

Citation: *R. v. 19574 Yukon Inc.*, 2006 YKTC 82

Date:20060731
Docket: T.C.05-00615
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

**19574 YUKON INC.
o/a BERNIE'S RACE TRAC**

Appearances:
Ludovic Gouaillier
Bernie Heffner

Counsel for Crown
Appearing on his own behalf

REASONS FOR SENTENCING

[1] T.C.J. RUDDY (Oral): 19574 Yukon Inc., doing business as Bernie's Race Trac Gas, has been charged with selling cigarettes to minors, contrary to the *Tobacco Act*, 1997, c. 13. The defendant is represented by Mr. Heffner, the owner and operator of Bernie's Race Trac. Mr. Heffner has essentially admitted the *actus reus* required to establish the offence but argues the defence of due diligence.

[2] The facts of this case stem from an enforcement program developed by Health Canada. Ms. Woo, a tobacco enforcement specialist for Health Canada, described the

program, indicating that minor test shoppers are utilized to check retailers for compliance with the *Act*. A first failure to comply results in a warning letter. Subsequent failures result in prosecutions.

[3] The matter before me today constitutes the third failure of Bernie's Race Trac to comply with the *Act*. In September of 2004, I believe, a warning letter was issued to a Michael Allen, who was a clerk at Bernie's Race Trac, for selling cigarettes to a minor. The following April of 2005, Mr. Allen, again, sold cigarettes to a minor test shopper. Both he and Bernie's Race Trac entered pleas of guilty and were convicted of offences in relation to that incident. The most recent offence arose on October 30th of 2005, and again involved Mr. Allen as the store clerk.

[4] The system in place at Bernie's Race Trac, to avoid such infractions, appears to have been verbally advising employees not to sell tobacco to minors, plus some signage advising of same, plus the hazards of smoking. After each of the incidents there appears to have been discussions within the store with Mr. Allen, reminding him not to sell to minors. There does not appear to have been any change to the store's approach to dealing with the issue.

[5] The evidence indicates Mr. Heffner sought input from Ms. Woo as to what he needed to do to establish due diligence. Ms. Woo and Mr. Heffner were only able to speak via telephone. Some suggestions were made by Ms. Woo, but she indicated that it was up to Mr. Heffner to decide what was right and appropriate for his business. Ms. Woo also indicated that it is her practice to provide a list of suggested actions with the

initial warning letter in each case. That list of suggestions was filed as Exhibit 3 in these proceedings.

[6] Mr. Allen, who was the sole witness for the defence, denied having ever seen such a document. Whether he did or did not, the evidence clearly does not establish for me that that list of suggestions went to Mr. Heffner.

[7] Mr. Heffner points to other regulations and regulatory bodies to which his business is subject and notes that they provide more detailed information to business owners as to the owner's obligations and how they may be met. He says that he did not receive the same from Health Canada in this case. He also notes the limitations inherent in running a small business.

[8] While I certainly sympathize with Mr. Heffner as to the limitations and frustrations of running a small business, I cannot find that the defence of due diligence has been established in this particular case. The system in place amounts to little more than verbal reminders and some signage. That system remained effectively unchanged throughout the three incidents.

[9] The fact of those three incidents of non-compliance clearly demonstrates that the system was inadequate. This ought to have put Mr. Heffner on notice that changes are needed, as the system is clearly not working. The obligation is on the business and not on Health Canada.

[10] The Crown has filed the case of *Sobeys Incorporated and Her Majesty the Queen*, [2000] N.S.J. No. 32 (QL), out of the Nova Scotia Supreme Court. In that

decision, Mr. Justice MacAdam made the following comments which, in my view, are equally applicable to the case before me.

The legislature having prohibited the sale of tobacco products to persons under the age of 19 years as a strict liability offence, the defence of due diligence is not available when a retailer or vendor is on notice that policies and procedures established to ensure both the existence of a proper system to prevent commission of the offence and that reasonable steps had been taken to ensure effective operation of the system in supervising this operation, were not effective. Although it would no doubt be useful for the Department of Health to provide some indication of what it expects of retailers or vendors and ensuring that the *Act* is observed by their staff, the defence of due diligence does not depend on the regulatory body establishing the guidelines, but rather on whether the vendor has established reasonable procedures, both in respect to establishing a policy and in respect to ensuring its observance. Although the various steps taken by the appellant would, in the absence of warnings there had been violations, in our view, have met the burden, such is not the case when their (sic) is evidence the steps were inadequate. This is not to require an "absolute guarantee" that tobacco products will never be sold to underage persons, but simply a requirement for the retailer or vendor to recognize that where systems or procedures implementing the policies and *Act* have turned out to be inadequate that further steps are required in order to ensure compliance with the legislative prohibition.

[11] So Mr. Heffner, while I certainly understand the difficulties of running a small business, the bottom line is that the onus is on you to ensure that appropriate systems are in place. What you have is clearly not working. I am not advocating necessarily that you threaten the jobs of individuals, which you are clearly so uncomfortable with, nor am I suggesting that you, as of necessity, have to install hardware that is beyond your means. But there are other steps that can be taken, short of those, that you need to explore and you have an obligation to explore those and to implement them. You need to look at the list of suggestions.

[12] As I noted, I could not find as a fact that you have seen it before, but I am sure Ms. Woo would be happy to give you a copy of it today. Talk to other small business

owners about what they have done and how they handled the situation. But the bottom line is you have to make some changes because what is in place is not working. And when you fail to make those changes, the defence of due diligence is simply not met in the eyes of the law. So the offence as charged has been made out and a conviction will be entered.

[13] Are we in a position to deal with the issue of disposition today?

[14] MR. GOUAILLIER: I believe we are.

[15] THE COURT: Mr. Heffner, are you prepared to deal with that today?

[16] MR. HEFFNER: Yes.

[17] THE COURT: Okay.

(Submissions by counsel)

[18] THE COURT: Thank you. Okay, Mr. Heffner, now it is your turn to talk to me about the sentence and what you think the sentence ought to be, and the things that I should consider in passing that sentence. What the Crown is suggesting or seeking at this point in time is the publication order indicating that you were convicted and a fine in the range of \$1,000. That is what they are suggesting at this point in time. Do you have any submissions or comments that you want to make with respect to that?

[19] MR. HEFFNER: I think I have said everything I wanted to say already.

[20] THE COURT: Okay. Thank you. I am satisfied that what the Crown is seeking is appropriate in all of the circumstances, noting of course that this is not a

first offence, that the maximum for subsequent offences is as high as \$50,000, but also recognizing, Mr. Heffner, that you are running small businesses, and that, as we have already discussed, brings with it many frustrations, a lot of those financial. So it is not, in my view, appropriate to unduly burden you from a financial perspective, but it is also clear to me that the fine needs to be somewhat larger than the fine on the prior offence to clearly send the message, not just to you but to other retailers as well, of the importance of the *Act* and the need to ensure that any system put in place is appropriate to do everything that can be done to avoid selling tobacco products to minors.

[21] So there will be a fine in the amount of \$1,000. I am also satisfied that it is appropriate, from a general deterrence perspective, that there be the order requiring you to publish in the newspaper. Have you provided him with a copy of that?

[22] MR. HEFFNER: I had to put it in the last time.

[23] THE COURT: Okay. You already know the drill. What I am simply going to do is sign off on this because I am comfortable with the wording of the order as is, and I will have the clerk fill in the particulars.

[24] That leaves the remaining issue of time to pay. The fine is \$1,000. I am assuming you are going to want a little bit of time to pull that together. Roughly how long do you think you would need to be able to pay that?

[25] MR. HEFFNER: Give me two weeks.

[26] THE COURT: Okay. What I am going to do is make it a month. So you have got an even month from today's date to get that sorted out, and that can simply be paid at that Court Registry downstairs.

[27] Anything further? Do you have submissions on the victim fine surcharge?

[28] MR. GOUAILLIER: Well, I think in that particular case, Your Honour, I think the amount of the fine, itself, is, you know, it is an offence against the general public, so it is probably dealt with by a significant fine for the --

[29] THE COURT: I, as well, would prefer any additional funds go towards putting the systems in place, so I am going to waive the victim fine surcharge at this point in time. Thank you.

RUDDY, T.C.J.