

# frankly FUNK



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It's likely that you've participated in a discussion on the subject of crime and punishment at some point in your life. I'm sure you'll remember this happening. The debate can go either way. The punishment either seems too severe or too lenient for the crime that has been committed. It's never about the fact that a crime has been committed; it's just about whether the punishment fits.

But how do you feel when your Ontario government punishes individuals who have NEVER committed a crime?

That is an outcome under the Smoke Free Ontario Act, which is currently the cause of much fear and concern among our storeowners. To restore fairness and integrity into the manner under which the Smoke Free Act is applied, we need to fix this.

Responsible community retailing is the cornerstone of our convenience store operating model. That obligation encompasses an array of socially responsible behaviours in our stores—including our refusal to sell age-restricted products to persons under the legal age. We train our employees on age-testing procedures and the techniques to be used when refusing a sale. Sometimes, despite our best efforts, an employee makes a mistake.

If a mistake like this occurs twice in any five-year period, our store loses the right to sell tobacco products for a six-month period. As the financial viability of many of our stores is a consequence of the traffic-generating power of tobacco and the resulting margins, this punishment will often cause an "offending" store to close. Our Ontario government doesn't apply this sort of punishment to other age-restricted retail locations... like the Beer Store or LCBO. Oddly, it's only for convenience stores. While clearly unfair, this fact is unfortunately not relevant to our discussion today.

So, let me get us back on track. If an age-restricted sales violation were to be committed by a convenience store employee, it remains a crime regardless of whether or not it was a mistake. We have absolutely no disagreement with that position.

Invariably, neither the storeowner nor the landlord who may own the physical premises (often completely independently from the business itself) was involved in the commission of this offence. In fact, the storeowner is likely to have done everything in his power to train the employee and enforce the appropriate behaviour in order to prevent the offence from occurring in the first place. But since the employee is often the only one charged, any due diligence defence available to the storeowner is irrelevant. You simply can't have your day in court unless you are the one charged.

Not surprisingly, employees are unlikely to tell storeowners that they have been charged—for fear of losing their jobs.

On the commission of a second offence (by this, or any other employee) the punishment is absolute and the store tobacco sales prohibition takes immediate effect. It's important to remember that this may well be the first time the storeowner has even heard that his employee(s) was/were involved in committing an offence. He has had no day in court, no opportunity to defend himself, no chance to deal with a rogue employee, nothing. He and all other entirely innocent employees at this location simply lose their livelihoods.

Now, let's consider the landlord's circumstances. The physical space, both sized and configured for a typical convenience store, is likely not well suited to alternative retail uses. Contracts that a landlord may have with other retailers within a mall location may effectively limit alternative uses altogether. The landlord is forced to sit on a vacated space for the duration of the sales prohibition, bereft of rental income.

I'm certain you are finding it hard to believe that what I'm describing could even be possible. Yet, let me assure you that it is happening right now in Ontario.

Every reasonable person can see the proper fix...

1. Employees have committed an offence when they sell age-restricted products to a minor. Period. Pay the fine and smarten up. Repeated offences trigger escalating penalties. I suppose an available defence should be one of being forced to do so under duress. Perhaps some additional form of defence might be available if the underage purchaser had fraudulently obtained or counterfeited government-issued identification.
2. Storeowners have committed an offence if after several employee convictions within a five-year period they then become subject to vicarious (indirect) liability provisions and are unable to demonstrate an



adequate due diligence defence. The prohibition stays with the person as a storeowner with no punishment transferred to the landlord or franchisor. The cost to a storeowner of not being able to be in his own store (or having to replace himself behind the counter with additional staff) is, by itself, enormous. Repeated offences trigger escalating penalties.

3. Landlords and Franchisors simply shouldn't be able to commit an offence under this act by virtue of any simple association unless they find themselves in the role of employee or storeowner.

There are only two more things that you need to know. The first is that the Smoke Free Ontario Act expressly provides for a due diligence defence. This is a defence based upon an employer doing everything one might reasonably expect to ensure that his employees are compliant with the law. But if the employer (or storeowner) is not charged, he is prevented from rendering this defence.

The second thing you need to know is that this is a relatively recent problem... even though the Smoke Free Ontario Act has been in force for years.

Until about one year ago, the ministry did not seem to grant automatic prohibitions on the sales of tobacco unless two convictions were registered against the storeowner directly. In order to obtain a conviction against the storeowner, his due diligence defence needed to fail. This, of course, seems entirely reasonable to me, and I suspect to most of you.

So what changed? Who decided that a convenience storeowner should be punished without ever having been convicted of committing a crime? And if he did commit a crime, punishing him without having any obligation to listen to his defence or obtain a conviction is just plain wrong.

# WHEN THE PUNISHMENT *REALLY* DOESN'T FIT THE CRIME

