

A Hearing Under Section 6 of the *Tobacco and Vapour Products Control Act*
[R.S.B.C. 1996] Chapter 451
as amended

Regarding an alleged Contravention of Section 2(2) of the
Tobacco and Vapour Products Control Act [R.S.B.C. 1996] Chapter 451

- by -

0749470 B.C. Ltd. dba Kimberley Shell,
and Malcolm Sargent, Director

(the “Respondents”)

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

Hugh McCall

Date of Hearing: January 10, 2019

Place of Hearing: By teleconference

Date of Decision: January 22, 2019

Appearing:

For 0749470 B.C. Ltd. dba:

Kimberley Shell:

Malcolm Sargent, Rhona Sargent

Malcolm Sargent:

On his own behalf

For the Interior Health Authority:

Maggie Stroscher, Enforcement Officer

Trish Hill, Team Lead - Tobacco Program

Heather Deegan, Dir. of Healthy Communities

Stan Thiessen, Enforcement Officer

Decision

Background

1. On November 13, 2018, the Administrator issued a Notice of Administrative Hearing (the “NOAH”) to determine whether or not 0749470 B.C. Ltd. dba Kimberley Shell (“Kimberley Shell”) and Malcolm Sargent had contravened Section 2(2) of the *Tobacco and Vapour Products Control Act* (the “TVPSCA”) by selling a tobacco product to a minor on May 4, 2018.
2. Based on information that neither Kimberley Shell nor Malcolm Sargent were contesting the sale of tobacco to a minor, a Notice of Hearing by conference call was issued November 13, 2018 for January 10, 2019. After the NOAH was issued, Mr. Sargent engaged counsel, Morné Coetzee. In a letter dated December 13, 2018, Mr. Coetzee requested an adjournment and indicated that the earliest he was available to participate in a hearing was April 29, 2019. Interior Health objected to the adjournment request.
3. After considering the parties’ submissions, I denied the adjournment request as this matter has been in progress since July 2018 and Mr. Sargent had more than adequate time to engage counsel and advise me and Interior Health of such prior to December 13, 2018. In addition, Mr. Coetzee’s limited availability would have resulted in an unacceptable further delay. Mr. Coetzee subsequently advised that he would not be able to act for the Respondents and requested that I communicate directly with Mr. Sargent. During Mr. Coetzee’s involvement it was never made clear whether the Respondents intended to change their initial position and contest the contravention, or simply wanted Mr. Coetzee to speak for them regarding the penalties proposed by Interior Health. The Respondents’ position remained unclear until the hearing on January 10, 2019 (the “Hearing”).
4. At the Hearing, Mr. Sargent clarified that neither he nor Kimberley Shell contested the contravention of section 2(2) of the TVPCA on May 4, 2018 and would not assert a defence of due diligence pursuant to section 12 of the *Tobacco and Vapour Products Control Regulation*, B.C. Reg. 232/2007 (the “TVPSCR”). Mr. Sargent wished to proceed with the Hearing and indicated that he did not want to engage new counsel.

The Issue

5. What penalty is appropriate for the May 4, 2018 contravention of Section 2(2) of the TVPCA in light of the two previous contraventions of Section 2(2) in March and December 2014?

Legislative Framework

6. Section 6.1 of the TVPCA provides that the administrator may make an order imposing a monetary penalty and prohibiting a person from selling tobacco or vapour products on being satisfied that the person has contravened a provision of the TVPCA. Before making an order, the administrator must provide the person with an opportunity to be heard.

7. Section 13 of the *TVPCR* sets out a number of factors the administrator must consider in imposing an administrative penalty. They include:
 - (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 the sale of tobacco or vapour products, as applicable;
 - (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.

Evidence and Discussion

8. Ms. Strosher, the Enforcement Officer (“EO”) submitted that the sale of tobacco to a minor on May 4, 2018 together with Kimberley Shell’s history of sales to minors had caused Interior Health to lose confidence in Kimberley Shell’s ability to prevent such sales. She submitted that the maximum Monetary Penalty of \$5,000.00 for a 3rd or Subsequent Contravention was warranted as was a Prohibition Period of 180 days. Interior Health did not propose a monetary penalty for Mr. Sargent as an individual Respondent.
9. In response to questions regarding the impact of the penalties on Kimberley Shell and Mr. Sargent if he sells the business, Ms. Strosher advised that any Monetary Penalty or Prohibition Period would not transfer with the business. In particular, the Prohibition Period would end with Mr. Sargent’s ownership and would not affect the new owners’ ability to obtain a Tobacco Retail Authorization (“TRA”).
10. Ms. Strosher outlined the history of Kimberley Shell’s sales to minors back to January 2010. Between January 2010 and January 2014, Kimberley Shell’s clerks (and on one occasion Mr. Sargent) sold tobacco to minors on 4 occasions. These sales prompted Interior Health to issue a warning and 3 tickets of \$575.00 each. Mr. Sargent was cooperative and all the tickets were paid. While I note these sales to minors, they are not relevant to my consideration of the penalty in this Hearing, as pursuant to the provisions of the *TVPCA*¹ only two contraventions, one in March 2014, and another in December 2014 are relevant.
11. The sale of tobacco to a minor in March 2014 prompted the Administrator to schedule an Administrative Hearing and I was designated to conduct the Hearing. Kimberley Shell and Interior Health reached agreement on a Monetary Penalty of \$1,000.00 and a 30-day Prohibition Period for which I issued a Consent Order.

¹ *TVPCA* section 6.1(4)

12. The sale of tobacco to a minor in December 2014 caused the Administrator to schedule a 2nd Administrative Hearing on April 14, 2015. Ms. Pinsky was designated by the Administrator to conduct the hearing. Interior Health sought the maximum penalty for a 2nd Contravention, being a Monetary Penalty of \$3,000.00 and a Prohibition Period of 90 days. Mr. Sargent did not contest the contravention and did not argue that Kimberley Shell had acted with due diligence. The sole issue before Ms. Pinsky was the penalty.
13. Ms. Pinsky addressed a number of factors in reaching her decision, as follows.
 - (a) She agreed with Interior Health that progressive enforcement was necessary as an incentive to encourage compliance with the legislation both for Kimberley Shell as well as other retailers.
 - (b) She noted that the maximum penalty did not always need to be imposed in order to encourage compliance and that the goal of progressive enforcement could be achieved if a penalty is within an appropriate range.
 - (c) She also noted that this was the 2nd time Interior Health was in an Administrative Hearing with the Respondent and that Interior Health had previously issued 3 tickets each for \$575.00 all of which had been paid by Mr. Sargent.
 - (d) In addition, she stated that it was important to balance the deterrent effect of the penalty with the livelihood of Mr. Sargent's family and his opportunity to sell his business.
 - (e) She further noted that a successful sale of the business was in the interests of both parties and would prevent future sales of tobacco to minors.
14. Ms. Pinsky found that a Monetary Penalty of \$2,500.00 and a Prohibition Period of 30 days were appropriate. Her view was that the penalty would act as a deterrent to the larger community of tobacco retailers while allowing the normal course of business to take place.
15. At the Hearing before me on January 10, 2019, Mr. Sargent explained that the sale to the MTS was accidental. He indicated that he is normally careful to avoid selling tobacco to minors and even challenges young adults about their use of tobacco. He stated that he has not had a night since May 4, 2018, when he has not woken up thinking about this contravention and stated that he has taken it very badly. Mr. Sargent developed diabetes a few years ago and at the time of the sale was on a new insulin medication. His blood sugar was low at the time which caused him to feel light-headed and inhibited his ability to think clearly.
16. Mr. Sargent has owned Kimberley Shell since 2006. Initially he employed young people as clerks and enjoyed seeing them flourish with new-found responsibility. However, he ceased doing so when he determined in 2014 that the preponderance of sales of tobacco to minors were made by their young employees. Currently, he has had good success with more mature employees.
17. Mr. Sargent has accepted an offer to purchase the gas station and convenience store which is subject to certain conditions being removed. The proposed closing date is April 1, 2019 and the purchaser would be expected to open on April 2, 2019. Both Mr. and Ms. Sargent submitted that a Prohibition Period would cause their sales to diminish as drivers stopping

for gas become aware that they can no longer purchase tobacco products. They fear that any reduction in business may cause their prospective purchaser to insist on a reduction of the sale price. Mr. Sargent stated that a Monetary Penalty is not an issue for him, but that the Prohibition Period would be problematic.

18. Mr. Sargent stated that following the last Prohibition Period in 2015, they tried to sell Kimberley Shell, but were not successful. Potential buyers stated that they needed to modernize the site and Shell wanted them to update their diesel tanks and their electronics. They have spent \$450,000 since 2014 modernizing their site. The only large assets which were not modernized were the gas reservoirs, but they have undergone pressure testing which has proven that they are sound. Their modernization efforts have enabled them to attract buyers. Mr. Sargent indicated that sales from tobacco products are \$45-\$50,000 per month on which they make a profit of 10%. Their gas sales are \$2.25-\$2.5 million per month on which they make a profit of 2-3%.
19. Interior Health submitted that the investment by Mr. Sargent was not relevant and that if the profit from tobacco was so high and was important for the sale of his business, he ought to have ensured that he was not suffering from low blood sugar while he was selling tobacco products. She pointed out that no other tobacco retailer in Interior Health's jurisdiction has as many contraventions as Kimberley Shell and submitted that the maximum penalties should apply. In response to Mr. Sargent's comments regarding the earlier sale of tobacco to minors, she pointed out that in 2011 Mr. Sargent sold tobacco to a minor and that it was not only young women employees who did so. Interior Health highlighted the effort and time Interior Health puts into education and training to assist retailers in achieving compliance before it moves to progressive enforcement.
20. Interior Health suggested that February 10, 2019, would be an appropriate start date for a Prohibition Period.
21. I accept that the May 4, 2018 sale was accidental and that Mr. Sargent did not intend to sell tobacco to a minor. However, it is just such instances when daily reminders and training keep the importance of preventing the sale of tobacco to minors in the forefront of a clerk's mind. In addition to reminders and training, employers can invest in technology to ensure that a sale does not take place unless a protocol has been executed to avoid selling tobacco to any person who appears less than 30 years of age.
22. When asked what efforts Kimberley Shell had made following the contraventions in 2014, other than making changes to their personnel, Mr. Sargent indicated that one of the first things they draw to the attention of new employees is Kimberley Shell's history of contraventions and the importance of preventing the sale of tobacco to minors. They also provide employees with the booklet to read and have them complete miscellaneous paperwork. Ms. Sargent indicated that she always advises new employees that Kimberley Shell 'IDs' anyone who looks less than 30 years old.
23. The Tobacco Test Shopper Compliance Check Report of May 4, 2018 shows that the MTS was not asked to produce identification. Mr. Sargent provided no information that Kimberley Shell has invested in cash register or software upgrades to assist it in preventing the sale of tobacco to minors, or that it provides regular training for sales staff on processes

for handling tobacco sales. That the MTS was not asked for ID on May 4, 2018, is consistent with an absence of training and technology which might have helped the Respondents avoid the sale.

24. It is notable that Kimberley Shell's previous contravention before May 4, 2018, was in December 2014, about 3½ years earlier. While this suggests Kimberley Shell was not contravening the legislation in this period, Interior Health did not have a TEO and was not doing compliance checks for 1½-2 years during that time. Consequently, the effective gap between contraventions is not as significant as it would otherwise appear.

Penalty Considerations

25. I accept that Interior Health's focus is to help tobacco retailers comply with the *TVPCA*. EOs have an educational role in assisting tobacco retailers to comply with tobacco control legislation. Beyond its educational role with tobacco retailers, Interior Health has a policy of progressive enforcement. In the case of Kimberley Shell, Interior Health's initial response to a sale of tobacco to a minor was to issue a warning. With subsequent sales it issued tickets involving monetary penalties only. It was only after the 5th sale in 4 years that Interior Health reported the contravention to the Administrator.
26. One of the objectives of progressive enforcement is to deter retailers who have contravened the *TVPCA* when it becomes apparent that they have not made changes in response to lesser penalties. Because decisions are publicised, they also act as a deterrent to other tobacco retailers. By bringing sales of tobacco to minors to the attention of the Administrator and seeking Administrative Hearings, Health Authorities can increase the pressure on tobacco retailers to ensure their systems are sufficiently robust to prevent such sales.
27. Mr. Sargent acknowledged that following the second Administrative Hearing related to the sale to a minor in December 2014, Kimberley Shell laid off its younger sales clerks who it asserted were less able to reliably enforce tobacco control legislation. However, as a small business owner for whom tobacco sales provided significant profit, there was no indication that Mr. Sargent took other steps to enhance Kimberley Shell's chances of preventing sales to minors. As noted there are technological advances which can help to prevent the sale of tobacco to minors and which may be particularly helpful in circumstances like those on May 4, 2018, at which time Mr. Sargent described his condition as 'feeling light headed' and 'not quite on it'.
28. I do not doubt that Mr. Sargent is well-intentioned. I am mindful that as a small, family-run business, Kimberley Shell does not have the resources of a large corporation. Nonetheless, given the significant responsibility borne by retailers who sell tobacco to the public and the severe consequences for young people under 19 years of age who begin to smoke tobacco, such retailers must exercise all reasonable care to prevent contraventions. Given that tobacco appears to be a significant generator of profit for Kimberley Shell, it is unclear why more significant steps were not taken by Mr. Sargent to ensure adequate systems were in place to prevent such contraventions.
29. While I note that there are two Respondents, Interior Health focused on an appropriate penalty for Kimberley Shell and it did not suggest any penalty for Mr. Sargent. While Mr.

Sargent indicated that he would willingly accept a Prohibition Period in his individual capacity, he indicated that he is currently minimizing his work at the gas station and I do not find that it would be a meaningful restriction. In addition, absent a suggested Monetary Penalty for Mr. Sargent in his personal capacity, I have not made an order against him for his role in the sale.

30. For retailers who contravene the *TVPCA* and do not take the steps necessary to prevent new sales of tobacco to minors the *TVPCR* provides increasingly more onerous penalties. As a retailer's contraventions mount up, the pressure on it to improve its compliance is increased through progressively more stringent penalties. In such circumstances, it is incumbent on the decision-maker to provide a strong rationale for deviating from progressively more onerous penalties. The contravention on May 4, 2018 was Kimberley Shell's 3rd sale of tobacco to a minor within a 5-year period. Pursuant to Schedules 2 and 3 of the *TVPCR*, a 3rd contravention of Section 2(2) attracts a Monetary Penalty of \$0-\$5000 and a Prohibition Period of 0-180 days.
31. The penalty provisions of the *TVPCA* act as an important deterrent to those who sell tobacco to minors and to other tobacco retailers. At the same time, I am aware that Mr. Sargent has health issues and would like to retire. I am also mindful given Mr. Sargent's circumstances that the imposition of a Monetary Penalty and Prohibition Period will impact his livelihood and could impact his prospective sale. However, this is not a situation in which a retailer has implemented multiple measures to prevent its staff from selling tobacco to minors, and in spite of such efforts a further sale has occurred. While that kind of situation may warrant a deviation from the practice of progressive enforcement, in this case there was little evidence of such efforts by Kimberley Shell.
32. I am aware of the potential consequences for the Sargents of a Prohibition Period and sympathize with their circumstances. However, I also note the views expressed by Interior Health regarding the efforts they have made to work with Kimberley Shell and their view that Mr. Sargent should have made greater effort to prevent sales of tobacco to minors if as he has said, tobacco sales are important to Kimberley Shell's business. It is clear on the information available that Mr. Sargent was put on notice that something more was required than simply hiring more mature personnel.
33. While Mr. Sargent indicated that his preference would be to pay multiple monetary penalties if it would allow him to avoid a Prohibition Period that is not possible within the legislative scheme of the *TVPCA*. In the circumstances I find that the maximum Monetary Penalty for a 3rd contravention of \$5000.00 is appropriate.
34. Regarding the imposition of a Prohibition Period, I note that Kimberley Shell was previously penalized in 2014 by the imposition of two 30-day Prohibition Periods. As this is a 3rd sale by Kimberley Shell within a 5-year period, it would be inconsistent with the practice of progressive enforcement to impose a penalty of less than 30 days. In addition, while I am mindful of Mr. Sargent's circumstances and have no wish to make the sale of his business more difficult, it would distort the principles of the *TVPCA* to give primacy to his circumstances rather than to the legislation which addresses serious issues of public health.

35. Taking all of the above into account and mindful that there is a balance to be achieved, I find that a Prohibition Period of 91 days is appropriate. As February 10, 2019 is a Sunday, I have chosen Tuesday, February 12 as the start day which will run for a period of 12 weeks. This penalty is consistent with the principles of progressive enforcement. In the event that the ‘subject’ sale of Kimberley Shell does not complete and Mr. Sargent continues to operate the business, I am not persuaded that the Prohibition Period which will continue to May 13, 2019, will unduly interfere with his ability to make a living.

Orders

36. Pursuant to Section 6.1(2) of the *Act*, I **ORDER** that Kimberley Shell pay a monetary penalty in the amount of **\$5,000.00**, which is due and payable upon service of the Administrative Penalty Notice.
37. I FURTHER **ORDER** that Kimberley Shell be prohibited from selling tobacco or offering to sell tobacco at 445 Ross Street, Kimberley, B.C. for the period beginning Tuesday, February 12, 2019 until the close of business on Monday, May 13, 2019.



Hugh McCall, Administrator's Delegate