



**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

Authorized Retailer:	Buddy's Smoke Shop Ltd.
Tobacco Retailer Authorization #:	TRA 1104-6383
For the Authorized Retailer:	Varinder Bassi and Anu Bassi
Enforcement Officers:	Jodi Fuller and Thasneem Sandi
Administrator's Delegate:	R. John Rogers
Date of Hearing:	December 4, 2019
Date of Decision:	January 3, 2020

INTRODUCTION

The Authorized Retailer, Buddy's Smoke Shop Ltd., (the "Retailer") holds Tobacco Retailer Authorization # TRA 1104-6383 (the "TRA") pursuant to which it operates an establishment called "Buddy's Smoke Shop" at #1- 45637 Lark Road, Sardis, B.C., V2R 3N5 (the "Store"). The TRA was first issued on December 15, 2017 in the name of "Rajdoot Restaurant and Sweet Shop Ltd." and subsequently reissued on October 1, 2018 in the name of "Buddy's Smoke Shop Ltd." (Ex 9).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The allegations against the Retailer are set out in the Notice of Administrative Hearing (the "NOAH") dated October 17, 2019.

The NOAH alleges that on January 3, 2019, the Retailer contravened sections 2(2) and 2.4(1) of the *Tobacco and Vapour Products Control Act*, R.S.B.C. 1996, c. 451 (the "Act") and sections 2 and 4.31(1) of the *Tobacco and Vapour Products Control Regulation* B.C. Regulation 232/2007 (the "Regulation") by selling vapour products to a person under the age of 19 and by displaying vapour products in a manner which were reasonably seen or accessed by a minor in the Store. If a contravention is found, a monetary penalty in an amount at my discretion is proposed together with a 30 day suspension of the Retailer's right to sell vapour products.

At the hearing, the Retailer's authorized representatives (the "Retailer's Representatives") did not dispute that the alleged contraventions had occurred, but they were concerned as to the effect that any imposed penalty might have on the Retailer's business.

For the purpose of this hearing and in accordance with section 5(2) of the Act, the Administrator has delegated to me the powers, duties and functions provided to the Administrator by the Act with respect to a decision as to whether or not the alleged contraventions have been proven, and, if I find the alleged contraventions to have been proven, a determination of an appropriate penalty therefore, and an order with respect to such determination.

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.

**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

EVIDENCE – ENFORCEMENT OFFICERS

NOAH

The Enforcement Officers’ evidence with respect to the alleged contraventions as stated in the NOAH might be summarized as follows:

- At approximately 12:25 p.m. on January 3, 2019, in the course of conducting a compliance test on the Store, Minor Test Shopper A (“MTS A”), who at the time was 17 years old, entered the Store and sought to purchase a vapour product from the sales person present in the Store (“Sales Person”);
- The Sales Person sold the vapour product to MTS A and permitted MTS A to view the other vapour products offered for sale in the Store;
- At no time while MTS A was in the Store did the Sales Person ask MTS A for identification;
- As MTS A was exiting the Store, Minor Test Shopper B (“MTS B”), who at the time was 15 years old, entered the Store and engaged the Sales Person in conversation with respect to what form of vapour product MTS B wished to purchase and what form of vaping device MTS B used;
- During this conversation, MTS B was able to view the open display of vapour products;
- When MTS B was unable to answer the Sales Person’s question as to what form of vaping device he used, the Sales Person at that point asked MTS B for identification and when it was not produced, asked MTS B to leave the Store which MTS B did;
- After exiting the store, both MTS A and MTS B documented their experience in the Store in their respective logbooks;
- The e-juice container sold to MTS A which was labelled “VaporDrops: Glazed Donut flavour” and which was represented to contain 3mg. of nicotine was sealed in an evidence bag (Ex 4);
- Enforcement Officer A (“EO A”) and Enforcement Officer B (“EO B”) then entered the Store and advised the Sales Person that he had sold a vapour product to a minor and that he had permitted two minors to remain in the Store and to view vapour products without first asking them for identification. The Sales Person denied the allegation and asked to see a sales receipt as proof of the purchase of the vapour product.

Enforcement Officer A

EO A testified that the NOAH correctly represented her recollection of the alleged contraventions committed by the Retailer on January 3, 2019

EO A then produced the “Report to the Administrator” (“RTA”) (Ex 1) which, she testified, she had authored, and she confirmed that its contents were correct. She noted that the facts detailed in the alleged contraventions referred to in the NOAH were, as well, set out in more detail in the RTA and she confirmed the accuracy of these facts.

The Evolution of the Retailer from Gladys Convenience Store to Buddy’s Smoke Shop

EO A produced a copy of a certificate of change of name issued by the Registrar of Companies under the British Columbia *Business Corporations Act* certifying that effective August 17, 2018 Rajdoot Restaurant and Sweet Shop Ltd. had changed its name to Buddy’s Smoke Shop Ltd. (Ex 8). In addition, EO A produced a copy of a business licence issued on April 25, 2016 by the City of Abbotsford authorizing Rajdoot Restaurant and Sweet Shop Ltd. to carry on business as Gladys Convenience Store. (Ex. 8).

EO A produced a corporate summary produced by the BC Registry Services and dated October 16, 2019 (Ex 8). This corporate summary referenced the change of name of the Retailer from Rajdoot Restaurant and Sweet Shop Ltd. to Buddy's Smoke Shop Ltd. and set out the sole director and officer of the Retailer to be the same person.

Enforcement History of Gladys Convenience Store

In her testimony, EO A noted that the Retailer while carrying on business as Gladys Convenience Store had the following enforcement history:

- November 17, 2016 – a violation with respect to promoting and displaying tobacco and vapour products (Ex 2);
- March 15, 2017 – a violation with respect to a sale of tobacco and vapour products to a minor and promoting and displaying tobacco and vapour products. A ticket was issued for these offences for which the Retailer paid two fines of \$575 each (Ex 2);
- May 17, 2017 – similar to what had occurred two months earlier, a violation with respect to a sale of tobacco and vapour products to a minor and promoting and displaying tobacco and vapour products. A ticket was also issued for these offences. In this instance the Retailer paid a reduced fine (Ex 2).

Enforcement History of Buddy's Smoke Shop

After the Retailer had effected a change of name, EO A noted that the Retailer, while carrying on business as Buddy's Smoke Shop, had the following enforcement history:

- December 19, 2017 - a compliance check at which to assure the Retailer's compliance, the rules under the Act and the Regulation were discussed as was the Minor Test Shopper program (Ex 3);
- January 10, 2018 - a compliance check similar to that performed less than a month earlier at which the same matters were discussed (Ex 3);
- March 22, 2018 – the Retailer was caught selling tobacco and vapour products to a minor and was alleged to be promoting and displaying tobacco and vapour products contrary to the Act. A written warning was given to the Retailer on this occasion (Ex 3);
- June 13, 2018 – in response to a complaint received on May 14, 2018 that the Retailer had been selling vapour products to persons under 19 years of age, a compliance check was conducted at the Store and the Retailer sold a vapour product to a minor test shopper under the Minor Test Shopper program and displayed tobacco and vapour products contrary to the Act. (Ex 3). On January 16, 2019, a ticket was issued to the Retailer for these contraventions (Ex 7).

Complaints Leading Up to the Minor Test Shopper Event on January 3, 2019

Following complaints from the local community on November 22, 2018, December 10, 2018, and December 21, 2018 complaining that the Retailer was selling vapour products to minors, including in one instance the caller's 14 year old son, on January 3, 2019 at 11:34 a.m. EO A and EO B went to the Store to conduct a compliance check

The Enforcement Officers met with the Sales Person and advised him that there had been a number of complaints regarding the Retailer's sale of vapour products to minors. At this

meeting, the Enforcement Officers discussed with the Sales Person the provisions of the Act and the Regulation and the Minor Test Shopper Program implemented to ensure that retailers were complying with the rules made under the Act and the Regulation. Part of this discussion focused on the possible penalties, including monetary fines and periods of suspension, if a retailer was found to be in contravention of its obligations with respect to the sale and display of tobacco and vapour products. EO A testified that during her discussions with the Sales Person at this meeting, he confirmed that he ensured that no one under the age of 19 was permitted in the Store, nor did he sell tobacco or vapour products to anyone under the age of 19.

Following this meeting with the Sales Person, approximately an hour later, MTS A and then MTS B entered the Store and, as alleged in the NOAH, the Sales Person sold the e-juice (Ex 4) to MTS A without asking her for identification and permitted MTS B to be in the Store and view the vapour products without asking him for identification.

EO A identified her notes (Ex 5) and confirmed that they properly reflected what had occurred on January 3, 2019.

Enforcement Officer B

EO B identified her notes (Ex 5) and confirmed that they properly reflected what had occurred on January 3, 2019.

EVIDENCE – RETAILER

The Retailer, apart from admitting that the alleged contraventions had occurred, did not provide any evidence.

SUBMISSIONS – ENFORCEMENT OFFICERS

In her submissions, EO A directed my attention to the enforcement history of the Retailer. She confirmed that if contraventions were found to have occurred as alleged in the NOAH, that in accordance with Schedules 2 and 3 of the Regulation, that these contraventions would be classified under the category of a first contravention.

SUBMISSIONS – RETAILER

The Retailer's Representatives expressed a great deal of concern as to the effect a penalty would have on the Store's operations as, they claimed, it was at best a minimal business.

REASONS AND DECISION

Contraventions

The Retailer has admitted that on January 3, 2019, as alleged in the NOAH, 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

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.

I therefore find that the Retailer on January 3, 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 at the hearing, as I have found that the Sales Person sold a vapour product to MTS A and permitted MTS B to remain in the Store, in both cases without asking for identification, 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 the contravention 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, the defence of due diligence is moot as the evidence before me is clear that the Sales Person was the directing mind of the Retailer and that he sold the vapour product to MTS A and permitted MTS B to remain in the Store, in both cases without asking for identification. This defence of due diligence, therefore, does not apply.

I am satisfied on a balance of probabilities that the Retailer committed the alleged contraventions of the Act and the Regulation by selling vapour products to a person under the age of 19 and by displaying vapour products in a manner which was reasonably seen or accessed by a minor in the Store and, therefore, is liable for the penalties as set out in the Act and Regulation.

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 I have found a contravention;
- 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 I consider to be in the public interest.

Above I have laid out in some detail the Retailer's enforcement history as to me it demonstrates a complete lack of interest on the Retailer's behalf in operating within the rules of the Act and Regulation with respect to the sale and displaying of tobacco and vapour products. Indeed, given the tickets that have been issued and the fines paid, albeit begrudgingly, it would appear that the Retailer merely considers the tickets and the resulting fines a cost of doing business.

The Enforcement Officers have recommended that the Retailer be prohibited from selling vapour products for a period of 30 days as this is the maximum suspension authorized under the Regulation for a contravention of the Act and the Regulation. I can well understand their frustration in receiving complaints from the local community, discussing these complaints with the Retailer, and getting the commitment from the Retailer to ensure that in the future the rules will be followed. And then having to go back some months later in response to further complaints.

It is the intention of the Enforcement Officers to ensure that retailers operate in compliance with the Act and the Regulation. It is this compliance that is sought, not a punishment of a retailer found to be in violation of the Act and the Regulation. However, in the matter at hand, it appears that no matter how many compliance meetings the Enforcement Officers had with the Sales Person, the breaches of the Act and the Regulation continued.

To review the factors which I should consider in determining an appropriate penalty I have considered and determined:

- The Retailer had multiple warnings, indeed, less than an hour after the compliance meeting on January 3, 2019 it performed the contraventions;
- The evidence before me clearly documents previous enforcement actions of a similar nature;

- The contraventions in the NOAH were definitely part of a repeated or continuous pattern of behaviour;
- As the Sales Person was alone in the Store, it appeared that if he does not have an ownership interest, he certainly is involved in the management of the Retailer; and
- There was no evidence of training and monitoring with respect to the sale and display of tobacco or vapour products at the Store.

Therefore, although I am cognizant of the Retailer's concern about operating in a low margin environment and the difficulty a prohibition against selling vapour products for a period of time and a monetary penalty might inflict, it is my hope that if the maximum monetary penalty is imposed on the Retailer together with the prohibition on sales of vapour products for the maximum time period permitted by the Regulation, that the Retailer might determine to change its ways.

ORDER

As I have found the Retailer liable with respect to the contraventions alleged in the NOAH, pursuant to section 6.1 (2) of the Act, I am imposing the maximum monetary penalty of \$1,000 for each of the contraventions, for a total monetary penalty of **\$2,000**.

The Enforcement Officers have sought a prohibition to prevent the Retailer from selling vapour products for a period of 30 days. Conceivably, as I have found that the Retailer was in contravention of both sections 2.4(1) and 2(2) of the Act, I could order that the Retailer be prohibited from selling vapour products for a total period of 60 days. However, as the Enforcement Officers have only sought a prohibition of a single 30 day period, I will so order.

I therefore order that the Retailer be prohibited from selling vapour products for a period of 30 days commencing at the close of business on **February 2, 2020** and continuing for a period of 30 days thereafter, ending at close of business **March 3, 2020**.

To ensure the order is effective, I order that a notice in the form as set out in Schedule 6 of the Regulation be posted in a prominent position in the Store by an Enforcement Officer.

Original signed by:

R. John Rogers

Date: January 3, 2020

Administrator's Delegate