IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Manship Holdings Ltd., 2007 NSPC 7

Date: February 19, 2007
Docket: 1587951
1587952
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1587954
Registry: Halifax

Her Majesty the Queen

v.

Manship Holdings Limited

DECISION

Judge:	The Honourable Judge Castor H. Williams
Heard:	October 12, 2006 in Halifax, Nova Scotia
Oral decision:	Decision, February 19, 2007
Charge:	s. 9(11)(a), s. 9(11)(b), s. 9(11)(f), s. 9(11)(f) of the Downtown Dartmouth Land Use By-Law
Counsel:	Randall Kinghorne, for the Halifax Regional Municipality (Crown) Mark Knox, for Manship Holdings Ltd. (Defence)

By the Court:

[1] The Halifax Regional Municipality has charged the defendant, Manship Holdings Ltd., alleging that:

> Between April 27, 2005 and October 27, 2005 at, or near 70 Windmill Road, Dartmouth, Nova Scotia did:
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> in the Downtown Neighbourhood Zone fail to comply with the requirements for home businesses by having in their employ more than one employee who was not living in the dwelling contrary to section 9(11)(a) of the Downtown Dartmouth Land Use By-Law, pursuant to section 505(1) of the Municipal Government Act, c.18, S.N.S., 1998;
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> and furthermore at the same place and time, did in the Downtown Neighbourhood Zone fail to comply with the requirements for home businesses by having more than twenty-five percent (25%) of the gross floor area of the dwelling for business use contrary to section 9(11)(b) of the Downtown Dartmouth Land Use By-law, pursuant to section 505(1) of the Municipal Government Act, c.18, S.N.S., 1998;
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> and furthermore at the same place and time did in the Downtown Neighbourhood Zone fail to comply with the requirements for home businesses by unlawfully having more than one sign advertising a home business contrary to section 9(11)(f) of the Downtown Dartmouth Land Use By-Law, pursuant to section 505(1) of the Municipal Government Act, c.18, S.N.S., 1998.
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> and furthermore at the same place and time did in the Downtown Neighbourhood Zone fail to comply with the requirements for home businesses by unlawfully having a sign that exceeded two (2) square feet in area contrary to section 9(11)(f) of the Downtown Dartmouth Land Use By-Law, pursuant to section 505(1) of the Municipal Government Act, c.18, S.N.S., 1998.

Issues

[2] In addition to those issues considered and determined by this Court in ***R.v. Manship Holdings Ltd.,*** [2006] N.S.J. No. 274, 2006 NSPC 31, the unresolved and continuing matters of dispute are: Did Manship Holdings Ltd., employ anyone? If so, how many persons did it employ? Did Manship Holdings Ltd., operate a home business? If so, what was the home business and the percentage of the gross floor area of the dwelling that was used for the home business? Did Manship Holdings Ltd., advertise to the public, by the use of external signage, the home business in which it was engaged? If so, what was the size and numbers, if any, of the signage?

[3] In other words, a resolution of these outstanding issues is of necessity a fusion of the opinions expressed in 2006 NSPC 31 and the evidence now tendered to support the Crown's actual case against the defendant. Thus, this case is a final determination of whether the defendant did violate any applicable bylaws.

Summary of the Relevant Evidence

[4] The Halifax Regional Municipality Police had an interest in and were investigating what they perceived to be illicit activity conducted by person or persons in the subject premises owned by the defendant. As part of an investigation team to gather evidence, Constable Barry Bonang of the Halifax Regional Municipality Integrated Vice Squad, acting as a decoy, at 2337 hours on April 27, 2005 went to the premises.

[5] Constable Bonang described it as a "gentleman's massage parlour " that was "in session" as he saw two neon signs that said "open." He knocked on a door and was allowed to enter. On entry, he was met by a female whom he described as a receptionist and with whom he had a discussion concerning the cost of a massage. Two other females came from another area of the premises and he was requested to make a choice between these females and the kind of massage or sexual services that he wanted. He assumed that all the females were "employees" but neither did he ascertain who employed them nor obtained or examined any register or documents to show who, if anyone, in fact, employed them. However, the officer emphasized that he

was present only as part of an undercover operation to gather evidence of the operation of a common bawdy house and not to gather evidence of the violation of any Municipal bylaws.

[6] The officer in charge of this undercover operation was Detective Constable Brian Johnston of the Prostitution Task Force. He was familiar with the premises and was investigating whether there was the operation, on the site, of a common bawdy house. Under the authority of a search warrant he entered the premises to effect "Criminal Code arrests." He identified and arrested the three women and a male whom he described as the "son of the owner."

[7] Constable Johnston described the interior of the premises as on the top floor there were a kitchen, a living room, common area and a bedroom containing a single bed. On the main level were reception and waiting areas. In addition, there were five rooms on the main floor each with a bed and shower except that one room also contained a Jacuzzi. He observed no clothing or dressers in these rooms but did note that one contained

personnel effects. There was also a common bathroom. The basement was unfinished and undivided with an open area and a crawl space.

[8] In Johnston's opinion, from his definition of a bedroom, there was only one bedroom in the premises as the other five rooms had no dressers in which one could put any clothing. Likewise, in his opinion, without conducting any physical measurements, the bedroom was about "eight feet by ten feet" and was less than half of the floor space. He also opined that the floor space on the second floor was less than that of the other floor. This witness also observed two exterior neon signs, one of which was affixed to the front of the building and the other at the rear. These signs were advertising the business as "open."

[9] Nonetheless, the police removed and seized the signs as evidence in the related criminal proceedings but took neither photographs nor actual measurements of these signs for the case at bar. More to the point, they did not tender these signs as exhibits in the case at bar. Even so, Constable Johnson estimated and opined, without having taken any physical measurements of these critical pieces of evidence, that they were larger than

two square feet and most probably measured four feet by three and one half feet.

[10] Shaun Audas, for six years, was a development Office of the Halifax Regional Municipality. Receiving complaints concerning the subject property he conducted some investigations by checking the ownership records and passing the file over to one William McLeod, the Community Standards Officer. In 2005, on a date he did not recall, accompanied by McLeod, he visited the property and conducted an inspection. He acknowledged that the business conducted on the premises was a massage parlour which, prima facie, was not a permitted use according to the current Land Use Bylaw for Downtown Dartmouth.

[11] However, he tendered a letter, Exhibit C3, dated February 13, 1996 from the City of Dartmouth and signed by one Kevin Warner, Development Control Technician, who had the authorization to do so, to one George Manship at the subject address. This letter accepted the fact that the operation of a massage parlour was permitted provided that, " . . . not more than 25% of the total floor area of the dwelling shall be used for home

occupation." Additionally, the letter informed the recipient that the total floor area of the premises was 2417.36 square feet that an inspection revealed that more than 25%, 603.34 square feet, were being used as a "home occupation" (massage parlour). The recipient was then admonished to correct the situation in order to conform with the Bylaws or face possible prosecution.

[12] Concerning the 2005 inspection, Audas assisted by McLeod measured the rooms but he now cannot recall those measurements. Then, to assist them in their measurement taking and to make any comparisons, they had the Halifax Regional Municipality's filed sketches of the premises. The measurements they then made were close to those sketches.

[13] During this inspection Audas saw what he believed to be a common room with a payphone, television and chairs on the top floor of the premises. Additionally, there was a kitchen. The access to the main floor was from the street and there was a hallway with three bedrooms. He, however, believed that the entire area was "used as business." Likewise, he believed that he measured the interior of a bedroom and although he saw no apparent signs

of any relevant or related activities, he opined that, excluding this bedroom, all the other rooms appeared to be “business related.”

[14] Further observations that he made were that there was an open basement which measured thirty-one feet by thirty-seven feet and, based on their assessment of the size of the house, he opined that the business portion exceeded 25%. He also guessed that between 40% and 50% of the house was business use. Even though he acknowledged that the current 2000 bylaws only permitted a total business use of 300 square feet he admitted that this was half of the square footage that was permitted in the governing bylaws in 1996 that was referenced in the City of Dartmouth’s letter.

[15] However, despite the fact that he was not aware that the 1996 correspondence referred to the conduct of an escort service, he knew and acknowledged that under the 1978 bylaws, that was then in effect, an escort service was a permitted use of the land. Furthermore, he had knowledge, from other sources, that the business conducted on the premises was that of a massage parlour. Additionally, he accepted that the 2000 bylaws restricted the number of employees allowed while the 1978 bylaws did not.

Even so, at the time of his inspection, in 1995, he neither saw nor encountered any “employees.”

[16] William McLeod now retired, at all material times, was the Halifax Regional Municipality’s Community Standards Officer. He visited the premises on at least three occasions. The first time was in December 2004 when a fence was erected. Also, he was there during the police raid on April 27, 2005 and again, with Audas, on June 9, 2005 to do some measurements. McLeod was aware that there were two signs on the building’s exterior but that these signs did not indicate what business, if any, that was conducted on or in the premises.

[17] Nonetheless, on April 27, 2005, with advance police information, and without a search warrant or notice to the defendant, he piggybacked onto the police raid of the premises. When inside and without taking any measurements, he made rough sketches of the ground and second floors that are tendered as Exhibit C6. He also went into the basement but made no sketch of this location. Likewise, he took a series of photographs that are tendered as Exhibit C7.

[18] During McLeod's perambulation of the premises he took note of and photographed the location of the exterior signs. As well, he noted the interior characteristics of the various rooms and that each had a number on its door; the existence of a time punch clock; a coin operated confectionary machine in the kitchen; the absence of any articles of clothing in the bedrooms and that only one bedroom appeared to have signs of occupation. In the basement, he saw two 70-gallon hot water tanks that serviced a shower in each of the bedrooms and a whirlpool. These observations led him to conclude that the premises did not appear to be used as a residence. However, despite all of his conjectures he admitted that the premises could also be used as a rooming house.

[19] Nonetheless, he admitted that he did not find any "customers" in any room and the only persons that he saw were police officers. Furthermore, he did not examine either the appliances in the kitchen or water heaters in the basement to determine whether they were functional, as he surmised, or in any working order.

[20] On June 9, 2005, accompanied by Audas, McLeod returned to the premises to do some measurement calculations. Using a sketch that he obtained from Audas he did some measurements to verify space usage. However, he could not recall the exact measurements but was certain that he did verify the measurements against the sketch. But, he did not measure the exterior signs. Now, however, he could only speak of estimates and the probable uses of the various spaces.

Submissions

[21] The Municipality's position was that the defendant corporation had the onus to prove that it was grandfathered and that the 2000 bylaws were inapplicable. Essentially, Constable Bonang, in his undercover role and part of a bawdy house investigating team, went into the premises to purchase sexual services from the occupant. Within the premises were three female occupants who apparently were engaged, in some degree, with the processing of his request. Also present in the premises was one Wayne Manship whom Bonang described as "the son of the owner." Therefore, the defendant was engaged in the conduct of a business enterprise.

[22] Furthermore, the fact that no records of employment were sought, found or established, did not diminish what was obvious that the females were employed by someone, or at least by Wayne Manship. Also, two employees did not reside on the premises. Additionally, it is clear that the premises was used to conduct business and the two signs that were attached to its exterior indicated that it was open to do business. Moreover, the police estimated sizes of the rooms and space used to conduct business and the size of the signs were credible. Furthermore, the room sizes and other observations such as lack of clothing items, time clock, shower in each room, common room area with television and coin operated confectionary machine, reasonably confirmed the conduct of a business.

[23] On the other hand, the defendant submitted that there was a paucity of evidence to support the prosecution. First, the Municipality's officials took no measurements of the premises or presented them as verifiable evidence of an objective corroborative proof of fact. Instead, it relied upon the subjective views of its witnesses that were biased and speculative and, as

a result, such evidence would be neither an acceptable nor safe basis on which to ground any conviction.

[24] Second, on the evidence, it was difficult to determine who were employees of the defendant, if at all, as the assumption was, without proof of fact, that the corporate defendant was engaged in operating a suspected common bawdy house. The corporate defendant might well be the legal owner of the premises but the Municipality cannot, without proof, attribute any alleged criminal enterprise conducted on or in the premises to it.

[25] Third, the exterior signs did not indicate definitively that a business was in operation as they did not connect intricately to any commercial activity inside the building. The signs, just reading “open,” without more, did not make a definitive connection concerning the kind of business, if any, that was open, if at all, to the public. Also, the 1978 bylaws did not restrict business signage to only one sign.

Analysis

[26] Considering the above posited questions, it is my opinion that any evidence that positively and beyond a reasonable doubt answers them, prima facie, would establish a case for the defendant, Manship Holdings Ltd., to meet. Then, it could avail itself to the defence of due diligence. It is always the burden of the Crown to prove beyond a reasonable doubt that the defendant has violated some applicable law and, it is never necessary for the defendant to prove its innocence. See: 2006 NSPC 31, para.42.

[27] I have reasoned in 2006 NSPC 31, at paras. 19, and 27, that the defendant has an accrued legal right to continue with its non-conforming status. Furthermore, this was not a case where the defendant has to prove an "exception under statute" defence. 2006 NSPC 31, paras. 37 through 41. Even if, as the Crown contended, the defendant had to prove an exception, it would still be incumbent upon the Crown first to establish a case against the defendant. Thus, in any case, the Crown would still have to prove, beyond a reasonable doubt, some violation of the present law to put the defendant to rely upon its lawfully vested right of the non -conforming use. Respectfully, however, the Crown's narrow interpretation of the evidence, as presented, on

this point, in my view, cannot be reconciled against the language and authority of the ***Municipal Government Act***, S.N.S. 1998, c.18, ss.219, 238(1), 261, 505(1) and 538, the ***Interpretation Act***, R.S.N.S. 1989, c.235, ss. 22(3), 23(1), and 24 and the ***Land Use By-Law for Downtown Dartmouth***, ***(July 2000),*** s. 4(ac) and s.5(1). See also: ***R.v. Buday,*** [1960] O.R. 403 (C.A.), ***R.v. City of Saulte Ste. Marie*** (1978), 40 C.C.C. (2d) 353 (S.C.C.).

Application of Principles to this Case

(a) Did Manship Holdings Ltd., employ anyone? If so, how many persons did it employ?

[28] When the police conducted the raid on April 27, 2005, their focus was on gathering evidence of the operation of a common bawdy house and not whether there was a violation of any Municipal bylaws. Thus, they made no enquires of the person that were present as to whether they were employed or by whom. Moreover, they neither sought**,** requested nor received any records or documentation in order to determine or to verify the employment status, if at all, of the occupants that they encountered and arrested.

[29] True, the defendant is the registered owner of the property, Exhibit C 1. All the same, from a criminal investigative viewpoint, the evidence may well point to the fact that the premises was a common bawdy house and those persons arrested either were inmates of or were found, without lawful excuse in a common bawdy house. However, there was no evidence as to whom or what entity, if at all, beyond a reasonable doubt, employed the arrested persons, or that the arrested persons, in fact, were employed by someone. Also, it must be noted that when the Municipality's officials actually visited the premises and did their inspections they neither encountered nor saw anyone working on the premises**.** Consequently, I conclude and find that the Crown has failed to prove beyond a reasonable doubt that the defendant, Manship Holdings Ltd., employed anyone, as alleged**.**

> **(***b)* *Did Manship Holdings Ltd., operate a home business? If so, what was the home business and the percentage of the gross floor area of the dwelling that was used for the home business?*

[30] I recall that the 2000 bylaws s.4 (t) defines "home business" to mean:

> …the use of a dwelling for gainful employment involving the provision or sale of goods or services or both goods and services and without limiting the generality of the foregoing does not include restaurants, take-outs, convenience stores, the keeping of animals, taxi stands, any use pertaining to vehicles, or any use deemed to be obnoxious.

[31] Here, the evidence presented was that at a point in time the defendant may have operated a massage club**.** Exhibit C3. However, I note that the letter was addressed to one George Manship and not to the corporate defendant. Even so, the evidence, however, is unclear as to what business, if any, the defendant currently operates. By way of example only, there was no evidence of any business registration documentation, business cards, bank statements, financial records, employment records or any other relevant and material documentation that would show that the corporate entity operated a home business on the premises.

[32] All the same, assuming, but without deciding, that the defendant operates a home business, in 1996 the total floor area of the premises was noted as 2417.36 square feet of which more than 25%, 603.34 square feet were business use. Now, however, no credible, reliable or trustworthy evidence was presented to establish the current square footage of the total floor area or the percentage, if any, that is used for a home business, if at all. Particularly**,** I am mindful that Audas and McLeod, in 2005, went specifically to inspect the premises and to record its measurements. Exhibit C5. However,

those empirical results were never presented, in evidence, either to support any assertion of fact or as proof to establish the premises' total square footage or to determine what percentage was used for business**.** What I have instead, in testimony, are unsupported subjective beliefs and guesswork, particularly Constable Johnston's and Audas' views, of the percentage of the gross floor area used for business.

[33] Thus, I am not satisfied that the Crown has proved beyond a reasonable doubt that the defendant operated a home business. Furthermore, as no business enterprise has been established beyond a reasonable doubt and, as the present gross floor area also has not been proved beyond a reasonable doubt it is not possible for me to adjudge what percentage of the gross floor area that is used for a home business as alleged, or at all.

(c) *Did Manship Holdings Ltd., advertise to the public, by use of external signage, the home business in which it was engaged? If so, what was the size and numbers, if any, of the signage?*

[34] I do not doubt that two exterior signs were affixed to the building and, I so find. The critical question, however, is: Were these signs advertising a

“home business” as defined in the 2000 bylaws? In my opinion, in order for the Crown to succeeded on this point, it had to prove, beyond a reasonable doubt, that the defendant was providing gainful employment involving the supply for sale of goods or services or both goods and services. Additionally, it must prove that the signs did in fact advertise a home business that was conducted inside the building and which was directly or circumstantially connected to the defendant. Then, it must prove further, that at least one of the signs exceeded two square feet in size.

[35] First, as I have reasoned, I am not satisfied that the Crown has proved beyond a reasonable doubt that the defendant employed anyone. Still, even if I were to apply a broad purposeful interpretation of the 2000 bylaw, without any employees, it seems hardly likely that the corporate defendant can be engaged in gainful employment or the offering for sale of goods and services or both. Moreover, according to McLeod’’s testimony, that I find to be credible and trustworthy on this point, these signs did not indicate what business, if any, that was conducted on or in the premises.

[36] Furthermore, even if I were to accept that the signs did advertise some home business, to ground any liability, I think that I must go further and enquire whether the advertised home business was one that the corporate defendant owned or operated gainfully. Here, in opinion, the evidence was unclear concerning the home business, if any, that was conducted on the premises. Moreover, even if there were any business conducted, I have accepted McLeod's testimony that the signs did not reflect the nature and type of business that he and the police conjectured was being conducted in or on the premises.

[37] Nevertheless, the evidence is clear and I do not doubt and find that the corporate entity is the registered owner of the property. See: Exhibit, C1. Thus, the presumption, without proof of the fact, appeared to have been that the corporate defendant was engaged in the operation of a home business. But, there was no evidence before me on who owned the signs and that the signs did, in fact, advertise a home business operated by the defendant.

[38] Consequently, in my opinion, what has not been established, beyond a reasonable doubt, is a sufficient nexus, either directly or circumstantially,

between the corporate entity and the activities allegedly being conducted on its premises. By way of example only: who are its corporate officers? Did any of its corporate officers, with knowledge of a home business, knowingly place the signs on the building advertising that such a home business was conducted inside the premises? In my view, these were important questions that needed answers.

[39] However, on these fundamental issues there were no answers. Thus, as there was no evidence of the corporate structure of the defendant so as make it possible for me to ground liability through the acts, if any, of its corporate officers, I cannot make a finding that, beyond a reasonable doubt, the defendant had more than one sign advertising a home business. See for example (on corporate liability): ***R.v. Patterson***, [2002] N.S.J. No.242, 2002 NSPC 14, at paras. 32-34.

[40] At the minimum, even if the Crown could have satisfied the burden of the signs' ownership and the advertised home business, in my opinion, it has failed to prove beyond a reasonable doubt the sizes of the signs. Having seized the signs, no one bothered photographing them with measurements, as proof of

size, for the case at bar. No one apparently recorded the measurements, if done, of the signs to present, in this case, as proof positive of their sizes. What, however, was presented was the subjective unsupported opinion of Detective Constable Johnston.

[41] Respectfully, I find the evidence on this fundamental fact in issue to be unreliable and untrustworthy. Furthermore, it is my opinion and, I find that this unusual approach to prove an essential fact of the case to be totally unacceptable. I say so because, in my opinion, neither does it meet the required unbiased objective standard of proof nor the burden on the Crown to present credible, reliable and trustworthy evidence to prove, beyond a reasonable doubt, its case against the defendant.

Conclusions

[42] Throughout this prosecution, I think that a practical and informed person fully apprised of all the facts could readily conclude, as reasonable, that the Municipality, prompted or influenced by neighborhood complaints of a perceived anomalous nuisance, appeared to have taken the dogged quixotic

approach of tilting at imaginary violations. That became evident as the Municipality has admitted that it not only had knowledge of and was fully aware of the fact that, by virtue of the operation of the relevant provisions of the ***Municipal Government Act***, *supra*. , concerning bylaws, but also by the tenets of statutory interpretation enacted in the ***Interpretation Act***, *supra*. , the defendant had a lawfully vested continuing right for the non-conforming use, if it were, in fact, so engaged.

[43] Moreover, as this court opined in 2006 NSPC 31 at paras. 43 and 44:

> 43...In my opinion, rights that are accrued under a sovereign law, are not defenses, per se, against delegated and subordinate enactments such as municipal bylaws. Against such subordinate enactments those accrued rights which are also known to exist by the Municipality, in my view, are not subjected to any diminution or challenge by the subordinate body unless it resorts to the enabling statute, in this case, the Municipal Government Act, for a remedy or relief.
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> 44 The substantive offences created by the 2000 bylaws and under which the defendant is charged, do not grant any exemptions or exceptions in their provisions. The Municipality, however, in adopting these bylaws has acknowledged an accrued right, and with respect to this right, correctly defers to the provisions of the Municipal Government Act, the enabling statute that conferred that right. As a result, in my view, the provisions of the Criminal Code, s. 794(2) which places the burden of proving that it is favoured by "an exception, exemption, proviso, excuse prescribed by law" on the defendant, would not be applicable to this case. I say so because the Criminal Code, s. 794(2) does not refer to accrued rights. To rule otherwise, in my opinion, would be to cloak the bylaws with equal powers with, or supremacy over its enabling statute.

[44] Additionally, it is my opinion, on the legal principles pronounced in ***R.v. City of Saulte Ste. Marie,*** *supra*. , the burden is on the Crown to prove every element of the above charges beyond a reasonable doubt. Then, and only then, it is open to the defendant, to prove, on a balance of probabilities, that it "reasonably believed in a set of facts which, if true, would render the act or omission innocent, or [it] took all reasonable steps to avoid the particular event."

[45] Here, as I have reasoned, I conclude and find that the Crown, in all the circumstances, has failed to prove beyond a reasonable doubt that the defendant:

(a) had any employees, much less any employees that were living on the premises;

(b) operated a home business or had a home business that used more than 25% of its gross floor area;

(c) had more than one sign advertising a home business or had a sign that exceeded two square feet in size advertising a home business.

[46] That being the case, and because as I have reasoned and found, it became unnecessary for me to make any further analysis. In the result, I find

the defendant not guilty, as charged, of all the counts on the Information tried before me.

J.