

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

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

- by -

Kelland Foods LTD. (d.b.a. Quality Foods – BC0844618)
(the “Respondents”)

Administrator’s Delegate under
Section 5 of the *Tobacco Control Act*:

Hugh McCall

Date of Hearing:

January 19 and 20, 2016

Place of Hearing:

Nanaimo, British Columbia

Final submissions completed:

January 20, 2016

Date of Decision:

February 8, 2016

Appearing:

For Kelland Foods LTD.

Lyall Woznesensky

For Vancouver Island Health Authority:

Kim Bruce, Regional Manager,
Tobacco Prevention
Kathryn Stuart, Counsel

Amended Decision and Order

Background

1. Kelland Foods LTD. ("Kelland") owns and operates 11 grocery stores on Vancouver Island, doing business as Quality Foods. Tobacco and tobacco products are among the goods they sell.
2. The Vancouver Island Health Authority (“Island Health”) alleged that 5 of Kelland's stores contravened Section 2(2) of the *Tobacco Control Act* (the “TCA”) by selling tobacco to Minor Test Shoppers ("MTS") on the following 5 occasions, at the locations indicated:
 - a. December 11, 2013 - Quality Foods, 100-530 5th Street, Nanaimo, BC;
 - b. December 31, 2014 - Quality Foods, 113-977 Langford Parkway, Langford, BC;
 - c. February 23, 2015 - Quality Foods, 1-2443 Collins Crescent, Nanoose, BC;

- d. July 9, 2015 - Quality Foods, 2275 Guthrie Road, Comox, BC;
 - e. August 31, 2015 - Quality Foods, 5800 Turner Road, Nanaimo, April 10, 2012,.
3. Island Health's witnesses were Michelle Dennis, Supervisor, Tobacco Prevention and Control Program, and Aaron Severs and Scott Riddell, both Tobacco Enforcement Officers (“TEO’s”)
 4. Kelland's witness was Lyall Woznesensky, Director of Strategic Planning and Professional Development.
 5. Kelland did not dispute the contraventions listed in paragraph 2, but provided evidence that following a previous administrative penalty in December 2012, it had taken steps to improve its tobacco policy in order to prevent the sale of tobacco to minors. It argued that it had exercised due diligence and pursuant to section 12 of the Tobacco Control Regulation (B.C. Reg. 232/2007) (the "Regulation") it should not be found to have contravened section 2(2) of the *TCA*.
 6. Island Health provided evidence of its efforts to ensure that Kelland was aware of its obligations under the *TCA* and to help it improve its tobacco policy. Island Health also provided evidence of two other sales to minors which took place at Kelland's stores in March and July 2013 for which it issued warnings only.
 7. While Island Health initiated the administrative hearing with respect to Kelland, it issued warnings only to the cashiers involved in the MTS sales.
 8. I was the adjudicator designated to conduct a previous administrative hearing which involved Kelland's store in Nanoose, BC. At that hearing in 2012, I found that Kelland had not demonstrated due diligence. I ordered that it pay a fine of \$1000.00 and prohibited it from selling tobacco products for a period of 28 days. One of the contraventions in this hearing took place at the Nanoose store.

Issues

9. Based on all the evidence, has Kelland demonstrated due diligence pursuant to Section 12 of the Regulation?
10. In the event that a defence of due diligence is not established, what penalty is appropriate for the 5 contraventions of Section 2(2)?

Legislative Framework

11. The relevant sections of the *TCA* are as follows:

Administrative penalties

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

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

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

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

Power to make regulations

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

[(a) to (f)]

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

[(h) and (i)]

(j) respecting administrative penalties, including the following:

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

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

Defence of due diligence

12 A person must not be found to have contravened a provision of the Act or regulations prescribed under section 6 if the person demonstrates to the satisfaction of the administrator that the person exercised due diligence to prevent the contravention.

Factors to be considered in imposing administrative penalties

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

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

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

- (a) previous enforcement actions for contraventions of a similar nature by the person;

(b) whether the contravention was repeated or continuous;

(c) whether the contravention was deliberate;

(d) the person's efforts to correct the contravention;

(e) any other matter the administrator considers relevant to the public interest.

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

Monetary penalties

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

Prohibition periods

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

Evidence

Island Health's evidence

13. Ms. Dennis testified about Island Health's progressive enforcement options: verbal or written warnings, meeting with the retailer, ticketing, and administrative hearings. In March 2013, following the prohibition period at the Nanoose store in January 2013, she was advised of another sale of tobacco to a MTS at Kelland's store on 5th Street Nanaimo. In July 2013 she became aware of a further sale to a minor at Kelland's store in Parksville. In both of those cases Kelland was issued a written warning.
14. On December 11, 2013 there was another contravention at the store on 5th Street, Nanaimo. Ms. Dennis testified that she was beginning to see a pattern develop following a period of prohibition which was of concern. Consistent with Island Health's policy of progressive enforcement she invited Mr. Woznesensky to a meeting on March 6, 2014.
15. A letter signed by Ms. Dennis on March 14, 2014, summarized Kelland's tobacco policies which Mr. Woznesensky described at the meeting on March 6, 2014. They included:
 - (a) cashiers must request identification ("ID") from customers who appear less than 30 years old;
 - (b) software on each till requires cashiers to enter the date of birth ("DOB") of customers who have been asked to produce ID;
 - (c) when a DOB is entered on the till a prompt indicates whether the customer is of legal age to purchase tobacco. Cashiers may use a "manager override key" if ID is not requested;
 - (d) if a cashier requests ID, they must enter the DOB and not use the manager override key;
 - (e) Kelland periodically performs random checks of tobacco sales to see if cashiers are requesting ID and it asks its managers to check video monitoring cameras
 - (f) Kelland's goal is to prevent the sale of tobacco to minors and it and its managers take the issue very seriously
 - (g) cashiers who sell tobacco to minors receive a written warning. A second incident warrants termination
 - (h) Mr. Woznesensky checks in with managers on a monthly basis and reminds them to discuss Kelland's tobacco policy with their staff

- (i) head cashiers monitor new cashiers
 - (j) Mr. Woznesensky indicated that he would clarify and remind staff regarding the use of the manager override function
16. Ms. Dennis testified that Island Health gave Mr. Woznesensky the compliance history of Kelland's stores on fifth Street in Nanaimo and in Parksville, as well as a table of inspections and outcomes for all Kelland stores within Island Health's jurisdiction. She pointed out that of 100 MTS inspections there were 21 sales, a 21% fail rate. She testified that the fail rate for comparable grocery chains was 5%.
17. Other issues discussed at the March 6, 2014 meeting included the possibility of using ID scanners rather than relying on staff to input the DOB information. It was suggested to Mr. Woznesensky that it would be helpful if he could track the DOB numbers entered in the till to see if cashiers were appropriately using the manager override function. It was also suggested that he follow up on information provided by a cashier, that she was trained to use her discretion as to whether or not she entered the DOB from the purchaser's ID, or used the manager override function.
18. At the March 6, 2014 meeting Island Health expressed concern that Kelland's existing systems were not preventing the sale of tobacco to minors and its letter of March 14th indicates that it could ticket Kelland or seek an administrative penalty if there were further MTS fails. The letter notes that Kelland had not revisited the idea of implementing its own MTS program and that Mr. Woznesensky indicated that Kelland would not restrict tobacco sales to single till.
19. Ms. Dennis testified that the suggestions they provided to Mr. Woznesensky were in an effort to help Kelland avoid sales of tobacco to minors, and that they are aware of what practices have been successful for other retailers. Mr. Woznesensky did not indicate that he had instructed Kelland's staff to ask customers seeking tobacco whether they were old enough to buy tobacco.
20. Ms. Dennis testified that Island Health instructs MTS to provide retailers with their ID and not to lie.
21. When questioned by Mr. Woznesensky, Ms. Dennis confirmed that they look at a retailers compliance over a three-year time frame when considering an appropriate response to a contravention, and in some circumstances they will look at a longer timeframe. Ms. Dennis also indicated that they do not have statistics but that stores using other till systems indicate that they work well. Ms. Dennis testified that she does not know if Kelland's till system is a problem and with certainty can only say that there was a sale to a minor. She confirmed that at the meeting of March 6, 2014, Mr. Woznesensky advised that he had decided not to use scanning software nor implement a mystery shopper program.
22. Ms. Dennis testified that when a retailer has a history of contraventions, the TEOs may add an additional MTS inspection and acknowledged that there may have been a slight increase in the number of MTS visits to Kelland's stores. Over three years that may have meant 15 more visits than at Safeway or Save on. Ms. Dennis testified that Island Health assesses a retailer's risk of selling tobacco to minors and that Kelland's stores were at higher risk.
23. Aaron Severs testified that, as a TEO his role is to educate and enforce the *TCA*, conduct routine inspections with MTS, follow up on complaints, and respond to the public. During routine retail inspections he checks to ensure that retailers are not displaying tobacco and that

they have proper signage. He also assists store managers and staff to understand the *TCA*, provides them with new educational materials and answers questions.

24. On December 31, 2014 he conducted a MTS inspection at Kelland's store in Langford. The MTS was able to purchase tobacco. The cashier described her training and advised that she had been working at the store for six months. She had asked for the MTS's ID, saw that she was born in 1998, mistakenly concluded that she was old enough to purchase tobacco and used the manager override key.
25. Mr. Severs testified that he also spoke with the store manager. On January 6, 2015 he wrote to the manager summarizing the MTS inspection. Mr. Severs also gave evidence about the Retailer Resource Kit, which is a collection of materials used by Island Health to help retailers prevent the sale of tobacco to minors and to comply with the *TCA*.
26. Mr. Severs testified that a MTS would not respond if asked whether they were old enough to purchase tobacco, as they have been trained only to provide their ID. While he indicated that asking a minor if they are old enough to purchase tobacco is not improper, it is not the best approach to determine whether a person can legitimately purchase tobacco. He thought the best approach was to ask a purchaser for ID.
27. He also testified that Kelland's store manager did not appear familiar with tobacco sales practices and procedures. He offered to send him a copy of the Retailer Resource Kit. The manager declined and indicated that a person from management would get back to Mr. Severs.
28. Mr. Riddell testified about a sale of tobacco during a MTS inspection at 5th Street, Nanaimo on March 19, 2013 which was overseen by TEO Rebekah Kirk. In that case ID was requested and reviewed briefly by the cashier who then sold tobacco to the MTS. On that occasion, Kelland received a warning only.
29. He also testified about another sale to a MTS at Kelland's store in Parksville on July 30, 2013 which was also overseen by TEO Rebekah Kirk. Her notes of the incident indicate that the cashier requested and reviewed the MTS ID, said "1996" and sold tobacco to the MTS. The tobacco inspection report signed by the cashier indicates that she thought it was at the cashier's discretion whether they enter the DOB into the computer program or use the manager override function. The manager on duty at the time was unaware of any procedures in place to prevent the sale of tobacco to minors other than asking for ID if the purchaser appeared less than 30 years old, typing in the DOB as shown on the purchaser's ID, being reminded by "check photo ID stickers", and the training package on tobacco.
30. Mr. Riddell also testified about a further sale of tobacco to a MTS at Kelland's store on 5th Street, Nanaimo on December 11, 2014. This was another inspection done by TEO, Rebekah Kirk. Her notes, signed by the cashier, indicate that the cashier did not request ID from the MTS.
31. Mr. Riddell testified that following the MTS inspection on December 11, 2013, Island Health decided that it should have a retailer meeting with Mr. Woznesensky. That decision resulted in the meeting of March 6, 2014, in which he was also a participant. Rebekah Kirk sent him her March 14, 2014 letter for review prior to finalizing it.
32. Mr. Riddell also testified that on April 1, 2014, Rebekah Kirk sent Mr. Woznesensky an email in which she provided feedback on 2 MTS inspections where Kelland's stores successfully

prevented the sale of tobacco to MTS. Although the stores were successful, the email indicates that in one instance the cashier entered the DOB of the MTS and when the till software would not allow the cashier to proceed, the cashier was unsure about what to do, asking a colleague "Why is it doing that?... Does that mean she is not of age?". In the other instance the cashier handed the tobacco to the minor and advised her to go to another till, where the second cashier would not sell the tobacco to the minor. Mr. Riddell testified that Mr. Woznesensky responded positively to the feedback and indicated in a reply that he would act on the information as soon as he returned from out of province.

33. Mr. Riddell subsequently spoke about a sale of tobacco to a MTS at an inspection he conducted at Kelland's store in Nanoose Bay on February 23, 2015. The store was busy at the time and although the cashier requested ID, she misread it and used her own override. The manager indicated that the store policy was for cashiers to enter the purchaser's DOB when ID is requested, not a manager override.
34. Mr. Riddell also testified about a sale of tobacco to a MTS at Kelland's store in Comox on July 9, 2015. On that occasion the cashier requested ID from the MTS, examined it, and sold the tobacco. She explained that she was trained on tobacco sales and instructed to ask any customer who appeared less than 30 years old whether they were old enough to purchase tobacco and then to ask for ID. She indicated that when she asked the MTS if they were old enough to purchase tobacco, the MTS did not answer. In contrast, the MTS reported that she was not asked if she was old enough to purchase tobacco, but only for her ID. The cashier told Mr. Riddell that she had used the manager override function to get past the DOB prompt, which was a breach of the Comox store policy.
35. The head cashier participated in discussions which Mr. Riddell had with the store manager. She stated that she thought all MTS were obligated to answer the question, "Are you old enough to purchase tobacco?" She gave Mr. Riddell an email from Mr. Woznesensky which indicated that that was the first question to ask a purchaser of tobacco who appeared less than 30 years old. Mr. Riddell advised that MTS are instructed to be truthful but that they are under no obligation to respond to such a question. He further advised that it was not an effective question to prevent the sale of tobacco to a minor, as a typical 16 year old would not admit that they were under age when asked. In Mr. Riddell's opinion the question appeared to be more an attempt to identify a MTS than to prevent the sale of tobacco to minors.
36. Mr. Riddell testified that he also conducted a MTS inspection at Kelland's store on Turner Rd., Nanaimo on August 31, 2015 which resulted in a another sale of tobacco to a minor. In that instance the cashier did not request ID. She explained that she had just started her shift and was flustered because she had been late. She said that she had used the manager override function.
37. When Mr. Riddell spoke with the manager he confirmed the store's policy to request ID from any purchaser of tobacco who appeared less than 30 years old. Every till at the store had an age reminder decal and DOB prompt. He also indicated that there was a handbook for staff which sets out the store's tobacco policy. He provided a copy to Mr. Riddell which was dated July 23, 2005. Mr. Riddell noted that the handbook does not refer to the use of software requiring entry of the purchaser's DOB.
38. Mr. Riddell acknowledged that the cashier at 5th Street, Nanaimo appeared to know Kelland's tobacco policies and procedures and that in the 3 MTS inspections since December 11, 2013 there had not been a fail. He also acknowledged that the information in Rebecca Kirk's email

dated April 1, 2014 was based on information relayed by the MTS involved in those attempted purchases and that Mr. Woznesensky responded within an hour.

39. Mr. Riddell also acknowledged that the cashier involved in the sale on June 30, 2015 at Quality Foods in Nanoose Bay did not follow Kelland's tobacco policy and that the sale might have been avoided if she had done so, and that the same applied to the sale in Comox on July 24, 2015. He agreed that every employee appeared to understand Kelland's tobacco policy and that there may not have been sales if the employees had followed it. Mr. Riddell did not ask the manager who gave him the 2005 tobacco policy whether he had an updated copy.
40. Mr. Riddell testified that he had not seen a copy of Kelland's policy since the end of the previous prohibition period. He indicated that the store policies appeared very similar from one store to another, with the exception of two stores where cashiers asked customers if they were old enough to purchase tobacco. He agreed that the cashiers were not following what they understood was Kelland's tobacco policy and that asking customers whether they were old enough to purchase tobacco could be to determine if they were nervous.

Kelland's evidence

41. Mr. Woznesensky testified that following the prohibition at their Nanoose store in 2013 Kelland agreed to do more. This included the following:
- (i) The person who manages their information technology ("IT") systems showed him a software system which provided cashiers an opportunity to enter a tobacco purchaser's DOB. Kelland implemented it in January 2013. Mr. Woznesensky testified that the software upgrade piggybacked on Kelland's existing system and he had no idea what it cost. He had a brief discussion with the their IT person about scanners, but he was unclear whether it would avoid the issue of cashiers using a manager override function and the cost to outfit all stores was about \$100,000.00.
 - (ii) While Mr. Woznesensky had ruled out a mystery shopper program as too expensive, and did not introduce a mandatory program, Kelland's store in Comox created one of its own after the retailer meeting on March 6, 2014. Mr. Woznesensky did not know how many times the Comox store conducted a mystery test shop and testified that the results were not recorded. He understood that the store may have used volunteers.
 - (iii) At two other stores, one of which was Parksville, managers asked floorwalkers to monitor whether cashiers were following tobacco sales policies and to report back. However, when asked Mr. Woznesensky agreed that a floorwalker, whose primary role is to reduce theft, would not be able to see a purchaser's ID nor whether the cashier used the managers override function.
 - (iv) Approximately every three months beginning in 2014 and continuing until approximately June 2015 when he became ill, Mr. Woznesensky reviewed video footage of till activity at various stores, which video footage was timed to correspond with the store's record of tobacco sales. Mr. Woznesensky testified that he looks to see if there is anything unusual happening, the approximate age of the purchaser, whether the cashier engages the purchaser in conversation and whether the cashier examines identification. With respect to the cashier pushing buttons on the till, he indicated that he cannot tell whether they are typing in a DOB or using the manager override function.
 - (v) Every month there is a store managers meeting. During those meetings Kelland's tobacco policy is almost always part of the agenda. Mr. Woznesensky testified that it is not only MTS fails which trigger discussions, but that the details of Kelland's tobacco policy is not discussed at such meetings.

- (vi) As of 2013, employees are required to check the store communications book at the beginning of every shift, but they are not required to initial it.
42. Mr. Woznesensky testified that in addition to these new measures, Kelland continues to give effect to policies previously implemented which include:
- (i) Head cashiers remain responsible for training new cashiers.
 - (ii) They also conduct random reviews in which they ask cashiers if they still know Kelland's tobacco policy. When asked by Ms. Stuart how often the random checks take place, Mr. Woznesensky stated that it varied from store to store and that he did not have exact numbers.
 - (iii) Store managers and head cashiers also monitor till activity to ensure that cashiers are properly implementing Kelland's tobacco policy.
 - (iv) Cashiers receive a performance review at the end of each year at which time Kelland's tobacco policy is touched on.
 - (v) If an employee sells tobacco to minors they receive a written warning and are advised that if they sell to a minor a second time their employment will be terminated.
 - (vi) Each store has a communications booklet which contains their tobacco sale policy.
43. Mr. Woznesensky also testified that Kelland had implemented almost all of the Successful Tobacco Retailer Policies included in Island Health's Tobacco Retailer Resource Kit. He also indicated that on every occasion where there has been a problem with Kelland's tobacco sales, he works with the store manager to ensure an appropriate resolution.
44. He also testified that between January 2013 and August 31, 2015 Kelland had 362,101 sales of tobacco and suggested that although their MTS fail rate was higher than other grocery chains of their size, they may have a higher volume of tobacco sales.
45. In regard Mr. Woznesensky's email, in which he directed all cashiers to first ask any person appearing less than 30 years old, "Are you old enough to buy tobacco?", he was adamant that it was not intended to force Island Health's MTS to declare themselves. His evidence was that cashiers are looking for and reading purchasers' reactions and that they thought it would help expedite the screening process. He testified that cashiers would have used that question as long as he has been involved with Kelland's tobacco policy. Having said that, he acknowledged that they could have begun to ask the question after the prohibition period in 2013. While he did not think that asking a purchaser's age would prevent employees from selling tobacco to minors he reiterated that it is only Kelland's first question and that they follow up with other questions and in particular request ID from purchasers appearing less than 30 years old.
46. Mr. Woznesensky testified that Kelland is committed to issues of public health and that they make substantial donations to support community healthcare projects.
47. He could not explain Island Health's evidence that the manager at Turner Road gave Mr. Riddell Kelland's 2005 tobacco policy. He stated that all managers are aware of the new policies and procedures and that they train assistant managers.
48. Mr. Woznesensky stated that since 2011, Kelland has in all cases informed store managers about changes to its tobacco policy but he acknowledged that the 2011 policy has not been amended to reflect the changes and that Kelland's tobacco policy had not been submitted as evidence for the hearing. However, he indicated that the store managers are all quite aware of Kelland's tobacco policies.

49. Mr. Woznesensky testified that head cashiers have the discretion whether to alert store managers about situations where cashiers do not appear to have followed Kelland's tobacco policy. He indicated that breaches of Kelland's policy would require the head cashier to go over the employee's training and testing. However, when asked, Mr. Woznesensky indicated that there was no written policy related to the random checks and no record-keeping, although he thought it was possible that store managers may be recording the results.
50. Mr. Woznesensky's view was that all contraventions were because of individual employees failures, and not because Kelland failed to develop or implement an effective policy.
51. In the event of a MTS fail, Mr. Woznesensky calls the store manager and asks them to review Kelland's tobacco policy with the failed employee. Store managers review all Kelland's policies and procedures, and may require re-testing. Kelland's tobacco policy is highlighted during employee training and is given priority over other concerns such as long customer lines.
52. Ms. Stuart led Mr. Woznesensky through Island Health's Tobacco Retailer Resource Kit:
- (i) He confirmed that new employees write the quiz at pages 33 and 34. He believed that employees who fail a MTS inspection also write the quiz and thought that they required employees to get 100%. He subsequently confirmed that they must get 100% but acknowledged that Kelland's tobacco policy does not specifically require that.
 - (ii) Mr. Woznesensky thought that clerks who sold tobacco had signed the letter of understanding at page 37. However, he did not recall whether Kelland's policy refers to a letter similar to the one at page 37.
 - (iii) With respect to a daily sign in sheet such as the one at page 44, Mr. Woznesensky did not recall that they ask employees to acknowledge Kelland's tobacco policy.
 - (iv) At page 32 of the Resource Kit there is a staff training checklist, but Mr. Woznesensky did not know if a similar checklist was used for any of the cashiers who failed MTS inspections.
 - (v) Mr. Woznesensky was not clear whether they have a Tobacco Policy Sign-off document like the one at page 48 but was confident that employees must complete the quiz and complete a Sign-off document.
 - (vi) Mr. Woznesensky did not recall having seen a Tobacco Sales Orientation and Refresher Training Checklist such as the one at page 41 in an employee file and did not believe that form is used at Kelland.
 - (vii) Mr. Woznesensky did not recall receiving the info sheet at page 39, but after the prohibition period in 2013 it was clear that compliance with the *TCA* and Regulation is Kelland's responsibility. With respect to the second page of the info sheet, which addresses monitoring of staff compliance, Mr. Woznesensky indicated that Kelland does not have documentation about staff being informed of Kelland's policy.
53. Mr. Woznesensky acknowledged receiving Island Health's documents summarizing the MTS inspections which took place at Parksville and 5th Street, Nanaimo between January 2010 and December 2013, as well as a summary of all MTS inspections at Kelland's stores (less Langford which opened July 2014) between January 2010 and February 2014.

The Law of Due Diligence

54. The leading case dealing with the defence of due diligence in strict liability offences is *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at p. 72 where Dickson J. makes it clear that the onus is on a retailer to prove that "it exercised all reasonable care by establishing a proper system to

prevent commission of the offence" and that it took "reasonable steps to ensure the effective operation of the system."

55. The Courts have found that a higher standard of what is "reasonable" applies in the public health context. In *R. v. Seaway Gas and Fuel*, a decision of the Ontario Court of Appeal the Court acknowledged that the *Ontario Tobacco Control Act* was an important public health statute which regulates "in a strict and careful fashion the distribution of a dangerous product."

56. However, in *R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 the Court stated:

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

57. In *R. v. Airline Hotel (Yukon) Ltd.*, 2007 YKTC 55, the court held that an electronic cash register which reminded employees to check ID before selling tobacco was insufficient to establish due diligence, as the owner did not remind staff frequently enough about not selling tobacco to minors and the consequences of non-compliance.

58. In *R. v. Sobeys Inc.* (2000), 181 N.S.R. (2d) 263 the court considered the retailer's defence of due diligence in the sale of tobacco to a minor following notice of 2 other sales to a minor at other stores. The court found that prior notice of a policy's ineffectiveness puts the retailer on notice that something more is required:

The appellant does not meet the standard of due diligence where it is under notice that its policies and procedures have on at least two occasions resulted in apparent violations of the *Act*... It is not, as counsel for the appellant suggests, the "continually raising of the bar" by requiring additional steps to be taken in the circumstances of knowledge that there had been sales to underage persons of tobacco products and warnings about future prosecutions in the event of further violations. In the light of these violations, it is not enough for the appellant to simply repeat that the policy must be reviewed with all employees. Something further is then required.

59. In *R. v. C.C. Eric James Management Ltd.*, 2000 BCPC 178, the court likewise found that a higher standard of care is required following an infraction. It stated:

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

60. In *R. v. Van Gard Drugs Ltd.* (1997), 242 A.R. 34 (P.C.) the Court stated:

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

61. In a number of cases from Ontario such as *R. v. Chung*, 2010 Carswell, Ont 11047, (C.J.), Saskatchewan, *R. v. Robert Klein Enterprises Inc.*, 2004 SKPC 31, Alberta, *R. v. 33rd Street N.E. Bingo Assn.*, 2001 ABPC 188 and British Columbia, *R. v. 348059 B.C. Ltd.*, 2003 BCPC

58 the courts have found that training or instruction of employees was insufficient to establish due diligence, and that there must be evidence of processes for monitoring, testing and ensuring employee compliance with legislation.

62. Underlying these decisions is the notion of continuing action when there is evidence that existing policies and procedures have failed. The courts are clear that when a retailer receives notice of a violation they must do something more or different.

Submissions

63. Island Health acknowledged that Kelland had admitted the 5 contraventions which are the subject of this administrative hearing. It pointed out that there were an additional two contraventions in 2013 which were not part of this administrative hearing.
64. Island Health submitted that a higher standard of due diligence is required both because of the public health context and because Kelland had notice of prior violations.
65. Ms. Stuart submitted that although Kelland claimed due diligence, it had not proven that it took reasonable care to establish a proper system to prevent contraventions and neither did it take reasonable steps to ensure the effective operation of its system. She noted that Kelland had not submitted documentation regarding its policies and that there was no evidence to show how it monitored implementation of its policy or measured its success. Ms. Stuart indicated that Island Health had reserved its submission on penalty until after the evidence was presented.
66. Kelland argued that it had demonstrated due diligence by making a sufficient number of changes to its tobacco policy following the previous hearing in December 2012. In particular Mr. Woznesensky noted Kelland's efforts to implement elements of the Tobacco Retailer Resource Kit and relied on the evidence he provided during the hearing. In Kelland's preliminary submission Mr. Woznesensky included legal argument made by Kelland's counsel at the hearing in 2012 which addressed the law on due diligence and applied it to the measures Kelland had taken prior to the hearing.

Analysis and Findings

67. Kelland admitted that it contravened section 2(2) of the *Tobacco Control Act* by selling tobacco to a person less than 19 years of age on 5 occasions as set out in paragraph 2 of this decision. Under the *TCA* the sale of tobacco to a minor is a strict liability offence and there is no requirement for Island Health to establish that Kelland intended to sell tobacco to a minor. It is enough to show that the sale occurred. However, a strict liability offence may be avoided if a defendant proves that it took all reasonable care to avoid the contravention, or exercised due diligence (section 12 of the Regulation).
68. Although Mr. Woznesensky argued in Kelland's preliminary submission and in his oral argument that Kelland had demonstrated due diligence, the evidence does not support that conclusion. For the reasons which follow I find that Kelland has not proven due diligence.
69. I recognize that Mr. Woznesensky is not legally trained and that he was ill during the time he represented Kelland in this administrative hearing. Although I encouraged him on at least 2 occasions to seek legal advice or assistance, he chose to represent Kelland on his own.

70. These are complex matters and the penalties are potentially serious. Significant preparation is required. Kelland presented no documentary evidence other than what was incorporated in its preliminary submission. The only evidence of Kelland's tobacco policy, training procedures, agreements with its employees, proof of training, etc. was through Mr. Woznesensky's testimony, Kelland's sole witness. In addition, Mr. Woznesensky's testimony regarding training of employees, tobacco sales reviews by head cashiers, a mystery shopper program developed by one store, the use of communication books in stores, etc. appeared to be based largely on hearsay evidence. He presented little direct evidence regarding the implementation and monitoring of Kelland's tobacco policy. In contrast, Island health called three witnesses who provided direct evidence.
71. I acknowledge that Kelland is a generous contributor to community health initiatives, but that was not the issue in this administrative hearing which focused uniquely on the contraventions set out in paragraph 2 of this decision and evidence related to the measures taken by Kelland to prevent the sale of tobacco to minors. While I accept that Kelland made some improvements to its tobacco policy after the prohibition period at the Nanoose store in January 2013, those measures were insufficient to significantly reduce its MTS fail rate or to prevent the sale of tobacco to minors. Other changes were required.
72. During the prohibition period at the Nanoose store between December 21, 2012 and January 17, 2013, I find that Kelland began to investigate and implement a software improvement to its sales tills. It is unclear how much research was conducted as it was done by IT personnel and Mr. Woznesensky's evidence about the research was vague. Although it is unclear whether the software was an expedient solution or a good solution, I nonetheless accept that it was an improvement.
73. However, there was no documentary evidence about the operation or procedures related to the new software. Neither was there any information about how employees were to be trained, tested or monitored in the use of the software. In the absence of such information, it would be impossible for head cashiers at different stores to train employees consistently on how to use it correctly. Island Health also argued that there was no evidence indicating how Kelland intended to test and monitor cashiers' use of the software.
74. I turn now to the other measures which Mr. Woznesensky indicated were taken by Kelland, and begin with the mystery shopper program. Based on his hearsay evidence I accept that one of Kelland's stores attempted to test its cashiers by using volunteer minors. While this initiative may have helped cashiers be more diligent, it falls far short of qualifying as a policy. It appears to have been a localized *ad hoc* measure, as it took place at one store only, the results were not documented, and it appears to have been of limited duration. In addition, it was inconsistent with Kelland's centralized tobacco policy which did not endorse a mystery shopper program.
75. Mr. Woznesensky also gave hearsay evidence with respect to 2 other stores where managers asked floorwalkers to monitor sales of tobacco to minors. In testimony he acknowledged the limited effectiveness of using floorwalkers in that role as they cannot see the identification produced by customers purchasing tobacco and they are likewise unable to see whether the cashier is keying in a DOB or the manager's override function. In addition, like the mystery shopper program, there was no evidence that this is part of Kelland's tobacco policy and neither do the results of this initiative appear to have been documented.

76. With respect to Mr. Woznesensky's review of tobacco sales video footage, I note that the video does not capture audio. While Mr. Woznesensky is able to view the interaction between a cashier and a customer purchasing tobacco, like the floorwalkers he is unable to see the purchaser's ID or the keys punched by the cashier. It is clear that this is an ineffective tool for testing or monitoring Kelland's tobacco policy and there was no evidence that this was a documented part of the policy. Finally, I note that the March 14, 2014 letter indicates that Mr. Woznesensky previously indicated that store managers had been asked to review video footage whereas in testimony, he indicated that they did not have the technology to review video footage. This suggests that store managers were not in fact performing that function when he indicated at the March 6, 2014 meeting that they were.
77. While Mr. Woznesensky characterized the discussion of Kelland's tobacco policy at monthly store managers' meetings as a new element of its tobacco policy, I note that tobacco sales issues are not raised at every meeting and it appears more likely that the sale of tobacco, like any other issue of importance, is placed on the agenda for the monthly meeting when there are issues to discuss. I am not persuaded that this is a new initiative and in addition there was no evidence that Kelland's tobacco policy requires discussion of the policy at monthly managers meetings.
78. With respect to Mr. Woznesensky's evidence that employees are required to review the communications book at the beginning of each shift, I note they are not required to sign it. Also, while Mr. Woznesensky indicated that the communications book includes a copy of Kelland's tobacco policy he did not submit a copy as evidence. Based on somewhat vague and hearsay evidence, I am not persuaded that the communications book at each store includes a copy of the tobacco policy. In addition, even if employees are required to review the communications book and it includes the tobacco policy, there is no record of whether they have done so, or other way to monitor if this is an effective tool.
79. In his testimony, Mr. Woznesensky was not always clear about what were new and what were old policies. The measures I have noted above are those I understood were new policies. There are a number of policies which pre-existed the prohibition period set out in paragraph 42 of this decision, which I do not intend to review. However, with respect to many of the measures, there was no evidence they are part of Kelland's documented tobacco policy. As such it is not possible to ensure that those measures are effectively implemented throughout the organization or to document and monitor whether they are effective in helping to prevent the sale of tobacco to minors.
80. Evidence submitted by witnesses for Island Health established that its intent is to ensure compliance with tobacco control legislation to minimize the sale of tobacco to minors and to help retailers prevent such sales.
81. Island Health's evidence with respect to the 7 failed MTS inspections between March 19, 2013 and August 31, 2015, was that 2 resulted when cashiers did not ask for ID and that 5 occurred, with some variation, when clerks requested ID and subsequently used the manager override function. This highlights a lack of understanding regarding the use of the software, insufficient training, or insufficient reminders about the need for diligence with respect to sales of tobacco. Island Health pointed out that employees who failed MTS inspections indicated that they were too busy or flustered to key-in the purchaser's DOB. It argued that if they had been properly trained they would have prioritized using the software as designed.

82. Island Health submitted that for the 5 contraventions, Kelland provided no information about the 5 cashiers: there were no personnel files; no evidence that they were properly trained; no information about their test results; no letters of understanding; and, no documentation outlining the steps taken with respect to testing or re-training the cashiers following the contraventions. Island Health submitted that 7 fails show that Kelland's tobacco policy was not working and that it is a systemic problem.
83. Where a retailer is given notice of a violation, it is indicative of a fault in their system. In the circumstances, a retailer acting reasonably must evaluate their system to ensure that the violation does not occur again. Whether this is properly characterized as a higher level of reasonableness or is simply a reasonable response to information about the effectiveness of their system is not so important. What matters is whether and how the retailer responds.
84. Island Health argued that Kelland had not established a proper system for preventing the sale of tobacco to minors. It pointed out that there was no evidence of a written policy and that what Kelland presented was a "confusing mess" which made it difficult to determine the terms of its policy. I agree that Kelland's evidence regarding its policy was confusing and difficult to understand. While I accept that Kelland has some form of written policy there was no evidence that what Mr. Woznesensky described as new measures, were incorporated into a comprehensive written plan which is capable of being implemented consistently from store to store, or of being monitored to determine its effectiveness.
85. Following Island Health's meeting with Kelland in March 2014 at which they discussed Kelland's compliance history and its tobacco policy, Island Health made suggestions for Kelland to improve its policies and practices. Following *Vanguard*, Island Health argued that alarm bells ought to have been ringing for Kelland, but in spite of that, there was little evidence that Kelland took steps to improve its policy.
86. In spite of the multiple violations of section 2(2) between March 2013 and August 2015, the only substantial modification to Kelland's tobacco policy was its upgraded software. The software upgrade took place in January 2013 and it should have been clear to Kelland after the 3 contraventions in 2013 that something more was required. As much as Kelland reacted quickly to implement the software, in the absence of a robust written policy and rigorous process for monitoring the effectiveness of its policy, Kelland has not demonstrated due diligence.
87. Kelland was put on notice that there continued to be a serious flaw in its tobacco policy as early as March 2013, and yet it failed to take steps to identify the source of the problem and implement changes in spite of significant assistance offered by Island Health's representatives. In spite of what I accept is a systemic problem, Kelland attributed the problem to the employees involved in the sales rather than take a serious look at what it could be doing differently. I am persuaded that its actions fall short of "a high standard of awareness" and "decisive, prompt and continuing action" (*Courtaulds*).
88. Regarding Mr. Woznesensky's direction, that staff should ask apparent minors wishing to purchase tobacco whether they are old enough to do so, Island Health argued that the only reason for asking that question is to catch MTS, who are instructed not to lie. When questioned on the issue Mr. Woznesensky strenuously denied that he was attempting to identify MTS. He explained that the idea behind the question is to see whether apparent minors exhibit nervousness in responding and that it is only the first question. Cashiers subsequently ask for ID. I find that asking potential minors whether they are old enough to purchase tobacco does

not assist Kelland in satisfying its obligations under the *TCA*. Kelland's obligation is to request and examine government issued ID to determine if a purchaser is of legal age. Given that the question about a purchaser's age is irrelevant to Kelland's obligation, I agree with Island Health that the most obvious objective of the question is to identify MTS.

89. However, while this may reflect antipathy by Kelland for the oversight provided by Island Health, I am not at all persuaded that Kelland does not support the objectives of the *TCA*. Kelland is an organization which has practices and procedures which may work for a small organization. However, it is no longer a small organization and must adopt policies which are effective in an organization of its size. Kelland has a fail rate of approximately 21%, which is 4 times higher than its peers of a similar size. It has received advice from many representatives of Island Health regarding measures it could take to improve its fail rate. However, it has resisted such suggestions and has tended to blame its employees for the failed MTS inspections, when the evidence is clear that its failures are the result of systemic issues.
90. On a balance of probabilities I am not persuaded that Kelland has demonstrated due diligence.

Penalty

91. Section 6.1 of the *Act* provides that the administrator may impose an administrative penalty if satisfied on a balance of probabilities that a person has contravened a provision of the *Act* or of the Regulation. The administrator may, by order, impose a monetary penalty and/or prohibit the person from selling tobacco in accordance with the prescribed schedule.
92. Section 6 of the Regulation prescribes penalties for violations of section 2(2) of the *Act* while section 13 of the Regulation, set out at page 3 and 4 of this decision, sets out the factors to be considered in imposing administrative penalties.
93. Schedule 2 and 3 of the Regulation establish respectively the range of monetary penalties and prohibition periods. For a first contravention of section 2(2) of the *Act* the range of monetary penalties is from \$0.00 to \$1,000.00 and the range of prohibition periods is from 0 to 30 days. For a second contravention of section 2(2), the range of monetary penalties is from \$0.00 to \$3,000.00 and the range of prohibition periods is from 0 to 90 days.
94. With respect to Kelland's Nanoose store, Island Health noted that it was the subject of the 2012 monetary penalty and prohibition order. It submitted that this was the second contravention at the Nanoose store and it proposed a maximum monetary penalty of \$3000.00 and a maximum prohibition period of 90 days.
95. I am persuaded that a more significant monetary penalty and a longer prohibition period are appropriate for the Nanoose store. In considering an appropriate penalty I have taken into account the factors set out at section 13(1) of the Regulation. I note that the previous contravention at this store was for sale of tobacco to a MTS. Kelland is the owner and operator of the store in question. I also note that the MTS fail at this store, followed 5 successful MTS inspections and together with the monetary penalties and prohibition periods applied to Kelland's other locations, I am satisfied that a monetary penalty of \$3000.00 and a prohibition period of 60 days are appropriate.
96. Island health submitted that the other MTS fails which are the subject of this administrative hearing, were first contraventions and again based on the evidence and its arguments, it

proposed the maximum monetary penalty of \$1000.00 and the maximum prohibition period of 30 days.

97. With respect to these 4 sales and the factors set out at section 13(1) of the Regulation, I note that the stores at 5th Street, Nanaimo and Turner Road, Nanaimo were both previously warned about MTS fails. The stores in Comox and Victoria did not receive previous warnings by TEOs. However I also note that Kelland is the owner of all of the stores and has a centralized tobacco policy. As monthly store manager meetings addressed tobacco fails, I accept that the managers of the Comox and Victoria stores would have been aware of the significant number of MTS fails and the apparent inability of Kelland's tobacco policy to prevent the sale of tobacco to minors. Based on all the above I am satisfied that a monetary penalty of \$1000.00 and a prohibition period of 30 days is appropriate for each of these 4 contraventions.
98. In addition to the above monetary penalties and prohibition periods, Island health sought an order pursuant to section 6.1(2)(b)(ii) of the *TCA*, that I prohibit the sale of tobacco and tobacco products from Kelland's 6 other locations on Vancouver Island for a period of 21 days. It argued that it was in the public interest to do so given the systemic nature of Kelland's inability to prevent the sale of tobacco to minors and the factors set out in section 13(2) of the Regulation.
99. Island Health argued that Kelland was aware of previous enforcement actions and pursuant to section 13(2) of the Regulation, I find there were many prior enforcement actions for the sale of tobacco to minors. Island Health also argued, and I am persuaded that the failure rate of 21% on MTS inspections is evidence of repeated or continuous contraventions. The 5% fail rate of other grocery chains with a similar number of stores provides insight into the levels of compliance which are possible.
100. While Island Health also submitted that the contraventions were deliberate based on Mr. Woznesensky's evidence that the cashiers involved knew and understood Kelland's tobacco policy and purposely ignored it, I am not persuaded that that argument has merit. In spite of Mr. Woznesensky's statements, all of the Tobacco Inspection Reports reveal that for one reason or another the cashiers who sold tobacco did not deliberately intend to do so. The sales occurred because the cashiers were under pressure, distracted, and did not prioritize Kelland's tobacco policy or were unclear about the policy.
101. Island Health submitted that the only effort Kelland made to improve its policy was to put its new software in place and that it ignored many other suggestions for improvement which were made by Island Health's representatives. Based on the evidence, I find that the changes Kelland made fell short of due diligence, particularly in light of its record of MTS fails.
102. As for other relevant matters, Island Health submitted that I should consider the deliberate nature of Mr. Woznesensky's direction that staff ask purchasers if they are old enough to purchase tobacco. There was no evidence that that misguided direction had an impact on Kelland's MTS fail rate and I have not placed any weight on it in considering whether I should order that Kelland be prohibited from selling tobacco at other locations. What is more significant in my view is the failure of Kelland to respond to a systemic and longstanding problem. The problem is such that it cannot be attributed to a few poor employees and until Kelland exercises due diligence, there is reason to believe that it will continue to experience a high rate of sales to minors.

103. Based on my consideration of the factors set out in section 13(2) of the Regulation, I am persuaded that there is a real and continuing public health risk as long as Kelland continues to sell tobacco and tobacco products under its existing tobacco policy. I am satisfied that it is in the public interest that Kelland's six other stores within Island Health's jurisdiction, being Bowen Road, Nanaimo, Qualicum Beach, Port Alberni, Parksville, Courtenay, and Campbell River be prohibited from selling tobacco and tobacco related products for a period of 20 days.

Order

104. **As have found that** Kelland contravened Section 2(2) of the *Act*, **I order** that it pay monetary penalties as follows and that such sums are due and payable upon service of this decision and Order:

- (a) Nanoose \$3000.00
- (b) 5th St., Nanaimo \$1000.00
- (c) Langford \$1000.00
- (d) Comox \$1000.00
- (e) Turner Road \$1000.00

105. **In addition, as have found that** Kelland contravened Section 2(2) of the *Act*, **I order** that it be prohibited from selling tobacco products in accordance with the schedule which follows beginning April 6, 2016:

- (a) Nanoose 60 days
- (b) 5th St., Nanaimo 30 days
- (c) Langford 30 days
- (d) Comox 30 days
- (e) Turner Road 30 days
- (f) Bowen Road 20 days
- ~~(g) Nanaimo 20 days~~
- (h) Qualicum Beach 20 days
- (i) Port Alberni 20 days
- (j) Parksville 20 days
- (k) Courtenay 20 days
- (l) Campbell River 20 days



Hugh McCall, Administrator's Delegate