

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 -

0976559 B.C. Ltd. (DBA: Dawson Creek Petro Canada)

(the “Respondent”)

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

Date of Hearing: May 29, 2015

Place of Hearing: Surrey, BC

Date of Decision: June 15, 2015

Appearing:
For 0976559 B.C. Ltd.
(DBA: Dawson Creek Petro Canada) Harpreet Dawar

For Northern Health Authority: Kathryn Stuart, Counsel
Stewart McDannold Stuart

Decision and Order

BACKGROUND

1. The Respondent 0976559 B.C. Ltd. (the “Respondent”) is a company which, at the times of the incident and of the hearing, was doing business as Dawson Creek Petro Canada, in Dawson Creek, British Columbia (the “Store”).

2. Pam Sawers operates as a Tobacco Enforcement Officer (TEO), in the Northern Health Authority of the Ministry of Health (NHA). She is responsible for education and compliance under the Tobacco Control Act (the “Act”). She gave evidence on behalf of the NHA.
3. a Minor Test Shopper (MTS), was hired by the Northern Health Authority, and was working for them at the time of the incident. gave evidence on behalf of the NHA.
4. Tanvir Biswas is the principal and owner of the Respondent. He gave evidence on behalf of the Respondent.
5. The Northern Health Authority alleges that the Respondent contravened Section 2(2) of the *Act* on February 2, 2015, by selling tobacco to a minor.
6. On April 16, 2015, a Notice of Administrative Hearing was issued under the Tobacco Control Act, to the Respondent, for a hearing to determine whether the Respondent had committed a contravention of the Act, and allowing for an Order to be made.
7. Service of the Notice was confirmed at the hearing.

ISSUES

8. Has the Northern Health Authority proven on a balance of probabilities that the respondent sold a tobacco product to a person under the age of 19 years, in contravention of the provisions of section 2(2) of the Act?
9. In the event that NHA is able to prove that the respondent sold tobacco to a person under 19 years of age, has the respondent demonstrated to the satisfaction of the administrator the defence pursuant to section 12 of the Regulations, that they exercised due diligence to prevent the contravention?
10. If a contravention of the provisions of section 2(2) did occur, what is the appropriate penalty for the offence?

LEGISLATIVE FRAMEWORK

11. The Act sets out the manner in which a person may deal in, sell, offer for sale, distribute, provide, advertise or promote the use of tobacco in British Columbia. It establishes prohibitions and penalties for non-compliance. Specifically:

12. Section 2(2) of the Act prohibits the sale, offer to sell, provision or distribution of tobacco to an individual who has not reached the age specified by 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 of a provision of the Act or regulations, or of an order of the administrator. Section 6.1(2) specifies that the order may be the imposition of a monetary penalty on the person, or it may be a prohibition of that person from selling tobacco or offering to sell tobacco at retail from the location at which the contravention occurred, or under certain circumstances, from any other location.
14. The Tobacco Control Regulation (the “Regulation”) defines the age for the purposes of Section 2 (2) of the Act to be 19 years.
15. Section 12 of the Regulations states that 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.
16. Section 13 of the Regulations sets out those considerations which must be taken by the administrator in imposing an administrative penalty on a person for contravention of a prescribed provision of the Act or regulations.

EVIDENCE

17. The minor test shopper was the first witness for the NHA. has worked for NHA as an MTS for 1 ½ years. is 18 years old. job is to walk into a store, look for signs prohibiting the sale of tobacco to minors, and try to buy a tobacco product. This MTS has gone on multiple test shops – around ten to fifteen times.
18. On February 2, 2015, the MTS was on the job, with Pam Sawers and another minor who also works as an MTS. This witness walked into the Store on his own, scanned for signs, and asked for a Canadian Classic Regular. The clerk at the store sold the tobacco to for \$14.00. The clerk did not ask for identification. The MTS then exited the store.
19. The MTS described the clerk as a male in his 50s or 60s. His name tag read something like AMIL. The MTS returned to Pam Sawers’ vehicle on exiting the store, and filled out a sheet describing experience.
20. Pam Sawers is a Tobacco Enforcement Officer and a Licencing Officer with Northern Health Authority, and is designated under the Ministry of Health. She is responsible for routine inspections regarding tobacco sales enforcement, and for the Minor Test Shopper program. In routine checks, she talks with clerks, examines signage and displays, speaks to store managers, discusses enforcement history of the store. As such she conducted an inspection of the Store on January 30, 2014. She had no concerns at the time.

21. On February 2, 2015, Ms. Sawers drove the MTS witness and another person to the Dawson Creek Petro Canada and parked a little to the side of the entrance. She watched the MTS walk into the store, and walk out three minutes later with cigarettes. She and the MTS filled out a report. Around 15 minutes later Sawers walked into the store and purchased gum.
22. Previously, the NHA had noted other contraventions of Act on the premises, namely, sale of tobacco to a minor on May 26, 2014. This resulted in a first warning to the Respondent, sent on June 10, 2014.
23. In August, 2014, the NHA received a complaint from the parent of a 14 year old boy that he had been sold cigars by a clerk at the store. The NHA issued a notice to the Respondent on September 3, 2014, as a result of this parent complaint.
24. The NHA decided to proceed with enforcement through the Administrative Law process, based on a history of 3 incidents within a relatively brief time frame. They also took into consideration that the Respondent did not request assistance for training staff in proper procedures for sale of tobacco products, despite 3 contraventions.
25. Tanvir Biswas lives in Hope, BC and travels to his store in Dawson Creek for about a week every month. He relies on his employees to take care of the day to day affairs of the store. He accepts that there have been contraventions of the Act as described in the warnings received, but indicates that his clerk's name is Aminul, not Amil as stated by the MTS.
26. Mr. Biswas says that he has conducted staff training and that he monitors the actions of his staff, as follows:
27. Mr. Biswas has used the website training tool program that is available for owners of establishments that sell tobacco products. He has coached his employees personally; he has advised them of the consequences of selling tobacco to minors; he personally meets with each employee when in town to counsel them, and he calls regularly when he is not in town. He has been planning to set up his own Minor Test Shopper program to check on his staff.
28. Mr. Biswas says he follows the Petro Canada rules about training staff about sales of tobacco to minors. He used a point of sale system on his computers, as supplied by Petro Canada. It reminds staff to ask for ID when selling tobacco. He has not asked Ms. Sawers for help in training staff or in compliance testing.
29. Mr. Biswas indicated he used the training tools provided by NHA, but was unable to clearly indicate which training tool were used, for which staff, or how recently.

ANALYSIS AND FINDINGS

- 30 The first issue is whether the Northern Health Authority has proven on a balance of probabilities Dawson Creek Petro Canada sold a tobacco product to a person less than 19 years of age on February 2, 2015, contrary to Section 2(2) of the *Act*?
- 31 The Minor Test Shopper gave a reasonably accurate account of the events which occurred at the Store on February 2, 2015. [redacted] erred in identifying the correct name of the clerk who sold [redacted] tobacco products, but despite [redacted] error, it was relatively easy to figure out who the clerk was. [redacted] was clear in his evidence of the date of the event, the Store, the items purchased, the payment for the product, and the fact that [redacted] was not asked for identification to show that [redacted] was 19 years of age or older.
- 32 There was no evidence to contradict that of the MTS as envisioned by Section 2(2.1) of the *Act*. In fact, there was corroborative evidence from Ms. Sawers, who noted the transactions immediately after the event.
- 33 Based on the evidence, I am fully satisfied on a balance of probabilities that the Northern Health Authority has proven that the Respondent through the store Dawson Creek Petro Canada sold a tobacco product to the Minor Test Shopper 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.
- 34 The second issue for me to consider is whether the Respondent 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.
- 35 The onus of proof of due diligence is that of a balance of probabilities. On balance, was due diligence exercised? Counsel for NHA argues that it was not, viewing the facts in the light of the Public Health objective to make sure that minors are not allowed to buy cigarettes, as iterated in *R. v. Seaway Gas & Fuel Ltd.* (2000), 142 C.C.C. (3d) 213 (Ont. C.A.) at para 33. The Court requires that “*you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors.*”
- 36 Counsel for NHA submitted that the defence of due diligence at section 12 of the *Regulation* requires proper maintenance of a system that prevents commission of an offence, as 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.

- 37 The evidence of Mr Biswas on behalf of the Respondent was unclear. He attempted to provide details of the training which he imparted to his staff in educating them about selling tobacco to minors. However, he was at best only able to show that he took the materials that are available from the Health Authority to vendors, and that he showed them to his employees. He was unable to state how the information was tested on his employees, or that they passed any tests related to knowledge of sale to minors.
- 38 Mr. Biswas stated that he has a point of sale system on his cash registers, and that it was provided to his store by Petro Canada. He was unclear in his knowledge of how the system worked, and although he was aware of an upgrade to the system as of January 2015, he did not clearly indicate that his employees were thoroughly trained in its use.
- 39 Finally, there was no evidence that Mr. Biswas accepted any assistance from the NHA with regard to training staff, or training himself on the laws, their application, or the penalties involved in not complying with the Act.
- 40 I find that because of the lack of training, testing and supervision of the Respondent's employees, they do not prove on a balance of probabilities that they exercised due diligence in the course of tobacco sales. A contravention has taken place, there is no defence of due diligence, and the Respondent is to be penalized.
- 41 Addressing the appropriate penalty under the Act and Regulations for the contravention of Section 2(2): The penalty provisions for this offence include two methods – fines and prohibitions from selling tobacco for particular periods of time.
- 42 The NHA has submitted that the Respondent should face both a fine and a prohibition from selling tobacco. Counsel requests a maximum penalty for a first contravention, being \$1000 fine and a 30 day prohibition. She indicates that there was no due diligence, no system in place for education of staff, or for monitoring of staff. This all despite the fact that there was prior warning to the Respondent, and prior notice of possible consequences of contravention of the Act.
- 43 Counsel for NHA argues that it is a policy of the Health Authority to support progressive enforcement, that is, an escalation of enforcement measures if the previous attempts at compliance are unsuccessful. The Respondent should not assume that non-compliance is just a cost of doing business. The motivation and incentive needs to be significant to make an impact on the Respondent.
- 44 The Respondent submitted that it has tried to do everything within his capacity to have compliance with the legislation from his employees. His intention is to seek help at this point to encourage better compliance.

45 Mr Biswas on behalf of the Respondent argued against the prohibition of tobacco sales as a penalty on the basis that the store is small and without tobacco sales it would suffer extreme hardship. Tobacco sales are only a portion of the revenue, but they bring in customers.

PENALTY

46 In reaching my decision on penalty I have taken the following factors into account.

- a. The need for a deterrent, both for the Respondent in question and as an example for the community of retailers.
- b. Previous warnings to the Respondent. One warning was based on serious allegations by a parent about unauthorized sales; this contravention was not denied and not proven, but its implications could be serious for the whole community
- c. Information and education by the NHA has been offered to the Respondent in the past, but without positive results.
- d. There will be financial hardship for the Respondent and the people it supports.
- e. This Respondent has never been ticketed or fined for an offence under this Act, so any penalty imposed will be the next progression from a warning notice only. The implication of this is that the penalty need not be at the maximum level in order to have significant impact on the Respondent's financial state. Even a lower amount will be significant due to the fact that it is a first penalty. I take into consideration that prohibition from selling tobacco products has the effect of a monetary penalty of significance.
- f. A first contravention of Section 2(2) of the Act has a maximum monetary penalty of \$1,000 and a maximum prohibition of 30 days.

47 Based on the above factors, I believe that on balance it is important to use this violation penalty as a significant deterrent to this retailer, as it is necessary to kick start a positive approach to educating staff. It also must be a deterrent to the larger community of tobacco retailers, for reasons of Public Health as described earlier. I do not, however, agree that both a fine and a prohibition are necessary on a first penalty.

48 Accordingly, I find that the Respondent shall pay a monetary penalty of **\$1000** in respect of the violation.

49 Further, I find that there will be no order in this case prohibiting tobacco sales in the Store.

ORDER

As I have found that the Respondent – 0976559 B.C. Ltd. (DBA: Dawson Creek Petro Canada) contravened Section 2(2) of the *Act*,

1. **I ORDER**, pursuant to Section 6.1 (1) of the Act, that the company pay a penalty of **\$1000**, which sum is due and payable upon service of this Decision and Order.

Helen Pinsky

Helen Pinsky, Administrator's Delegate