



**DECISION OF
THE ADMINISTRATOR**

Tobacco and Vapour Products Program
Health Protection Branch
Population and Public Health

MINISTRY OF HEALTH

IN THE MATTER OF

A hearing pursuant to Section 5(1) of
The Tobacco and Vapour Products Control Act, R.S.B.C. 1996, c. 451

Respondent:	Simatech Satellite Services Inc. DbA: Simatech Vapour Shop ("Respondent")
Represented by:	Gino Vincenzo Capone Diaz ("Respondent's Representative")
Respondent's Counsel:	Paul Waller, Barrister & Solicitor Reed Pope Law Corporation, Barristers & Solicitors ("Respondent's Counsel")
Island Health's Representative	Rebekah Kirk ("Island Health's Representative")
Island Health's Counsel:	Andrew W. Buckley, Barrister & Solicitor Stewart McDannold Stuart, Barristers & Solicitors ("Island Health's Counsel")
Adjudicator	R. John Rogers
Dates of Hearing	January 24, 25 & 26 2023
Date of Decision	February 21, 2023

INTRODUCTION

1) Island Health is a regional board under the *Health Authorities Act*, RSBC 1996 c.180, responsible for the provision of publicly funded health services on Vancouver Island, the Gulf Islands, Johnstone Strait and part of the Central Coast of British Columbia. As part of its responsibilities, Island Health operates the Tobacco & Vapour Prevention and Control Program (the “Control Program”) under which it employs Tobacco and Vapour Enforcement Officers (“TVEO’s”) who are responsible for ensuring compliance with the *Tobacco and Vapour Products Control Act*, R.S.B.C. 1996, c. 451 (the “Act”) and section 2 of the *Tobacco and Vapour Products Control Regulation*, B.C. Regulation 232/2007 (the “Regulation”). As part of the Control Program, as well, Island Health employs Minor Test Shoppers (“MTS’s”) who conduct compliance checks on establishments selling tobacco and vapour products.

2) The Respondent, under the name “Simatech Vapour Shop”, owns and operates 7 retail establishments selling vapour products on Vancouver Island, British Columbia. Of these 7 locations, the retail establishment located at 4A-6338 Metral Drive, Nanaimo (the “Metral Drive Location”), the retail establishment located at 255 Island Highway East, Parksville (the “Parksville Location”), and the retail establishment located at 2149A Bowen Road, Nanaimo (the “Bowen Road Location”) are the Respondent’s retail establishments which are the subject of this enforcement hearing.

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTY

3) The allegations against the Respondent are set out in the Notice of Administrative Hearing (the “NOAH”) dated August 31, 2022, issued by the Administrator appointed pursuant to section 5 of the Act (“the Administrator”), as the Administrator is so empowered by section 6.1 of the Act.

4) The NOAH alleges that on August 18, 2021, the Respondent at the Metral Drive Location contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19. The NOAH further alleges that on the same date and at the same location, the Respondent committed a further contravention of section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment (the “Metral Drive Contraventions”).

5) The NOAH further alleges that that on August 31, 2021, the Respondent at the Parksville Location again contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19 and contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the

use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment. (the “Parksville Contraventions”).

6) And thirdly, the NOAH alleges that on November 19, 2021, the Respondent at the Bowen Road Location again contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19 and contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment. (the “Bowen Road Contraventions”).

7) The NOAH recommends that if the contraventions alleged in the NOAH are proven, that the following penalties be assessed against the Respondent:

- For the Metral Drive Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$1,000;
- For the Parksville Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$675;
- For the Bowen Road Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$675;

resulting in monetary penalties amounting in total to \$5,350 together with a prohibition period of 30 days for each of the three locations operated by the Respondent and referenced above.

THE ADMINISTRATIVE HEARING

8) For the purpose of the hearing and in accordance with section 5(2) of the Act, the Administrator has delegated to the undersigned as the Adjudicator the powers, duties and functions provided to the Administrator by the Act with respect to a decision as to whether or not the contraventions as alleged in the NOAH are proven, and, if the undersigned finds the alleged contraventions to have been proven, a determination of an appropriate penalty therefore and an order with respect to such determination.

9) The hearing was held by video conference on January 24, 25, and 26, 2023. Prior to the commencement of the hearing, after being advised by the undersigned of the procedural rules which would be applicable to the conduct of the hearing in an online format, the Respondent’s Counsel and Island Health’s Counsel agreed on behalf of their clients to conduct the enforcement hearing by video conference and in accordance with the stated procedural rules.

RELEVANT STATUTORY PROVISIONS

Tobacco and Vapour Products Control Act, R.S.B.C. 1996, c. 451

Prohibitions

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

Prohibitions on display or promotion of tobacco and vapour products

2.4 (1) A person must not

- (a) display tobacco products or vapour products, or
- (b) advertise or promote the use of tobacco or vapour products by means of a sign or otherwise

in any manner prohibited by the regulations.

Tobacco and Vapour Products Control Regulation B.C. Regulation 232/2007

Minimum age of 19 years

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

Limits on advertising

4.31 (1) A retailer must not, on the premises of a retail establishment, display tobacco or vapour products, or advertise or promote the use of tobacco or vapour products, in any manner by which the tobacco or vapour products or the advertisement or promotion

- (a) may reasonably be seen or accessed by a minor inside the retail establishment, or
- (b) are clearly visible to a person outside the retail establishment.

Limits on advertising vapour products

4.301 A manufacturer, distributor, wholesaler, retailer, or a person acting on behalf of any of them must not advertise a vapour product in any place, whether inside or outside, by any means that may be seen, accessed or heard by a minor.

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.

**Schedule 2
Monetary Penalties**

Column 1	Column 2	Column 3		
Item	Contravention	Monetary Penalty		
		First Contravention	Second Contravention	Subsequent Contravention
	Minors			
1	Breach of section 2 (2) [<i>selling or offering to sell tobacco or vapour products to an individual who is under 19 years of age</i>] of the Act	\$0 - \$1,000	\$0 - \$3,000	\$0 - \$5,000
	Advertising			
4.1	Breach of section 2.4 [<i>displaying tobacco or vapour products, or advertising or promoting tobacco or vapour product use, in a manner prohibited by the regulations</i>] of the Act	\$0 — \$3,000	\$1,000 — \$4,000	\$4,000 — \$5,000

**Schedule 3
Prohibition Periods**

Column 1	Column 2	Column 3		
Item	Contravention	Prohibited Period (days)		
		First Contravention	Second Contravention	Subsequent Contravention
	Minors			
1	Breach of section 2 (2) [<i>selling or offering to sell tobacco or vapour products to an individual who is under 19 years of age</i>] of the Act	0-30	0-90	0-180

	Advertising			
4.1	Breach of section 2.4 [<i>displaying tobacco or vapour products, or advertising or promoting tobacco or vapour product use, in a manner prohibited by the regulations</i>] of the Act	0-30	0-90	0-180

EXHIBITS

10) The Adjudicator noted that the Respondent and Island Health had produced and exchanged exhibits to form part of this hearing in digital form well in advance of the hearing so that each party had had an opportunity to review the same. Neither party objected to the admission of any of the exhibits submitted by the other and, as the hearing progressed, these exhibits were identified, verified, and introduced into evidence as part of the hearing record. During the hearing, a total of 113 exhibits were so identified, verified and entered into evidence as part of the hearing record.

EVIDENCE –ISLAND HEALTH

The Reports to the Administrator

11) The TVEO employed by Island Health (“TVEO 1”) who was present during the compliance checks at all the Respondent’s establishments which led to the issuance of the NOAH, completed three reports to the Administrator referencing these three compliance checks, each report dated February 8, 2022. The first such report (the “Metal Drive Report” - Island Health Documents tab 2 Ex #32) referenced the alleged contraventions occurring at the Metal Drive Location, the second such report (the “Parksville Report” - Island Health Documents tab 3 Ex #33) referenced the alleged contraventions occurring at the Parksville Location, and the third such report (the “Bowen Road Report” - Island Health Documents tab 4 Ex #34) referenced the alleged contraventions occurring at the Bowen Road Location.

12) In her evidence, TVEO 1 confirmed that she was the author of these reports and that they accurately reflected what had occurred at the referenced locations during the compliance checks. She also confirmed that copies of each of these three reports had been sent by email to the Respondent’s registered office and that on February 16, 2022, copies of these reports had been forwarded by email to the Respondent.

The Alleged Metal Drive Contraventions

13) The description of what occurred during the compliance check of the Metal Drive Location on August 18, 2021 involving the two MTS's as described in the Metal Drive Report might be summarized as follows:

- On August 18, 2021, TVEO 1 accompanied by another TVEO ("TVEO 2") were conducting compliance checks of retail establishments in the Nanaimo area together with the two MTS's, MTS 1 and MTS 2,
- MTS 1 and MTS 2 went into the Metral Drive Location unaccompanied, with the intention of attempting to purchase a vapour product,
- A short time later, MTS 1 and MTS 2 returned to the vehicle occupied by TVEO 1 and TVEO 2 and advised the TVEO's that MTS 1 had been sold a vapour product without at any time while in the establishment being asked to produce identification demonstrating her to be at least 19 years old,
- TVEO 1 and TVEO 2 then entered the Metral Drive Location, advised the employee of the Respondent (the "Metral Drive Employee") of the alleged sale of the vapour product to MTS 1, and noted that the Metral Drive Employee responded that:
 - She had been employed by the Respondent at the Metral Drive Location for approximately six months,
 - She had not requested identification, but when MTS 1 presented her identification, the Metral Drive Employee had misread the birth date, and
 - She had not asked for identification from MTS 2,
- TVEO 2 then spoke to the manager of the Metral Drive Location (the "Metral Drive Manager") advising her of the alleged contravention and noted that the Metral Drive Manager advised that:
 - The policy of the Metral Drive Location was to request identification from customers that appear to be 25 years of age and under,
 - The till has an age reminder decal visible to assist the clerks,
 - No formal training is offered to staff other than direct supervision for the first two weeks of employment for all new employees, and
 - When asked by TVEO 2 if the Metral Drive Location used an ID scanner as TVEO 2 had previously recommended to the Respondent's Representative, the Metral Drive Manager confirmed that there was not such a scanner at the Metral Drive Location, nor was there a till prompt to assist staff in verifying the age of customers.

The Alleged Parksville Contraventions

14) The description of what occurred during the compliance check of the Parksville Location on August 31, 2021 involving the two MTS's as described in the Parksville Report might be summarized as follows:

- On August 31, 2021, TVEO 1 was conducting compliance checks of retail establishments in the Parksville area together with the two MTS's, MTS 2 and MTS 3,

- MTS 2 and MTS 3 went into the Parksville Location unaccompanied with the intention of attempting to purchase a vapour product,
- A short time later, MTS 2 and MTS 3 returned to the vehicle occupied by TVEO 1 and advised that MTS 3 had been sold a vapour product without at any time while in the establishment being asked to produce identification demonstrating her to be at least 19 years old,
- TVEO 1 then entered the Parksville Location, and spoke to its manager (the “Parksville Manager”) advising him of the alleged contravention and noted that the Parksville Manager stated that:
 - He had been the manager of the Parksville Location since its opening approximately 4 months previously,
 - He had sold the vapour product to MTS 3 without asking her for her identification as he had thought that she and MTS 2 were regular shoppers at the establishment,
 - The till has an age reminder decal visible to assist the clerks,
 - No training is offered to staff of the Respondent other than direct supervision for the first two weeks of employment for all new employees, and
 - He was not aware of an ID policy for the Parksville Location although he usually requested identification from customers who appeared to be 25 years of age and younger.

The Alleged Bowen Road Contraventions

15) The description of what occurred during the compliance check of the Bowen Road Location on November 19, 2021 involving the two MTS’s as described in the Bowen Road Report might be summarized as follows:

- On November 19, 2021, TVEO 1 was conducting compliance checks of retail establishments in the Nanaimo area together with the two MTS’s, MTS 2 and MTS 3,
- MTS 2 and MTS 3 went into the Bowen Road Location unaccompanied with the intention of attempting to purchase a vapour product,
- A short time later, MTS 2 and MTS 3 returned to the vehicle occupied by TVEO 1 and advised that MTS 3 had been sold a vapour product without at any time while in the establishment being asked to produce identification demonstrating her to be at least 19 years old,
- TVEO 1 then entered the Bowen Road Location, spoke to the employee of the Respondent (the “Bowen Road Employee”), advising the Bowen Road Employee of this alleged sale, and noted that the Bowen Road Employee responded to TVEO 1 that:
 - He had been employed by the Respondent at the Bowen Road Location for approximately one year,
 - He acknowledged that he had not requested identification from either MTS 2 or MTS 3,
 - The Respondent’s policy was to request identification from customers that appear to be 35 years of age and under, and
 - That in-person training was provided to all new employees of the Respondent.

The Respondent's Enforcement History in the Reports to the Administrator

16) The Reports to the Administrator prepared by TVEO 1 each contain a similar section called the "Chronological enforcement history involving this retailer" which describes the enforcement history of the Respondent's locations within Island Health's jurisdiction prior to the alleged contraventions which are the subject of this hearing. This description of the 9 incidents involving the Respondent's locations and the resulting action on behalf of Island Health following these incidents might be summarized as follows:

- December 28, 2016 – at the Bowen Road Location the sale of a vapour product to an MTS – as a result, correspondence dated February 3, 2017 regarding the sale of vapour products to a minor was sent to the Respondent's Representative,
- April 18, 2017 – at the Respondent's location at 435 5th Street, Courtney, BC, (the "Courtney Location") the sale of a vapour product to an MTS – as a result, correspondence dated April 27, 2017 regarding the sale of vapour products to a minor was sent by TVEO 2 to the President of the Respondent,
- May 15, 2017 – at the Respondent's location at 4-1516 Fairfield Road, Victoria BC the sale of a vapour product to an MTS – as a result, correspondence dated June 12, 2017 regarding the sale of vapour products to a minor was sent to the Respondent,
- November 7, 2017 – at the Metral Drive Location the sale of a vapour product to an MTS – as a result, correspondence dated November 14, 2017 regarding the sale of vapour products to a minor was sent by TVEO 2 to the President of the Respondent,
- February 1, 2018 - at the Metral Drive Location, the sale of a vapour product to an MTS – as a result, a Tobacco/Vapour Products Minor Test Shopper Inspection Report was provided to the Respondent with "To Be Determined" cited as "Action Taken",
- February 13, 2018 - at the Courtney Location, the sale of a vapour product to an MTS – as a result, a Tobacco/Vapour Products Minor Test Shopper Inspection Report was provided to the Respondent with "To Be Determined" cited as "Action Taken",
- April 11, 2018 – a non-compliance meeting was held with the President of the Respondent together with members of Island Health's Tobacco & Vapour Prevention and Control Program, including TVEO 2, at which the Respondent's compliance history, including the contraventions committed by the Respondent on February 1, 2018 and February 13, 2018, were reviewed. Following this review, the President of the Respondent stated that the Respondent had put in place preventive measures which he enumerated. Additional preventive measures were recommended by the members of Island Health's Tobacco & Vapour Prevention and Control Program, including:
 - Providing an electronic identification scanner,
 - Recording in writing when a patron is asked for identification,
 - Providing appropriate refresher training and education to employees,
 - Adding reminders to check for identification on employee paychecks,
 - Keeping written documentation of all store policies, staff training and monitoring actions, and
 - Outlining consequences for employees who sell to minors including that the employee can be fired.

Following this meeting a Tobacco and Vapour Retailer Toolkit was provided to the President of the Respondent for each of the Respondent's establishments and a written

summarization of the meeting together with a written warning was given to the Respondent in correspondence dated June 2, 2018,

- April 17, 2018 - TVEO 2 sent an email to the Respondent's Representative with information on ID scanners and Mystery Shoppers to follow up on the discussions at the meeting on April 11, 2018,
- March 22, 2019 - at the Respondent's Courtney Location, the sale of a vapour product to an MTS – as a result, Violation Ticket AH19498072 was issued and was sent to the Respondent by TVEO 2 on August 6, 2019 and the ticket was paid by the Respondent on August 15, 2019,
- July 23, 2019 – a non-compliance meeting was again held with the President of the Respondent together with members of Island Health's Tobacco & Vapour Prevention and Control Program, including TVEO 2, at which the Respondent's compliance history, including the contravention committed by the Respondent on March 22, 2019, was reviewed. Following this review, the President of the Respondent stated that the Respondent had put in place preventive measures which he enumerated. Additional preventive measures were recommended by members of Island Health's Tobacco & Vapour Prevention and Control Program, including:
 - Providing an electronic identification scanner,
 - Recording in writing when a patron appearing to be 35 years of age or younger is asked for identification and record the patron's date of birth,
 - Hiring underage mystery shoppers to ensure compliance, and
 - Disciplining staff members who fail to follow the Respondent's policies.

Following this meeting a written summarization of the meeting together with a written warning was given to the Respondent in correspondence dated August 6, 2019,

- August 29, 2019 – at the Respondent's Bowen Road Location, the sale of a vapour product to an MTS – as a result, written correspondence dated September 6, 2019 regarding the sale was given to the Respondent by a representative of the Island Health Tobacco & Vapour Prevention and Control Program,
- September 26, 2019 – at the Respondent's Metral Drive Location, the sale of a vapour product to an MTS – as a result, a Tobacco/Vapour Products Minor Test Shopper Inspection Report was provided to the Respondent with "To Be Determined" cited as "Action Taken",
- February 11, 2020 - a further non-compliance meeting was held with the Respondent's Representative together with representatives of Island Health's Tobacco & Vapour Prevention and Control Program, including the Island Health's Representative, at which the Respondent's compliance history, including the contravention committed by the Respondent on September 26, 2019, was reviewed. Following this review, the Respondent's Representative confirmed that the Respondent had put in place numerous additional preventive measures which he enumerated.

Additional preventive measures to prevent the sale of vapour products to minors were again discussed and recommended by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program for use by the Respondent, which measures included:

- Providing an electronic identification scanner,
- Recording in writing when a patron appearing to be 35 years of age or younger is asked for identification and record the patron's date of birth,

- Creating a discipline policy for staff members who fail to follow the Respondent's policies and procedures, and
- Obtaining a till prompt to assist staff members when verifying age.

At this meeting, the Respondent was issued Violation Ticket AH28075134 for the contravention on September 26, 2019 and a copy was delivered to the Respondent's Representative. Subsequently, written correspondence summarizing the meeting was sent to the Respondent on February 20, 2020, which written correspondence again noted the Respondent's obligation to ensure compliance with the Act and the Regulation and the consequences that the Respondent might face if this obligation were not met.

Island Health's Witnesses

17) Island Health produced as witnesses at the hearing the three MTS's and the two TVEO's who were present during the contraventions alleged in the NOAH. These parties, together with Island Health's Representative, each gave evidence at the hearing.

The Minor Test Shoppers

18) MTS 1, MTS 2, and MTS 3 all provided evidence of their ages at the time of the alleged contraventions which proved that they were under the age of 19 at that time. They each testified as to how their time on duty as an MTS proceeded and how they had been trained to conduct themselves during a compliance check at an establishment. These instructions included:

- They were to dress in a normal fashion, similar to what they would wear on a regular day,
- To demonstrate this normal appearance at the commencement of their shift they would have their photograph taken by the accompanying TVEO,
- Included with these photographs, a picture would be taken of their current identification,
- When entering an establishment, if they were asked for their identification, they would advise the party asking them that they did not have their identification with them and would leave the establishment without having purchased any vapour product,
- Similarly, if they went to purchase a vapour product and prior to completing the purchase they were asked for identification, they would advise the party asking them that they did not have identification and would leave the establishment without completing the purchase,
- If the purchase of a vapour product was completed without having been asked for identification, they would take the purchased vapour product, leave the establishment, return to the vehicle where their accompanying TVEO would be waiting, and they would give this TVEO the purchased product, and
- They would immediately record in writing their understanding and observations of what had occurred from the time they entered the establishment.

MTS 1's Evidence

19) MTS 1 testified that prior to the date of the alleged Metral Drive Contraventions, she had been working with Island Health since 2019 and that, on that date, she was 17 years old.

20) She confirmed as set out in the Metral Drive Report that she had been sold a vapour product at the Metral Drive Location by the Metral Drive Employee and that at no time while she was in the establishment, either upon entry or prior to the sale, did the Metral Drive Employee or any other employee of the Respondent ask her for identification.

21) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

22) MTS 1 identified a copy of the notes she had made immediately upon exiting the Metral Drive Location on August 18, 2021 (Island Health Documents tab 8 Ex #2) and confirmed that they accurately reflected what had occurred during her visit to the establishment.

23) On cross-examination, MTS 1 testified that she had attended at other establishment locations of the Respondent, usually in the Comox Valley of British Columbia. When asked, she testified that she could not recall what the outside of these establishments looked like or whether or not she could look inside. Nor did she recall whether or not there was a sign outside these establishments stating that no minors were permitted within.

24) When asked on cross-examination if during her visit to the Metral Drive Location on August 18, 2021 she had observed any signage, she testified that she did not remember, but agreed that there might have been signage which she had not seen.

MTS 3's Evidence

Parksville Location

25) MTS 3 testified that prior to the date of the alleged Parksville Contraventions, she had been working with Island Health since 2019 and, that on that date, she was 16 years old.

26) She confirmed as set out in the Parksville Report that she had been sold a vapour product at the Parksville Location by the Parksville Employee and that at no time while she was in the establishment, either upon entry or prior to the sale, did the Parksville Employee or any other employee of the Respondent ask her for identification.

27) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

28) MTS 3 identified a copy of the notes she had made immediately upon exiting the Parksville Location on August 31, 2021 (Island Health Documents tab 18 Ex #7) and confirmed that they accurately reflected what occurred during her visit to the establishment.

Bowen Road Location

29) MTS 3 testified that by the date of the alleged Bowen Road Contraventions, she had had a birthday and was, on that date, 17 years old.

30) She confirmed as set out in the Bowen Road Report that she had been sold a vapour product at the Bowen Road Location by the Bowen Road Employee and that at no time while she was in the establishment, either upon entry or prior to the sale, did the Bowen Road Employee or any other employee of the Respondent ask her for identification.

31) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

32) MTS 3 identified a copy of the notes she had made immediately upon exiting the Bowen Road Location on November 19, 2021 (Island Health Documents tab 26 Ex #10) and confirmed that they accurately reflected what had occurred during her visit to the establishment.

33) On cross-examination, MTS 3 confirmed that during compliance checks at the Respondent's establishments in the fall or winter of 2022, that she had been asked for identification and, when she didn't produce it, that she had been asked to leave the establishment. When asked, she agreed that this had occurred on other occasions at the Respondent's establishments.

34) MTS 3 testified on cross-examination that when she had approached the Parksville Location, she had seen signs on the door stating that no minors were permitted in the store. She agreed, when asked, that from the outside of the establishment she could see no advertising or, as the glass was frosted, she could not see into the establishment.

35) With respect to the Bowen Road Location, she testified that she could not recall whether or not there were signs outside the establishment, or whether or not the facing glass was frosted.

36) When asked, MTS 3 testified on cross-examination that she had entered the Metral Drive Location within the previous few months and that she had been asked for identification, and, when she did not produce it, was asked to leave the establishment.

MTS 2's Evidence

Metral Drive Location

37) MTS 2 testified that prior to the date of the alleged Metral Drive Contraventions, she had been working with Island Health for approximately 3 years, during which time she had done about 100 compliance checks. She stated that she puts in about 2 to 3 shifts a month, usually on a weekend.

38) On August 18, 2021, she was 16 years old.

39) She confirmed as set out in the Metral Drive Report that she had accompanied MTS 1 into the Metral Drive Location and that she had observed MTS 1 having been sold a vapour product by the Metral Drive Employee. She testified that at no time while she was in the establishment,

either upon entry or prior to the sale, did the Metral Drive Employee or any other employee of the Respondent ask her for identification.

40) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

41) MTS 2 identified a copy of the notes she had made immediately upon exiting the Metral Drive Location on August 18, 2021(Island Health Documents tab 9 Ex #14) and confirmed that they accurately reflected what had occurred during her visit to the establishment.

Parksville Location

42) MTS 2 confirmed as set out in the Parksville Report that she had accompanied MTS 3 into the Parksville Location and that she had observed MTS 3 having been sold a vapour product by the Parksville Employee. She testified that at no time while she was in the establishment, either upon entry or prior to the sale, did the Parksville Employee or any other employee of the Respondent ask her for identification.

43) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

44) MTS 2 identified a copy of the notes she had made immediately upon exiting the Parksville Location on August 31, 2021(Island Health Documents tab 19 Ex #16) and confirmed that they accurately reflected what occurred during her visit to the establishment.

Bowen Road Location

45) MTS 2 confirmed as set out in the Bowen Road Report that she had accompanied MTS 3 into the Bowen Road Location and that she had observed MTS 3 having been sold a vapour product by the Bowen Road Employee. She testified that at no time while she was in the establishment, either upon entry or prior to the sale, did the Bowen Road Employee or any other employee of the Respondent ask her for identification.

46) During her time in the establishment, she testified, she was able to clearly observe vapour products on display.

47) MTS 2 identified a copy of the notes she had made immediately upon exiting the Bowen Road Location on November 19, 2021(Island Health Documents tab 27 Ex #18) and confirmed that they accurately reflected what had occurred during her visit to the establishment.

48) When asked on cross-examination, MTS 2 testified that she had been to the Metral Drive Location as recently as December 2022, was asked for identification and, when she did not produce it, she was asked to leave. She confirmed that since the dates of the alleged contraventions, on a number of other occasions she has been asked for identification at the

Bowen Road Location and at the Parksville Location, as well, and was asked to leave when it was not produced.

49) MTS 2 testified on cross-examination that for each of the compliance checks leading to the alleged contraventions, she has seen that the windows of the establishments were frosted and that she could not see inside, that there was a sign in the front of the establishment which stated that no minors were permitted to enter, that there were decals on the tills requiring proof of age prior to purchasing products, and agreed that there might be signs in the store prohibiting the sale of products to minors, but that she did not recall the same.

TVEO 1's Evidence

50) TVEO 1 testified that she has been working as a Tobacco & Vapour Enforcement Officer/Reduction Coordinator with Island Health for two years working in the mid Vancouver Island area, including the Nanaimo, Parksville and Chemainus municipalities, and that her responsibilities included encouraging retailers, such as the Respondent, to run their businesses in compliance with the Act and the Regulation. Prior to commencing her employment with Island Health, she stated, she had been employed as an inspector in Alberta.

51) In describing how she carried out her duties, she noted the difference between a routine inspection of a retailer and an inspection resulting from a complaint and stated that an inspection involving an MTS is to ensure compliance.

52) The process she deploys, she testified, is that where a first infraction occurs when a vapour product is sold to a minor, she gives a verbal warning to the party who sold the product and to the retailer involved and encourages training in ensuring compliance, including training on an effective policy of requiring identification. If there is a subsequent infraction, the retailer is issued a "To Be Determined" notice, and if there are subsequent infractions, the retailer is subjected to further progressive enforcement action including an administrative hearing such as the matter at hand.

53) TVEO 1 testified that she had met with the Island Health's Representative following the compliance inspection at the Metral Drive Location on August 18, 2021, and, following this meeting, she had reviewed the data held by Island Health on the compliance record of the Metral Drive Location. She included this data in a document entitled "Summary of Violations" (Island Health Documents tab 35 Ex #22) and completed a similar summary for the Parksville Location (Island Health Documents tab 36 Ex #25) and for the Bowen Road Location (Island Health Documents tab 37 Ex #31).

54) She stated that she had consolidated and updated the data from these three reports in a report dated January 18, 2022 entitled "Table of Minor Shopper Inspections and Outcomes" (Island Health Documents tab 34 Ex #35) to document the numerous interactions between representatives of Island Health's Tobacco & Vapour Prevention and Control Program and the various locations of the Respondent on Vancouver Island. She noted that this report showed that during the 5-year period extending from November 2016 to November 2021:

- For all the Respondent's 7 locations on Vancouver Island:

- There had been 87 MTS inspections,
- There had been 12 violations,
- Resulting in contraventions during 14% of these inspections.
- During this time period for only the Bowen Road Location:
 - There had been 14 MTS inspections,
 - There had been 3 violations,
 - Resulting in contraventions during 21% of these inspections.
- During this time period for only the Metral Drive Location:
 - There had been 22 MTS inspections,
 - There had been 4 violations,
 - Resulting in contraventions during 18% of these inspections.
- During this time period for the Parksville Location:
 - There had been 1 MTS inspection,
 - There had been 1 violation,
 - Resulting in a contravention rate of 100%, and
- During this time period for the Respondent's 3 locations in Victoria:
 - There had been 16 MTS inspections,
 - There had been 0 violations,
 - Resulting in contraventions during 0% of these inspections.

55) She noted the difference in the compliance record of the Respondent's Victoria locations as compared with that of Metral Drive Location, the Bowen Road Location and the Parksville Location.

56) With respect to the Metral Drive Contraventions, the Parksville Contraventions, and the Bowen Road Contraventions, TVEO 1 testified that she was involved with all those compliance inspections and that the reports she had prepared the days following these inspections (Island Health Documents tab 15 Ex #21), (Island Health Documents tab 24 Ex #24), (Island Health Documents tab 32 Ex #29) accurately reflect what occurred during those compliance inspections, including the discussions with the various employees of the Respondent about the Respondent's policies and procedures involving the requirement of asking for identification of patrons entering the establishments as reflected in the NOAH. TVEO 1 also identified and confirmed:

- the contents of the To Be Determined Decision Form dated September 16, 2021 involving the Metral Drive Contraventions (Island Health Documents tab 16 Ex #26) provided to the Respondent advising the Respondent of the Metral Drive Contraventions,
- the contents of the To Be Determined Decision Form dated September 16, 2021 involving the Parksville Contraventions (Island Health Documents tab 25 Ex #27) provided to the Respondent advising the Respondent of the Parksville Contraventions, and
- the contents of the To Be Determined Decision Form dated January 11, 2022 involving the Bowen Road Contraventions (Island Health Documents tab 33 Ex #28) provided to the Respondent advising the Respondent of the Bowen Road Contraventions.

TVEO 2's Evidence

57) TVEO 2 testified that he has been employed by Island Health as a TVEO since February of 2013. His area of responsibility is northern Vancouver Island, extending northward from Qualicum Beach and including Port Alberni and Denman and Hornby Islands.

58) TVEO 2 referenced 8 letters in the Island Health Documents dating from February 3, 2017 in which Island Health wrote to the Respondent referencing violations of the Act and the Regulation by the Respondent at a number of its locations.

59) He testified that he together with the Island Health's Representative were coauthors of the letter dated June 2, 2018 (Island Health Documents tab 41 Ex #37) in which reference was made to what was called a "non-compliance meeting" held with the representatives of the Respondent on April 11, 2018 to discuss the compliance history at the Metral Drive Location and the Courtney Location of the Respondent. He noted that, as referenced in this letter, the Respondent had stated that it was taking a number of measures to prevent future sales to persons under 19 years of age and that the representatives of Island Health's Tobacco & Vapour Prevention and Control Program had recommended additional measures that the Respondent might consider taking to achieve compliance, including providing staff members with an ID scanner to assist them in determining the age of customers.

60) TVEO 2 also referenced the second of the 8 letters which was dated August 6, 2019 (Island Health Documents tab 40 Ex #38) and which he had again coauthored with the Island Health's Representative. He noted that this letter referenced a meeting held with the Respondent's Representative on July 23, 2019 during which the Respondent's Representative confirmed what policies and procedures were in effect at the Respondent's locations to ensure compliance and that again the recommendation had been made by TVEO 2 for the Respondent, in order to ensure such compliance, to implement a number of additional policies including obtaining the ID scanner as had been earlier recommended.

61) The eighth of these letters dated February 20, 2020, TVEO 2 testified, he did not author, but noted that it referenced an additional meeting with the Respondent's Representative on February 11, 2020 when again the compliance history of the Respondent was discussed, the Respondent's Representative again confirmed what policies and procedures were in effect at the Respondent's locations to ensure compliance and that, again, recommendations were made by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program as to what additional measure might be taken by the Respondent to ensure compliance, including the acquisition of ID scanners.

62) TVEO 2 testified that he was part of the team conducting the compliance inspection at the Metral Drive Location on August 18, 2021 and confirmed that the report (Island Health Documents tab 17 Ex #36) that he had prepared summarizing what occurred at the Metral Drive Location on that date correctly summarized his recollection of what had occurred and that the NOAH correctly summarized the Metral Drive Contraventions. He noted particularly his conversation with the Metral Drive Manager about recommending that the Metral Drive Manager request that the Respondent acquire an ID scanner situated at the entrance to the establishment to assist employees in ensuring compliance with the Act and the Regulation.

63) On cross-examination, TVEO 2 confirmed that following the meetings with the representatives of Island Health's Tobacco & Vapour Prevention and Control Program, as referenced above in the 3 letters, that the Respondent had implemented a number of the recommendations made by the Island Health representatives in order to improve the Respondent's compliance record, and that, to his understanding, following the Respondent becoming aware of the issuance of the NOAH on February 16, 2022, that the Respondent had acquired the ID scanners as recommended by the Island Health representatives.

Island Health's Representative's Evidence

64) The Island Health's Representative testified that she has been the Supervisor of the Island Health Tobacco & Vapour Prevention and Control Program since 2017 and, prior thereto, had served as a Tobacco & Vapour Enforcement Officer/Reduction Coordinator to the program for approximately 5 years.

65) As Supervisor, she testified, her responsibilities include providing leadership to the team operating under this program in order to ensure that retailers selling tobacco and vapour products do so in compliance with the provisions of the Act and the Regulation.

66) Island Health's Representative testified that in order to achieve this compliance from regulated retailers, she and her team take a progressive enforcement approach starting with education. If after meetings with a particular retailer to encourage compliance by educating the retailer on what steps the retailer might take to achieve this compliance, the retailer continues to operate in contravention of the Act and the Regulation, the retailer will be given verbal and then written warning. If, unfortunately, the retailer is still not achieving the compliance required by law, further enforcement action will be taken against the retailer.

67) For the matter at hand, Island Health's Representative testified, the decision was made to proceed to requesting an Administrative penalty hearing following a review of the Table of Minor Shopper Inspections and Outcomes summary of January 18, 2022 (Island Health Documents tab 34 Ex #35) prepared by TVEO 1.

68) She noted that for a corporate retailer which has more than one retail location, such as the Respondent, when considering whether or not the corporate retailer is in compliance with the Act and the Regulation, all the retail locations will be included in the assessment.

EVIDENCE –THE RESPONDENT

The Respondent's Witnesses

The Evidence of the Respondent's Representative

69) The Respondent's Representative testified that the business of the Respondent is a family business dealing strictly in vapour products. He confirmed that he is a director of the Respondent and has been so together with his brother ("Director 2") since 2013. The Respondent is owned by their father who is the president of the Respondent.

70) The Respondent's Representative described his duties working for the Respondent as assisting store managers with their employee training and, when required, working in and managing a store.

71) He testified that the Respondent opened its first location in Victoria, British Columbia in 2013 as the motivation was to provide to customers with an alternative to cigarettes by enabling them to access vapour products. The Bowen Road Location was opened in 2014, the Metral Drive Location in 2015, and the Parksville Location in 2021. The Respondent currently operates 7 locations on Vancouver Island selling vapour products to the public.

72) The Respondent's Representative testified that immediately after hearing of the contravention occurring on August 18, 2021 at the Metral Drive Location, that in accordance with the Respondent's policy, he had fired the Metral Drive Employee who had sold the vapour product to MTS 1. He had, as well, spoken to staff members about the contravention. He had hoped to meet with the representatives of Island Health's Tobacco & Vapour Prevention and Control Program on September 16, 2021 to secure guidance as to what policy changes the Respondent should be making. Unfortunately, that meeting was cancelled at the last minute by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program.

73) However, following receipt of the email on February 16, 2022 attaching the Metal Drive Report (Island Health Documents tab 2 Ex #32), the Parksville Report (Island Health Documents tab 3 Ex #33), and the Bowen Road Report (Island Health Documents tab 4 Ex #34), the Respondent's Representative immediately took action and that day sent out an email (the "Respondent's Representative's February 16, 2022 Email") to all managers of the Respondent (Respondent's Documents Part A – General Documents Ex #44) attaching three documents entitled "3-month Review Form", "Simatech Compliancy Procedures", and "CheckingID".

74) In this email, the Respondent's Representative described the 3-month Review Form as a refresher training method and requested that the Respondent's managers use this form for all staff members every 3 months to allow the Respondent to keep track of staff member training. The second document was described in the email as a series of questions regarding the Respondent's policies and training procedures, and the third form was to explain how staff should check for identification.

75) In addition, in this email, the Respondent's Representative advised the Respondent's managers that the Respondent had ordered ID scanners which were scheduled to arrive in a few weeks. He referenced the fact that the equipment pricing and service fees (Respondent's Documents Part A – General Documents tab 5 - Ex #48) was a very large investment on the part of the Respondent, costing over \$10,000 for the equipment with a monthly cost to the Respondent of \$1,400 in service fees.

76) The Respondent's Representative noted that the new procedures set out in the Respondent's Representative's February 16, 2022 Email were part of the Respondent's ongoing efforts to improve its compliance policies.

77) He noted the documentation contained in the Vapour Retailer Kit (Respondent's Documents Part A – General Documents tab 6 – Ex's #49, 50, 51, 52, 53, 54, 55, 56, 57) and the signage created in September 2021 (Respondent's Documents Part A – General Documents tab 3 - Ex #46). These new signs clearly stated that the Respondent required identification from patrons 35 years of age and under. He also noted the Letter of Understanding with respect to the ID scanner (Respondent Documents Part A – General Documents tab 4 - Ex #47) which the Respondent required all employees to sign following their training on the scanner once the ID scanners were placed in the establishments.

78) The Respondent's Representative testified that commencing in March 2022, the Respondent deployed a new training program entitled "Vapour Training 2022" which included an update of the Respondent's training (Respondent's Documents Part A – General Documents tab 8 – Ex's #58 - 80).

79) The Respondent's Representative noted, however, that the implementation of these new policies was not always well received by its customer base and referenced an email (Respondent's Documents Part A – General Documents tab 7 – Ex's #81 and 82) in which a regular customer expressed frustration at being asked for identification.

80) However, despite customer complaints, the Respondent's Representative testified that the Respondent had a zero-tolerance policy against selling vapour products to minors and provided a number of examples where employees were terminated as a result of breaching this policy.

Metral Drive Location

81) To demonstrate its policies with respect to compliance at the Metral Drive Location, the Respondent's Represented referenced:

- examples of CCTV camera footage, which footage, the Respondent uses to monitor in store activity to ensure that employees are following the Respondent's policies (Respondent's Documents Part B – Instore Videos tab 11 – Ex #88),
- pictures of the tills and example of signage at the tills (Respondent's Documents Part B – Photos tab 13 – Ex #89),
- 3-Month Review Forms completed by the employees as part of the Respondent's new policy initiatives, (Respondent's Documents Part B – Tobacco-Vapour Prevention - tab 15 – Ex #92),
- the new form of employee agreements completed online by the employee (Respondent's Documents Part B – Training Employment and Tools tab 16 – Ex #93), and
- the Respondent's update forms signed by all employees of the Metral Drive Location confirming that ID must be requested within 10 seconds of a customer entering the premises (Respondent's Documents Part B – Simatech Policy Update tab 17 – Ex #94).

82) The Respondent's Representative testified that the Respondent had taken all necessary steps to ensure compliance with the Act and the Regulation and that any suspension of its license as a result of liability for the alleged Metral Drive Location Contraventions would severely affect the Respondent and its employees. He noted that good employees are difficult to find and, in any

event, a closure of the establishment would result in the current employees finding employment elsewhere and the Respondent having to take the time and resources to train new employees.

Parksville Location

83) The Respondent's Representative testified that the Parksville Employee had received his training at the Metral Drive Location before moving to the Parksville Location. When the Respondent's Representative learned that the Parksville Employee had sold a vapour product to MTS 3, the Parksville Employee was immediately fired.

84) As with the Metral Drive Location, the Respondent's Representative provided examples of:

- the training received by an employee at the Parksville Location,
- an example of the CCTV camera footage used to monitor the premises together with photos of the signage in the location,
- a copy of a record of a staff compliance meeting signed by employees,
- a copy of the policy update, and
- copies of staff signing off on employment agreements

(Respondent's Documents Part C – tabs 19-25 – Ex's #96-101).

Bowen Road Location

85) Again, similar to the Metral Drive Location, the Respondent's Representative provided examples of:

- the monitoring of employees at the Bowen Road Location, both onsite by managers and by way of CCTV cameras, and noted recorded examples of test shoppers,
- copies of employment agreements signed by employees at the location both prior to and following November 19, 2021,
- photographs of the tills and frontage at the Bowen Road Location, illustrating the signage present, and
- copies of employment agreements for employees at the Bowen Road Location.

(Respondent's Documents Part D – tabs 26-38 – Ex's #102-108).

86) The Respondent's Representative also referenced and confirmed the copies of the training materials deployed at other locations of the Respondent (Respondent's Documents Part E – tabs 39-44 – Ex #109) and copies of ID logs deployed following the Respondent's Representative's February 16, 2022 Email at the Metral Drive Location, the Parksville Location and the Bowen Road Location (Respondent's Documents Part F – tabs 45-47 – Ex's #110-113).

Cross-Examination of the Respondent's Representative

87) When asked, the Respondent's Representative testified that the person responsible for staff training is primarily the manager in each store location. However, following the alleged Bowen Road Contraventions, the Respondent's Representative is more involved, especially at the level of training new store managers. He stated that once a new employee has been hired, there is a two-week onboarding training.

88) The Respondent's Representative was referred to the letter dated June 2, 2018 (Island Health Documents tab 41 Ex #37) and he confirmed that he had attended the meeting of April 11, 2018 and that the letter accurately reflected what had occurred at that meeting. He agreed that the letter properly reflected the Respondent's policies at that time and the recommendations that had been made by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program with respect to taking steps to enforce these policies.

89) Similarly, when the Respondent's Representative was referred to the letter of August 6, 2019 (Island Health Documents tab 40 Ex #38) he confirmed that he had attended the meeting of July 23, 2019 and that the letter accurately reflected what had occurred at that meeting. He agreed that the letter properly reflected the Respondent's policies at that time and that the Respondent's policies had not changed since the meeting on April 11, 2018. He also agreed that again, among other recommendations, the subject of ID scanners and requiring employees to record customer ages had been made by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program with respect to taking steps to enforce these policies.

90) The Respondent's Representative was then referred to the to the letter of February 20, 2020 (Island Health Documents tab 38) and he confirmed that he had attended the meeting of February 11, 2020 and that the letter accurately reflected what had occurred at that meeting. He also agreed that again among other recommendations, including some new ones not previously referenced, the subject of ID scanners and requiring employees to record customer ages had been made by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program with respect to taking steps to enforce these policies.

91) He agreed that at this meeting on February 11, 2020, the Summary of Violations setting out the Respondent's record of violations which had previously been shared with the Respondent was reviewed. He agreed that this document recorded the fact that employees of the Respondent had been caught 9 times selling vapour products to minors. He was also directed to the statement in this letter and confirmed his understanding that it was the Respondent's obligation to ensure that a plan of compliance was implemented and working and that if the Respondent continued to violate the Act and the Regulation that enforcement proceedings could be taken against the Respondent and that fines and suspensions could be imposed on the Respondent.

92) When asked about staff turnover, the Respondent' Representative stated that although the Respondent has a number of longer-term employees, the Respondent employs a large number of people as salesclerks, and, for this category of employee, half of them will turnover in a particular year.

93) The Respondent Representative was directed to the Respondent Representative's Email of February 16, 2022 and he confirmed that the order for ID scanners referenced in that email (Respondent's Documents Part A – General Documents tab 5 - Ex #48) was placed after the Respondent received the NOAH from the Respondent's solicitors and that the email itself had been sent out a couple of hours after receipt of the NOAH.

94) When asked about the number of staff at the Metral Drive Location, the Respondent's Representative testified that there were always 2 on duty, but that the store had a complement of 6 or 7. Similarly with the Bowen Drive Location. Parksville has 3 employees with additional staff added following the alleged Parksville Contraventions.

The Evidence of the Bowen Road Employee

95) The Bowen Road Employee testified that he had started his employment with the Respondent as a sales associate in August of 2020 and referenced the copy of each of the Letter of Understanding, the Employment Agreement, the Vapour Sales Exam, and the Training Certificate (Respondent's Documents Part D – tab 29 – Ex #104) which he confirmed he had signed on August 12, 2020 and which correctly reflected the training he had received from the Respondent as given by the store manager and the Respondent's Representative.

96) On November 19, 2021, the day of the alleged Bowen Road Contraventions, he testified, it was very busy in the store so that when MTS 2 and MTS 3 entered the store, even though he was aware of the consequences, he decided to forego the Respondent's policy and not to ask them for their identification upon entry.

97) Although he confirmed that he had signed the inspection report prepared by TVEO 1 setting out the details of the alleged Bowen Road Contraventions (Island Health Documents tab 28), he denied stating to TVEO 1 that he had not received training. He testified that he had been well trained but that the selling of the vapour product to MTS 2 had been a mistake.

The Evidence of the Bowen Road Manager

98) The Bowen Road Manager testified that she had been the manager of the Bowen Road Location since January of 2020 and that her role as manager was to oversee the store operations and to provide training to staff such as dress code and compliance with the provisions of the Act and the Regulation.

99) She testified that she has trained at least 15 employees of the Respondent including the Bowen Road Employee and confirmed her signature on the documents reflecting his training (Respondent's Documents Part D – tab 29 – Ex #104) and that the Bowen Road Employee was well aware from this training that if he sold a vapour product to a minor that he would be fired.

100) The Bowen Road Manager confirmed that the Bowen Road Employee was fired as a result of the alleged Bowen Road Contraventions. She stated that her goal is to ensure that vapour products are not sold to minors.

101) She testified that since the alleged Bowen Road Contraventions, the Respondent's compliance policies within the establishment have been greatly increased with the introduction of the ID log, the CCTV camera monitoring, and the ongoing staff training, with the effect that

since that date, at least 3 patrons have been denied service due to the fact that they could not produce valid identification demonstrating that they were at least 19 years old.

102) The Bowen Road Manager expressed her concern as to the effect a suspension could have on both her employees and her customers. She stated that the 6 current staff might have difficulty finding other employment and her regular customers might not return.

The Evidence of the Metral Drive Manager

103) The Metral Drive Manager testified that she had started as a salesclerk working for the Respondent at the Metral Drive Location in August of 2020 and following training by the Respondent's Representative, became manager of that store and has been so for approximately the last 2 years. She now has the responsibility to train the store's employees.

104) Although she confirmed that she had signed the inspection report prepared by TVEO 1 setting out the details of the alleged Metral Drive Contraventions (Island Health Documents tab 10), she denied stating to TVEO 1 that she had not received any formal training.

105) Following the alleged Metral Drive Contraventions, she testified, the Respondent's compliance policies had been strengthened by using in the establishment an ID scanner, ID logs, a CCTV camera system, and asking everyone entering the establishment for identification. She noted, as well, that there is now an ongoing training program every 3 months.

106) She stated that she had trained both the Metral Drive Employee and the Parksville Manager and confirmed that they were properly trained and were well aware that if they sold a vapour product to a minor that they would be fired.

The Evidence of Director 2

107) Director 2 testified that he worked in the family business operated by the Respondent and that he had done so since about 2019 when, at the age of 19, he had started as a salesclerk. Subsequently, he was a manager at the Metral Drive Location and currently he is engaged with online work on behalf of the Respondent and in monitoring the locations operated by the Respondent.

108) He stated that the culture of the Respondent's business is to help people, and that means enabling adults to move away from using cigarettes to a safer alternative in the form of vapour products. This culture definitely includes preventing minors from purchasing vapour products.

109) He testified that if a suspension was imposed on the Respondent's locations, it would have a significant impact on the Respondent's employees who would lose their jobs and their steady incomes, and the Respondent would have to find and train new employees.

SUBMISSIONS –RESPONDENT

110) The Respondent submits that it operates its 7 locations on Vancouver Island with a business focus more on health rather than maximizing the financial returns. To that end, since its

beginning in 2013 with its first location, it has had policies in place that emphasized compliance with the Act and the Regulation and in building a close working relationship with Island Health and the representatives of Island Health's Tobacco & Vapour Prevention and Control Program.

Section 4.31 and Section 4.301 of the Regulation

111) The Respondent submits that section 4.31 of the Regulation does not apply to its 7 establishments as they are what it terms as "19 years of age or older" locations. As a result, it takes the position that with the signage clearly visible outside these locations, the obligation is on the customer to ensure that prior to entering the establishment, the customer is at least 19 years old or should not be entering the establishment.

112) The Respondent submits that section 4.301 of the Regulation prohibits a retailer from advertising or promoting vapour products in any manner which "may reasonably be seen, accessed or heard by a minor inside the retail establishment". It submits that the evidence clearly demonstrates that the windows of its establishments are opaque so that no one can see inside the establishment from the street. Therefore, from outside the establishment, it clearly meets this requirement.

113) It is the Respondent's further position that as its 7 establishments on Vancouver Island are limited to 19 years of age or older customers, the Respondent clearly does not permit a minor entry into any of its retail establishments. It has clear signage outside its establishments to that effect. Therefore, if a minor does enter one of the Respondent's establishments, that minor is clearly not obeying the signage and the minor is "effectively trespassing". This being the case, there is no obligation on the Respondent to enforce the provisions of section 4.31 of the Regulation.

114) Therefore, the Respondent submits, it is not liable for the alleged contraventions in the NOAH focused upon a breach of section 4.31 of the Regulation.

Due Diligence Defence

115) The Respondent submits that the obligation is on the Respondent not to secure perfection, but only to take reasonable steps to prevent the sale of vapour products to minors. It submits that for it to benefit from the due diligence defence, it must demonstrate that it has taken reasonable steps to ensure compliance with the Act and Regulation. This obligation, it notes, does not require it to take all conceivable steps, but merely all reasonable steps.

116) The Respondent submits that at the time of the alleged contraventions it had and continues to have exemplary training in place for all employees, especially new ones, it tests all employees on its policies, and, since the occurrence of the alleged contraventions, has invested significant sums of money in technology such as CCTV camera systems and ID scanners.

117) The evidence clearly demonstrates, it submits, that all the employees of the Respondent involved in the sales leading to the alleged contraventions were well trained and were well aware of what was expected of them. They each merely committed an error in making the sales. Despite the fact that they committed an error, the Respondent followed its zero-tolerance policy and terminated their employment.

118) The Respondent submits that it has clearly demonstrated that it had and continues to have an adequate and effective program in place to prevent the sale of vapour products to minors, that the employees involved in the alleged contraventions were not directing minds of the Respondent, and that the Respondent is entitled to benefit from the due diligence defence.

Proposed Penalty

119) The Respondent submits that the penalties sought by Island Health are excessive as the facts do not support the maximum period of the 30-day suspension as sought by Island Health in the NOAH. Especially, the Respondent submits, in light of the fact that this is the first contravention alleged against the Respondent which has led to the issuance of a Notice of Administrative Hearing.

120) It submits that a suspension is not required to motivate it to achieve its goal of total compliance, noting that it has already taken significant steps towards that goal. Indeed, it states, any suspension will result in the loss of trained employees with the greater possibility of new replacement and lesser experienced employees failing to comply with the Respondent's zero-tolerance policy.

121) The alleged contraventions that occurred as set out in the NOAH were caused by employee error, and, as the Respondent has taken the necessary steps to ensure that such will not happen again, the Respondent should not be penalized.

122) In conclusion, the Respondent submits, as it is not liable for breaching section 4.31(1) of the Regulation as alleged in the NOAH and as the defence of due diligence applies with respect to the sale of vapour products, it should be held not liable for the alleged contraventions. However, if such liability is found, that if any penalty is imposed that it should be minimal to reflect the remedial efforts that the Respondent has taken since the occurrence of the alleged contraventions.

SUBMISSIONS – ISLAND HEALTH

123) Island Health in its submissions notes that the Respondent admits that its employees sold vapour products to MTS 1 and MTS 3 as alleged in the NOAH.

124) With respect to the alleged contraventions in the NOAH relating to section 4.31 of the Regulation, Island Health submits that the evidence clearly establishes that these contraventions occurred.

125) Island Health further submits that the defence of due diligence does not apply with respect to the alleged contraventions in the NOAH, and that the Respondent is, therefore, liable for these

contraventions and that the penalties recommended by Island Health in the NOAH should be imposed on the Respondent.

The Respondent's Record

126) Island Health submits that, unfortunately, the Respondent's record of compliance with the Act and the Regulation is not at all exemplary and is reflective of an impaired system of compliance among the Respondent's establishments, especially with respect to the Metral Drive Location, the Parksville Location and the Bowen Road Location.

127) The matter at hand deals with 3 alleged contraventions occurring within 3 months of each other. And these contraventions follow upon a history of 9 contraventions over the previous 5-year period. Island Health submits that the evidence clearly demonstrates that the alleged contraventions are not isolated incidents, but rather reflect a pattern of behaviour by the Respondent.

128) In addition, Island Health notes, during this period extending from December 2016 to November 2021, the members of Island Health's Tobacco & Vapour Prevention and Control Program issued 4 verbal warnings to the Respondent, which came in the form of violation tickets, and organized 3 formal meetings between representatives of the Respondent and the representatives of Island Health's Tobacco & Vapour Prevention and Control Program.

129) Island Health submits that as testified by Island Health's Representative, Island Health has a progressive enforcement policy starting with education and, if compliance is still not achieved after a great deal of effort on the part of Island Health's Tobacco & Vapour Prevention and Control Program to assist in its occurrence, the process ends with an enforcement hearing. The evidence clearly shows this progressive enforcement policy involving the Respondent culminating in this hearing.

130) Indeed, from the evidence presented, Island Health notes that it appears that it took the issuance of the NOAH received by the Respondent on February 16, 2022 for the Respondent to implement many of the compliance policies and training it now has in place and to commit to making the capital expenditures on such items as the ID scanners.

The Respondent's Position on Sections 4.31 and 4.301 of the Regulation

131) Island Health in its submissions notes that contraventions under the Act and the Regulation are subject to the doctrine of strict liability. This doctrine, in the context of sections 4.31 and 4.301 of the Regulation, means that a retailer must take all reasonable steps to ensure that a minor does not enter an establishment in which the retailer displays vapour products. It submits that posting signs prohibiting a person 19 years of age or less from entering is not enough.

132) Therefore, Island Health submits, if it has demonstrated on a balance of probabilities that a retailer has permitted a minor to enter an establishment which displays vapour products for sale thereby enabling the minor to view these vapour products, that the retailer is liable for this contravention unless the defence of due diligence applies.

133) The Ontario Court of Appeal, *Island Health* notes, has referred to this obligation when considering the legislative purpose of the Ontario legislation regulating the sale of tobacco, which legislation is similar to that of the Act and Regulation. In *R. v. Pourlatfali* 132 O.R. (3d) 136 at paragraphs 30-32, the Court considers the legislative purpose of the Ontario legislation and observes:

[30] First, I consider the legislative purpose. The goal of the SFOA [*Smoke-Free Ontario Act*, S.O. 1994, c. 10] is to reduce the harms caused by smoking. A key focus is to prevent minors from smoking by restricting their access to tobacco products.

[31] In *Seaway Gas [Regina v. Seaway Gas & Fuel Ltd. et al* 47 O.R. (3d) 458], at para. 32, MacPherson J.A. noted, in respect of the Tobacco Control Act, 1994, that the Act is an important public health statute. The Act and its regulations attempt to regulate in a strict and careful fashion the distribution of a dangerous product and advance the public interest in health and in preventing the widespread and serious medical problems directly attributable to smoking. He also stated, at para. 33, that

. . . the provisions of the Act and regulations should be interpreted with a judicial eye firmly focussed on the public health purposes of the legislation. One of the most important purposes of the legislation is to make sure that minors are not able to buy cigarettes. The legislation should be strictly interpreted to help achieve that purpose.

[32] From this, it is clear that the interpretation of s. 3(3) must be consistent with the public health purposes of the Act, and in particular the important purpose "to make sure that minors are not able to buy cigarettes".

134) *Island Health* submits that these two legal decisions by the courts of Ontario apply equally to vapour products as well as tobacco products. They clearly demonstrate a clear obligation on the Respondent, which obligation should be strictly interpreted, to require the Respondent in accordance with the terms of the Act and the Regulation to restrict the access of minors to vapour products in accordance with the public health interest incorporated in the Act and the Regulation.

135) Such an interpretation means that it is not sufficient for the Respondent to have only appropriate signage which clearly states a restriction on anyone under the age of 19 from entering the establishment and then to leave it to patrons to comply with this restriction. Nor is this obligation satisfied by glazing the windows of its establishments to ensure that minors are not able to see products offered for sale within the establishment from outside the establishment.

136) It means that a retailer must take whatever steps are reasonable to ensure that no minors are able to enter the establishment and, thereby, able to view the vapour products it has on display and the advertising therefor.

137) Island Health submits that the evidence is clear, that on the three occasions as detailed in the NOAH, the MTS's, MTS 1, MTS 2, and MTS 3, were able to view vapour products offered for sale by the Respondent and the advertising therefor, and that the Respondent therefore did not satisfy the obligation placed upon it by Sections 4.31 and 4.301 of the Regulation.

Due Diligence Defence

138) Island Health submits that it is not sufficient to just have in place a system of initial comprehensive training of new employees. With such a system must come an equal system of training reinforcement, and of enforcement of the Respondent's compliance policies. In other words, it submits, the Respondent must clearly demonstrate that it has used all reasonable care to establish a system to prevent the exposure of minors to vapour products and the advertising therefore in its establishments, and to prevent the sale of vapour products to minors therein.

139) Furthermore, Island Health submits, the Respondent must be able to demonstrate that it took reasonable steps to ensure the effective operation of such a system. As well, there must be evidence of processes for monitoring, testing and ensuring employee compliance with the with the Act and the Regulation. In support of its position, Island Health noted the following cases: *R. V. Sobey's Inc.*, 2000 CanLII 1961 (NS SC), *R. v. Ontario Inc.*, 2009 ONCJ 605, and *R. v. Airline Hotel (Yukon) Ltd.*, 2007 YKTC 55

140) Island Health further noted that the onus upon the Respondent to establish due diligence defence is greater when a retailer has been put on notice of past compliance issues. In support of this greater onus, Island Health cited the following cases: *R. V. Sobey's Inc.*, 2000 CanLII 1961 (NS SC), and *R. v. C.C. Eric James Management Ltd.* 2000 BCPC 178

Conclusion

141) The alleged contraventions involve the application of the doctrine of strict liability. Therefore, Island Health submits, negligence is no defence, and it is, therefore, no answer to say that an employee made a mistake. To establish the Respondent's liability, all that Island Health needs to do is to establish on a balance of probabilities that the alleged contraventions did occur, and Island Health submits that it has done so. Indeed, it notes, the Respondent has admitted that, as set out in the alleged contraventions, vapour products were sold to the MTS purchasers.

142) It is Island Health's position that Respondent is liable for the alleged contraventions unless it can establish the defence of due diligence. However, given the compliance record of the Respondent which details previous sales of vapour products to minors on 9 occasions, Island Health submits that this defence has not been established, especially having been put on notice by the members of Island Health's Tobacco & Vapour Prevention and Control Program that the Respondent's policies and procedures were deficient.

143) Island Health submits that the Respondent is, therefore, liable for the alleged contraventions and that the penalties proposed by Island Health in the NOAH should be imposed upon it as a consequence.

REASONS AND DECISION

Sale of Vapour Products to Minors Contraventions

144) The Respondent has admitted that, as alleged in the NOAH, its employees sold vapour products to the MTS's, MTS 1 and MTS 3.

145) I therefore find that the Respondent, in contravention of section 2(2) of the Act and section 2 of the Regulation, on August 18, 2021 at the Metral Drive Location, on August 31, 2021 at the Parksville Location, and on November 19, 2021 at the Bowen Road Location sold vapour products to a person under the age of 19.

Exposure to Advertising Contraventions

146) The Respondent has denied the allegations of liability with respect to section 4.31 of the Regulation noting that by ensuring that no one could see into their establishments from the street outside their buildings and by posting signs at the entrance clearly prohibiting any person under the age of 19 from entering the establishment that it had met any obligation imposed upon it by section 4.31 of the Regulation. Indeed, it has submitted, if a minor elects to ignore this signage posted at the entrance to its establishments, that minor is clearly trespassing, and the Respondent has no further obligation to that minor with respect to the minor's exposure to the display and advertising of vapour products within the establishment.

147) Island Health in its submissions disagrees with the Respondent's interpretation of its obligation under section 4.31 of the Regulation. Island Health submits that there exists a clear obligation on the Respondent to take whatever steps are reasonably necessary to ensure that no minors are able to enter the establishment and, thereby, are able to view the vapour products it has on display and the advertising therefor. The evidence clearly demonstrates that MTS 1, MTS 2, and MTS 3, all minors, clearly saw vapour products for sale and advertising related thereto when they entered the Respondent's establishments.

148) It is well settled that the entitlement to sell vapour products to the public is a privilege and not a right. With this privilege comes certain obligations imposed by law upon those exercising this privilege to ensure that they operate within strict guidelines, especially when the exercising of this privilege involves a matter of public health as it relates to minors.

149) In its submissions, the Respondent acknowledges that by being entitled to sell vapour products to the public, it is required to respect this privilege and the responsibilities that

accompany it. It acknowledges that it must take all reasonable steps to ensure that it operates in compliance with the Act and the Regulation. It submits that the placing of the signs at the entrances to its establishments meets this requirement.

150) I am unable to agree with the position of the Respondent on this interpretation of section 4.31. The placement of entrance signs at the front of its establishments to restrict entry to those 19 years of age and older does not meet the responsibility imposed on the Respondent by section 4.31 of the Regulation to prevent minors from viewing displayed vapour products or the advertising therefor within its establishments.

151) I therefore find that Island Health has met the onus upon it to prove on a balance of probabilities that the Retailer contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor, firstly, on August 18, 2021 inside the Metral Drive Location, secondly, on August 31, 2021 inside the Parksville Location, and, thirdly, on November 19, 2021 inside the Bowen Road Location.

The Defence of Due Diligence

152) As noted by Island Health in its submissions, the matter at hand involves what is referred to as the doctrine of strict liability. This doctrine holds that if a body, such as Island Health, proves on a balance of probabilities that a contravention to a legislative or regulatory obligation has been committed by an entity within its area of responsibility, that the entity, in this case the Respondent, is liable for the commission of this contravention, notwithstanding any mistake or negligence on the part of the person committing the contravention, unless the entity is able to demonstrate the defence of due diligence.

153) As also noted by Island Health in its submissions, the leading case describing the defence of due diligence and the onus on a defendant to demonstrate its existence is the decision of the Supreme Court of Canada in *Regina v. Sault Ste. Marie (City)*, 1978 CanLII 11 (SCC), where Dickson J. summarizes the elements of the defence 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. 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. Natrass*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.)

The Directing Mind Limitation

154) It is to be noted that the Supreme Court of Canada in *Regina v. Sault Ste. Marie (City)* clearly states that the defence of due diligence is not available to the Respondent if the offence in question is caused by what is described in the decision as the “directing mind” of the Respondent. From the evidence, it is clear that for both the Metral Drive Contraventions and the Bowen Road Contraventions, the vapour products were sold by sales employees and not employees in a management role. Therefore, this exception does not apply to these contraventions.

155) With respect to the Bowen Road Contraventions although the employee selling the vapour product to MTS 3 was the manager of the Bowen Road Location, I find that he was new to the job having been recently trained for this role and that, therefore, he should not be considered a directing mind involved in the commission of the contravention. Rather, I find that on the evidence it is clear that the “directing mind” of the Parksville Location at that time was the Respondent’s Representative who was not involved in the sale to MTS 2.

156) Therefore, I find that the Respondent is not restricted from the “directing mind” exception from claiming the due diligence defence for the Metral Drive Contraventions, the Parksville Contraventions and the Bowen Road Contraventions.

Finding on the Due Diligence Defence

157) When determining to become engaged in the selling of vapour products, the Respondent, no matter its best of intentions to reduce cigarette consumption, took on the obligations imposed by the Act and the Regulation upon a vendor of vapour products, including the obligation of restricting entry to its establishments to minors and the prohibition against the sale of vapour products to minors.

158) To satisfy these obligations, the Respondent had to implement a series of compliance policies which had to be strictly enforced. As well, it had to establish and maintain a system of education with respect to these policies, both at the initial stage of an employee’s employment and during the employee’s continued employment with the Respondent, to ensure that that employee both understood and adhered strictly to these policies. This approach has often been referred to as an employer creating and maintaining a culture of strict compliance with the Act and the Regulation involving the sale of vapour products to the public.

159) These obligations were referenced in the context of Ontario legislation dealing with the sale of tobacco products in the Province of Ontario in *Regina v. Seaway Gas & Fuel Ltd. et al* 47 O.R. (3d) 458], where the Ontario Court of Appeal in reference to a merchant’s right to sell tobacco products noted the obligations that accompanied it by stating at paragraph 36:

..... The privilege is the merchant's opportunity to sell products to the public and to earn a profit, or even to gain a livelihood, thereby. The responsibility arises from the fact there is a direct interface or relationship between the merchant and the customer. With respect

to regulated products, it is crucial that the merchant understand and respect the limits of its privilege to sell to the public.

And further at paragraph 37:

..... the message to vendors is a simple one: you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors.

160) Although the Ontario Court of Appeal was referencing Ontario legislation dealing with the sale of tobacco products, the Court's comments on the privilege and the responsibility accompanying it apply as well to the sale of vapour products in British Columbia and to the obligations imposed on the Respondent by the Act and the Regulation.

161) Therefore, to apply the approach of the Ontario Court of Appeal to the matter at hand, for the Respondent to succeed in its due diligent defence, it must demonstrate that it has been "scrupulously vigilant" in ensuring that it did not sell vapour products to minors or permit them to observe vapour products or advertising therefore in its establishments.

162) The hearing on this matter as noted above lasted 3 days during which the Respondent submitted over 60 exhibits, many of which were to demonstrate that prior to and following the contraventions enumerated in the NOAH that it had and continues to maintain this strict culture of compliance with the Act and the Regulation and that the sales of vapour products constituting the contraventions were nothing more than momentary errors on the part of employees at the time of occurrence.

163) Unfortunately for the Respondent, I do not accept this position. Written documents alone are not sufficient. There must be credible actions resulting in measurable results and causing a culture of compliance. In the evidence before me, I did not find this.

164) I therefore find that the provisions of section 12 of the Regulation does not apply as I find, for the following reasons, that the Respondent did not establish a defence of due diligence to the contraventions alleged in the NOAH:

Inconsistencies in Policies

165) The evidence presented suggested very strongly that there were inconsistencies in the Respondent's policies and how they were being interpreted by the Respondent's employees. For example, although some of the documentation placed in evidence suggested that the Respondent's policy was to check the identification of every customer coming into an establishment if that customer appeared to be under the age of 35, when TVEO 1 spoke with the Metral Drive Manager on August 18, 2021, the Metral Drive Manager stated that the age limit was 25.

Apparent Lack of Extended Education

166) TVEO 1 testified that in her conversations with both the Manager of the Metral Drive Location and the Manager of the Parksville Location, they both confirmed that following the initial training of employees, there was no follow-up training.

Apparent Lack of Follow-Up by The Respondent

167) As noted by Island Health in its submissions, the onus on the Respondent to establish the defence of due diligence is greater if it is demonstrated that the Respondent has been warned on a number of occasions by the by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program that improvement was required.

168) This increased onus was referenced in *R. V. Sobey's Inc.* 2000 CanLII 1961 (NS SC), where the Supreme Court of Nova Scotia noted at paragraph 61 in reference to a contravention under the Nova Scotia *Tobacco Access Act* (1993) c. 14 that:

the defence of due diligence is not available when a retailer or vendor is on notice that policies and procedures established to ensure both the existence of a proper system to prevent commission of the offence and that reasonable steps had been taken to ensure effective operation of the system in supervising this operation, were not effective...

169) As was also noted by Island Health in its submissions, notwithstanding a number of conversations with and encouragement by the representatives of Island Health's Tobacco & Vapour Prevention and Control Program, it was not until the Respondent had received a copy of the NOAH that it proceeded to implement programs and purchase equipment to enable it to bring its operating policies more in line with a culture of compliance with the Act and the Regulation.

The Respondent's Track Record

170) However, the most telling aspect of the Respondent's performance when it comes to how it maintained within its establishments a culture of compliance with the Act and Regulation is the Respondent's compliance record. As was clear from the evidence presented by Island Health, the Respondent's record of compliance was badly lacking in performance. The 3 contraventions referenced in the NOAH occurring within 3 months of each other, and the fact of these contraventions follow upon a history of 9 contraventions over the previous 5-year period, clearly does not reflect a culture of compliance within the Respondent's establishments.

171) Although in cross-examination, MTS 1, MTS 2, and MTS 3 acknowledged that when they visited establishments of the Respondent on other occasions they had been asked for identification and that when they were not able to produce it were required to leave the establishment, this evidence does not demonstrate a culture of compliance on the part of the Respondent's employees with the 3 alleged contraventions constituting errors on the part of these employees. Rather it demonstrates a clear inconsistency in the application of the Respondent's policies on requiring the production of identification from customers possibly being minors.

172) I therefore find that the defence of due diligence does not apply and that the Respondent is liable for the following contraventions as set out in the NOAH:

- On August 18, 2021, the Respondent at the Metral Drive Location contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19,
- On August 18, 2021, the Respondent at the Metral Drive Location contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment,
- On August 31, 2021, the Respondent at the Parksville Location contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19,
- On August 31, 2021, the Respondent at the Parksville Location contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment,
- On November 19, 2021, the Respondent at the Bowen Road Location contravened section 2(2) of the Act and section 2 of the Regulation by selling vapour products to a person under the age of 19, and
- On November 19, 2021, the Respondent at the Bowen Road Location contravened section 2.4(1) of the Act and section 4.31 of the Regulation by displaying vapour products and advertising or promoting the use of vapour products in a manner which might reasonably be seen or accessed by a minor inside the retail establishment.

PENALTY

173) In determining an appropriate penalty, section 13 of the Regulation sets out, among other factors, that the following items be taken into consideration:

- Whether the Respondent had a prior written warning concerning the type of conduct for which a contravention is found;
- Previous enforcement actions of a similar nature to which the Respondent was a party;
- Was the contravention at hand part of a repeated or continuous pattern of behaviour;
- Was the contravention deliberate or an oversight;
- Whether the person committing the conduct leading to the contravention has an ownership interest in the business carried on by the Respondent;
- Whether the person committing the conduct is an employee or agent of the owner of the business carried on by the Respondent;
- What form of training and monitoring does the Respondent perform with respect to the sale of tobacco or vapour products its establishments; and
- Any other matters considered to be in the public interest.

174) The Respondent's compliance history is set out above in some detail as it appears to demonstrate that, notwithstanding that there have not been any enforcement actions similar to the ones included in the matter at hand, the numerous warnings given to the Respondent by the

representatives of Island Health's Tobacco & Vapour Prevention and Control Program appear not to have changed the performance by the Respondent prior to the occurrence of the contraventions set forth in the NOAH.

175) However, following the delivery of the NOAH to the Respondent, it is clear from the evidence that the Respondent has taken the necessary steps to improve its performance and to ensure a stricter culture of compliance with the Act and the Regulation. But this change in performance, no matter how commendable, should not lead to a reduction of penalties imposed on contraventions occurring prior to this improvement. Indeed, it is regrettable that it required the delivery of the NOAH to the Respondent for the Respondent to implement these revised policies of compliance.

176) I find that the penalties recommended by Island Health in the NOAH are appropriate penalties and in accordance with the items referenced in section 13 of the Regulation. I also accept the submission of Island Health that a monetary penalty alone is not sufficient and that a suspension should be included in the penalty imposed.

177) However, there is an element of the evidence presented by the Respondent that I believe should be incorporated into the implementation of these penalties. That is with respect to the impact of the recommended suspensions on the Respondent's employees at the three establishments of the Respondent which will be affected by the suspensions. In their evidence, a number of employees of the Representative expressed concern that a closure of the establishment at which they were employed would adversely affect them as they would cease earning their salaries. As well, the Respondent's Representative expressed concern about losing valuable trained personnel if these three establishments were forced to close at the same time.

178) Therefore, in my order imposing a suspension on the Respondent's locations, I have included a direction that the Respondent's Representative negotiate with the representatives of Island Health's Tobacco & Vapour Prevention and Control Program a schedule of closures for the three locations which will have the minimum impact on the employees of these three locations.

179) As this matter is the first time a Notice of Administrative Hearing has been issued against the Respondent and a hearing held, section 16(b) of the Regulation provides that for the purposes of calculating the penalty range pursuant to Column 3 of Schedules 2 and 3 of the Regulation the contraventions in the NOAH are considered to each be a "First Contravention".

180) Thus, the range of penalties to which the Respondent is subject pursuant to the provisions of Schedules 2 and 3 of the Regulation for the contraventions set out in the NOAH are monetary penalties ranging from \$0 - \$1,000 for the contravention of Section 2(2) of the Act and \$0 - \$3,000 for section 2.4(1) of the Act; and prohibition periods of 0 – 30 days for each of Section 2(2) and section 2.4(1) of the Act.

181) As noted above, Island Health has recommended monetary penalties amounting in total to \$5,350 and a prohibition period of 30 days for each of the three locations referenced in the NOAH. I find these penalties reasonable and reflective of the provisions of section 13 of the Regulation.

ORDER

182) As the Respondent has been found liable with respect to the contraventions alleged in the NOAH, pursuant to section 6.1 (2)(a) of the Act, it is hereby ordered that the following penalties be assessed:

- For the Metral Drive Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$1,000;
- For the Parksville Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$675;
- For the Bowen Road Contraventions:
 - For contravention of s. 2(2) of the Act – a monetary penalty of \$1,000 and a prohibition period of 30 days,
 - For contravention of s. 2.4(1) of the Act – a monetary penalty of \$675;

resulting in monetary penalties amounting in total to \$5,350 and a prohibition period of 30 days for each of the three locations operated by the Respondent and referenced above.

183) As also referenced above, the Respondent is to negotiate with the representatives of Island Health's Tobacco & Vapour Prevention and Control Program a schedule of closures for the three locations which will have the minimum impact on the employees of these three locations, and, once there has been agreement upon such a schedule, I order that the Respondent be prohibited for a period of 30 days from selling or offering to sell vapour products in that particular establishment in accordance with the schedule agreed upon.

184) During this period of prohibition in each establishment, the Respondent shall display signs satisfactory to the representatives of Island Health's Tobacco & Vapour Prevention and Control Program in a prominent location in the establishment notifying the public that this prohibition is in place. These signs are to remain in place during the period of prohibition.

185) Should, prior to March 31, 2023, the ordered negotiations between the Respondent and the representatives of Island Health's Tobacco & Vapour Prevention and Control Program not

Simatech Satellite Services Inc.
dba Simatech Vapour Shop

Date: February 21, 2023

produce an agreement as to a schedule of closures for the three locations, the parties are instructed to submit to me their recommended schedule of closures and I will make the determination as to the schedule of closures.

Dated: February 21, 2023

Original Signed by:

R. John Rogers

Administrator's Delegate