

A Hearing Under Section 6 of the *Tobacco and Vapour Products Control Act*
R.S.B.C. 1996 c. 415 (as amended)

Regarding alleged Contraventions of Section 2(2) of the
Tobacco and Vapour Products Control Act R.S.B.C. 1996, c.451

- by –

Cana Fuel Inc.

(“Cana”)

Administrator’s Delegate under Section 5 of the
Tobacco and Vapour Products Control Act:

C. L. Roberts

Date of Hearing:

September 25, 2018

Place of Hearing:

Burnaby, B.C.

Date of Decision:

October 4, 2018

Appearing:

For Cana Fuel Inc.:

Ning Wang

For the Fraser Health Authority:

Stanley Dhaliwal

Decision

Background

1. Cana Fuel Inc. (“Cana”) operates a gas station on Marine Drive in Burnaby. Mr. Wang is the sole director and officer. Cana has been licenced to sell tobacco products since 2007.
2. The Fraser Health Authority (“FHA”) alleged that on March 16, 2018, Cana contravened Section 2(2) of the *Tobacco and Vapour Products Control Act* (the “Act”) by selling tobacco products to a minor. Cana did not dispute the allegation.
3. The sole issue to be determined is the appropriate penalty.

Facts

4. Mr. Dhaliwal is a Tobacco Enforcement Officer with the Fraser Health Authority, responsible for education and compliance under the *Tobacco and Vapour Products Control Act* (the “Act”).
5. On March 16, 2018, Mr. Dhaliwal conducted a minor test shopper (“MTS”) inspection at the store. The clerk did not request identification and the MTS was sold a package of cigarettes.
6. Mr. Wang did not dispute that, on March 16, 2018 at the time of the inspection, he was participating in a telephone conference call hearing with another delegate of the Administrator, Helen Pinsky, regarding an alleged contravention of the *Act*. He conceded that he left a clerk at the counter who was inexperienced and untrained while he was on the call, and that, during that time, the clerk sold the cigarettes to the MTS without asking for identification. He apologized for the contravention.
7. Mr. Dhaliwal indicated that Cana has not had any violations after March 16, 2018.

Law and Analysis

8. The *Act* prohibits the sale, distribution, provision, advertising and promotion of the use of tobacco except in accordance with the *Act* and *Regulation*.
9. Section 2(2) of the *Act* prohibits a person from selling, offering for sale, providing or distributing tobacco to a person under the age of 19 years of age (Section 2 of the *Tobacco and Vapour Products Control Regulation* (the “*Regulation*”)).
10. Cana conceded, and I find, that it sold tobacco products to a person under 19 years of age on March 16, 2018, in contravention of Section 2(2). No defence of due diligence was presented.

What is the appropriate penalty?

11. Section 6.1 of the *Act* provides that the administrator may impose a monetary penalty in accordance with the prescribed schedule and/or prohibit the person from selling tobacco at retail from the location at which the contravention occurred if satisfied on a balance of probabilities that a person has contravened a provision of the *Act* or of the *Regulation*.
12. Section 6 of the *Regulation* sets out the prescribed penalties for violations of Sections 2(3) and 2.4 of the *Act* while Section 13 outlines the factors to be considered in imposing administrative penalties. Schedule 2 and 3 of the *Regulation* establish respectively the range of monetary penalties and prohibition periods. For a first contravention of Section 2(2) of the *Act* the range of monetary penalties is from \$0 to \$1,000 and the prohibition period is from 0 to 30 days. For a second contravention, the monetary penalty range is from \$0 to \$3,000 and the prohibition period is from 0 to 90 days.
13. FHA sought a monetary penalty in the amount of \$575 for the contravention, with no prohibition period.
14. The factors to be considered in imposing administrative penalties are set out in Section 13 of the *Regulation*:
 - (1) *In imposing an administrative penalty on a person for a contravention of a prescribed provision of the Act or regulations, the administrator must consider the following factors:*
 - (a) *whether an enforcement officer has given the person a prior written warning concerning the conduct that is the subject matter of the penalty;*
 - (b) *whether the person has an ownership interest in the business carried on at the location where the contravention occurred;*
 - (c) *in respect of a breach of section 2 (2) or (3) or 2.4 of the Act or section 4 of this regulation,*
 - (i) *whether the person is an employee or agent of the owner, and*
 - ...
 - (e) *any other matter the administrator considers relevant to the imposition of a penalty.*
 - (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 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.*
 - ...

15. The *Regulation* enables me to consider other factors that may be relevant to imposing a penalty. In my view, those factors can include both mitigating and aggravating factors. Mitigating factors would include, for example, the Respondent's degree of cooperation, any admission of a contravention and steps taken. Aggravating factors would include, for example, a contravention involving dishonesty, whether the contravention is planned or premeditated, past history and the extent of the harm caused by the contravention.
16. As noted in paragraph 6, on March 16, 2018, the date of the contravention, Mr. Wang was on a telephone hearing regarding an allegation of selling tobacco products to a minor. The circumstances were very similar to those before me. In that matter, Arbitrator Pinsky imposed a monetary penalty of \$150 and prohibited Cana from selling tobacco products for a period of seven days.
17. I am persuaded that a monetary penalty is an appropriate sanction for the contravention.
18. Mr. Wang did not dispute the contravention and apologized for it. He said that he is usually the only person working at the store, and that, on March 16, 2018, he was in the back of the store for only a short period of time while participating in the telephone hearing.
19. Cana has been found to have violated the *Act* on two occasions since it obtained a license, and is well aware of the requirements of the legislation. I find the circumstances of this violation to be unusual, and unlikely to be repeated. Mr. Wang cooperated with the Tobacco Enforcement Officer, and admitted the contravention. There is no evidence of dishonesty or planning of the contravention.
20. I am not obliged to agree to the fine proposed by the Tobacco Enforcement Officer, the amount of which I understand he had discussed with Mr. Wang, although I find it well considered. In light of all of the circumstances, including the fact that this is Cana's second contravention of Section 2(2) of the *Act*, I find a fine in the amount of \$600 to be appropriate.

Order

21. **As I have found that** Cana contravened Section 2(2) of the *Act* on March 16, 2018, **I ORDER**, pursuant to Section 6.2(2) of the *Act*, that it pay a penalty of **\$600**, which sum is due and payable upon service of this Decision and Order.



Carol Roberts, Administrator's Delegate

