Citation: *The City of Whitehorse v. 6660 Yukon Ltd. (The Capital Hotel),* 2006 YKTC 83

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IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

The City of Whitehorse

Plaintiff

v.

6660 Yukon Ltd. (The Capital Hotel)

Defendant

Appearances:

Lori A. Lavoie	Counsel for the Plaintiff
Andre Roothman	Counsel for the Defendant

REASONS FOR JUDGMENT

[1] 6660 Yukon Ltd., doing business as the Capital Hotel, is facing five counts of violating the current City of Whitehorse smoking bylaw over a two-month period extending from February 28th to April 27th of 2006. These five incidents follow on the heels of two earlier charges which the hotel opted not to defend.

Facts:

[2] The City presented its case through the evidence of three bylaw officers who outlined the following five incidents:

1. On February 28th, Officer Bonnie Howell was checking the woman's washroom located in the bar of the Capital Hotel when she discovered

Judy Lynn McDonald, an employee of the hotel, smoking a cigarette. Ms. McDonald indicated that she knew she was not supposed to be smoking and that she was concerned she was going to lose her job as a result.

2. On March 2nd, Officer Michael Hardie entered the Capital bar through the rear door and observed a female patron sitting at a table smoking a cigarette and having a drink. He further noted a male employee of the bar in the vicinity.

3. On March 10th, Officer Hardie again entered the bar through the rear door of the Capital and noted a male patron sitting at the bar smoking a cigarette. A female bartender was located behind the bar.

4. On March 22nd, Senior Bylaw Constable David Pruden entered the bar at the Capital and observed a male patron standing by the pool table in the process of lighting a cigarette. A female employee, namely Ms. McDonald, stood some five feet in front of the patron, looking directly at him. The gentleman inhaled and exhaled, but Ms. McDonald said nothing until she noted the presence of Officer Pruden, at which time she told the man to get out of the bar.

5. On April 27th, Officer Pruden again entered the bar at the Capital. He observed two female patrons seated at a table, one holding a lit cigarette and the other holding an unlit cigarette. Upon seeing the officer, the woman with the lit cigarette proceeded to throw it under the table.

[3] In each of these five incidents, the actual smokers were charged and all were subsequently convicted of contravening the smoking bylaw. In addition, summary conviction tickets were issued against the Capital Hotel itself for permitting smoking in a prohibited place contrary to section 4 of the bylaw.

Issue:

[4] In addressing the charges, the Capital Hotel does not take issue with the basic facts alleged, but rather, advances the defence of due diligence. The hotel presented its defence through General Manager and part owner, Maurice Byblow who gave evidence regarding the steps taken by the hotel to enforce the smoking bylaw. The sole issue to be determined is whether those steps taken are sufficient to establish the defence of due diligence on a balance of probabilities.

The Law:

[5] In the decision of *Regina v. City of Sault Ste. Marie,* [1978] 40 C.C.C. (2d) 353, the Supreme Court of Canada recognized three categories of offences: true criminal offences in which the prosecution must establish *mens rea* or intent, absolute liability offences in which the prosecution must only establish that the prohibited act was committed, and strict liability offences in which the prosecution need not establish *mens rea* but where the defence of reasonable care or due diligence is available.

[6] The offences before this court properly fall within the strict liability category. For greater clarity, the Supreme Court of Canada, in the *City of Sault Ste-Marie, supra*, defined strict liability offences as follows:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. (page 18)

[7] The Court went on to elaborate on the defence of due diligence in the context of a corporate defendant:

> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are

> the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. (pages 20 and 21)

Evidence Due Diligence:

[8] A determination of whether the Capital Hotel has established the defence of due diligence in this case requires an examination of the evidence of Maurice Byblow. As a preliminary matter in assessing Mr. Byblow's evidence, I would note that the crown has not challenged Mr. Byblow's credibility, nor did I note anything in either the manner or substance of his testimony which would cause me any concerns as to his credibility. Rather the sole question for me is whether the steps taken, as outlined by Mr. Byblow, satisfy me, on a balance of probabilities, that the Capital Hotel exercised due diligence in its efforts to ensure compliance with the smoking bylaw.

[9] Mr. Byblow outlined the steps taken as follows:

1. All staff were provided with information and training at monthly staff meetings. This was done
   - By circulating copies of the bylaw;
   - By walking staff verbally through the hotel's expectations for enforcement which he summarized as follows: advise patron they can't smoke; advise them they will be refused service; and advise them to leave; and lastly,
   - By running staff through mock enforcement exercises by having someone pretend to light up and asking an employee to demonstrate how they would deal with them.

2. A notice was created setting out the policy in simple language. A copy of this notice was filed as Exhibit 7 in these proceedings. It reads as follows:

   > Notice:
   >
   > The City of Whitehorse has banned smoking in all public places and it is unlawful to light up on these premises.
   >
   > Therefore, should anyone be observed smoking, they will be asked to butt out, requested to leave, and denied service.
   >
   > However, our insurance coverage does not allow us to physically remove customers for smoking.

> We ask that you comply with the smoking bylaw, and step outside for a smoke.
>
> Management
> Capital Hotel

Copies of the notice were provided to all staff, and were printed in red, laminated and posted throughout the bar to remind both staff and patrons of the bylaw and the Capital's enforcement policy. I would note that the evidence of the three bylaw officers confirmed that the Capital Hotel had appropriate signage posted throughout the premises at the time of the five incidents.

3. Mr. Byblow spent considerable time speaking to patrons to advise them of the new rules and that the Capital Hotel had to comply with them.

4. Mr. Byblow increased patrols through the bar to check for compliance, and observed bar through the closed circuit camera system, and when an infraction was observed, Mr. Byblow either went up to deal with it himself or directed a staff member to deal with the offender.

5. Calls were made by staff to bylaw for assistance, but a message was received that the voice mail was full. The evidence of the bylaw officers contradicted this to some extent by suggesting this may not be possible, but I am satisfied on the facts that whether the calls were actually placed by staff or not, Mr. Byblow was advised by his staff and honestly believed that such calls had been made.

6. Calls were made by staff to the RCMP for assistance who advised that it was not their problem. Again, I do not have direct evidence of these calls being made, but I am satisfied that Mr. Byblow honestly believed that they had.

[10] Mr. Byblow testified that these efforts to ensure compliance with the smoking bylaw were met with a great deal of resistance from his own staff. Of particular note, he and his former manager did not see eye to eye on the issue of enforcement. As Mr. Byblow felt the manager was not providing adequate direction to the staff on enforcement of the bylaw, the manager was terminated and Mr. Byblow took over day to day operations.

[11] Furthermore, the first of the five incidents, involving an employee found smoking on the premises, makes it clear that other staff were equally resistant to respecting and complying with the bylaw.

[12] Mr. Byblow testified that he took staff members aside whom he felt were not complying and spoke directly to them about his expectations regarding the bylaw. Furthermore, he instituted a policy indicating that staff infractions of the hotel's compliance policy would result in suspension of the employee for one to two shifts.

[13] This policy was implemented with Ms. McDonald, the employee found smoking on the premises. She was suspended following that incident. Ms. McDonald was also the employee involved in the fourth incident wherein the male patron lit a cigarette in front of her and she failed to take action until she noted the presence of the bylaw officer. Ms. McDonald was subsequently terminated. Indeed, Mr. Byblow testified that all of the employees involved in the five incidents before the court have since been terminated. He went on to say that no less than half a dozen employees have been terminated in the last six months. While he did suggest that all terminations were the result of a variety of factors, he nonetheless made it clear that failure to comply with the hotel's policy on enforcement of the smoking bylaw was a major factor in all terminations.

[14] Mr. Byblow went on to testify that he ensured that all new hires clearly understood what was expected of them regarding the smoking bylaw, and he was adamant that the Capital Hotel now rarely has a problem with smoking on the premises, and that they no longer have any problem with staff compliance with the bylaw.

Analysis:

[15] Are these steps as outlined by Mr. Byblow sufficient to establish the defence of due diligence?

[16] In the British Columbia case of *R. v. C.C. Eric James Management Ltd.*, [2000] No. 2853, concerning a charge arising from the sale of tobacco to a minor, the B.C. Provincial Court provided the following statement which is helpful in assessing the sufficiency of a due diligence defence:

> A useful question to keep in mind, and perhaps another way of expressing the test when reviewing the actions of an employer in a case such as this, is what else might the employer have done to prevent the commission of this offence. If it is possible to identify and articulate preventive actions which are reasonable, and which common sense demands in the circumstances faced by the employer, and which were not undertaken, then the defence of due diligence would not protect the employer. (paragraph 6)

[17] The defence argues that the evidence of Mr. Byblow establishes that the Capital Hotel took all reasonable care in its efforts to meet its obligations under the bylaw, and thus has met the test for due diligence.

[18] The Crown takes the position that the defendant has not met its onus in establishing due diligence. The Crown argues that there were other reasonable steps which the defendant failed to take and, as a result, the defence of due diligence must fail.

[19] Firstly, the Crown suggests that the defendant ought to have developed a more extensive written policy for staff, setting out both the law and what steps are to be taken by staff in dealing with infractions. I am somewhat at a loss in determining what a more extensive written policy would have included that would have made any difference in this case.

[20] With respect to setting out the law for staff, I note that the defendant provided the bylaw to all staff. The bylaw itself is relatively brief and straightforward. I am satisfied that staff could not be given a clearer or more comprehensive overview of the law than the actual bylaw.

[21] With respect to setting out the steps to be taken by staff in dealing with infractions, the Crown elaborated that it would be reasonable to include steps similar to those set out in the first bylaw which reads:

> GENERAL PROVISIONS
>
> 5. When the proprietor of any premises has designated the premises, or a portion thereof, as a non-smoking area, he shall:
>
> (1) post signs in a conspicuous locations as prescribed in this bylaw; and
> (2) request that people desist from smoking; and
> (3) if people fail to desist from smoking,
>   (a) take action to report that person to an Officer; and
>   (b) stop serving the smoker and those procuring liquor for the smoker; and
>   (c) remove the smoker from the premises; and
> (4) remove all ashtrays or similar receptacles on tables or other locations where smoking is prohibited by this bylaw.

[22] These provisions, in turn, are similar to the obiter comments of Reilly J. in *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality),* [2000] O.J. No. 2985, regarding what may be expected of a proprietor in ensuring compliance with a smoking bylaw:

> Without wishing to pre-judge the facts or the application of the law to any pending or future case, I would suggest that in an individual fact situation a proprietor might be simply expected to demonstrate reasonable efforts to "ensure compliance" with the by-law. Specifically, he or she will be expected to comply with the signage and ashtray requirements of the by-law. Beyond that, such proprietor might be expected to deal with a "smoker" just as they would with any other person under the influence, indecently dressed or otherwise constitutes a nuisance. Proprietors of bingo halls and other public establishments have long dealt with such persons as a matter of common sense. Such person should almost certainly be refused service by the proprietor and requested to leave. If the offending patron refuses to do so, the proprietor may well contact the police or by-law enforcement officers. (paragraph 32)

[23] In reviewing the evidence of Mr. Byblow, I note that the policy established by the Capital Hotel does not differ materially from either the steps set out in the

first bylaw or the steps recommended in the *Cambridge Bingo, supra*, case. Furthermore, the majority of the steps in the hotel policy, with the exception of calling the authorities, were clearly reduced to writing by the defendant in the notice provided to all staff and posted in the establishment. This was then expanded on, explained and reinforced verbally in training sessions during staff meetings as well as individual meetings held where there were concerns about an employee's compliance.

[24] I fail to see what more an extended written policy would have included or what this would have accomplished. My views might be different if there was some indication that staff were having difficulty understanding what was expected of them, but, to the contrary, the comments of Ms. McDonald to Officer Howell indicate that she clearly understood that there was to be no smoking permitted by staff or patrons.

[25] The policy in question is not a complex one with numerous alternatives and options, which would demand a more comprehensive written policy. Indeed, as Mr. Byblow himself noted, the steps intended to ensure compliance are really quite simple. I also note that considerable efforts were made to ensure that staff understood the policy and were provided adequate training on how to implement it in practice. The problems in this case arose not from an inadequate policy or inadequate training, but rather from staff resistance to implementing the policy.

[26] Overall, I am satisfied that both the policy developed by the hotel and the manner in which the policy was conveyed to staff were both reasonable and sufficient in all of the circumstances.

[27] The next missed step suggested by the Crown is the defendant's failure to have staff sign an acknowledgement confirming their understanding of the policy and their willingness to enforce it. When asked about this possibility, Mr. Byblow agreed that it was a good idea, but not one he had thought of. Should his failure to think of such an option, negate the defence of due diligence?

[28] In my view, it would be unreasonable to expect such a standard of perfection, by requiring a defendant to demonstrate that every conceivable step was taken. In any given situation there are different options open to an employer to achieve the same or similar ends. If the choice made is a reasonable one, is it fair to then prejudice the employer for not choosing an alternate reasonable option. A signed acknowledgement may well be a reasonable option for addressing demonstrated inability or unwillingness of staff to comply, but it is not the only option. It is equally reasonable, and potentially more effective, to manage non-compliance with disciplinary action, including warnings, suspensions, and terminations, the option chosen by Mr. Byblow in this case.

[29] I am satisfied that the Capital Hotel took reasonable steps to manage the significant problem of non-compliance, and their failure to implement other lesser alternatives for addressing non-compliance should not preclude their advancing a due diligence defence.

[30] Next the Crown argues that Mr. Byblow ought to have increased his patrols and spot checks. Given the many and varied duties of a manager, it would be unreasonable to expect Mr. Byblow to spend all of his time in the bar monitoring compliance. I am satisfied, on his evidence, that he did, in fact, increase his patrols, and that he utilized the closed circuit video system appropriately in an effort to monitor compliance.

[31] Lastly, the crown argues that the defendant ought to have refused entry to known offenders. Mr. Byblow expressed concern about his authority to do so and the potential for liability under Human Rights Legislation. In my view, Mr. Byblow’s concerns are somewhat misplaced in this regard. I see no reason why an establishment could not refuse entry and service to an individual who breaks the law while in their establishment.

[32] However, my conclusion that the defendant would have the authority to bar known offenders does not equate to a conclusion that common sense would demand that such a step be taken on the facts of this case. Each of the smokers

in the five incidents was a different individual, and each was subjected to a sanction in the form of a summary conviction ticket. There was no evidence before me to suggest that they were repeat or chronic offenders in the Capital Hotel. That being the case, a policy barring known offenders would have done nothing to prevent the commission of any of the offences before me, and, therefore, ought not to be a bar to a successful due diligence defence in this case.

[33] As noted earlier, the Supreme Court of Canada in the *Sault Ste Marie, supra,* case set out three elements to be established by a corporate defendant advancing a due diligence defence:

1. the acts of the employee took place without the corporate defendant's approval or direction;
2. a proper system was established to prevent the commission of an offence; and
3. reasonable steps were taken to ensure the effective operation of the system.

[34] There is no evidence in this case to suggest that Mr. Byblow as the directing mind of the corporation was willfully involved in or condoned in any way the failure of individual employees to comply with the requirements of the bylaw. An appropriate policy or system was developed to ensure compliance. All staff were provided with appropriate information and training. Where the effective operation of the system broke down was the unwillingness of staff and even the previous manager to comply with the requirements of the bylaw and the direction given to them by Mr. Byblow. However, I am satisfied that Mr. Byblow took reasonable steps to monitor staff compliance, and when he encountered the non-compliance stemming from staff resistance, he took reasonable steps to manage non-compliance by employing appropriate disciplinary tools.

[35] I am satisfied that the Capital Hotel has established all three elements set out in *Sault Ste Marie*.

[36] Before concluding, however, there is one final issue which needs to be addressed, namely the number of offences in this case. In the case at bar, the Defendant is facing five separate counts over a two month period following closely on the heels of two other infractions. Does the sheer number of offences in this case establish that the efforts of the Defendant were inadequate and therefore, do not amount to due diligence?

[37] In general, subsequent offences will affect the standard to be applied in assessing whether the defence of due diligence has been met. As noted by Bagnall J. in the *C.C. Eric James Management* case:

> Where an infraction has occurred, the employer would do well to alter its policies in order to avoid a recurrence; in other words, a higher standard of care is indeed required because of the failure of the employer's policies and practices to successfully avoid the infraction. (paragraph 11)

[38] When I consider the evidence in this case, I am satisfied that the number of offences should not form a bar to a due diligence defence. As noted earlier, I am satisfied with the system put in place by the defendant and the steps taken to ensure its effective operation. But I also note that the evidence establishes that the defendant was faced with significant performance management issues with both staff and his previous manager resisting his efforts to implement the policy. Clearly, a major shift in the culture of the organization was required. This is not something that is quickly or easily managed, as is evidenced by the fact that the defendant was ultimately unable to successfully create this shift without a virtual turnover of staff. Given the magnitude of the task facing the defendant, two months is not an unreasonable passage of time for the defendant to achieve resolution of its internal difficulties.

[39] That being said, the Capital Hotel has now had its opportunity to clean house and has assured this court that the problems are now resolved. Accordingly, the hotel must now be on notice that should future problems arise, they will not be viewed in the same light.

[40] In the final result, I find that the defendant 6660 Yukon Ltd. has established the defence of due diligence on a balance of probabilities as it relates to the charges before me. Accordingly, all charges are hereby dismissed.

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RUDDY T.C.J.