

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 -

7-Eleven Canada Inc. (d.b.a. 7-Eleven #29783),
Michael Dunnington
(the “Respondents”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Hugh McCall
Date of Hearing:	October 24 and 25, 2011
Place of Hearing:	Kelowna, British Columbia
Date of Decision:	December 22, 2011
Appearing: For 7-Eleven Canada Inc. and Michael Dunnington:	Cliff Proudfoot, Counsel Lauren Cook, Counsel
For the Interior Health Authority:	Stan Thiessen, Tobacco Enforcement Officer, Interior Health Authority

Decision and Order

Background

1. 7-Eleven Canada Inc. (7-Eleven) is a nationwide company selling a wide range of goods and services in each of the communities in which they have a store. All of their stores are corporately owned. Tobacco and tobacco by-products are among the goods they sell. Michael Dunnington was employed as a sales associate at the 7-Eleven store (#29783), located at 105-125 Highway 33E, Kelowna, B.C. (the “Store”) from approximately May 2007 until approximately January 2011.

2. Personnel giving evidence on behalf of 7-Eleven were Len McGeouch, Manager of Government and Regulatory Affairs, Jan Holt, Field Training Specialist in British Columbia and Amy Zimmer, Field Consultant in Kelowna, British Columbia.
3. As a Tobacco Enforcement Officer (TEO) Stan Thiessen, is responsible for education and compliance under the *Tobacco Control Act* (the “Act”).
4. [redacted] was a Minor Test Shopper (MTS) hired by Mr. Thiessen between October 2010 and May 2011. She gave evidence on behalf of the Interior Health Authority.
5. The Interior Health Authority alleges that 7-Eleven and Michael Dunington contravened Section 2(2) of the *Act* on December 2, 2010 by selling tobacco to a minor.

Issues

6. Has the Interior Health Authority proven on a balance of probabilities that 7-Eleven and Michael Dunington sold a tobacco product to a person less than 19 years of age on December 2, 2010, contrary to the provisions of Section 2(2) of the *Act*?
7. In the event that the Interior Health Authority is able to prove that the Respondents sold tobacco to a person less than 19 years of age, has either 7-Eleven or Michael Dunington established a defence of due diligence pursuant to Section 12 of the *Tobacco Control Regulation* (the *Regulation*)?
8. In the event a sale to a person less than 19 is proved and a defence of due diligence is not substantiated, what penalty should be imposed for the contravention of Section 2(2)?

Legislative Framework

9. The relevant sections of the *Act* are as follows:

2(2) A person must not sell, offer for sale, provide or distribute tobacco to an individual who has not reached the age specified by regulation under section 11(2)(g).

2(2.1) It is a defence to a charge under subsection (2) if the person charged with the contravention demonstrates that, in concluding that the individual reached the age specified by regulation, the person

(a) required the individual to produce a prescribed form of identification,

(b) examined the identification, and

(c) reasonably believed that the identification

(i) was that of the individual, and

(ii) had not been altered or otherwise falsified.

6.1 (1) Subject to the regulations, the administrator may make an order under subsection (2) if satisfied on a balance of probabilities that a person has contravened

(a) a prescribed provision of the Act or of the regulations, or

(b) an order of the administrator.

(2) The administrator, by order, may do one or both of the following:

- (a) impose a monetary penalty on the person, in accordance with the prescribed schedule of penalties;*
- (b) prohibit the person, in accordance with the prescribed schedule of prohibition periods, from selling tobacco or offering to sell tobacco at retail
 - (i) from the location at which the contravention occurred, and*
 - (ii) subject to the regulations, if the administrator is satisfied that it is in the public interest to do so, from any other location, if the person sells or offers to sell tobacco at retail at more than one location.**

11(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(g) specifying the age for the purposes of section 2(2);

(j) respecting administrative penalties, including the following:

- (iv) prescribing, in relation to a contravention under section 6.1(1), whether an administrative penalty may be imposed if the person who committed the contravention demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention;*

10. The relevant sections of the *Regulation* are as follows:

2 The age for the purposes of section 2(2) of the Act is 19 years.

12 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.

13(1) In imposing an administrative penalty on a person for a contravention of a prescribed provision of the Act or regulations, the administrator must consider the following factors:

- (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) if the person is an employee, whether and to what extent the owner or a person retained by the owner to operate the business provides training and monitoring of the person with respect to tobacco sales;**
- (d) in respect of a breach of section 2 (4), 10.1 or 10.3 of the Act, whether the person has knowledge of the prohibition order;*
- (e) any other matter the administrator considers relevant to the imposition of a penalty.*

(2) In determining, under section 6.1 (2) (b) (ii) of the Act, if it is in the public interest to prohibit a person from selling tobacco at retail from a location other than the location at which the contravention occurred, the administrator must consider all of the following:

- (a) previous enforcement actions for contraventions of a similar nature by the person;*

- (b) whether the contravention was repeated or continuous;*
 - (c) whether the contravention was deliberate;*
 - (d) the person's efforts to correct the contravention;*
 - (e) any other matter the administrator considers relevant to the public interest.*
- (3) If a person who commits a contravention is a franchisee, the administrator must not impose a prohibition order on another location operated independently at arm's length from the person by another franchisee of the same franchisor.*

Evidence

Interior Health Authority

11. Mr. Thiessen conducts routine inspections and works with retailers to ensure they understand their obligations under the *Act* and that: they display proper signage; they do not display tobacco products; and, their business information is current. He also encourages and reminds them of their obligation to check customers' identification to ensure that they do not sell tobacco products to minors.
12. Mr. Thiessen conducts routine compliance checks with Minor Test Shoppers (MTS) who are less than 18 years of age.
13. On December 2, 2010, Mr. Thiessen conducted a routine compliance check at the Store accompanied by [redacted] who on that day, was approximately 17½ years old.
14. Mr. Thiessen gave [redacted] \$10.00 and directed her to enter the Store and attempt to purchase tobacco.
15. [redacted] entered the Store, while Mr. Thiessen observed her through the large windows at the front of the Store.
16. [redacted] testified that she entered the Store and spoke to a clerk whose name tag indicated that his name was Michael. He was a tall man of Caucasian background in his early twenties with light brown hair and a beard. She asked him for a "Prime Time" cigar. Her evidence was that he did not make any enquiries with respect to her age and neither did he ask her for identification. He took a rum flavoured "Prime Time" out of the drawer and asked her for \$2.23, which was the cost of the product. She gave him \$10.00 and he gave her the "Prime Time" and change.
17. [redacted] left the Store, returned to Mr. Thiessen's vehicle and gave him the "Prime Time" and change of \$7.77. (Exhibit 3).
18. Mr. Thiessen confirmed the identity of the clerk, Michael after locking the "Prime Time" in his briefcase. The following day, he determined that Michael was Michael Dunington, the same clerk who had failed a routine compliance check which he had done with a different MTS on July 16, 2010, for which he had issued a warning.
19. As this was the second time in less than a year, that an employee at the Store had sold tobacco to a minor, Mr. Thiessen issued a Report to the Administrator.

20. Mr. Thiessen spoke to the assistant store manager about the sale to a minor in December 2010 and delivered a letter in that regard to 7-Eleven and Mr. Dunington at the Store on January 6, 2011. The letter was the first written notice regarding the sale to a minor.

Mr. Dunington

21. Exhibit 15 is an undated statement from Mr. Dunington:

Hugh McCall

Due to work commitments I am unable to attend these proceedings. I am also unable to recall the transaction on December 2, 2010 so I have nothing to add regarding the government shop. I do not dispute that it occurred and I accept full responsibility for my actions. As such, I have asked Mr. Proudfoot to handle my council in my absence. Please extend to him the courtesies you would have to me.

Regards,

Michael Dunington, BSC (Chemistry)

7-Eleven

22. Ms. Holt, 7-Eleven's Field Training Specialist, oversees all training at 7-Eleven's 151 stores in British Columbia. Among her other duties, she teaches sales associates and senior associates to become certified store managers and she teaches new store manager trainees and new field consultant trainees. 7-Eleven has approximately 2,000 employees in B.C.
23. Ms. Holt's evidence is that all new employees are trained on all relevant laws and corporate policies including information on the ID Zone, 7-Eleven's policy and procedures regarding the sale of tobacco and other age restricted products such as lottery tickets. (Exhibit 5). The training also tests an employee's knowledge and awareness of their role and responsibility with respect to the sale of tobacco and other age restricted products. The documents clearly indicate that a sales associates' employment could be terminated if they fail to follow the procedures or that they could be charged or fined.
24. 7-Eleven's training is designed to ensure that employees are aware of the various tobacco related products, the age at which it is legal to purchase those products, the identification required for proof of age and how to recognize when tobacco is being purchased for a minor by a third party. It also includes information on how to avoid conflict in the event that a sales associate must refuse a sale. After reviewing the information and taking periodic quizzes, employees are given a challenge test and must achieve 100% to pass.
25. New employees are provided with a combination of in person and computer based training, to ensure the best learning outcome, and are accompanied by a coach when they begin working at the till.
26. Each employee is required to complete knowledge based tests during their annual performance appraisal and are refused a pay increase if they do not correctly complete it.
27. Sales associates are retrained on 7-Eleven's policies if they fail a government compliance check or the "mystery shop" program. That program, which is operated by an independent company

hired by 7-Eleven, sends test shoppers in their early 20s into 7-Eleven stores to purchase tobacco. If sales associates fail to request identification from the test shopper, they fail the test. If a sales associate fails either a government compliance check or a mystery shop two times, their employment is terminated.

28. Ms. Zimmer, 7-Eleven's Business Consultant, oversees the operation of the stores in her area and assists managers on operational and employee issues. She acknowledged that Mr. Dunington was a good employee and liked by the Store's customers. She testified about the Store's implementation of the ID Zone policy.
29. The Store maintains a communication journal and a Daily Task Assignment Sheet which employees must initial each time they work. The Daily Task Assignment Sheet requires that employees initial a reminder statement about the ID Zone policy and their obligation not to sell cigarettes, lottery or tobacco to minors.
30. In addition, the Store has a number of other strategies to help remind sales associates not to sell tobacco to minors: prescribed government posters; distinctive ID Zone decals; ID Zone reminders above the till; an electronic reminder from the till at the time of sale; and, ID Zone posters in the employee only areas.
31. On January 6, 2011 Ms. Zimmer learned about the failed government compliance check on December 2nd, 2010 and immediately suspended Mr. Dunington pending an investigation. When she was satisfied that he had failed the compliance check as well as a compliance check on July 16, 2010, she terminated his employment pursuant to 7-Eleven's policy that a second failure within 5 years will result in dismissal.
32. 7-Eleven takes tobacco control laws very seriously. The compliance failures were discussed with many employees at the Store and every employee was required to sign off on a note in the communication journal describing the seriousness of the situation (Exhibit 14).
33. Ms. Zimmer only became aware of Mr. Dunington's July 16th compliance failure on January 6, 2011. She was not clear why the Store Manager had not advised her of the failure or why she had not become aware of it through the communication journal. On December 2nd, 2010, the manager again failed to advise Ms. Zimmer of the compliance check failure. He was suspended for other reasons on December 15, 2010 and was terminated later that month. Although he did not communicate with Ms. Zimmer about the compliance failures, he gave Mr. Dunington a formal warning in July 2010 that another failure would result in his termination, and in accordance with 7-Eleven policy, made Mr. Dunington retrain on the ID Zone.
34. Len McGeouch, 7-Eleven's Manager of Government Affairs, testified that the shapes and colours of 7-Eleven's ID Zone decals and signs have changed seven times since 1990 to help sales associates at 7-Eleven's stores keep the ID Zone policy in the forefront of their minds. The most recent warning decal was created in June 2010. 7-Eleven stores also display the "We expect ID" signs produced by the Western Convenience Store Association.
35. Top executives stressed the importance of complying with the law and corporate policies regarding the sale of tobacco products when communicating with employees in 1994 and 1997 (Exhibit 5, Tab 2 and 3).

36. 7-Eleven brought in new cash registers which prompt sales associates to verify purchasers' age in 2000. It has improved the Mystery Shop program to ensure consistency across Canada. It has also implemented its CBT program, the Daily Task Assignment Sheets and a hand out which explains the ID Zone policy and allows sales associates to turn away and avoid conflict with angry customers.
37. In 2008 7-Eleven revised its ID Zone policy. Whereas previously sales associates were required to ask for identification if a person appeared to be less than 25 years old, they must currently do so if the customer appears to be less than 30 years old.
38. In a continuing effort to encourage diligence and to help employees avoid compliance check failures Mr. McGeouch wrote to employees on November 20, 2009, January 21, 2010 and February 17, 2010 (Exhibit 5, Tabs 20-22). These letters were distributed as "cheque stuffers" to employees or as marketing bulletins.
39. Although the Store failed the two compliance checks involving Mr. Dunington in 2010, it passed 4 mystery shops. Mr. Dunington was present for a mystery shop on April 25, 2010 and appropriately requested identification from the mystery shopper (Exhibit 22).

Submissions

40. Mr. Thiessen submitted that Michael Dunington had clearly breached Section 2(2) of the *Act* in selling the "Prime Time" to on December 2, 2010. He argued that 7-Eleven must bear responsibility for inadequate supervision at the Store and that 7-Eleven did not call any witnesses who were involved in the day to day operation of the Store.
41. Mr. Thiessen acknowledged that the ID Zone is a very good program and that 7-Eleven's witnesses demonstrated commitment to it. However, he pointed out the miscommunication between Ms. Zimmer and the Store Manager on the two occasions when tobacco was sold to a minor and questioned whether management's commitment to the program was effectively communicated to those at the store level. I understood him to argue that the defence of due diligence should be denied because 7-Eleven did not establish that they had effectively implemented the program at the store level.
42. Mr. Proudfoot submitted that the defence of due diligence at section 12 of the *Regulation* does not alter the classic formulation of the defence established by the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 which 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.
43. He argued that 7-Eleven took all reasonable care to ensure compliance with Section 2(2) of the *Act*. He submitted that due diligence requires that an organization take reasonable steps. It does not require perfection or superhuman efforts as was stated in *R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 by Judge Fitzpatrick of the Provincial Court of Ontario:

Reasonable care and due diligence do not mean super human efforts. They mean a high standard of awareness and decisive, prompt and continuing action. To demand more would in my view, move a strict liability offence dangerously close to one of absolute liability.

44. Mr. Proudfoot also referred to *R. v. Fletcher Challenge Canada Limited* (B.C. Provincial Court, 26 August 1997, unreported) in which an employee was given clear instructions not to interfere with a stream. He did so and was convicted of altering fish habitat. Fletcher Challenge was found not guilty because its clear instructions to the employee were ignored. Mr. Proudfoot submitted that the facts in *Fletcher Challenge* are analogous to the facts before me.
45. Mr. Proudfoot submitted that 7-Eleven has done what Mr. Thiessen suggested: it has a compliance plan and it trains and evaluates its employees on the plan. He reviewed the evidence of 7-Eleven's witnesses and the many elements of the ID Zone policy. He reiterated that 7-Eleven has continuously made efforts to improve its program in order to make it more effective. Mr. Proudfoot submitted that there was overwhelming evidence that 7-Eleven had exercised due diligence and that the contravention against it should be dismissed.

Analysis and Findings

46. The first issue is whether the Interior Health Authority has proven on a balance of probabilities that 7-Eleven and Michael Dunnington sold a tobacco product to a person less than 19 years of age on December 2, 2010, contrary to Section 2(2) of the *Act*?
47. In spite of [redacted] unreliable responses to some questions by counsel regarding the success she had in purchasing tobacco from retailers, her testimony in regard to purchasing tobacco at the Store was not impugned. She was clear with respect to the date, 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 19 or older.
48. There was no evidence to contradict that of [redacted] as envisioned by Section 2(2.1) of the *Act*. In fact, there was corroborative evidence from Mr. Thiessen, and the written statement of Michael Dunnington who in a forthright and honest manner accepted that the "government shop" occurred, and responsibility for his actions.
49. Based on the uncontradicted evidence, I am fully satisfied on a balance of probabilities that the Interior Health Authority has proven that Michael Dunnington and 7-Eleven sold a tobacco product to [redacted] contrary to the provisions of Section 2(2) of the *Act*. This is a strict liability offense and no proof of intent is required. Liability flows from the breach.
50. The second issue for me to consider is whether 7-Eleven or Michael Dunnington has established a defence of due diligence. Section 12 of the *Regulation* states that a person must not be found to have contravened a provision of the *Act* where they demonstrate to the satisfaction of the administrator that they have exercised due diligence to prevent the contravention.
51. Mr. Proudfoot cited the Supreme Court of Canada's statement in *Sault Ste. Marie, supra* with respect to due diligence. The defence requires that the person relying on it demonstrate that they

have exercised all reasonable care to ensure compliance with the provision which has been breached. In determining whether the defence had been established in an environmental context, Judge Fitzpatrick in *R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 added that reasonable care does not mean super human efforts. It means a high standard of awareness and decisive, prompt and continuing action.

52. In *R. v. Southland Canada Inc.* (B.C. Prov. Ct., 26 July 2000, unreported) a previous case involving 7-Eleven, the company was charged with selling tobacco to a minor. Judge McGee adopted the reasoning of Judge Fitzpatrick and acquitted 7-Eleven. Although the company's sales associate had sold tobacco to a MTS who should have been asked for identification, Judge McGee found that the defendant's program to ensure that tobacco was not sold to minors met the standard of due diligence.
53. 7-Eleven created the ID Zone policy. They train their employees. Through various visual cues 7-Eleven employees are constantly reminded that the sale of tobacco products to those less than 19 years old contravenes the *Act*. New employees are tested before they are allowed to work on a till. They are re-tested annually. They do not get an increase in their wage unless they demonstrate competency. They initial a Daily Task Assignment Sheet and acknowledge the ID Zone policy. They initial the communication journal. The till electronically reminds employees to check the purchasers identification when a tobacco product is sold. There are letters from senior executives reminding employees about the company's ID Zone policy. There is oversight by Store Managers and Field Consultants or Business Consultants. There is also the "mystery shop" program which independently tests employee compliance with the ID Zone policy. Employees understand that their employment may be terminated if they fail to apply the policy. If an employee fails a mystery shop or a government compliance check they are given a warning that another failure will result in the termination of their employment. They are required to retrain on the ID Zone policy. Upon a second failure, their employment is terminated as occurred with Mr. Dunington.
54. While Mr. Thiessen challenged 7-Eleven's due diligence defence on grounds that it did not call any witnesses from the Store to testify about the "in Store" implementation of the ID Zone policy, I am not persuaded that it was necessary for 7-Eleven to do so. Ms. Holt trained the assistant store manager who has been at the Store for 14 years and who is a certified trainer. Ms. Zimmer is at the Store regularly. She described what she does when she is in the Store: she observes the sales associates at they do their work; she interacts with customers and gets their feedback on the performance of the Store's employees; she checks the communication journal and the Daily Task Assignment Sheet; she signs off on all the annual performance reviews of staff. Ms. Zimmer is involved enough with the Store that she knows the employees by name.
55. Although Ms. Zimmer was unaware of the failed government compliance checks in July and December 2010, I infer that this was due to the Store Manager's failure to inform her. There were clearly other issues and problems which led to the termination of his employment in December 2010. Had Ms. Zimmer been aware of his failure to advise her of the failed compliance check, it would have been a further ground to end his employment. I note that in spite of the Store Manager's overall poor performance, he enforced 7-Eleven's policy and gave Mr. Dunington written warning that a further sale to a minor would result in termination. He also required that Mr. Dunington and the employees who were in the store at the time of the sale retrain. In my view this demonstrates that 7-Eleven's compliance plan continued to work

even though there were personnel problems and that the ID Zone policy was effectively implemented at the store level.

56. I am satisfied that all of the measures taken by 7-Eleven demonstrate that it exercised all reasonable care in establishing a proper system to prevent the commission of an offence and to ensure the effective operation of the system. In the words of Judge Fitzpatrick I find that 7-Eleven has demonstrated a high standard of awareness and decisive, prompt and continuing action. I find on a balance of probabilities that 7-Eleven has established a defence of due diligence. However, I do not find that Michael Dunnington has established the defence.
57. I conclude that a 7-Eleven employee sold a tobacco product to a person less than 19 years of age. However, I find that 7-Eleven has established a defence of due diligence. As a result I conclude that the Health Authority has not established that 7-Eleven has contravened Section 2(2) of the *Act*.
58. I find that Michael Dunnington contravened Section 2(2) of the *Act* by selling a tobacco product to a person less than 19 years of age and that he has not established a defence of due diligence

Penalty

59. Section 6.1 of the *Act* provides that the administrator may impose an administrative penalty if satisfied on a balance of probabilities that a person has contravened a provision of the *Act*.
60. Mr. Thiessen proposed a penalty of less than \$50.00 considering the hardship which Mr. Dunnington has suffered already as a result of losing his employment with 7-Eleven, a position which he had enjoyed. Mr. Proudfoot agreed that a penalty of less than \$50.00 was appropriate.
61. The factors I have considered in weighing the appropriate penalty pursuant to S 13(1) of the *Regulation* include the fact that Mr. Dunnington received a previous written warning from Mr. Thiessen. I also note that Mr. Dunnington is no longer in employment where he handles the sale of tobacco products. He was a person who was well trained and who appeared to understand the law and 7-Eleven's policies. He expressed regret at having contravened the *Act*. There was ample evidence that he is a person of character and there was no evidence to suggest that these incidents resulted from anything other than inadvertence.

Order

62. **As have found that** Michael Dunnington contravened Section 2(2) of the *Act*, **I order** that he pay a penalty of \$40.00, which sum is due and payable upon service of this decision and Order.



Hugh McCall, Administrator's Delegate