

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN



- v -

Y.K. 899328 CONVENIENCE STORE LTD.

Transcript of the Oral Reasons For Judgment of The
Honourable Judge B.A. Bruser, sitting in Yellowknife, in the
Northwest Territories, on the 18th day of July, A.D. 2002.

APPEARANCES:

Ms. S. Kendall:

Counsel for the Crown

Mr. J. Brydon:

Counsel for the Defence

1 THE COURT: Well, the defence makes much of the
2 issue that perfection is not required, that's nice to
3 know. I doubt this judgment will be one of
4 perfection.

5 I think I will deliver it now rather than
6 reserve on it. One reason is my unavailability for
7 much of the period between now and mid September.
8 Not all of it, but much of it.

9 The charge is against YK899328 Convenience Store
10 Ltd., carrying on business as Corner Mart.

11 The common ground is that on November 6, 2001,
12 Sheena Tremblay, born January 21, 1985, working for
13 Health Canada in tobacco enforcement on an ad hoc
14 basis, entered into the Corner Mart in Yellowknife.
15 There, with money supplied by the Government of
16 Canada and in particular by the tobacco inspector,
17 she purchased a package of cigarettes. They are Du
18 Maurier and the package with the cigarettes in it is
19 marked Exhibit 3.

20 The only issue for my consideration is as put by
21 Mr. Brydon; under all the circumstances, has the
22 defendant company shown due diligence, this being, by
23 agreement, an offence of strict liability.

24 A leading case in the area of strict liability
25 is that of *Wholesale Travel Group Incorporated*,
26 [1991] 3 SCR 154.

27 In that case, the Supreme Court held that due

1 diligence must be established by an accused on the
2 balance of probabilities, even though this means that
3 there may be a conviction where a court might
4 otherwise have a reasonable doubt. Or, to put it in
5 another context, regulatory offences, according to
6 the Supreme Court, are not crimes under the Criminal
7 Code of Canada. This alleged offence is under the
8 *Tobacco Act*, 1997, and amendments thereto.

9 The *Wholesale Travel Group Incorporated* case
10 said that companies operating in a regulated area
11 agree to be subject to a certain standard of care,
12 and agree to accept the requirement that they are to
13 meet that standard on an ongoing basis. Regulatory
14 offences, the Supreme Court has said, are treated
15 differently because they are in place to protect the
16 vulnerable in Canadian society. Without the reverse
17 onus, the Crown would be required to prove negligence
18 beyond a reasonable doubt which, according to my
19 understanding of the *Wholesale* case, would in most
20 cases be practically impossible. Therefore, the
21 Supreme Court has said that once the Crown proves
22 beyond a reasonable doubt that the actual act, which
23 in this case is the sale of the cigarettes to a young
24 person under the age of 18, then negligence is
25 presumed. This gives the accused the opportunity to
26 rebut the presumption if the accused can prove on a
27 balance of probabilities that reasonable care (due

1 diligence) was taken.

2 The hallmark of strict liability offences, again
3 according to my understanding of the Supreme Court,
4 is not proof by the Crown of negligence, but proof to
5 the necessary standard by the accused of due
6 diligence. Hence, due diligence is the issue before
7 me. The Crown and the defence are correct, in my
8 view, that this is the only issue remaining.

9 In the Ontario Court of Appeal case of *Nickel*
10 *City Transport (Sudbury) Limited*, 1993, 82 CCC (3rd)
11 541, the Court held that to properly characterize an
12 offence as strict liability, the Court will have
13 regard to the overall regulatory pattern adopted by,
14 in this case Parliament, the subject matter of the
15 legislation, the importance or severity of the
16 penalty, and the precise language used.

17 That case sets out principles to help the Court
18 determine if an offence is strict liability or not.
19 I have referred to the Ontario case though to
20 emphasize the importance of looking at the
21 legislation because without looking at the
22 legislation, it can be difficult to determine exactly
23 what the parameters of due diligence might be. I
24 then turn to the applicable parts of the legislation
25 for assistance.

26 This analysis is necessary because Mr. Brydon's
27 argument has taken the Court on a step-by-step basis

1 to the point where he says due diligence has been
2 met, at the end of which he says what else could his
3 client have done? I will return to Mr. Brydon's
4 argument in more depth shortly and, of course, I will
5 address the Crown argument as well.

6 The legislation comfortably sets out the purpose
7 of the *Tobacco Act* in Section 4. I think Parliament
8 has done people in this country a very fine service
9 in setting out the purpose as it has done in section
10 4. Parliament so often is criticized for its
11 legislation in the courts; this is an example of
12 legislation drafted very well in Section 4.

13 Section 4 provides that the purpose of the Act
14 is to provide a legislative response to a national
15 public health problem of substantial and pressing
16 concern and, in particular;

17 a) to protect the health of Canadians in light
18 of conclusive evidence implicating tobacco use and
19 the incidence of numerous debilitating and fatal
20 diseases.

21 b) to protect young persons and others from
22 inducements to use tobacco products and the
23 consequent dependence on them.

24 c) To protect the health of young persons by
25 restricting access to tobacco products, and to
26 enhance public awareness of the health hazards of
27 using tobacco products.

1 With that in mind, Parliament has set out in
2 Section 8(1),

3 No person shall furnish a tobacco product
4 to a young person in a public place or in a
5 place to which the public reasonably has
6 access.

7 The Corner Mart is such a place because the public
8 reasonably has access to it. If the public didn't,
9 the Corner Mart would quickly be out of business.

10 Subsection 2),

11 A person shall not be found to have
12 contravened Subsection 1 if it is
13 established that the person attempted to
14 verify that the person was at least 18
15 years of age by asking for and being shown
16 documentation prescribed for the purpose of
17 verifying age and believed, on reasonable
18 grounds, that the documentation was
19 authentic.

20 Section 9 is a provision requiring the retailer to
21 post in a prescribed place and manner signs in a
22 prescribed form and with a prescribed content that
23 inform the public of the offence of furnishing
24 tobacco products to young people.

25 I return to Subsection 8(2). If the Corner Mart
26 could fit itself within Subsection 2, it would not
27 and could not be found to have contravened Subsection
28 1.

29 That subsection, however, does not appear to be
30 exclusive of the principles of common law set out by
31 the Supreme Court of Canada with respect to the issue
32 of due diligence. What it says is what it means. It

1 addresses a particular situation where if the company
2 attempts to verify that the person is at least 18
3 years of age by asking for and being shown
4 identification and believed on reasonable grounds
5 that it was authentic, it could not be responsible if
6 the documentation was not authentic.

7 The section that I have referred to just now
8 seems to have that in mind. To turn that upside
9 down, I don't think it can be said that because the
10 Corner Mart failed to ask for identification that
11 it's automatically guilty of this offence. That
12 subsection does not preclude the common law of due
13 diligence and I now turn to other aspects of it. In
14 doing so, I do not lose track of the principle of law
15 that the Court can accept all of the evidence of a
16 witness, reject all the evidence of a witness, or
17 accept part of it and reject other parts of it.

18 This principle is important in this case because
19 I am in agreement with Crown counsel that the
20 evidence of the last defence witness is not entirely
21 credible. He is the manager of the Corner Mart. He
22 says that he always emphasizes to staff not to sell
23 tobacco products to minors. He says that and he
24 tells his employees that if customers who are buying
25 tobacco products look to be 25 or younger, they are
26 always to ask for photo identification. According to
27 him the store, for much of the 24-hour period, is a

1 very busy place and every effort is made to have
2 somebody help out at the counter during the peak
3 times. The time in question, according to the
4 18-year-old who sold the tobacco products to the
5 young person Sheena Tremblay, was a busy period. It
6 was so busy that Joseph Masongsong said that he
7 scarcely has a moment during his 5 p.m. to 9 p.m.
8 shifts to himself. Yet there he was, during a very
9 busy period working alone, and it is apparent from
10 his testimony that he is often left alone during such
11 busy periods.

12 I don't completely accept the evidence of the
13 last Crown witness whom I will, for the sake of ease
14 of reference, refer to as Siva as he has been
15 referred to throughout his testimony.

16 Siva has said that if the two witnesses who were
17 employees, Michaela and Joseph, were very busy, not
18 only would they have somebody with them, but he said
19 that if he were there, he would be right there with
20 them himself. This evidence I find to be an
21 exaggeration. I find that it does not reflect
22 reality. He says that he spoke to Joseph Masongsong
23 immediately after the sale about it. He says that he
24 learned about it because he was in the kitchen and
25 saw on a monitor, which was an 18-inch one, colour,
26 with sound, that this transaction had apparently been
27 completed. At one point he says that he saw the back

1 of the person. He was concerned from looking at the
2 back of that person that, based upon his experience
3 as a medical doctor in his previous country, that the
4 person looked under the age of 18. Yet later in his
5 testimony, when asked about that in more detail, he
6 says that he did not see the transaction even though
7 earlier he had said that he had watched the sale, and
8 later he also said that he saw the side of the
9 person; yet before this testimony he said he couldn't
10 remember if he had seen the face.

11 If you see the side of somebody you see part of
12 the face. Did he see the side of the person or did
13 he see the back? Did he see the entire sale or did
14 he simply see her leaving? Did he truly believe that
15 this was simply a friend of Joseph, as he testified,
16 who had been visiting him, and if so why would he
17 have gone out to check up on Joseph?

18 Joseph didn't talk about having talked to Siva
19 about the sale. On the contrary, it was Jimmy Kong,
20 the owner, according to Mr. Campbell, the health
21 inspector who dealt with Joseph. And it was the
22 owner, according to both Joseph and the health
23 inspector who became angry, not at the health
24 inspector, but at Joseph for having sold the package
25 of cigarettes to a young person.

26 I find it incredible that the manager of the
27 Corner Mart would, from time to time, do these spot

1 audits that he testified about, taking kids from the
2 streets to make these purchases and not pay them, but
3 give them a slice of pizza or something. Maybe that
4 happens, but I do find it incredible that it would
5 take on the importance by the Corner Mart that this
6 witness tried to impress upon the Court.

7 On the other hand, I accept the evidence of the
8 several witnesses about the policy at the Corner Mart
9 not to sell tobacco products to young persons. I
10 accept the evidence that when a tobacco product is
11 entered into the cash register, a special code is
12 used. The prompt on the screen is a prompt to remind
13 staff to check for identification, and photo
14 identification where it is necessary to do so.

15 I accept that the employees were told that if
16 somebody appeared to be 25 or younger, the employees
17 were to ask for photo identification so that the
18 employees and the Corner Mart would not run afoul of
19 Section 8.

20 These parts of the evidence that I have just
21 referred to are credible. They are corroborated and
22 they ring true at the end of the day.

23 I accept the evidence of Joseph Masongsong that
24 when he sold the cigarettes he was very busy. It's a
25 fact, I find, that he didn't have sufficient help at
26 the counter. I think his employer should have
27 ensured that he had the help that he needed. I do

1 not reject his testimony when he said "I wasn't
2 thinking" and "I was being ignorant." He said that he
3 did not even get a good look at the face of the young
4 person Sheena Tremblay, and he was clearly at fault.
5 He admitted it. He was charged. • He apparently pled
6 guilty and he was placed on probation. He has
7 learned his lesson; it's unlikely he will ever do
8 that again. But, is the Corner Mart liable for what
9 he did? Is it enough that the Corner Mart did not
10 have somebody with him at that particular moment in
11 time when the store was very busy? This leads me to
12 the particulars of the defence argument.

13 The defence made submissions first, because it
14 called evidence, this is why I am referring to the
15 defence argument first.

16 I agree with Mr. Brydon's remark at the outset
17 that this isn't about perfection. Mr. Brydon asked
18 at what point is there insufficient diligence?
19 That's perhaps one way to look at it, but I prefer to
20 not look at it that way. I prefer to apply this in
21 the way that the Supreme Court of Canada says it
22 should be applied. Has the accused, on the balance
23 of probabilities, taken reasonable care in all the
24 circumstances? What are the circumstances? I have
25 referred to a number of them; I continue with the
26 defence argument.

27 Mr. Brydon asked, What does a reasonable tobacco

1 retailer in the position of the accused have to fail
2 to do not to succeed in due diligence? Again, the
3 defence is twisting the test around. I'm not certain
4 that it means the same thing that the test is meant
5 to mean, and I stick to the clear language of the
6 Supreme Court of Canada. It's easier to follow. It
7 doesn't get the Court or anybody else into the
8 question of resolving negatives. It is concise.

9 But Mr. Brydon asked the proper question, What
10 would a reasonable person in the place of the accused
11 have to do? Mr. Brydon says the store did have a
12 tobacco sales license. A reasonable store in that
13 position would have a license.

14 There is an obligation for the reasonable store
15 to take reasonable steps not to sell to minors. The
16 Corner Mart did take many reasonable steps because of
17 the reminders that employees received. I do not
18 accept that they were warned everyday, I think that
19 would be fantastic given how busy that place is, but
20 I do accept that they were reminded on a regular
21 basis not to sell tobacco products to young persons.

22 Another element of what a reasonable store
23 would have to do, Mr. Brydon says, is to post the
24 required signs. The evidence is clear the Corner
25 Mart had posted the required signs warning against
26 sales to and purchases by young persons.

27 There is the policy in place of questioning

1 people who are 25 or younger, or perhaps under 25,
2 (the distinction is one without significance here
3 because there is a seven-year safety barrier around
4 each sale).

5 Mr. Brydon says that there are times in the
6 store where things just get too busy and people
7 forget. Reasonable people forget, in fact everybody
8 forgets from time to time. Everybody is careless
9 from time to time, and I do not think that the Corner
10 Mart should fail in due diligence simply because at
11 that moment in time when Sheena Tremblay was in the
12 store and it was busy, that Siva did not present
13 himself at the counter when he had pressing duties to
14 do in the kitchen. This is a small operation and the
15 margin, as we've heard, is not a great one in the
16 tobacco sale business.

17 Mr. Brydon says that on this day, November 6,
18 2001, Joseph Masongsong knew what to do. This is
19 correct. He did know what to do. He got careless.
20 I have already commented upon that and need not
21 repeat myself, but Mr. Brydon says can we attribute
22 that conduct to the company to the required standard?
23 And that's when the defence entered into the
24 submission that this is a small mom and pop
25 operation, worked hard at by family members plus
26 Siva, a manager of 11 years, and high school
27 students.

1 Can the business be faulted for hiring students?
2 I think not. I think it better to presume that
3 students will do their work to the best of their
4 skill and ability, and that with proper training they
5 can do proper work. The evidence does not show any
6 training program for everybody at the same time, but
7 this is not, as Mr. Brydon has argued, a Government
8 department that can afford that luxury. People come
9 for a few hours, leave, somebody else will come and
10 so forth. But, individually, and this often works
11 better than a group teaching session, each employee
12 is told not to do this and is reminded on an ongoing
13 basis, if not daily, of the law against providing
14 tobacco products to young people, and of the in-store
15 policy of 25 or younger.

16 Mr. Brydon says that the cash register is a
17 further safety measure built in by the store. I have
18 already remarked upon that. I am in agreement with
19 that branch of Mr. Brydon's argument.

20 Mr. Brydon says that we must talk about the
21 reasonable corner store in Yellowknife and not big
22 business. He has a point. I do not reject it. He
23 says that at some point one has to be careful not to
24 impose unrealistic expectations on small operations
25 because if they are imposed, the operation simply can
26 not function. I think this is a reality of any
27 business and, in particular, a small business without

1 the safety net that a big business might have.

2 The final point that I address emerging from the
3 defence argument is that Joseph Masongsong is not an
4 irresponsible employee. I had the opportunity to
5 assess him when he testified. He strikes me as very
6 bright, very articulate, honest, and forthright.
7 This is the kind of person any employer would be
8 happy to be able to have working for them. This is
9 not a case where the Corner Mart has put up with an
10 irresponsible employee who might reasonably be
11 expected to do on a regular basis this sort of thing
12 Joseph, by mistake, on this occasion did.

13 Joseph had testified that as soon as he began
14 working at the store he was told about the policy,
15 and he began working there about one year and two
16 months ago. He was warned that if this would happen
17 the store, and he, would be in "big trouble." He says
18 that what he usually would do would be to look for
19 youthful appearance, height, and the like and how
20 they talk.

21 Crown counsel has said forcefully that the
22 Corner Mart is leaving the decision regarding age to
23 other teens. Well I ask why not? Would a teen not
24 be in a very good position to recognize another teen?
25 Would a 55-year-old not have more trouble identifying
26 the approximate age of a teenager than another
27 teenager? In my view the Corner Mart, while this was

1 not a purpose in hiring teens to sell tobacco
2 products, has actually enhanced its *Tobacco Act*
3 obligations by putting people behind the counter who
4 can recognize other young people. It often takes one
5 to know one. This applies to many areas of life.

6 The Crown says that the Corner Mart was not
7 actively assisting its young employees to identify
8 young people. But given the remarks that I have made
9 and the findings of fact that I have come to, I can
10 not accept that branch of the argument raised by the
11 Crown. I don't think that any employer has an
12 obligation to teach its employees the fine science of
13 anatomy or the fine area of human psychology. One
14 has to look at it from the context of what was going
15 on in that operation, that is what kind of business
16 it was and where it was located and how it operated.

17 The Crown says that the witness Michaela
18 Neglak-Voss, age 18 as is Joseph Masongsong, had sold
19 cigarettes at the Corner Mart on a number of
20 occasions to young persons before stopping that
21 practice. But the case before me is not about what
22 she did some time ago, but rather it is about what
23 Joseph Masongsong did on November 6th. In any event,
24 even if I am mistaken about this, Michaela did stop
25 her conduct after being talked forcefully to by Siva
26 and Mr. Kong.

27 Michaela testified that she seems to guess at

1 ages. The problem with this argument though is that
2 much of her testimony seemed vague. She lacks the
3 precision or at least in the courtroom lacked the
4 precision of Joseph. I find Joseph to be a more
5 articulate, more mature, and more engaging
6 individual. But put behind a counter of a store,
7 Michaela has an idea of what to look for. She has
8 made mistakes before, has done this before apparently
9 intentionally, which I find by inference, and is
10 making an effort not to do it anymore.

11 On all of the evidence, the most I can say in
12 terms of any lack of reasonable care by the Corner
13 Mart is that they failed, during a busy time, to have
14 somebody at the store at a time when Sheena Tremblay
15 was there. This was a mistake. Mistakes do happen.
16 That mistake should not have happened but the
17 totality of the evidence satisfies me that reasonable
18 care, that is due diligence, was taken by the Corner
19 Mart. The Corner Mart might have a problem should
20 there be a future case of this sort arguing that,
21 "Well we had another busy moment, let us off" given
22 this experience that it has had here today.

23 The Corner Mart should, from this point on,
24 take -- and with the benefit of these reasons, take
25 further steps to ensure that during busy periods the
26 clerks do not get so occupied that when selling
27 tobacco products they don't bother to go through the

1 necessary considerations in checking for
2 identification where it is apparently necessary to do
3 so.

4 I'm not prepared in this case to attach
5 liability to the Corner Mart for the clear liability
6 of Joseph Masongsong. The connection is not solidly
7 enough there because of the finding of reasonable
8 care taken by the Corner Mart. I find the accused
9 not guilty.

10 In arriving at this decision, I am saying
11 nothing to discourage health inspectors to continue
12 using young people in the course of their
13 investigations in Yellowknife. This has been a very
14 valuable exercise for the Corner Store and exercises
15 of this sort may be heard in the future but only if
16 Health Canada continues to inspect in this way. The
17 Court is not trying to discourage it from doing so.

18 So that concludes the judgment. There is a
19 package of cigarettes; is the Crown asking that it be
20 forfeited?

21 MS. KENDALL: Yes please, Sir.

22 MR. BRYDON: If it please could be forfeited, I
23 have no use for them.


24 THE COURT: There they are.

25 THE CLERK: Thank you, Sir.

26 THE COURT: And that will be at the end of the
27 appeal period, Madam Clerk, not now. We'll close

1 court.

2 -----
3 Certified correct to the best of my skill
4 and ability (Subject to Editing by Presiding
5 Judge).

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7 Sandra Burns R.P.R., C.R.R.
8 Court Reporter
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