

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 –

Haike Investment Co. Ltd. (doing business as Happy Valley Market)

(the “Respondent”)

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

C. L. Roberts

Date of Hearing:

November 20, 2015

Place of Hearing:

Langford, British Columbia

Date of Decision:

November 27, 2015

Appearing:

For Haike Investment Co. Ltd.:

Mei (May) Chen, Jackie Bleeker

For the Island Health Authority:

Ryan Bertolin

Decision

Background

1. The Island Health Authority (“IHA”) alleged that on July 6, 2015, Haike Investment Co. Ltd., sometimes doing business as Happy Valley Market, (“Happy Valley”) contravened Section 2(2) of the *Act*, which prohibits a person from selling, offering for sale, providing or distributing tobacco to a person under the age of 19 years of age (Section 2 of the *Regulation*).

Preliminary issue

2. On November 2, 2015, IHA made an application under Rule 6(1) of the Rules for additional time to present its evidence and make submissions. IHA said that it intended to call three witnesses in addition to making submissions on the issue of due diligence and would require more than the 90 minutes prescribed by the Rules in which to do so.
3. Although Happy Valley did not oppose the application, it asked that the time not be “significantly extended” so as to not greatly impede the operation of its store, since all of its witnesses were store employees.
4. I granted IHA’s application. I concluded that the extension of time was not significantly greater than the 90 minutes prescribed by the Rules, and that the extension would not prejudice Happy Valley, given that it was not necessary for all of its witnesses to be present for IHA’s case, and that the employees could return to work upon the completion of their evidence.

Issues

5. Has IHA proven on a balance of probabilities that Happy Valley sold tobacco products to a person under the age of 19 in contravention of Section 2(2) of the *Act*?
6. If so, has Happy Valley established a defence of due diligence pursuant to Section 12 of the *Tobacco Control Regulation* (the “*Regulation*”)?

Evidence

7. I heard evidence from Aaron Severs, a Tobacco Enforcement Officer with IHA; A.L., a minor test shopper (MTS); Alison Coupar, the Supervisor, Tobacco Prevention and Control for IHA; Helen Kopin and Maureen Schaler, both of whom are Happy Valley sales clerks, Ms. Chen, Happy Valley’s store manager; and from Ms. Bleeker, who is employed in Happy Valley’s kitchen.

8. Haike Investments Co. Ltd. was incorporated on February 27, 2013. Lin Guodong is the company's sole director. Haike Investments purchased Happy Valley Market and obtained authorization to sell tobacco products at the premises on May 21, 2013.
9. Mr. Severs conducted an initial inspection of Happy Valley on August 27, 2013 following the change of ownership. Although the store was observed to be in compliance with tobacco regulations in most respects, a MTS was able to purchase tobacco products even though the clerk had asked for, and received, her identification. The clerk informed Mr. Severs that she received minimal training about tobacco sales and was not told to request or check identification. The clerk stated that she had read the MTS's age incorrectly. Mr. Severs verbally warned both the clerk and Happy Valley about the contravention, and provided the store manager with warning signage and Ministry of Health educational pamphlets about preventing tobacco sales to minors. IHA subsequently informed Happy Valley about the contravention by letter dated September 3, 2013.
10. On February 21, 2014, a MTS was able to purchase tobacco products from Ms. Kopin, the clerk on duty at Happy Valley that day. Mr. Severs spoke to Ms. Chen, who informed him that she was the new store manager and had been on the job three days. Ms. Chen informed Mr. Severs that she knew nothing about tobacco laws and was not sure how staff had been trained in tobacco sales, and that she wanted more information. Mr. Severs provided Ms. Chen with Ministry of Health educational material about preventing tobacco sales to minors.
11. Mr. Severs also spoke with Ms. Kopin, who informed him that she had worked at the store for four years and that she had been trained in tobacco sales. She was aware that she was required to ask purchasers for identification if they looked under 19 years of age and that the purchaser had to show government-issued photo identification. Ms. Kopin said that she had not asked for identification that day because she had just started work and that there was "a lot going on" at the time of the sale. Mr. Severs also provided Ms. Kopin with educational material and suggested to look below the photograph on the British Columbia issued identification card or drivers' license which, in the case of a minor, contains the notation "under 19 until XXXX [date]."
12. IHA issued written warnings to both Happy Valley and to Ms. Kopin about the February 21, 2014 contravention.
13. Given that this was Happy Valley's second contravention, Mr. Severs and Ms. Coupar invited Mr. Kopin and Ms. Chen to a meeting at the IHA's office to discuss the recent sales as well as possible strategies to prevent future contraventions. Mr. Severs provided Ms. Chen with a history of compliance checks at Happy Valley which indicated it had failed 3 of 4 MTS since Happy Valley became the new owner years and asked what corrective steps Happy Valley had taken following the August 2013 contravention. Ms. Chen informed IHA that the store policy was to ask customers who looked under 35 years of age for identification and that the policy was posted in the store.
14. On April 1, 2014, Ms. Chen forwarded a copy of Happy Valley's store policy to Mr. Severs by email. The policy consisted of a one-page document reminding clerks on duty about a number of things including where to park, how customers could pay for goods and

to not sell tobacco “to persons under 19 and please check ID if they look under 19.” Mr. Severs replied stating that, at the meeting, Ms. Chen indicated that Happy Valley’s policy was to request identification if someone looked under 35 years of age, and he sought a photo of the signage that stated identification would be requested for tobacco sales. Happy Valley did not respond to Mr. Severs’ email.

15. On April 2, 2014, IHA wrote to Ms. Chen, summarizing the measures she said had been taken to prevent future sales of tobacco to persons under the age of 19 and the new steps that may be taken in the future. The letter also set out additional measures the parties had discussed that could form part of the plan for Happy Valley’s business. This list included role plays, the establishment of written practices and procedures, refresher training, testing employees to ensure full understanding of the regulations, policies and procedures, monitoring employees to ensure that the business plan was being followed, and outlining consequences for staff who sell to minors. The letter concluded by emphasizing that it was the business owner’s responsibility to ensure that the plan is implemented and working, and set out the possible penalties in the event of non-compliance.
16. On February 3, 2015, a MTS purchased tobacco products from Ms. Kopin while she was on duty at Happy Valley. Mr. Severs spoke with Ms. Kopin following the sale and she explained that, although she looked at the MTS’s identification, she had “miscalculated” her age and stated that the sale was “her fault again.” Ms. Kopin was issued a violation ticket. That ticket has been disputed and the trial is set for January 7, 2016.
17. As a result of the sale, IHA issued Happy Valley a second written warning. The February 25, 2015 letter outlined relevant sections of the *Act*, summarized the inspection history for the previous 18 months and outlined possible additional strategies for the store to consider to avoid future contraventions. The letter concluded by emphasizing that it was the business owner’s responsibility to ensure that the plan is implemented and working, and set out the possible penalties in the event of non-compliance.
18. On July 6, 2015, AL purchased a package of “Pall Mall Red” regular cigarettes from clerk Marissa Jobs at Happy Valley and reported the sale to Mr. Severs.
19. Mr. Severs entered the store, confirmed Ms. Jobs’ identity, and asked to speak with the store manager, who was identified as Ms. Chen. Mr. Severs informed Ms. Chen that there had just been a sale of tobacco products to a minor and told her that he would speak with her after he spoke with Ms. Jobs.
20. Ms. Jobs informed Mr. Severs that she had worked at the store for three months, that she was told to use her better judgement about when to ask a customer for identification, and to request identification if someone “looked young.” Ms. Jobs said that she did not ask the MTS for identification because the MTS looked 30 years of age to her. Ms. Jobs also said that she did not recall seeing a Tobacco Sales Policy, did not realize there was a calculator at the cash till to compute the age of the client, had not seen the 2015 “Check Photo ID” decals, was not aware of the Tobacco Retailer Resource Kit, and had never been asked to take a quiz on her knowledge of tobacco regulations. Ms. Jobs reported that she felt as if she had been “thrown into the dragon’s pit.”

21. Mr. Severs informed Ms. Chen that there had been a sale of tobacco to a minor and asked her what steps had been put in place since the last sale to a minor on February 3, 2015. Ms. Chen informed him that all staff received training on tobacco regulations, that they knew they were to request identification if the purchaser looked to be under 30 years of age, that they had been instructed as to what form of identification was acceptable, and where to locate the age of majority on the identification documents. She added that the Tobacco Retail Resource Kit had been posted in the store office and staff had been instructed to read it. Ms. Chen also said that she had conducted one internal mystery shop. Although Ms. Chen said that Happy Valley had a new policy in place, she was unable to locate it.
22. Ms. Chen acknowledged that Ms. Jobs had not confirmed in writing that she had read the tobacco policy, that there was no calculator at the sales till and that neither role plays nor pop quizzes had been implemented for staff.
23. Mr. Severs informed Ms. Chen that he would inform her at a later date what action the IHA would take regarding the contravention. On July 14, 2015, after discussions with other IHA officers, Ms. Severs decided to prepare a Report to Administrator, which led to this hearing.
24. Happy Valley did not dispute or challenge any of the IHA's evidence.
25. Happy Valley's position was that Ms. Jobs was a "rogue employee" who acted against company policy in failing to request identification and was not honest in telling Mr. Severs that she had not read the Tobacco Retailer Resource Kit or tobacco sales policy.
26. Ms. Schaler has been a Happy Valley employee for approximately one year. She testified that her training in tobacco regulations consisted of reading Happy Valley's training binder. She and Ms. Kopin were responsible for training new clerks, including Ms. Jobs.
27. Ms. Schaler said that a copy of the Tobacco Retailer Resource Kit was posted inside an office at Happy Valley and was also part of a binder that all employees were to take home and read. Ms. Schaler said that she watched Ms. Jobs read the binder and sign to confirm that she did so but did not review the Resource Kit with her. Ms. Schaler was unaware whether the binder was still on the premises. Although Ms. Schaler also believed that Ms. Jobs had been given a test or quiz on her understanding of the *Act*, she had no personal knowledge of that.
28. Ms. Schaler testified that Ms. Jobs had been shown the signs at the cash register cautioning clerks to ask for identification and that she instructed Ms. Jobs to ask customers for identification. Ms. Schaler trained Ms. Jobs for one half day and believed Ms. Jobs when she assured Ms. Schaler that she was comfortable with her obligations. Ms. Schaler agreed that she had not conducted any role plays with Ms. Jobs.
29. Ms. Kopin has been a clerk at Happy Valley since August 10, 2009, and has worked for three different owners. Ms. Kopin said that she had been trained on Tobacco Regulations by the store's first and second owners and that she was responsible for training Ms. Jobs, along with Ms. Schaler.

30. Ms. Kopin said that, as part of her training responsibilities, she instructs new clerks to read the Tobacco Retailer Resource Kit and sign it once they have done so. She said that she trained Ms. Jobs for 2 hours after she was hired, and that Ms. Jobs said that she knew everything already. Ms. Kopin said that she stressed to Ms. Jobs that she was to ask customers for identification since she had herself been caught not doing so. Ms. Kopin said that Happy Valley's policy is to ask customers for identification if they look under 30 years of age.
31. Ms. Kopin acknowledged that she had sold cigarettes to minors on two occasions while employed by Happy Valley, explaining that, on the first occasion she was flustered, and on the second occasion, she had made an error calculating the age of the customer. Ms. Kopin said that she reminded Ms. Jobs to always ask for identification, both during the training and again following the March 31, 2014 meeting with IHA.
32. Ms. Bleeker said that Happy Valley experiences a very high turnover of clerks because they are paid only minimum wage. She said that because of Happy Valley's financial circumstances, they are unable to have two clerks and a manager at the store at all times, as IHA has suggested. Ms. Bleeker also conceded that some of the staff do not understand English well but denied that Ms. Jobs received insufficient training about selling tobacco products.
33. Ms. Chen has been employed as Happy Valley's store manager on a part-time basis for two years. She is responsible for all operations of the store and communicating all issues to the owner. She received no training about Happy Valley's obligations regarding tobacco sales when she started and knew nothing about the *Tobacco Control Act* until Ms. Kopin was issued her first warning. After that, she has learned little by little and believes she now knows everything there is to know. She agreed that she was aware that continued contraventions could result in penalties.
34. Ms. Chen said that she has attempted to institute a mystery shopper program but has not had any willing or reliable volunteers. She had her son attempt to purchase tobacco products on one occasion, but has done nothing since. Ms. Chen also agreed that more efforts should be taken to prevent contraventions, including additional staff training in the sale of tobacco products.
35. Ms. Chen said that although she has spoken to the owners about how to solve the compliance issues, she has been told just to do her best. She said that the owners are not really involved in the management of the store and have not assisted her in her efforts to implement measures to avoid contraventions.
36. Ms. Chen acknowledged that although Mr. Severs gave her information about obtaining scanning machines which would prompt cashiers to ask for identification when tobacco products were being purchased, she had not followed up on that information.

SUBMISSIONS

37. The IHA submitted that Happy Valley had violated section 2(2) of the *Act* by selling tobacco products to a person under the age of 19 years of age on July 6, 2015, and that

although it had taken some steps to prevent contraventions, those steps did not meet the requirements of the due diligence defence.

38. IHA also argued that, having been notified on several occasions that its system of preventing sales of tobacco to minors was ineffective, Happy Valley had to demonstrate a higher level of compliance. It argued that Happy Valley's monitoring system was not operational or functioning.
39. Ms. Bleeker submitted that although Happy Valley's owners were making honest efforts to comply with the *Act* and *Regulation*, the store was not doing well financially and could not afford to take the steps suggested by IHA. She contended that Happy Valley was doing what it could.

Law and Analysis

40. The *Act* prohibits the sale, distribution, provision, advertising and promotion of the use of tobacco except in accordance with the *Act* and *Regulation*.
41. Section 6(1)(a.1) provides that the defence of due diligence is available for the prohibition on the sale of tobacco products to a person under 19 years of age.
42. Section 12 of the *Regulation* provides 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.

Has the IHA established a contravention of section 2(2) of the *Act*?

43. Happy Valley did not contest IHA's evidence that on July 6, 2015, a MTS purchased tobacco products from Happy Valley. On the basis of that evidence, I find that IHA has established that Happy Valley contravened Section 2(2) of the *Act* by selling a tobacco product to a person under 19 years of age.

Has Happy Valley established a defence of due diligence?

44. Once IHA proves the act on a balance of probabilities, the burden shifts to the Respondent to demonstrate that it took all reasonable care to avoid the commission of the offence.
45. That burden, as set out in *R. v. Sault Ste. Marie* ((*Sault Ste. Marie* ([1978] 2 SCR 1299)) requires that the party alleged to have committed an offence to 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.

46. The Court continued:

...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.

47. In *Courtaulds Fibres Canada* (1992), 76, C.C.C. 93d) 68 (Ont. C.J.), reasonable care in due diligence cases was determined to be a high standard of awareness of a problem, and continuing action.

48. The level of action required to establish due diligence also depends on the mischief the legislation is meant to address. In *R. v. Seaway Gas & Fuel Ltd.* (2000), 142 C.C.C. (3d) 213 (Ont. C.A.), the Court noted that legislation designed to prevent the sale of tobacco to minors was an important public health statute:

The Act and its regulations attempt to regulate in a strict and careful fashion the distribution of a dangerous product. In RJR-MacDonald Inc. v. Canada (Attorney General), [1994] S.C.R. 311 (SCC) the Supreme Court of Canada considered the Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.) and some of the regulations promulgated pursuant to it. Referring to the general purposes of the regulations, Sopinka and Cory JJ. said, at p. 353:

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good.

49. The Court in *Seaway* found that this reasoning was equally applied to the Ontario *Tobacco Control Act* and concluded that the *Act* and regulations should be strictly interpreted in light of the public health purposes of the legislation, one of which was to ensure that minors are not able to purchase cigarettes.

50. The Court also commented on the merchants' position of both privilege, that being the opportunity to sell products to the public and earn a profit, and even gain a livelihood, thereby, and responsibility, which was the merchants' understanding and respect for the limits of its privilege to sell to the public:

As expressed by Dickson C.J. in Sault St. Marie...:

...The elements of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations that are designed to avoid that danger.

Applying this passage to the sale of tobacco products in Ontario, the message to vendors is a simple one: you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors. One of the ways a vendor fulfills this responsibility is by insisting that the young person seeking to buy cigarettes is in fact old enough to do so....

51. In *Westfair Foods Ltd.* ((2006) SKQB 87) a tobacco retailer was found to have demonstrated due diligence in the following circumstances:

- * provided each employee with a written copy of its Tobacco Sales Policy that required identification from persons who appeared to be 25 or under;
- * participated in role-playing activities in which an experienced employee would act as a test shopper to allow cashiers to become comfortable with the store's policy and procedures regarding the sale of tobacco;
- * installed software in each register that required the cashier to enter the customer's date of birth when a tobacco product was sold;
- * conducted recognition tests every two to three weeks that included a review of the store's tobacco policy;
- * conducted quarterly reviews of each cashier based on the tobacco sales policy;
- * posted signs at each till stating it was illegal to sell tobacco to minors;
- * provided training to call a supervisor if a customer was upset about not being asked for identification;
- * conducted mystery shoppers once a year or every two years; and
- * imposed mandatory punishments for employees that sold tobacco to minors.

52. Once a retailer has notice of past compliance issues in its stores, the level of action required to establish due diligence is higher. (*R. v. Sobey's Inc.* (2000), 181 N.S.R. (2d) 263 (S.C.), *R. v. C.C. Eric James Management Ltd.*, 2000 B.C.P.C. 178 and *R. v. Van Gard Drugs Ltd.* (1997), 242 A.R. 34 P.C.)

53. I conclude that Happy Valley has not met the burden of demonstrating that it exercised all reasonable care to avoid the commission of the offence.

54. Happy Valley had four MTS failures between August 27, 2013 and July 6, 2015. It had been issued a number of written warnings about the ineffectiveness of its system of preventing sales of tobacco to minors and had participated in educational sessions with staff from the IHA. Despite these warnings, I find that Happy Valley failed to take appropriate steps to put in place, and monitor, a system to avoid further contraventions. I particularly note that Happy Valley representatives met with IHA on March 31, 2014 and discussed a number of measures that could be taken, including role plays, refresher training and education to employees, testing employees, monitoring employees by using video surveillance or store-employed test shoppers to ensure staff were following policies and procedures, using birth date prompts to ensure staff were aware of which dates they should be looking for identification and providing bonuses to staff that refuse sales during compliance checks.

55. Although Happy Valley's evidence is that clerks were told to ask for identification and instructed to read some educational material provided by IHA, there is no evidence the

clerks were tested on their understanding of the document. Happy Valley conducted one mystery shop before abandoning that system. Even though one of the Happy Valley clerks had been issued a violation ticket for selling tobacco products to a minor, that clerk was responsible for training other clerks. One of the clerks she trained also failed to comply with the tobacco sales requirements. There is no evidence Happy Valley disciplined or re-trained either of these employees.

56. Happy Valley has not participated in any role-play activities. It has not installed any software on its registers. It has not conducted reviews of the tobacco policy or conducted any recognition tests with the clerks. It has not tested the clerks on all relevant laws and store policies. There is no surveillance system in place to ensure that clerks are adhering to the policies. In short, Happy Valley's efforts to prevent sales of tobacco to minors were inadequate and ineffective.
57. Contending that an employee is dishonest is not a due diligence defence, nor is contending that the store has inadequate financial resources. As noted in paragraph 50, above, the privilege of being licensed to sell tobacco products to the public and earn a profit thereby, carries with it important responsibilities.

What is the appropriate penalty?

58. Section 6.1 of the *Act* provides that the administrator may impose a monetary penalty in accordance with the prescribed schedule and/or prohibit the person from selling tobacco at retail from the location at which the contravention occurred if satisfied on a balance of probabilities that a person has contravened a provision of the *Act* or of the Regulation.
59. 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(2) of the *Act* the range of monetary penalties is from \$0 to \$1,000 and the prohibition period is from 0 to 30 days.
60. The IHA sought a monetary penalty in the amount of \$1,000 and a 30-day licence suspension for the contravention in light of Happy Valley's history of infractions.
61. Happy Valley conceded that is aware of the requirements of the *Act* and *Regulation*, and in particular, the prohibition against selling tobacco to minors. I am persuaded that a monetary penalty and a license suspension are appropriate sanctions for the contravention.
62. The factors to be considered in imposing administrative penalties are set out in Section 13 (1) of the Regulation:
- (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

...

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

63. The *Regulation* enables me 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 admission of a contravention and the degree of remorse (where the Respondent is an individual). Aggravating factors would include, for example, a contravention involving dishonesty, whether the contravention is planned or premeditated, past history and the extent of the harm caused by the contravention.
64. Happy Valley received no fewer than two written warnings about the sale of tobacco to minors and one verbal warning. One of its clerks has received a violation ticket for the sale of tobacco products to minors. Although the ticket has been disputed and no judicial determination has been made, that the ticket was issued at all put Happy Valley on notice of failures with its system.
65. Given the number of contraventions in the two year period despite IHA's efforts, I find that a monetary penalty in the amount of \$1,000 and a 30-day licence suspension are appropriate for the contravention.

Order

66. **As have found that** Happy Valley contravened Section 2(2) of the *Act*, **I ORDER**, pursuant to Section 6.2(2) of the *Act*, that it pay a penalty of **\$1,000**, which sum is due and payable upon service of this Decision and Order.
67. **In addition, as have found that** Happy Valley contravened Section 2(2) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products for a period of 30 days beginning January 20, 2016.



Carol Roberts, Administrator's Delegate

