

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

Regarding an alleged Contravention of Section 2(2) of the  
*Tobacco Control Act* R.S.B.C. 1996, c.451

- by -

Kelland Foods LTD. (d.b.a. Quality Foods – BC0844618),  
Tracey Benisch, Clerk at Quality Foods  
(the “Respondents”)

Administrator’s Delegate under Section 5 of the <i>Tobacco Control Act</i> :	Hugh McCall
Date of Hearing:	October 15 and 16, 2012
Place of Hearing:	Nanaimo, British Columbia
Final submissions completed:	November 5, 2012
Date of Decision:	December 2, 2012
Appearing:	
For Kelland Foods LTD.	David Perry, Counsel
For Tracey Benisch	Self-represented
For Vancouver Island Health Authority:	Kathryn Stuart, Counsel Ryan Bortolin, Counsel

## Decision and Order

### Background

1. Kelland Foods LTD. (Kelland) owns and operates 11 grocery stores on Vancouver Island and in Powell River doing business as Quality Foods. One of their stores is located at Unit #1, 2443 Collins Crescent, Nanoose Bay, British Columbia (the “Nanoose Store” or the “Store”). Tobacco and tobacco by-products are among the goods they sell.

2. Tracey Benisch is a 25 year employee of Quality Foods and began to work as a clerk at the Nanoose Store in January 2012.
3. The Vancouver Island Health Authority (“VIHA” or the “Health Authority”) alleged that Kelland and Ms. Benisch contravened Section 2(2) of the *Tobacco Control Act* (or the “Act”) on April 10, 2012, by selling tobacco to a minor.
4. Witnesses testifying on behalf of VIHA were [redacted], the Minor Test Shopper (“MTS”), [redacted] (the “Supporting MTS”), Ruby Bandechha and Glynnis Schwan, both Tobacco Enforcement Officers (“TEO’s”), Michelle Dennis, Supervisor, Tobacco Prevention and Control Program, and Kim Bruce, Regional Manager, Tobacco Prevention and Control Program.
5. Witnesses testifying for Kelland were Lyall Woznesensky, Director of Strategic Planning and Professional Development and Jason Burrows, Manager at the Nanoose Store.
6. Ms. Benisch testified on her own behalf.
7. The Respondents did not dispute the evidence related to the sale of tobacco to the MTS on April 10, 2012.
8. In addition to the evidence regarding the sale on April 10, 2012, VIHA’s provided evidence of other sales of tobacco to minor test shoppers at the Nanoose Store on December 19, 2011, July 14, 2011, October 4, 2010, July 27, 2010, and February 23, 2009.

## Issues

9. Has VIHA proved on a balance of probabilities that Kelland and Ms. Benisch sold tobacco to a person less than 19 years of age on April 10, 2012, in contravention of section 2(2) of the *Act*?
10. If VIHA has proved that there was a contravention of section 2(2) of the *Act*, has Kelland or Ms. Benisch established a defence of due diligence pursuant to Section 12 of the Tobacco Control Regulation (B.C. Reg. 232/2007) (the “Regulation”)?
11. In the event that a defence of due diligence is not established by either of the Respondents, what penalty is appropriate for the contravention of Section 2(2)?

## Legislative Framework

12. The relevant sections of the *Act* are as follows:

### ***Prohibitions***

*2(2) A person must not sell, offer for sale, provide or distribute tobacco to an individual who has not reached the age specified by regulation under section 11(2)(g).*

*2(2.1) It is a defence to a charge under subsection (2) if the person charged with the contravention demonstrates that, in concluding that the individual reached the age specified by regulation, the person*

*(a) required the individual to produce a prescribed form of identification,*

- (b) examined the identification, and
- (c) reasonably believed that the identification
  - (i) was that of the individual, and
  - (ii) had not been altered or otherwise falsified.

**Administrative penalties**

6.1 (1) Subject to the regulations, the administrator may make an order under subsection (2) if satisfied on a balance of probabilities that a person has contravened

- (a) a prescribed provision of the Act or of the regulations, or
- (b) an order of the administrator.

(2) The administrator, by order, may do one or both of the following:

- (a) impose a monetary penalty on the person, in accordance with the prescribed schedule of penalties;
- (b) prohibit the person, in accordance with the prescribed schedule of prohibition periods, from selling tobacco or offering to sell tobacco at retail
  - (i) from the location at which the contravention occurred, and
  - (ii) subject to the regulations, if the administrator is satisfied that it is in the public interest to do so, from any other location, if the person sells or offers to sell tobacco at retail at more than one location.

**Power to make regulations**

11(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

[(a) to (f)]

(g) specifying the age for the purposes of section 2(2);

[(h) and (i)]

(j) respecting administrative penalties, including the following:

- (iv) prescribing, in relation to a contravention under section 6.1(1), whether an administrative penalty may be imposed if the person who committed the contravention demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention;

13. The relevant sections of the Regulation are as follows:

**Minimum age of 19 years**

2 The age for the purposes of section 2(2) of the Act is 19 years.

**Prescribed provisions of the Act and regulation**

6 (1) The following provisions of the Act are prescribed for the purposes of sections 6.1 (1)

(a) [administrative penalties] and 6.5 [liability of employees, officers, directors or agents of corporation] of the Act:

- (a) section 2 (2), (3) and (4) [prohibitions];
- (a.1) section 2.4 [prohibitions on display or promotion of tobacco products];
- (b) section 6.4 (1) [recovery of monetary penalty];
- (c) section 10.1 [sign indicating prohibition orders];
- (d) section 10.3 [removing tobacco from public display].

**Defence of due diligence**

12 A person must not be found to have contravened a provision of the Act or regulations prescribed under section 6 if the person demonstrates to the satisfaction of the

*administrator that the person exercised due diligence to prevent the contravention.*

***Factors to be considered in imposing administrative penalties***

*13(1) In imposing an administrative penalty on a person for a contravention of a prescribed provision of the Act or regulations, the administrator must consider the following factors:*

- (a) whether an enforcement officer has given the person a prior written warning concerning the conduct that is the subject matter of the penalty;*
- (b) whether the person has an ownership interest in the business carried on at the location where the contravention occurred;*
- (c) in respect of a breach of section 2 (2) or (3) or 2.4 of the Act or section 4 of this regulation,*
  - (i) whether the person is an employee or agent of the owner, and*
  - (ii) 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;*
- (d) in respect of a breach of section 2 (4), 10.1 or 10.3 of the Act, whether the person has knowledge of the prohibition order;*
- (e) any other matter the administrator considers relevant to the imposition of a penalty.*

*(2) In determining, under section 6.1 (2) (b) (ii) of the Act, if it is in the public interest to prohibit a person from selling tobacco at retail from a location other than the location at which the contravention occurred, the administrator must consider all of the following:*

- (a) previous enforcement actions for contraventions of a similar nature by the person;*
- (b) whether the contravention was repeated or continuous;*
- (c) whether the contravention was deliberate;*
- (d) the person's efforts to correct the contravention;*
- (e) any other matter the administrator considers relevant to the public interest.*

*(3) If a person who commits a contravention is a franchisee, the administrator must not impose a prohibition order on another location operated independently at arm's length from the person by another franchisee of the same franchisor.*

***Monetary penalties***

*14 For a contravention of a provision referred to in Column 2 of Schedule 2, the range of monetary penalties set out opposite that provision in Column 3 may be imposed.*

***Prohibition periods***

*15 For a contravention of a provision referred to in Column 2 of Schedule 3, the range of prohibition periods set out opposite that provision in Column 3 may be imposed.*

**Evidence**

14. The evidence presented by the Health Authority and Kelland focused primarily on the issue of due diligence: the steps taken by each of them, and the communication between them prior to the sale of tobacco on April 10, 2012, which led to this administrative action. As such, I will review the evidence sequentially, beginning with Kelland's tobacco policy prior to July 2011 through to the sale of tobacco on April 10, 2012. While I have considered all of the evidence, including the testimony and exhibits, I will focus on the evidence which is most relevant to the issues set out in paragraphs 9 and 10.

Sales of tobacco and Kelland's tobacco policy before July 2011

15. Ms. Bandechha testified that she conducts compliance checks with minor test shoppers (15 to 17 years old) whose role is to try to purchase tobacco from retailers. Ms. Bandechha conducted compliance checks at the Nanoose Store on: February 23, 2009, July 27, 2010 and October 4, 2010. On each of those dates the minor test shoppers were successful in purchasing tobacco from the store and she gave the store Manager, David Burns, a Tobacco Inspection and Activity Report.
16. Mr. Woznesensky testified that Kelland's corporate office had little involvement in store operations or the implementation of tobacco sales policies before July 2011. Store managers administered tests regarding tobacco sales policies and authorized cashiers for tobacco sales. However, Kelland's stores did have some common tobacco sales policies before July 2011. Those were:
  - (a) ID Decals prompted cashiers to check identification
  - (b) Quality Foods Tobacco Enforcement Procedure Policy
  - (c) Software on cash registers prompted cashiers to check identification
  - (d) New staff were given a training manual dealing with selling tobacco
  - (e) Each new employee was given a quiz and was required to pass (August 18, 2011 letter from VIHA to Kelland)

Sale of tobacco on July 14, 2011 and meeting of July 28, 2011

17. Ms. Schwan was testified that she conducted a compliance check at the Nanoose Store on July 14, 2011 at which time the minor test shoppers were successful in purchasing tobacco. She issued a Tobacco Inspection and Activity Report to the manager, Mr. Burrows and advised him that she would need to contact a representative of Kelland's corporate office.
18. Mr. Burrows testified that he is a 5½ year employee of Kelland and had been promoted to Manager at the Store a few days before July 14, 2011. Before becoming Manager he had no experience with tobacco compliance. After receiving the tobacco inspection and activity report from Ms. Schwan, he contacted Mr. Woznesensky who testified that he scheduled a meeting with VIHA for July 28, 2011.
19. Ms. Bandechha attended the meeting on July 28, 2011 as Ms. Schwan was absent on medical leave. Her supervisor Ms. Dennis, Mr. Woznesensky and Mr. Burrows were also present.
20. Ms. Dennis and Ms. Bandechha testified that when a retailer has multiple sales to a minor, VIHA is concerned about whether they have adequate policies and practices. With their wide range of experience with retailers, they know which systems appear to work best and can help retailers improve their policies and practices. That was their purpose in meeting with Kelland.
21. At the meeting, VIHA reviewed the Nanoose Store's history of sales to minors and discussed Kelland's policies and other strategies for compliance, such as other software, restricting sales to one till and a mystery shop program. She testified that although Kelland did not agree to use any of those specific strategies, it agreed to develop a Tobacco Compliance Plan (the "Compliance Plan") and submit it to VIHA for review by August 22, 2011.
22. Although Mr. Burrows recalled that software was discussed at the meeting, he did not recall the details. He testified that with Kelland's software a warning pops up on the till's screen when a

tobacco product is scanned and displays the date before which a purchaser must be born in order to purchase tobacco. The cashier would be required to tap the “enter” key to confirm that the purchaser is older than 19, or clear to cancel the sale.

23. Mr. Woznesensky testified that before the meeting he was unaware that there had been sales of tobacco to minors at the Store in July and October 2010. The reason Kelland opposed using a mystery shopper program was because VIHA did not have information regarding the effectiveness of such programs and Kelland had found that mystery shoppers were not cost effective for theft prevention. With respect to other software which required cashiers to type in a purchaser’s date of birth (“DOB”) he told VIHA that cashiers could still make an error and it would increase wait times at tills. He did not recall discussing scanning technology. While they also discussed restricting sales of tobacco to one till, the Nanoose Store is so small and has so few tills open at a given time that he thought it would disrupt customer service.
24. On August 18, 2011, Ms. Bandechha sent Kelland a letter confirming the discussions at the July meeting. She encouraged Kelland to review VIHA’s Tobacco Retailer Resource Kit and confirmed its commitment to develop a Compliance Plan that included training of staff, a means of self monitoring for compliance, and a reminder to submit the plan by August 22, 2011. The letter also indicated that VIHA would conduct further compliance checks and that violations of section 2(2) of the *Act* could result in a violation ticket or an administrative hearing.

#### Submission of Compliance Plan and related communication

25. After the July meeting, Kelland made tobacco control policies a corporate responsibility. Mr. Woznesensky welcomed the development of the Compliance Plan and saw it as a positive development. He submitted Kelland’s Compliance Plan on August 10, 2011. While the plan did not include a mystery shopper program, software changes, or any initiatives to restrict sales to one till, it did include the following:
- (a) An enhanced Quality Foods Tobacco Instore Policy
  - (b) Training new staff with the materials provided by VIHA, ongoing reminders to employees about tobacco policies, and an annual review for employees selling tobacco
  - (c) New employees were to be tested on the materials provided by VIHA
  - (d) New employees were to be informed of enforcement penalties for non compliance
  - (e) Employees were required to sign a letter of understanding regarding Quality Foods Policy on Tobacco Sales
  - (f) Display of appropriate tobacco signage
  - (g) Software on cash registers prompting cashiers to check identification
26. Mr. Burrows testified that in July 2011 he tested every employee in regard to tobacco sales at the Nanoose Store. He also read the booklet, did the test, and was graded by the assistant manager. He indicated that to the best of his recollection, he reminds staff about tobacco policies once per week. He also watches to see that employees check purchasers’ identification.
27. Mr. Woznesensky testified that all new employees receive a departmental orientation at the store and that he provides 3 to 4 hours of additional training on broader employment issues.
28. On August 18, 2011, Mr. Woznesensky forwarded Ms. Schwan an email from Kevin Knowles, one of Kelland’s managers, outlining additional steps he was taking to ensure compliance with the *Tobacco Control Act*. However, Mr. Knowles indicated that without a till system requiring

the cashier to type in the purchaser's date of birth, he felt that his initiatives would not completely eliminate human error. Ms. Schwan replied to Mr. Woznesensky as follows:

“Are you planning on adding any of these ideas to your compliance plan?

The suggestion related to software that forces clerks to enter birth year and will void a sale is very common and I have seen retailers have success installing this as a measure.

Also mystery shoppers of your own to test your stores could be beneficial.

If these are considerations that you could implement you could revise your compliance plan and forward it to me.”

29. Ms. Schwan testified that that it was Kelland's responsibility to ensure that it complied with the legislation and that Mr. Woznesensky's reply indicated that her suggestions had been covered in the July meeting and that Kelland took the view that their added measures were sufficient for the moment. Mr. Woznesensky restated his comments made at the meeting about software and indicated that they had decided against the idea of a mystery shopper program. He also indicated that they had added a written warning letter to any employee who received a violation notice as part of Kelland's progressive discipline related to its tobacco policies.
30. Ms. Bandechha acknowledged that VIHA's letter to Kelland “approving” its Compliance Plan and stating that the “approved compliance plan may not be altered or terminated without prior approval of the Tobacco Prevention and Control Program” were an unfortunate choice of words. Mr. Woznesensky testified that he saw VIHA's August 23, 2011 letter as an endorsement of their Compliance Plan.

#### Sale of tobacco on December 19, 2011 and related communication

31. Ms. Schwan conducted another compliance check at the Nanoose Store on December 19, 2011. The minor test shoppers she worked with were again successful in purchasing tobacco. Following the sale she issued a Tobacco Inspection and Activity Report to Mr. Burrows who indicated that he would advise Mr. Woznesensky.
32. Mr. Woznesensky testified that following the sale on December 19, 2011, Kelland developed a written warning letter for any employee responsible for the sale of tobacco to a minor. The letter indicates that the employee will be personally responsible for a fine of potentially \$575.00 and that the store could be fined up to \$5000.00. He advised Ms. Schwan of the letter and she acknowledged it as a further addition to the Compliance Plan.

#### The meeting of January 12, 2012

33. On January 12, 2012, Ms. Schwan, Ms. Dennis and Ms. Bruce met Mr. Woznesensky for a second time. Ms. Schwan showed Mr. Woznesensky a list of Kelland's sales of tobacco to minors at all of its stores. The list included 11 violations between January 1, 2010 and December 31, 2011. Of those, 4 were at the Nanoose Store. In addition, 5 occurred between August 12, 2011 and December 29, 2011, after the creation of Kelland's Compliance Plan.
34. Ms. Dennis testified that they again discussed further measures Kelland could take to reduce sales to minors including improved software, the possibility of Kelland operating its own mystery shopper program and concentrating the sale of tobacco at one till. She recalled Mr. Woznesensky indicating that he thought their existing software was sufficient and that a mystery shopper program would be cost prohibitive. She also recalled Mr. Woznesensky indicating that concentrating tobacco sales at one till could create uneven line-ups and would be inconsistent with their focus on customer service. She testified that VIHA's representatives

encouraged Mr. Woznesensky to change its Compliance Plan and made it clear that they thought further violations would occur as Kelland's systems were insufficient.

35. Ms. Bruce testified that there had been a sale to a minor each time there had been a compliance check at the Nanoose Store. VIHA representatives discussed VIHA's approach to progressive enforcement. She testified that she clearly communicated to Mr. Woznesensky that further sales would result in ticketing or a report to the administrator.
36. Although Mr. Woznesensky acknowledged that he had received the list of tobacco sales violations, he did not recall a discussion about software which would allow a purchaser's identification to be scanned for their date of birth nor did he recall discussing the possibility of restricting sales of tobacco to one till, although he agreed it was likely discussed. He acknowledged telling VIHA that a mystery shop program would be cost prohibitive. He tried to make clear that he needed some evidence that any proposed measures would be successful. He testified that Kelland wanted to give the Compliance Plan time to see whether it would work and if it appeared to be working, they were not going to make other changes.

#### The Letter of January 20, 2012 and related communication

37. Ms. Schwan drafted a letter to Kelland summarizing the January 12, 2012 meeting and gave Kelland feedback on digital surveillance related to a sale of tobacco to a minor. She noted that the clerk requested identification from the purchaser, but contrary to Kelland's policy, failed to compare the purchaser's identification with the date provided on the computer screen.
38. Ms. Bruce's evidence was that the letter was drafted based on the notes and memories of the Health Authority's representatives within days of the meeting and that it accurately reflected the discussion at the meeting as well as their review of the digital surveillance record.
39. On January 23, 2012, Mr. Woznesensky emailed Ms. Schwan clarifying the letter of January 20, 2012, based on his recollection of the meeting. With respect to the use of software requiring a cashier to type in a purchaser's date of birth he indicated that there was still the potential for human error. He did not refer to VIHA's software which electronically scans and detects a purchaser's date of birth. He took issue with the fact that VIHA did not recognize how quickly they implement the Compliance Plan and reiterated that a mystery shopper program would be cost prohibitive. With respect to restricting sales to one till he again indicated that at the Nanoose Store which is smaller it could mean long line ups at the till selling tobacco and no line up at the other till and that the optics would not be good based on their belief that "customer service is a number 1 priority."
40. Ms. Dennis responded to Mr. Woznesensky's January 23, 2012 email on February 13, 2012. She made it clear that Kelland had responsibility to ensure that its employees were following policies and procedures and that it was clear in the videotape provided by Mr. Woznesensky that the clerk did not check the purchaser's identification with the information on the till.
41. Mr. Woznesensky agreed that VIHA's letter of January 20, 2012, made clear that further violations of section 2(2) of the *Act*, could result in legal action including an administrative hearing. He knew that Kelland was responsible to ensure that there were no sales of tobacco to minors, but thought the violations of the *Act* would stop with the policies they had in place.



The sale of tobacco to a minor on April 10, 2012

42. The MTS testified that she worked with Ms. Schwan on April 10, 2012 conducting compliance checks. She was 16 years old on that date. One of their compliance checks was at the Nanoose Store. She entered the Store and stood in line at the first till. There was a person in front of her and one behind. When it was her turn, she asked the clerk for cigarettes. The clerk asked her for identification and she gave the clerk her BC Driver's License. The clerk examined her license for approximately 20 seconds and gave it back to her. The clerk retrieved the cigarettes from a cupboard and the MTS paid for them. She then returned to the vehicle operated by Ms. Schwan, gave her the cigarettes and wrote her notes, which she identified at Tab 4 of Exhibit 1. The Supporting MTS's testimony corroborated that of the MTS.
43. Mr. Burrows testified that even though Ms. Benisch was not a new employee she was required to read the employee handbook and take the tobacco test which she did on January 11, 2012.
44. Although Ms. Benisch is a 25 year employee of Kelland, she testified that this was the first time she had experienced a test shop. She is a very diligent employee and is committed to preventing the sale of tobacco to minors. She follows Kelland's Compliance Plan and asks purchasers of tobacco who look less than 30 years old for identification and checks their picture. She then gets the requested pack of cigarettes, scans it, and checks the DOB on the identification against the pop up window to ensure that she is not selling tobacco to a minor.
45. However, Ms. Benisch also testified that the MTS's notes of the purchase were accurate and that she had returned the MTS driver's license to her before getting the package of cigarettes, and that she did not compare the DOB on the drivers license with the date on the till's computer screen. When asked whether she had a consistent practise, Ms. Benisch was unclear and responded that on occasion she keeps the date in her head and returns the identification and at other times she keeps the identification and checks it against the computer screen.
46. Ms. Benisch received a written warning letter from Kelland after she received the violation notice. However, she did not know what Kelland would do if she fails a further test shop, as the warning provided for unspecified disciplinary action. In the event that there is a financial penalty arising from the administrative proceedings, Ms. Benisch will have to bear the cost.

Other evidence

47. Ms. Bruce testified that VIHA sees each retailer as unique and realizes that they have an understanding of their store, their staff turnover and their policies and for that reason VIHA can only make suggestions and provide information. In addition, the legislation is very clear that the retailer has responsibility for compliance.
48. Ms. Bruce testified that VIHA's research shows that if a retailer sells tobacco to a minor test shopper, they are more likely to sell tobacco to another youth, particularly as VIHA encourages minor test shoppers to dress plainly and does not allow them to wear makeup, whereas other youth try to look older than they really are.
49. Mr. Woznesensky testified that Kelland has not researched other potential software programs and while he did not remember discussing software which scans a purchaser's identification, he acknowledged in cross examination that it would probably be helpful. He also acknowledged telling VIHA that a mystery shop program would be cost prohibitive although he testified that

he did not know what it would cost. He testified that while Kelland’s owners keep financial information confidential, they have advised him that they do not make money on tobacco sales. He stated that it is important for Kelland to sell tobacco in order to stay competitive with other grocers and that they sell tobacco for the same price as other retailers.

50. Ms. Benisch testified that Kelland’s current software works well, but she indicated that it might increase accuracy if she was required to input a customer’s date of birth. She also testified that it might also help if there was a way to scan a customer’s identification.

## Submissions

51. VIHA asserted that the alleged contravention on April 10, 2012, had been proven on a balance of probabilities and that Kelland had not proved due diligence. VIHA submitted that a higher standard of due diligence is required both because of the public health context and because Kelland had had notice of prior violations. VIHA also noted Kelland’s failure to implement a program of effective monitoring. Counsel for VIHA reviewed Kelland’s Compliance Plan, comparing it to the compliance plans reviewed in other tobacco decisions, and addressed the issue of penalty.
52. Kelland did not dispute that there was a violation of section 2(2) of the *Tobacco Control Act*. However, it argued that it had demonstrated due diligence. Kelland’s Counsel reviewed the steps taken by Kelland since the sale to a minor in July 2011 including its move to a corporate based tobacco policy, the development of its Compliance Plan and the policies within the plan, etc. The submission also responds to VIHA’s preliminary submissions on due diligence and: public health; the sale of tobacco to minors; monitoring and mystery shopper programs; constant reminders; the retailer’s responsibility for compliance; and, whether the standard of what is reasonable is raised after notice of a violation. It also addresses the issue of penalty.
53. I have relied on counsel’s submissions to lay out some broad principles in regard to the law of due diligence, and will address other aspects of their submissions, where appropriate, as I analyze the evidence and make findings.

## The Law of Due Diligence

54. The parties agreed that the leading case dealing with the defence of due diligence in strict liability offences is *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. The defence of due diligence was described by Dickson J. of the Supreme Court of Canada at paragraph 72 as follows:

The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused’s direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (my emphasis) The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.).

55. Counsel for Kelland argued that the standard for due diligence is not “perfection”, but “reasonableness” as the term was used by the Supreme Court of Canada in *Sault Ste. Marie*. In

defining due diligence, Counsel for Kelland drew on two cases involving sales of tobacco to minors.

56. In *Westfair Foods Ltd. v. Her Majesty the Queen*, SKQB 87 (CanLII) the court found that the standard of due diligence was whether the employer had “taken all reasonable care in establishing a proper system to prevent the cashiers from selling tobacco to minors and whether they had taken reasonable steps to ensure the effective operation of the system.” The decision confirms that “extraordinary or great diligence” is not needed and that the employer is not required to exercise extreme care such as might be taken by a person of unusual prudence.
57. In *R. v. Overwaitea Foods Group Ltd.*, 2011 BCPC 386 (CanLII) the court found that the retailer had policies which were of a reasonable standard and that it took care in administering those policies. The court was concerned about requiring too high a standard for training and monitoring, thereby creating a standard of perfection which would be too difficult to maintain.
58. Counsel for Kelland also relied on *R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 in which the Ontario Provincial Court considered whether incidents of water pollution contravened environmental statutory provisions. The court found the incidents of pollution resulted because of human error or old and faulty equipment and that the company’s efforts to act in an environmentally conscious manner and to make changes in the 11 months prior to the spills constituted due diligence:

Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action. To demand more would in my view, move a strict liability offence dangerously close to one of absolute liability.

59. Counsel for VIHA submitted that Kelland had not demonstrated that it took reasonable care to establish a proper system to prevent contraventions and neither did it take reasonable steps to ensure the effective operation of its system. VIHA also relied on *Courtaulds Fibres*.
60. VIHA argued that there is a higher standard of what is “reasonable” in the public health context and relied on *R. v. Seaway Gas and Fuel*, a decision of the Ontario Court of Appeal. The Court acknowledged that the *Ontario Tobacco Control Act* was an important public health statute which regulates “in a strict and careful fashion the distribution of a dangerous product.” The issue before the Court was whether the list of prescribed identification for proof of age should be interpreted strictly or was a guide in regard to acceptable personal identification.
61. Counsel for Kelland pointed out that the legislature’s inclusion of the defence of due diligence in the Regulation did not make specific reference to the public health context. In addition, Counsel for Kelland cautioned that elevating the standard of what is reasonable risked turning a strict liability offence into an absolute liability offence, an approach that was rejected by the Supreme Court of Canada in *Sault Ste. Marie*.
62. Counsel for VIHA also submitted that the standard of due diligence was raised after VIHA gave Kelland notice of the *Tobacco Control Act* violations and relied on several cases in support of that proposition. In *R. v. Sobey’s Inc.* (2000), 181 N.S.R. (2d) 263 the court considered the retailer’s defence of due diligence in the sale of tobacco to a minor following notice of 2 other sales to a minor at other stores. The court stated:

The appellant does not meet the standard of due diligence where it is under notice that its policies and procedures have on at least two occasions resulted in apparent violations of the *Act*... It is not, as

counsel for the appellant suggests, the "continually raising of the bar" by requiring additional steps to be taken in the circumstances of knowledge that there had been sales to underage persons of tobacco products and warnings about future prosecutions in the event of further violations. In the light of these violations, it is not enough for the appellant to simply repeat that the policy must be reviewed with all employees. Something further is then required.

63. VIHA argued that the position in *Sobey's* with respect to notice of prior contraventions is consistent with decisions in British Columbia. In *R. v. C.C. Eric James Management Ltd.*, 2000 BCPC 178, also dealing with the sale of tobacco to a minor, the Court is more specific than in *Sobey's*. It stated:

Where an infraction has occurred, the employer would do well to alter its policies in order to avoid a recurrence; in other words, a higher standard of care is indeed required because of the failure of the employer's policies and practices to successfully avoid the infraction.

64. VIHA also cited *R. v. Van Gard Drugs Ltd.* (1997), 242 A.R. 34 (P.C.) in which the Court stated:

Certainly after the receipt of the second warning letter alarm bells ought to have sounded in the minds of management. They ought to have been alerted that the system that they had in place, the manuals and the signs, were not effective and had to be reworked. The institution of a system is not, in itself, sufficient to establish that one has been duly diligent. From time to time, a system must be tested to see if it is working to determine if it prevents the happening of certain events, in this case the sale of cigarettes to minors. That could have been done in the present case by something as simple by getting a test shopper, someone over the legal age by three or four years but who looked youthful, to see whether or not they could get cigarettes without being asked for identification.

65. Counsel for Kelland argued that the comments referring to a higher standard of care in *C.C. Eric James Management* were *obiter dicta*, as in that case the retailer was acquitted. Kelland also attempted to distinguish *Sobey's*, as in that case the retailer failed to carry through with improvements, while in Kelland's case the Compliance Plan was swiftly put in place. However, as Counsel for Kelland pointed out in its submission, much turns on the facts.

## **Analysis and Findings**

### Has VIHA proved that the Respondents contravened section 2(2) of the *Tobacco Control Act*?

66. I find that the Respondents contravened section 2(2) of the *Tobacco Control Act* by selling tobacco to a person less than 19 years of age on April 10, 2012. Under the *Act* the sale of tobacco to a minor constitutes the violation. It is a strict liability offence and there is no requirement for the Administrator to establish that the Respondents intended to sell tobacco to a minor. A strict liability offence may be avoided if a defendant proves that it took all reasonable care to avoid the violation, or exercised due diligence. (section 12 of the *Regulation*)

67. Both Respondents asserted a defence of due diligence and it was common ground that they bore the onus of proving the defence.

### Have the Respondents proved that they exercised due diligence?

68. I find on a balance of probabilities that there were several violations of section 2(2) of the *Act* prior to July 14, 2011. However, the parties appeared to agree that the measure of whether Kelland exercised "all reasonable care by establishing a proper system to prevent commission

of the offence and by taking reasonable steps to ensure the effective operation of the system” should begin with the development of its Compliance Plan.

69. The Compliance Plan was not created in a vacuum. It was built on some elements of Quality Foods “store based” Tobacco Enforcement Procedures as well as elements from VIHA’s Tobacco Retailer Resource Toolkit and the discussion Kelland had with VIHA at the meeting in July 2011.
70. Kelland’s August 10, 2011 Compliance Plan provides insight into Kelland’s assumptions about the reason for the previous failures of Quality Foods, Tobacco Enforcement Procedures. The major difference between Kelland’s Compliance Plan and the previous “store based” Tobacco Enforcement Procedures, is the shift to centralized control. Many of the other changes in the Compliance Plan focus on improving staff training and making employees more aware of tobacco laws and appear more like enhancements than significant changes. Some elements which remained the same included the software program, signage and visual prompts at the tills.
71. VIHA’s staff suggested other strategies to help Kelland create a compliance plan which would have a greater chance of preventing sales of tobacco to minors: suggestions that Kelland rejected. Although VIHA employees have the benefit of seeing many retailers’ operations and gaining an understanding of what makes some successful and others not, I accept that in July and August Kelland could reasonably take the view that it had improved its program sufficiently to prevent the sale of tobacco to minors.
72. Shortly after the Compliance Plan was sent to VIHA, Mr. Knowles advised Mr. Woznesensky that it would not be sufficient to increase employee awareness and that a change of software would be required in order to prevent further sales of tobacco to minors. Mr. Woznesensky forwarded the email to Ms. Schwan, who wrote back supporting the opinion expressed by Mr. Knowles. The feedback from one of Kelland’s managers and a TEO who was not present for the July meeting gave Kelland another opportunity to re-assess its Compliance Plan. However, at this point the Compliance Plan was still very new and Kelland could still reasonably take the view that it had done what was required to prevent the sale of tobacco to minors.
73. A week later, on August 23, 2011, VIHA sent a letter indicating that the Compliance Plan was “approved” and that it could not be “altered or terminated without prior approval”. While this language could have led Kelland to believe that VIHA was assuming some responsibility for its compliance with tobacco law, I am satisfied that Mr. Woznesensky and Kelland were not misled. The language and approach by VIHA employees in other correspondence and in meetings, as well as the email exchange between Mr. Woznesensky and Ms. Schwan, show that Mr. Woznesensky and Kelland were at all times in control of Kelland’s Compliance Plan and Kelland’s compliance with the *Tobacco Control Act*.
74. On December 19, 2011, there was a further sale to a minor at the Nanoose Store and in an email exchange at the end of December Mr. Woznesensky advised Ms. Schwan of an addition to Kelland’s Compliance Plan: a written warning letter, as part of their program of progressive discipline, to employees receiving a violation notice for selling tobacco to a minor. This was yet another exchange between VIHA and Kelland, in which Kelland demonstrated that it was in control of its Compliance Plan.
75. The sale on December 19, 2011 at the Nanoose Store was one of four sales at Kelland’s stores in December 2011. By that time, Kelland’s Compliance Plan had been in place for four months

and it should have been clear to Kelland that these violations did not arise from an isolated incident of poor training or a mistake. At the meeting which occurred in January it should have been clear to Kelland that VIHA's representatives saw these sales as a significant problem and knew that unless Kelland's Compliance Plan was changed significantly, it would not prevent further sales of tobacco to minors.

76. Counsel for VIHA submitted that the standard of reasonableness is raised once a retailer has had notice of violations. The cases cited by VIHA in support of this submission (*Sobey's*; *C.C. Eric James Management*; and *Van Gard Drugs*) have been discussed and the approach taken by the Courts in those decisions is clear. Where a retailer is given notice of a violation, it is indicative of a fault in their system. In the circumstances, a retailer acting reasonably would evaluate their system to ensure that the violation did not occur again. Whether this is properly characterized as a higher level of reasonableness or is simply a reasonable response to information about the effectiveness of their system is not so important. What matters is whether and how the retailer responds.
77. Each of VIHA's representatives took notes at the meeting and used their notes to contribute to a letter from VIHA to Kelland on January 20, 2012, summarizing the discussion. Although Mr. Woznesensky's recollection of the meeting differs from what was stated in the letter of January 20, 2012, he did not take notes during the meeting and he was alone to participate in and recall the conversation. On balance, I find that the letter of January 20, 2012 is the most accurate record of what was discussed during the meeting.
78. Kelland declined to act on any of VIHA's suggestions. With respect to software, Mr. Woznesensky responded that Kelland's software should be sufficient and that the problem was "human error". In a response to VIHA's letter, his email of January 23, 2012, ignores both the conversation about scanning software at the January 12, 2012 meeting and the reference to it in the letter. Kelland appeared to take issue with the level of information provided by VIHA about the software systems and appeared to suggest that VIHA was at fault for not giving Kelland enough information. While, it is clear that VIHA is not obligated to provide Kelland with that information, there was also no evidence that Kelland made any effort to request further information from VIHA. In addition, there was evidence that Kelland made no effort to research other software which might be effective.
79. The letter records that Kelland declined to implement a comprehensive monitoring program and compliance testing of its own, because it would be cost prohibitive. However, it is apparent that Mr. Woznesensky has very little information regarding the revenue generated by the sale of tobacco products and that he did not investigate the cost of operating a mystery shopper program. I am not persuaded that Kelland exercised "reasonable care" in establishing a proper system to prevent the violation of section 2(2) of the *Tobacco Control Act* or took "reasonable steps to ensure the effective operation of the system" in rejecting an initiative as "cost prohibitive" without knowing its cost and without knowing the revenue stream available to pay for it.
80. In regard to Ms. Schwan's suggestion that tobacco sales to minors could be reduced if the sale of tobacco was restricted to one till and one clerk for each shift, Mr. Woznesensky wrote that it could mean long line ups at the till selling tobacco and no line up at the other till and that the optics would not be good based on their belief that "customer service is a number 1 priority." Although I have a great deal of respect for Kelland's laudable focus on customer service, to risk violating the *Tobacco Control Act* and possibly sell a very dangerous substance to minors rather

than potentially disrupt a high level of customer service is, in my view, an inappropriate ordering of priorities. I am also persuaded that this does not demonstrate “due diligence”.

81. Ms. Bruce reviewed VIHA’s policy of progressive enforcement at the January 12<sup>th</sup> meeting. I am satisfied that she specifically indicated that the spectrum of responses can include ticketing and an administrative hearing. In addition, I note that the second last paragraph of the January 20<sup>th</sup> letter indicates that further compliance checks would occur and that future violations could result in further legal action or an administrative hearing with fines of potentially \$5,000.00 and/or a 180 day tobacco sales prohibition.
82. In spite of the violation of section 2(2) in December 2011 at the Nanoose Store, and the other violations at three other Kelland stores, there was no evidence that Kelland modified its Compliance Plan in any meaningful way. It is very clear in this circumstance, that as much as Kelland is a solid corporate citizen and reacted quickly in putting together the Compliance Plan and implementing it, its actions do not meet the test of due diligence. I am not persuaded that it exercised all reasonable care in establishing a proper system to prevent a contravention or that it took reasonable steps to ensure the effective operation of the system. Kelland was put on notice that there was a serious flaw in its Compliance Plan in December 2011, and yet it failed to take steps to identify the source of the problem and implement changes in spite of a high level of assistance offered by VIHA’s representatives. Kelland appeared to settle for the *status quo* rather than act with “a high standard of awareness” and take “decisive, prompt and continuing action.” (*Courtaulds*)
83. I am not persuaded on a balance of probabilities that Kelland has demonstrated that it exercised due diligence to prevent a contravention of section 2(2) of the *Tobacco Control Act*.
84. While I have no doubt as to Ms. Benisch’s sincerity and desire to avoid the sale of tobacco to minors I find her practices with respect to checking purchasers’ identification documents with the pop up screen on the till confusing. Sometimes she compares them and at other times she relies on doing a calculation in her head. When she sold tobacco to the Minor Test Shopper on April 10, 2012, she did the calculation in her head and was wrong. In the circumstances, I find that she has also not established a defence of due diligence to prevent a contravention of section 2(2) of the *Act*.

## **Penalty**

85. Section 6.1 of the *Act* provides that the administrator may impose an administrative penalty if satisfied on a balance of probabilities that a person has contravened a provision of the *Act* or of the Regulation. The administrator may, by order, impose a monetary penalty and/or prohibit the person from selling tobacco in accordance with the prescribed schedule.
86. Section 6 of the Regulation prescribes penalties for violation of section 2(2) of the *Act* while section 13 of the Regulation, set out at page 4 of this decision, sets out the factors to be considered in imposing administrative penalties.
87. Schedule 2 and 3 of the Regulation establish respectively the range of monetary penalties and prohibition periods. For a first contravention of section 2(2) of the *Act* the range of monetary penalties is from \$0.00 to \$1,000.00 and the range of prohibition periods is from 0 to 30 days.

88. VIHA relied on the Provincial Court’s decision in McAllister in proposing a penalty of \$300.00 for Ms. Benisch. (*R. v. Catherine McAllister*, AH00774267-1, Nanaimo Registry Provincial Court).
89. VIHA argued that Kelland should receive both the maximum fine of \$1,000.00 and the maximum prohibition of 30 days for a first contravention of section 2(2) of the *Act* to ensure that Kelland did not adopt a “cost of doing business” rationale, particularly in light of the public health objective of the *Act*. Kelland submitted that its actions in preparing and implementing the tobacco control program and in taking a serious approach to the sale of tobacco should be important factors in considering a penalty. It submitted that the maximum penalties should be limited to situations in which a retailer wilfully fails to follow procedure. Kelland submitted that its commitment to preventing the sale of tobacco to minors and its willingness to work with VIHA are factors which should be considered in reducing the penalty which might be appropriate.
90. I note that the Nanoose Store has a significant history of sales to minor test shoppers and that while well meaning, Kelland did not implement a Compliance Plan which was effective in avoiding sales to minors. Kelland appeared to limit its efforts based on an assumption that no matter what steps were taken, the sale of tobacco to minors through human error was unavoidable. That attitude, or a lack of financial resources, or time, or commitment, appeared to stand in the way of Kelland investigating the options suggested by the TEOs for improving its Compliance Plan. There is no question that Kelland as an organization and its employees as individuals appear committed to preventing the sale of tobacco to minors, but unless that commitment translates into an effective Compliance Plan, the sale of tobacco to minors is highly likely to continue.
91. I accept that Ms. Benisch is both diligent and personally committed to avoiding the sale of tobacco to minors. However, even those who are diligent are susceptible to errors. The evidence was that Ms. Benisch does not always follow Kelland’s Compliance Plan. Looked at objectively, her uneven application of Kelland’s Compliance Plan suggests that more or different training, or more or different reminders, or a better software system which is less susceptible to human error is required. In spite of her good intentions, Ms. Benisch’s actions resulted in the sale of tobacco to a minor. However, I note that this is her first offence and as I am persuaded that the issue in this case is more of a systemic or corporate wide issue, I find that a penalty of \$150.00 is appropriate. While Counsel for VIHA suggested a fine of \$300.00 to match that of Ms. McAllister, I note that some employees only received a warning when they sold tobacco to a minor and that on balance \$150.00 is fair and will act as a substantial deterrent for Ms. Benisch.
92. One of the factors at Kelland’s stores is a significant emphasis on customer service. With such an orientation, Kelland was reluctant to restrict sales of tobacco to one till and to use software which would have required employees to type in the purchaser’s date of birth, as both of those measures could disrupt the regular flow of consumer traffic through its tills and Kelland’s focus on a good experience for its customers. That focus on the customer experience may in part be responsible for sales to minors, as employees feel compelled to fulfill Kelland’s focus on customer service and move customers through the tills, rather than focus on avoiding the sale of tobacco to minors.
93. VIHA’s evidence of 6 sales of tobacco to minors at the Nanoose Store, two of which occurred within 8 months following the first meeting between VIHA and Kelland, indicate that this is a



significant problem. If sales have occurred on each occasion that minor test shoppers have presented themselves at the Store, then sales are certainly occurring when other minors, who make a greater effort to appear older than 19, attempt to purchase tobacco. The devastating effects of using tobacco were well described by Ms. Bruce in testimony and although this is considered Kelland's first contravention, it follows a history of sales to minors and a well meaning, but ineffective response to those incidents. In the circumstances, I am persuaded that the contravention by Kelland warrants the most significant monetary penalty. I have awarded the maximum fine of \$1,000.00.

94. VIHA also argued that it would be appropriate to prohibit Kelland from selling tobacco products for a period of 30 days on grounds that it would prevent Kelland from shrugging off the monetary penalty as a "cost of doing business". Clearly, an order prohibiting the Nanoose Store from selling tobacco would require posting signs regarding the prohibition which may have an impact on the Store's good will. In addition, those customers who normally purchase tobacco at the store will find it inconvenient and will need to purchase their tobacco elsewhere. I am persuaded that the history of tobacco sales to minors at the Nanoose Store is sufficiently poor that in addition to the monetary penalty, it is appropriate to prohibit the sale of tobacco at the Nanoose Store for a period of 28 days.

## Order

95. **As have found that** Ms. Benisch contravened Section 2(2) of the *Act*, **I order** that she pay a penalty of \$150.00, which sum is due and payable in three equal monthly payments of \$50.00 on January 15, 2013, February 15, 2013 and March 15, 2013.
96. **As have found that** Kelland contravened Section 2(2) of the *Act*, **I order** that it pay a penalty of \$1,000.00, which sum is due and payable upon service of this decision and Order.
97. **In addition, as have found that** Kelland contravened Section 2(2) of the *Act*, **I order** that it be prohibited from selling tobacco products at the Nanoose Bay Store for a period of 28 days beginning on a date to be agreed upon by a representative of VIHA and Kelland.



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Hugh McCall, Administrator's Delegate