

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 –

1273129 Alberta Ltd.,  
dba Dawson Creek Petro Canada

(the “Respondent”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Helen Pinsky
Date of Hearing:	September 11, 2013
Place of Hearing:	by conference call hearing
Date of Decision:	October 3, 2013
Appearing: For 1273129 Alberta Ltd.	Rashid Mohammed Aziz
For Northern Health Authority:	Pam Sawers Tobacco Enforcement Officer

## Decision and Order

### BACKGROUND

1. The Respondent 1273129 Alberta 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, a convenience store and gas station, in Dawson Creek, British Columbia (the “Store”).

2. Rashid Mohammed Aziz is the principal and owner of the Respondent, which owned the Dawson Creek Petro Canada franchise at the time of all the alleged and admitted incidents described in this decision. The Store was operated by staff employed by the Respondent.
3. Pam Sawers, a Tobacco Enforcement Officer (TEO), appeared on behalf of the Northern Health Authority (NH). Listening in to the hearing was Sheila Winthrow, on behalf of NH. She did not take part in the hearing.
4. On July 2, 2013, a Notice of Administrative Hearing was issued under the Tobacco Control Act, R.S.B.C. 1996, c. 451 (The “Act”), to 1273129 Alberta Ltd. sometimes dba Dawson Creek Petro Canada, for a hearing to determine whether the Respondent had committed a contravention of the Act, and allowing for an Order to be made.
5. Service of the Notice was confirmed at the hearing.
6. A pre-hearing application was held August 7, 2013, by conference call hearing, to determine certain matters, which shall be described in this decision.
7. After the pre-hearing application, and before the date set for hearing, I determined that the hearing of this matter would not be held in person in Dawson Creek as originally planned, but rather by conference call hearing on the date and at the time set for the original hearing, namely 10:00 am September 11, 2013.
8. The hearing was restricted to the determination of penalty and fines, as the parties were in agreement as to the facts of the alleged incident and contraventions. The decision to proceed electronically was made primarily because credibility of witnesses was no longer required, as evidence was submitted by agreement. Further, consideration was taken of certain conveniences offered to the parties to the hearing if it were held without the requirement of actual travel.

#### **PRE-HEARING APPLICATION**

9. On July 15, 2013, Pam Sawers made an application to be determined prior to the hearing, namely, to allow the testimony of the Minor Test Shopper (the “MTS”) in this matter to be given by phone at the hearing, as she would be unavailable in person at the place and date set. She is attending University in Alberta.
10. The application was made by email, which was delivered to me and to the Respondent. I determined that it be heard by conference call, and set a conference call for 9:00 am August 7, 2013. Both parties attended at the time and date set, and evidence was presented by the applicant in favour of the application.
11. The Respondent did not oppose the application, and subsequently **I ordered that** the evidence of the MTS could be heard by telephone or other electronic means at the hearing, so long as both parties and I were able to hear the evidence and to question the witness if and as necessary.

12. I was subsequently advised by the Respondent that he did not, in fact, contest the evidence of the witness MTS, nor did he contest the evidence as alleged by the NH or by Pam Sawers, and which was to be presented at the hearing.

### **LEGISLATIVE FRAMEWORK**

13. 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:

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.

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 Regulation establishes 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 Regulation 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. Pam Sawers set out the evidence as described in her , and the Respondent did not dispute any of the evidence provided, as follows:
18. On April 11, 2013, an employee of the Respondent sold tobacco to an MTS, who was under the employ and surveillance of Pam Sawers at the time. The MTS had not reached the age specified under regulation for purchasing tobacco, being 19 years.
19. Previously, the NH had noted other contraventions of section 2 (2) of the Act, namely, sale of tobacco to an MTS on December 18, 2009; sale of tobacco to an MTS on November 27, 2010; sale of tobacco to an MTS on February 10, 2011. In all these three

instances the NH issued a notice that a violation occurred, and a warning that further such conduct will result in the issuance of a violation ticket, or other punitive action.

20. In addition, after the incident on February 10, 2011, an information session was held by the NH with the Respondent in response to this contravention.
21. The NH issued the Respondent a ticket for a further contravention of section 2 (2) of the Act. This contravention occurred on May 3, 2012. A monetary penalty of \$575.00 was imposed, and it was paid by the Respondent.
22. The Respondent acknowledged ongoing history of committing infractions, but noted to the NH during discussions that they have problems with high staff turnover.

### **ANALYSIS AND FINDINGS**

23. The first issue to determine is whether the NH has 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. Based on the joint statement of agreed facts, I find that in fact the Respondent did commit this offence on April 11, 2013.
24. The second issue is to determine whether the Respondent has 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. No evidence was submitted to demonstrate that level of exercise of due diligence, and I found that the defence is not applicable in this case.
25. 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.
26. The parties have submitted an agreed-upon fine of \$2500. I make no comment except to include their agreement in my decision and order.
27. As to the penalty, Pam Sawers requested a prohibition of tobacco sales for a period of two weeks. It was appropriate because of the lengthy history of contraventions and because monetary penalty alone has not been successful to date.
28. Ms. Sawers noted that the Respondent has given up the Store, and will return it to Petro Canada effective September 30, 2013. As a result, it may be difficult to assess a penalty on the Respondent, one which can actually be enforced.
29. The NH recognizes that the Respondent made reasonable efforts to train staff at the Store, and that the Respondent has co-operated with the Authority. It has not proven successful.

30. There is a huge problem with enforcing the Tobacco Control Act regarding unauthorized sales of tobacco, in Dawson Creek. Every opportunity must be taken to indicate the serious nature of the offence and its consequences.
31. Mr. Aziz on behalf of the Respondent says that not only does he not dispute the evidence of contravention of the Tobacco Control Act, but that he personally disapproves of tobacco sales to minors. He has been unable to impart the seriousness of enforcement, to the point that he has had three successive managers in the Store, and the turnover is mainly due to tobacco offences. He says that as an owner his hands are tied.
32. Mr. Aziz indicated that he did not have full support of Petro Canada in his efforts to prevent unauthorized sales to minors. When he fired his last staff for selling tobacco to a minor, Petro Canada told him he had acted too harshly.
33. Mr. Aziz on behalf of the Respondent also argued against the prohibition of tobacco sales as a penalty on the basis that the store is small and without tobacco sales it would die.

## **PENALTY**

34. In reaching my decision on penalty I have taken the following factors into account.
  - a. The need for a deterrent
  - b. This is the fourth noted contravention by the Respondent in this Store.
  - c. Information and education by the NH has been provided to the Respondent in the past, but without positive results.
  - d. It is important to balance the livelihood of the Respondent with the effect of a general deterrence on the community of retailers
  - e. 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.
  - f. A second contravention has a maximum monetary penalty of \$3,000 and a maximum prohibition period of 90 days.
35. The factors are mitigated by the following arguments regarding the imposition of a penalty:
  - a. The Respondent will no longer operate the store as of September 30, and there is no practical way to enforce any penalty that might be imposed. Even if the penalty were to be imposed on the date of hearing, the Tobacco Control Act enforcement would require at least 2 weeks grace time to set up the penalty.
  - b. The imposition of the prohibition on the Respondent in the last month of operating this Store would create an unfair disadvantage to the party that is taking over running the Store for Petro Canada. They would take on an operation that had been prohibited from selling their major product just before their opening date.
  - c. The penalty would not actually serve as a deterrent to the Respondent in these circumstances.

36. Based on the above factors, I decline to make an order in this case prohibiting tobacco sales in the Store. I note that in the ordinary course, i.e. that the store operation was ongoing by the Respondent, prohibition of sales for an extended period would be an appropriate penalty, and I would have no hesitation on imposing that penalty should the circumstances warrant.

**ORDER**

1. **As I have found that** the Respondent 1273129 Alberta Ltd. contravened Sections 2(3) and 2.4 of the *Act*, **I ORDER**, pursuant to Section 6.2(2) of the *Act*, that the company pay a penalty of **\$2,500**, which sum is due and payable upon service of this Decision and Order.
2. **I make no order** against the Respondent as to prohibition from selling tobacco products for any period of time.

*Helen Pinsky*

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Helen Pinsky, Administrator's Delegate