PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. 3237211 Nova Scotia Ltd., 2012 NSPC 80

Date: 20120801
Docket: 2210978
Registry: Sydney

Between:

Her Majesty the Queen

v.

3237211 Nova Scotia Limited

DECISION

Judge:	The Honourable Judge Jean M. Whalen
Heard:	June 16, 2011 and April 25, 2012, in Sydney, Nova Scotia
Oral decision:	August 1, 2012
Written decision:	September 19, 2012
Charge:	Section 5(1) *Tobacco Access Act*
Counsel:	Kathy Pentz, for the Crown Chris Madille, for the Defence

By the Court:

[1] INTRODUCTION

[2] On June 22, 2010 a clerk named, Ian, employed by Mr. Mahar, sold cigarettes to "a test purchaser" employed by the Department of Health and Wellness. The test purchaser was under the age of 19 and a non-smoker. As a result the store and in particular, Mr. Mahar, the franchisee, was charged pursuant to s. 5(1) of the *Tobacco Access Act*. This is a strict liability offence. The accused raised the defence of "due diligence".

[3] ISSUE

[4] The sole issue is whether or not, on a balance of probabilities, the accused has established the defence of due diligence.

[5] THE LAW

[6] In *R. v. Sobeys Inc.*, 181 N.S.R. (2d) 263, MacAdam J., at para. 29 said:

> 29 The respondent acknowledges the defence of due diligence may be available to the appellant. Reference is made to the comments of Justice Cromwell, on behalf of the court, in [R. v. Sobey's Inc. (1998), 172 N.S.R. (2d) 165 (N.S. C.A.)] (C.A.C. 148131, December 2nd, 1998), as follows:
>
> > Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval...and whether the accused 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. (emphasis added)

[7] At para 34:

> 34 In his written submission, counsel for the respondent also notes from the decision in Tesco Supermarkets v. Nattrass, supra, the comments of Lord Diplock at p. 154:
>
> > If the principle has taken all reasonable precautions in the selection and training of servants to perform supervisory duties and

> has laid down an effective system of supervision and used due diligence to see that it is observed, he is entitled to rely on a default by a superior servant in a supervisory duties as a defence under s 24(1), as well as, or instead of, on an act or default of an inferior servant who has no supervisory duties under his contract of employment. (emphasis added)

[8] At para. 36:

> 36 Undisputed is that to establish the defence of due diligence, the accused must show, on a balance of probabilities, that the conduct took place without its direction or approval, that it exercised all reasonable care by establishing a proper system to prevent commission of the offence and, finally, that it took reasonable steps to ensure the effective operation of its system and supervised its operation. There being no evidence, nor suggestion, the conduct took place with the direction and approval of the appellant, having in mind the clear policy to the contrary, at issue is whether Sobey's exercised reasonable care by establishing a proper system to prevent commission of the offence and took reasonable steps to ensure the effective operation and supervision of the system.

[9] REVIEW OF THE EVIDENCE

[10] Andrea MacLeod testified she was 18 years old and employed as a "youth test purchaser" for the Provincial government. She accompanied Mr. Dave Madill on the date in question to the Need's Convenience Store owned by Mr. Mahar.

[11] She entered the store and asked the male clerk for a package of "Nex Blue" cigarettes [exhibit #2]. "He got the cigarettes, rang it in the cash register." She paid with a $20.00 bill and received change.

[12] She was not asked for any "I.D." nor did she have any on her person. She returned to the vehicle driven by Mr. Madill and gave him the tobacco, change and receipt. She does not recall any other patrons in the store.

[13] Mr. David Madill testified that he is employed as an Inspector by the Province of Nova Scotia, Department of Health and Wellness. Part of his job entails doing inspections of any store that holds a "retail vendor's permit" for tobacco products. This includes the "youth test purchasing program".

[14] On June 22, 2010 he instructed Ms. MacLeod to go into the accused store and buy the package of cigarettes [exhibit #2]. Ms. MacLeod did not get a receipt from the clerk; Mr. Madill got the receipt from Mr. Mahar.

[15] At p. 17, line 18:

> "I, after I did all my paperwork, I went back in, I spoke to the clerk who sold the cigarettes and advised an offence has been committed under s. 5(1) of the *Tobacco Access Act* and Mr. Mahar was at the store at that time and I spoke with him, he reprinted it out for me, I advised him what happened, what occurred, we had some conversation, I advised him he had received a warning...June 30th of 2009 and this check that we did on our check...there are two blocks on the top of the check sheet, one says for administration purposes only, that is where we go to check to see who are complying, usually you will get a warning if there are no extenuating circumstances we give them a warning..."

[16] Mr. Paul Mahar testified that he "took over" the Needs store #4490 located at 103 King Street, North Sydney in July 2009. He had 8/9 employees at the time. Ian MacPherson had already been employed at the store when he took over.

[17] He had never been the subject of a prior complaint. Mr. Mahar was in the store on the date in question. He was in his office at the time of sale and he gave no direction to Ian MacPherson regarding the sale of the cigarettes [exhibit #2].

[18] The Inspector (Mr. Madill) came back to his office and they had a discussion about what transpired. Mr. Mahar said he was surprised, they went out to the cash and Mr. Mahar said, "Ian had that look on his face". The clerk blamed it on the fact he was busy and he made a mistake.

[19] Mr. Madill did not have a receipt for the sale of the tobacco. Mr. Mahar verified the time of purchase and gave a receipt to Mr. Madill.

[20] Mr. Mahar said staff were trained verbally and they knew the regulation. There was no written policy at the time. He also testified the store had a policy that if a purchaser looked under 25, the clerks were to ask for I.D. Mr. Mahar said

this was communicated to all employees before June 22, 2010. There was also a computer prompt on the register for certain products which indicated "age restriction", this would give clerks a second opportunity to ask for I.D. This feature can be easily overridden by the clerk by simply pushing a button.

[21] Mr. Mahar testified that prior to June 22, 2010 he told all his employees of the sanctions they could face which included fines or loss of employment.

[22] All of Mr. Mahar's employees had to take the "We Expect I.D. Program". This is an online training program. Each employee must pass the exam with a mark of 100%. The certificate will not be issued unless you achieve the score of 100%. Mr. Mahar's policy was no employment if you do not have the certificate.

[23] Mr. MacPherson obtained his certificate on October 4, 2009 (after Mr. Mahar received a warning letter in July 2009). Only (5) employees had this certificate prior to the date of June 22, 2010.

[24] Besides the online training, Mr. Mahar testified employees would then have (3) shifts with him or another manager and receive training to check I.D's, which included telling employees what was an acceptable form of identification.

[25] This training was in place prior to June 22, 2010, and specifically communicated to Ian MacPherson. And although there was no log made of this, Mr. Mahar recalls that Ian MacPherson was shown the warning letter from Mr. Madill and told "to watch for this", and he had a meeting wherein he told his employees they could be fined.

[26] Prior to June 22, 2010, Mr. Mahar outlined the steps he took to ensure clerks were following policy: 1) remind them on a daily basis; 2) use of video surveillance to monitor clerks at the cash register.

[27] Mr. Mahar recalls the warning letter from Mr. Madill. It stated, "Andrew" had sold cigarettes to a minor. In response to the letter he began "I.D." training, security training, and increased monitoring shifts. He also had a meeting with Andrew to discuss the letter. Prior to June 22, 2010 he testified he would bring up the "I.D." issue "daily because customers need to be asked everyday", and he was

on the floor everyday “monitoring to see policies followed”, and would “spend a half hour a day on cameras”.

[28] On cross examination Mr. Mahar testified there is no store policy regarding “no sale to underage” because it’s the law. Ian MacPherson was an existing employee and after the letter from Mr. Madill he took the online exam at the store. Mr. Mahar kept no log of every refusal to minors. He did show Mr. Madill the “we expect I.D.” certificates.

[29] Mr. Mahar took no disciplinary action again Andrew; he left his employ. He took no disciplinary action against Ian who subsequently quit. He did not have Ian sign the employee contract(s) he obtained from Mr. Madill, because “it doesn’t specify the policy and because he had no idea if it would have made a difference.”

[30] There was no policy in place that if “cash” got busy he was to be called by the employees to assist.

[31] Mr. Mahar testified all staff members were present for the meeting he had with Ian that day (although he also testified it was hard to get employees to come in for things other than their shifts). He kept no minutes or logs of this meeting.

[32] ANALYSIS

[33] There has been lots of evidence about what Mr. Mahar is doing now with respect to compliance but the key is to consider whether, at the time of the incident, on the balance of probabilities, the accused had done all that could be reasonably expected...

[34] I find:

1) Mr. Ian MacPherson was not called to testify regarding the sale of the product, training he may have received, or the meetings that he and other staff members were said to have attended.

2) No other employees were called to testify regarding communication received from Mr. Mahar concerning store policy of asking for I.D.

3) No evidence was led confirming the “computer prompt” regarding “age restriction” product sales.

4) There was no written notice of sanctions that could be imposed by the courts or the employer.

5) The training module “We Expect I.D. Program” is not recognized by the Province of Nova Scotia.

6) No other manager/assistant managers were called to testify regarding training and/or monitoring staff.

7) Mr. Andrew Patterson was not called to testify about his sale of cigarettes to a minor or anything he may or may not have said or any training he may or may not have received.

8) No photos were submitted of signage that existed in the store in June 22, 2010 or samples of video surveillance available to Mr. Mahar to assist him in monitoring the clerks at “cash”.

[35] The court is left with the sole testimony of Mr. Mahar to make out the defence of due diligence.

[36] I find:

1) Mr. Mahar was in the store at the time Ian MacPherson sold the cigarettes to Ms. MacLeod.

2) He gave no direction to his employee regarding the sale of the cigarettes. He was in the office at the time of the sale.

3) All his employees were trained “verbally” there was no written policy, etc., at the time.

4) The “I.D.” policy was “communicated” to his employees but there was no written communication.

5) Mr. Mahar’s employees were “told” of sanctions but nothing was written and given to them.

6) The test/exam for the online training of employees was not supervised by any store manager, particular Mr. MacPherson. Although taken in Mr. Mahar’s office, Mr. Mahar was in and out of the office while he wrote the exam.

7) Only (5) employees had the certificates prior to the offence date. There is no evidence as to where the exam was taken or if anyone supervised it.

8) Despite the warning letter from Mr. Madill in 2009, Mr. Mahar did not:

a) keep minutes of any meetings with staff;

b) impose any sanctions on his employees for failing to follow the required law;

c) keep a log of any monitoring done by him or other managers and what, if any, “policy infractions” may have occurred.

d) require employee to keep a log of refusal to sell to minors during their shift.

e)there was no written report made/kept of Andrew Patterson’s infractions or Ian MacPherson’s infractions of the T.S.A.

f) no employee was required to sign a contract about illegal sales of tobacco only read same.

g) Mr. Mahar did not have Andrew Patterson or Ian MacPherson sign a contract after his infraction.

9) There was no policy created for a clerk to call for assistance if they “got busy at the cash”, which was the excuse given by Mr. Mahar regarding both employees.

10) Mr. Mahar has never had a meeting with Mr. Madill to review the guidelines that were mailed to him. He has read them.

[37] CONCLUSION

[38] Given all of the above I find Mr. Mahar did not exercise all reasonable care by establishing a proper system to prevent the commission of the offence, or take reasonable steps to ensure the effective operation of the systems on the date in question.

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The Honourable Jean M. Whalen