

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

Regarding an alleged Contravention of Section 2.4 (1)(a) and 2.4 (1)(b) of the
Tobacco Control Act R.S.B.C. 1996, c.451

- by -

Seung Ho RHO and Kwang Eun BAE (DBA: Habits We Have Smokeshop)

(the “Respondent”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Helen Pinsky
Date of Hearing:	October 27, 2015
Place of Hearing:	Abbotsford, BC
Date of Decision:	November 7, 2015
Appearing: For Seung Ho RHO and Kwang Eun BAE (DBA: Habits We Have Smokeshop)	Seung Ho Rho
For Fraser Health Authority:	Hans Mulder

Decision and Order

BACKGROUND

1. The Respondent is a storefront business owned and operated by the proprietors, husband and wife Seung Ho Rho and Kwang Eun Bae, and those two individuals (the Store).

2. The Fraser Health Authority's spokesperson, Hans Mulder, 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 Control Act (the Act).
3. Two minor test shoppers (MTS), employed by the Fraser Health Authority, Mr. J.S.A. and Ms. J.S., gave evidence on behalf of the Authority.
4. Seung Ho Rho, an owner and operator of the Respondent, gave evidence on behalf of the Respondent.
5. The Fraser Health Authority alleges that the Respondent contravened Section 2.4 (1)(a) and 2.4(1) (b) of the *Act* on July 15, 2015.
6. On September 11, 2015, a Notice of Administrative Hearing was issued under the Tobacco Control 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.

LEGISLATIVE FRAMEWORK

8. The Act sets out the manner in which a person may deal in, sell, offer for sale, distribute, provide, advertise or promote the use of tobacco in British Columbia. It establishes prohibitions and penalties for non-compliance. Specifically:
 - 2.4 (1) A person must not*
 - (a) display tobacco products, or*
 - (b) advertise or promote the use of tobacco by means of a sign or otherwise*

in any manner prohibited by the regulations.
9. 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.

10. 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.*

11. The Regulation 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

12. The minor test shopper J.S.A. was the first witness for the FHA. He has worked as an MTS for 10 months. He was 17 years old as at July 15, 2015. His job is to attempt to purchase tobacco products in stores.

13. On July 15, 2015, the MTS entered the Store at 2:45 pm. He opened the door, and a chime rung out. He saw two people behind the counter. His intention was to buy a coke from the cooler. He walked to the cooler, stayed there around 30 seconds, then attempted to buy a coke. The person at the counter (whom he identified as Mr. Rho) asked for identification. The MTS said he had none, whereupon he was told he could not buy the coke. He returned it to the cooler and left.

14. The Store is age restricted. One must be 19 to enter. There is a sign on the outside restricting entry. In the store the MTS saw tobacco products on display. He recognized them as such because they were consistent with other tobacco products seen and handled by him.

15. The minor test shopper J.S. gave evidence. She is an MTS and has been so employed for almost one year. Her evidence matched that of the other MTS. She said that the encounter lasted about five minutes in total. She saw tobacco products visible in the store. She was not prevented from entering the store.
16. Mr. Mulder gave evidence that he directed the MTS to enter the Store on the day in question as part of directing compliance checks. He saw the sign on the door of the Store showing it to be an age restricted premises. On entering the Store himself after the MTS exited, he saw tobacco displayed on two walls of the Store.
17. Mr. Mulder also gave evidence that he saw tobacco products displayed in cases at the front counter. He saw cigarettes, grinders, papers, pipes and other products. He spoke to Mr. Rho about the MTS visit. Mr. Rho told him that he had been occupied when the minors entered the Store, so that he couldn't right away ask for ID.
18. The Respondent attended a Provincial Court Hearing in August, 2015, for a similar incident which occurred in 2013. A fine of \$375.00 was imposed. No details of the incident were provided.
19. Mr. Rho did not challenge the evidence presented on behalf of the FHA.
20. In his evidence Mr. Rho confirmed that he had been dealing with a sales representative when the 2 minors entered the Store, and that he didn't see them right away. When they were at the cooler he couldn't see their faces well, but at the counter he asked for ID right away. When they didn't have ID, he refused to sell anything to them.
21. The Store is operated by the owners, Mr. Rho and his wife, without other staff. Most of the time only one person is minding the Store.
22. The Respondent makes \$300.00 per month by having a tobacco display inside the store. It has been a helpful source of income. Since July, 2015, they have decided against having the display in their store. Their intention is to cover all tobacco products, remove displays, and operate as a convenience store. They are doing this in response to the situation which precipitated this hearing.
23. Usually Mr. Rho does not have minors coming into the Store, as they know that he won't sell anything to them. He doesn't remember the last time a minor entered, other than the MTS. He regularly checks ID if a person looks young and tries to make a purchase.

ISSUES

24. Has the Fraser Health Authority proven on a balance of probabilities that the Respondent did display tobacco products and advertise or promote the use of tobacco by means of a sign or otherwise in a prohibited manner on July 15, 2015 in contravention of Section 2.4

(1) (a) and 2.4(1) (b) of the *Act*? I understand this to mean in a manner that allows minors to be exposed to the display and advertisement of tobacco products.

25. If so, has the Respondent established a defence of due diligence?

26. If a contravention is found and a penalty is to be imposed, what is the appropriate penalty?

ANALYSIS AND FINDINGS

27. The Respondent did not dispute the evidence as presented by the FHA.

28. Based on the evidence of both parties, I am fully satisfied that the Respondent contravened section 2.4(1) of the *Act*. This is a strict liability offense and no proof of intent is required. Liability flows from the breach. No defence of due diligence has been argued, and none will be considered.

29. Remaining at issue is the appropriate penalty.

30. Addressing the appropriate penalty under the Act and Regulations for the contravention of Section 2.4 (1)(a) and 2.4(1)(b):

- a. 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 2.4 of the *Act* the range of monetary penalties is from \$0 to \$3,000 and the prohibition period is from 0 to 30 days.

31. The Health Authority sought a monetary penalty in the amount of \$700 and a 14 day licence suspension for the contravention in light of the Respondent's history and in light of similar penalties in other similar matters. There was an admission that there was no sale to a minor in this situation.

PENALTY

32. 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 of contraventions by this Respondent. In this matter, I find that a similar matter was dealt with previously, but it is unclear whether it involved display, advertising, sale to a minor, or something else entirely. It is also unclear whether the matter arose as a violation of this section of the *Act*. I cannot make assumptions that this was a serious mitigating factor, under the circumstances of lack of clarity as to the nature of the alleged violation.
 - c.** I find no other aggravating factors such as willful disregard for the law, dishonesty, or intention to deceive.
 - d.** There will be financial hardship for the Respondent and the people it supports.
 - e.** I accept the evidence of Mr. Rho that as soon as he ascertained there was a question as to the MTS' age, he requested ID, and when that was not provided, he refused to sell even a cold drink to the minor. He should have ascertained their minority earlier and refused entry to the store. He argues hardship in that he is alone in staffing the Store most of the time, and I accept that his circumstances do not lend themselves well to running a tobacco shop. There are legitimate restrictions on entry which are difficult to enforce as a sole proprietor.
 - f.** Mr. Rho and his wife have made the decision to turn the Store into a convenience store, thus allowing minors to enter to make non-tobacco purchases. This requires giving up revenue of \$300 per month for tobacco displays plus complying with the concealment of tobacco products at all times. I find that the Respondent has made difficult decisions, involving effort and loss of revenue, all in support of putting themselves in a compliance position re: section 2.4(1) of the *Act*. This all relates to mitigation of the offence and efforts to cooperate.
 - g.** In assessing penalty, I take into account the similar matter to which Mr. Mulder referred, in which a penalty of \$375.00 and no prohibitions were ordered. I am not aware of other penalties involving section 2.4.
 - h.** I have no doubt that the Respondent is aware of the requirements of the *Act* and *Regulation*, and in particular, the prohibition against displaying tobacco products to minors. I am persuaded that a monetary penalty is appropriate sanctions for the contravention. A prohibition from selling tobacco products is very onerous and I am concerned that it may discourage the Respondent from making the positive changes to his shop that he has declared.
33. Based on the above factors, I believe that on balance it is important to use this violation penalty as a significant deterrent to this retailer, as it is necessary to kick start a positive change. It also must be a deterrent to the larger community of tobacco retailers, for reasons of Public Health as described earlier. I do not, however, agree that both a fine and a prohibition are necessary on a first penalty, based on the above reasoning.

34. Accordingly, I find that the Respondent shall pay a monetary penalty of **\$750** in respect of the violation.

35. Further, I find that there will be no order in this case prohibiting tobacco sales in the Store.

ORDER

As I have found that the Respondent – Seung Ho RHO and Kwang Eun BAE (DBA: Habits We Have Smokeshop) contravened Section 2.4(a) and 2.4(b) of the *Act*,

1. **I ORDER**, pursuant to Section 6.1 (1) of the *Act*, that the company pay a penalty of **\$750.00**, which sum is due and payable upon service of this Decision and Order.

Helen Pinsky

Helen Pinsky, Administrator's Delegate