

A Hearing under Section 6 of the *Tobacco and Vapour Products Control Act*
R.S.B.C. 1996, c. 451
as amended

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

- by -

Cana Fuel Inc.

(the “Respondent”)

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

Helen Pinsky

Date of Hearing:

January 26 and March 16, 2018

Place of Hearing:

Burnaby, BC and by conference call

Date of Decision:

March 23, 2018

Appearing:

For Cana Fuel Inc.

Ning Wang

For Fraser Health Authority:

Edward Wong

Decision and Order

BACKGROUND

1. The Respondent is a company Cana Fuel Inc., which is wholly owned by Ning Wang. Through the company he operates a storefront called Cana Fuel, which is licenced to sell tobacco products.

2. The Fraser Health Authority's spokesperson, Edward Wong, operates as a Tobacco Enforcement Officer (TEO), in the Fraser Health Authority of the Ministry of Health (FHA). He is responsible for education and compliance under the *Tobacco and Vapour Products Control Act* (the Act).
3. A minor test shopper (MTS), employed by the Fraser Health Authority, was involved in the original investigation and appeared as a potential witness at the first hearing date in Burnaby, BC, but did not present evidence. Her written statement formed part of the evidence package that was disclosed before the hearing to the Respondent and to the administrator's delegate.
4. Ning Wang represented his company Cana Fuel Inc. at the hearing of this matter, and he gave evidence. Edward Wong gave evidence on behalf of the FHA.
5. The Fraser Health Authority alleges that the Respondent contravened Section 2 (2) of the Act on June 3, 2017.
6. On November 21, 2017, a Notice of Administrative Hearing was issued under the Act, to the Respondent, for a hearing to determine whether the Respondent had committed a contravention of the Act and allowing for an Order to be made.
7. Service of the Notice was confirmed at the hearing.
8. The hearing began on January 26, 2018, in Burnaby, BC, and was adjourned before completion at the request of the Respondent. The adjournment was set to March 16, 2018 by conference call hearing, unless I heard submissions to the contrary before that date. Having heard consent from the parties to continue by conference call, the hearing resumed at 9:45 am on March 16. At that time, all the remaining evidence and arguments were heard.

LEGISLATIVE FRAMEWORK

9. Section 2(2) of the Act prohibits the sale, offer to sell, provision or distribution of tobacco to an individual who has not reached the age specified by regulation.
10. Section 6.1(1) of the Act permits the administrator to make an order under Section 6.1(2) if satisfied that a person has contravened of a provision of the Act or regulations, or of an order of the administrator. Section 6.1(2) specifies that the order may be the imposition of a monetary penalty on the person, or it may be a prohibition of that person from selling tobacco or offering to sell tobacco at retail from the location at which the contravention occurred, or under certain circumstances, from any other location.
11. The Tobacco and Vapour Products Control Regulation (the "Regulations") defines the age for the purposes of Section 2 (2) of the Act to be 19 years.

12. Section 12 of the Regulations states that 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.
13. Section 13 of the Regulations sets out those considerations which must be taken by the administrator in imposing an administrative penalty on a person for contravention of a prescribed provision of the Act or regulations.
 - (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*
 - (ii) ...*
 - ...*
 - (e) any other matter the administrator considers relevant to the imposition of a penalty.*
14. The Regulations allows the administrator's delegate 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 steps taken to prevent re-occurrence of a contravention, any admission of a contravention and the degree of remorse (where the Respondent is an individual). Aggravating factors would include, for example, past history, a contravention involving dishonesty, whether the contravention is planned or premeditated, and the extent of the harm caused by the contravention.

EVIDENCE

15. The minor test shopper provided a written report, which I considered as part of the evidence. It stated that on June 3, 2017, the MTS entered the store at 11:45 am and was successful in purchasing tobacco products from the clerk at the store. The clerk did not request identification, or make any other attempts to verify the age of the MTS. She was in fact under the age of 19 years. The MTS paid for the tobacco product and subsequently handed it to the TEO together with a written report of the transaction.
16. Edward Wong provided a written report, which he confirmed at the hearing and affirmed that it was true. He stated that shortly after the sale to the MTS took place, on June 3, 2017, he entered the store Cana Fuel and recognized the clerk as being the owner of the store. The owner confirmed the sale, but he claimed that the shopper had appeared to him to be older than 19 years.

17. Mr. Wong gave evidence that the Respondent apologized for the sale to a minor. He then became upset during the encounter on June 3, 2017, and responded emotionally to the TEO, showing anger that he had been caught in a situation where an offence had occurred due to lack of attention.
18. The TEO Mr. Wong testified that on June 16, 2017, he entered the store Cana Fuel with the intention of serving a Notification of Violation to Mr. Wang. He attempted to serve the Notification on a woman in the store, but had difficulty in doing so, as she refused to acknowledge receipt. The woman was subsequently identified as related to the owner Ning Wang. The TEO did eventually serve the document with the assistance of the Burnaby RCMP that day. The Respondent admits service of the Notification.

ISSUES

19. Has the FHA proven on a balance of probabilities that the respondent sold a tobacco product to a person under the age of 19 years, in contravention of the provisions of section 2(2) of the Act?
20. If FHA is able to prove that the respondent sold tobacco to a person under 19 years of age, has the Respondent demonstrated to the satisfaction of the administrator the defence pursuant to section 12 of the Regulations, that they exercised due diligence to prevent the contravention?
21. If a contravention of the provisions of section 2(2) did occur, what is the appropriate penalty for the offence?

ANALYSIS AND FINDINGS

22. The written report of the minor test shopper does not carry the weight of sworn evidence. She did not give oral evidence, although the minor test shopper was available for cross-examination on the first day of the hearing.
23. I accept the MTS's written evidence on the basis that the Respondent does not dispute it. He in fact admits that the sale of tobacco to a minor in fact took place.
24. I also accept the evidence of TEO Edward Wong, who attended at the store immediately after the fact, and received an apology for the sale. The Respondent does not dispute this evidence.
25. Based on the evidence, I am fully satisfied on a balance of probabilities that the Fraser Health Authority has proven that the Respondent through the store Cana Fuel sold a

tobacco product to the MTS contrary to the provisions of Section 2(2) of the Act. This is a strict liability offense and no proof of intent is required. Liability flows from the breach.

26. No defence of due diligence has been argued, and none will be considered.

27. Remaining at issue is the appropriate penalty.

PENALTY

28. Addressing the appropriate penalty under the Act and Regulations for the contravention of Section 2(2):

- a. Section 6 of the Regulations sets out the prescribed penalties for violations of Sections 2(2) of the Act while Section 13 outlines the factors to be considered in imposing administrative penalties. Schedule 2 and 3 of the Regulations 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.

29. In reaching my decision on penalty and in addressing section 13 of the Regulations, I have taken the following factors into account.

- a. The need for a deterrent, both for the Respondent in question and as an example for the community of retailers.
- b. Previous history by this Respondent. In this matter, the TEO has admitted that this is a first offence for this retailer. He also acknowledges that the retailer has a good record.
- c. There are no other aggravating factors such as willful disregard for the law, dishonesty, or intention to deceive.
- d. The Respondent through Mr. Wang has admitted the offence and Mr. Wang has apologized for his emotional behaviour on June 3, 2017 during his meeting with TEO Edward Wong.
- e. Mr. Wang has accepted the authority of the FHA to conduct inspections of his store in the future. He has agreed that he and his employees will adopt a more professional manner in dealing with government officials. While this is not a direct factor in considering the appropriate penalty, it does give the TEO some assurance that there is full cooperation from the Respondent and that this is consistent with the previous history of compliance by this store.

- f. The Respondent has requested a lower fine due to financial hardship, and the TEO agrees that this is appropriate under the circumstances. The TEO has requested that there be a prohibition period.
 - g. I have no doubt that the Respondent is aware of the requirements of the Act and Regulations. I am persuaded that a fine and short prohibition are appropriate sanctions for the contravention.
30. Accordingly, I find that the Respondent shall pay a monetary penalty of **\$150.00** in respect of the violation.
31. Further, I find that the Respondent will be prohibited from selling tobacco products for a period of seven (7) days.

ORDER

1. **As I have found that** Cana Fuel Inc. contravened Section 2(2) of the *Act*, **I ORDER**, pursuant to Section 6.1 (2)(a) of the Act, that it pay a penalty of **\$150.00** which sum is due and payable upon service of this Decision and Order.
2. **In addition, as I have found that** Cana Fuel Inc. contravened Section 2(2) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products for a period of seven (7) days beginning April 23, 2018.

Helen Pinsky

Helen Pinsky, Administrator's Delegate