



**DECISION OF
THE ADMINISTRATOR**

Tobacco and Vapour Products Program
Health Protection Branch
Population and Public Health

MINISTRY OF HEALTH

IN THE MATTER OF

A hearing pursuant to Section 5(1) of

The Tobacco and Vapour Products Control Act, R.S.B.C. 1996, c. 451

Retailer:

Buddy's Smoke Shop Ltd.
Db: Buddy's Smoke Shop
(the "Retailer")

For the Retailer:

Anu Bassi
(the "Retailer's Representative")

Enforcement Officer:

Stan Dhaliwal
(the "Enforcement Officer")

Adjudicator:

R. John Rogers
(the "Adjudicator")

Date of Hearing:

September 9, 2021

Date of Decision:

September 24, 2021

INTRODUCTION

The Retailer, Buddy's Smoke Shop Ltd., operates an establishment called "Buddy's Smoke Shop" at #1-45637 Lark Road, Chilliwack, BC, V2R 3N5 (the "Store") under Tobacco Retailer Authorization number TRA 1110-7404.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The allegations against the Retailer are set out in the Notice of Administrative Hearing (the "NOAH") dated July 16, 2021.

The NOAH alleges that on October 11, 2019, the Retailer contravened section 2.4(1)(b) of the *Tobacco and Vapour Products Control Act*, R.S.B.C. 1996, c. 451 (the "Act") and section 4.31(1) of the *Tobacco and Vapour Products Control Regulation*, B.C. Regulation 232/2007 (the "Regulation") by the manner in which it displayed promotional advertising materials to encourage the purchase of vapour products. The NOAH further alleges that on November 7, 2019, the Retailer continued this contravention of section 2.4(1)(b) of the Act and 4.31(1) of the Regulation in its maintained display of these promotional advertising materials and at that time confirming to the attending enforcement officers that the Store was "now an all-ages store".

The NOAH notified the Retailer that an administrative hearing was to be held by videoconference at 9:30 a.m. on September 9, 2021, for the purpose of determining whether or not the Retailer had committed the alleged contraventions as set out in the NOAH.

PRE-HEARING TELECONFERENCE

A Pre-Hearing Teleconference was held on August 24, 2021 for the purpose of reviewing the matters to be dealt with at the videoconference scheduled for September 9, 2021. This teleconference was attended by Ms. Scalzo, Enforcement Analyst, on behalf of the Ministry of Health, the Enforcement Officer on behalf of the Fraser Health Authority, the Retailer's Representative, and the Retailer's employee (the "Employee") who is the husband of the Retailer's Representative.

At this Pre-Hearing Teleconference, the Retailer's Representative was offered the option of agreeing that the contraventions alleged in the NOAH had, in fact, occurred. If this option were exercised, she was advised, the hearing scheduled for September 9, 2021 would deal strictly with what penalty the Adjudicator felt appropriate.

The Retailer's Represented advised that the Retailer was not prepared to make a decision on this option offered to it during the Pre-Hearing Teleconference. The Retailer was, therefore, given until August 31, 2021 to determine whether or not it wished to accept this offer. In an email dated August 28, 2021 to Ms. Scalzo, the Retailer's Representative accepted the offer on behalf of the Retailer and agreed that the contraventions as alleged in the NOAH had, in fact, occurred.

During this Pre-Hearing Teleconference the following questions asked by the Retailer's Representative were addressed and answered:

1. Question: Were not the contraventions addressed in the NOAH dealt with at the administrative hearing held on December 4, 2019 (the “First Administrative Hearing”) and upon which a decision was rendered by the Adjudicator on January 3, 2020?

Answer: The decision of the Adjudicator dated January 3, 2020 following the First Administrative Hearing dealt with contraventions committed by the Retailer on January 3, 2019. The contraventions referenced in the NOAH and which will be dealt with at the hearing scheduled for September 9, 2021 were alleged to have been committed on October 11, 2019 and November 7, 2019, well after the contraventions of January 3, 2019 and were not before the Adjudicator for his consideration at the First Administrative Hearing.

2. Question: Will the ticket issued to the Retailer on July 8, 2021 be dealt with at the hearing on September 9, 2021?

Answer: The ticket issued on July 8, 2021 has its own dispute resolution process and is independent of the administrative hearing process for which the hearing will be held on September 9, 2021. Although evidence of the issuance of this ticket may be submitted at the hearing on September 9, 2021 as a reflection of the Retailer’s ongoing noncompliance with the Act and the Regulation, the contravention alleged in this ticket will not be in issue.

THE ADMINISTRATIVE HEARING

For the purpose of the hearing and in accordance with section 5(2) of the Act, the Administrator as so empowered by the Act (“the Administrator”) delegated to the Adjudicator the powers, duties and functions provided to the Administrator by the Act with respect to a decision as to whether or not the contraventions as alleged in the NOAH have been proven, and, if the Adjudicator finds the alleged contraventions to have been proven, a determination of an appropriate penalty therefore, and an order with respect to such determination.

ONLINE HEARING PROTOCOL

This administrative hearing to deal with the contraventions alleged in the NOAH was held by video conference at 9:30 a.m. on September 9, 2021, being the time and the date specified in the NOAH for the hearing to be held. In order to carry out the hearing online, an email invitation was sent by the Adjudicator on September 4, 2021 inviting the Enforcement Officer and the Retailer’s Representative to join the online hearing on the appointed date and time. In this email, the Adjudicator noted that, as referenced above, the Retailer had admitted that the contraventions alleged in the NOAH had occurred and that, therefore, the purpose of this hearing was to determine an appropriate penalty for the admitted contraventions.

At the appointed date and time for the video conference, the Enforcement Officer and the Retailer’s Representative were present online with the Adjudicator. The Enforcement Officer identified the three parties who were present in the room with him and with access to the online hearing as being the Regional Manager of the Fraser Health Authority and two other parties who

were agents of the Fraser Health Authority and who were involved in the contraventions reference in the NOAH. The Retailer's Representative identified two parties that were present in the room with her and with access to the online hearing as being the Employee and the Retailer's Representative's son.

Before proceeding further with the administrative hearing, as the hearing was being conducted online, the Adjudicator took the parties present through a protocol to ensure that each of the parties was comfortable with the online format and then polled each of the parties to receive that party's confirmation to that effect, including the approval of the Enforcement Officer and the Retailer's Representative to the other parties being present during the online hearing with access to and the ability to participate in the hearing.

RELEVANT STATUTORY PROVISIONS

Tobacco and Vapour Products Control Act, R.S.B.C. 1996, c. 451

Prohibitions on display or promotion of tobacco and vapour products

2.4 (1) A person must not

- (a) display tobacco products or vapour products, or
- (b) advertise or promote the use of tobacco or vapour products by means of a sign or otherwise

in any manner prohibited by the regulations.

Tobacco and Vapour Products Control Regulation B.C. Regulation 232/2007

Minimum age of 19 years

2 The age for the purposes of section 2 (2) of the Act is 19 years.

Limits on advertising

4.31 (1) A retailer must not, on the premises of a retail establishment, display tobacco or vapour products, or advertise or promote the use of tobacco or vapour products, in any manner by which the tobacco or vapour products or the advertisement or promotion

- (a) may reasonably be seen or accessed by a minor inside the retail establishment, or
- (b) are clearly visible to a person outside the retail establishment.

First, Second and Subsequent Contraventions

16 For the purposes of Schedules 2 and 3,

- a) a contravention is of the same type as another contravention if each contravention is described by the same item of the Schedule, and

- b) a contravention by a person is
- (i) a first contravention if the contravention was committed at or in respect of a location and the person has not committed a contravention of the same type at or in respect of that location within the 60 month period preceding the commission of the contravention,
 - (ii) a second contravention if the contravention was committed at or in respect of a location and the person committed one contravention of the same type at or in respect of that location within the 60 month period preceding the commission of the contravention, and
 - (iii) a subsequent contravention if the contravention was committed at or in respect of a location and the person has committed a contravention of the same type at or in respect of that location within the 60 month period preceding the commission of the contravention

Schedule 2
Monetary Penalties

Column 1	Column 2	Column 3		
Item	Contravention	Monetary Penalty		
		First Contravention	Second Contravention	Subsequent Contravention
	Advertising			
4.1	Breach of section 2.4 [<i>displaying tobacco or vapour products, or advertising or promoting tobacco or vapour product use, in a manner prohibited by the regulations</i>] of the Act	\$0 — \$3,000	\$1,000 — \$4,000	\$4,000 — \$5,000

Schedule 3
Prohibition Periods

Column 1	Column 2	Column 3		
Item	Contravention	Prohibited Period (days)		
		First Contravention	Second Contravention	Subsequent Contravention
	Advertising			
4.1	Breach of section 2.4 [<i>displaying tobacco or vapour products, or advertising or promoting tobacco or vapour product use, in a manner prohibited by the regulations</i>] of the Act	0-30	0-90	0-180

EXHIBITS

The Adjudicator noted that there was documentary evidence provided by the Enforcement Officer to be considered at the hearing and that these documents had previously been provided in electronic form to the Retailer's Representative. The Adjudicator listed these documents as the following exhibits to become part of the hearing record:

Exhibits filed by the Enforcement Officer

Exhibit 1 – A copy of the Certificate of Change of Name for the Retailer dated August 17, 2018 certifying the change in the Retailer's name from Rajoot Restaurant and Sweet Shop Ltd. to Buddy's Smoke Shop Ltd.

Exhibit 2 – A copy of the BC Company Summary for the Retailer dated August 2, 2019 identifying the Retailer's Representative as a director of the Retailer

Exhibit 3 – A copy of the Notice of Articles for the Retailer dated August 17, 2018.

Exhibit 4 – A copy of the Tobacco Retail Authorization # TRA-1110-7404 for the Retailer which was issued on October 1, 2018 following its change of name to the current one.

Exhibit 5 – A copy of the business license issued to the Retailer by the City of Chilliwack on January 25, 2019 naming the Employee as the Licencee.

Exhibit 6 – A copy of the Report to the Administrator under the Act and Regulation dated January 6, 2020 setting out the compliance history of the Retailer from December 19, 2017 to November 7, 2019.

Exhibit 7 – Copies of notes made by Enforcement Officers following their visits to the Store and discussions with the Employee on October 11, 2019, October 22, 2019, October 23, 2019 and November 7, 2019.

Exhibit 8 – Copies of pictures of tobacco and vapour products displayed in the Store during the above visits to the Store by Enforcement Officers.

Exhibit 9 – A copy of the Report to the Administrator under the Act and Regulation dated November 8, 2019.

Exhibit 10 – Copies of Tobacco Inspection & Activity Reports dated August 1, 2019 describing discussions between the Enforcement Officer and the Employee about the restrictions around the display and promotion of tobacco and vapour products in the Store together with copies of pictures of such display and promotion in the Store.

Exhibit 11 – a copy of ticket issued by the Enforcement Officer following his attendance at the Store on October 21, 2020.

Exhibits filed by the Retailer

There were no exhibits filed by the Retailer.

SUBMISSIONS – ENFORCEMENT OFFICER

The Enforcement Officer testified that, as was evident from the copy of the Report to the Administrator under the Act and Regulation dated January 6, 2020 (the “Current Report”) as set out in Exhibit 6, the Retailer has an extremely poor record when it comes to complying with the restrictions on the display and sale of vapour products under the Act and the Regulation.

He noted that the First Administrative hearing on December 4, 2019, dealt with contraventions committed by the Retailer on January 3, 2019. He further noted that the Current Report outlined eight incidents starting with January 16, 2019 and extending until November 7, 2019 when enforcement officers had attended the Store and had found the Retailer to appear to have been in contravention of section 2.4(1)(b) of the Act and 4.31(1) of the Regulation. He testified that enforcement action in the form of an administrative hearing to deal with these alleged contraventions was not taken against the Retailer at that time due to delays caused by COVID-19.

In his testimony, he confirmed that at his visit to the Store on November 7, 2019, as set out in the NOAH, the Employee had stated to him that the Store was “now an all-ages store”.

The Enforcement officer also noted the enforcement ticket issued on October 21, 2020. His attendance at the store leading to this ticket, he testified, came about in response to a complaint from a member of the public.

The Enforcement Officer submitted that as the Retailer had admitted to the contraventions, that a penalty should be imposed on the Retailer. It would appear, he testified, that despite the education, warnings, compliance meetings and violation tickets, the Retailer's compliance with the Act and the Regulation has not been secured and, therefore, the maximum fine and prohibition as set out in the Act and Regulation must be imposed to secure this compliance.

He submitted that as due to the delays caused by COVID 19 an administrative hearing was not held dealing with the alleged contraventions documented in the Current Report occurring between January 16, 2019 and November 7, 2019, in effect the admitted contraventions dealt with in the NOAH and to which the Retailer had admitted were the third contraventions committed by the Retailer in the space of a 60 month period and that, therefore, a monetary penalty of \$5,000 and a prohibition period of 180 days should be imposed on the Retailer.

SUBMISSIONS – RETAILER

The Retailer submitted that prior to the visits by the Enforcement Officer it was in compliance with the Act and the Regulation. It noted that it had made changes to its window displays by tinting them to ensure that their contents could not be seen from outside the Store and that new signage had been added to the Store to limit access to patrons over the age of 19.

The Retailer denied that the Employee had advised the Enforcement Officer that the Store was open to all ages as set out in the Current Report or as testified by the Enforcement Officer and confirmed that the Store was restricted to serving only patrons over the age of 19.

The Retailer disputed what the Enforcement Officer stated in the Current Report, stating that there were no sales to minors and that the Employee had followed up with the party who had issued the complaint leading to the visit by the Enforcement Officer on October 21, 2020 and had advised the party that the product allegedly sold to a minor was not part of the inventory carried by the Store and that, therefore, the sale must have been made elsewhere.

The Retailer submitted that it had taken the necessary steps to be in compliance with the Act and the Regulation by changing its signage and modifying its door and windows and that a penalty was not appropriate, especially in light of the challenging effects that COVID 19 are having on retailers such as the Retailer.

REASONS AND DECISION

Contraventions

The Retailer has admitted that, as alleged in the NOAH, the Retailer in contravention of section 2.4(1) of the Act and sections 2 and 4.31(1) of the Regulation on October 11, 2019 and

November 7, 2019 displayed vapour products in the Store in a manner which were reasonably seen or accessed by a minor.

I therefore find that the Retailer on October 11, 2019 and November 7, 2019 committed the contraventions of the Act and the Regulation as alleged in the NOAH.

Due Diligence

Although the Retailer did not raise the defence of due diligence, as I have found that the Retailer committed the contraventions as set out in the NOAH, the Retailer is liable under the Act and the Regulation unless it can demonstrate that it was duly diligent in taking reasonable steps to prevent these contraventions from occurring.

The onus falls on the Retailer to demonstrate on a balance of probabilities this due diligence. In doing so, the Retailer must not only clearly demonstrate that it has established procedures to identify and prevent from happening activities that might lead to these contraventions of the Act and Regulation, it must, as well, clearly demonstrate that it continues to ensure that such procedures are consistently in operation and acted upon by its employees.

The Supreme Court of Canada outlined this concept of the defence of due diligence in *R. v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J, says, in part:

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, thus negating wilful involvement of the accused, 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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

In the matter at hand, it is clear that the commission of the contraventions referenced in the NOAH were not lapses of judgment or oversight on the part of the Employee or a slight deficiency in the Retailer's overall compliance strategy. Rather it appears that not only did the Retailer in the commission of the contraventions appear to flaunt the provisions of the Act and the Regulation, but even following the First Administrative Hearing and the finding of the Retailer's contraventions of the Act and the Regulation, the Retailer continued, as is evident from the Current Report, to operate in breach of the Act and the Regulation.

I therefore find that the defence of due diligence does not apply and that the Retailer is liable for the contraventions to which it has admitted.

PENALTY

In determining an appropriate penalty, the Regulation sets out, among other factors, that the following items be taken into consideration:

- Whether the Retailer had a prior written warning concerning the type of conduct for which a contravention is found;
- Previous enforcement actions of a similar nature to which the Retailer was a party;
- Was the contravention at hand part of a repeated or continuous pattern of behaviour;
- Was the contravention deliberate or an oversight;
- Whether the person committing the conduct leading to the contravention has an ownership interest in the business carried on by the Retailer;
- Whether the person committing the conduct is an employee or agent of the owner of the business carried on by the Retailer;
- What form of training and monitoring does the Retailer perform with respect to the sale of tobacco or vapour products at the Store; and
- Any other matters considered to be in the public interest.

The Retailer's enforcement history appears to demonstrate a complete lack of interest on the Retailer's behalf in operating within the rules of the Act and Regulation with respect to the display and promotion of vapour products in the Store. It is also obvious from the issuance of the ticket by the Enforcement Officer on October 21, 2020 that the Retailer has little intention of mending its operating procedures despite its statements to the contrary.

To review the factors which should be considered in determining an appropriate penalty, the following are relevant to the matter at hand:

- The evidence clearly documents previous contraventions of a similar nature;
- The contraventions in the NOAH were definitely part of a repeated or continuous pattern of behaviour;
- The contraventions were clearly not an oversight;
- While there is no evidence that the Employee has an ownership interest in the business carried on by the Retailer, the Employee is the husband of the director of the Retailer; and
- There is no evidence of training or monitoring of the actions of the Employee performed by the Retailer with respect to the displaying or the promotion of vapour products at the Store.

Section 16 (b) of the Regulation provides that for the purposes of Schedules 2 and 3 of the Regulation in the determination of a penalty, the time limit for the commission of a contravention is a 60 month time period.

The decision of the Adjudicator dated January 3, 2020 following the First Administrative Hearing found that the Retailer in contravention of sections 2(2) and 2.4(1) of the Act and sections 2 and 4.31(1) of the Regulation had sold vapour products to a person under the age of 19 and displayed vapour products in a manner which were reasonably seen or accessed by a minor in the Store. As a result of this finding, the Adjudicator found a first convention had been committed and imposed a monetary penalty of \$2,000 and a prohibition order from selling vapour products for a period of 30 days.

The Enforcement Officer submitted that were it not for delays caused by COVID-19 that an administrative hearing would have been held following the First Administrative Hearing and that therefore, in effect, this administrative hearing is dealing with a third contravention within a 60 month period as provided for in Section 16(b) of the regulation.

Unfortunately, although I might agree with the Enforcement Officer that the Retailer given its history of noncompliance is deserving of penalties in keeping with a third contravention, Section 16(b) of the Regulation deals with contraventions determined by an adjudicator at an administrative hearing and not alleged contraventions. Thus, the range of penalties to which the Retailer is subject given the finding of liability are those dealing with a second contravention.

Therefore, in accordance with the provisions of section 16(b) for the purposes of calculating the penalty range pursuant to Column 3 of Schedules 2 and 3 of the Regulation the contraventions in the NOAH are considered to each be a "Second Contravention".

With the contraventions in the NOAH collectively constituting such a second contravention, the range of penalties to which the Retailer is subject pursuant to the provisions of Schedules 2 and 3 of the Regulation is a monetary penalty ranging from \$1,000 - \$4,000 for the contravention of section 2.4(1) of the Act and 4.32(1) of the Regulation, and a prohibition period of 0 – 90 days for the contravention of section 2.4(1) of the Act and 4.32(1) of the Regulation.

ORDER

As the Retailer has been found liable with respect to the contraventions alleged in the NOAH, pursuant to section 6.1 (2)(a) of the Act, it is hereby ordered that:

- the maximum monetary penalty of \$4,000 be assessed against the Retailer for the contraventions of section 2.4(1) of the Act and 4.32(1) of the Regulation, and
- the maximum time period of 90 days be assessed against the Retailer for the contraventions of section 2.4(1) of the Act and 4.32(1) of the Regulation.

I therefore order that the Retailer be prohibited for a period of 90 days from selling or offering to sell vapour products in the Store, from displaying vapour products in the Store, and from advertising vapour product use in the Store.

Such prohibition shall commence on Friday, October 22, 2021 and shall continue until and including Thursday, January 20, 2022. During this period of prohibition, the Retailer shall display signs satisfactory to the Enforcement Officer in a prominent location in the Store notifying the public that this prohibition is in place. These signs are to remain in place during the period of prohibition.

Date: September 24, 2021

R. John Rogers

Administrator's Delegate