

Tobacco Control Act – Popcorn Canadian Enterprises Limited, Luo, Jun Feng
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 -

Popcorn Canadian Enterprises Limited (d.b.a. Sheffield and Sons Tobacconists),
Luo, Jun Feng
(the “Respondents”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Hugh McCall
Date of Hearing:	February 19, 2013
Place of Hearing:	Abbotsford, British Columbia
Date of Decision:	February 28, 2011
Appearing:	
Popcorn Canadian Enterprises Limited: Luo, Jun Feng:	Luo, Jun Feng Self represented
For the Fraser Health Authority:	Hans Mulder Tobacco Enforcement Officer

Decision and Order

Background

1. Luo, Jun Feng is the owner of Popcorn Canadian Enterprises Limited (“Popcorn”) which holds a franchise from Sheffield and Sons Tobacconists (the “Store”). The Store is located at Unit #182, 32900 South Fraser Way, 7 Oaks Mall, Abbotsford, B.C. and in addition to selling tobacco products, lottery tickets and miscellaneous convenience store goods, it also operates a Canada Post outlet. Mr. Luo has been in business at that location since 2003.
2. The Fraser Health Authority (the “FHA”) alleges that Popcorn and Mr. Luo contravened Section 2(2) of the *Tobacco Control Act* (the “Act”) on October 4, 2012, by selling tobacco to a minor.

3. Mr. Luo was the sole witness appearing on behalf of the Respondents.
4. Mr. Hans Mulder, a Tobacco Enforcement Officer (TEO), appeared on behalf of the FHA. He was accompanied by two witnesses, both of whom acted as Minor Test Shoppers (“MTS”) on October 4, 2012. They were [redacted] (MTS1) and [redacted] (MTS2).
5. All witnesses gave testimony under oath or by way of solemn affirmation.

Issues

6. Has the FHA proven on a balance of probabilities that Popcorn and Mr. Luo sold a tobacco product to a person less than 19 years of age on October 4, 2012, contrary to the provisions of Section 2(2) of the *Act*?
7. In the event that the FHA is able to prove that the Respondents sold tobacco to a person less than 19 years of age, has either Popcorn or Mr. Luo established a defence of due diligence pursuant to Section 12 of the *Tobacco Control Regulation* (the *Regulation*)?
8. In the event a sale to a person less than 19 is proven and a defence of due diligence is not substantiated, what penalty should be imposed for the contravention of Section 2(2)?

Legislative Framework

9. The relevant sections of the *Act* are as follows:

2(2) A person must not sell, offer for sale, provide or distribute tobacco to an individual who has not reached the age specified by regulation under section 11(2)(g).

2(2.1) It is a defence to a charge under subsection (2) if the person charged with the contravention demonstrates that, in concluding that the individual reached the age specified by regulation, the person

- (a) required the individual to produce a prescribed form of identification,*
- (b) examined the identification, and*
- (c) reasonably believed that the identification*
 - (i) was that of the individual, and*
 - (ii) had not been altered or otherwise falsified.*

6.1 (1) Subject to the regulations, the administrator may make an order under subsection (2) if satisfied on a balance of probabilities that a person has contravened

- (a) a prescribed provision of the Act or of the regulations, or*
- (b) an order of the administrator.*

(2)The administrator, by order, may do one or both of the following:

- (a) impose a monetary penalty on the person, in accordance with the prescribed schedule of penalties;*
- (b) prohibit the person, in accordance with the prescribed schedule of prohibition periods, from selling tobacco or offering to sell tobacco at retail*
 - (i) from the location at which the contravention occurred, and*

- (ii) *subject to the regulations, if the administrator is satisfied that it is in the public interest to do so, from any other location, if the person sells or offers to sell tobacco at retail at more than one location.*

11(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(g) specifying the age for the purposes of section 2(2);

(j) respecting administrative penalties, including the following:

- (iv) prescribing, in relation to a contravention under section 6.1(1), whether an administrative penalty may be imposed if the person who committed the contravention demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention;*

10. The relevant sections of the Regulation are as follows:

2 The age for the purposes of section 2(2) of the Act is 19 years.

12 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(1) In imposing an administrative penalty on a person for a contravention of a prescribed provision of the Act or regulations, the administrator must consider the following factors:

- (a) whether an enforcement officer has given the person a prior written warning concerning the conduct that is the subject matter of the penalty;*
- (b) whether the person has an ownership interest in the business carried on at the location where the contravention occurred;*
- (c) in respect of a breach of section 2 (2) or (3) or 2.4 of the Act or section 4 of this regulation,*
 - (i) whether the person is an employee or agent of the owner, and*
 - (ii) if the person is an employee, whether and to what extent the owner or a person retained by the owner to operate the business provides training and monitoring of the person with respect to tobacco sales;*
- (d) in respect of a breach of section 2 (4), 10.1 or 10.3 of the Act, whether the person has knowledge of the prohibition order;*
- (e) any other matter the administrator considers relevant to the imposition of a penalty.*

(2) In determining, under section 6.1 (2) (b) (ii) of the Act, if it is in the public interest to prohibit a person from selling tobacco at retail from a location other than the location at which the contravention occurred, the administrator must consider all of the following:

- (a) previous enforcement actions for contraventions of a similar nature by the person;*
- (b) whether the contravention was repeated or continuous;*
- (c) whether the contravention was deliberate;*
- (d) the person's efforts to correct the contravention;*
- (e) any other matter the administrator considers relevant to the public interest.*

(3) If a person who commits a contravention is a franchisee, the administrator must not impose a prohibition order on another location operated independently at arm's length from the person by another franchisee of the same franchisor.

Evidence

Fraser Health Authority

11. The first witness on behalf of the FHA was MTS1. He testified that on October 4, 2012, he accompanied Mr. Mulder to the 7 Oaks Mall. Mr. Mulder instructed him to attempt to purchase a lower priced tobacco product such as a Prime Time Cigar from the Store. MTS1's evidence was that he was 17 years old at the time and that he made no effort to appear older than he was.
12. MTS1 entered the Store and asked a middle aged man of Asian background behind the counter for two vanilla flavoured "Prime Time Plus" cigars. He gave the man \$10.00 and received two Prime Time Plus cigars and his change. When he was asked to identify the person who sold him the cigars MTS1 indicated that it was Mr. Luo. MTS1 testified that Mr. Luo did not ask to see his identification. MTS1 testified that a sealed evidence bag signed by him on October 4, 2012 contained the two cigars he purchased from the Store. The sealed evidence bag was marked as Exhibit 1.
13. On cross examination, MTS1 indicated that he could not recall whether Mr. Luo was engaged in any other activity at the time he purchased the tobacco.
14. The second witness on behalf of the FHA was MTS2. He testified that he was 16 years old on October 4, 2012 and that he accompanied Mr. Mulder and MTS1 to the 7 Oaks Mall. He entered the mall with MTS1 at which point he held back and was across from the entrance to the Store as MTS1 purchased the Prime Time Plus cigars. He testified that MTS1 did not act or speak aggressively. He did not see MTS1 produce his identification before he was given the tobacco. MTS2 also identified the person who sold the tobacco as Mr. Luo.
15. As MTS1 left the Store, MTS2 entered. Mr. Luo was leaving the till area, but returned to it as MTS2 approached the counter. MTS2's task was to attempt to purchase a lottery ticket, which is another age restricted product. When he asked for a lottery ticket, Mr. Luo asked him for identification and when MTS2 did not produce acceptable identification, Mr. Luo refused to sell him a lottery ticket.
16. On cross examination, MTS2 testified that he could not recall whether Mr. Luo was talking on the telephone when MTS1 purchased tobacco.
17. Mr. Mulder also testified for the FHA. His work is to ensure retailers are aware of their responsibilities and to enforce the *Act* and the Regulations. As part of his work Mr. Mulder conducts compliance checks one or two times per year on tobacco retailers. On October 4, 2012, he was conducting compliance checks on age restricted products with his counterpart in the Gaming, Policy and Enforcement Branch. He testified that the FHA has a policy of progressive enforcement and the compliance check on the Store was partially motivated by prior enforcement issues.
18. On October 4, 2012, Mr. Mulder was present when MTS1 returned to the FHA's vehicle with two Prime Time Plus cigars. The tobacco was placed in an evidence bag (Exhibit 1) which was signed and dated and kept in the FHA evidence locker until the date of the hearing.

19. While MTS1 wrote his notes, Mr. Mulder entered the Store and advised Mr. Luo that he would be forwarding a report to the Administrator. Mr. Luo told Mr. Mulder that he could not afford to pay a penalty. Mr. Mulder advised Mr. Luo that he would be pursuing both a monetary penalty and a prohibition period as the Store and Mr. Luo had previously sold tobacco to a minor.
20. Mr. Mulder served Mr. Luo with the Report to the Administrator, a copy of his notes, a copy of the MTS's notes and a photocopy of the front of the evidence bag (Exhibit 1). In addition, he testified that he personally served Mr. Luo with the Notice of Administrative Hearing.
21. With respect to the Store's record, Mr. Mulder testified that he had inspected and previously issued warning notices to Popcorn and Mr. Luo for prohibited signage in 2008 and again in 2009. In March 2010 he issued violation tickets to Popcorn and to Mr. Luo for the sale of tobacco to a minor. Mr. Mulder testified that the ticket issued to Mr. Luo personally was withdrawn as part of a settlement involving the ticket issued to Popcorn.

Popcorn Canadian Enterprises Limited and Mr. Luo, Jun Feng

22. Mr. Luo admitted that he sold tobacco to a minor on October 4, 2012. He explained that it was a bad moment for him as the sale took place while he was talking to his wife on the phone about their son who was ill. He had an employee who was about to leave and his wife was not able to come to the Store. Mr. Luo thought he might need to close for the day.
23. Mr. Luo testified that when MTS1 asked him for 2 vanilla Prime Time cigars, he was distracted and did not look at MTS1's face. He was only aware that MTS1 was about the same height as himself and he assumed it was okay. Mr. Luo admitted that he made a mistake and apologized to Mr. Mulder for having previously argued with him.
24. In support of his testimony, Mr. Luo introduced photographs on his tablet computer, medical receipts, and a warning to employees regarding tobacco sales. The photographs from digital surveillance confirmed that Mr. Luo was on the telephone when MTS1 purchased tobacco and that he was not on the telephone when he refused to sell a lottery ticket to MTS2. The medical receipts confirmed the purchase of medicine for his son on October 3, 2012, and the warning letter showed that he had made his employees aware of the need to comply with the *Act* and Regulations. Although Mr. Luo did not disclose this evidence in advance of the hearing, I agreed to consider it on the understanding that I would hear further testimony from Mr. Mulder if he needed to respond to that evidence, or to adjourn if required. However, after Mr. Luo's evidence, it was not necessary to do either.
25. Mr. Luo testified that he has been in business for 10 years and that he has no intention of selling tobacco to minors. He has used the Tobacco Retailer Kit provided by the FHA to train employees and he has also taken the training himself. He warns employees that if they sell tobacco to minors, they will be fired. He also noted that there is a sign on the cash register advising purchasers that the Store checks identification of anyone who looks like they are less than 30 years old. He testified that his employees do a better job of ensuring that there are no sales of tobacco to minors than he does.
26. In 2010 Mr. Luo mortgaged his home in order to renovate the Store. He testified that the renovation, the additional debt, and mediocre sales have made his life very stressful.

Analysis and Findings

27. The first issue is whether the FHA has proven on a balance of probabilities that Popcorn and Luo, Jun Feng sold a tobacco product to a person less than 19 years of age on October 4, 2012, contrary to Section 2(2) of the *Act*?
28. Mr. Luo did not dispute the FHA's evidence and I find on a balance of probabilities that the FHA has proven that Popcorn and Luo, Jun Feng sold a tobacco product to a minor 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.
29. The second issue is whether Luo, Jun Feng or Popcorn has established a defence of due diligence. Section 12 of the Regulation states that a person must not be found to have contravened a provision of the *Act* where they demonstrate to the satisfaction of the administrator that they have exercised due diligence to prevent the contravention.
30. With respect to the October 4th sale, it is clear that Mr. Luo was distracted by talking on the telephone and did not focus his attention on the sale. I accept that if he had, he would likely have asked for identification as he did when MTS2 attempted to purchase a lottery ticket. While his son's illness no doubt made the telephone call more distracting, Mr. Luo runs a small business and there may be many occasions when he answers phones or places telephone calls while operating a till. In these circumstances there is a chance that he may make mistakes and due diligence would require that he avoid multitasking while selling tobacco products. On October 4, 2012, it is clear that Mr. Luo was not acting with due diligence.
31. With respect to a defence of due diligence by Popcorn, Mr. Luo testified that both he and his staff have been trained on what is required to comply with the *Act* and Regulations. He showed me a letter warning his employees that they would be fired in the event that they were found to have contravened the provisions of the *Act* or Regulations. He indicated that he monitors the digital surveillance camera in the Store to ensure that employees check purchasers' identification. The Store's policy is to ask for identification from any person who appears less than 30 years old and a sign on the till notifies purchasers of that policy.
32. Mr. Luo did not identify any steps he has taken since 2010 to improve Popcorn's tobacco control policies or procedures. There was no evidence with respect to staff reminders or annual testing. There was also no evidence that Popcorn uses cash register software which requires the operator to verify the purchaser's date of birth.
33. The leading case dealing with the defence of due diligence in strict liability offences is *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. The defence of due diligence was described by Dickson J. of the Supreme Court of Canada at paragraph 72 as follows:

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 wilful 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. (my emphasis) 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. For a

useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Natras*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.).

34. It is apparent that Popcorn has taken some steps to prevent the sale of tobacco to minors, but there was insufficient evidence that it had exercised all reasonable care to establish a proper 'system' to prevent such sales. The steps taken by Popcorn have not been effective on 2 of the last 6 occasions when Mr. Mulder has conducted compliance checks and based on all of the evidence, I find that Popcorn has not proved the defence of due diligence.

Penalty

35. Section 6.1 of the *Act* provides that the administrator may impose an administrative penalty if satisfied on a balance of probabilities that a person has contravened a provision of the *Act*.

36. Based on my finding that neither Popcorn nor Mr. Luo has substantiated a defence of due diligence, I find that both have contravened Section 2(2) of the *Tobacco Control Act*, and I must consider what penalty may be appropriate.

37. The FHA submitted that the 7 Oaks mall is a high traffic area for young people and that Mr. Luo has approximately 30 tobacco sales a day. The FHA sought a monetary penalty and prohibition period which would act as a deterrent to Mr. Luo and other retailers and make it clear to Mr. Luo that his practices must improve. While Mr. Mulder questioned Mr. Luo's commitment to preventing the sale of tobacco to minors and was concerned that he had come to regard infractions as a cost of doing business, he also acknowledged that Mr. Luo and Popcorn do not have a significant history of sales to minors. Mr. Mulder also recognized that Mr. Luo has a family to support and that he is the owner of a small business that has been experiencing some financial difficulties.

38. Mr. Mulder sought a monetary penalty in the total amount of \$1,000 against Popcorn and Mr. Luo, as well as a prohibition period of 10 days.

39. Mr. Luo acknowledged his mistake and very clearly stated his commitment to preventing the sale of tobacco to minors. He showed that commitment by refusing the sale of a lottery ticket to MTS2 a few minutes after selling tobacco to MTS1. I have no concerns about Mr. Luo's commitment to the policies and purposes underlying the *Act* and Regulations.

40. Mr. Luo is a new Canadian and he was sometimes difficult to understand. He appeared genuinely distraught by having to appear at the administrative hearing. As he put it, he came to Canada for the opportunities it provides, not to break its laws. I accept that Mr. Luo's business is struggling. He works at the Store himself and has one or two employees. He has a wife and son to support. He asked for leniency and promised not to make the same mistake again.

41. While there are some retailers which deliberately sell tobacco to minors, most attempt to comply with the *Act* and Regulations. However, in spite of their good faith intentions, they fail on occasion because of factors such as employee distraction, fatigue, absent mindedness or the pressure of customer wait lines. In order to protect the public and themselves, retailers must have robust systems in place to help ensure compliance. They require constant reminders, annual testing and significant consequences for employees in order to ensure that sales of tobacco remain top of mind. They can also use cash register technology which requires the

operator to verify the purchaser's date of birth. The sale of tobacco to minors is a serious public health issue and employers must exercise "all reasonable care by establishing a proper system to prevent commission of the offence." Popcorn and Mr. Luo, need to improve the systems they have in place to ensure that the Store is able to prevent the sale of tobacco to minors.

42. In reaching my decision on penalty I have taken the following factors into account:
- (a) The need for a deterrent.
 - (b) Mr. Mulder previously ticketed Popcorn and Mr. Luo for the same offense 2½ years earlier.
 - (c) This was Popcorn and Mr. Luo's second sale to a minor and Mr. Mulder submitted that he did not consider 2 sales to be a significant history of selling to minors.
 - (d) Mr. Luo is the owner of Popcorn.
 - (e) Mr. Luo acknowledged his mistake and was remorseful.
 - (f) Mr. Luo appeared very committed to avoiding the sale of tobacco to minors.
 - (g) Mr. Luo was for the most part cooperative with Mr. Mulder, and apologized for an instance when he became argumentative.
 - (h) When not distracted, Mr. Luo refused the sale of a different age restricted product.
 - (i) This is the first occasion that Popcorn and Mr. Luo have been found by a delegate of the Administrator to have contravened Section 2(2) of the *Act*.
 - (j) A first contravention of Section 2(2) of the *Act* has a maximum monetary penalty of \$1,000 and a maximum prohibition period of 30 days.
 - (k) Second contraventions have a maximum monetary penalty of \$3,000 and a maximum prohibition period of 90 days.
43. Based on all of the above factors, I conclude that the maximum monetary penalty is not warranted. I have allowed a monetary penalty of \$200 for Luo, Jun Feng and a \$300 monetary penalty for Popcorn. In addition, I find that a prohibition period of 5 days is appropriate. In arriving at the monetary penalty and the prohibition period, I have attempted to provide a consequence which is substantial enough to be a deterrent to the Respondents, but not so onerous that it leaves them with insufficient resources to improve their tobacco control related systems. I have also attempted to impose a monetary penalty and a prohibition period which, considering the seriousness of the contravention and the retailer's record of interactions with the health authority, are consistent with penalties sought and made in other areas of British Columbia.

Order

44. **As have found that** Luo, Jun Feng contravened Section 2(2) of the *Act*, **I order** that he pay a monetary penalty of \$200, which sum is due and payable upon service of this decision and Order.
45. **As I have found that** Popcorn Canadian Enterprises Limited contravened Section 2(2) of the *Act*, **I order** that it pay a monetary penalty of \$300, which sum is due and payable upon service of this decision and Order.
46. **In addition, as I have found that** Popcorn Canadian Enterprises Limited contravened Section 2(2) of the *Act*, **I order** that it be prohibited from selling tobacco products for a period of 5 days

Tobacco Control Act – Popcorn Canadian Enterprises Limited, Luo, Jun Feng
beginning when the Store opens on Thursday April 4, 2013 and ending at the close of business
on Monday, April 8, 2013.

A handwritten signature in black ink that reads "Hugh McCall". The signature is written in a cursive, flowing style.

Hugh McCall, Administrator's Delegate