

Compliance and Enforcement Policy Manual

Tobacco Control Act Tobacco Control Regulation

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Approved for public release



Ministry of
Health

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1 Introduction

1.1 Purpose and status of this manual

The purpose of this manual is to provide guidance and best practices to tobacco enforcement officials, who are responsible for administering the:

- [Tobacco Control Act](#) (the “act”); and
- [Tobacco Control Regulation](#) (the “regulation”).

This manual also references legislation and bylaws that may impact enforcement activities. In particular, the following are referenced:

- [Tobacco Tax Act](#);
- [Offence Act](#);
- [Tobacco Act](#) (federal legislation); and
- Local government bylaws.

The manual should be followed unless there are compelling reasons to depart from it. If such circumstances are present, the tobacco enforcement official should consult their supervisor and manager prior to any action. This manual does not supersede the act or regulation and, in the event that any inconsistencies between the manual and the act or regulation, the legislation must be followed.

This manual was prepared by representatives of the Ministry of Health and the regional health authorities, and has been approved for use by each of these agencies. It may be complemented by policies and procedures specific to each health authority.

In this manual, the term ‘tobacco enforcement official’ is used. This term refers to all persons who have been designated as enforcement officers under the act. This can include both tobacco enforcement officers and environmental health officers.

1.2 Overview of the act and regulation

The act and regulation confer powers and impose requirements and restrictions, which are relevant to the work of tobacco enforcement officials. These powers and requirements include:

- restrictions on the sale, distribution, and advertising or promotion of tobacco, including:
 - prohibiting sale of tobacco to minors,
 - prohibiting sale of cigarettes in packages of less than 20, and
 - requiring warning signs at points of sale;



- restrictions on where tobacco products may be sold, offered for sale or distributed;
- restrictions on where tobacco products may be used;
- restrictions on the retail display of tobacco and the advertising or promotion of the use of tobacco by means of a sign or otherwise;
- specifying the powers of enforcement officers, and their right to seize and detain items that may constitute evidence of a contravention or an offence; and
- providing that the minister may enter into information-sharing agreements to share information with officials responsible for administering the *Tobacco Tax Act*.

The act also provides for the designation of an “administrator” who may hold hearings and impose administrative penalties for violations of certain provisions of the act and regulation.

All tobacco retailers must comply with the act as well as any other applicable legislation. For example, a Tobacco Retail Authorization (TRA) or retailer’s permit is issued under the *Tobacco Tax Act*. The retailer must comply with the *Tobacco Control Act* and the Tobacco Control Regulation as contraventions under the act and regulation will impact the retailer permit.

1.3 Roles and responsibilities

Ministry of Health

The Ministry of Health is responsible for the administration of the act and regulation. While most of the day-to-day implementation of these statutes falls to tobacco enforcement officials, the Minister of Health and the ministry are responsible for the legislation and its implementation.

Although the Ministry of Health does not provide direction to the health authorities on a case-specific or day-to-day basis, the ministry does provide stewardship on funding arrangements, and policy development, all of which is supported by the reporting functions as described Section 7 of the manual, ‘*Reporting*’.

Health authorities

The five regional health authorities employ tobacco enforcement officials. These include tobacco enforcement officers and, in some cases, environmental health officers. Tobacco enforcement officials are responsible for the day-to-day enforcement of the act and regulation.



Ministry responsible for administration of the *Tobacco Tax Act*

The Ministry of Finance is presently the ministry responsible for the *Tobacco Tax Act* and its supporting regulations (the ministry responsible can change depending on current government organization). Although the focus of the ministry's work is on tax aspects of tobacco sales, there may be overlap with the work of tobacco enforcement officials in relation to persons who violate either or both of these applicable statutes. The act provides that the Ministry of Health and the responsible ministry may enter into information-sharing agreements. This allows the ministries to exchange information regarding persons who are authorized to sell tobacco at the retail level in British Columbia. (Note: The Ministry of Finance conducts enforcement activities of wholesale tobacco sales under the *Tobacco Tax Act*.)

Health Canada

Health Canada is responsible for the administration and enforcement of the federal *Tobacco Act*. The *Tobacco Act* governs the manufacture, sale, labelling and promotion of tobacco products and includes prohibitions and restrictions regarding these issues. These include but are not limited to the following:

Manufacture:

- Tobacco products must be manufactured in conformity with the standards established by regulations.
- Manufacturers must submit information about tobacco products, their emissions and any research and development related to these tobacco products and emissions.
- The manufacture of cigarettes, little cigars and blunt wraps that contain any of the specified additives set out in the *Tobacco Act* (including most flavouring agents) is no longer permitted, subject to exception provided by the *Tobacco Act*.

Sale:

- Tobacco products may not be furnished to a young person in a public place or in a place to which the public has reasonable access.
- Retailers must post signs that inform the public that the sale or giving of a tobacco product to a young person is prohibited by law, or that contain a prescribed health message unless exempted by the regulations.
- No person must sell a tobacco product by means of a display that permits a person to handle the tobacco product before paying for it, unless exempted by the regulations.
- No person must sell cigarettes, little cigars and blunt wraps that contain any of the specified additives set out in the *Tobacco Act* (including most flavouring agents), subject to exception provided by the *Tobacco Act*.
- No person must sell cigarettes, little cigars and blunt wraps in a package that contains less than 20 units.



Labelling:

- Manufacturers or retailers may not sell a tobacco product unless the package containing it displays information required by regulations about the product, its emissions, and the health hazards and effects arising from the use of the product or its emissions.

Promotion:

- No person must promote a tobacco product or a tobacco product-related brand element except as authorized by the *Tobacco Act* or its regulations.

The federal *Tobacco Act* provides the authority to the Governor in Council to make regulations regarding the manufacture, sale, labelling and promotion of tobacco products. A number of regulations have been made pursuant to the *Tobacco Act*, regarding these issues:

Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)

The Tobacco Products Labelling Regulations (Cigarettes and Little Cigars) stipulate the requirements for the health-related labels that must be displayed on cigarette and little cigar packages.

Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)

The Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms) prohibit the use of the terms "light" and "mild", and variations thereof, on various tobacco products, their packaging, promotions, retail displays, as well as on tobacco accessories.

Tobacco Products Information Regulations

The Tobacco Products Information Regulations stipulate the requirements for the health-related labels that must be displayed on tobacco products other than cigarettes, little cigars and blunt wraps.

Cigarette Ignition Propensity Regulations

All cigarettes manufactured or imported for sale in Canada are required to have a reduced likelihood of igniting upholstered furniture, mattresses and bedding.

Tobacco (Access) Regulations

The *Tobacco Act* prohibits the sale of tobacco products to young persons (18 years of age or less) and requires retailers of tobacco products to post signs that inform the public that furnishing tobacco products to young persons is prohibited by law. These regulations



specify the place, manner, form and content of signs to be posted in retail outlets. The regulations also set out the documentation that may be used to verify the age of the person purchasing tobacco products and exempt duty-free shop operators.

Tobacco Reporting Regulations

Tobacco manufacturers and importers must submit to Health Canada with annual reports which include their sales data, manufacturing information, tobacco product ingredients, toxic constituents, toxic emissions, research activities and promotional activities.

Tobacco (Seizure and Restoration) Regulations

The *Tobacco Act* contains enforcement powers that can be exercised by designated inspectors. Where, in the lawful exercise of those enforcement powers, an inspector seizes a tobacco product or other, its owner may apply to a court for a restoration of the seized product. These regulations outline the restoration procedure under the *Tobacco Act*.

The minister may designate any person or class of persons as an inspector or analyst for the purpose of this *Tobacco Act*. The powers of the inspectors include, but are not limited to, entering any place, other than a means of transportation, in which they believe on reasonable grounds a tobacco product is manufactured, tested, stored, packaged, labelled or sold.

Local government

Local governments may pass bylaws regarding tobacco control, including bylaws that prohibit smoking in certain places. These bylaws may impose requirements that are more restrictive than provincial law.

Local government bylaws are enforced by local government bylaw enforcement officials. Tobacco enforcement officials are not responsible for enforcing local government bylaws unless a specific agreement to this effect has been approved between a local government and a health authority. Such an agreement sets out the delegation of authority to the tobacco enforcement official.

In any case where tobacco enforcement officials are enforcing a local government bylaw for which they have delegated authority, it is essential that they act pursuant to their powers under that bylaw and the relevant local government legislation. Relevant legislation may include the *Local Government Act*, the *Community Charter*, the *Vancouver Charter* or the *Capital Region District Letters Patent* and *Capital Region District Regulation*. The tobacco enforcement official must also give due consideration to any enforcement policy of that local government.



For a list of smoke-free bylaws in British Columbia and elsewhere in Canada, the Non-Smokers' Rights Association offers a database that can be accessed at: <http://www.nsra-adnf.ca/cms/smoke-free-laws-database.html>

Police

Police officers may, from time to time, assist tobacco enforcement officials in dealing with situations in which there is potential risk to health and safety. Police assistance may include accompanying tobacco enforcement officials on inspections, such as surveillance activities, or with seizure activities. Although such assistance is required infrequently, it can be requested in appropriate cases.



2 Guiding principles

Tobacco enforcement officials are encouraged to apply the following guiding principles when using discretion to enforce the act and regulation:

Safety: Tobacco enforcement officials should treat personal safety as their priority, and should assess risk and make appropriate decisions. Whenever tobacco enforcement officials have concerns regarding their personal safety or of those under their care (such as a minor test shopper), they should remove themselves from the situation and seek direction and support from their supervisor.

Progressive enforcement: Enforcement action should be undertaken on a continuum, starting with compliance promotion, progressing to warnings, and finally to the pursuit of various penalties if non-compliance continues (such as administrative penalties, violation tickets, and long-form prosecutions pursuant to the *Offence Act*).

In some circumstances and at the discretion of the tobacco enforcement official, it may be appropriate to move to a more significant response without proceeding through each step of the compliance continuum.

Respect: Tobacco enforcement officials should always treat people with respect and are entitled to be treated with respect in return. Tobacco enforcement officials are not expected to endure physical or verbal abuse.

Courtesy: Tobacco enforcement officials should treat people courteously, even when dealing with a person who may not extend the same courtesy in return.

Responsibility: Tobacco enforcement officials must recognize that they are responsible for enforcing a regulatory regime and they may encounter individuals who react negatively to enforcement activity. Tobacco enforcement officials should clarify their statutory responsibilities under the act and regulation, and explain the reasons for their actions with all persons with whom they are dealing.



3 Promoting voluntary compliance

The first step on the progressive enforcement continuum is compliance promotion, which involves education and outreach to ensure that regulated persons are aware of the laws that apply to them and the means by which they can bring themselves into compliance with the act and regulation. This step is essential since it is often the most successful means of ensuring compliance, and is generally less time-consuming and resource-intensive than responding to an incident of non-compliance after it has occurred.

Tobacco enforcement officials should make it clear that it is ultimately up to the responsible person to ensure their compliance with the act and regulation. Additionally, officials may want to draw attention to the benefits of taking appropriate steps provided by the due diligence defence under Section 2.1 and 2.3 of the act, which may apply to persons who have taken reasonable steps to ensure compliance.

Promoting compliance can take various forms, including:

- circulating educational information to retailers or other persons;
- meeting with retailers and others to discuss the requirements of the act and regulation;
- speaking at schools or other public venues, in accordance with any applicable health authority policy; and
- referring to Ministry of Health website.

4 Assessing compliance

4.1 Authority for assessing compliance

Tobacco enforcement officials are responsible for assessing whether compliance is occurring. The authority of tobacco enforcement officials to undertake inspections and related activities is set out in Section 3 and 4 of the act. These sections provide as follows:

Enforcement officers – Section 3

- (1) *The minister may designate as enforcement officers any persons or categories of persons the minister considers qualified to be so designated.*
- (2) *To carry out the duties of an enforcement officer under this act, an enforcement officer may at any reasonable time enter and inspect any place*
 - (a) *to which the public has access and where tobacco is offered for sale, or*
 - (b) *to which any of sections 2.1 to 2.3 apply.*
- (3) *If an enforcement officer reasonably believes that a contravention or an offence under this act has been committed, the enforcement officer may seize and detain for the purposes of this act any item that may constitute evidence of the contravention or offence if the item is*
 - (a) *in plain view, and*
 - (b) *in a place to which the public has access.*
- (4) *A person must not*
 - (a) *hinder, obstruct or otherwise interfere with an enforcement officer who is acting under this act, or*
 - (b) *knowingly make a false or misleading statement, or provide or produce a false document or thing, to an enforcement officer who is acting under this act.*

Detention or return of things seized – Section 4

- (1) *If an item is detained under section 3 (3), an enforcement officer must give a receipt for the item to the person from whom it was seized and*
 - (a) *promptly return the item to the owner of the item, after making copies or taking extracts from the item insofar as the enforcement officer considers this to be required for the purposes of this act, and the making of copies or the taking of extracts is to be under the supervision of an enforcement officer and at the expense of the person from whom it was seized, or*
 - (b) *retain the item and make it available for review by the person from whom it was seized, if the enforcement officer considers that retention of the item is necessary and reasonable for the purposes of*
 - (i) *an investigation of a contravention or an offence under this act,*
 - (ii) *the imposition of an administrative penalty under section 6.1, or*
 - (iii) *the prosecution of an offence under this act.*



- (2) *A copy made or extract taken under subsection (1), certified by an enforcement officer as a true copy or extract from the original, is admissible in evidence to the same extent as, and has the same evidentiary value as, the item of which it is a copy or from which it is an extract.*
- (3) *On conviction for an offence under this act, an item detained under section 3 (3) in relation to the offence and not returned under subsection (1) is forfeited to the government.*
- (4) *An item that is retained under subsection (1) (b) must be returned to its owner, on written request of that person to the administrator, within 120 days of its seizure, unless*
 - (a) *the administrator considers that the item is required for the purposes of a proceeding under this act, or*
 - (b) *subsection (3) applies.*
- (5) *If the owner of an item that is retained under subsection (1) (b) has not made a written request to the administrator for its return within 120 days of its seizure, the item is forfeited to the government.*

Tobacco enforcement officials must be familiar with these sections and ensure that they respect all terms and limitations. If there are any questions about the legal authority for undertaking a proposed action, the tobacco enforcement official should refer to their supervisor or manager, and legal counsel may need to be consulted. Tobacco enforcement officials should also contact their supervisor or manager if they feel their actions are being imposed on as per Section 3(4) of the act.

The importance of inspection powers and their legal limitations is significant, as a failure to respect them may result in a breach of Section 8 of the *Canadian Charter of Rights and Freedoms* (the “Charter”), which protects persons against “unreasonable search and seizure.” Violations of Section 8 of the Charter could compromise prosecutions and result in legal remedies being awarded against the government.

Finally, seizure powers should only be used when essential to obtain evidence that a contravention occurred. If possible, lesser means to obtain the necessary evidence should be used.

4.2 *Inspection types*

Purpose

Inspections are conducted by tobacco enforcement officials to assess whether a tobacco retailer is violating the act or regulation. Violations may include:

- selling tobacco to minors;
- non-compliance with signage requirements;
- selling individual cigarettes;



- selling packages of less than 20 cigarettes; and
- displaying tobacco products or promotional material in a manner or place prohibited by the regulation.

Three types of inspections can be conducted, and the type depends on the reason for the inspection. These three types are routine, complaint, and minor test shopper inspections.

Routine inspections are conducted by tobacco enforcement officials at the discretion of the health authority without a prior reason. Tobacco enforcement officials may test the retailer for issues like the sale of single cigarettes, compliance to prohibition directives, or smoking infractions. For more information, see Section 4.3 “*Routine inspections*”.

Complaint inspections are conducted by tobacco enforcement officials in response to an allegation that the tobacco retailer has contravened on the act or regulation. Often a formal verbal or written allegation is submitted to the health authority. Tobacco enforcement officials are not expected to undertake a predetermined number of inspections.

Minor test shopper inspections are conducted by tobacco enforcement officials and assisted by minor test shoppers to determine the potential for violations of the act or regulation. Minor test shoppers are young persons who are employed or contracted by the health authority to test a retailer’s willingness to sell tobacco to minors, and who report their findings to a supervising tobacco enforcement official.

Frequency

Limitations on resources and factors such as geographic location may impact the ability of tobacco enforcement officers to inspect a retail establishment with high frequency. However, the frequency of inspections is at the discretion of the health authorities. Considerations should include the compliance history of a particular retailer and the likelihood of future compliance. For example, a retailer with a history of strong compliance and located in a remote geographic location may not require more frequent inspections than a retailer with a poor history of compliance.

Prohibition on offering inducements for non-compliance

During inspections, tobacco enforcement officials must ensure that the retailer or other responsible person has an opportunity to demonstrate whether he or she will or will not comply with the act or regulation. Tobacco enforcement officials must not take steps to induce the person to engage in non-compliance. For example, tobacco enforcement officials may ask to purchase individual cigarettes from a retailer, but should not offer any reward or benefit (beyond the price of the product) to incent the retailer to make such a sale.



It is important that tobacco enforcement officials and minor test shoppers *never* provide false information to a retailer.

Follow-up

If a retailer or other person fails a compliance check, the tobacco enforcement official may take one of the actions for responding to non-compliance as discussed in Section 5 “*Responding to non-compliance*”. The tobacco enforcement official should also record information about action taken in the health authority’s filing system, and identify the retailer or individual as someone who warrants further inspections as discussed in Section 4.2 “*Inspection types*”.

In any case where a tobacco enforcement official chooses a response other than seeking an administrative penalty, issuing a ticket, or pursuing long form prosecution, the tobacco enforcement official may return the tobacco products purchased during the compliance check to the store for a refund as per health authority policy.

4.3 Routine inspections

4.3.1 Where and when to inspect

A routine inspection involves visiting a place for the purpose of assessing compliance, usually without advance notice.

Inspections provide an opportunity to engage in compliance promotion: educating retailers and others on the requirements of the act and regulation, and to help them achieve compliance in a proactive and constructive manner. Inspections may also be used as an occasion to ensure that retailers and others are aware of the potential penalties they face if they contravened on the act or regulation.

Tobacco enforcement officials are encouraged to undertake regular inspections of tobacco retailers, and may also inspect other establishments as discussed in section 4.5 *Complaints about non-compliance*” under “*Places where tobacco sales or use are prohibited*”.

Tobacco retailers

Tobacco enforcement officials are encouraged to conduct routine inspections at each establishment that is authorized to sell tobacco products in their region. As a general practice, these inspections should be conducted as soon as reasonably possible after a tobacco enforcement official learns of a newly licensed establishment.

As discussed in Section 4.2 “*Inspection types*”, the frequency of inspections is at the discretion of the health authorities. However, considerations should include the compliance history of a particular retailer and the likelihood of future compliance.

To obtain a complete list of establishments authorized to sell tobacco within each region, tobacco enforcement officials should contact the Ministry of Health. This information is obtained by the Ministry of Health from the ministry responsible for the *Tobacco Tax Act*, which allows issuance of the TRA certificate. This is pursuant to an information-sharing agreement that is addressed in Section 5.1 of the *Tobacco Control Act*, “*Agreement to obtain information*”.

4.3.2 Materials to bring on an inspection

When conducting routine inspections, tobacco enforcement officials should bring with them materials that assist retailers and others in understanding the act and regulation and promoting their compliance. Such materials include:

- inspection forms and/or checklist established by the health authority;
- warning signs and decals that must be displayed;
- information sheets and guidelines prepared by the Ministry of Health;
- a digital camera;
- copies of the act and regulation; and
- *Tobacco Enforcement Official’s Ministerial Order*.

4.3.3 Explaining that a routine inspection is being conducted

Tobacco enforcement officials should begin a routine inspection by identifying themselves (including showing any picture identification issued by the health authority, if requested), explaining the purpose of the inspection, and explaining the legal authority under which the inspection is being undertaken. Tobacco enforcement officials might ask the store owner, manager or other person in charge whether they have any questions about the inspection. If questions arise, the tobacco enforcement officials should answer them to the best of their ability.

If the owner, manager or other person in charge of an establishment objects to the conduct of an inspection, the tobacco enforcement officials should again explain their legal authority for the inspection with specific reference sections 3 and 4 of the act and regulation see section 4.1 “*Authority of assessing compliance*”. If the person continues to object to the conduct of the inspection, the tobacco enforcement officials should consider the objection, assess whether they believe there is any risk to safety or well-being in proceeding, and take one of the following actions, as appropriate in the circumstances:



- continue the inspection despite the person's objection;
- offer to defer the inspection to allow the person to consult legal counsel; or
- defer the inspection and consult the tobacco enforcement official's supervisor or manager.

4.3.4 What to look for

When conducting routine inspections of authorized tobacco retailers, tobacco enforcement officials should verify owner/operator information, typically by asking to see the TRA issued by the Ministry of Finance responsible for the administration of the *Tobacco Tax Act*. Officials should assess compliance with the provisions of the act and regulation related to:

- required signage;
- minimum package size and prohibition on selling tobacco from an open package;
- restriction on retail displays and promotion; and
- substantially enclosed (note: restaurants and bars may have a Tobacco Retailer Authorization).

To ensure the orderly conduct of inspections, tobacco enforcement officials are encouraged to use an inspection checklist established by their health authority. When using an inspection checklist as an aid, tobacco enforcement officials must ensure that they apply the rules as worded in the act and regulation.

To the extent that interpretation and application of the act and regulation may involve some degree of discretion, tobacco enforcement officials are encouraged to consider the intent of the act.

Operator compliance practices

Tobacco enforcement officials are encouraged to ask the store owner, manager, or employer to provide information on the policy, training, and supervisory steps taken to ensure compliance by all employees and patrons. Tobacco enforcement officials may wish to emphasize the importance of such policy, training, and supervision, as these actions may improve a case of due diligence defence if a contravention is alleged to occur.

When reviewing such matters, tobacco enforcement officials should make it clear that there is no legal requirement for the responsible person to provide this information. Rather, it should be clarified that the request was made with a view to helping the retailer understand what processes might assist in their meeting the obligations under the act and regulation.



4.3.5 Concluding the inspection

At the end of a routine inspection, the responsible person should be informed of the results. In health authorities where a written form is used, the inspection results should be discussed and a copy of the form may be left with the person. In health authorities where inspection results are entered directly into an electronic system, the person should be advised verbally of the results of the inspection, and a hard copy of the results should be provided at the earliest practicable time, if there are any compliance concerns.

In any case where non-compliance is found, a copy of the report should be sent to the retail owner to ensure they are informed of the violation. The tobacco enforcement official should consider taking one of the steps outlined in Section 5 of the manual, “*Responding to non-compliance*”.

In all cases, the information obtained from an inspection should be included in the tobacco enforcement official’s filing system, in accordance with applicable policy and procedures of the health authority. This may include entering the information in the health authority’s electronic database.

4.4 Surveillance

Surveillance is an inspection method, or tool, that can be used in certain circumstances. The term "surveillance" refers to discrete enforcement activities undertaken by tobacco enforcement officials to assess compliance where:

- (a) they have reason to believe that a person is not complying with the act or regulation;
and
- (b) regular methods of inspection are not possible or appropriate in the circumstances.

For example, surveillance may be an appropriate tool in situations where a retailer sells tobacco products only to minors whom he or she knows, who speak a certain language or who lie about their age. Such information may come to the attention of tobacco enforcement officials through complaints from the public, school officials or community policing offices, and therefore is used to verify the veracity of such a complaint.

Preliminary considerations

Before undertaking any surveillance activity, a tobacco enforcement official is encouraged to discuss the situation with their supervisor or manager. The tobacco enforcement official should also consider whether to request police assistance. This may be appropriate in cases in which identification will be demanded from a person who contravenes the act or regulation.



Applicable principles

When surveillance activity is undertaken, the following principles should be considered:

- all surveillance activity must be fully documented;
- tobacco enforcement officials should only undertake surveillance activity with a partner, and under the direction of their supervisor or manager;
- police assistance may be requested if it is considered necessary to demand identification from a person; and
- if concerns about personal safety exist, police should be consulted in advance of the surveillance activity and asked to participate if necessary.

4.5 *Complaints about non-compliance*

Places where tobacco sales or use are prohibited

Tobacco enforcement officials are not expected to conduct inspections of places where tobacco sales are prohibited under Section 2.1 of the act (e.g. various types of public sector buildings), or places where the use of tobacco is prohibited under Section 2.2 and 2.3 of the act (e.g. school property, indoor public places, and indoor work places). However, nothing prevents tobacco enforcement officials from undertaking routine inspections of such places if they believe that it is appropriate to do so in particular circumstances.

Tobacco enforcement officials will typically address compliance issues in such places where concerns have been brought to their attention. Concerns may be raised in the form of complaints by the public, requests for assistance from school officials or employers.

Receipt of complaints

Complaints alleging that violations of the act or regulation occurred may be provided to tobacco enforcement officials verbally or in writing. The complainant should be advised that all complaints are subject to the Freedom of Information and Protection of Privacy act. Tobacco enforcement officials should never refuse a complaint if a complainant refuses to identify themselves. However, discretion should be used when determining the credibility of the complaint and depth of the investigation.

Assessing and responding to complaints

When assessing allegations, tobacco enforcement official should consider any relevant information that may establish the allegation's credibility; this includes information on file about the person or establishment. If the tobacco enforcement official believes the complaint falls within the act or regulation, he or she should develop a complaint response



plan in consultation with their supervisor or manager. Actions within a response plan include:

- completing a complaint inspection to verify whether there is evidence to substantiate non-compliance;
- issuing a warning letter; and/or
- communicating with those expected to demonstrate reasonable care and diligence to ensure individuals do not violate the act while on their premises (this includes dealing with illegal places of sale, tobacco on school property and smoking in or near indoor public place or work places, as outlined in sections 2.1 to 2.3 of the act).

Even if further investigation does not provide evidence of non-compliance, the tobacco enforcement official may consider taking enforcement action as described in Section 5, “*Responding to non-compliance*”, based on the strength of the information provided by the complainant and a history of non-compliance.

In order to prove there was non-compliance to a decision maker, the tobacco enforcement official should consider whether they have sufficient evidence and can provide a strong case for burden of proof. Burden of proof is known as the “balance of probabilities” in administrative hearings and “beyond a reasonable doubt” in court proceedings.

Under certain circumstances, it may be appropriate to proceed with a violation ticket, prosecution, or administrative penalty on the strength of a complaint. For example, a former employee of an establishment may make a complaint about an establishment that is backed by a credible history of tobacco sales to minors. However, the burden of proof is on the tobacco enforcement official and not the establishment referenced in the complaint. For this reason, it is advised that the tobacco enforcement official investigate prior to enforcement actions.

Recording of complaints

All complaints alleging non-compliance with the act or regulation should be recorded and included in health authority files, with specific reference to the establishment or person to whom the complaint relates. The file should also indicate the action taken in response to the complaint, and the outcome.

Providing information about complaints

When undertaking compliance assessment activity in response to a complaint, a tobacco enforcement official should advise the person who is the subject of the complaint that a complaint has been received, though it is not required.

5 Responding to non-compliance

Consistent with the principle of progressive enforcement (discussed in Section 2 of the manual, “*Guiding principles*”), enforcement action should be undertaken on a continuum. When non-compliance is found, the discretion of the enforcement official, in consultation with their supervisor or manager, is relied upon to determine the appropriate response from the range of available options. These options include verbal and written warnings, administrative penalties, violation tickets, and long form prosecutions pursuant to the *Offence Act*.

The exercise of discretion is based on the facts of a particular case. In assessing which option is appropriate, the tobacco enforcement official may consider:

- (a) the severity of the noncompliance at issue; and
- (b) the likelihood of ongoing non-compliance.

More significant responses (i.e. administrative hearing process or tickets) should be considered when a contravention is significant (e.g. sale of tobacco to minors) and there is a likelihood or history of recurrence (e.g. the owner of the store does not accept responsibility for the action of his or her staff). When a contravention is less significant (e.g. partial obstruction of a sign) and the person expresses a willingness to remedy it, it may be appropriate to employ a less significant response (i.e. a verbal or written warning may suffice).

In some situations, enforcement officials may find it appropriate to issue more than one warning before pursuing more formal penalties. In infrequent situations, the enforcement official may consider it appropriate to seek an administrative penalty or issue a ticket on the first finding of non-compliance, without prior warnings.

5.1 Verbal warnings

A tobacco enforcement official may decide that verbal warnings are appropriate if minor violations are found. A verbal warning should be given by stating the contravention, indicating how to avoid the contravention in future and explaining the consequences of non-compliance.

When a verbal warning is given, an inspection report or other written document (as per health authority policy) should be given to notify the retailer of the contravention, and a notation should be made on the file regarding the nature of the contravention, the content of the verbal warning provided, and the person’s response. This process will ensure that tobacco enforcement officials and the retail owner are aware of prior verbal warnings given



to a person. It will also assist tobacco enforcement officials in responding to future non-compliance by the retailer.

5.2 *Written warnings*

Written warnings may be appropriate when the tobacco enforcement official determines that some degree of formality is required in responding to a contravention, but does not consider it necessary to seek a penalty.

Written warnings may be provided by way of a letter or an inspection report as per health authority policy. In drafting warning documentation, tobacco enforcement officials should include the following information:

- the name of the person to whom the letter is directed;
- the date, place and time¹ of the alleged contravention;
- the name of the clerk involved (if known), or a description of that clerk;
- the nature of the alleged contravention;
- the penalties that could be imposed in relation to that contravention if a violation ticket were issued, a court prosecution undertaken or administrative penalty sought;
- notification that the existence of prior written warnings is a factor that may be considered by the administrator in assessing penalties for future contraventions;
- confirmation that no penalty is being sought or imposed at this time;
- an invitation to contact the tobacco enforcement official if the person has any questions concerning the letter, the act or the regulation; and
- if the tobacco enforcement official believes that it would be helpful, a general invitation to contact the tobacco enforcement official.

It is advisable to deliver warning letters as soon as possible after a contravention is noted. Warning or inspection letters may be delivered in person or by mail to the retail owner and, if appropriate, copied to the retail manager. The tobacco enforcement official has discretion as to what delivery method is appropriate.

- If the letter is delivered in person, the tobacco enforcement official is encouraged to take the opportunity to discuss the contents of the letter with the retail owner, and explain the purposes for which it is being provided.
- If the letter is delivered by mail and/or email, the tobacco enforcement official is encouraged to place a follow-up telephone call to the retail owner to confirm receipt and

¹ If the tobacco enforcement official is concerned that identifying the specific time of sale in a warning letter may allow identification of the minor test shopper (e.g. by allowing review of store video tape) they may instead choose to specify a time range during which the sale took place (e.g. between 6:00 and 9:00 p.m.)



discuss the purpose for which the letter was sent. If the letter is sent to a chain store, a copy of the warning letter should also be sent to the head office of the chain.

When a written warning is given, a copy of the warning letter and any response from the person to whom it is addressed should be included in the file for that person or establishment. The file should also indicate when and how the written warning was delivered.

5.3 *Compliance plans*

Compliance plans are created by the owners of tobacco retail establishments. The plans allow an owner to assess and design procedures that will assist their establishment in complying with the act and regulation. Tobacco enforcement officials are encouraged to promote the development of compliance plans; **however, they should not approve or review compliance plans.** The retailer is entirely responsible for determining the establishment's gaps or deficiencies that may result in non-compliance with legislation.

When describing a compliance plan with a retailer, the tobacco enforcement officer should emphasize the following:

- the plan must be created by the retailer; and
- the retailer is entirely responsible and obligated to comply with the act and regulation, and to ensure their establishment follows the legislation.

When considering whether to recommend that the retailer develop a compliance plan, tobacco enforcement officials should be guided by the following principles:

- a compliance plan may be developed at any point, whether or not warnings have been issued or penalties sought or imposed;
- compliance plans are not to be used in exchange for the withdrawal of a ticket or request for administrative penalty; and
- tobacco enforcement officials must clarify that any guidance they provide in the review of a compliance plan does not preclude enforcement action if noncompliance is found to exist in the future.

Any time a tobacco enforcement official should only provide information on developing a compliance plan and emphasize that the retailer is ultimately responsible to ensure that the compliance plan is implemented and working in the business premise.

5.4 Penalties

The act creates two distinct types of penalty processes: the administrative process (administrative hearings) and the civil process (violation tickets or long form prosecution under the *Offence Act*).

The tobacco enforcement official will use discretion in determining which process to pursue, knowing that the penalties that can be imposed through each process are different and may have varying impacts in terms of the deterrent effect.

The administrative penalty system is established via sections 6.1 to 6.6 of the act. This system allows the administrator to impose monetary penalties, and/or to prohibit the sale of tobacco products for a specified period of time, where the administrator finds a person to be in contravention of the act or regulation. This approach also enables other parties to be pursued for violations, such as the employees, officers, directors or agents of a corporation. (Refer to the next section, “*Pursuit of a penalty against an individual and/or a corporation*”.)

While all offences can be pursued under the *Offence Act*, certain offences may also be pursued under the administrative process. A summary of offences, and whether they can be pursued by under administrative process, are shown below:

Table 1. <i>List of offences pursuable under the administrative process.</i>		
Section	Offences	Pursuable via the administrative process?
<i>Tobacco Control Act (Section 12)</i>		
2(2)	Sell tobacco to a person under 19	Yes
2(3)	Sell cigarettes from an open package	Yes
2(4)	Sell tobacco where prohibition order applies	Yes
2.1	Tobacco not to be sold in certain places	No
2.2	No smoking or other tobacco use in schools	No
2.3	No smoking in or near certain places	No
2.4	Prohibitions on display or promotion of tobacco products	Yes
6.4(1)	Recovery of monetary penalty	Yes
10.1	Sign indicating prohibition order	Yes
10.3	Removing tobacco from public display	Yes
<i>Tobacco Control Regulation</i>		
4	Sell cigarettes in packages containing fewer than 20	Yes
5	Fail to display/affix warning signage	Yes

Pursuit of a penalty against an individual and/or a corporation

An individual who personally violates the act or regulation may be subject to a penalty, as are other individuals and entities that are liable to the commission of an offence, such as employees and directors of corporations, and the corporation itself. The individuals and entities that may be subject to penalties vary depending on the violation.

Section 12: Offences. If an employee of a corporate tobacco retailer contravenes one of the provisions listed in Section 12 of the act, the contravention may be pursued as an offence against the employee, an officer or director of the corporation, or both. Section 12 provides, in part, as follows:

- (2) *If a corporation commits an offence under subsection (1) and an officer, director, employee or agent of the corporation directed, authorized, assented to, acquiesced in or participated in the commission of the offence, that individual also commits and is liable to the penalties for that offence.*
- (3) *If an officer, director, employee or agent of a corporation commits an offence under subsection (1) while acting on behalf of the corporation, the corporation also commits and is liable to the penalties for that offence.*
- (4) *For the purposes of subsection (3), a corporation has the burden of proving that an officer, director, employee or agent of the corporation was not acting on behalf of the corporation at the time that individual committed an offence under this act.*

Section 2.1: Tobacco not to be sold in certain places. The act prohibits the dealing in, offering for sale, distribution and sale of tobacco in specified places. It provides, in part, as follows:

- (2) *Subject to subsection (3), if any person contravenes subsection (1) in respect of a place, each manager, owner and lessee of the place is deemed to have contravened that subsection and each is liable for the contravention.*
- (3) *It is a defence to a charge under subsection (2) if the manager, owner or lessee, as applicable, demonstrates that he or she exercised reasonable care and diligence to prevent the contravention.*
- (4) *Subsection (2) applies whether or not the person who dealt in, sold, offered for sale or distributed tobacco, or any other person, is charged with contravening subsection (1).*

Section 2.2: No smoking or other tobacco use in schools. The act prohibits smoking or use of tobacco, or holding lighted tobacco in schools and on school property. It provides, in part, as follows:

- (2) *Subject to subsection (5), if any person contravenes subsection (2), the board, superintendent and principal each are deemed to have contravened that subsection and each is liable for the contravention.*
- (3) *It is a defence to a charge under subsection (4) if the board, superintendent or principal demonstrates that each exercised reasonable care and diligence to prevent the contravention.*
- (4) *Subsection (4) applies whether or not the person who smoked or used tobacco, or held lighted tobacco, or any other person, is charged with contravening subsection (2).*

Section 2.3: No smoking in or near certain places. The act prohibits smoking or the holding of lighted tobacco in and near enclosed public places, workplaces and prescribed places. It provides, in part, as follows:

- (3) *Subject to subsection (5), if any person contravenes subsection (1) in respect of a place described under subsection (1) (a) (i) or (iii), each manager, owner and lessee of the place is deemed to have contravened that subsection and each is liable for the contravention.*
- (4) *Subject to subsection (5), if any person contravenes subsection (1) in respect of a workplace, the employer is deemed to have contravened that subsection and is liable for the contravention.*
- (5) *It is a defence to a charge under subsection (3) or (4) if the manager, owner, lessee or employer, as applicable, demonstrates that he or she exercised reasonable care and diligence to prevent the contravention.*
- (6) *Subsections (3) and (4) apply whether or not the person who smoked tobacco, or held lighted tobacco, or any other person, is charged with contravening subsection (1).*

When tobacco enforcement officials have sufficient evidence to pursue a penalty against more than one person for the same offence, they must avoid the practice of always selecting one category of person rather than another. Instead, the facts of each case must be considered, and exercise of discretion made. This may include consideration of whether a due diligence defence likely exists on the facts of each case.

Due diligence defence

Before any decision is made to pursue a penalty against a person, the tobacco enforcement official may wish to consider whether that person likely has a defence to the contravention on the basis that he or she took reasonable steps to prevent it.

When tobacco enforcement officials consider whether a defence of due diligence could successfully be raised on the facts of any particular case, they will want to consider what guidelines have been developed, the existence of compliance plans, and other relevant



information. Tobacco enforcement officials are encouraged to consult with legal counsel if they have questions about whether or not a particular person would likely be able to avail himself or herself of a due diligence defence.



In particular, it is important to note that:

- Section 2.1 of the act and Section 3 of the regulation provide that it is a defence to a charge of selling tobacco to a minor if the person demonstrates that, in concluding that the individual had reached the age specified by the regulation, the person:
 1. required the individual to produce a passport, driver's license with photo and date of birth of the holder, or an identification card issued by government agency with photo and date of birth of the holder;
 2. examined that identification; and
 3. reasonably believed that the identification was that of the individual and had not been altered or falsified.
- Section 12 of the regulation establishes a defence of due diligence in relation to any matter for which an administrative penalty may be sought. The defence could potentially be relevant to any person, but particularly to persons who own a retail store or are, under the act, responsible for the actions of another person who actually committed the contravention.

Although Section 2.1, 2.2, and 2.3 of the act make people such as managers, owners, lessees, school boards, superintendents, principals and employers liable for contraventions that occur in places they are responsible for, each of these sections also provides a defence to any such person who can demonstrate that he or she "exercised reasonable care and diligence to prevent the contravention."

After guilt is established, the administrator will consider penalties. A tobacco enforcement official may make a submission to the adjudicator on the matter of penalty/penalties.

Section 13 of the regulation requires the administrator to consider the following factors when assessing penalties:

- (a) *whether the person has an ownership interest in the business carried on at the location where the contravention occurred;*
- (b) *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) *if the person is an employee, whether and to what extent the owner or a person retained by the owner to operate the business provides training and monitoring of the person with respect to tobacco sales*

When an administrative penalty is pursued against a person who personally committed a contravention, and the person is an employee who has not received appropriate training and monitoring and has no ownership interest in the establishment, the administrator may exercise his or her discretion to impose a lesser penalty. The administrator may also decide



not to impose a prohibition period, and to impose a monetary penalty against the person who is not the owner but who actually committed the contravention.

Decision on which penalty to pursue

When there are two possible penalties for a contravention of the act or regulation, tobacco enforcement officials must elect whether to pursue an administrative penalty or a prosecution pursuant to the *Offence Act*.

Administrative penalty process: The administrative penalty process is less formal than a court proceeding, and the administrator may impose a penalty if he or she is satisfied “on a balance of probabilities” that the alleged contravention occurred.

Monetary penalties levied after an administrative hearing may be more significant than those available by way of violation ticket. The administrative penalties levied against a retailer could include a prohibition against selling tobacco for a specified period of time.

If the administrative penalty process is pursued, the tobacco enforcement official will be required to write a report to the administrator (see appendices in *Rules for Administrative Hearings under the Tobacco Control Act* at web link [http://www.health.gov.bc.ca/tobacco/under “Current Topics”](http://www.health.gov.bc.ca/tobacco/under%20Current%20Topics)) to request that the process be initiated. Whether to pursue the penalty will be decided by the administrator. If the administrator decides to commence an administrative proceeding, he or she will issue a notice of hearing and the tobacco enforcement official will be required to testify at that hearing, which may be conducted in person, by teleconference or in writing.

Prosecutions process: In determining whether a prosecution pursuant to the *Offence Act* should proceed, enforcement officials must abide by the British Columbia Crown Counsel policies *Charge Assessment Guidelines* and *Charge Assessment - Social Regulatory Offences*. (See the *Crown Counsel Policy Manual* for current policies at web link <http://www.ag.gov.bc.ca/prosecution-service/policy-man/>.)

Tobacco enforcement officials may want to consider the following two options when deciding which penalty to pursue:

1) Violation tickets provide an efficient and straightforward process to prosecute an alleged offender. In many cases, the violation ticket can be issued and served at the time of the alleged offence. The alleged offender may choose not to dispute the violation ticket and a deemed conviction will be entered without the necessity of the offender appearing before the court. If a person contests a violation ticket, it may still be necessary for the tobacco enforcement official to provide a report to Crown counsel, and to secure Crown counsel's agreement to allow the matter to proceed to trial. In certain circumstances, Crown counsel may assume conduct of the prosecution and require the tobacco enforcement official to provide a Report to Crown Counsel. In some Health Authorities, the tobacco enforcement



official or a delegated officer may represent the Crown by preparing the case and act as Crown counsel.

2) Long form prosecutions allow a court to impose penalties of up to \$2,500 and/or three months imprisonment (both of which are double for second and subsequent offenses). In practice, however, courts rarely impose maximum penalties. In order to pursue a long form prosecution, it is necessary to do all of the following:

- (a) complete a report to Crown counsel;
- (b) have Crown counsel approve the charge; and
- (c) provide evidence at trial.

Long form prosecutions should be considered only in extraordinary cases.

5.4.1 Administrative penalties

Certain contraventions under the act and regulation can be pursued under the administrative penalty regime established under the act.

In order for a tobacco enforcement official to seek an administrative hearing, the tobacco enforcement official must complete a report to the administrator. (See appendices in *Rules for Administrative Hearings under the Tobacco Control Act* <http://www.health.gov.bc.ca/tobacco/> under “Current Topics”). The report should be submitted to the administrator as soon as possible after the alleged contravention occurs.

Upon receipt of such a report, the administrator will decide whether to proceed. If the administrator decides to proceed, he or she will give notice to the person(s) against whom the penalty is being sought, and will provide an opportunity for a hearing. The process by which the administrator conducts hearings is set out in the document, *Rules for Administrative Hearings under the Tobacco Control Act*. Tobacco enforcement officials should familiarize themselves with this process and be prepared to participate fully in it. In particular, tobacco enforcement officials should ensure that they are fully aware of and comply with any procedural requirements the administrator may establish regarding disclosure of information or records prior to a hearing, and use of information or records at the hearing.



5.4.2 Tickets

Violation tickets must be completed and issued in accordance with procedures outlined in the ICBC Enforcement Officer's Instruction Manual which can be accessed at web link <http://www.ag.gov.bc.ca/courts/overview/locations.htm>. They can only be issued by persons designated as enforcement officers under Section 3(1) of the act. While enforcement officers have authority to issue violation tickets and prosecute same, Crown counsel always has the authority to intervene at any time and assume conduct of the prosecution.

Violation ticket books must be kept in a secure manner, and tobacco enforcement officials must be able to account for the status of all violation ticket books provided to them. Occasionally, ICBC may request health authorities to undertake a reconciliation of ticket books issued with tickets used or retained by them.

Tobacco enforcement officials should consider specific principles in relation to the use of violation tickets, mentioned below.

- 1) In order to minimize tension or to address safety concerns:
 - where appropriate, the tobacco enforcement official should call the retailer ahead of time to advise that the tobacco enforcement official will be attending to issue a ticket;
 - in any case where it is reasonably anticipated that safety may be at issue, the tobacco enforcement official should consult their supervisor or manager, follow health authority policy, and another enforcement official and/or a police officer should attend; and
 - in any case where concerns about safety remain, issuance of the ticket should be deferred and a manager consulted or until concerns are addressed.

Subject to the points above, tickets should generally be issued at the time a contravention is noted, or as soon as reasonably practicable thereafter. Although a ticket may legally be issued at any time within 12 months of a contravention, all efforts should be made to deliver the ticket in a timely manner.

- 2) The tobacco enforcement official should take steps to confirm the identity of the person to whom the ticket will be issued. Such steps may include:
 - asking the person (at that time or later) for identification;² or
 - asking the retailer to confirm the identity of an employee.

² In any case where identification is requested and the person refuses to provide it, the tobacco enforcement official should seek the assistance of a police officer. Police officers have legal authority to demand the production of identification for tobacco enforcement purposes.



- 3) A tobacco enforcement official should determine the legal name of the entity operating the business. This information may be found posted in the establishment and include the Tobacco Retailer Authorization, tax certificate, tobacco retailer's permit, business license and/or certificate of incorporation. The British Columbia Corporate Registry lists all incorporated businesses. Searches can be conducted through BC OnLine, although a fee applies.
- 4) Tobacco enforcement officials must ensure that they complete all parts of the ticket and specify the offence, the sections of the act or regulation that are alleged to have been contravened, and the penalty established for the contravention in question, as specifically required by the *Violation Ticket Administration and Fines Regulation*, which is made under the *Offence Act*.
- 5) The BLUE copy of the ticket must be served on the person to whom the alleged contravention relates, in accordance with the provisions of the *Offence Act*:

Serving an individual. The ticket must be served by a peace officer or enforcement officer, who must deliver it personally to the person to whom it is directed.

Serving a corporation. The ticket must be served by delivering it to a director, manager, secretary, another executive officer of the corporation or a branch of it. The ticket may also be served on the legal counsel of an extraprovincial company. If the tobacco enforcement official is unclear whether the person in charge of the premises is one of the persons listed above, the tobacco enforcement official should ask this person whether he or she is the person in charge of the establishment at that point in time. The tobacco enforcement official should note the name and position of the person on a Certificate of Service, and also in the officer's notes as the person receiving the ticket on behalf of the corporation.

Serving a partnership. The ticket must be served by a peace officer or tobacco enforcement official by delivering it personally to one of the registered partners.

- 6) The WHITE copy of the ticket must be sent to the Insurance Corporation of British Columbia (after the certificate of service on the back side is completed). A copy of the ticket and certificate of service should first be made and filed in the health authority's filing system.
- 7) The YELLOW copy of the ticket should remain inside the ticket book with the officer's notes and removed at the end of each day; however, some tobacco enforcement officials may choose to leave the ticket in the book, along with the GREEN copy (which is no longer required by the Ministry of Health). While the management of tickets may vary, tobacco enforcement officials should act according to health authority policy.



- 8) If a decision is made to ticket more than one entity (e.g. the corporation that owns a business and the clerk who personally committed the contravention), a separate ticket must be issued to each.
- 9) The tobacco enforcement official is advised to take careful notes about the circumstances of service, including the time and place of service, the name of the person served, a description of the person served and any other relevant facts. Such notes may be helpful in proving that service was affected if service is later challenged.
- 10) A tobacco enforcement official who is having difficulty serving a ticket on a person or corporation should consult his or her supervisor, who may in turn consult legal counsel if necessary.

For further information regarding the issuance and service of violation tickets and related matters, see the *Offence Act*, particularly sections 14 to 18 and 27 to 31.

Ticket withdrawal, cancellation and voiding

A tobacco enforcement official may withdraw a ticket within 30 days of issuance where:

- 1) the official who issued the ticket becomes aware that an error was made on the form of the ticket issued;
- 2) there is no longer a substantial likelihood of conviction; and/or
- 3) a prosecution is no longer in the public interest.

Tickets should not be withdrawn solely because the person to whom the ticket was issued has taken steps or made commitments to achieve better compliance in future.

In any case in which a ticket is withdrawn, the tobacco enforcement official must follow the procedures set out in the Insurance Corporation of British Columbia's Enforcement Officer's Instruction Manual. The tobacco enforcement official must also advise the Manager of Tobacco Control Programs with the Ministry of Health.

ICBC may cancel a ticket due to missing information, incorrect information on the ticket or incorrect service. If a tobacco enforcement official becomes aware of a problem with a ticket after the 30-day period has expired, and no dispute has been filed, he or she is not able to cancel the ticket and he or she should consult ICBC and/or Crown counsel as appropriate.

In any case in which a ticket has been prepared but not issued, it is sufficient to write "void" in large letters across the top, staple all copies of the ticket together, and leave the ticket in the ticket book. This will ensure that all tickets are accounted for.



5.4.3 Reports to Crown counsel

Reports to Crown counsel may be required in two circumstances:

- 1) in any case in which a tobacco enforcement official wishes to proceed by way of long form prosecution (which is rare); and
- 2) in cases in which a violation ticket has been issued and Crown counsel is presenting the case.

Whenever a report to Crown counsel is required it should address the basic requirements of the Crown counsel policy, *Charge Assessment Guidelines*.

If tobacco enforcement officials have any questions regarding the preparation of a report to Crown counsel, they should contact a manager or Crown counsel before submitting the report.

If a report to Crown counsel is prepared, it should be provided to the appropriate contact person for each health authority.

(Note: In any case in which a ticket or charge proceeds through court, the tobacco enforcement official will usually be expected to testify. If, for any reason, the tobacco enforcement official does not expect to be available to testify, they should discuss their availability with Crown counsel at the earliest possible date.)

5.5 Consultation with other agencies

Tobacco enforcement officials are encouraged to consult with their colleagues in related agencies in those cases where the coordination of enforcement activities may assist one or both agencies achieving their statutory mandates.

Tobacco enforcement officials must not use powers under the act solely and specifically for the purpose of assisting an official with a different statutory mandate. For example, tobacco enforcement officials must not exercise their inspection powers under the act solely to assess for potential contraventions of the federal *Tobacco Act* or the provincial *Tobacco Tax Act*.

Therefore, if in the course of their duties, tobacco enforcement officials become aware of an apparent violation of the federal *Tobacco Act*, the provincial *Tobacco Tax Act*, or any relevant local government bylaws, they should refer that information to the appropriate officials from the agency in question.



Tobacco enforcement officials are encouraged to coordinate joint inspections with other tobacco-related officials. Such joint inspections may prove effective in various ways, including ensuring comprehensive messaging and relationship building with retailers concerning tobacco laws, maximizing use of resources and minimizing travel expenses.

5.5.1 Referrals to Health Canada

As of March 31, 2008, tobacco enforcement officials are no longer designated as federal inspectors under the federal *Tobacco Act*. Therefore, provincial inspectors do not have the authority to address contraventions of the federal *Tobacco Act*. Enforcement Officers are required to refer any issues, questions or possible contraventions of the *Tobacco Act* to Health Canada for review and action if required. See appendices for the referral format to Health Canada.

Situations that would require a referral to Health Canada include the following:

- new importer or manufacturer;
- promotion activity, outside of the “retail” environment:
 - newspaper,
 - radio,
 - TV, and
 - events/locations where no tobacco products are sold but are being promoted;
- tobacco products which appear to be in contravention of the labelling requirements of the *Tobacco Act*;
- websites selling tobacco products; and
- head shops - shops that tend to sell rolling papers, blunts and tubes.

The above list is not exhaustive. In instances where tobacco enforcement officials are uncertain as to whether or not the federal *Tobacco Act* would apply, they should contact Health Canada for clarification.

5.6 *Seizure of goods or documents and retention of evidence*

If goods are seized as part of an inspection or compliance check, the seizure must be conducted in compliance with Section 3 and 4 of the act. If tobacco enforcement officials have any questions about their powers to seize and retain evidence, they should consult with their manager before seizing the evidence, or as soon as possible thereafter if prior consultation is not practical.

If evidence is seized or otherwise obtained (including packages of tobacco products purchased by minor test shoppers, or photographs taken by minor test shoppers), it must be securely stored and the chain of custody must remain secure and clear at all times. These



measures are necessary so that tobacco enforcement officials may satisfy a court, if necessary that evidence presented is indeed the evidence that was originally obtained. Steps that should be taken in this regard, and include the following:

- storing evidence in a secure place where access is appropriately controlled; and
- completing an evidence ledger.

6 Preparing for and appearing before the administrator or in provincial court

Tobacco enforcement officials may be called upon to testify during the administrative hearing process or in court if a violation ticket has been contested or if a trial results from a long form prosecution.

Information regarding the timing and location of appearances, and any preliminary steps to be taken will be provided by Crown counsel, the court or the administrator, as applicable.

The administrative hearing process is intended to be less formal than the court process, however, is bound by the rule of law, the principles of administrative fairness as set out in the regulation and common law. As well, procedural rules are set out in the document, *Rules for Administrative Hearings under the Tobacco Control Act*.

Pre-hearing disclosure

The administrator has developed procedural rules governing pre-hearing disclosure of documents and information. Tobacco enforcement officials should provide all information required by the procedural rules of the administrator or requested by the other party (or parties). If there is any information in the file that the tobacco enforcement official believes would not be appropriate to disclose (e.g. confidential informant information, if disclosure might put the informant at risk), the tobacco enforcement official should consult legal counsel or consult with the Health Authority's appointed privacy information officer regarding disclosure.

Persons who dispute a violation ticket or are subject to a long form prosecution may request copies of all of the tobacco enforcement official's records concerning the matter at issue.

In any case in which Crown counsel is involved, the tobacco enforcement official should provide Crown counsel with all relevant information, even if not specifically referred to in the report to Crown counsel.

Organizing the attendance of witnesses

Tobacco enforcement officials may be required to organize the attendance of witnesses such as minor test shoppers in support of their case. If so, additional details will be provided by the administrator or Crown counsel, as applicable.



Tips for testifying

The following are guidelines to help ensure effective and appropriate testimony, whether before the administrator or in court. These guidelines are not exhaustive, and tobacco enforcement officials should draw upon their own expertise and experience when testifying. Tobacco enforcement officials with limited experience as witnesses are encouraged to consult with their colleagues or managers before testifying.

- 1) The tobacco enforcement official should bring a copy of their delegation letter and all relevant documents (including notebook, file notes and correspondence with the defendant) and any physical evidence (such as cigarette packs).
- 2) In administrative penalty hearings, tobacco enforcement officials should also bring written evidence of prior contraventions, as established by:
 - Earlier convictions that were secured either because a ticket was not disputed or because a conviction was obtained following trial;
 - reasons issued in any successful prosecution of the defendant; and
 - prior contraventions found by the administrator against the defendant.
- 3) The tobacco enforcement official will be asked whether he or she wishes to “swear” or “affirm” to tell the truth. The processes are similar in that both involve a solemn promise to tell the truth, but "affirming" does not have religious connotations and does not require the witness to take an oath on the Bible. Both approaches are acceptable, and the tobacco enforcement official should determine which he or she prefers before being called to testify.
- 4) The tobacco enforcement official should address a judge as "Your Honor" and a justice of the peace or judicial justice as "Your Worship". The tobacco enforcement official should refer to the administrator by his or her surname, with the appropriate honorific (Mr. or Ms.).
- 5) The tobacco enforcement official should address the judge or the administrator when answering questions, even if the questions were posed by counsel or the other party.
- 6) The tobacco enforcement official may sit or stand when giving testimony in court (following the swearing or affirmation, when the judge or judicial justice invites the witness to sit). This is a matter of individual choice.
- 7) Before giving testimony, the tobacco enforcement official should familiarize him- or herself with the relevant evidence and the issues that may arise during questioning.



- 8) The tobacco enforcement official should give direct, clear and completely truthful answers to all questions posed. He or she should never be evasive or unwilling to provide answers, even if an answer may be harmful to the case.
- 9) If the tobacco enforcement official wishes to refer in court to his or her notes to assist with recollection of events, he or she must first ask the court's permission to do so. The same practice should be followed when testifying before the administrator.
- 10) If the tobacco enforcement official does not hear or understand a question, he or she should say so and ask to have the question repeated or clarified. This applies whether the question is asked by counsel for the other party, Crown counsel, the judge or the administrator.
- 11) If the tobacco enforcement official still does not understand the question, he or she should ask again. The tobacco enforcement official should not attempt to answer a question that he or she did not fully hear or understand.
- 12) If the tobacco enforcement official has any questions regarding the process for testifying before the court or the administrator, he or she should ask the judge or the administrator.
- 13) Evidence such as photographs, videotapes and tape recordings must be "authenticated" before it will be accepted by a court or the administrator. Such items will be presented as proposed "exhibits," and the tobacco enforcement official should be prepared to explain when, where and how each exhibit was obtained, and what steps were taken since the time it was obtained to ensure that it has remained secure and has not been altered.
- 14) If the tobacco enforcement official considers it necessary to bring audio or visual equipment to support his or her testimony and any proposed exhibits, the tobacco enforcement official should consult in advance with the court or the administrator's office.

Representing the Crown

The enforcement officer will often act as a prosecutor if a violation ticket is disputed; however, Crown counsel may choose to represent the Crown or arrangements may be made for some other representative of the Health Authority to do so. The decision whether to allow someone other than Crown counsel to represent the Crown in such proceedings will be made by Crown counsel considering various factors, including whether the person disputing the ticket intends to be represented by legal counsel and whether the case will be heard by a Provincial Court justice or a judicial justice of the peace.

Enforcement officers acting as prosecutor will require additional training and experience beyond that which applies to appearing as a witness. Health authorities may provide this training along with other support to staff designated to perform this function. See your manager for more information.

7 Miscellaneous

7.1 Complaints about tobacco enforcement officials

If a person complains about the conduct of a tobacco enforcement official, the official should attempt to address the person's concerns. If this is not possible, the complainant should be provided with the name and contact information of the tobacco enforcement official's immediate supervisor, and invited to pursue the matter with the supervisor.

Complaints about health authority staff received by the Ministry of Health will be referred to the health authority's program manager.

7.2 Media enquiries

Tobacco enforcement officials should refer any media inquiries or requests to their supervisor or manager. Response to the media will be determined by health authority policy.

Tobacco enforcement officials are asked to advise the Ministry of Health Tobacco Control Program of media inquiries that may be of interest to the ministry.

7.3 Application of the act and regulation to First Nations and Aboriginal Communities

Provincial laws, such as the act and regulation, apply to First Nations and Aboriginal peoples and reserve lands. Therefore, the act and regulation apply throughout British Columbia; however, the following should be noted:

- Section 2.2(3) of the act provides that the prohibition against smoking or use of tobacco in schools and on school property does not apply to the ceremonial use of tobacco, if the ceremonial use is approved by the school board and is performed in relation to a traditional First Nations and/or Aboriginal cultural activity.
- The act or regulation may or may not apply based on the extent that the act or regulation unjustifiably infringes upon existing First Nations and Aboriginal rights. The answer to this question will depend upon legal analysis and the facts of a particular case. If tobacco enforcement officials encounter situations in which First Nations and/or Aboriginal persons take the position that the act or regulation do not apply to them, legal counsel should be consulted.





Compliance and Enforcement Policy Manual

APPENDICIES

1. Minor Test Shopper - Safety
2. Substantially Enclosed Spaces
3. Assessing Tobacco Sales on Campus
4. Compliance Plan
5. Tobacco Facility Information
6. Tobacco Retailer Report
7. Violation and Warning Notice
8. Exhibit Storage, Disposal and Tracking
9. Referral to Health Canada



8 APPENDIX 1 - Minor Test Shopper Policy - Safety

Minor tests shoppers are young workers as defined by the BC Occupational Health and Safety Regulation (the “regulation”). Young worker means anyone under the age of 25. Young workers have been identified as a higher risk group for work-related accidents by Worksafe B.C. More than 50% of work-related accidents happen during a young worker’s 1st 6 months on the job.

Both new and young workers must be provided safety orientation and training in compliance with sections 3.23 through 3.25 of the regulation. These amendments came into effect on July 26, 2007 and describe orientation and training requirements for young and new workers.

3.23 Young or new worker orientation and training

1. An employer must ensure that before a young or new worker begins work in a workplace, the young or new worker is given health and safety orientation and training specific to that young or new worker's workplace.
2. The following topics must be included in the young or new worker's orientation and training:
 - a. the name and contact information for the young or new worker's supervisor;
 - b. the employer's and young or new worker's rights and responsibilities under the *Workers Compensation act* and this regulation including the reporting of unsafe conditions and the right to refuse to perform unsafe work;
 - c. workplace health and safety rules;
 - d. hazards to which the young or new worker may be exposed, including risks from robbery, assault or confrontation;
 - e. working alone or in isolation;
 - f. violence in the workplace;
 - g. personal protective equipment;
 - h. location of first aid facilities and means of summoning first aid and reporting illnesses and injuries;
 - i. emergency procedures;
 - j. instruction and demonstration of the young or new worker's work task or work process;
 - k. the employer's health and safety program, if required under Section 3.1 of this regulation;
 - l. WHMIS information requirements set out in Part 5, as applicable to the young or new worker's workplace; and



- m. contact information for the occupational health and safety committee or the worker health and safety representative, as applicable to the workplace.

3.24 Additional orientation and training

An employer must provide a young or new worker with additional orientation and training if:

- workplace observation reveals that the young or new worker is not able to perform work tasks or work processes safely, or
- requested by the young or new worker.

3.25 Documentation

An employer must keep records of all orientation and training provided under sections 3.23 and 3.24.

MTS ORIENTATION

Minor Test Shopper health and safety orientations should be provided during the general orientation before the employee commences work. In addition to the general training requirements in this regulation, specific risk reduction instructions should include:

Strategies to reduce Automobile related injury

- Seat belts must be worn at all times when the vehicle is in motion.
- MTS should wear light colored clothing to increase visibility.
- TEO's should avoid parking on the busy streets where the test shopper will have to enter and exit the vehicle.
- Jaywalking is not permitted. Cross at intersections.



17.4 Riding restrictions

A worker must not ride in a vehicle

- (a) in a standing position, unless protected from being thrown off balance, or
- (b) with any part of the body outside the vehicle unless essential to the work process, and then only if the worker is adequately restrained.

17.5 Securing equipment

(1) Materials, goods, tools or equipment carried in a portion or compartment of a vehicle in which workers are riding must be located and secured to prevent injury to the operator or workers.

Strategies to reduce the risk of violence

- TEOs should avoid leaving the MTSs alone for extended periods of time and accompany the MTSs through areas that are poorly lit, isolated, or have a high crime rate.
- The TEO is expected to immediately come to the assistance of the MTS if the retailer or other member of the public shows hostility towards the MTS. Threats or acts of violence should be reported to the police.
- MTSs must be instructed never to engage in a confrontation. They are to leave a store at once and proceed directly to the TEOs vehicle and get in at the first sign of aggressive behavior from a clerk, store owner, or member of the public.
- The MTSs are expected to take direction from the TEO on how the inspections are conducted. The TEO should use discretion and judgment to provide direction where necessary to help safeguard the MTSs personal safety.

Strategies to reduce other injury

- MTSs reporting for work under the influence of alcohol or drugs will be dismissed immediately.



- MTSs must wear clothing while working that is within reason appropriate to the environment; for example, the following are examples of inappropriate clothing:
 - belly tops;
 - miniskirts;
 - muscle shirts; and
 - Sunglasses.
- TEO vehicles should carry a personal first aid kit when possible.
- TEO's should keep the MTS parent/guardian phone numbers on hand.
- MTS must be tested regarding their knowledge and a record kept of this training.



SAMPLE WORKER ORIENTATION CHECKLIST

Employee Name	Date Hired	Date of Orientation
Position (tasks)		
Name of Person Providing Orientation	Position	Health Authority
Name of Supervisor		Phone Number

TOPIC	INIT. (trainer)	INIT. (worker)	COMMENTS
1. Rights and responsibilities (a) General duties of employers, workers, and supervisors (b) Worker right to refuse unsafe work and procedure for doing so (c) Worker responsibility to report hazards and procedure for doing so			
2. Workplace health and safety rules (a) _____ (b) _____ (c) _____ (d) _____			
3. Known hazards and how to deal with them (a) _____ (b) _____ (c) _____ (d) _____			
4. Safe work procedures for carrying out tasks (a) _____ (b) _____ (c) _____ (d) _____			
5. Procedures for working alone or in isolation			
6. Measures to reduce the risk of violence in the workplace and procedures for dealing with violent situations			
7. Personal protective equipment (PPE) what to use, when to use it, and where to find it (a) _____ (b) _____ (c) _____ (d) _____			
8. How to report an illness, injury, or other accident (including near misses)			
9. Emergency procedures (a) Locations of emergency exits and meeting points (b) Locations of the fire extinguishers and fire alarms (c) How to use fire extinguishers (d) What to do in an emergency situation			
10. Where applicable, basic content of the occupational health and safety program (a) What hazardous materials are in the workplace			

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Excerpt - Occupational health and safety training guideline

(a) Name and contact information for the worker's supervisor

The worker must know the identity of the individual(s) responsible for providing work direction to him/her, and how to contact him/her if they are not immediately available. This can be particularly helpful to ensure any ongoing questions in the early period of time on the job are addressed.

(b) The employer's and worker's rights and responsibilities

The worker must be informed about his/her rights and responsibilities and those of the employer under the *Workers Compensation Act* ("act") and this regulation. For example, the worker has the right to be informed about workplace hazards (including WHMIS), the duty to report hazards, the duty to refuse unsafe work, and the right to participate in workplace health and safety activities. The worker should also be advised of the protection from discrimination provisions in the *act*, and provisions related to first aid and reporting any injuries and diseases.

(c) Workplace health and safety rules

The worker must be trained in the workplace health and safety rules applicable to the workplace and the tasks the worker will perform. The rules are expected to address any hazards that the worker may encounter, including various types of controls, such as work procedures, use of personal protective equipment, and the safe means of operating equipment.

(d) Hazards to which the worker may be exposed

The worker must be informed about the hazards he/she could encounter while performing assigned work tasks. Depending on the work setting, these hazards may be physical in nature and involve a risk of injury, or may pose a risk of disease (e.g. when handling a hazardous substance). If a worker is in a location that involves contact with the public, the employer must advise of any risks that may arise, including, as applicable, abusive behaviour, robbery, assault, or other possible confrontation.

(e) Working alone or in isolation

If the worker is assigned to work alone or in isolation, the worker must be trained in the policies and procedures to be followed. Under the requirements of this regulation the employer must set up a system for checking on the well being of the worker. When establishing the system, the employer must consult with the worker on the time intervals to be used. In some cases working alone is linked to a potential for violence in the workplace.

(f) Violence in the workplace

The worker must be provided with orientation and training on the policies and procedures to be followed in the event of violence in the workplace. The worker should be advised of the meaning of the term "violence," which includes any threatening statement or behaviour, and the circumstances in the workplace where a risk of violence may be



present. The worker should be trained in the procedures to follow to eliminate or minimize any risk in such situations, for example, when handling money, and opening or closing the business. He/she should also be trained in the steps to take to eliminate or minimize the risk of injury to the worker in the event of an incident.

In part, this topic is already covered under topics (c), (d), and (e). However, instruction in this topic will ensure that the worker is given an understanding of the overall measures in the workplace for protection from violence.

(g) Personal protective equipment (PPE)

The worker must be provided with appropriate orientation and training in the use and care of any personal protective equipment or clothing that the worker is required to use to safely perform his/her work. This is also a requirement under [Part 8](#) of the regulation, and will help the worker meet his or her obligations to use PPE properly (i.e. listening devices, panic button).

(h) Location of first aid facilities, the means of summoning first aid, and reporting illnesses and injuries

The worker must be advised of the location of first aid facilities, the identity of the first aid attendant(s), and how to summon an attendant. This topic also covers the employer's obligation to inform the worker of the procedures to follow to report an illness or injury to WorkSafeBC.

(i) Emergency procedures

The worker must be advised of potential emergency situations that could occur in his/her work location, and trained in the procedures to follow. This topic is a companion to topic (h) on first aid, and addresses other aspects of emergency response, such as evacuation in the event of fire, or if hazardous substances are handled, how to contain a spill of the substance.

(j) Instruction and demonstration of the worker's work task or work process

The worker must be provided with both instruction and demonstration - not simply a verbal description - of work tasks that the worker will be required to perform when he/she begins work. Further training may be required as new tasks are assigned.

The demonstration should address the aspects of the work that will involve safety risks if not performed correctly. For example, if the worker will be operating a piece of mechanical equipment, the employer will need to ensure that all safety points are demonstrated, including the use of guarding and other safety devices, means of equipment start-up, and how to follow safe operating procedures.

(k) The employer's occupational health and safety (OHS) program

Under this topic the employer is expected to provide an orientation to the OHS program in the workplace. If a program is required under Section [3.1](#) of the regulation the orientation



would describe the program elements, which are outlined in Section [3.3](#) of the regulation, and how they are implemented. If, for a small workplace, the program is less formal, then the orientation would be on the elements of the program outlined in Section [3.2](#).

(m) Contact information for the joint occupational health and safety (OHS) committee, or worker health and safety representative

If applicable, the employer must inform the worker on how to contact the joint OHS committee, or the worker health and safety representative.

Delivering the orientation

The employer must determine how to deliver the orientation and training to the worker.

However, there are a number of options to consider.

- ***Address topics according to applicability:*** As previously noted, some topics listed in Section 3.23 may not be applicable in a given workplace. The employer can adjust the orientation accordingly.
- ***Organize topics into groups:*** Section 3.23 requires that applicable topics be covered in the orientation or training, but not necessarily as separate items. The employer can organize the orientation or training in any manner, as long as the content intended by the topics is addressed. For example, three of the topics involve contact information, and could be presented as a unit. Two of the topics (first aid and emergency procedures) involve a common theme of emergency response. The topics on working alone and violence often cover aspects of the same issue, and could be presented together. Other combinations are also possible.
- ***Use generic instruction and orientation coupled with site-specific information:*** Information on some of the topics listed in Section 3.23 may be applicable from one workplace to another while site-specific instructions will only apply at the worksite in question. Generic instruction and orientations can serve as a good basis on which an employer can add employer or site-specific information. Generic instruction and orientation, coupled with site-specific information can be particularly useful where a worker is performing the same work under different circumstances. Examples include circumstances where:
 - Employers have with a number of workplaces;
 - The industry has highly mobile workers, such as in construction; and
 - Workers are performing casual or temporary work, such as substitute teachers.
- In determining the right combination of generic and site specific topics that will meet the requirements of Section 3.23, the circumstances of each scenario need to be considered. By way of example, generic topics for workers under the above noted circumstances could include
- Employer and worker rights and responsibilities



- Employer's occupational health and safety program
- Generic aspects of WHMIS
- Personal protection equipment
- Topics that will be site specific include:
 - Workplace health and safety rules;
 - Name and contact of supervisor;
 - Location of first aid facilities; and
 - Emergency procedures.
- Generic instruction and orientation could be provided at a corporate or district level. In some cases workers could carry documentation as proof that they have received generic orientation for their respective occupation or trade. Generic orientation and training that includes an expiry date will help ensure that workers receive up to date information.

9 APPENDIX 2 - Assessing Enclosed Spaces

The purpose of this document is to provide guidance for tobacco enforcement officials when determining whether “a building, structure, vehicle or other place” is “substantially enclosed” within the meaning Section 2.3 of *Tobacco Control Act* (the “act”) and Section 4.2 of the Tobacco Control Regulation (the “regulation”).

The duty to demonstrate compliance is that of the owner, who has the responsibility to determine, calculate, and demonstrate to the tobacco enforcement official that they are in compliance.

Section 2.3 of the act provides [emphasis added]

- 2.3 (1) Subject to subsection (2), a person must not smoke tobacco, or hold lighted tobacco:
- (a) in any building, structure, vehicle or any other place that is fully or substantially enclosed and
 - (i) is a place to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry,
 - (ii) is a workplace, or
 - (iii) is a prescribed place, or
 - (b) within a prescribed distance from a doorway, window or air intake of a place described in paragraph (a).

Section 4.2 of the regulation provides [emphasis added]

- 4.2 (3) For the purposes of section 2.3 of the act, a building, structure, vehicle or any other place is fully or substantially enclosed if
- (a) it has a roof or other covering, and
 - (b) more than 50% of the nominal wall space is enclosed by any material that does not permit air to flow easily through it.
- (4) For the purposes of subsection (3), the “nominal wall space” is the area determined by calculating the length, in metres, of the perimeter of the building, structure, vehicle or place, and multiplying it by 2.7 metres.

Instances where tobacco enforcement officials will be called upon to determine if a building, structure, vehicle or place is substantially enclosed will generally involve outside smoking areas that have been altered with some type of roof and walls to protect against weather. It is these situations that this policy will address.

The definition of “substantially enclosed” is a two-part definition. In order for tobacco enforcement officials to determine that a building, structure, vehicle or place is substantially enclosed the area in question must have a “roof or other covering” and at least 50% of the nominal wall space of the area in question must be enclosed “by any



material that does not permit air to flow easily through it". It is not sufficient that only one of these requirements is present, both must be.

“Material that does not permit air flow easily through it” is considered to be a material that reduces air flow by 15% or more. For example, bug screens of 1/8th or 1/16th an inch are **not** appropriate as they reduce air flow by 18% and 26% respectively. However, bug screens of 1/4th an inch **are** appropriate as they reduce air flow by 6%.

Part 1) “roof or other covering”

If a building, structure, vehicle or place has no “roof or other covering” then it is not “substantially enclosed”. The presence of a “roof or other covering” is a requirement for a building, structure, vehicle or place to qualify as “substantially enclosed”.

Generally, the determination of whether a building, structure, vehicle or place has a “roof” will be relatively straight forward. Any wooden or metal structure covered with roofing shingles, tar paper, sheet metal, ceramic tile or other typical roofing materials will be considered a “roof”. The common feature of a typical roof is that it protects against the weather and, of importance for this determination, does not permit air to flow easily through it.

In situations where a building, structure, vehicle or place does not have a typical roof but is covered with a plexiglass cover, an awning, a tent or other type of covering, the extent to which the particular covering does not permit air to flow easily through it will be a guiding factor in determining whether that cover can be considered an “other covering” within the meaning of Section 4.2 of the regulation. Covers that do not permit air to flow easily through it qualify as “other coverings”.

Types of coverings (apart from typical roofs) that would likely qualify as an “other covering” include:

- coverings made from plexiglass, tempered glass, glass or plastic materials; and
- awnings and tent-like covers made from a material that does not allow air to flow easily through. Typically, these coverings will be made from a type fabric that is coated with a material that does not allow air to flow easily through it.

A covering with large spaces between the material comprising the covering, such as wood lattice or woven wood panels, would not qualify as an “other covering” as the spaces between the wood would allow air to easily pass through. Similarly, individual tables covered by umbrellas affixed to each table would likely also not qualify as an “other covering”.

However, a number of large umbrellas that are each made from a material that does not permit air to flow easily through it, and together, cover a substantial amount of a patio



could qualify as an “other covering” if, in the opinion of the tobacco enforcement official, the umbrellas make it difficult for smoke to escape from the patio area (see below for a fuller discussion on partial roofs and other coverings).

The above examples of “other coverings” are provided for illustrative purposes only, and are not intended to be determinative or exhaustive. Tobacco enforcement officials will have to consider each situation on a case by case basis having regard to the unique facts presented by each in determining whether they meet the requirements of the definition of “substantially enclosed.”

A building, structure, vehicle or place need not be completely covered by a “roof or other covering” to be qualify as “substantially enclosed”. Generally speaking, the more a building, structure, vehicle or place is covered by a “roof or other covering” the greater the likelihood that it will qualify as “substantially enclosed”.

Again, tobacco enforcement officials will have to consider each situation on a case by case basis having regard to the unique facts presented by each in determining whether they meet the requirements of the definition of “substantially enclosed”. A guiding factor for tobacco enforcement officials in this regard will be the degree to which the covered portion of the building, structure, vehicle or place makes it difficult for smoke to escape from the building, structure, vehicle or place. The goal is to allow air to move, thereby removing smoke from the building, structure, vehicle or place in question. Therefore, the more that a building, structure, vehicle or place is covered by a “roof or other covering” the greater the likelihood that that air will not easily move out of the area in question.

In situations where a patio is partially covered and partially uncovered, tobacco enforcement officials may divide the patio into two separate areas – covered and uncovered – and then apply the two-stage “substantially enclosed” test to both areas individually. Following this approach, a covered portion of a patio may be found to be “substantially enclosed” (depending on how the walls are constructed), while the uncovered portion may not. Smoking could be prohibited in the covered patio area and permitted in the uncovered area. In making this determination, tobacco enforcement officials will have to be guided by the unique facts presented by the particular situation, including whether or not more than 50% of the nominal wall space of the covered patio area is enclosed by any material that does not permit air to flow easily through it.

Part 2) “more than 50% of the nominal wall space is enclosed by any material that does not permit air to flow easily through it”

If there is a roof or covering, as set out under sec. 4.2 of the regulation, then the next step is to determine if material that is enclosing the perimeter of the building, structure, vehicle or place in question “does not permit air to flow easily through it”.

Materials that would typically qualify here include:

- solid panels made from plexiglass, tempered glass, glass, plastic materials, cement, concrete, brick or wood;
- planters or dense shrubbery; and
- canvass or other fabrics coated with a material that does not easily permit air to pass through it;

It is unlikely that a fence or wall comprised of panels that have large spaces between the material comprising the covering, such as wood lattice or woven wood panels, would qualify as the spaces between the wood would allow air to easily pass through.

The above examples are provided for illustrative purposes only, and are not intended to be determinative. Tobacco enforcement officials will have to consider each situation on a case by case basis having regard to the unique facts presented by each in determining whether the material in question “does not permit air to easily flow through it”.

If a tobacco enforcement official determines that the material in question indeed “does not permit air to flow easily through” the next task is to determine whether or not “more than 50% of the nominal wall space of the building, structure, vehicle or place” in question is covered by such material. To determine the nominal wall space:

- Step 1: Measure the length, in metres, of the walls of the building, structure, vehicle or place in question, and multiply that figure by 2.7³. This will give you the total nominal wall space.
- Step 2: Multiply the total nominal wall space by 50%.
- Step 3: Determine the total area (length x height) of the wall space that has material that does not permit air to flow easily through it (does not include open spaces between, below or above the panels of the material in question).

³ For the purpose of determining the “nominal wall space” of a building, structure, vehicle or place Section 4.2(4) of the regulation sets a standard wall height of 2.7 metres. In situations where, for instance, a roof covering a patio is 2.5 metres high or 4 metres high, the deemed standard wall height of 2.7 metres, and not the actual wall height, is to be used for the purpose of determining the “nominal wall space”.



Step 4: If the number that results from Step 3 is greater than the number that results from Step 2, then “more than 50% of the nominal wall space of the building, structure, vehicle or place is enclosed by any material that does not permit air to flow easily through it” and, as such, would qualify for the definition of “substantially enclosed”.

Examples

Below are some illustrative examples regarding the determination of whether a patio would qualify as “substantially enclosed” within the meaning of Section 2.3 of the act and Section 4.2 of the regulation. The following examples are provided for illustrative purposes only, and are not intended to be determinative. Tobacco enforcement officials will have to consider each situation on a case by case basis having regard to the unique facts presented by each in determining whether the building, structure, vehicle or place is “substantially enclosed”.

When there is no roof or covering over a patio:

- A patio does not have a “roof or other covering”.

In this example, the patio would not qualify as “substantially enclosed” as it does not meet the “roof or other covering” requirement. Smoking would be permitted in the patio area.

When there is a roof or covering completely covering a patio:

- **Example 1:** A patio is (1) 100% covered by a “roof or other covering” and (2) has a perimeter, the nominal wall space of which is less than 50% enclosed with “a material that does not permit air to flow easily through it”.

In this example, the patio would not qualify as “substantially enclosed” as the 50% nominal wall space requirement is not met. Smoking would be permitted in the patio area.

- **Example 2:** A patio is (1) 100% covered by a “roof or other covering” and (2) has a perimeter, the nominal wall space of which is more than 50% enclosed with “a material that does not permit air to flow easily through it”.

In this example, the patio would qualify as “substantially enclosed” as both requirements of the definition have been met. Smoking would be prohibited in the patio area.

When there is a roof covering a small portion of a patio:

- A patio is (1) 25% covered by a “roof or other covering” and (2) more than 50% of the nominal wall space of the covered area’s perimeter is enclosed by “a material that does not permit air to flow easily through it”.

In this example, it is unlikely that the entire patio would qualify as “substantially enclosed”; however, a tobacco enforcement official could divide the patio into two areas – covered and uncovered – and then apply the two-stage “substantially enclosed” test for each area. Following this approach, the uncovered patio area would not qualify as “substantially enclosed” because it does not have a “roof or other covering”, while the covered patio area alone could qualify as such as both parts of the “substantially enclosed” test are met. Smoking could be prohibited in the covered patio area, but permitted in the uncovered area.

When there is a roof covering half of a patio:

- A patio is (1) 50% covered by a “roof or other covering” and (2) less than 50% of the nominal wall space of the covered area’s perimeter is enclosed by “a material that does not permit air to flow easily through it”.

As with the previous example, it is unlikely that the entire patio would qualify as “substantially enclosed”; however, a tobacco enforcement official could again divide the patio into two areas – covered and uncovered – and then apply the two-stage “substantially enclosed” test for each area. Following this approach, the uncovered patio area would not qualify as “substantially enclosed” because it does not have a “roof or other covering”, and the covered patio area would also not qualify as it does not meet the nominal wall space requirement. Smoking would be permitted in the entire patio area.

When there is a roof covering more than half of a patio:

- A patio is (1) 75% covered by a “roof or other covering”, (2) has an outer perimeter, the nominal wall space of which is more than 50% enclosed with “a material that does not permit air to flow easily through it”, and (3) more than 50% of the nominal wall space of the covered area’s perimeter is enclosed by “a material that does not permit air to flow easily through it”. Where more than half of a patio is covered by a “roof or other covering” a tobacco enforcement official may apply the “substantially enclosed” test to the entire patio area, rather than dividing it into two areas. Following this approach, the covering in this example could qualify as a “roof or other covering” if, in the opinion of the tobacco enforcement official, based the unique facts of the particular situation, the “roof or other covering” makes it difficult for air (smoke) to easily move out of the patio area as a whole. The nominal wall space requirement is met in this instance. Smoking could be prohibited



in the entire patio area depending on the tobacco enforcement official's determination regarding the "roof or other covering".

If it is determined that the entire patio is not "substantially enclosed" a tobacco enforcement official could still divide the patio into two areas – covered and uncovered – and then apply the two-stage "substantially enclosed" test for each area. Following this approach, the uncovered patio area would not qualify as "substantially enclosed" because it does not have a "roof or other covering", while the covered patio area could qualify as such as both parts of the "substantially enclosed" test are met. Smoking could be prohibited in the covered patio area, but permitted in the uncovered area.

Again, the above examples are provided for illustrative purposes only, and are not intended to be determinative. Tobacco enforcement officials will have to consider each situation on a case by case basis having regard to the unique facts presented by each in determining whether the building, structure, vehicle or place is "substantially enclosed".



10 APPENDIX 3 - Assessing Tobacco Sales on Campus

The purpose of this document is to provide guidance for tobacco enforcement officials when determining whether tobacco cannot be sold on a campus of a public university or other public post-secondary institution pursuant to Section 2.1 of the *Tobacco Control Act* (the “act”).

Section 2.1 of the act provides:

2.1 *A person must not deal in, sell, offer for sale or distribute tobacco in any of the following places:
[...]
(b) the campus of a public university or other public post-secondary institution;*

The term “campus” is defined in Section 4.1 of the Tobacco Control Regulation (the “regulation”) which provides:

4.1 *"campus" means property or part of a property that is*

- (a) owned or leased by, or operated under the authority of, a public university or other public post-secondary institution, and*
- (b) used primarily for the purposes of
 - (i) delivering educational programs or other learning programs,*
 - (ii) research,*
 - (iii) providing student services, or*
 - (iv) providing services by affiliated student organizations,**

and includes real property and improvements, personal property and, if the property includes common areas between improvements, the common area.;

Three-Step Analysis

The framework for the prohibition from selling tobacco on a campus of a public universities or post-secondary institution provides for a three-step analysis. All three questions included in the analysis must be answered in the affirmative in order for the prohibition to apply.

Step 1: Is the university or post-secondary institution in question ‘public’?

- If no, then the prohibition does not apply.
- If yes, then the analysis proceeds to Step 2.

Step 2: Is the property upon which the tobacco is being sold from owned or leased by the university or post-secondary institution, and if not, is the property in question



nonetheless operated under the authority of the university or post-secondary institution?

- If no to all parts of this question, then the prohibition does not apply.
- If yes to any part of this question, then the analysis proceeds to Step 3.

Step 3: Is the property upon which the tobacco is being sold from ‘used primarily for the purposes of’

- (i) **delivering educational programs or other learning programs,**
- (ii) **research,**
- (iii) **providing student services, or**
- (iv) **providing services by affiliated student organizations?**

- If no, then the prohibition does not apply.
- If yes, then the prohibition applies, and tobacco cannot be sold from the location in question.

Step 1: Is the university or post-secondary institution in question ‘public’?

Public universities and public post-secondary institutions are created by provincial legislation, and include universities, colleges and institutes. Tobacco enforcement officials should ensure the status of an institution as part of their assessment of the application of the prohibition.

At time of update, the Ministry of Advanced Education, Innovation and Technology and Responsible for Multiculturalism provides leadership to the public post-secondary education system, and also regulates private career training institutions. The Ministry maintains lists of public institutions on its website. (At time of update: <http://www.aved.gov.bc.ca/publicpsed/welcome.htm>.)

If the university or post-secondary institution in question is public, then the tobacco enforcement official proceeds to Step 2 of the analysis.

Step 2: Is the property upon which the tobacco is being sold from owned or leased by the university or post-secondary institution, and if not, is the property in question nonetheless operated under the authority of the university or post-secondary institution?

The term ‘campus’ as defined in the regulation includes real property (i.e. land), improvements (i.e. buildings and structures), common areas between improvements (i.e. courtyards, patios, walkways etc.) and personal property (i.e. this could include a vehicle or cart from which tobacco could sold). In general, tobacco enforcement officials will be faced with situations where tobacco is being sold from a retail establishment located inside a building that is located on the campus of the university or post-secondary institution.



However, the definition of the term ‘campus’ is broad enough to encompass situations where tobacco is being sold from a kiosk, cart or vehicle within the common areas between buildings located on a campus.

In determining whether the property in question is owned or leased by, or operated under the authority of the university or post-secondary institution, tobacco enforcement officials are encouraged to contact the administration of the university or post-secondary institution to ascertain such.

If the property in question is owned by the university or post-secondary institution, but leased to a third party, such an arrangement would still satisfy this part of the analysis.

If tobacco is being sold from a vehicle, cart or other type of personal property that is not owned or leased by the university or post-secondary institution, but the vehicle, car or personal property in question is located on real property that is owned or leased by, or operated under the authority of the university or post-secondary institution, such an arrangement would satisfy this part of the analysis.

If the tobacco enforcement official determines that the property in question is not owned or leased by, or operated under the authority of the university or post-secondary institution, then the prohibition does not apply. If, however, the tobacco enforcement official determines that the property in question is owned or leased by, or operated under the authority of the university or post-secondary institution, then he or she proceeds to Step 3 of the analysis.

Step 3: Is the property upon which the tobacco is being sold from ‘used primarily for the purposes of’

- (i) delivering educational programs or other learning programs,**
- (ii) research,**
- (iii) providing student services, or**
- (iv) providing services by affiliated student organizations?**

This part of the analysis requires the tobacco enforcement official to determine what the *primary* purpose of the property in question is. If the property is primarily being used for one or more of the four stated purposes in Section 4.1 of the regulation, then this part of the analysis is satisfied and the prohibition would apply. If the property is not being used primarily for one or more of the four stated purposes, then the prohibition would not apply and tobacco can be sold from that particular location. The focus here is on the ascertaining whether the *primary, main or principal* use of the property (as opposed to its exclusive use) is consistent with one or more of the stated purposes.

Generally, tobacco enforcement officials will be faced with situations where tobacco is being sold from a retail establishment inside a university building. In these situations, tobacco enforcement officials will have to look at the entire building in question and



determine whether it is being primarily used for one or more of the four stated purposes. This will involve ascertaining what the other parts of the building are being used for, and then, by considering all of the building's purposes as a whole, determining what the primary use of the building in question is.

The following examples are provided for illustrative purposes only:

Example 1

A public university owns a building that contains six commercial tenants that each leases their space from the university. The building contains a video store, pub, restaurant, stationary store, grocery store and a drug store. 100 % of the buildings floor space is used by the commercial tenants. Tobacco is sold at the grocery store.

In this example, looking at the building as a whole it cannot be said that it is used primarily for one or more of the four stated purposes. Rather, it is being used primarily (and, in this example, exclusively) for commercial purposes. As such, tobacco could be sold here.

Example 2

A public university owns a building that contains four lecture halls, 10 classrooms, three study areas, a computer lab for use by students, two research facilities, 20 offices for professors and teaching assistance and one small corner store that sells tobacco. The corner store only comprises three percent of the total floor space of the building.

In this example, looking at the building as a whole it can be said that it is primarily being use for one or more of the stated purposes. With the exception of the corner store, all of the other purposes of the building are for one or more of the stated purposes. Additionally, 97% percent of the building floor space is being used for one or more of the stated purposes. As such, tobacco cannot be sold here.

The above two examples are fairly straight forward, representing examples at either end of the spectrum. The determination of a building's primary purpose gets more difficult when there is a more balanced mixture of one or more of the stated purposes and other purposes within a single building. In situations such as these, tobacco enforcement officials can take guidance from comparing the square footage of the building that is being used in furtherance of one or more of the stated purposes to the square footage of the building that is being used for another purpose. In the general, the more of a building's square footage that is being used for one of the stated purposes, the more likely it is that it can be said that the building is primarily being used for one or more of the stated purposes.

If, after concluding this part of the analysis, the tobacco enforcement official determines that the property in question is primarily being used for one or more of the four stated purposes in Section 4.1 of the regulation, then this part of the analysis is satisfied and the prohibition would apply. If, on the other hand, it is determined that the property is not



being used primarily for one or more of the four stated purposes, then the prohibition would not apply and tobacco can be sold from that particular location.



11 APPENDIX 4 – Compliance Plan

Date

Dear Sir/Madam:

SAMPLE LETTER

Re: Tobacco Compliance Plan

It has come to our attention that there has been a recent occasion where you or a worker in your premises sold tobacco to a minor test shopper employed by the local Health Authority. It is important to take this opportunity to remind you of the potential consequences of contraventions under the *Tobacco Control Act* and Tobacco Control Regulation, as well as to provide you information on developing a compliance plan.

As a retailer, the onus is on you to ensure that you and all staff members are well trained and knowledgeable of the requirements for tobacco sales. It is also important to be aware of the consequences when retailers and their employees contravene the provincial *Tobacco Control Act* and Tobacco Control Regulation and commit an offence. You and your staff should be encouraged to review the information provided by the health authority. Information is available at the Ministry of Health's website at www.health.gov.bc.ca/tobacco.

There are two penalty options that may be imposed for retailers and their staff who violate the *Tobacco Control Act* and Tobacco Control Regulation. They could receive:

- a violation ticket for \$575, or
- a penalty under the Administrative Penalty Process.

First convictions under the Administrative Penalty Process could result in a fine of up to \$1000 and/or a tobacco sales prohibition up to 30 days. For subsequent convictions, penalties can increase up to \$3000 and/or a 180-day tobacco sales prohibition.

A compliance plan is a set of written policies, practices and procedures to demonstrate how you as a retailer will prevent tobacco sales to minors. The objective is to protect the health of children and youth by prohibiting the sale of tobacco to persons under 19 years of age. It is ultimately **up to the retailer to ensure compliance with the act and regulation.**

Actions that may form a part of the compliance plan for your business include, **but are not limited to**, the following:

- Provide written policies, practices and procedures on what your business will do to prevent tobacco sales to minors.



- Provide appropriate training and education to employees so they understand and are capable of performing according to the established policies, practices and procedures.
- Keep written documentation of staff training and monitoring actions, including:
 - a) Test employees to ensure that they fully understand the regulations and your business policies, practices and procedures;
 - b) Test employees on determining and calculating age from ID produced by contractors hired by you, as a compliance check on your staff;
 - c) Monitor employees using video surveillance or store employed test shoppers to ensure they are following the compliance plan.

- Post signs advising ID will be requested if customers look 25 years of age or less.
- Limit sale of tobacco to one till or service desk and use clerks who are reliable and have a good judgment on when to ask for ID and how to check ID (for example, older clerks).
- Use birth date prompting to ensure your staff is well aware of which date they should be looking for in order to sell tobacco.
- Provide a calculator at the cash register for ease of calculating age of customers.
- Hold regular information meetings to reiterate the compliance plan to your staff.
- Outline of the consequences for staff who sell to minors.

Please note that **it is the business owner's responsibility to ensure that the compliance plan is implemented and working in the business premise.** In addition, be advised that having a compliance plan does not indemnify you from future ticketing/prosecution/Administrative penalties should your business be found to have sold tobacco to a minor.

In order to help prevent minors from accessing tobacco in your store, it is recommended that you develop and implement a compliance plan for the sale of tobacco. If you decide to implement or modify an existing plan, it is important to inform your staff of any changes that you will be making with respect to tobacco sales.

Sincerely,

[Insert Name]
Tobacco Enforcement Officer
Tobacco Enforcement Program:
XXX Health Authority



12 APPENDIX 5 – Tobacco Facility Information - Form

Link to fill enabled form:

[Tobacco Facility Information form- HLTH 3333](#)



13 APPENDIX 6 – Tobacco Retailer Report - Form

Link to fill enabled form:

[Tobacco Retailer Report form - HLTH 3339](#)



14 APPENDIX 7 – Violation and Warning Notice - Form

Link to fill enabled form:

[Violation and Warning Notice for Tobacco Retailers form - HLTH 3334](#)



15 APPENDIX 8 – Exhibit Storage, Disposal and Tracking - Form

Link to fill enabled form:

[Exhibit Storage, Disposal and Tracking form - HLTH 3338](#)



16 APPENDIX 9 – Referral to Health Canada – Form

Link to fill enabled form:

[Referral to Health Canada form - HLTH 3340](#)