

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

Regarding alleged Contraventions of Sections 2(2) and 2.4(1) of the  
*Tobacco and Vapour Products Control Act* R.S.B.C. 1996, c.451

- by -

101 Trading Co. Ltd. dba Willoughby Market

(the “Respondent”)

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

Hugh McCall

Date of Hearing:

November 21, 2017

Place of Hearing:

Surrey, BC

Date of Decision:

December 10, 2017

Appearing:

For the Respondent:

Sungsoo Kim

Kyungdo Kim

For Fraser Health Authority:

Stan Dhaliwal, Tobacco Enforcement Officer  
T.R., Minor Test Shopper

## **Decision and Order**

### **BACKGROUND**

1. Willoughby Market is a convenience store located at 20793 72nd Avenue, Langley, B.C. Kyungdo Kim is a Director of the Respondent. His father, Sungsoo Kim is the former owner and was previously the respondent in an administrative penalty hearing under the

Tobacco Control Act, adjudicated by Ms. Helen Pinsky (Decision dated September 19, 2016).

2. The Respondent did not deny the history of contraventions. Nor did it argue that the current corporate vehicle should be considered a new entity for purposes of the contraventions before me. All the individuals involved in operating Willoughby Market when the previous contraventions took place continue to be involved and are principals of 101 Trading Co. Ltd.
3. Stan Dhaliwal is a designated Tobacco Enforcement Officer ("TEO") under the *Tobacco and Vapour Products Control Act* (the "Act") for the Fraser Health Authority ("FHA"). Mr. Dhaliwal conducted a compliance check with two minor test shoppers (the "MTS") on March 20, 2017 which led to the administrative penalty hearing before me.
4. The FHA alleged that on March 20, 2017, the Respondent contravened Section 2.4(1) of the *Act* by displaying tobacco products in a manner which permitted them to be viewed by the MTS for more than 3 minutes, and Section 2(2) of the *Act* by selling a vapour product to a minor.
5. On September 28, 2017, a Notice of Administrative Hearing was issued for a hearing to determine whether the Respondent had contravened the *Act*, and allowing for an Order to be made.
6. The sole issue at the hearing was a determination of penalty and fines, as the parties agreed to the facts and did not dispute the contraventions.

## **ISSUES**

7. Has the FHA proven on a balance of probabilities that the Respondent displayed tobacco and vapour products to minors in contravention of Section 2.4(1) of the *Act* and that the Respondent sold a vapour product to a person under the age of 19 years, in contravention of Section 2(2) of the *Act*?
8. Is there a defence that the Respondent exercised due diligence?
9. If a contravention of the provisions of section 2.4(1) and 2(2) occurred, what is the appropriate penalty for the offence?

## **LEGISLATIVE FRAMEWORK**

10. The *Act* establishes how a person must handle the retailing of tobacco and vapour products in British Columbia and provides prohibitions and penalties for non-compliance.
11. Section 2(2) of the *Act* prohibits the sale, offer to sell, provision or distribution of tobacco and vapour products to an individual who has not reached the age specified by the Vapour Products Control Regulation (the "Regulation").

12. Section 2.4(1) prohibits a person from displaying tobacco or vapour products, or advertising or promoting the use of tobacco or vapour products by means of a sign or any other manner prohibited by the Regulation.
13. 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 a provision of the *Act* or Regulation, or of an order of the administrator. Section 6.1(2) specifies that the administrator may impose a monetary penalty on the person, or may prohibit the person from selling or offering to sell tobacco or vapour products at retail from the location at which the contravention occurred, or under certain circumstances, from any other location.
14. The Regulation defines the age for the purposes of Section 2(2) of the *Act* to be 19 years.
15. Section 12 of the Regulation states that a person must not be found to have contravened a provision of the *Act* or Regulation prescribed under section 6 if the person demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention.
16. Section 13 of the Regulation sets out the factors which the administrator must take into account when imposing an administrative penalty on a person for the contravention of the *Act* or Regulation.

## **EVIDENCE**

17. The parties agreed that 2 contraventions took place on March 20, 2017. The MTS (who were under 19 years of age) working with Mr. Dhaliwal were able to view tobacco and vapour products displayed contrary to section 2.4(1) of the *Act*, and were able to purchase a vapour product contrary to section 2(2) of the *Act*.
18. On November 5, 2016, another compliance check involving MTS took place. On that occasion an employee of the respondent sold a package of John Players regular cigarettes to the MTS and was issued a ticket for a violation of section 2 (2) of the *Act*.
19. On August 8, 2016, TEO Wong discovered that the respondent was contravening Sections 2.4(1)(a) and (b) of the *Act* by displaying products and promoting tobacco in a prohibited manner. In addition, TEO Wong observed that the respondent failed to display a warning sign contrary to Section 5(1) of the Regulation. He issued a warning to the respondent.
20. On March 18, 2016, TEO Wong conducted a compliance check. On that occasion an employee of the Respondent sold tobacco to a MTS, who was with TEO Wong. The MTS. This contravention was the subject of the administrative penalty hearing before Ms. Pinsky.

21. Another incident involving the Respondent selling tobacco to a MTS took place in 2015, and complaints were also made to the FHA that the Respondent sold tobacco to a minor. These incidents were dealt with by warnings.
22. Following the events of March 20, 2017, the FHA decided to proceed with another administrative hearing based on the number of contraventions at Willoughby Market within a relatively brief time frame.
23. Kyungdo Kim spoke on behalf of the Respondent with assistance from his father Sungsoo Kim. Kyungdo Kim admitted the contravention on March 20, 2017 and acknowledged the Respondent's record of contraventions. Both Kyungdo Kim and Sungsoo Kim expressed remorse and a willingness to continue working with the FHA. Kyungdo Kim explained the changes they have made since March 20, 2017. They have installed a functioning lock on the door of the room in which they keep tobacco. People who want to purchase tobacco must ring for a clerk who checks their identification to ensure that they are of age. The identification is checked again at the point of sale. They have made those changes to ensure that there will be no further sales to minors.
24. Both Kyungdo Kim and Sungsoo Kim explained that Willoughby Market operates at minimal profit and that tobacco and vapour products make up 60% of store sales. They requested that I consider the ability of Willoughby Market to remain in business in the event I order that the Respondent be prohibited from selling tobacco and vapour products for a period of time.

## ANALYSIS AND FINDINGS

25. Based on the FHA's evidence and the Respondent's admission, I accept that the Respondent contravened both Section 2.4(1) and 2(2) of the *Act* on March 20, 2017.
26. This is a strict liability offense and no proof of intent is required. Liability flows from the breach and the only defence is that of 'due diligence' which Dickson J. of the Supreme Court of Canada discussed in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

The due diligence which must be established is that of the accused alone. 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. (my emphasis) The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Natras*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.).

27. Several Courts have determined that the level of due diligence required is higher in the context of public health and safety. In *R. v. Seaway Gas and Fuel*, a decision of the Ontario Court of Appeal the Court acknowledged that the *Ontario Tobacco Control Act*

was an important public health statute which regulates “in a strict and careful fashion the distribution of a dangerous product.”

28. In addition, in *R. v. Sobey's Inc.* (2000), 181 N.S.R. (2d) 263 the court held that the retailer had not met the standard of due diligence where it was on notice that its policies and procedures resulted in apparent violations of the *Act* on two previous occasions. Similarly in *R. v. C.C. Eric James Management Ltd.*, 2000 BCPC 178, a decision by the Provincial Court of B.C., the Court held that a higher standard of care is required when a retailer has notice that its policies and practices have failed.

29. In *R. v. Van Gard Drugs Ltd.* (1997), 242 A.R. 34 the Alberta Provincial Court stated:

Certainly after the receipt of the second warning letter alarm bells ought to have sounded in the minds of management. They ought to have been alerted that the system that they had in place, the manuals and the signs, were not effective and had to be reworked. The institution of a system is not, in itself, sufficient to establish that one has been duly diligent. From time to time, a system must be tested to see if it is working to determine if it prevents the happening of certain events, in this case the sale of cigarettes to minors. That could have been done in the present case by something as simple by getting a test shopper, someone over the legal age by three or four years but who looked youthful, to see whether or not they could get cigarettes without being asked for identification.

30. The Respondent did not argue that it had acted with due diligence and neither was there evidence to demonstrate that it had exercised all reasonable care to prevent the contraventions. I find that a defence of due diligence has not been proven.

31. Having found that the contraventions occurred and that the Respondent has not established a defence of due diligence, I now consider what penalty is appropriate.

## **PENALTY**

32. In the previous administrative penalty hearing, Ms. Pinsky, Administrator's Delegate, indicated that although both a monetary penalty and a prohibition period could be ordered, the FHA sought a monetary penalty. She stated:

The Fraser Health Authority has submitted that the Respondent should face a fine commensurate with a first offence under the Act. They are not requesting a prohibition from selling tobacco. They have begun appropriate training with the Respondent and with the company that has taken over operations of the business, and are not focussed on past mistakes.

33. The factors Ms. Pinsky considered in reaching her decision on penalty included the need for a deterrent, the history of previous warnings, progress made by the retailer, the small scale of the operation, the potential for financial hardship to the owners/operators, their history of tickets or lack thereof, and the fact that a first contravention of Section 2(2) of the Act provided a maximum monetary penalty of \$1,000.00.

34. Ms. Pinsky concluded that it was important to use the penalty as a significant deterrent for Willoughby Market as well as a deterrent for the larger community of tobacco

retailers. However, she determined that both a monetary penalty and prohibition period were not necessary. She ordered that the Respondent pay a monetary penalty of \$500.00.

35. Between the contravention on March 18, 2016 and the contraventions on March 20, 2017, the Respondent had two other violations of the *Act*. They were:
- August 8, 2016, display and promotion of tobacco products (Section 2.4(1)) - warning issued; and
  - November 5, 2016, sale of tobacco to a minor (Section 2(2)) - violation ticket issued.
36. In regard to the contraventions before me the FHA sought a fine of a minimum of \$1,000.00 and a prohibition period of a minimum of 30 days. The FHA is aware that 101 Trading Co. Ltd. is a small company, but also noted that this is a second contravention of Section 2(2) and that the window for prohibition periods is from 0 to 90 days and that the range for penalties is \$0.00 to \$3,000.00. The penalty for a first contravention of Section 2.4(1) is a prohibition period of 0 to 30 days and a monetary penalty of \$0.00 to \$3,000.00. The FHA has worked to help the Respondent improve its systems and to develop a Tobacco Policy. In the circumstances, it sought a meaningful penalty.
37. I have considered the following factors. Kyungdo Kim and Sungsoo Kim were remorseful. They have taken steps to ensure that there are no further contraventions of the *Act*. They alleged that Willoughby Market is a marginal business and that it relies heavily on tobacco, which represents 60% of its sales. While this evidence was not substantiated by financial statements, I am inclined to accept it as accurate.
38. However, while a monetary penalty and prohibition period may have a deleterious impact on the financial viability of the Respondent's business, the *Act* is intended to protect important issues of public health. Financial difficulty is not a valid reason for contravening such legislation, and while a retailer's financial hardship due to a contravention of the legislation is a factor in determining an appropriate penalty, it is not a significant factor.
39. Section 13 of the Regulation requires that I consider certain factors in imposing an administrative penalty. Those which are relevant to this decision include whether the Respondent has been warned about the issue. In this case, the Respondents received several warnings. Another is whether the person involved in the sale has an ownership interest. In this case it is a family business and each person responsible for a contravention of the *Act* has an ownership interest in the family business.
40. I am persuaded that the Respondent has acted in good faith and that it has made efforts to fulfil its responsibilities as a retailer of tobacco and vapour products. It has placed all of its tobacco products in a separate room with a secure door. It checks identification of individuals accessing the room and again at the point of sale. However, some of the physical changes it has made to the store and to its tobacco policy were only implemented following the contraventions on March 20, 2017.

41. This suggests that the monetary penalty issued for the breach on March 18, 2016, was not sufficient to prompt the Respondent to alter its physical space or improve its screening processes.
42. While I understand the financial hardship which a monetary penalty and prohibition period may have on the Respondent's business, my focus is to ensure compliance with the *Act* and Regulation. The evidence indicates that there are significant negative health impacts when people begin to smoke when they are under 19 years old and it is essential that retailers of tobacco products fulfil their responsibilities as the law requires.
43. Taking all the factors into account, including: the Respondent's history of multiple violations; the fact that it is a small business with limited resources; the fact that it is a family owned enterprise; the fact that this was the Respondent's second administrative penalty hearing; the fact that the Respondent has had multiple warnings; the fact that in spite of the history of violations, the principals of the Respondent appear sincere in their desire to fulfil their responsibilities; the fact that any penalty imposed will have a significant impact on the finances of the business (despite the lack of detailed evidence); and the fact that monetary penalties and prohibition periods act as a deterrent for other tobacco retailers, I am persuaded that a monetary penalty of \$1,000.00 and a prohibition period of 18 days is appropriate.
44. The Respondent must be aware that the penalties for further contraventions of the *Act* could be much more significant, and that it must ensure that it rigorously implements a tobacco policy. I note for example that for a second contravention of Section 2.4(1), there is a mandatory prohibition period of between 30 and 60 days, which means there would be a minimum 30 day prohibition, no matter what the circumstances or mitigating factors.

## ORDER

45. **As I have found that** the Respondent, 101 Trading Co. Ltd. (doing business as Willoughby Market) contravened Sections 2(2) and 2.4(1) of the *Act*, I ORDER:
  1. Pursuant to Section 6.1(1) of the Act, that the Respondent pay a penalty of **\$1,000.00**, which sum is due and payable upon service of this Decision and Order.
  2. That it be prohibited from selling tobacco and vapour products beginning January 16, 2018 and ending February 2, 2018.



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Hugh McCall, Administrator's Delegate