively, the branch submits that even if the licensee's argument is accepted and patrons in the smoking area are excluded, the number of person in the establishment would still be in excess of capacity as the liquor inspector and constable's counts were 381 and 360 respectively and did not include staff.

ANALYSIS AND DECISION

Notwithstanding the landing is outside the red lined or licensed area, I find the patrons on the landing or smoking area, are essentially within the licensed establishment for the purpose of determining the number of persons in the establishment at any one time. This area, a series of small landings and stairs, outside and adjacent to the main licensed area, is convenient for patrons who wish to smoke or use a cell phone. It is agreed, this area is not a point of entry into or exit from the club and indeed, the lower stairs are blocked off with tape. There is a continual flow of patrons entering and exiting this area. Although staff is stationed inside the doorway to the landing, patrons are not counted as they enter or exit this area. The number of patrons on the landing is not accounted for in the door count. Patrons in this area, however, are included in room counts

and there is no evidence to suggest they are not. I find this evidence indicates that patrons on the landing are considered even by the staff to be part of the licensed area. If patrons in the area were excluded, room counts and door counts would be difficult, if not impossible to reconcile.

I find that even if the patrons on the landing were excluded, the number of persons in the Plan B Nightclub on the night of the investigation would still exceed the licensed capacity of 292.

Adding 20 staff and half the number of patrons on the dance floor to the constable's count of 360, would bring her count to well over 400. I do not find this result so grossly at variance with the liquor inspector's count as counsel for the licensee suggests. Adding 20 staff to the inspector's second count of 381, would also put his count over 400.

I found the constable and liquor inspector's testimonies consistent and reliable. They are objective third parties, experienced in conducting inspections and both recorded their findings in their notebooks right away. Taking into consideration the circumstances and the difficulty in conducting counts given the number and movement of persons in the establishment, I find the constable and liquor inspector's counts reasonably establish that the number of persons in the club was well over the maximum person capacity.

I am not so confident in the doorperson's floor count of 320 persons. Although he informed the liquor inspector that his count did not include staff, he testified that it did include staff. I prefer the liquor inspector's evidence as he recorded this information in his notes at the time (Exhibit 2, Tab 3). Given this evidence and the fact that the doorperson could not remember the conversation with the constable, I find his evidence self-serving and unreliable.

I also give little weight to the door counts of 304 and subsequent door counts. They were significantly lower than the floor counts including the doorman's count of 320, not including staff. Both the doorman and manager acknowledged the door counts could be wrong and I accept the floor counts conducted by the liquor inspector and constable as a more accurate assessment of the persons in the establishment that evening.

I find, therefore, the licensee contravened section 6(4) of the Regulation by allowing more persons in the Plan B Nightclub than the licensed capacity.

Due Diligence

The defence of due diligence is a complete defence to contraventions under the *Act*. The onus is on the licensee to demonstrate on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. The licensee must also establish that the employee connected to the contravention was not the directing mind of the licensee. The existence of policies is not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignores it, or makes no effort to see that it is enforced (*R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 QL 21; *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)* 2004 BCSC 248; *Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2005 BCSC 1465).

In this case, the defence of due diligence was not raised by the licensee and I find the evidence was insufficient to establish that the licensee had met the requirements of the defence.

I find the general manager was the directing mind of the licensee with respect to the contravention. He was at the front door, managing staff and was responsible for monitoring the number of persons in the club that night. The licensee was present that night and as he was busy working behind the bar, did not see or speak with the liquor inspector or constable. He acknowledged the manager was in charge of door staff. The staff knew he was present but did not tell him that the door count was 304 over the licensed capacity.

The significant difference between the door counts and floor counts that evening lead me to conclude the system in place to monitor the number of persons going into and out of the club was inadequate. The doorman's attitude that 304 was not so overcrowded and his lack of understanding of the consequences of overcrowding further indicate the existing systems such as training were not sufficient to prevent the numbers of persons in the club exceed the licensed capacity.

I also find the licensee could reasonably have anticipated the evening, a holiday, would be busier than usual. However, there is no evidence that extra measures were taken to ensure that the number of persons did not exceed capacity.

PENALTY

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

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 by the minimums set out in Schedule 4 of the *Regulations*. However, 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.

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

The branch submits that a penalty is appropriate as the licensee was given a four-day suspension for serving liquor after hours only months after receiving the licence. Particularly, the evidence of staff that 304 persons is “not really overcrowded”, requires a strong message that the person capacity needs to be adhered to, and a four-day suspension should communicate this message.

I am satisfied the licensee knew and understood the consequences of contravening the legislation. On June 14, 2005, he met with the liquor inspector for an initial interview. The inspector testified that he was very thorough and clear regarding enforcement action. He also gave the licensee a copy of the Guide. The licensee had a further opportunity to review his obligations a few months later when he received a four-day suspension for a contravention of a different type.

I find the contravention was serious in that the number of patrons far exceeded the licensed capacity thus indicating a disregard for the safety of the patrons and staff and acceptable community standards. The crowded conditions on the dance floor should have alerted staff to the possibility the club was over capacity.

I am further persuaded that a penalty is needed to encourage voluntary compliance as the evidence indicates that no steps were taken to reduce the number of patrons when it was known the establishment was over capacity.

In considering the appropriate penalty, I have also taken into consideration the licensee's subsequent implementation of logbooks to record door counts and floor counts throughout the evening.

Given the evidence, I find a penalty is warranted and that the recommended penalty of four (4) days is appropriate.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 113949 for a period of four (4) days, to commence as of the close of business June 8, 2007 and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulation*).

I direct that Liquor Primary Licence No. 113949, be held by the branch or the Victoria Police Department from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

"Kathleen McIsaac"
Enforcement Hearing Adjudicator

Date: May 8, 2007

cc: Victoria Police Department

Liquor Control and Licensing Branch, Victoria Headquarters
Attn: Ron Rodrigue, A/Regional Manager

Liquor Control and Licensing Branch, Surrey Regional office
Attn: Shahid Noorani, Branch Advocate

APPENDIX A

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

6 (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 licence 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).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

Definitions

1 (1) In this regulation

...

"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;

"patron capacity", in relation to an establishment, means the maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12 (3) (b) of the Act as the area where liquor may be sold or served;

"person capacity", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment;

Schedule 4 Penalties for Overcrowding

Period of Suspension (Days)	Monetary Penalty
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Contraventions

First	Second	Subsequent	
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Item 14 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

1-3	3-6	6-9	\$1 000 - \$3 000
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Item 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
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