

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 (1)(a) and 2.4 (1)(b) of the
Tobacco Control Act R.S.B.C. 1996, c.451, as amended

- by -

Abby Dollar Plus Inc. (sometimes doing business as Specialty Smoke Shop)
(the “Respondent”)

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

Helen Pinsky

Date of Hearing:

October 27 and November 17, 2015

Place of Hearing:

Abbotsford, BC and by conference call

Date of Decision:

December 4, 2015

Appearing:

For Abby Dollar Plus Inc

Vikas Ohri

Jagtar Singh Nagra

For Fraser Health Authority:

Hans Mulder

Decision and Order

BACKGROUND

1. The Respondent is a storefront business owned by the company Abby Dollar Plus Inc., which is a family company owned by Parmjeet Kaur Nagra. Her husband Jagtar Singh Nagra and their son Lovepreet Singh Nagra operate the store, known as Specialty Smoke Shop (the Store).

2. The Fraser Health Authority's spokesperson, Hans Mulder, operates as a Tobacco Enforcement Officer (TEO), in the Fraser Health Authority of the Ministry of Health (FHA). He is responsible for education and compliance under the Tobacco Control Act (the Act).
3. Two minor test shoppers (MTS), employed by the Fraser Health Authority, R.G. and G.L. were involved in the original investigation but did not present evidence.
4. Jagtar Singh Nagra gave evidence on behalf of the Respondent on his own and subsequently through his advocate Vikas Ohri.
5. The Fraser Health Authority alleges that the Respondent contravened Section 2.4 (1)(a) and 2.4(1) (b) of the *Act* on July 3, 2015.
6. On September 11, 2015, 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.
7. Service of the Notice was confirmed at the hearing.
8. At the hearing the TEO Mr. Mulder withdrew his claim against the individuals who had been named in the Notice and this matter proceeded against the Respondent only.
9. The hearing began on October 27, 2015, in Abbotsford, BC, and was adjourned shortly thereafter, by request of the Respondent and agreement of Mr. Mulder, due to illness of Jagtar Singh Nagra, who appeared at the hearing and represented himself at the time. The adjournment was set to 1:00 pm on November 17, 2015, by conference call hearing. At that time, all the remaining evidence and arguments were heard.

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:
 - 2.4 (1) A person must not*
 - (a) display tobacco products, or*
 - (b) advertise or promote the use of tobacco by means of a sign or otherwise*

in any manner prohibited by the regulations.

11. 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.

12. Section 4.31 of the Regulations sets limits on advertising tobacco.

4.31 (1) 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.

13. Section 4.32 of the Regulations establishes the requirements for the sign on which a retailer may advertise on the premises of a retail establishment the types of tobacco products for retail.

14. 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.

(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) ...

...

(e) any other matter the administrator considers relevant to the imposition of a penalty.

15. The Regulation allows the administrator's delegate to consider other factors that may be relevant to imposing a penalty. In my view, those factors can include both mitigating and aggravating factors. Mitigating factors would include, for example, the Respondent's degree of cooperation, any steps taken to prevent re-occurrence of a contravention, any admission of a contravention and the degree of remorse (where the Respondent is an individual). Aggravating factors would include, for example, past history, a contravention

involving dishonesty, whether the contravention is planned or premeditated, and the extent of the harm caused by the contravention.

EVIDENCE

16. The minor test shoppers provided written reports, which I considered as part of the evidence. They each stated that on July 3, 2015, they entered the store together, looked around, saw tobacco products on display, and asked to purchase a tobacco product at the cash desk. They were asked for ID, and left the store without making a purchase. Each MTS also reported that tobacco was clearly visible to them from the outside of the store. The window looking into the store was frosted but you could see inside where the frosting ended, around chest level.
17. Mr. Mulder gave oral evidence for the FHA. He conducted an inspection immediately after his MTS shoppers returned to the car from the store. On the outside he saw a glass storefront with a door in the centre. There are two steps up to the door from the sidewalk. Tobacco was clearly visible from the outside through the windows, although the bottom 50 cm of the glass was frosted. He said that an average person over 4 or 5 feet tall could look into the clear window panes.
18. Mr. Mulder also stated that he saw four signs in the window, each on letter size paper, and each announcing a clearance sale. This was disputed by Mr. Jagtar Singh Nagra, whose evidence was that there was only one sign. Neither provided further evidence on the point as to location on the window, how much space was taken up by the signs, or other details.
19. Mr. Mulder then entered the store. He saw Lovepreet Singh Nagra in the store, and informed him of the requirements for compliance with the Act. Mr. Nagra was known to Mr. Mulder from prior encounters with him in his capacity as a TEO. He has been involved in inspections of the store (at various locations in his jurisdiction) since 2008.
20. As at July 3, 2015, the Store was age restricted. One must be 19 to enter. There is a sign on the outside restricting entry. In the store there were tobacco products on display.
21. There have been seven prior warnings on file regarding display of tobacco products and advertisement of tobacco products, between the years 2007 and 2013. In 2009 a violation ticket was issued.
22. The Respondent's evidence is that in order to see through the clear part of the window to the store, a person has to climb 2 steps from the sidewalk level, and look in to the store. This was adequate discouragement. But in response to the TEO's visit, the frosting has now been expanded, and as well, the tobacco that had formerly been on display inside the store is now behind doors. The store has been converted from an adult only store to one that invites all ages and conceals tobacco.

23. Mr. Nagra says that his premises has now been inspected successfully a couple of times since its conversion from an adult only store.
24. There is no evidence that the store keeper, Lovepreet Singh Nagra, noticed or spoke to the MTS's before they requested a tobacco purchase. The Respondent's evidence is that 99% of minors do not enter the store, and that when they do, the staff asks for ID and refuses to sell tobacco to them.
25. The Respondent suggested that the inspection by Mr. Mulder and the issuance of a Notice of Administrative Hearing is racially motivated, and that they are being singled out in terms of compliance. The TEO denies this. No actual evidence was presented to support this allegation other than there have been frequent inspections and several warnings issued. The TEO stated that he has 500 retailers, and no time to be racist.

ISSUES

26. Has the Fraser Health Authority proven on a balance of probabilities that the Respondent did display tobacco products and advertise or promote the use of tobacco by means of a sign or otherwise in a prohibited manner on July 3, 2015 in contravention of Section 2.4 (1) (a) and 2.4(1) (b) of the *Act*? I understand this to mean in a manner that allows minors to be exposed to the display and advertisement of tobacco products.
27. If so, has the Respondent established a defence of due diligence?
28. If a contravention is found and a penalty is to be imposed, what is the appropriate penalty?

ANALYSIS AND FINDINGS

29. The reports of the minor test shoppers did not carry the weight of sworn evidence, and the MTS in question were not available for cross-examination. I accept their evidence as such. I placed greater weight on the evidence of Hans Mulder, who attended at the store and also gave evidence at the hearing.
30. Mr. Mulder presented evidence that there were four signs were posted on the outside window of the store. However he did not describe them in full detail including composition, or positioning. He had no photographic evidence to support his statements, or supporting statements of other observers. The respondent challenged the evidence of Mr. Mulder on this point, and countered that there was only one promotion sign. Neither was clear as to the size of the signs concerning age restrictions to entering the store.

31. There was no basis on which to assess credibility, given the lack of attention to detail related to the signage on the outside window. As a result, I decline to make a determination that a full four signs were posted outside the store.
32. As to the evidence of the display of tobacco products, it is apparent that the products were visible to a person who came to the door of the store and looked inside the windows on either side. Does this make the products *clearly visible to a person outside the retail establishment* as described in the Regulations? I accept that it does. The frosting was inadequately covering the window, and it is reasonable to expect passers-by to peer into the store through the clear area of the window.
33. The Respondent argued that one had to climb 2 stairs to peer into the window, and that the frosting was high enough. I have taken notice of the height of 50 cm, and even added to the 18 inches comprised of 2 stairs, it is clear that many youth are tall enough to look into the store windows. The tobacco products were uncovered and on display in a place visible from the windows.
34. I also find it disturbing that the minor test shoppers were able to walk into the adult only store and look around for a short period, without question. No evidence was presented of other customers being tended to in the store, nor is there evidence that the staff was unable to see the two youth, or to assess their age before they approached the counter. This afforded the youth a period of time in which to inspect the tobacco products on display. This runs counter to the intent of the Act.
35. I am fully satisfied that the Respondent contravened section 2.4(1) of the *Act*. This is a strict liability offense and no proof of intent is required. Liability flows from the breach.
36. No defence of due diligence has been argued, and none will be considered.
37. Remaining at issue is the appropriate penalty.
38. Addressing the appropriate penalty under the Act and Regulations for the contravention of Section 2.4 (1)(a) and 2.4(1)(b):
 - a. Section 6 of the Regulation sets out the prescribed penalties for violations of Sections 2(3) and 2.4 of the *Act* while Section 13 outlines the factors to be considered in imposing administrative penalties. Schedule 2 and 3 of the Regulation establish respectively the range of monetary penalties and prohibition periods. For a first contravention of Section 2.4 of the *Act* the range of monetary penalties is from \$0 to \$3,000 and the prohibition period is from 0 to 30 days.
39. The FHA seeks a monetary penalty in the amount of \$700 and a short period of suspension for the contravention in light of the Respondent's history of warnings, and in light of similar penalties in other similar matters. There was an admission that there was no sale to a minor in this situation.

PENALTY

40. In reaching my decision on penalty and in addressing section 13 of the Regulations, 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 history by this Respondent. In this matter, I find that there is a lengthy history between the FHA and the Respondent. It involves inspections in the proper course of events, but also includes a large number of warnings, and one violation for a similar offence. While I found no evidence of prejudice against the Respondent, nor do I believe it was singled out for attention, I accept that stores selling tobacco in the FHA are inspected at regular intervals, and ought to benefit from it. At some point they must exert greater vigilance and care regarding the enticement of minors to tobacco products, based on the knowledge imparted on them by the FHA. The Respondent's failure to prevent visibility of his tobacco products did not show any vigilance on their part.
- c. There are no other aggravating factors such as willful disregard for the law, dishonesty, or intention to deceive.
- d. I accept the actions of the Respondent that immediately on being advised of the inadequacy of the frosting on the windows, they proceeded to frost the windows to a greater height. This shows goodwill. Further, the Nagras have made the decision to turn the Store into a convenience store, thus allowing minors to enter to make non-tobacco purchases. They have not mentioned the sacrifice involved in this move, but I accept it as mitigation of the offence.
- e. There is a combination of allowing tobacco products to be seen from outside, together with a failure to keep the minor shoppers out of the store from the outset. These actions, especially together, need to be addressed appropriately.
- f. I have no doubt that the Respondent is aware of the requirements of the *Act* and *Regulations*, and in particular, the prohibition against displaying tobacco products to minors. I am persuaded that a fine and short prohibition are appropriate sanctions for the contravention.

41. Accordingly, I find that the Respondent shall pay a monetary penalty of **\$600** in respect of the violation.

42. Further, I find that the Respondent will be prohibited from selling tobacco products for a period of 15 days.

ORDER

1. **As have found that** Abby Dollar Plus Inc. contravened Section 2.4 (1)(a) of the *Act*, **I ORDER**, pursuant to Section 6.2(2) of the *Act*, that it pay a penalty of **\$600.00** which sum is due and payable upon service of this Decision and Order.
2. **In addition, as have found that** Abby Dollar Plus Inc. contravened Section 2.4(1)(a) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products for a period of 15 days beginning January 15, 2016.

Helen Pinsky

Helen Pinsky, Administrator's Delegate