

A Hearing under Section 6 of the *Tobacco Control Act* R.S.B.C. 1996, c. 451
as amended

Regarding an alleged Contravention of Section 2.4(a) of the
Tobacco Control Act R.S.B.C. 1996, c.451

- by -

786 Bentley Convenience Store Ltd.
Sometime doing business as Bentley Convenience Store

(the “Respondent”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Helen Pinsky
Date of Hearing:	February 11, 2014
Place of Hearing:	Surrey, BC
Date of Decision:	March 6, 2014
Appearing: For 786 Bentley Convenience Store Ltd.	Abdul Hafeez Abdul Noor
For Fraser Health Authority:	Edward Wong Tobacco Enforcement Officer

Decision and Order

BACKGROUND

1. The Respondent 786 Bentley Convenience Store Ltd. (the “Respondent”) is a company which, at the times of the incident and of the hearing, was doing business as Bentley Convenience Store, in Surrey, British Columbia (the “Store”).

2. Abdul Hafeez and Abdul Noor are the principals and owners of the Respondent, and Abdul Hafeez is the operator of the Store.
3. Edward Wong, a Tobacco Enforcement Officer (TEO), appeared on behalf of the Fraser Health Authority (FHA).
4. On December 19, 2013, a Notice of Administrative Hearing was issued under the Tobacco Control Act, R.S.B.C. 1996, c. 451 (The “Act”), to 786 Bentley Convenience Store Ltd. (The “Respondent”), sometime doing business as Bentley Convenience Store (The “store”), for a hearing to determine whether the Respondent had committed a contravention of the Act, and allowing for an Order to be made. The hearing date was set for February 15, 2014 at 10:00 am. This was later changed by mutual consent of all the parties to February 11, 2014, at 10:00 am.
5. Service of the Notice was confirmed at the hearing.

ISSUES

6. Was there a contravention of section 2.4(a) of the Act?
7. Did the respondents demonstrate to the satisfaction of the administrator the defence pursuant to section 12 of the Regulations, that they exercised due diligence to prevent the contravention?
8. If a contravention did occur, what is the appropriate penalty for the contravention?

LEGISLATIVE FRAMEWORK

9. The Act sets out the manner in which a person may deal in, sell, offer for sale, distribute, provide, advertise or promote the use of tobacco in British Columbia. It establishes prohibitions and penalties for non-compliance. Specifically:

Section 2.4(a) of the Act prohibits the display of tobacco products in any manner prohibited by the Regulations.

Section 6.1(1) of the Act permits the administrator to make an order under Section 6.1(2) if satisfied that a person has contravened of a provision of the Act or regulations, or of an order of the administrator. Section 6.1(2) specifies that the order may be the imposition of a monetary penalty on the person, or it may be a prohibition of that person from selling tobacco or offering to sell tobacco at retail from the location at which the contravention occurred, or under certain circumstances, from any other location.

10. Section 4.31(1) of The Tobacco Control Regulation (the “Regulations”) establishes that “A retailer must not, on the premises of a retail establishment, display tobacco products, or advertise or promote the use of tobacco, in any manner by which the tobacco products or the advertisement or promotion
(a) may reasonably be seen or accessed by a minor inside the retail establishment or

(b) are clearly visible to a person outside the retail establishment.”

11. Section 4.3 of the Regulations defines “minor” in section 4.31 as “a person who is under 19 years of age”.
12. Section 12 of the Regulations states that a person must not be found to have contravened a provision of the Act or regulations prescribed under section 6 if the person demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention.
13. Section 13 of the Regulations sets out those considerations which must be taken by the administrator in imposing an administrative penalty on a person for contravention of a prescribed provision of the Act or regulations.

EVIDENCE

14. Eddy Wong and a Minor Test Shopper (MTS) gave evidence on behalf of the FHA. Abdul Hafeez gave evidence on behalf of the Respondent.
15. On October 19, 2013, Mr. Wong, a TEO since August 2005, was conducting compliance tests in the Surrey area, which is his enforcement territory. Accompanying him was a MTS and companion. The FHA hires persons between the ages of 15 and 17 to act as MTS. They are instructed to dress age appropriately, enter stores where they observe for tobacco infractions, and attempt to purchase tobacco products.
16. Previously, the FHA had noted other contraventions of Act on the premises, namely, sale of single cigarettes to a person, and tobacco products visible from point of sale, on April 16, 2009. The owner Abdul Hafeez was issued a violation ticket for selling cigarettes from an open package. Further, the FHA issued notices to the respondent on May 6, 2010 for displaying tobacco and tobacco products in a prohibited manner; on March 14, 2011 for the same contravention, on January 31, 2012 for a related matter, with a violation observation to ensure that all tobacco products and accessories are not visible; on November 27, 2012 for displaying tobacco accessories and promoting tobacco in a prohibited manner; on March 28, 2013 for displaying tobacco products in a prohibited manner. In all these instances the FHA issued a notice that a violation occurred, and on March 28, 2013 contained a warning that further such conduct would result in the issuance of a violation ticket, or other punitive action.
17. At 15:15 on October 19, 2013, the MTS, on duty with Mr. Wong at the time, entered the store with a companion. He was instructed to look for tobacco or tobacco products on display, and to try to buy cigarettes. He walked by the front counter, and noticed the open display of cigarettes behind it. There were two curtains which were supposed to cover the tobacco shelves, but one was open. He walked to the back of the store, then walked back and attempted to purchase cigarettes, but was refused purchase. He says he was able to see up to 40 packs of cigarettes, and specifically named Next Red and Blue, and that he could see the display from all points in the store.

18. The MTS then left the store, returned to Mr. Wong's vehicle, and informed him of the violation.
19. At 16:15 on the same day, October 19, 2013, Mr. Wong entered the store. He saw Mr. Hafeez and recognized him as a proprietor. He noticed that the curtains in front of the tobacco display were open and all the tobacco was visibly on display. He identified himself to Mr. Hafeez, and took two photographs of the tobacco display, including one photo of Mr. Hafeez in front of the display. Those photographs, copies of which were entered at the hearing as exhibits, clearly indicate an open display of packages of cigarettes and other tobacco products, because at least one curtain was pulled open. At the time, Mr. Hafeez told Mr. Wong that he was stocking the shelves, but Mr. Wong saw no open cartons around or near the counter.
20. In his evidence, the MTS inspected the photographs, and noted that they did not represent the exact location of the curtains during his visit earlier that day, but that the display was similar, and that he recognized the tobacco products from his memory of the earlier viewing.
21. Mr. Wong issued a tobacco inspection and activity report and served it on Mr. Hafeez as a principal of the Respondent.
22. Mr. Hafeez's normal practice when at the retail counter of his store was to pick up a curtain or set it to one side when selling tobacco, and then to drop it when the transaction is completed. He noticed the MTS and companion in his store on the day in question, and he was aware that the curtain was open to display tobacco products. He says he was concerned with keeping an eye on them at the back of the store for reasons of security and theft, rather than with leaning back, losing his gaze on them, and closing the display curtain.
23. Mr. Hafeez accepts that there was a violation on the day in question. He was in the middle of arranging for a new cabinet to be built behind the counter. It is now constructed and installed, and there are doors which automatically drop down and close after they have been opened. The doors hide all tobacco products from display.
24. Mr. Hafeez says that in order to conceal the tobacco products they originally used plastic curtains, but those fell apart. They then used a shower curtain, then steel framing. His last attempt was heavy curtains, but they exposed a slight gap in the centre. He says that the cabinet with drop-down doors is their latest attempt at compliance with the legislation and that he is confident they will provide good concealment.

ANALYSIS AND FINDINGS

25. The first issue to determine is whether the FHA has proven on a balance of probabilities that the Respondent displayed products in a prohibited manner, in contravention of the provisions of section 2.4(a) of the Act. Based on the evidence before me, including the

statement of the MTS, his confirmation of the photographic evidence, and the statements of all parties, I find that in fact the Respondent did contravene section 2.4(a) of the Act on October 19, 2013.

26. The second issue is to determine whether the Respondent has demonstrated to the satisfaction of the administrator the defence pursuant to section 12 of the Regulations, that they exercised due diligence to prevent the contravention. While the Respondent admits that on the day in question, on two occasions, tobacco was on display to the public, they offer reasons. Firstly Mr. Hafeez was stacking the shelves, and at the time of the second visit (by Mr. Wong), the contractor was coming in and out to measure doors. The Respondent set out the many ways in which they attempted to comply with the legislation over the years, using various drapings. Despite those stated attempts, they were issued notices on a frequent basis for the contravention of displaying their products in public. On October 19, 2013, the process of construction had already begun, on a cabinet that seemingly will resolve the problem of public display. Did their actions meet the test of due diligence?
27. Once a strict liability offence is proven, the burden shifts to the Respondent to demonstrate that it exercised due diligence to avoid committing the act, in accordance with section 12 of the Regulations. The burden, as set out in *R. v. Sault Ste. Marie* requires that the party alleged to have committed an offence show that they:

... 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 standard of proof established in the *Sault Ste. Marie* case is that “the defendant must only establish on a balance of probabilities that he has a defence of reasonable care” (page 1325).

28. The owner of the store is also the chief operator. He has been issued many notices for violation, and was aware of the shortfalls of his actions in preventing the display of tobacco products. Nonetheless, until the day of the final notice, there was no effective method used for concealing his products. No mechanism or practice had been adopted to ensure concealment. This is not an example of having taken reasonable care. Nor does it describe the establishment of a proper system to prevent commission of the offence. No notices seemed to have effect on the outcome, and the violations continued to occur. There is no evident diligence in the practices of the owner or of the store and they are not successful in meeting the test required in the Act.

PENALTY

29. The Act and Regulations provide for both fines and prohibitions from selling tobacco for particular periods of time as penalties for contravening section 2.4(a).

30. The FHA has submitted that the Respondent should face both a fine and a prohibition from selling tobacco. They suggest a \$1500 fine and a 30 day prohibition. Mr. Wong argues that this is a second contravention of the Act for the Respondent, because Mr. Hafeez was fined in 2009 for selling cigarettes from an open package.
31. The available penalties for contravention are set out in Schedules 2 and 3 of the Regulations. For the purposes of Schedules 2 and 3,
 - a) a contravention is of the same type as another contravention if each contravention is described by the same item of the Schedule,
32. This matter is a contravention of a different section of the Act from the first contravention by Mr. Hafeez. Each section of the Act is described on a different line of the Schedule as the next. This penalty will be taken from the first column of the Schedule – first contravention – because it is the first contravention of section 2.4(a).
33. Mr. Hafeez and Mr. Noor both indicate their willingness to comply with the Act, and cite their successful construction of a cabinet as proof of that willingness. They also attempt to comply in all other matters regarding tobacco sales, in what they say is a very difficult neighbourhood, and while against the pressure of many of their customers.
34. Mr Hafeez and Mr. Noor on behalf of the Respondent argued against the prohibition of tobacco sales as a penalty on the basis that the store is small and without tobacco sales it would suffer extreme hardship. Tobacco sales are only a portion of the revenue, but they bring in customers, who then make other purchases in the store. The men are feeding two large families based on their income from the Store, and a month of losing sales would destroy the company. I accept this argument by the Respondent company's owners, and accept that there is a factor of hardship to store-owners that must be considered. The FHA did not dispute the owners' argument about financial hardship, but they declare that the punitive factor of the penalty must be considered as well.
35. In reaching my decision on penalty I have taken the following factors into account.
 - a. The need for a deterrent, both for the Respondent and as an example for the community of retailers.
 - b. Seven inspections and reports of this store have resulted in notices of infractions.
 - c. Information and education by the FHA has been provided to the Respondent in the past, but without positive results.
 - d. The Respondents have now successfully constructed an effective cabinetry to conceal tobacco products. This took place at the same time as the most recent inspection and report were issued. The FHA and the Respondents were both hopeful that the automatic closing function of the cabinet doors will make a difference to the visibility of tobacco products at the front counter.
 - e. Financial hardship for the Respondent and the two families it supports.
 - f. A first contravention of Section 2.4(a) of the Act has a maximum monetary penalty of \$3,000 and a maximum prohibition of 30 days.

36. Based on the above factors, I believe that on balance it is important to use this violation penalty as a deterrent to this retailer as well as to the larger community of tobacco retailers. The store now has a cabinet built particularly to hide tobacco products from view. Provided that it works as anticipated, there should be no further violations of the prohibition against displaying tobacco. This assumes proper use and operation of the cabinetry. However, there were display violations over a period of several years, and this should not be forgotten or allowed to pass without consequence. A decision in this instance should serve as an example to others that they cannot wait until some last case scenario before they take positive action to conceal tobacco products.
37. I have determined that a monetary penalty is appropriate as it signifies the financial consequences of disregard for the requirements of the Act, especially after suitable warnings. I have also determined that a prohibition from sale of tobacco products for a period of time will serve as an effective deterrent both to the owners and to the other merchants in the community. Hopefully it will cause the merchants to consider compliance with the legislation and Regulations as of paramount importance in their retail operations.
38. Accordingly, I find that the Respondent shall pay a monetary penalty of \$1,500 in respect of the violation.
39. Further, I find that there should be an order in this case prohibiting tobacco sales in the Store for a period of 10 days.

ORDER

- 1. As I have found that** the Respondent 786 Bentley Convenience Store Ltd. contravened Section 2.4 (a) of the *Act*, **I ORDER**, pursuant to Section 6.1 (1) of the *Act*, that the company pay a penalty of **\$1,500**, which sum is due and payable upon service of this Decision and Order.
- 2. I FURTHER ORDER** that the Respondent is prohibited selling tobacco products for a period of ten days, the dates of such prohibition to be determined by the Administrator.

Helen Pinsky

Helen Pinsky, Administrator's Delegate