

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(2) of the
Tobacco Control Act R.S.B.C. 1996, c.451

- by -

Sungsoo Kim (sometimes DBA: Willoughby Market)

(the “Respondent”)

Administrator’s Delegate under
Section 5 of the *Tobacco Control Act*:

Helen Pinsky

Date of Hearing:

September 9, 2016

Place of Hearing:

Surrey, BC

Date of Decision:

September 19, 2016

Appearing:

For Sungsoo Kim

Sungsoo Kim
Kyungdo Kim

For Fraser Health Authority:

Connie Banting

Decision and Order

BACKGROUND

1. The Respondent Sungsoo Kim was a business proprietor at the time the event at issue occurred. At the time he was the sole proprietor of the business called Willoughby Market.

2. Connie Banting is the co-ordinator of the Tobacco and Vapour Products control at Fraser Health authority. At the hearing she represented Fraser Health Authority on behalf of Edward Wong, Tobacco Control Officer, who was unable to attend due to a conflict.
3. The Fraser Health Authority alleges that the Respondent, through a salesperson, contravened Section 2(2) of the *Act* on March 18, 2016, by selling tobacco to a minor.
4. On July 13, 2016, a Notice of Administrative Hearing was issued under the Tobacco Control Act, to the Respondent, for a hearing to determine whether the Respondent had committed a contravention of the Act, and allowing for an Order to be made.
5. Service of the Notice was confirmed at the hearing.
6. The hearing was restricted to the determination of penalty and fines, as the parties were in agreement as to the facts of the alleged incident and contraventions.

ISSUES

7. Has the Fraser Health Authority proven on a balance of probabilities that the respondent sold a tobacco product to a person under the age of 19 years, in contravention of the provisions of section 2(2) of the Act?
8. Is there a defence that due diligence was exercised by the Respondent?
9. If a contravention of the provisions of section 2(2) did occur, what is the appropriate penalty for the offence?

LEGISLATIVE FRAMEWORK

10. 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:
11. Section 2(2) of the Act prohibits the sale, offer to sell, provision or distribution of tobacco to an individual who has not reached the age specified by regulation.
12. 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.
13. The Tobacco Control Regulation (the “Regulation”) defines the age for the purposes of Section 2 (2) of the Act to be 19 years.

14. 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.
15. 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

16. The Fraser Health Authority (FHA) provided a statement by Edward Wong, Tobacco Enforcement Officer who was present at the time of the alleged violation on March 18, 2016. The statement was accompanied by supporting documentation, plus copies of previous complaints and infractions at Willoughby Market. The Respondent did not dispute any of the evidence provided, as follows:
17. On March 18, 2016, an employee of the Respondent sold tobacco to a Minor Test Shopper (“MTS”), who was under the employ and surveillance of a tobacco enforcement officer at the time. The MTS had not reached the age specified under regulation for purchasing tobacco, being 19 years.
18. He also listed four incidents involving the Respondent and occurring in 2015, where either tobacco was sold to a minor, or a complaint of tobacco sales to a minor was received at the Fraser Health Authority. These matters were dealt with by warnings.
19. The Fraser Health Authority decided to proceed with enforcement through the Administrative Law process, based on the history of those incidents within a relatively brief time frame.
20. Kyungdo Kim spoke on behalf of his father, the Respondent Sungsoo Kim. He gave evidence that the alleged violation did occur, and that there had been previous warnings about improper sales to a minor. He expressed remorse, a willingness to work with the Fraser Health Authority to correct problems in handling tobacco sales, and he expressed his personal intention to become involved with the business of Willoughby Market. To that end, the store is now owned by a corporate entity which has taken over ownership and operations from the respondent. Kyungdo Kim is a principal of that corporate entity.

ANALYSIS AND FINDINGS

21. The first issue to determine is whether the FHA has proven on a balance of probabilities that the respondent sold a tobacco product to a person under the age of 19 years, in contravention of the provisions of section 2(2) of the Act. Based on the joint admission of facts, I find that in fact the Respondent did commit this offence on March 18, 2016.
22. 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. The evidence did not argue to the point, and I found that the defence is not applicable in this case.
23. Based on the evidence, I am fully satisfied on a balance of probabilities that the Fraser Health Authority has proven that the Respondent through the store Willoughby Market Canada sold a tobacco product to the Minor Test Shopper contrary to the provisions of Section 2(2) of the *Act*. This is a strict liability offense and no proof of intent is required. Liability flows from the breach.
24. Addressing the appropriate penalty under the Act and Regulations for the contravention of Section 2(2): The penalty provisions for this offence include two methods – fines and prohibitions from selling tobacco for particular periods of time.
25. The Fraser Health Authority has submitted that the Respondent should face a fine commensurate with a first offence under the Act. They are not requesting a prohibition from selling tobacco. They have begun appropriate training with the Respondent and with the company that has taken over operations of the business, and are not focussed on past mistakes.

PENALTY

26. In reaching my decision on penalty I have taken the following factors into account.
 - a. The need for a deterrent, both for the Respondent in question and as an example for the community of retailers.
 - b. Previous warnings to the Respondent.
 - c. Information and education has been offered to the Respondent since the Violation Ticket was issued, and there seem to be appropriate results.
 - d. This is a mom and pop operation. There will be financial hardship for the Respondent and the family involved.
 - e. This Respondent has never been ticketed or fined for an offence under this Act, so any penalty imposed will be the next progression from a warning notice only. The

implication of this is that the penalty need not be at the maximum level in order to have significant impact on the Respondent's financial state. Even a lower amount will be significant due to the fact that it is a first penalty.

- f. A first contravention of Section 2(2) of the Act has a maximum monetary penalty of \$1,000.
27. Based on the above factors, I believe that on balance it is important to use this violation penalty as a significant deterrent to this retailer, as it is necessary to kick start a positive approach to educating staff. It also must be a deterrent to the larger community of tobacco retailers, for reasons of Public Health as described earlier. I do not, however, agree that both a fine and a prohibition are necessary on a first penalty.
28. Accordingly, I find that the Respondent shall pay a monetary penalty of **\$500.00** in respect of the violation.
29. Further, I find that there will be no order in this case prohibiting tobacco sales in the Store.

ORDER

As I have found that the Respondent Sungsoo Kim (sometimes doing business as Willoughby Market) contravened Section 2(2) of the *Act*,

1. **I ORDER**, pursuant to Section 6.1 (1) of the Act, that the Respondent pay a penalty of **\$500.00**, which sum is due and payable upon service of this Decision and Order.

Helen Pinsky

Helen Pinsky, Administrator's Delegate