

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 2.4(a) of the
Tobacco Control Act R.S.B.C. 1996, c.451

- by –

492354 BC Ltd. (doing business as Save N’ Shop Food Store),
(the “Respondent”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	C. L. Roberts
Date of Hearing:	December 15, 2011
Place of Hearing:	Mission, British Columbia
Date of Decision:	January 5, 2012
Appearing: For 492354 BC Ltd.:	W. Martin Finch, Q.C. Troy Estensen (articled student)
For the Fraser Health Authority:	Hans Mulder, Tobacco Enforcement Officer

Decision

Background

1. The Fraser Health Authority alleges that on March 17, 2011, 492354 BC Ltd. doing business as Save N’ Shop Food Store (“Save N’ Shop”) had an open display of tobacco products behind the counter visible to a minor, contrary to Section 2.4 (a) of the *Tobacco Control Act* (the “Act”). Save N’ Shop contends that the Health Authority has not proven a contravention of the *Act*.

Preliminary issues

2. On October 7, 2011, the Administrator, *Tobacco Control Act*, issued a Notice of Administrative Hearing to Save N’Shop alleging that on March 24, 2011, a clerk of Save N’Shop had an open display of tobacco products behind the counter visible to a minor. The Health Authority sought an amendment to the Notice to correct the Notice date to March 17, 2011. Save N’Shop agreed that all of the material that had been provided to Save N’Shop prior to the Notice being issued had indicated the date as March 17, 2011. I found there was no prejudice to Save N’Shop and ordered that the Notice be amended.
3. The Notice also specified that the Tobacco Enforcement Office would provide Save N’Shop, no later than 20 days before the hearing, with disclosure of all documentary evidence the Tobacco Enforcement Officer intended to submit in evidence as well as a list of witnesses and a summary of the evidence expected to be given by those witnesses. Although Mr. Mulder conceded that he had not provided Save N’Shop’s counsel with the required material, he said he had not done so because he had not received confirmation from counsel that he in fact intended to act for Save N’Shop at the hearing. I advised the parties that I would entertain any adjournment application following the presentation of the Health Authority’s evidence. No adjournment was necessary.

Issues

4. Has the Fraser Health Authority proven on a balance of probabilities that Save N’Shop displayed tobacco products to a person under the age of 19 in contravention of Section 2.4(a) of the *Act*?
5. If so, has Save N’Shop established a defence of due diligence pursuant to Section 12 of the *Tobacco Control Regulation* (the “*Regulation*”)?
6. Has the Health Authority offended the *Kienapple* principle in pursuing an administrative penalty for a contravention of section 2.4(a) of the *Act* as well as charging Shop N’Save with an offence under section 2(2) of the *Act* for the events of March 17, 2011?

Law

7. The *Act* prohibits the sale, distribution, provision, advertising and promotion of the use of tobacco except in accordance with the *Act* and *Regulation*.
8. 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*).
9. Section 2.4 (1) (a) prohibits a person from displaying tobacco products in any manner prohibited by the regulations. 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 reasonably be seen or accessed by a minor inside the retail establishment.

For the purposes of section 4.31(1), a minor is defined as a person under 19 years of age (Section 4.3).

10. That section 2.4 of the *Act* creates a regulatory offence was not at issue. There was also no dispute that the offence is one of strict liability given the provision of the due diligence defence established in section 12 of 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.

11. Section 6(1)(a.1) of the *Act* provides that the defence of due diligence is available for the prohibition on the display of tobacco products. Once the Health Authority proves the act, the onus of proof shifts to the defendant to show that it took all reasonable efforts to avoid the commission of the offence. (*Sault St. Marie* ([1978] 2 SCR 1299))
12. Section 6.2 of the *Act* prohibits the administrator from prosecuting a person for an offence if the administrator has imposed an administrative penalty for the same contravention that is the subject of the administrative penalty, and that a person who has been charged with an offence under the *Act* may not be subject to an administrative penalty in respect of the circumstances that gave rise to the charge. (my emphasis)

Evidence

13. The only evidence was that of [redacted] “minor test shopper” employed by the Health Authority.
14. [redacted] who was born on [redacted] testified that she had been employed as a minor test shopper for two years. Her duties were to enter stores, attempt to make purchases of tobacco products and to look for displays of tobacco, all on the instructions of the Tobacco Enforcement Officer. After reporting for work on March 17, 2011, [redacted] and Mr. Mulder discussed which stores they would be visiting that day.
15. That afternoon, [redacted] entered Save N’Shop at 33236 First Avenue, Mission BC to purchase cigarettes. It was the first time she had been inside the store. She agreed that she entered the store despite seeing a sign on the door restricting entry to persons over the age of 19 years.
16. [redacted] walked up to the counter and asked the clerk for a package of “Belmont” cigarettes. [redacted] believed that the clerk misunderstood her because she asked [redacted] if she wanted regular “Pall Malls” [redacted] agreed that she did and the clerk rang in her purchase [redacted] paid and left the store.
17. [redacted] provided a physical description of the clerk and testified that she saw no one else in the store and that at no time was she asked for identification or asked to leave the

store. [] also testified that she did not observe any signs inside the store indicating that it was an age restricted area.

18. After completing her purchase, [] returned to Mr. Mulder's vehicle and wrote up notes of her actions and observations. It was her evidence that she and Mr. Mulder visited 20 to 30 different stores that day.
19. [] initially testified that the clerk obtained the cigarettes from behind the till. However, after reviewing her notes, she clarified that the clerk pointed to "Pall Mall" cigarettes that were on display behind her.
20. In cross-examination, [] acknowledged that the store prohibited entry to persons under the age of 19 years so that it could have an open display of tobacco products. [] also agreed that she entered the store against the owner's wishes.
21. Save N'Shop acknowledged that it had been issued a ticket under section 12 of the *Act* for selling tobacco products to a person under 19 years of age as a result of sale of cigarettes to [] that day.

Submissions

22. The Health Authority submitted that Save N'Shop had violated section 2.4(a) of the *Act* by displaying tobacco products to a person under 19 years of age on March 17, 2011. Mr. Mulder contended that the evidence demonstrated that, when [] asked for a package of cigarettes, the clerk pointed to an open display of "Pall Mall" cigarettes and that no time did the clerk ask [] for identification.
23. The Health Authority argued that the conditions of Save N'Shop's licence required them to comply with all applicable laws, including section 2.4(a) of the *Act*, and argued that a sign on door prohibiting entry to persons under the age of 19 years was only one step in due diligence. Mr. Mulder argued that Save N'Shop had not taken any steps to prevent [] from entering and that the mere presence of a sign on the door that prohibited entry to persons under 19 years of age did not meet the requirements of the due diligence defence. Mr. Mulder submitted that if Save N'Shop had a monitoring system in place, it was not operational or functioning.
24. Save N'Shop contended that the Health Authority had failed to demonstrate, on a balance of probabilities, that a contravention had been made out. Although Mr. Finch did not challenge [] credibility, he contended that she had limited recollection about what had occurred.
25. Mr. Finch argued that the evidence established only that Save N'Shop's clerk provided [] with cigarettes upon request. Mr. Finch argued that [] had no independent recollection that the clerk had displayed cigarettes to her, rather, that [] simply inferred that the clerk had pointed to a display.
26. In the alternative, as I understood his argument, Mr. Finch contended that the offence of displaying tobacco products only occurred because Save N'Shop had sold tobacco to a

minor. He argued that it was an abuse of process for the Health Authority to proceed against Save N’Shop by way of an administrative penalty for displaying tobacco products as well as under the *Offence Act* for the sale of tobacco to a minor. He submitted that in doing so, the Health Authority had offended the rule against multiple convictions, or the *Kienapple* principle.

27. Mr. Finch also argued that section 4.31 of the *Regulation* imported a test of reasonableness and that it was reasonable for Save N’Shop’s owner to assume that a person under 19 years of age would not enter the store after reading the sign. Mr. Finch contended that [redacted] had no right to enter the store as the Tobacco Control Officer’s agent without permission and that if [redacted] had been exposed to tobacco products, it was only because she had entered Save N’Shop’s property without authority.
28. Mr. Mulder argued that the *Kienapple* case did not apply because Save N’Shop had contravened two separate sections of the *Act*. He contended that there could be no abuse of process if the evidence supported a finding of two different contraventions.
29. Mr. Mulder submitted that because [redacted] entered the store under his authority to determine compliance with *Act*, she could not be considered a trespasser. He submitted that the evidence was that the clerk pointed to “Pall Mall” cigarettes at time of sale so there was evidence of SOME display, even if I found that the evidence established that the clerk only pointed to one type of cigarette.

Analysis and Findings

Factual findings

30. I am satisfied, on a balance of probabilities, that the evidence establishes that Save N’Shop contravened section 2.4(a) of the *Act* in displaying tobacco products in a manner by which they could reasonably be seen by a minor. [redacted] was less than 19 years old on March 17, 2011, the date of the contravention.
31. [redacted] initially gave her evidence without the benefit of refreshing her memory or relying on notes that she made immediately upon leaving the store. After refreshing her memory, her evidence was somewhat inconsistent with her initial evidence. Although [redacted] did not remember the precise date, time or address of the store before referring to her notes, she did recall that she entered the Save N’Shop store and purchased tobacco products. She provided a physical description of the clerk. She recalled that she asked for “Belmont” cigarettes and that the clerk gave her “Pall Mall” cigarettes. [redacted] initially testified that the clerk got the cigarettes from “behind the till”, but after refreshing her memory, she testified that the clerk pointed to “Pall Mall” cigarettes behind her.
32. [redacted] had an independent recollection of many important facts even though her job as a minor test shopper was part time and involved a large number of stores in any one day. [redacted] evidence about the store, the personnel, the product, the payment for the product, and the fact that she was not asked her age or for identification to show that she was at least 19 years old was not challenged. Although [redacted] evidence on one

material point was somewhat inconsistent, I find that her memory, refreshed by looking at her notes, was reliable.

33. While it could be reasonable to infer that there were a number of packages of “Pall Mall” cigarettes on display behind the clerk given the nature of Save N’Shop’s licence, I find that there was at least one package, and that this evidence is sufficient for a contravention of Section 2.4(a) of the *Act*.
34. Once a strict liability offence is proven, the burden 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*) The burden, as set out in *R. v. Sault Ste. Marie (ibid)* 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.

35. Save N’Shop called no evidence to demonstrate due diligence, arguing only that was a trespasser.
36. In my view, relying on minors not to enter a store that has a sign on the door prohibiting entrance to persons under 19 years of age does not demonstrate due diligence. There was no evidence that Save N’Shop had a proper system in place to prevent minors from accessing the store and viewing the displayed tobacco products. If it did, the system was not operating effectively as was not asked for identification at any time while in the store.
37. I find that Save N’Shop has not exercised due diligence to prevent a contravention.

Abuse of process

38. Save N’Shop contends that the Health Authority’s decision to seek an administrative penalty for a contravention of section 2.4(a) at the same time as proceeding under the *Offence Act* for a contravention of section 2(2) for the events of March 17, 2011 constituted an abuse of process.
39. The *Kienapple* principle or the rule against multiple convictions for offences arising out of the same cause or matters, is intended to protect an individual from an abuse of process, or the undue exercise by the Crown of its power to prosecute and punish. (*R. v. Kienapple* [1975] 1 S.C.R. 729 and *R. v. Prince* [1986] 2 SCR 480). In my view, section 6.2 of the *Act* is also intended to prevent an abuse of process.
40. For the *Kienapple* principle to operate, there must be a sufficient connection, both factual and legal, between the underlying offences. Where the same transaction gives rise to two or more offences with substantially the same elements, the accused should be convicted of only the most serious of the offences.

41. In my view, the *Kienapple* principle is not engaged in this case. Although both offences arise out of [redacted] March 17, 2011 visit to Save N’Shop, they are factually distinct. On the evidence presented, the Health Authority could have proceeded with the section 6.4 contravention even if [redacted] had not purchased cigarettes.
42. [redacted] had to take a second step, that is, purchase the cigarettes, in order for Save N’Shop to be charged with the second offence. This distinguishing feature shows the legal connection between the offences does not exist. Furthermore, the evidence does not support a factual nexus, or a conclusion that tobacco products were only on display when they were taken from concealed storage to be sold.
43. I also find that the Health Authority has not contravened section 6.2 of the *Act*, as it has not prosecuted Save N’Shop for an offence under section 2.4(a), nor has it proceeded by way of an administrative penalty for the offence under section 2(2).
44. I conclude that there is no abuse of process.

PENALTY

45. I conclude that an administrative penalty may be imposed for the contravention pursuant to section 6 of the *Act*. The parties agreed that I ought not to hear submissions on the appropriate penalty until I had made a finding on whether or not there had been a contravention.
46. In light of my conclusion, I will give the parties the opportunity to make arrangements with the Administrator to reconvene this hearing to make submissions on an appropriate penalty in this matter.



Carol Roberts, Administrator’s Delegate