

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 -

0749470 B.C. Ltd DBA: Kimberley Shell
(the “Respondent”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Helen Pinsky
Date of Hearing:	April 14, 2015
Place of Hearing:	by conference call hearing
Date of Decision:	April 29, 2015
Appearing: For 0749470 B.C. Ltd	Malcolm Sargent Rhona Sargent
For Interior Health Authority:	Stan Thiessen Tobacco Enforcement Officer

Decision and Order

BACKGROUND

1. The Respondent 0749470 B.C. Ltd. (the “Respondent”) is a company which, at the times of the incident and of the hearing, was doing business as Kimberley Shell, in Kimberley, British Columbia (the “Store”).
2. Malcolm Sargent is the principal and owner of the Respondent, and he and his wife Rhona Sargent spoke on behalf of the company and the Store.

3. Stan Thiessen, a Tobacco Enforcement Officer (TEO), appeared on behalf of the Interior Health Authority (IHA).
4. On December 13, 2014, a Notice of Administrative Hearing was issued under the Tobacco Control Act, R.S.B.C. 1996, c. 451 (The “Act”), to the Respondent, doing business as Kimberley Shell (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 April 14, 2015, at 10:00 am., by conference call hearing as to the issue of penalty and fines only.
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. The decision to proceed electronically was made primarily because credibility of witnesses was no longer required, and evidence was submitted by agreement.

LEGISLATIVE FRAMEWORK

7. 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:
8. 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.
9. 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. The Tobacco Control Regulation (the “Regulation”) defines the age for the purposes of Section 2 (2) of the Act to be 19 years.
11. Section 12 of the Regulation establishes 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.”
12. 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

13. Stan Thiessen set out the evidence, and the Respondent did not dispute any of the evidence provided, as follows:
14. On December 13, 2014, 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.
15. Previously, the IHA had noted other contraventions of section 2 (2) of the Act, namely, sale of tobacco to MTS employees of the IHA in 2010 (twice), 2011 and 2014. In the first instance, a warning letter was issued. In three instances, a ticket in the amount of \$575 was issued, and each of these tickets was accepted and paid by the Respondent.
16. In addition, on August 26, 2014, an order was issued including a penalty of \$1000 and a suspension of sales of tobacco products for a period of 30 days.
17. The Respondent acknowledged ongoing history of committing infractions, but noted that they have been diligent in encouraging compliance with the Act by their employees. They have gone through a training manual with employees and have received assurances from their employees that there will be compliance.
18. The IHA agrees that Mr. Sargent on behalf of the Respondent has been very co-operative with them. He questioned his employee on learning of her infraction, and the response he received was “I forgot”. He dismissed the employee and posted his notice of infraction in the staff room as a deterrent for other employees.

ANALYSIS AND FINDINGS

19. The first issue to determine is whether the NH 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 statement of agreed facts, I find that in fact the Respondent did commit this offence on December 13, 2014.
20. 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.
21. 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.

22. Mr. Thiessen on behalf of the IHA argues for a fine of \$3,000, which is the maximum amount that can be imposed for a second contravention of section 2 (2) of the Act. He also requests a prohibition of tobacco sales for a period of 90 days, which is the maximum time allowable for a second contravention of section 2 (2) of the Act. He cites the frequency of failures to comply with section 2 (2) of the Act as requiring progressive enforcement, in order to encourage the tobacco seller to maintain the clear goal of preventing sales to minors.
23. The IHA recognizes that the Respondent made reasonable efforts to train staff at the Store, and that the Respondent has co-operated with the Authority. It has not proven successful. It also acknowledges that the Respondent is listing the store for sale, and that a long prohibition from selling tobacco will impact bottom line results in the Store. This might hinder a sale of the business.
24. Mr. and Mrs. Sargent, on behalf of the Respondent, expressed their grave concern with the difficulty of staff compliance with the Act. Mrs. Sargent has found this very upsetting, and Mr. Sargent says he is losing sleep over it. They have decided to sell the business. They have requested some leniency in the number of days that they are prohibited from selling tobacco products. The cigarette sales are important for the Store in order to bring customers in, so that they will buy other products as well. They were a small family-owned business without the support of a corporation.
25. I agree with the IHA that progressive enforcement is necessary as an incentive to encourage compliance with the Act. It is necessary not only for the Respondent who has committed an infraction, but with the tobacco sellers in the community as a whole, in order to set an example.
26. In order to make the point of encouraging compliance, I do not find it necessary to always impose a maximum penalty. The purpose of progressive enforcement may be met if a penalty is within the appropriate range.

PENALTY

27. 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. This is the second time the Health Authority has had a hearing with the Respondent, after three tickets, and all for the same offence.
 - c. It is important to balance the livelihood of the family and the opportunity of sale of the business, with the effect of a general deterrence on the community of retailers.
 - d. A first contravention of Section 2 (2) of the Act has a maximum monetary penalty of \$1,000 and a maximum prohibition of 30 days.

- e. A second contravention has a maximum monetary penalty of \$3,000 and a maximum prohibition period of 90 days.
 - f. It is in the interest of both parties to allow for a successful sale of the business of the Respondent, with the hopes of future prevention of sales to minors.
28. Based on the above factors, I believe that on balance it is important to use this violation penalty as a deterrent to the larger community of tobacco retailers, while allowing the normal course of business turnover to take place.
29. Accordingly, I find that the Respondent shall pay a monetary penalty of \$2,500 in respect of the violation.
30. Further, I find that there should be an order in this case prohibiting tobacco sales in the Store for a period of 30 days.

ORDER

1. **As I have found that** the Respondent 0749470 B.C. Ltd contravened Section 2 (2) of the *Act*, **I ORDER**, pursuant to Section 6.1 (1) of the Act, that the company pay a penalty of **\$2,500**, 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 thirty days, the dates of such prohibition to be determined by the Administrator.

Helen Pinsky

Helen Pinsky, Administrator's Delegate