



**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***

<b>Respondent:</b>	<b>Komal Enterprises Ltd. dba Delta News Stand &amp; Smoke Shop</b> (“Respondent”)
<b>Represented by:</b>	<b>Harjit Nandha</b> (“Respondent’s Representative”)
<b>Respondent’s Counsel:</b>	<b>Christopher Drinovz, Barrister &amp; Solicitor</b> <b>Kane Shannon Weiler LLP, Barrister &amp; Solicitors</b> (“Respondent’s Counsel”)
<b>Fraser Health’s Representative</b>	<b>Edward Wong</b> (“Health Authority’s Representative”)
<b>Adjudicator</b>	<b>R. John Rogers</b>
<b>Date of Hearing</b>	<b>January 9, 2024</b>
<b>Date of Decision</b>	<b>January 29, 2024</b>

## **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, as well, Fraser Health employs minor test shoppers who conduct compliance checks on establishments selling tobacco and vapour products.

2) The Respondent, under the name “Delta News Stand & Smoke Shop”, owns and operates a retail establishment selling vapour products located at #170 8047 120 Street, Delta, B.C., V4C 6P7 (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 June 11, 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 9, 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 Counsel and the Health Authority's Representative agreed with the administrative hearing being conducted by video conference and in accordance with the stated procedural rules.

## **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.

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**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.

**Factors to be considered in imposing administrative penalties**

**13 (2)** In determining, under section 6.1 (2) (b) (ii) of the Act, if it is in the public interest to prohibit a person from selling tobacco or vapour products, as applicable, at retail from a location other than the location at which the contravention occurred, the administrator must consider all of the following:

- (a) previous enforcement actions for contraventions of a similar nature by the person;
- (b) whether the contravention was repeated or continuous;
- (c) whether the contravention was deliberate;
- (d) the person's efforts to correct the contravention;
- (e) any other matter the administrator considers relevant to the public interest.

**Monetary Penalties**

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>		
<b>Item</b>	<b>Contravention</b>	<b>Monetary Penalty</b>		
		<b>First Contravention</b>	<b>Second Contravention</b>	<b>Subsequent Contravention</b>
	<b>Minors</b>			
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
	<b>Advertising</b>			
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**

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>		
<b>Item</b>	<b>Contravention</b>	<b>Prohibited Period (days)</b>		
		<b>First Contravention</b>	<b>Second Contravention</b>	<b>Subsequent Contravention</b>
	<b>Minors</b>			
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
	<b>Advertising</b>			
4.1	Breach of section 2.4 [ <i>displaying tobacco or vapour products, or</i>	0-30	0-90	0-180

<i>advertising or promoting tobacco or vapour product use, in a manner prohibited by the regulations] of the Act</i>			
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**EXHIBITS**

8) 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 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. During the hearing, the Respondent produced and verified a total of 17 exhibits included under Exhibit 2 and Fraser Health produced and verified a total of 26 exhibits included under Exhibit 3, all of which exhibits were entered into evidence as part of the hearing record.

**EVIDENCE – FRASER HEALTH**

*The Report to the Administrator*

9) 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 June 11, 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 November, 30, 2022 (the “Report to the Administrator”) (Exhibit 1).

10) 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 June 11, 2022.

*The Alleged Contraventions Contained in the Report to the Administrator*

11) The description of what occurred during the compliance check of the Store on June 11, 2022, as set out in the Report to the Administrator might be summarized as follows:

- On June 11, 2022, the Health Authority’s Representative was conducting compliance checks of retail establishments together with the minor test shopper (“MTS G”) who was 16 years old on that date,
- MTS G went into the Store unaccompanied by the Health Authority’s Representative and purchase a vapour product,
- Even though the Store is restricted to patrons over 19 years of age, at no time while he was in the Store was MTS G asked for his identification, and
- While in the Store, as well as purchasing the vapour product, MTS G observed

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numerous vapour and tobacco products openly displayed in the Store.

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

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

- June 26, 2006: Sale to minor violation resulting in warning letter,
- August 17, 2006: Sale to minor resulting in the issuance of a ticket to the Store,
- January 14, 2007: Complaint of sale to minor resulting in warning letter,
- July 23, 2008: Sale to minor violation and ticket issued to the Store,
- April 13, 2011: Display of tobacco products and accessories resulting in warning letter issued to Store,
- July 1, 2012: Outdoor sandwich board promoting tobacco accessories resulting in warning letter issued to Store,
- September 8, 2016: Cigar boxes and vapour products on display resulting in verbal warning issued to Store,
- October 5, 2016: Tobacco and vapour products display violation resulting in verbal warning issued to Store,
- October 18, 2017: Tobacco and vapour products display violation resulting in warning letter issued to Store,
- October 1, 2018: Complaint of sale to minor,
- November 12, 2019: Tobacco and vapour products display violation resulting in warning letter issued to Store,
- May 18, 2021: Complaint of sale to minor and banned products discovered in Store resulting in warning issued for sale of banned products and permitting minors in Store,
- September 20, 2021: Order issued for removal of banned products from the Store,
- January 26, 2022: Following complaint of sale to minor, ticket issued for sale of banned products and warning letter issued for sale violation,
- April 5, 2022: Complaint of sale to minor, and
- June 1, 2022: Complaint of sale to minor and the sale of banned products.

**Fraser Health's Witnesses**

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

***MTS G***

14) MTS G testified that he was 16 years old on June 11, 2022, and that on that day he was dressed in a normal fashion, similar to what he would wear on a regular school day.

15) He confirmed that the copy of his notes made by him on June 11, 2022 (Ex 2 Document 18) accurately reflected what happened on that day and testified that:

- He entered the Store at 12:30 by himself, walked up to the sales counter and was asked by the salesclerk (the “Salesclerk”) what he was looking to purchase,
- When he asked for Allo 800’s, the Salesclerk advised him that the Store did not have Allo’s 800, but did have Allo’s 500 and gave him a list of the flavours offered by the Store in that product,
- He then asked the Salesclerk if the strawberry kiwi flavour was good and, when advised by the Salesclerk that it was good, completed the purchase by presenting the Salesclerk a \$20 bill and receiving back \$4 in change,
- As he was leaving the Store, he observed a great assortment of vapour products on display in the Store, and
- As well, on his way out a person next to the exit door asked if MTS G wished to sample what this person was offering. He declined the offer and left the Store.

***Cross-examination of MTS G***

16) On cross-examination, MTS G confirmed his understanding that the Allo 800’s vapour product was a banned product while the Allo 500’s vapour product was not.

17) He, when asked, confirmed that he did have facial hair on the day that he entered the Store, but that the marking on his arm was a pen mark and not a tattoo.

18) MTS G confirmed that when he attended the Store on other compliance checks after June 11 2022, he was asked for identification and was not able to purchase a product.

***Evidence of the Health Authority’s Representative***

19) 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 on June 11, 2022. 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 exposure and sale of such products to minors.

20) He testified that the reason for the compliance check with MTS G on June 11, 2022, was both because Fraser Health had received a number of complaints about the Respondent selling vapour products to minors and because of the Respondent’s poor record in the area of display violations.

21) On June 11, 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 and that he had not asked MTS G for identification but claimed that he did not ask MTS G for identification as he believed that MTS G was a regular shopper.

22) When in the Store, the Health Authority’s Representative stated, he spoke with the Respondent’s Representative and advised the Respondent’s Representative that because the Licensee on numerous previous occasions following complaints to the Fraser Health Authority



had been warned about the Store's lack of compliance, that with this sale the Fraser Health Authority would be proceeding to this administrative hearing. On June 15, 2022, the Health Authority's Representative returned to the Store for a full inspection, delivered to the Respondent's Representative a copy of the Report to the Administrator, and advised the Respondent's Representative that the matter would be advancing to an administrative hearing.

23) 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 very poor compliance history of the Respondent as set out in the Report to the Administrator. He noted reference to 5 display violations committed by the Respondent and 4 sales to minors complaints received by Fraser Health and confirmed that he on each visit to the Store had given the Respondent's Representative warnings to correct these violations. Given the apparent lack of action by the Respondent, the Respondent's Representative was notified that further violations would result in being subject to the imposition of administrative penalties.

24) He also confirmed the copy of his notes in Exhibit #2 document 14 and confirmed that he had delivered to the Respondent's Representative a copy of the Report to the Administrator.

#### ***Cross-examination of the Health Authority's Representative***

25) When asked, the Health Authority's Representative testified that although he had had discussions with the Respondent's Representative about the number of complaints that had been received by Fraser Health, there was no written warning delivered to the Respondent referencing these complaints.

26) When asked if he could verify the basis for or the validity of the complaints made to Fraser Health about the Store, the Health Authority's Representative testified that he could not confirm that these complaints were legitimate.

27) The Health Authority's Representative testified, when asked on cross-examination, that during the COVID 19 pandemic there had been no compliance inspections of the Store. However, as following the pandemic the Store was no longer in his area of responsibility, he could not comment on possible complaints made about the Store after that date. However, he confirmed that it was his understanding that after June 11, 2022, MTS G had been involved in one compliance inspection at the Store.

## **EVIDENCE –THE RESPONDENT**

### **The Respondent's Witnesses**

#### ***The Evidence of the Respondent's CPA***

28) The Respondent's CPA (the "CPA") testified that he was the Respondent's Representative's son, and that the business of the Respondent is a family business, with the Respondent being owned by the Respondent's Representative.

29) The CPA stated that as it was a family business, that he has been involved with it since its inception in 1992, noting that it has grown from a more limited convenience store to a store which includes the sale of tobacco and vapour products, offering items for sale both online and in its bricks and mortar location. In that he is a CPA, he testified, he is currently responsible for overseeing the Respondent's financial components. The Respondent currently has 4 employees and 2 managers.

30) He testified that as a family business, the Respondent takes very seriously its responsibility to ensure public safety, to follow the rules dealing with minors, and to ensure that vapour products are not displayed or sold to minors.

31) Prior to the contravention on June 11, 2022, he stated, the Respondent as a seller of British Columbia lottery tickets ensured that its employees had the training involved with that program to ensure that lottery tickets were not sold to minors, including the training on facial clues to determine age, the testing as follow up, and the requirement to complete the training checklist. He referenced a copy of the "Lotto! Certification Handbook" in Exhibit #3- document #7 of the Respondent's exhibits and a copy of the BCLC Lottery Retailer Database and Certification Report for the Respondent as of December 4, 2023, as Exhibit # 3 – document #16 confirming the certification of each of the Respondent's employees as of that date. The CPA stated that prior to June 11, 2022, the Salesclerk had taken and passed this training.

32) However, following June 11, 2022, he testified, the Respondent has doubled down on ensuring employees are compliant with the rules, including implementing a test shopping program to ensure that the Store staff are asking for identification and are otherwise compliant with the Respondent's policies.

33) He noted the following included in the Respondent's exhibits:

- Exhibit 3 - document #1 – copy of a picture of the front of the Store as of June 11, 2022, with the windows covered to prevent minors from seeing vapour products on display in the Store. He noted that the advertising pictured was in compliance with the Act and Regulation. He also noted the signage provided by Fraser Health notifying that access to the Store is restricted to persons over 19 years of age, and
- Exhibit 3 – document #4 – copies of pictures of signage in the Store at the front counter stating that the Respondent requires identification from anyone appearing to be under 25 years of age and stating that sale to a person under 19 years old is illegal.

34) The CPA testified that there are CCTV cameras throughout the Store which monitor and record employees working in the Store and the Respondent uses these recorded events for training to ensure compliance with the Respondent's policies and to make the employees aware that they are being monitored.

35) Following June 11, 2022, he testified, the Respondent's policy has changed to require management to confirm that the training outlined in the document entitled "Tobacco and Vapour Sale Policy" (the "Manual") (Exhibit 3 - document #5) has been provided to all new employees. He noted that the Manual commences with the statement that the Respondent maintains a strict

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zero-tolerance policy regarding the sale of tobacco and vapour products to minors and that it is against the Respondent's values to sell these products to anyone under the age of 19.

36) The CPA noted, as well, that the Manual confirms that regular checks will be conducted to ensure that all employees adhere to this stated policy and that any breach will result in disciplinary action involving a three-step process in the form of a verbal warning, a written warning and then termination.

37) He referenced the section of the Manual setting out identification procedures to prevent sales to minors and noted that this was to apply to any person who appeared to be under the age of 25 and that it included assistance to the employee as to how to handle different scenarios when asking for identification. He testified that there was always a senior manager on site at the Store and that if the employee was at all uncomfortable with a situation that the employee was to consult this senior manager.

38) The CPA testified that each new employee receives training based upon the contents of the Manual and that a refresher training of the policy is given every three months for existing employees. In addition, Store management must now complete the document entitled "Employee Checklist" for all employees to reference their training, which checklist must be kept in the relevant employee's personnel file.

39) The CPA referenced copies of the documents entitled "Staff Training Checklist", "Tobacco & Vapour Product Quiz", "Letter of Understanding", "Tobacco & Vapour Sale Policy", and "Delta Newsstand Employee Training Checklist" in Exhibit 3 – documents 11-13 which reflected how this new compliance policy was being implemented and the fact that each member of the Store's staff had completed and signed off on these documents.

40) On June 11, 2022, the CPA testified, the Salesclerk was employed as a retail sales associate and was not part of the management of the Store.

41) As an employee, he stated, the Salesclerk had started in August of 2020 and had received his initial training from the Respondent's Representative and in this initial training and in his follow-up training he was always encouraged to ask for identification. The CPA stated that following June 11, 2020, the Respondent found out that the Salesclerk has ADHD and that on the day in question, he had in addition to his health challenges, family issues and consequently was distracted. The CPA testified that the Salesclerk made a gross mistake in selling the vapour product to MTS G.

42) The CPA referenced the copy of the picture of MTS G (Exhibit 3 document #14) taken from the Store's CCTV camera and testified that if he had been at the sales counter that day, he definitely would have asked MTS G for his identification.

43) The Salesclerk, the CPA testified, as a clear example to the other employees in the Store was eventually terminated by the Respondent in November of 2022 for the violation committed on

June 11, 2022. This delay in his termination was caused by the difficulty in finding a replacement staff member following the end of the pandemic.

44) The CPA testified that since June 11, 2022, the Respondent has greatly improved the enforcement of its policies on requiring its staff members to ask for identification of customers in the Store and had markedly mended its ways. He noted that the Respondent has incurred legal fees in relation to this administrative hearing and was prepared to pay monetary penalties immediately if the same were imposed. However, he asked that as the Store was the primary source of income for both the Respondent's Representative and the Store's employees, that a penalty not involve the prohibitions submitted by the Fraser Health Authority.

***Cross-examination of the Respondent's Representative's CPA***

45) The CPA was directed to documents #12 and #13 of Exhibits 2 which referenced the warnings given to the Respondent about violations. When asked what measures the Respondent had taken in response to these warnings, the CPA responded that the Respondent had replaced the drapes concealing the products and had installed sliding metallic hangers to prevent minors from viewing tobacco products in the Store.

46) The CPA was then directed to document #15 Exhibit 2 which referenced a complaint from a parent that her daughter aged 16 and her boyfriend aged 17 were purchasing vapour products with a high nicotine concentration from the Store and was asked what steps were taken in instances such as this once the Store became restricted to only persons over 19 years of age from entering the Store. He testified that the staff was instructed to always ask for anyone who looked under 19 for identification. However, the CPA agreed that MTS G was not asked for identification when he entered the Store and that the Salesclerk, himself, was under 19 years of age when he sold the vapour product to MTS G.

***The Evidence of the Salesclerk***

47) The Salesclerk testified that when he started his employment at the Store in 2020, he was given training on the requirement to ask for identification from any customer who appeared to be under 25 and that he had taken the BC Lottery online course. After this training, he stated, he felt completely comfortable in asking for identification.

48) He testified that the Respondent's policy was one of zero tolerance and that if any customer in the Store appeared to be under 25 years of age, that he was to promptly ask for two pieces of identification. If the customer resisted, he was to ask for management's help.

49) On June 11, 2022, he testified, he had had an argument with his stepfather, and, given his diagnosis of ADHD, as referenced in the copy of the letter from his physician in Exhibit 3 document #17, he was not paying the necessary attention to his duties at the Store and thought that MTS G appeared to be over 25 years of age.

50) The Salesclerk testified that he regrets his decision to sell the vapour product to MTS G and that as a result of this sale, his employment with the Respondent was terminated. He stated that he has not worked since that termination.

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## **SUBMISSIONS –RESPONDENT**

### ***Subsections 13(1) and 13(2) of the Regulation***

51) The Respondent's Counsel in his submissions admitted that the violation as alleged in the NOAH occurred on June 11, 2022, and also advised that the Respondent was not going to advance a due diligence defence.

52) However, the Respondent's Counsel noted that under subsection 6.1(2) of the Act, the imposition of either a monetary penalty or a prohibition, or both, is a discretionary power granted to the Administrator. In addition, he noted, when making a determination as to the imposition of such an administrative penalty, the provisions of subsections 13(1) and 13(2) of the Regulation are applicable.

53) The Respondent's Counsel specifically referred to the subparagraphs of subsection 13(2) and noted:

- The matter at hand is the first enforcement action taken against the Respondent under the Act,
- The violation was a clear mistake on the part of the Salesclerk, and
- That since the violation, the Respondent has taken great efforts to ensure that such a sale does not happen again.

54) In reference to these provisions, the Respondent's Counsel submitted that the Salesclerk:

- was a young employee and not part of the Store's management,
- was distracted by recent family and health issues, and
- clearly made a mistake which he regrets thinking that MTS G was over 25 years of age.

55) As well, the Respondent's Counsel noted that the evidence clearly shows that following the violation, the Respondent quickly updated its policies with a formal written policy on tobacco and vapour product sales, provided a detailed guide to employees to ensure that the requisite identification is sought, and implemented the involvement of all Store employees to ensure that they were well aware of these changes and their enforcement. This, the Respondent's Counsel submitted, is a clear indication of the Respondent's shift in culture to more strict compliance to ensure no further such violations occur.

56) Based upon these observations, the Respondent's Counsel submitted, that as this is the first enforcement action against the Respondent, that an appropriate administrative penalty would be limited to a monetary penalty of \$1,000 for each contravention and to not include a prohibition. It submits that as a result of the violation, the Respondent has already incurred substantial costs, and a prohibition would exacerbate the impact of these costs by imposing a loss of income on a small family business and on the 4 employees who are dependent upon this business for their livelihood.

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## **SUBMISSIONS –FRASER HEALTH**

57) The Health Authority's Representative in his closing submissions noted that the Respondent admits that the Salesclerk sold vapour products to MTS G as alleged in the NOAH.

58) He also noted that prior to June 11, 2022, there had been 4 complaints concerning the sale of vapour products to minors at the Store. Although the Respondent has taken responsibility for the violations on June 11, 2022, its previous record of compliance was extremely poor.

59) It appeared from this continuous evidence of non-compliance, he submitted, that the Respondent was ignoring all rules concerning the admission of minors into the Store and the sale of vapour products to minors. And, he noted, these contraventions occurred when the Respondent's Representative, who is the owner of the Respondent, was present in the Store. It certainly appeared from the Respondent's actions that it had made a conscious decision not to provide any remedial actions following these numerous warnings, leading to the requirement to hold this administrative hearing.

60) However, the Health Authority's Representative acknowledged, the Respondent has taken definite remedial actions since the violations occurred on June 11, 2022 and this effort should be recognized. But given the serious affects to a minor's health from the use of vaping products, any penalty should include a prohibition.

61) Therefore, the Health Authority's Representative submitted, an appropriate administrative penalty would be the recommended monetary penalties and the prohibition only for the display violation.

## **REASONS AND DECISION**

### ***Sale of Vapour Products to Minors Contraventions***

62) The Respondent has admitted that, as alleged in the NOAH, the Salesclerk sold a vapour product to MTS G on June 11, 2022.

63) I therefore find that the Respondent, in contravention of section 2(2) of the Act and section 2 of the Regulation, on June 11, 2022, at the Store sold a vapour product to a person under the age of 19.

### ***Exposure to Advertising Contraventions***

64) The Respondent has also admitted liability with respect to section 4.31 of the Regulation that 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

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vapour products in a manner which might reasonably be seen or accessed by a minor inside the Store.

65) I therefore find that on June 11, 2020, the Respondent contravened 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 was seen by MTS G, a minor, inside the Store.

## **PENALTY**

66) In determining an appropriate penalty, in addition to the provisions of section 13(2) of the Regulation referenced by the Respondent's Counsel and as above set out, section 13 (1) of the Regulation includes additional items which should be taken into consideration, some of these applicable to the matter at hand might be summarized as follows:

- Whether the Respondent had a prior written warning concerning the type of conduct for which a contravention is found;
- 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.

67) The Respondent's compliance history is set out above in some detail as it appears to demonstrate that, notwithstanding that there have not been any enforcement actions similar to the matter at hand, the numerous warnings given to the Respondent by the representatives of Fraser Health's Control Program appear not to have changed the performance by the Respondent prior to the occurrence of the contraventions set forth in the NOAH on June 11, 2022.

68) However, following the delivery of the NOAH to the Respondent, it is clear from the evidence that the Respondent has taken the necessary steps to improve its performance and to ensure a stricter culture of compliance with the Act and the Regulation. It is regrettable that it required the delivery of the NOAH to the Respondent for the Respondent to implement these revised policies of compliance.

69) When determining to become engaged in the selling of vapour products and prohibiting the admission of persons under the age of 19 into the Store, 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.

70) 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.

71) 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.

72) 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.

73) Therefore, to apply the approach of the Ontario Court of Appeal to the matter at hand, for the Respondent to be able to sell and display vapour products, it must demonstrate that it has been "scrupulously vigilant" in ensuring that it does not sell vapour products to minors or permit them to observe vapour products or advertising therefore in the Store.

74) Given the Respondent's compliance record as above set out, it is obvious that prior to June 11, 2022, the Respondent was clearly not maintaining this standard of being scrupulously vigilant and, therefore, the imposition of an administrative penalty is appropriate.

75) As this matter is the first time a Notice of Administrative Hearing has been issued against the Respondent and a hearing held, section 16(b) of the Regulation provides that 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 "First Contravention".



76) Thus, the range of penalties to which the Respondent is subject pursuant to the provisions of Schedules 2 and 3 of the Regulation for the contraventions set out in the NOAH are monetary penalties ranging from \$0 - \$1,000 for the contravention of Section 2(2) of the Act and \$0 - \$3,000 for section 2.4(1) of the Act; and prohibition periods of 0 – 30 days for each of Section 2(2) and section 2.4(1) of the Act.

77) I find that the monetary penalties recommended by Fraser Health in the NOAH are appropriate penalties and in accordance with the items referenced in section 13 of the Regulation.

78) I also accept the submission of Fraser Health that a monetary penalty alone is not sufficient and that a prohibition should be included in the penalty imposed. However, I am also cognizant of the impact that the prohibitions recommended by Fraser Health if imposed would have on the Respondent and on Respondent's employees.

79) Therefore, in my order imposing a prohibition on the Store I have taken the recommendation from the Health Authority's Representative that there only be a prohibition imposed for the display violation. However, in acknowledgement of the remedial efforts clearly demonstrated by the Respondent since June 11, 2022 and in recognition of the impact that a 30 day prohibition would have on the Respondent, its owner, and its employees I have reduced the number of days of the prohibition from the 30 days recommended by Fraser Health to 7 days.

## **ORDER**

80) 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
- For contravention of s. 2.4(1) of the Act – a monetary penalty of \$3,000 and a prohibition of 7 days;

resulting in monetary penalties amounting in total to \$4,000 and a total prohibition period of 7 days to reflect the efforts that the Respondent has taken to ensure that it becomes and remains scrupulously vigilant in ensuring that minors are not exposed in the Store to the display of vapour products and that minors are not sold vapour products.

Dated: January 29, 2024

Original Signed by:  
R. John Rogers  
Administrator's Delegate