



**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

Respondent:	1275356 BC Ltd. dba Juicy Vape Shop (“Respondent”)
Represented by:	Grayson Novak (“Respondent’s Representative”)
Fraser Health’s Representative	Edward Wong (“Health Authority’s Representative”)
Adjudicator	R. John Rogers
Date of Hearing	January 16, 2024
Date of Decision	January 31, 2024

INTRODUCTION

1) Fraser Health is a regional board under the *Health Authorities Act*, RSBC 1996 c.180, responsible for the provision of publicly funded health services in an area of British Columbia extending from the Fraser Canyon west to the Vancouver suburbs of Burnaby and Delta. As part of its responsibilities, Fraser Health operates the Tobacco & Vapour Prevention and Control Program (the “Control Program”) under which it employs Tobacco and Vapour Enforcement Officers (“TVEO’s”) who are responsible for ensuring compliance with the *Tobacco and Vapour Products Control Act*, R.S.B.C. 1996, c. 451 (the “Act”) and section 2 of the *Tobacco and Vapour Products Control Regulation*, B.C. Regulation 232/2007 (the “Regulation”). As part of the Control Program, Fraser Health employs Minor Test Shoppers (“MTS”) who conduct compliance checks on establishments selling tobacco and vapour products.

2) The Respondent, under the name “Juicy Vape Shop”, owns and operates a retail establishment selling vapour products located at #101A 1812 152 Street, Surrey, B.C., V4A 4N5 (the “Store”).

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTY

3) The allegations against the Respondent are set out in the Notice of Administrative Hearing (the “NOAH”) dated September 7, 2023 issued by the Administrator appointed pursuant to section 5 of the Act (“the Administrator”). The NOAH, pursuant to section 6.1 of the Act, established the administrative hearing which resulted in this decision.

4) The NOAH alleges that on July 30, 2022, the Respondent contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19. The NOAH further alleges that on the same date, the Respondent committed a further contravention of section 2.4(1) of the Act and section 4.31(1) of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the Store.

5) The NOAH recommends that if the contraventions alleged in the NOAH are proven, that the following penalties be assessed against the Respondent:

- For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days, and
- For contravention of s. 2.4(1) of the Act – a monetary penalty of \$3,000 and a prohibition period of 30 days

resulting in monetary penalties amounting in total to \$4,000 together with a prohibition period totalling 60 days.

THE ADMINISTRATIVE HEARING

6) For the purpose of the administrative hearing and in accordance with section 5(2) of the Act, the Administrator has delegated to the undersigned as 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 were proven, and, if the undersigned finds the alleged contraventions to have been proven, a determination of an appropriate penalty therefore and an order with respect to such determination.

7) The administrative hearing was held by video conference on January 16, 2024. Prior to the commencement of the hearing, after being advised by the undersigned of the procedural rules which would be applicable to the conduct of the hearing in an online format, the Respondent's Representative and the Health Authority's Representative agreed with the administrative hearing being conducted by video conference and in accordance with the stated procedural rules.

8) RELEVANT STATUTORY PROVISIONS

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

Prohibitions

2 (2) A person must not sell, offer for sale, provide or distribute tobacco or vapour products to an individual who has not reached the age specified by regulation under section 11 (2) (g).

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.

Limits on advertising vapour products

4.301 A manufacturer, distributor, wholesaler, retailer, or a person acting on behalf of any of them must not advertise a vapour product in any place, whether inside or outside, by any means that may be seen, accessed or heard by a minor.

Defence of due diligence

12 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.

**Schedule 2
Monetary Penalties**

Column 1	Column 2	Column 3		
Item	Contravention	Monetary Penalty		
		First Contravention	Second Contravention	Subsequent Contravention
	Minors			
1	Breach of section 2 (2) <i>[selling or offering to sell tobacco or vapour products to an individual who is under 19 years of age]</i> of the Act	\$0 - \$1,000	\$0 - \$3,000	\$0 - \$5,000
	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
	Minors			
1	Breach of section 2 (2) <i>[selling or offering to sell tobacco or vapour products to an individual who is under 19 years of age]</i> of the Act	0-30	0-90	0-180
	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

9) The Adjudicator noted that the Respondent and Fraser Health had produced and exchanged exhibits in digital form to serve as exhibits for this administrative hearing well in advance of the hearing so that each party had had an opportunity to review the same. Neither party objected to the admission of any of the exhibits submitted by the other and, as the hearing progressed, these exhibits were identified, verified, and introduced into evidence as part of the hearing record.

10) During the hearing, the Respondent produced and verified a total of 2 exhibits included under Exhibits 3 and 4 and Fraser Health produced and verified a total of 22 exhibits included under Exhibits 1 and 2, all of which exhibits were entered into evidence as part of the hearing record.

EVIDENCE – FRASER HEALTH

The Report to the Administrator

11) The Health Authority's Representative confirmed that he was the TVEO employed by Fraser Health who was present during the compliance check at the Store on July 30, 2022, which compliance check led to the issuance of the NOAH. Following this compliance check, the Health Authority's Representative completed the Report to the Administrator dated December 23, 2022 (the "Report to the Administrator"), a copy of which was entered as Exhibit #1.

12) In his evidence at the Administrative Hearing, the Health Authority's Representative confirmed that he was the author of the Report to the Administrator and that it accurately reflected what had occurred at the Store during the compliance check on July 30, 2022.

The Alleged Contraventions Contained in the Report to the Administrator

13) The description of what occurred during the compliance check of the Store on July 30, 2022 as set out in the Report to the Administrator might be summarized as follows:

- On July 30, 2022, the Health Authority's Representative was conducting compliance checks of retail establishments together with two minor test shoppers, MTS G who was 16 years old on that date, and MTS S who was 17 years old on that date,
- At 12:58 pm on that date, MTS G and MTS S went into the Store unaccompanied by the Health Authority's Representative and MTS G purchased a vapour product,
- While in the Store, both MTS G and MTS S observed numerous vapour products and accessories, all of which were openly displayed, and
- Even though the Store was restricted to customer over 19 years of age, at no time while they were in the Store were either MTS G or MTS S asked for their identification.

The Respondent's Enforcement History in the Report to the Administrator

14) In addition, the Report to the Administrator set out the enforcement history of the Store. The history set out might be summarized as follows:

- May 13, 2021: the initial inspection of the Store during which a representative of the Respondent was provided education on the rules concerning the sale of vapour products, including the prohibition on the sale of banned products and the requirement to ensure that:
 - minors were not able to see vapour products displayed in the Store,
 - only persons over the age of 19 were permitted into the Store, and
 - with vapour sales, identification was first provided by the purchaser to prevent the sale of such products to minors.
- September 21, 2021: During a compliance check, the Store was found to be offering a banned product and warned against this practice.
- December 2, 2021: Again, during a compliance check, the Store was found to be offering a banned product and was warned that if this practice continued that further forms of enforcement action would follow.

- February 3, 2022: During a compliance check, the TVEO's were forced to leave the Store and, when they returned with RCMP officers, they found the Store closed.
- February 16, 2022: A follow up inspection of the Store for banned vapour products resulted in a Health Order being issued to remove all banned vapour products from the Store and the issuance of a violation ticket for obstructing/interfering with the compliance check on February 3, 2022.
- May 21, 2022: Based upon a complaint of a sale of vapour products to a minor, a ticket was issued and served on the Respondent's Representative by the Health Authority's Representative. This was followed by a warning letter noting that the front door of the Store was open and requiring repair. This open space enabled vapour products and accessories to be visible from outside the Store.
- June 20, 2022: An additional warning letter was delivered to the Store, as besides having a prohibited promotional sign in the Store window, the Respondent had not repaired the Store's front door enabling vapour products and accessories to be visible from outside the Store. Consequently, on July 13, 2022 a ticket was served on the Respondent's Representative by the Health Authority's Representative.
- November 4, 2022 following the purchase of a banned product by a TVEO on October 26, 2022, a public Health Order was issued to remove banned vapour products from the Store.

Fraser Health's Witnesses

15) Both MTS G and the Health Authority's Representative gave evidence at the administrative hearing.

MTS G

16) MTS G testified that he was employed by the Fraser Health Authority as a minor test shopper and had been involved in this activity for two to three years. He stated that in his role as a minor test shopper, he was to attempt to purchase vapour products in order to determine if the vendor was operating in compliance with the obligation to not sell vapour products to any customer under the age of 19 years old.

17) He testified that on July 30, 2022 he was 16 years old and that on that day he was dressed in a normal fashion, similar to what he would wear on a regular school day.

18) He confirmed that the copy of the notes made by him on June 30, 2022 (Ex 2 Document 15) accurately reflected what happened on that day and testified that:

- He entered the Store at 12:55 together with MTS S, walked up to the sales counter and was asked by the salesclerk (the "Salesclerk") what he was seeking to purchase,
- When he asked for Allo 800's, the Salesclerk advised him that the Store did not have Allo 800's, but did have Allo 500's and gave him a list of the flavours offered by the Store in that product,
- He then asked the Salesclerk what the Salesclerk's favourite flavour was and was told "Grape Ice" which MTS G then asked to purchase,

- Before completing the sale, the Salesclerk asked MTS G if it was MTS G's first time at the Store and, when MTS G advised that it was, the Salesclerk gave him a discount on the purchase price of the vapour product being purchased, and
- He completed the purchase by presenting the Salesclerk a \$20 bill and receiving back \$6.10 in change.

19) MTS G testified that while in the Store, he and MTS S observed a great number of vapour products and accessories all of which were openly displayed and easily visible to both him and MTS S.

20) When he and MTS S exited the Store, MTS G stated, he returned to the vehicle where the Health Authority's Representative was located, delivered the vapour product which he had purchased, a copy of a picture of which he confirmed as Exhibit 2 document 13, and completed his notes, a true copy of which he confirmed as Exhibit 2 document 15.

21) MTS G testified that he had never been to the Store before July 30, 2022 and he did not recognize the Salesclerk.

22) When asked on cross-examination if on July 30, 2022 MTS G had facial hair, he acknowledged that he did.

Evidence of the Health Authority's Representative

23) The Health Authority's Representative testified that he has been working with Fraser Health since 2007 as a TVEO and that the Store was in his area of responsibility. His obligation in carrying out his duties as a TVEO, he stated, was to ensure that the law regarding the display and sale of vapour products and accessories is followed, particularly when it came to the prohibition against the display and sale of such products to minors.

24) On July 30, 2022, the Health Authority's Representative testified, he went into the Store following the sale of the vapour product to MTS G and advised the Salesclerk of the sale. He stated that the Salesclerk confirmed the sale but claimed that he did not ask MTS G for identification as he believed that MTS G was a regular shopper.

25) The Health Authority's Representative then referenced the 21 documents included in Exhibit #2 and confirmed their identity, noting that documents 1-11 referenced and confirmed the compliance history of the Respondent as set out in the Report to the Administrator.

26) He also confirmed the copy of his notes in Exhibit #2 document 14 and confirmed that he had delivered a copy of the Report to the Administrator on August 5, 2022 to the Respondent's Representative as set out in the copies of the documents included as documents 17 and 18 in Exhibit #2.

EVIDENCE –THE RESPONDENT

The Respondent's Witness

The Evidence of the Respondent's Representative

27) The Respondent's Representative testified that the Store has closed so he questioned the reasons for having this administrative hearing.

28) However, he noted, the complaints by the Health Authority's Representative were minor in nature. He testified that the open door complained of by the Health Authority's Representative was a very small opening and that after the Health Authority's Representative had made the complaint, that the Respondent's Representative had contacted the landlord for the Store's location to get the door fixed.

29) In addition, the Respondent's Representative noted, the complaint about the display in the window of the Store was unfounded as it did not list a product, but rather merely stated a brand name.

30) The Respondent's Representative testified that he had clearly instructed the Store's staff to ask for identification of any patrons in the Store who appeared to be minors and referenced the two pictures of group chats in Exhibit #3 and Exhibit #4 to demonstrate this strict requirement.

31) He testified that it was the clear policy of the Respondent not to sell vapour products or accessories to any minor due to the harm that such products do to minors.

32) He noted that MTS G had facial hair during the sale on July 30, 2022 and that to the Salesclerk MTS G obviously looked to be over the age of 19. However, because of the Salesclerk's mistake, after the sale to MTS G on July 30, 2022, the Salesclerk was fired.

SUBMISSIONS –RESPONDENT

33) In his closing submissions, the Respondent's Representative submitted that he apologized for the sale to MTS G on July 30, 2022, but stated that it was the strict policy in the Store for all staff to ask minors for identification if they were to be in the Store.

SUBMISSIONS – ISLAND HEALTH

34) The Health Authority's Representative in his submissions noted that the Respondent had an extremely poor compliance history which included refusing to permit TVEO's to perform inspections at the Store. He pointed out the numerous warnings of infractions committed by the Store as set out in its compliance record and that despite these warnings that these infractions continued.

35) Even though the Store has ceased doing business, the Health Authority's Representative submitted, the maximum penalties recommended in the Notice of Hearing in the form of fines totalling \$4,000 and prohibition periods totalling 60 days should be imposed.

REASONS AND DECISION

Sale of Vapour Products to Minor Contravention

36) The Respondent has produced no evidence to contradict the evidence provided by the Fraser Health Authority that, as alleged in the NOAH, on July 30, 2022 the Salesclerk who was an employee of the Respondent sold a vapour product to MTS G who was, at the time, under the age of 19.

37) I therefore find that the Health Authority has proven on a balance of probabilities that the Respondent, in contravention of section 2(2) of the Act and section 2 of the Regulation, on July 30, 2022 sold vapour products to a person under the age of 19.

Exposure to Advertising Contraventions

38) The Respondent has similarly provided no evidence to contradict the evidence provided by the Fraser Health Authority that, as alleged in the NOAH, on July 30, 2022 the Respondent in the Store exposed both MTS G and MTS S, both of whom at the time were under the age of 19, to displays of vapour products and advertising promoting the use of vapour products.

39) I therefore find that that the Health Authority has proven on a balance of probabilities that the Respondent on July 30, 2022 acted in contravention of section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising promoting the use of vapour products in a manner which was reasonably seen or accessed by MTS G and MTS S, both of whom were minors.

The Defence of Due Diligence

40) The matter at hand involves what is referred to in law as the doctrine of strict liability. This doctrine holds that if a body, such as the Fraser Health Authority, proves on a balance of probabilities that a contravention to a legislative or regulatory obligation has been committed by an entity within its area of responsibility, that the entity, in this case the Respondent, is liable for the commission of this contravention, notwithstanding any mistake or negligence on the part of the individual committing the contravention, unless the entity is able to demonstrate the defence of due diligence.

41) The Regulation in section 12 confirms the Respondent's right to rely on a due diligence defence to escape liability for the contraventions alleged in the NOAH. However, the Regulation does not provide a description of what factors should be considered when determining whether or not a party in a particular instance has established this due diligence defence. For these factors, one must look to the common law.

42) The leading case describing the defence of due diligence and the onus on a defendant to demonstrate its existence is the decision of the Supreme Court of Canada in *Regina v. Sault Ste. Marie (City)*, 1978 CanLII 11 (SCC), where Dickson J. summarizes the elements of the defence as follows:

... 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, 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. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Natrass*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.)

The Directing Mind Limitation

43) It is to be noted that the Supreme Court of Canada in *Regina v. Sault Ste. Marie (City)* clearly states that the defence of due diligence is not available to the Respondent if the offence in question is caused by what is described in the decision as the “directing mind” of the Respondent. From the evidence, it is clear that the Salesclerk was not a directing mind of the Respondent. Therefore, this exception does not apply to these contraventions.

Finding on the Due Diligence Defence

44) When determining to become engaged in the selling of vapour products, the Respondent, no matter its best of intentions, took on the obligations imposed by the Act and the Regulation upon a vendor of vapour products, including the obligation of restricting entry to its establishment to minors and the prohibition against the sale of vapour products to minors.

45) To satisfy these obligations, the Respondent had to implement a series of compliance policies which had to be strictly enforced. As well, it had to establish and maintain a system of education with respect to these policies, both at the initial stage of an employee’s employment and during the employee’s continued employment with the Respondent, to ensure that that employee both understood and adhered strictly to these policies. This approach has often been referred to as an employer creating and maintaining a culture of strict compliance with the Act and the Regulation involving the sale of vapour products to the public.

46) These obligations were referenced in the context of Ontario legislation dealing with the sale of tobacco products in the Province of Ontario in *Regina v. Seaway Gas & Fuel Ltd. et al* 47 O.R. (3d) 458], where the Ontario Court of Appeal in reference to a merchant’s right to sell tobacco products noted the obligations that accompanied it by stating at paragraph 36:

..... The privilege is the merchant's opportunity to sell products to the public and to earn a profit, or even to gain a livelihood, thereby. The responsibility arises from the fact there is a direct interface or relationship between the merchant and the customer. With respect to regulated products, it is crucial that the merchant understand and respect the limits of its privilege to sell to the public.

And further at paragraph 37:

..... the message to vendors is a simple one: you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors.

47) Although the Ontario Court of Appeal was referencing Ontario legislation dealing with the sale of tobacco products, the Court's comments on the privilege and the responsibility accompanying it apply as well to the sale of vapour products in British Columbia and to the obligations imposed on the Respondent by the Act and the Regulation.

48) Therefore, to apply the approach of the Ontario Court of Appeal to the matter at hand, for the Respondent to succeed in a due diligent defence, it must demonstrate that it has been "scrupulously vigilant" in ensuring that it did not sell vapour products to minors or permit them to observe vapour products or advertising therefor in the Store.

49) Despite the expressed best intentions and examples of group chat communications with the staff of the Store as demonstrated in Exhibits 3 and 4 as presented by the Respondent, there is no evidence before me which demonstrates that the Respondent was scrupulously vigilant, or which clearly demonstrates a climate of strict compliance with the Act and the Regulation.

50) I therefore find that the provisions of section 12 of the Regulation do not apply as I find that the Respondent did not establish a defence of due diligence to the contraventions alleged in the NOAH.

PENALTY

51) In determining an appropriate penalty, section 13 of the Regulation sets out, among other factors, that the following items be taken into consideration:

- Whether the Respondent 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 Respondent 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 Respondent;
- Whether the person committing the conduct is an employee or agent of the owner of the business carried on by the Respondent;

- What form of training and monitoring does the Respondent perform with respect to the sale of tobacco or vapour products its establishments; and
- Any other matters considered to be in the public interest.

52) The Respondent's compliance history is set out above in some detail above as it appears to demonstrate that, notwithstanding the numerous warnings given to the Respondent by the Health Authority's Representative, the Respondent appears not to have in the least altered its performance prior to the occurrence of the contraventions set forth in the NOAH.

53) Given the Respondent's extremely poor performance history, the penalties recommended by the Fraser Health Authority in the NOAH appear to be completely appropriate. The only question before me is what effect the fact that the Store has closed should have on the penalties imposed.

54) In considering the answer to this question, I am mindful of what is often referred to as the two forms of deterrence when the quantum or form of a penalty is being considered. The first form of deterrence is called individual deterrence and it posits that a penalty should be imposed which will send a clear message to the specific perpetrator that if that perpetrator again commits the contravention for which it has been found liable, that a similar or greater penalty will be imposed. In other words, the imposition of the penalty will encourage the individual perpetrator to not again commit the contravention.

55) The second form is called general deterrence. This reference is usually made in the context of a regulated industry in which the perpetrator is operating, the rules of which industry the perpetrator has broken. The reasoning behind the consideration of the general deterrence is to encourage other operators in the industry to understand the consequences of contravening the rules and regulations of the regulated industry.

56) It is in the context of the form of general deterrence that I find that notwithstanding that the Store has closed, that the full penalties recommended by the Fraser Health in the NOAH should be imposed. In other words, that the imposition of these penalties sends a clear message to other retailers of vapour products and accessories that if a retailer commits contraventions similar to those as set out in the NOAH and acts in a manner similar to that conducted by the Respondent as reflected in its compliance record in the NOAH, that the maximum penalties as authorized by the Act and the Regulation will be imposed.

ORDER

57) As the Respondent 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 following penalties be assessed:

- For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days, and

- For contravention of s. 2.4(1) of the Act – a monetary penalty of \$3,000 and a prohibition period of 30 days.

resulting in monetary penalties amounting in total to \$4,000 and a prohibition period of 60 days.

Dated: January 31, 2024.

Original Signed by:

R. John Rogers

Administrator's Delegate