



**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

Retailer:

Al's Smoke Shop Corp.
Db: Al's Smoke Shop
(the "Retailer")

For the Retailer:

Sadik Tuma
(the "Retailer's Representative")

Enforcement Officer:

Edward Wong
(the "Enforcement Officer")

Adjudicator:

R. John Rogers
(the "Adjudicator")

Date of Hearing:

July 28, 2021

Date of Decision:

August 18, 2021

INTRODUCTION

The Retailer, Al's Smoke Shop Corp., operates an establishment called "Al's Smoke Shop" at 10533 King George Blvd., Surrey, B.C. V3T 2X1 (the "Store") under Tobacco Retailer Authorization number TRA 1061-5098.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The allegations against the Retailer are set out in the Notice of Administrative Hearing (the "NOAH") dated June 3, 2021.

The NOAH alleges that on August 17, 2019, the Retailer contravened section 2(2) of 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") by selling vapour products to a person under the age of 19. The NOAH further alleges that on August 22, 2019, the Retailer committed a further contravention of section 2.4(1) of the Act and 4.32(1) of the Regulation by displaying a large sandwich board in the Store window and on the sidewalk outside the Store advertising or promoting the use of tobacco or vapour products, which sandwich boards were not compliant with section 4.32(1) of the Regulation.

The NOAH notified the Retailer that an administrative hearing was to be held by videoconference at 9:30 a.m. on July 28, 2021, in order to determine whether or not the Retailer had committed the alleged contraventions as set out in the NOAH.

PRE-HEARING TELECONFERENCE

A Pre-Hearing Teleconference was held on July 6, 2021, for the purpose of reviewing the matters to be dealt with at the videoconference scheduled for July 28, 2021. This teleconference was attended by Ms. Scalzo, Enforcement Analyst, on behalf of the Ministry of Health, the Enforcement Officer on behalf of the Fraser Health Authority, the Retailer's Representative, and the Retailer's employee (the "Employee") who is the son of the Retailer's Representative.

At this Pre-Hearing Teleconference, the Retailer's Representative was offered the option of agreeing that the contraventions alleged in the NOAH had, in fact, occurred. If this option were exercised, he was advised, the hearing on July 28, 2021 would deal strictly with what penalty the Adjudicator felt appropriate.

The Retailer's Representative declined this offer and stated that he wished to proceed with the hearing as scheduled. He confirmed that he wished to present oral evidence at the administrative hearing, including calling the Employee as a witness, to dispute the allegations that the person to whom the vapour products were sold as alleged in the NOAH was a minor and that the signage was in contravention of the Regulation also as alleged in the NOAH.

The Enforcement Officer advised that he would call to present evidence at the hearing the Minor Test Shopper (MTS) to whom it is alleged in the NOAH that vapour products were sold by the Employee without first asking for identification to demonstrate proof of age.

THE ADMINISTRATIVE HEARING

For the purpose of the hearing and in accordance with section 5(2) of the Act, the Administrator as so empowered by the Act (“ the Administrator”) delegated to 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 have been proven, and, if the Adjudicator finds the alleged contraventions to have been proven, a determination of an appropriate penalty therefore, and an order with respect to such determination.

This hearing was held by video conference at 9:30 a.m. on July 28, 2021, being the time and the date specified in the NOAH for the hearing to be held. In order to carry out the hearing online, an email invitation was sent by the Adjudicator on July 23, 2021 inviting the Enforcement Officer, the MTS, the Retailer’s Representative, and the Employee to join the online hearing on the appointed date and time.

At the appointed date and time for the video conference, the Enforcement Officer and the MTS were present online with the Adjudicator. However, the Retailer’s Representative and the Employee despite their professed intentions at the Pre-Hearing Teleconference, were not present online. After waiting for a period to ensure that their absences were not due to technical difficulties, the Adjudicator proceeded with the hearing as authorized by section 9 of the Regulation.

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</i>	\$0 — \$3,000	\$1,000 — \$4,000	\$4,000 — \$5,000

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

**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

ONLINE HEARING PROTOCOL

At the commencement of the hearing, as the hearing was being conducted online, the Adjudicator took the parties present through a protocol to ensure that each of the parties was comfortable with the online format and then polled each of the parties to receive that party’s confirmation to that effect.

EXHIBITS

The Adjudicator noted that there was documentary evidence provided by the Enforcement Officer to be considered at the hearing and that these documents had previously been provided in

electronic form to the Retailer's Representative. The Adjudicator listed these documents as the following exhibits to become part of the hearing record:

Exhibits filed by the Enforcement Officer

Exhibit 1 – Copies of the front and back of an evidence bag identified as S899122 and with a front label stating:

“Location subject: Al's Smoke Shop
10533 KGB, Surrey
Collected by: Wong, E (the signature of E. Wong)
Date: Aug 17/19 Time: 14:20”, and

With the back of the bag showing through the plastic a package which included the following labelling:

JUUL
MANGO
4 Juul pods x 0.7 mL
59 mg/mi Nicotine
(5%Strength/Taux de 5%).

Exhibit 2 – Copies of the three pages of notes of the MTS made by her following the alleged sale to her on August 17, 2019.

Exhibit 3 – A picture of the personal identification of the MTS showing her date of birth to be February 14, 2002, making her 17 years old on August 17, 2019.

Exhibit 4 – Copies of the 3 pages of notes of the Enforcement Officer made by him on August 17, 2019.

Exhibit 5 – Copies of the 2 pages of notes of the Enforcement Officer made by him on August 22, 2019.

Exhibit 6 – a picture of a sandwich board located in the broken front window of the Retailer on August 22, 2019, stating:

“Al's Smoke Shop
Best Price in town
Smokes Start From:
Cartons \$78.99
OPEN”

Exhibit 7 – a picture of a sandwich board located outside the entrance to the Retailer on August 22, 2019, stating:

“Al's Smoke Shop
Best Price in town
Smokes Start From:
OPEN”

Exhibit 8 – a copy of the Inspection Report of the Early Notification of the recommendation for a hearing and a copy of the Early Notification letter delivered to the Retailer by the Enforcement Officer on August 22, 2019.

Exhibit 9 – a copy of the Sole Proprietorship Summary resulting from a search for the Retailer conducted on June 28, 2021 showing the name of the Retailer's Representative as the individual involved, but with the business address at 14787 108 Ave., Surrey, B.C., V3R 1V9, together with a copy of the original Statement of Registration of Sole Proprietorship for the Retailer filed on August 25, 2008.

Exhibit 10 – a copy of the business license issued by the City of Surrey on June 14, 2021 to the Retailer's Representative doing business as "Al's Smoke Shop" at the business address of 10533 King George BLVD, Surrey, B.C.

Exhibit 11 – a copy of the Enforcement Officer's Report to the Administrator dated September 5, 2019 recommending this hearing.

Exhibits filed by the Retailer

There were no exhibits filed by the Retailer.

EVIDENCE – ENFORCEMENT OFFICER

The Enforcement Officer testified that he was an enforcement officer with Fraser Health and had been dealing with the Retailer since at least 2008.

He testified that his focus has always been to provide education to tobacco and vapour retailers in order to ensure compliance with the Act and the Regulation. He accomplishes this, he stated, through routine inspections, complaint follow ups, and test shopping. The test shopping program uses minors aged 15 to 17 years old to enter a retail establishment and to attempt to purchase tobacco or vapour products. He stated that these minors are instructed that if they are requested to do so, they are to provide to the retailer their valid identification demonstrating that they are not 19 years of age.

The model that he works from, the Enforcement Officer testified, is a progressive enforcement model so that if a retailer is not in compliance with the Act or the Regulation, a warning letter will be issued, and the Enforcement Officer will provide to the retailer education on that infraction. However, if compliance issues continue, the Enforcement Officer will then issue violation tickets for the infractions, and, if compliance issues still continue and there has been no change by the retailer, he will provide a report to the Administrator under the Act requesting an administrative hearing.

The reason for the present hearing, he testified, is that despite the education, warnings, compliance meetings and violation tickets, he has not been successful securing the Retailer's compliance with the Act and the Regulation.

NOAH

The Enforcement Officer confirmed the contraventions as stated in the NOAH. He testified that these contraventions might be summarized as follows:

- At approximately 14:20 hrs. on August 17, 2019, in the course of conducting a compliance test on the Store, MTS, who at the time was 17 years old, entered the Store and purchased a package of JUUL Mango Pods from the Employee. Following this purchase, the Enforcement Officer entered the Store and the Employee confirmed to the Enforcement Officer that the Employee had sold this vapour product package to the MTS; and
- On August 22, 2019, the Enforcement Officer returned to the Store to advise the Retailer that Fraser Health was intending to request the holding of this administrative hearing. Prior to entering the Store, the Enforcement Officer observed a large sandwich board on the sidewalk (Exhibit 7) and another large sandwich board in the Store's front window (Exhibit 6) advertising prices of tobacco cigarette cartons, with both the sandwich board on the sidewalk and the signage board in the window being signage larger than the permitted 968 cm².

The Enforcement Officer emphasized that what was important to note with respect to the first contravention was that the Employee at no point asked the MTS for identification prior to selling her the vapour product, that the MTS was underage, and that as well as selling age restricted products to the MTS, the Employee permitted the MTS, an underage person, to be in the Store which sold age restricted products.

The Enforcement Officer's Report

The Enforcement Officer noted as set out in his report (Exhibit 11) the Retailer's enforcement history to be as follows:

1. June 6, 2006, initial inspection with the Retailer's Representative
2. September 25, 2006, compliance check. Warning letter for sale violation.
3. March 26, 2008, compliance check. Warning letter for sale violation.
4. April 4, 2008, routine inspection. Discussed tobacco promotion including sandwich board signs and maximum size and display ban of tobacco products.
5. April 24, 2008, follow-up inspection. Warning letter for tobacco display and promotion.
6. June 22, 2008, compliance check. Warning letter for display violation.
7. July 6, 2008, compliance check. Ticket issued for display violation.

8. August 19, 2008, compliance check. Warning letter for sale to minor.
9. September 10, 2009, compliance check. Ticket issued for sale and display violations.
10. August 27, 2010, compliance check. Warning letter for sale violation.
11. June 20, 2012, routine inspection. Verbal warning for display violation.
12. February 18, 2013, routine inspection. Verbal warning for display violation.
13. August 9, 2013, compliance check. Warning for display violation.
14. February 11, 2017, compliance check. Warning for vapour sale violation.
15. Complaint on June 19, 2019, from Surrey RCMP, that store was selling vapour products to minors.
16. Complaint on August 21, 2019, from Surrey RCMP, that store was selling tobacco products to minors.

EVIDENCE – MTS

In her testimony, MTS testified that on August 17, 2019 she was 17 years old. She identified a copy of her notes (Exhibit 2) and confirmed them to accurately reflect what occurred on August 17, 2019 when she entered the Store.

In her testimony she noted, as set out in her notes, the fact that when she left the Store having been shown the pipes and the bongs by the Employee and having been sold the package of Juul pods by the Employee, that she had observed several young people in the Store with ages she estimated to be between 12 and 14 years old.

EVIDENCE – RETAILER

As above set out, despite expressing an intention to attend the hearing and to dispute the contraventions, the Retailer did not attend the hearing and, therefore, has not offered any evidence.

SUBMISSIONS – ENFORCEMENT OFFICER

The Enforcement Officer submitted that over the time of his interaction with the Retailer as is evidenced by its enforcement history as set out in his enforcement report (Exhibit 11), and despite the best efforts of the Enforcement Officer to secure its compliance, the Retailer has continued to refuse to comply with the provisions of the Act and the Regulation and, consequently, he has been forced to seek this administrative hearing.

SUBMISSIONS – RETAILER

The Retailer made no submissions.

REASONS AND DECISION

Contraventions

The evidence before me is clear that, 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 on August 17, 2019 sold vapour products to a person under the age of 19 and, as further demonstrated by the evidence of the MTS, the Retailer displayed vapour products in the Store in a manner which were reasonably seen or accessed by a minor, some of whom besides MTS were present in the Store.

In addition, the evidence before me is clear that, as further alleged in the NOAH, the Retailer in contravention of section 2.4(1) of the Act and section 4.31(1) of the Regulation on August 21, 2019 through the use of sandwich boards, both on the sidewalk outside the Store and in the Store window, continued to display, advertise or promote the use of tobacco in a manner by which the advertisement or promotion are clearly visible to a person outside the retail establishment.

I therefore find that the Retailer both on August 17, 2019 and on August 21, 2019 committed the contraventions of the Act and the Regulation as alleged in the NOAH.

Due Diligence

Although the Retailer did not appear at the hearing, and, therefore, did not raise the defence of due diligence, as I have found that the Retailer committed the contraventions as set out in the NOAH, 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 these contraventions 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, although the Retailer did not appear at the hearing, from the evidence of the Enforcement Officer and the MTS, and especially from the Retailer's enforcement history as set out in the Enforcement Officer's report (Exhibit 11), it is clear that the commission of the contraventions referenced in the NOAH were not lapses of judgment or oversight on the part of the Employee or a slight deficiency in the Retailer's overall compliance strategy. Rather it appears that not only did the Retailer in the commission of the contraventions appear to flaunt the provisions of the Act and the Regulation, but even following the acknowledged sale to the MTS on August 17, 2019, the Retailer continued to sell tobacco products to minors as was evident from the complaint filed against the Retailer by the Surrey RCMP on August 21, 2019.

I therefore find that the defence of due diligence 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 that the Retailer displayed, advertised, or promoted the use of tobacco in a manner by which the advertisement or promotion are clearly visible to a person outside the retail establishment.

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 a contravention is found;
- 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 considered to be in the public interest.

The Retailer's enforcement history is set out above in some detail as it appears to demonstrate 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. It is also obvious from the complaint filed by the Surrey RCMP on August 21, 2019, that following the sale to the MTS on August 17, 2019, the Retailer had no intention of mending its ways.

To review the factors which should be considered in determining an appropriate penalty, the following are relevant to the matter at hand:

- The evidence clearly documents previous contraventions of a similar nature;
- The contraventions in the NOAH were definitely part of a repeated or continuous pattern of behaviour;
- The contraventions were clearly not an oversight;
- While there is no evidence that the Employee has an ownership interest in the business carried on by the Retailer, the Employee is the son of the owner of the Retailer; and
- There is no evidence of training or monitoring of the actions of the Employee performed by the Retailer with respect to the sale of tobacco or vapour products at the Store.

Section 16 (b) of the Regulation provides that for the purposes of Schedules 2 and 3 of the Regulation in the determination of a penalty, the time limit for the commission of a contravention is a 60 month time period. The evidence presented demonstrated that the Retailer has received two warning within the 60 month period.

However, this matter is the first time a Notice of Administrative Hearing has been issued against the Retailer and a hearing held. Therefore, in accordance with the provisions of section 16(b) 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”.

Thus, the range of penalties to which the Retailer 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.

ORDER

As the Retailer 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 maximum monetary penalty of \$1,000 be assessed against the Retailer for the contravention of section 2(2) of the Act; and
- the maximum monetary penalty of \$3,000 be assessed against the Retailer for contravention of section 2.4(1) of the Act

for a total monetary penalty assessed against the Retailer of \$4,000.

As with the complaint to the Surrey RCMP on August 21, 2019, the Retailer has clearly demonstrated by its actions that there appears to be no effort on its part to ensure compliance, it is hereby ordered that the following prohibitions as provided for in Schedule 3 be imposed on the Retailer:

- the maximum time period of 30 days be assessed against the Retailer for the contravention of section 2(2) of the Act; and
- the maximum time period of 30 days be assessed against the Retailer for contravention of section 2.4(1) of the Act

for a total prohibition period assessed against the Retailer of 60 days.

I therefore order that the Retailer be prohibited for a period of 60 days from selling or offering to sell tobacco or vapour products in the Store, from displaying tobacco or vapour products in the Store, and from advertising or promoting tobacco or vapour product use either in the Store, in the Store window or on the sidewalk outside the Store. Such prohibition shall commence on September 7, 2021 and shall continue until and including November 5, 2021. During this period of prohibition, the Retailer shall display signs satisfactory to the Enforcement Officer in a prominent location in the Store notifying the public that this prohibition is in place. These signs are to remain in place during the period of prohibition.

Date: August 18, 2021

Original Signed by:



R. John Rogers

Administrator's Delegate