

A Hearing Under Section 6 of the *Tobacco Control Act* R.S.B.C. 1996, c. 451
as amended

Regarding an alleged Contravention of Sections 2(3) and 2.4(a) of the
Tobacco Control Act R.S.B.C. 1996, c.451

- by -

Hero Smoke Shop
(the “Respondent”)

Administrator’s Delegate under
Section 5 of the *Tobacco Control Act*: Carol L. Roberts

Date of Hearing: February 6, 2013

Place of Hearing: Surrey, British Columbia

Date of Decision: February 22, 2013

Appearing:

For Fraser Health Authority: Hans Mulder

For Hero Smoke Shop: No one appeared

Decision

Background

1. No one appeared on behalf of Hero Smoke Shop (“Hero”) at the time and date set for the hearing. Hans Mulder appeared on behalf of the Fraser Health Authority (the “Health Authority”).
2. Pursuant to Section 7 of the *Tobacco Control Regulation* (the *Regulation*), the administrator must provide notice to a person that the administrator intends to conduct a hearing to determine whether the person has committed a contravention of the Act or regulations. This notice must, among other things, describe the contravention alleged to have been committed, specify the date, place and time of the hearing, and advise the person that the administrator may proceed with the hearing and make an order imposing an administrative penalty if the person fails to appear or provide submissions, as applicable.

3. On November 6, 2012, the Administrator, *Tobacco Control Act* (the *Act*) issued a Notice of Administrative Hearing (the Notice) to Hero. The Notice set out the time, date and location of the hearing as well as the allegations against Hero. The Notice stated that

...if the Respondent fails to appear at the hearing or to provide submissions, the Administrator or the Administrator’s delegate may proceed with the hearing and make an order imposing an administrative penalty on the Respondent without further notice.
4. Mr. Mulder testified under oath that on November 14, 2012, he personally served Rahim Saed, one of the Officer/Directors of Hero, with a package of documents including the Notice. He also informed Mr. Saed of his intention to seek a suspension of his licence to sell tobacco. A copy of the Notice was also sent by regular mail to the other Officer/Director of Hero.
5. Section 8 of the *Regulation* provides that if a person who has been served notice of an administrative hearing under Section 7 fails to appear at a hearing or provide submissions, the administrator may proceed with the hearing and make an order imposing an administrative penalty on the person without further notice to that person.
6. I was satisfied, based on Mr. Mulder’s evidence, that Hero was properly notified of the time, date and location of the hearing.

Evidence

7. Mr. Mulder was the sole witness for the Health Authority. He has been a Tobacco Enforcement Officer (TEO) with the Health Authority for approximately four years.
8. On September 20, 2012, acting on information from the RCMP, Mr. Mulder entered Hero to conduct a compliance check. Mr. Mulder spoke with an individual behind the counter whom he later identified as Rahim Saed. Upon entering the store, Mr. Mulder observed an open package of “Pall Mall” cigarettes on the counter in front of Mr. Saed. After a brief conversation, Mr. Mulder asked Mr. Saed if he could purchase some individual cigarettes. Mr. Saed told him that he would sell him 2 cigarettes for \$1. Mr. Mulder gave Mr. Saed a “loonie” and received two individual cigarettes. When Mr. Mulder asked Mr. Saed for some matches, Mr. Saed said he did not have any but lit Mr. Mulder’s cigarette for him.
9. Mr. Mulder identified himself as a TEO and obtained identification from Mr. Saed. Mr. Saed indicated that he was the owner/proprietor of Hero. Hero’s business license was posted in the store.
10. Mr. Mulder notified Mr. Saed that he was in contravention of a number of provisions of the *Act* and issued Hero several tickets in respect of some of those violations. Mr. Mulder informed Mr. Saed that he would be proceeding by way of administrative process in respect of two of the contraventions; those being the sale of individual cigarettes, and having an open display of cigarettes.
11. Approximately one week later, Mr. Mulder hand-delivered to Mr. Saed his “Report to Administrator” which contained the date and time and a brief description of the alleged

contraventions. Some time after that, Mr. Mulder hand-delivered a disclosure package containing copies of his notes and the evidence bags to Mr. Saed.

12. Mr. Mulder testified that Hero operates a small convenience store in the Whalley district of Surrey. Mr. Mulder's evidence, which I accept, is that the store is located in an area frequented by a marginalized population and which attracts significant police attention. Although Hero is able to sell a variety of goods, Mr. Mulder testified that he saw little product other than tobacco in the store.
13. Mr. Mulder advised me that Hero has been licensed to sell tobacco since at least 2008, which is when the tobacco licenses were first issued. He also advised me that Hero has received prior written warnings about its business practices as they pertain to tobacco.
14. The Health Authority alleges that on September 20, 2012, Hero contravened Section 2(3) of the *Tobacco Control Act* (or the "Act") by selling cigarettes from an opened package, and Section 2.4 (a) by displaying cigarettes in a prohibited manner.
15. In addition to the evidence regarding the sale on September 20, 2012, the Health Authority provided evidence of violation tickets that had been issued to Hero on February 19, 2011 (for sale to a minor), March 10, 2012 (for sale to a minor and display) the sale of single cigarettes on August 16, 2012, and for permitting smoking in a prohibited place on September 20, 2012. The violation tickets are still before the courts.

Issues

16. Has the Health Authority proven on a balance of probabilities that on September 20, 2012, Hero sold cigarettes from an opened package, in contravention of Section 2(3) of the *Act*?
17. Has the Health Authority proven on a balance of probabilities that on September 20, 2012, Hero displayed tobacco products in a manner prohibited by the regulations, in contravention of Section 2.4(a) of the *Act*?
18. If the Health Authority has established one or more of the contraventions, what penalty is appropriate?

Analysis and Findings

19. Section 2 of the *Act* provides that *a person must not deal in, sell, offer for sale, distribute, provide, advertise or promote the use of tobacco except in compliance with the Act and regulations*. Section 2(3) provides that *A person must not sell or offer for sale cigarettes from an opened package* and Section 2.4(a) provides that *a person must not display tobacco products in any manner prohibited by the regulations*.
20. Section 4.31 (1) (a) of the *Regulation* provides that *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 may be reasonably seen or accessed by a minor inside the retail establishment*.

21. Based on the uncontradicted evidence of the Health Authority, I find, on a balance of probabilities, that on September 20, 2012, Hero sold two cigarettes from an opened package to Mr. Mulder for \$1 in contravention of Section 2(3) of the *Act*.
22. Again, based on the Health Authority’s uncontradicted evidence, I further find on a balance of probabilities, that on September 20, 2012, Hero had an open package of “Pall Mall” brand cigarettes on a counter next to the till. This constitutes a contravention of Section 2.4(a) of the *Act*, as this display is prohibited by Section 4.31(1)(a) of the Regulation.

Penalty

23. 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.
24. 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(3) of the *Act* the range of monetary penalties is from \$0 to \$1,000 and the prohibition period is from 0 to 30 days. For a first contravention of Section 2.4, the range of monetary penalties is from \$0 to \$3,000 and the prohibition period is from 0 to 30 days.
25. The Health Authority sought a monetary penalty in the amount of \$2,000 and a 60 day licence suspension for each of the contraventions, for a total monetary penalty of \$4,000 and a 120 day licence suspension.
26. The Health Authority submitted that Hero has been issued a number of written warnings and that it currently has four outstanding violation tickets. The Health Authority was prompted to conduct a compliance check in this case after receiving credible and reliable information from the RCMP that Hero had been making sales of tobacco in contravention of the *Act*.
27. The Health Authority also submitted that there were a number of aggravating factors in this case to support the imposition of both a monetary penalty and a licence suspension, including the fact that Hero was selling individual cigarettes at a significant markup to a population that is marginalized as well as the fact that Hero’s proprietor lit the cigarette for Mr. Mulder. The Health Authority contended that Hero’s actions constituted a “complete flaunting” of the Regulation.
28. 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*

(ii) ...

...

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

29. 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.
30. I accept that Hero has been issued a number of written warnings, although there is no evidence that any of those warnings were in relation to conduct which is the subject matter of the penalty. I further note that Hero has been issued four violation tickets. Although those matters have not been disposed of by the courts, I infer that, as a result of being issued these tickets, Hero is aware of the requirements of the *Act* and *Regulation*, and in particular, the prohibition on the sale of individual cigarettes.
31. I also accept that Mr. Saed is an owner and Officer/Director of Hero and that he was not only the person who contravened the *Act*, but also the one who lit Mr. Mulder's cigarette. I note that Hero has had a license to sell tobacco for approximately 5 years and infer that Mr. Saed is aware of the licensing requirements.
32. I have considered the fact that, at .50 per cigarette, Hero receives an additional 25% over the retail price of a package of cigarettes, which represents a significant markup. I have also considered that the retail premises are located in an area which is dominated by a vulnerable population. These are aggravating factors.
33. Considering all of these factors, I am persuaded that a significant monetary penalty as well as a license suspension are appropriate for each of the contraventions. However, there is no evidence to support the sanctions sought by the Health Authority. As there is no evidence Hero has been found in contravention of any of these Sections on any prior occasion, I am bound by the sanctions prescribed in the Schedules.
34. I find that a monetary penalty in the amount of \$1,000 for the contravention of Section 2(3) is appropriate. Mr. Saed did not just offer to sell a cigarette from an opened package, he sold two at a significant markup, one of which he subsequently lit. Although I do not consider it a contravention for the purposes of these proceedings, I note that Hero was issued a violation ticket in respect of an alleged breach of this Section in August 2012, approximately one month before this contravention occurred. Based on all of these factors, I find the maximum penalty for a first contravention to be appropriate.
35. I also find that a monetary penalty in the amount of \$2,000 for the contravention of Section 2.4, is appropriate in the circumstances. I note that Hero was issued a violation ticket under this Section in March 2012 and that it was well aware of its obligation to display tobacco products in accordance with the Regulation.

36. The total monetary penalty is \$3,000.
37. I am also persuaded that, in the circumstances, it is appropriate to order that Hero be prohibited from selling tobacco products at for a period of 60 days. Although the violation tickets issued to Hero have not yet been disposed of, it is clear that Hero is taking no steps to ensure that it is in compliance despite being warned of its conduct under the *Act*. There is no evidence Hero is exercising due diligence to prevent the conditions to which the penalty relates. There is no evidence of any mitigating factors. I am persuaded that there is a need to provide an incentive for Hero to comply with the *Act* and Regulation and that a significant suspension period is appropriate in these circumstances.

Order

38. **As have found that** Hero contravened Sections 2(3) and 2.4 of the *Act*, **I ORDER**, pursuant to Section 6.2(2) of the Act, that it pay a penalty of **\$3,000**, which sum is due and payable upon service of this Decision and Order.
39. **In addition, as have found that** Hero contravened Sections 2(2) and 2.4 of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products for a period of 60 days beginning the date of the service of this Order, and in any event, no later than March 1, 2013.

A handwritten signature in black ink, appearing to read 'Carol Roberts', written in a cursive style.

Carol Roberts, Administrator's delegate