

# **Compliance and Enforcement Policy Manual**

*Tobacco and Vapour Products Control Act*  
Tobacco and Vapour Products Control Regulation

August 2016



Ministry of  
Health

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## INTRODUCTION

### 1 Purpose and status of this manual

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

- *Tobacco and Vapour Products Control Act* (the “Act”); and<sup>1</sup>
- *Tobacco and Vapour Products Control Regulation* (the “Regulation”)<sup>2</sup>.

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

- *Tobacco Tax Act* (responsibility of BC’s Ministry of Finance);
- *Offence Act* (allows ticketing by enforcement officers designated under the Act);
- *Tobacco Act* (federal legislation and responsibility of Health Canada); and
- Local government bylaws.

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 ‘enforcement officer’ is used. This term refers to:

- Enforcement officers designated by ministerial order under section 3 of the Act
- Environmental health officers designated as a class under section 3 of the Act

#### ***1.1 Overview of the Act and Regulation***

The Act and Regulation confer powers and impose requirements and restrictions, including:

- restrictions on the sale, distribution, and advertising or promotion of tobacco and vapour products, including:

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<sup>1</sup> *This is an unofficial consolidation of the Tobacco and Vapour Products Control Act, prepared July 8, 2016 for convenience only. This consolidation includes all amendments in force as of that date and reflects how the Act will read on September 1, 2016, the date on which B.C. Reg. 149/2016 brings into force amendments to the Act.*

<sup>2</sup> *This is an unofficial consolidation of the Tobacco and Vapour Products Control Act, prepared July 8, 2016 for convenience only. This consolidation includes all amendments in force as of that date and reflects how the Act will read on September 1, 2016, the date on which B.C. Reg. 149/2016 brings into force amendments to the Act.*



- prohibiting sale of tobacco and vapour products to minors,
  - prohibiting sale of cigarettes in packages of less than 20, and
  - requiring warning signs at points of sale for both tobacco and vapour products;
- 
- restrictions on where tobacco and vapour products may be sold, offered for sale or distributed;
  - restrictions on where tobacco and vapour products may be used;
  - restrictions on the retail display of tobacco and vapour products and the advertising or promotion of the use of tobacco and vapour products 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;
  - providing that the minister may enter into information-sharing agreements to share information with officials responsible for administering the *Tobacco Tax Act*; and
  - designating an adjudicator who holds hearings and imposes administrative penalties for violations of certain provisions of the act and regulation.

## ***1.2 Roles and responsibilities***

### **Ministry of Health**

The Ministry of Health is responsible for the administration of the Act and Regulation. 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.

### **Health authorities**

The five regional health authorities employ enforcement officers and environmental health officers; both enforce the tobacco and vapour product laws on behalf of the Ministry of Health. Enforcement officers are responsible for the day-to-day enforcement of the Act and Regulation.

### **Ministry of Finance**

The Ministry of Finance issues tobacco retailer authorisations and maintains this database (includes details on opening and closures of tobacco retailers). The Ministry of Finance has responsibilities that relate to the Act; primarily licencing tobacco retailers and taxation of wholesale tobacco. The Ministries of Health and Finance may enter into information-sharing agreements. This allows the ministries to exchange information with respect to tobacco retail authorisations. There may be overlap with the work of enforcement officers in relation to persons who violate either the *Tobacco Tax Act* or the *Tobacco and Vapour Products Control Act* or both of these applicable statutes.



## **Health Canada**

Health Canada is responsible for the administration and enforcement of the federal *Tobacco Act* and there are federal inspectors who enforce the *Tobacco Act*. The *Tobacco Act* governs the following:

- Manufacture;
- Sale;
- Labelling; and
- Promotion of tobacco products.

A number of regulations have been made pursuant to the *Tobacco Act*, these include:

- Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)
- Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)
- Tobacco Products Information Regulations
- Cigarette Ignition Propensity Regulations
- Tobacco (Access) Regulations
- Tobacco Reporting Regulations
- Tobacco (Seizure and Restoration) Regulations

## **Local government**

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

Local government bylaws are enforced by local government bylaws enforcement officials. Enforcement officers designated under the act 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 enforcement officer.

## **Police**

Police officers may, from time to time, assist enforcement officers in dealing with situations in which there is potential risk to health and safety. Police assistance may include accompanying enforcement officers 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

Enforcement officers are encouraged to apply the following guiding principles in enforcing the Act and Regulation:

**Safety:** Enforcement officers should treat personal safety as their priority, and should assess risk and make appropriate decisions. Whenever enforcement officers 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.

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

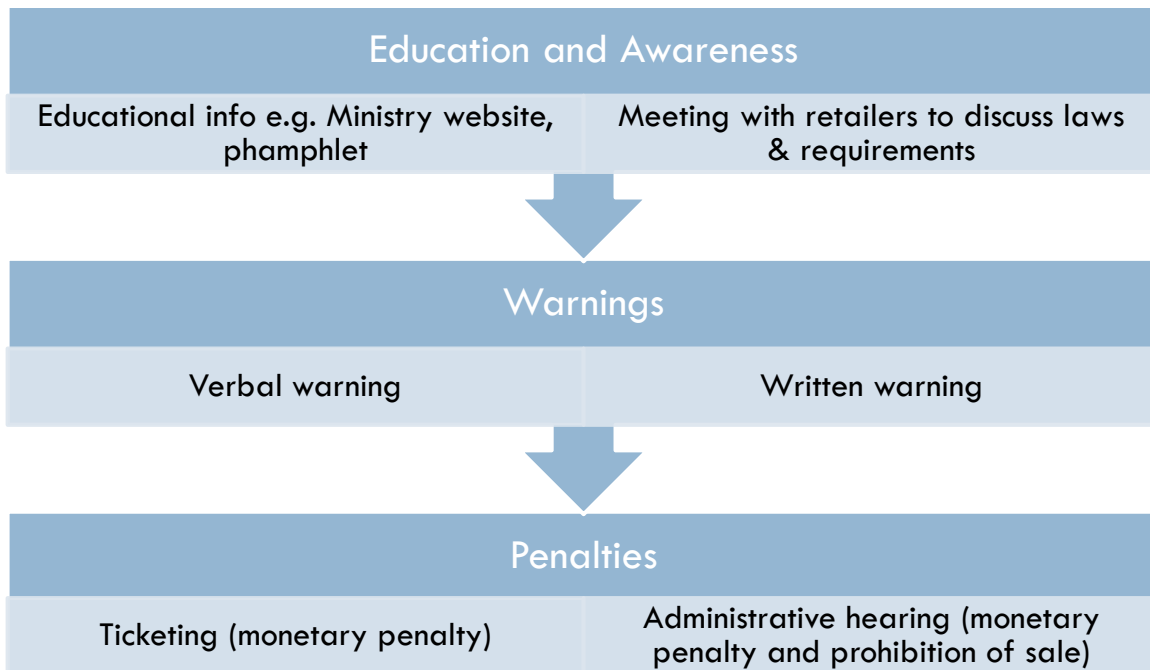
**Courtesy:** Enforcement officers should treat people courteously, even when dealing with a person who may not extend the same courtesy in return.

**Responsibility:** Enforcement officers must recognize that they are responsible for enforcing a regulatory regime and they may encounter individuals who react negatively to enforcement activity. Enforcement officers 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 Progressive Enforcement Model

Enforcement action should generally be undertaken on a continuum, starting with education and awareness, progressing to verbal warning, written warning and to stronger deterrents such as tickets (monetary penalty) and administrative hearings (which have both monetary penalties and suspensions of tobacco retailer licences as well as prohibition of sale of vapour products) as captured in the diagram below. Health authorities may provide additional guidance to their enforcement staff for consistency. In some circumstances and at the discretion of the enforcement officer, it may be appropriate to move to a more significant response without proceeding through each step of the compliance continuum. Consultation with the supervising manager of the regional health authority should occur if an enforcement officer wishes to use a stronger deterrent.



**Note:** it is ultimately up to the responsible person to ensure their compliance with the Act and Regulation. Enforcement officers may want to draw attention to the benefits of taking appropriate steps provided by the due diligence defence which may apply to persons who have taken reasonable steps to ensure compliance.



## 4 Compliance

### 4.1 Authority of enforcement officers

Enforcement officers are responsible for conducting inspections and assessing whether compliance is occurring. The authority and powers of enforcement officers to undertake inspections and related activities is set out in Sections 3 and 4 of the Act. For more information refer to Appendix 4 - Seizure and Surveillance.

Inspections are conducted by enforcement officers to assess whether a tobacco or vapour product retailer is violating the Act or Regulation.

Inspections may be:

1. Routine; or
2. Complaint based.

Some of the inspections include the use of minor test shoppers. Inspections are usually conducted without advance notice.

**Routine inspections** are conducted by enforcement officers at the discretion of the health authority without a prior reason and as a matter of course to ensure compliance with the requirements of the Act and Regulation. For example an enforcement officer may test a tobacco or vapour product retailer for issues such as the sale of tobacco or vapour products to minors, compliance with prohibition directives and smoking or vaping infractions.

**Complaint inspections** are conducted by enforcement officers in response to an allegation that the tobacco or vapour product retailer has contravened the Act and/or Regulation. Often a formal verbal or written allegation is submitted to the health authority or the Ministry of Health.

**Use of minor test shoppers in inspections** - Enforcement officers may be assisted by minor test shoppers to determine the potential for violations of the Act or Regulation in either type of inspection. Minor test shoppers are young persons who are employed or contracted by the health authority to test a tobacco or vapour product retailer's willingness to sell tobacco or vapour products to minors, and who report their findings to a supervising enforcement officer. For more information refer to Appendix 1 – Minor Test Shopper Safety.

Frequency of inspections is at the discretion of the health authorities. Factors affecting inspections may include limitations on resources by health authorities such as geographic location or staffing levels. Considerations by health authorities may include:

- whether or not the retailer is new;
- the compliance history of a retailer – including the placement of a retailer on the progressive enforcement model as well as past contravention (s); and
- the likelihood of future compliance.

## **4.2 Tobacco and Vapour Product Retailers**

As a general practice, inspections will be conducted as soon as reasonably possible after an enforcement officer learns of a newly licensed establishment for tobacco or vapour product retailers who have begun business.

Enforcement officers may use materials that educate retailers on the tobacco and vapour laws including:

1. inspection forms and/or checklist established by the health authority;
2. warning signs and decals that must be displayed;
3. information sheets and guidelines prepared by the Ministry of Health;
4. a digital camera;
5. copies of the Act and Regulation; and
6. Enforcement officer's ministerial order.

### **Conduct of an Inspection**

Enforcement officers should begin a routine inspection that does not include a minor test shopper 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.

Enforcement officers will be verifying:

- Owner/operator information (for tobacco products by asking to see the tobacco retailer authorisation issued by the Ministry of Finance); and/or
- A business licence (from a municipality) for the vapour product retailers.

Enforcement officers will be assessing compliance for tobacco and/or vapour products with the following:

- required signage;
- sales to minors restrictions;
- minimum package size and prohibition on selling tobacco from an open package;
- restriction on retail displays and promotion; and
- substantially enclosed for applicable businesses where tobacco and /or vapour product use is allowed. For more information refer to Appendix 2 – Substantially Enclosed Spaces.

### **Compliance Practices of the Tobacco and/or Vapour Product Retailer**

Enforcement officers may 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. Such policy, training, and supervision may improve a case of due diligence defence if a contravention is alleged to occur.

At the end of an inspection, the responsible person should be informed of the results. The inspection results should be discussed and a copy of the inspection results may be left with the person. 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. Health authorities have their specific electronic systems for recording inspection activities as well as compliance histories of retailers.

### **4.3 *School Property***

Enforcement of smoking or vaping restrictions on school property pursuant to section 2.2 of the Act will be enforced by health authority enforcement officers subject to resource management. Enforcement will be done on a complaint only basis and in accordance with the progressive enforcement model. Generally each health authority will customise strategies that complement enforcement efforts. It is at the health authority's discretion which strategies best apply but collaboration with school boards will generally occur to ensure that the needs of resource management for health authorities and adherence to provincial laws by school boards is balanced.

### **4.4 *Health Board Property***

Enforcement of smoking or vaping restrictions on health board premises pursuant to section 2.21(1) of the Act will be enforced by health authority enforcement officers subject to resource management. Enforcement will be done on a complaint only basis and in accordance with the progressive enforcement model. Generally each health authority will customise strategies that complement enforcement efforts. It is at the health authority's discretion which strategies best apply. For more information refer to Appendix 3 – Assessing Tobacco and Vapour Sales on Campus.

Section 2.21(1) of the Act does not include First Nations Health Authority property.

### **4.5 *Places Where Tobacco/Vapour Product Sales are Prohibited***

#### **Enforcement Officer Discretion/Management of the Complaint**

Enforcement officers are not expected to conduct inspections of places where tobacco or vapour sales are prohibited under Section 2.1 of the Act. However, nothing prevents enforcement officers from undertaking routine inspections of such places if they believe that it is appropriate to do so in particular circumstances. Complaints by the public and/or requests for assistance from school officials, health boards or employers would suffice for an enforcement officer to exercise their discretion to undertake an inspection. Complaints alleging that violations of the act or regulation occurred may be provided to enforcement officers verbally or in writing.



An enforcement officer may draft a complaint response plan. The plan may 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 or vapour products on school property or health board premises and smoking or vaping in or near indoor public or work places).

Enforcement officers will use the progressive enforcement model to manage complaints. All complaints alleging non-compliance with the Act or Regulation should be recorded and included in health authority files.

## 5 Non-compliance: Application of the Progressive Enforcement Model

Enforcement action will generally be taken using the progressive enforcement model however enforcement officers have discretion in whether or not to strictly adhere to the continuum. The exercise of discretion is based on the facts of a particular case. In assessing which option is appropriate, the enforcement officer may consider:

1. the severity of the noncompliance at issue;
2. whether the retailer has exercised due diligence; and
3. the likelihood of ongoing non-compliance.

More significant responses (i.e. tickets or administrative hearing process) should be considered if a contravention is significant (e.g. sale of tobacco or vapour products to minors), the retailer has not exercised due diligence 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 infrequent situations, the enforcement officer may consider it appropriate to issue a ticket or to seek an administrative penalty on the first finding of non-compliance, without prior warnings.

### 5.1 *Education and Awareness*

The enforcement officer will generally seek to ensure that the retailer is educated on the requirements of the Act and Regulation. The enforcement officer may reference and/or provide any Ministry of Health pamphlets, Ministry of Health website resources, the tobacco and vapour laws and any other resources deemed relevant.

The role of the enforcement officer is to monitor compliance to the legislation. The retailer is responsible for taking the necessary steps to ensure compliance to the Act and Regulation.

Retailers are also responsible for revising their policies and guidelines regarding tobacco and vapour products as necessary to achieve compliance. The enforcement officer may offer suggestions to the retailer on strategies to assist them in complying with the legislation. However the retailer is responsible for what strategies they implement to ensure compliance. It is the owner's and/or manager's and staff's responsibility to comply with the Act and Regulation at all times. They must take all necessary steps to ensure compliance on an ongoing basis.

### 5.2 *Verbal Warnings*

An enforcement officer may decide that verbal warnings are appropriate if minor violations are found. A verbal warning may 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.

### 5.3 *Written Warnings*

Written warnings may be appropriate when the enforcement officer 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, enforcement officers should include the following information:

- the name of the person to whom the letter is directed;
- the date, place and time 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;
- an invitation to contact the enforcement officer if the person has any questions concerning the letter, the act or the regulation; and
- if the enforcement officer believes that it would be helpful, a general invitation to contact the enforcement officer.

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 enforcement officer has discretion as to what delivery method is appropriate.

1. If the letter is delivered in person, the enforcement officer 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.
2. If the letter is delivered by mail and/or email, the enforcement officer is encouraged to place a follow-up telephone call to the retail owner to confirm receipt and 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.

#### **5.4 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 the Ministry's share point site. Tickets 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 enforcement officers must be able to account for the status of all violation ticket books provided to them. Enforcement officers 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 enforcement officer should call the retailer ahead of time to advise that the enforcement officer will be attending to issue a ticket;
  - in any case where it is reasonably anticipated that safety may be at issue, the enforcement officer should consult their supervisor or manager, follow health authority policy, and another enforcement officer 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 enforcement officer 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; or
  - asking the retailer to confirm the identity of an employee.
- 3) An enforcement officer 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) Enforcement officers 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 extra-provincial company. If the enforcement officer is unclear whether the person in charge of the premises is one of the persons listed above, the enforcement officer should ask this person whether he or she is the person in charge of the establishment at that point in time. The enforcement officer 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 enforcement officer 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 with the return address of the enforcement officer and health authority 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 and GREEN copies of the ticket should remain inside the ticket book with the officer's notes. While the management of tickets may vary, enforcement officers 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 enforcement officer 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) An enforcement officer 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

An enforcement officer may withdraw a ticket within 30 days of issuance where:

1. the officer 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 enforcement officer must follow the procedures set out in the Insurance Corporation of British Columbia's Enforcement Officer's Instruction Manual. The enforcement officer must also advise the Manager of Tobacco and Vapour Products Program with the Ministry of Health.

ICBC may cancel a ticket due to missing information, incorrect information on the ticket or incorrect service. If an enforcement officer 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.

## **5.5 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 enforcement officer 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.

### **Administrative Penalty Process/ Prosecutions Process**

#### **Administrative Penalty Process**

The administrative penalty process is less formal than a court proceeding. If the administrative penalty process is pursued, the enforcement officer will be required to write a report to the administrator 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 enforcement

officer will be required to testify at that hearing, which may be conducted in person, by teleconference or in writing.

The administrative penalty system is established via the Act. This system allows the administrator to impose monetary penalties, and/or to prohibit the sale of tobacco and vapour 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. A summary of offences that can be pursued via administrative penalty process are shown below:

Table 1. <i>List of offences pursuable under the administrative penalty process.</i>		
Section	Offences	Pursuable via the administrative process?
<i>Tobacco and Vapour Products Control Act</i>		
2(2)	Sell tobacco or vapour products to a person under 19	Yes
2(3)	Sell cigarettes from an open package	Yes
2(4)	Sell tobacco or vapour products where prohibition order applies	Yes
2.1	Tobacco or vapour products not to be sold in certain places	No
2.2	No smoking or vaping or other tobacco or vapour product use in schools	No
2.21(2)	Smoke or hold lighted tobacco, use an e-cigarette or hold an activated e-cigarette on health board property	No
2.3	No smoking or vaping in or near certain places	No
2.4	Prohibition on display or promotion of tobacco and vapour products	Yes
6.4(1)	Recovery of monetary penalty	Yes
10.1	Sign indicating prohibition order	Yes
10.3	Removing tobacco or vapour products from public display	Yes
<i>Tobacco and Vapour Products Control Regulation</i>		
4	Sell cigarettes in packages containing fewer than 20	Yes
5	Fail to display/affix warning signage	Yes

Enforcement officers may access the “Rules for Administrative Hearing under the Tobacco and Vapour Products Control Act” policy document. There is also training available for conduct of a hearing.



### **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://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-2-charge-assessment-social-regulatory-offences.pdf> .)

Enforcement officers 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 enforcement officer to provide a Report to Crown Counsel. In some Health Authorities, the enforcement officer 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:
  - I. complete a report to Crown counsel;
  - II. have Crown counsel approve the charge; and
  - III. provide evidence at trial.

Long form prosecutions should be considered only in extraordinary cases.

### **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.

If an employee of a corporate tobacco or vapour product retailer contravenes one of the provisions listed in the Act, the contravention may be pursued as an offence against the employee, an officer or director of the corporation, or both.

When enforcement officers 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. Note that tobacco retailers are licenced under the *Tobacco Tax Act* and if a prohibition order is made against a retailer then the retailer's tobacco licence is suspended. Vapour products do not require a licence like tobacco retailers; prohibition orders against vapour product retailers will be a suspension of the vapour product retailer's ability to sell vapour products. Tobacco contraventions will result only in penalties with respect to tobacco retailers. Vapour product contraventions will result only in penalties with respect to vapour product retailers.

### **Due Diligence Defence**

Before any decision is made to pursue a penalty against a person, the enforcement officer 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 enforcement officers 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, and other relevant information. Enforcement officers 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 the laws provide that it is a defence to a charge of selling tobacco or vapour products 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 performed a calculation to verify the date of birth was more than 19 years prior; and
3. reasonably believed that the identification was that of the individual and had not been altered or falsified.

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 the Act makes 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. An enforcement officer may make a submission to the adjudicator on the matter of penalty/penalties.

## **Reports to Crown Counsel**

Reports to crown counsel may be required in two circumstances:

1. in any case in which an enforcement officer 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 enforcement officers 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 enforcement officer will usually be expected to testify. If, for any reason, the enforcement officer does not expect to be available to testify, they should discuss their availability with crown counsel at the earliest possible date.)

## **5.6 Consultation with Other Agencies**

Enforcement officers 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.

Enforcement officers must not use powers under the act solely and specifically for the purpose of assisting an officer with a different statutory mandate. For example, enforcement officers 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, enforcement officers 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. Enforcement officers should ensure they consult with health authority managers and privacy personnel before sharing information with other agencies.



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

### **5.7 Referrals to Health Canada**

Provincial enforcement officers 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 appendix 5 for the referral 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 enforcement officers are uncertain as to whether or not the federal *Tobacco Act* would apply, they should contact Health Canada for clarification. Please note referrals to Health Canada under the *Tobacco Act* refer only to tobacco products and not vapour products.

Vapour products can be referred to Health Canada. A person who sells e-cigarettes with nicotine in Canada is doing so in violation of the Food and Drugs Act and its Regulations. There are a number of compliance and enforcement measures that Health Canada may take when non-compliance is identified. These measures are outlined in Health Canada's Compliance and Enforcement Policy 0001 ([http://www.hc-sc.gc.ca/dhp-mps/compli-conform/gmp-bpf/pol/pol\\_1\\_tc-tm-eng.php](http://www.hc-sc.gc.ca/dhp-mps/compli-conform/gmp-bpf/pol/pol_1_tc-tm-eng.php)) and can range from requesting the regulated party to voluntarily stop sale to prosecution.

## **6 First Nations and Aboriginal Communities – Application of Tobacco and Vapour Products Control Act and Regulation**

Provincial laws 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 and/or vaping or use of tobacco and/or vapour products in schools and on school property does not apply to the ceremonial use of tobacco only, 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 enforcement officers 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.





# APPENDICES

1. Minor Test Shopper Policy - Safety
2. Substantially Enclosed Spaces
3. Assessing Tobacco or Vapour Product Sales on Campus
4. Surveillance and Seizure
5. Referral to Health Canada

## **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 WorkSafeBC. More than 50% of work-related accidents happen during a young worker’s first 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 regulations describe orientation and training requirements for young and new workers.

### **BC Occupational Health and Safety Regulation 3.23- Young or new worker orientation and training**

- An employer must ensure that before a young or new worker begins work in a work place, the young or new worker is given health and safety orientation and training specific to that young or new worker's workplace.
- 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. workplace hazardous materials information system requirements set out in Part 5 of the Regulation, 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.

### **BC Occupational Health and Safety Regulation 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.

### **BC Occupational Health and Safety Regulation 3.25 - Documentation**

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

### **Minor Test Shopper 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.
- Enforcement officers 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.

### **BC Occupational Health and Safety Regulation 17.4 - Riding restrictions**

A worker must not ride in a vehicle:

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

### **BC Occupational Health and Safety Regulation 17.5 - Securing equipment**

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**

Minor test shoppers should complete the health authority violence prevention training prior to working in the field.

### **Strategies to reduce other injury**

- Minor test shoppers reporting for work under the influence of alcohol or drugs will be subject to health authority policy. Health authorities would remove the minor test shopper from the workplace and then consult human resources on next steps.
- Enforcement officer vehicles should carry a personal first aid kit when possible.
- Enforcement officers should keep the minor test shopper parent/guardian phone numbers on hand.
- Minor test shoppers must be tested regarding their knowledge and a record kept of this training.

### **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* 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 *Workers Compensation 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***

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 personal protective equipment 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 program***

Under this topic the employer is expected to provide an orientation to the occupational health safety 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 committee, or worker health and safety representative***

If applicable, the employer must inform the worker on how to contact the joint occupational health safety 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 of the Regulation may not be applicable in a given workplace. The employer can adjust the orientation accordingly.
- *Organize topics into groups:* Section 3.23 of the Regulation 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 of the Regulation 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:
  - i. Employers have with a number of workplaces;
  - ii. The industry has highly mobile workers, such as in construction; and

- iii. 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 of the Regulation, the circumstances of each scenario need to be considered. By way of example, generic topics for workers under the above noted circumstances could include:
  - a. Employer and worker rights and responsibilities
  - b. Employer's occupational health and safety program
  - c. Generic aspects of workplace hazardous materials information system
  - d. Personal protection equipment
  - e. Topics that will be site specific include:
    - i. Workplace health and safety rules;
    - ii. Name and contact of supervisor;
    - iii. Location of first aid facilities; and
    - iv. 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.



## APPENDIX 2 - Assessing Enclosed Spaces

The purpose of this document is to provide guidance for enforcement officers when determining whether “a building, structure, vehicle or other place” is “substantially enclosed” within the meaning Section 2.3 of *Tobacco and Vapour Products Control Act* (the “Act”) and Section 4.2 of the Tobacco and Vapour Products 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 enforcement officer that they are in compliance.

Instances where enforcement officers will be called upon to determine if a building, structure, vehicle or place is substantially enclosed will generally involve outside smoking or vaping 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 enforcement officers 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 1/8<sup>th</sup> or 1/16<sup>th</sup> an inch are **not** appropriate as they reduce air flow by 18% and 26% respectively. However, bug screens of 1/4<sup>th</sup> 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 enforcement officer, the umbrellas make it difficult for smoke or vapour emissions 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. Enforcement officers 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, enforcement officers 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 enforcement officers in this regard will be the degree to which the covered portion of the building, structure, vehicle or place makes it difficult for smoke or vapour emissions to escape from the building, structure, vehicle or place. The goal is to allow air to move, thereby removing smoke or vapour emissions 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, enforcement officers 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 or vaping could be prohibited in the covered patio area and permitted in the uncovered area. In making this determination, enforcement officers 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. Enforcement officers 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 an enforcement officer 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 2.7<sup>3</sup>. This will give you the total nominal wall space.

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<sup>3</sup> 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,

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).

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. Enforcement officers 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 or vaping 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 or vaping 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 or vaping would be prohibited in the patio area.

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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”.

### **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 or vaping 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, an enforcement officer 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 or vaping 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” an enforcement officer 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 enforcement officer, based on the unique facts of the particular situation, the “roof or other covering” makes it difficult for air (smoke or vapour emissions) to easily move out of the patio area as a whole. The nominal wall space requirement is met in this instance. Smoking or vaping could be prohibited in the entire patio area depending on the enforcement officer’s determination regarding the “roof or other covering”.

If it is determined that the entire patio is not “substantially enclosed” an enforcement officer 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 or vaping 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. Enforcement officers 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”.



## **APPENDIX 3 - Assessing Tobacco and Vapour Product Sales on Campus**

Section 2.1 of the *Tobacco and Vapour Products Control Act* (the “Act”) prohibits the sale of tobacco and vapour products on a campus of a public university or other public post-secondary institution. The term “campus” is defined in Section 4.1 of the *Tobacco and Vapour Products Control Regulation* (the “Regulation”).

### **Three-Step Analysis**

The framework for the prohibition from selling tobacco or vapour products 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 or vapour products 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 or vapour products are being sold from used primarily for the purposes of:**

- **delivering educational programs or other learning programs,**
  - **research,**
  - **providing student services, or**
  - **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 public?**

Public universities and public post-secondary institutions are created by provincial legislation, and include universities, colleges and institutes. Enforcement officers



designated under the Act should ensure the status of an institution as part of their assessment of the application of the prohibition.

The Ministry of Advanced Education 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. As of August 2016 the link is found at <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 or vapour product 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 be sold). In general, enforcement officers will be faced with situations where tobacco or vapour products are 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 or vapour products are 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, enforcement officers 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 or vapour products are 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, cart 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 enforcement officer 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 enforcement officer 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:**

- **delivering educational programs or other learning programs,**
- **research,**
- **providing student services, or**
- **providing services by affiliated student organizations?**

This part of the analysis requires the enforcement officer 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 and vapour products 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, enforcement officers will be faced with situations where tobacco and vapour products are being sold from a retail establishment inside a university building. In these situations, enforcement officers 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 and/or vapour products are 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 and vapour products 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 and/or vapour products. 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 and/or vapour products 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, enforcement officers 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 enforcement officer 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 and vapour products can be sold from that particular location.

## APPENDIX 4 – Surveillance and Seizure

Surveillance is an inspection method, or tool, that can be used in certain circumstances. The term "surveillance" refers to discrete enforcement activities undertaken by enforcement officers 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 or vapour 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 enforcement officers 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, an enforcement officer is encouraged to discuss the situation with their supervisor or manager. The enforcement officer 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;
- enforcement officers 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.

### Seizure of goods or documents and retention of evidence

If goods are seized as part of an inspection, the seizure must be conducted in compliance with Section 3 and 4 of the Act. If enforcement officers 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 or vapour 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 enforcement officers 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.



# APPENDIX 5 – Health Canada Referral



## REFERRAL TO HEALTH CANADA

Submit via email: Subject: TOBACCO ACT REFERRAL, ATTN REGIONAL MANAGER  
Email: BC.TCP@hc-sc.gc.ca

Facility TRA #	Facility Name	Facility Owner	Contact Phone Number
Facility Address			

Question/Issue/Possible Contravention

If applicable, physical location of the potential contravention (i.e. location within the facility)

Name of Tobacco Product Involved, attach pictures (if applicable) and any other relevant information

Referred By

Enforcement Officer's Name	Phone Number	Email Address
Health Authority Name and Address		

HLTH 3340 2013/08/13

Link to fill and save enabled form:  
[Referral to Health Canada form - HLTH 3340](#)