

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 –

Ali Zulfiqar doing business as Sunfood Market

(the “Respondent”)

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

C. L. Roberts

Date of Hearing:

September 18, 2015

Place of Hearing:

Richmond, British Columbia

Date of Decision:

September 28, 2015

Appearing:

For Ali Zulfiqar:

On his own behalf

For the Fraser Health Authority:

Kathryn Stuart

Decision

Background

1. The Fraser Health Authority alleges that on July 15, 2014, Ali Zulfiqar doing business as Sunfood Market (“Sunfood”) sold tobacco products to a minor, contrary to Section 2(2) of the *Tobacco Control Act* (the “Act”).

Law

2. The *Act* prohibits the sale, distribution, provision, advertising and promotion of the use of tobacco except in accordance with the *Act* and *Regulation*.
3. Section 2(2) 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(2) of the *Regulation*).
4. Section 2(2) of the *Act* is a regulatory offence for which there is a defence of due diligence (Section 12 of the *Tobacco Control Regulation* (the “*Regulation*”):

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.

Evidence

5. I heard evidence from T.J., a minor test shopper (“MTS”); Edward Wong, a Tobacco Enforcement Officer (“TEO”) with the Fraser Health Authority; and Mr. Zulfiqar.

Health Authority

6. T.J. has been employed as a MTS for the Fraser Health Authority for 2 years and is currently 17 years of age. He testified that on July 15, 2014, he and another MTS entered Sunfood Market. T.J. asked the clerk for a single “Prime Time” cigarello. When the clerk asked him for identification, T.J. said that he had none with him. The clerk then asked T.J. how old he was, to which T.J. replied “19.” The clerk then sold T.J. the cigar and T.J. left the store.
7. T.J. provided a physical description of the clerk and testified that there was only one clerk on duty at that time.
8. After completing his purchase, T.J. returned to Mr. Wong’s vehicle and wrote notes of his actions and observations.
9. In cross-examination, T.J. acknowledged that he was not telling the truth when he told the clerk that he was 19 years old but said that he was instructed to be truthful in everything else he said. He also denied that he spoke to anyone outside the store before returning to Mr. Wong’s vehicle.
10. Mr. Wong testified that on July 15, 2014, he observed T.J. and another MTS enter Sunfood’s store. Upon exiting, T.J. informed Mr. Wong that he had purchased a “Prime Time” cigarillo and provided Mr. Wong with a physical description of the clerk he had purchased it from.

11. Mr. Wong entered the store and observed the clerk, Mr. Mahmood, whom he recognized from previous visits. Mr. Wong informed Mr. Mahmood of the reason for his visit and informed him of the contravention of the *Act*. Mr. Wong testified that Mr. Mahmood acknowledged he had sold the MTS a tobacco product and admitted that he had not checked T.J.'s identification. Mr. Wong informed Mr. Mahmood that he would be forwarding information about the violation to the Ministry of Health.
12. Mr. Wong testified that he had visited the store on a number of occasions since Mr. Zulfiqar took ownership of it in January 2010.
13. Those visits included a routine inspection in January 2010, in which Mr. Wong discovered that the store had been displaying tobacco products improperly. Mr. Wong informed Mr. Zulfiqar about his obligations under the *Act*, discussed the steps he could take to ensure compliance, including training and supervision of staff and possible enforcement actions the Health Authority could take.
14. On October 21, 2010, the Fraser Health Authority issued Mr. Zulfiqar a violation ticket for selling tobacco to a person under the age of 19 on October 11, 2010. For reasons that are not relevant to this decision, no conviction was entered.
15. Mr. Wong conducted another routine inspection at Sunfood on April 13, 2011. Mr. Wong provided Mr. Zulfiqar with a Tobacco Retailer Resource Kit and spent approximately 15 minutes with him outlining the requirements of the *Act* and the penalties for non-compliance.
16. On July 11, 2011, Mr. Wong received a complaint from the Surrey RCMP regarding Sunfood selling tobacco to minors. Mr. Wong conducted a compliance check and noted that, in that instance, Mr. Zulfiqar followed the MTS out of the store and did not sell tobacco products to him.
17. Mr. Wong conducted a routine inspection on May 30, 2012 and issued Sunfood a warning for improper display of tobacco accessories.
18. Mr. Wong conducted a routine inspection on March 11, 2013 and noted that tobacco accessories were being improperly displayed. Mr. Wong provided Sunfood with new signage.
19. On November 30, 2013, two MTS purchased tobacco products from Mr. Mahmood at Sunfood. The Health Authority issued Mr. Mahmood a violation ticket in the amount of \$575 for a sale to a minor under section 2(2) of the *Act* and another to Mr. Zulfiqar for improper display, as the cabinet in which the tobacco products were stored was broken. Mr. Mahmood paid the ticket. Mr. Zulfiqar disputed his ticket and it was dismissed because of, as I understood Mr. Wong's evidence, a technical defect in the prosecution of the matter.

Sunfood

20. Mr. Zulfiqar did not challenge Mr. Wong's evidence.

21. Mr. Zulfiqar testified that his clerk, Mr. Mahmood, provided him with a different version of events from that testified to by T.J and Mr. Wong, which was that an adult purchased the tobacco products on behalf of the MTS.
22. At the hearing, I informed Mr. Zulfiqar that, as Mr. Mahmoud was not present to give sworn evidence and his evidence was not subject to cross-examination, I would give it less weight than that of the Health Authority. Mr. Zulfiqar then said he had no further evidence.

Issues

23. Has the Fraser Health Authority proven on a balance of probabilities that Sunfood sold a tobacco product to a person less than 19 years of age on July 15, 2014 in contravention of Section 2(2) of the *Act*?
24. If so, has Sunfood established a defence of due diligence?
25. If a contravention is found and a penalty is to be imposed, what is the appropriate penalty?

Analysis and Findings

Has the Fraser Health Authority proven on a balance of probabilities that Sunfood sold a tobacco product to a person less than 19 years of age on July 15, 2014 in contravention of Section 2(2) of the *Act*?

26. On the basis of the evidence before me, I find that Fraser Health Authority has established, on a balance of probabilities, that on July 14, 2014, Sunfood contravened Section 2(2) of the *Act* for selling a tobacco product to a person under 19 years of age.

Has Sunfood established a defence of due diligence?

27. Section 6(1)(a.1) of the *Act* provides that the defence of due diligence is available for the prohibition on the sale of tobacco products to minors. Once the Health Authority proves the act, the onus of proof shifts to the Respondent to demonstrate that it exercised due diligence to avoid committing the act. (Section 11(2)(j) of the *Act* and Section 12 of the *Regulation*)
28. The burden, as set out in *R. v. Sault Ste. Marie (City)*, [1978] 2. S.C.R. 1299 requires that the party alleged to have committed an offence 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.

29. 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.

30. 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.
31. 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.

32. The Court 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.
33. 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 from the sales; 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....

34. Mr. Zulfiqar called no evidence to demonstrate due diligence. He argued that the MTS was dishonest, that the Health Authority failed to provide him with proper, up-to-date signage, and that, although Mr. Mahmood was to blame for the contravention, he could not terminate his employment without contravening the *Employment Standards Act*. As I understand Mr. Zulfiqar, he also believes that Mr. Wong is harassing him and treating him unfairly.
35. The Health Authority argued that Sunfood could not rely on a defence of due diligence because it did not have any method of testing the effectiveness of the system it had in place.
36. The Health Authority also argued that 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.* CITE and *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.))

Analysis

37. Although both Mr. Zulfiqar and Mr. Mahmood are aware of the requirements of the *Act* and the Health Authority has provided Mr. Zulfiqar with information and resources, I am unable to conclude that Sunfood has an effective system in place to prevent the sale of tobacco to minors.
38. The fact that the Health Authority did not provide Sunfood with updated signage setting out the legal age for purchasers is irrelevant. It is not the Health Authority's responsibility to provide a retailer with appropriate tools to ensure compliance. Furthermore, the contravention did not arise out of Mr. Mahmood's failure to properly calculate the age of the MTS. It is not Although Mr. Mahmood asked the MTS questions about his age, he took no steps to verify the accuracy of the information given to him.
39. Given Mr. Zulfiqar's knowledge of Mr. Mahmood's previous failures to verify the age of purchasers of tobacco products, he had a duty to take extra steps, such as conducting his own MTS testing, or directly or indirectly reviewing Mr. Mahmood's performance. While I accept that Mr. Mahmood asked questions related to the MTS's age, those steps are ineffectual if the responses are not verified for accuracy.
40. I find that Sunfood has not met the requirements of the due diligence defence.

What is the appropriate penalty?

41. 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.
42. 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.

43. The Health Authority sought a monetary penalty in the amount of \$1,000 and a 30 day licence suspension for the contravention in light of Sunfood’s history of infractions.

44. 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.*

45. 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.

46. Sunfood has received a number of written warnings about the sale of tobacco to minors and three violation tickets since Mr. Zulfiqar purchased the business. Two of the violation tickets were issued for the sale of tobacco products to minors.

47. The Health Authority has provided Mr. Zulfiqar with information and resources, including a “Tobacco Retailer Resource Kit” which contains tips and resources to assist retailers in complying with the *Act*.

48. I have no doubt that Sunfood is aware of the requirements of the *Act* and *Regulation*, and in particular, the prohibition against selling tobacco to minors. I am also persuaded that a monetary penalty and a license suspension are appropriate sanctions for the contravention.

49. Although the Health Authority sought the maximum monetary penalty of \$1,000 as well as the maximum 30 day suspension, I am concerned that this sanction is disproportionate to sanctions sought by the Health Authority in similar situations.

50. On the same day I heard the Health Authority’s case against Sunfood, I heard another matter in which the Health Authority made a joint submission of a \$750 penalty and a 25 day licence suspension on facts somewhat similar to the facts here. In that case, the business

owner, who was also the clerk at the retail outlet, sold tobacco products to a person under the age of 19 without asking any questions about the MTS's age or asking for identification. The retailer had also been the subject of complaints and had been issued two tickets for contraventions that had not yet been disposed of by the Court.

51. Unlike the situation in the other case, Mr. Mahmood made some attempt to comply with the *Act* by both questioning the MTS about his age and asking for identification. Although I have found this to be inadequate for the purpose of establishing due diligence, it was an effort that should result in a lesser penalty in this matter.
52. I find that a monetary penalty in the amount of \$500 and a 20 day licence suspension for the contravention of Section 2(2) is both appropriate in the factual circumstances of this case and to reflect fairness between retailers in similar situations.

Order

53. **As I have found that** Sunfood contravened Section 2(2) of the *Act*, **I ORDER**, pursuant to Section 6.2(2) of the Act, that it pay a penalty of **\$500**, which sum is due and payable upon service of this Decision and Order.
54. **In addition, as I have found that** Sunfood contravened Section 2(2) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products for a period of 20 days beginning November 13, 2015.



Carol Roberts, Administrator's Delegate