

Tobacco and Vapour Products Control Act – FHC Enterprises Ltd.
A Hearing Under Section 6 of the *Tobacco and Vapour Products Control Act*
R.S.B.C. 1996 c. 415 (as amended)

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

- by –

FHC Enterprises Ltd. doing business as Fields Store

(“Fields”)

Administrator’s Delegate under Section 5 of the
Tobacco and Vapour Products Control Act:

C. L. Roberts

Date of Hearing:

January 16 and 17, 2017

Place of Hearing:

Nanaimo, B.C.

Date of Decision:

January 30, 2017

Appearing:

Counsel for FHC Enterprises Ltd.:

Robert McDonell

Counsel for the Vancouver Island Health Authority:

Kathryn Stuart

Decision

Background

1. The Vancouver Island Health Authority (“VIHA”) alleged that on March 9, 2015, July 22, 2015 and August 25, 2015, FHC Enterprises Ltd., doing business as Fields, (“Fields”)

contravened Section 2(2) of the *Tobacco and Vapour Products Control Act* (the “*Act*”) by selling tobacco products to a minor.

2. Section 2(2) prohibits a person from selling, offering for sale, providing or distributing tobacco to a person under the age of 19 years of age (Section 2(2) of the *Tobacco and Vapour Control Regulation* (the “*Regulation*”).
3. Fields did not dispute the allegations.
4. The issues to be determined are
 - (a) whether Fields has established a defence to the charge under Section 2(2.1) of the *Act*; and
 - (b) whether Fields has established a defence of due diligence pursuant to Section 12 of the *Regulation* for any or all of the sales.

Evidence

5. I heard evidence from Aaron Severs and Scott Riddell, Tobacco Enforcement Officers (“TEO”) with VIHA and Shelley McClure, the Leader of Operations for the Tobacco and Vapour Control Program for VIHA. I also heard evidence from Dean Petruk, President and CEO of Fields: Moira Hutchison, manager of the Fields Sooke store: and Michelle Landry, the former manager of the Port Hardy Fields store.
6. Fields has operated stores in Canada since 1948. Incorporated in March 2012, FHC Ltd. purchased 62 Fields stores from its former owner, Hudson’s Bay Company, shortly thereafter. Thirty one of those stores are in British Columbia, with the rest located in Saskatchewan, Manitoba, Alberta and the Northwest Territories. Of the 31 stores in British Columbia, six are located on Vancouver Island: Sooke, Gold River, Port Hardy, Port McNeill, Parksville and Lake Cowichan. A seventh store, located in Comox, has since closed.
7. Tobacco Retail Authorizations were issued for the Vancouver Island Fields stores in April 2012.

Sales to minors at Fields stores September 2012 to September 2014

8. On June 15, 2012, a TEO conducted a routine inspection at the Sooke store and determined a signage violation (a contravention of Section 5(1) of the *Regulation*) had occurred. Corrective action was requested and implemented during the visit, and a verbal warning was issued.
9. On July 12, 2012, a TEO conducted a minor test shopper (“MTS”) inspection at the Port McNeill store. The clerk did not request identification and the MTS was sold a tobacco product. A Tobacco Retailer Resource kit was given to the assistant manager and the TEO issued a verbal warning to the clerk. VIHA informed Mr. Petruk about the contravention by letter dated August 20, 2012. The letter set out the provisions of Section 2(2) of the *Act* and

outlined the importance of educating staff about checking identification. The letter stated that further compliance checks would be conducted at the retail premises and outlined the penalties for violations of Section 2(2).

10. On July 30, 2013, a TEO conducted a MTS inspection at the Parksville store. Although the clerk requested and was provided identification from the MTS, the minor was sold a tobacco product. The clerk told the TEO that she had completed a refresher on tobacco sales that morning and that she had checked the minor's ID and thought the minor was old enough. The TEO provided a copy of the Tobacco Retailer Resource Tool Kit for management and staff to review along with "check photo ID" decals. Both Fields and the clerk were issued verbal warnings. On September 4, 2013, VIHA sent a letter to Mr. Petruk regarding the violation. The letter indicated that the onus was on the retailer to ensure that all staff members were well trained and knowledgeable about the requirements for tobacco sales. The letter read, in part as follows:

... it is recommended that Fields develop and implement a plan to prevent further tobacco sales to minors. This plan may consist of written policies, practices and procedures to demonstrate a commitment to prevent tobacco sales to minors. If you decide to implement or modify an existing plan, it is important to inform your staff of any changes that you will be making with respect to tobacco sales. Please note that it is the business owner's responsibility to ensure that the plan is implemented and working in the business premises. In addition, be advised that having a plan does not indemnify you from future ticketing/prosecution/administrative penalties should your business be found to have sold tobacco to a minor.

11. The letter concluded by outlining the possible penalty options for continued violations.
12. On August 16, 2013, a TEO conducted an MTS inspection at the Comox store. Although the clerk requested and was provided identification, the minor was sold a tobacco product. The TEO provided the clerk with a Ministry of Health educational pamphlet "Preventing Tobacco Sales to Minors" and explained the line "Under 19 until XXX" below the photo on the ID. A verbal warning was issued to the clerk and to Fields. VIHA informed Fields about the contravention by letter dated August 27, 2013. The letter contained warnings similar to that in the August 20, 2013 letter, emphasizing that it was the business owner's responsibility to ensure that the plan is implemented and working, and set out the possible penalties in the event of non-compliance.
13. On December 30, 2013, a TEO conducted an MTS inspection at the Sooke store. Although the clerk asked for and was provided identification, she sold a tobacco product to the minor. The clerk informed the TEO that she had received training at a liquor store she had previously worked at but had not received much training at Fields yet. She said that she had worked at Fields for four to six weeks and had recently been promoted to Assistant Manager. The clerk stated that the process for tobacco sales was to ask for identification for anyone who appeared under 35 years of age. The clerk admitted that she requested identification but did not thoroughly check it. The TEO provided educational pamphlets to the clerk. Both the clerk and Fields were issued verbal warnings. VIHA informed the store manager about the contravention by letter dated January 14, 2014, with a copy to Fields'

Head office. The letter contained warnings similar to those set out in the letters of August 20, 2013, September 4, 2013 and August 27, 2013, and included Ministry of Health educational pamphlets.

14. On July 8, 2014, a TEO conducted an MTS inspection at the Parksville store. Although the clerk requested and received identification, she sold a tobacco product to the minor. The clerk said that she had only been working at the location for two days. She had not received tobacco-related training. The store manager was unaware of the tobacco training package. The TEO encouraged the clerk not to sell tobacco until she received training, and showed her how to look for the line beneath the photograph on the British Columbia issued identification card or driver's license which, in the case of a minor, contains the notation "under 19 until XXXX [date]." The TEO also provided the store with Ministry of Health educational pamphlets about preventing tobacco sales to minors. Fields was given a copy of the inspection report which indicated that any action to be taken as a result of the contravention was "to be determined."
15. On July 9, 2014, the TEO conducted an MTS inspection at the Sooke store. Although the clerk requested and was provided with identification, she sold a tobacco product to the minor. The clerk informed the TEO that she had worked at the store since the end of January 2014, and had been trained in tobacco sales. The training included instruction in requesting identification from anyone who wished to purchase tobacco and looked under 30 years of age. The clerk also said that she had reviewed a binder about tobacco sales and reviewed Fields' store policies on tobacco sales. The clerk acknowledged that she should have consulted the "Check photo ID" decal or read the "Under 19 until XXX" on the identification. The tobacco inspection report was provided to Fields as well as the clerk, with a "to be determined" notation in the "Action Taken" section.
16. Ms. McClure testified that the goal of the *Act* and *Regulation* was the reduction of the use of tobacco and the promotion of a smoke-free environment. VIHA employs a progressive enforcement model which emphasises education and awareness followed by warnings and finally, if sales of tobacco to minors continue, the imposition of penalties. VIHA's policy is to meet with retailers who have repeated contraventions after two written warnings following the sale of tobacco to minors.
17. In light of the number of contraventions, Mr. Severs and another TEO, Rebekah Kirk, held a "non-compliance" meeting with Mr. Petruk and Marika Kokoshke, Fields' District Manager, by telephone on September 23, 2014. The purpose of the meeting, according to Ms. McClure, was to notify Fields that the company policies regarding tobacco sales were not working and needed improvement. According to Ms. McClure, Fields' failure rate of 24% for MTS inspections was particularly high, with stores of similar size having a failure rate of three to five percent and smaller stores having failure rates of approximately 10%.
18. Ms. Severs and Ms. Kirk discussed the compliance history and sales of tobacco to minors at the Sooke and Parksville locations with the Fields representatives. VIHA also provided Fields with a table outlining the compliance history of all Fields locations on Vancouver Island from July 2012 until July 2014, which provided the figures supporting the 24% failure rate. Fields informed VIHA that its management team had implemented the following measures to prevent future sales of tobacco to minors:

- a District Program for tobacco training using the content of VIHA’s Toolkit for Tobacco Retailers;
 - All stores had access to compliance and training sheets;
 - All managers and employees are made aware of Fields’ policies regarding tobacco sales;
 - Each manager is sent a reminder by Outlook prompting them to have staff re-read and sign off on tobacco training;
 - New employees, once trained in tobacco sales, are not left unattended for tobacco sales for at least two days following training;
 - The store provides a “daily, weekly and non-negotiable” list to staff and managers;
 - If an employee sells tobacco to a minor, they receive a “verbal written warning” and the event is used as a training tool;
 - If an employee sells tobacco to a minor a second time, they are put on “formal performance management;”
 - If the store manager does not train and ensure understanding by a clerk and the clerk sells tobacco to a minor, the manager is also issued a “verbal written” warning and moves to formal performance management for a subsequent sale to a minor.
19. VIHA made suggestions for additional changes to reduce or eliminate sales of tobacco to minors, including investing in a “secret shopper” program, creating and posting signage stating “we ID under 30, please have your ID ready” and having calculators available at the tills for clerks to use to determine the age of the customer. Fields indicated that it had discussed implementing a “secret shopper” program but had no plans to implement one in the immediate future.
20. VIHA wrote to Mr. Petruk on October 3, 2014. The letter provided a summary of the meeting and contained a written warning to Fields as a result of the July 8, 2014 sale to a minor at the Parksville store and the July 9, 2014 sale to a minor at the Sooke store. The letter noted that Fields had informed VIHA that it was upgrading its point of sale (POS) system at retail outlets which would allow clerks to scan identification documents to determine the age of the customer, and that Fields expected the system to be rolled out in 10 of its stores by the end of 2014 with expansion in 2015.
21. The October 3, 2014 letter warned Fields that “first convictions under the administrative penalty process could result in a fine of up to \$1,000 and/or a tobacco sales prohibition up to 30 days.”
22. Mr. Petruk testified that after the meeting with VIHA, Fields ‘challenged itself’ to come up with solutions and “up its game.”
23. Although Fields submitted into evidence its current Tobacco Policy which Mr. Petruk reviewed and approved following the September 24, 2014 meeting, Mr. Petruk was unable to identify what specific changes had been made to the policies or directives as a result of that meeting. Mr. Petruk testified that while some of the suggestions made by VIHA at the meeting were included in the policy, he was unable to identify them. Mr. Petruk testified that Fields also revised its Vancouver Island management team, increased the frequency of its electronic communications to store managers to every month rather than every three months and hired more district managers to ensure the tobacco policies were carried out.

24. Fields' policies are uniform across all of its stores, with the policies and applicable legislation available to each store on an intranet. Fields training, which is conducted online, is updated regularly and store managers are reminded of any policy updates by way of daily electronic communication. Mr. Petruk indicated that Fields' success starts with the store management and that, following the September meeting, it enhanced the human resources department to ensure proper training was in place.
25. Mr. Petruk testified that following the September meeting, Fields notified store managers that its tobacco policies and directives had changed. However, the managers were not told what those changes were. Mr. Petruk was unable to say how staff were trained, other than to say that all staff were expected to read all documents, containing policies and procedures, that were available on the intranet.
26. Fields also had a teleconference call with senior staff and, among other things, directed that tobacco policies be installed in lunchroom facilities. District managers were instructed to review the tobacco sales policy line by line to ensure managers understood them.
27. Mr. Petruk agreed that the tobacco policies were inconsistent in that some stated that staff were to check identification if a customer looks under 30 while others it stated to do so if the customer looked under 25. He was also unable to explain why some clerks thought it was necessary to ask for ID if the customer appeared under 19, while others thought it was 30 and still others thought the age was 35. He was also unable to explain why no one at Fields had noted the inconsistencies if they had reviewed the policies in detail.
28. Mr. Petruk testified that, sometime in 2015, Fields implemented an on-line Health Canada quiz that staff are required to pass, although he could not state precisely when the test was implemented, nor what score the employees were required to achieve to pass. He also acknowledged that there were no references in Fields' policy about the test or what was required for successful completion.
29. Mr. Petruk also agreed that Fields did not conduct tests with clerks relating to sales of tobacco and that Fields' training material did not contain any diagrams or photos of any forms of ID or any information demonstrating how to review identification documents to check age.

Sales to minors after September 2014

30. On March 9, 2015, a minor test shopper ("MTS") purchased a package of cigarettes from Ms. Hutchison, the clerk on duty at the Sooke Fields that day. Mr. Severs spoke to Ms. Hutchison, who informed him that she was the acting store manager and had worked at the store since August 20, 2014. Ms. Hutchison also informed Mr. Severs of the following:
 - She received training on tobacco sales by a sales binder from Fields' Head Office and Ministry of Health education pamphlets;
 - She was told to request ID from anyone who looked under 19 years of age;
 - She had read and signed off on the training package;
 - Managers get reminders every three months to re-read and sign off on tobacco training;
 - She was unaware of the daily, weekly and non-negotiable list;

- She was not aware of the process if an employee sells to a minor, or the consequences to the manager of the store;
 - No one at the store was responsible for tobacco training;
 - She was unaware if the Tobacco Retailer Resource Kit was present at the store;
 - There was no “secret shopper” program in place;
 - There was no “We ID under 30 years of age” signage posted at the store;
 - Calculators were not used at the till to determine age.
31. A Fields employee since August 2014, Ms. Hutchison was promoted to the manager of the Sooke store in approximately April 2015. She has 20 years’ experience in store management, including a short period selling regulated products to minors. Ms. Hutchison testified that the training she had received had been rushed and that she was “learning on the fly.” She had reviewed Fields’ policies and completed a quiz on tobacco sales to minors. Ms. Hutchison also acknowledged that she was familiar with the line under the photo identification “under 19 until XXXX” and that it was Fields’ policy to ask for identification when customers appeared to be under the age of 30.
32. Ms. Hutchison recalled that, on March 9, 2015, she made an error in calculation of the age of the customer and sold a tobacco product to a minor. She acknowledged that she did not look at the “under 19 until XXX” line on the identification because she was preoccupied by too many other things. Ms. Hutchison stated that, in addition to being the only employee at the store that day, she was distressed due to some personal issues and was perhaps not as focussed as she might otherwise have been.
33. Ms. Hutchison agreed that she should have double-checked the customer’s year of birth. She said that, in retrospect, she should have used the Check Photo ID decal (2015) posted at the cash till.
34. After being notified of the contravention, Ms. Hutchison printed the material available to her online and put a copy in the store lunchroom. She spent time trying to bring “rogue” employees into line and, on the instruction of Fields’ head office, re-trained all the employees on tobacco sale policies. She said that although Fields did not provide her with any new materials or policies, she goes beyond what Fields asks her to do, including requiring employees to sign off on documents and providing them with documents that are not included in Fields’ online training material.
35. Ms. Hutchison said that she trains employees immediately after they are hired, and re-trains them every three months. Since 2016, that re-training occurs monthly. She said that the employees take the quiz contained in the Training Kit which she marks, and that employees cannot sell tobacco products until they satisfy her that they know the rules. She said that she also refers to the examples on how to examine identification in her training.
36. Mr. Petruk said that after being notified of this contravention, which occurred six months after the review meeting, Fields hired two additional directors, one of whom was responsible for Store Operations and made tobacco sales “front and centre.”

37. On July 22, 2015, a MTS purchased a package of cigarettes from Rein Widenmaier, the clerk on duty at Sooke Fields that day. After the purchase, Mr. Severs informed Ms. Widenmaier about the sale. Ms. Widenmaier informed Mr. Severs as follows:

- she had worked at the store since December 2014;
- she had received training on the sale of tobacco by the previous store manager Leanne Stephens, and in fact, had been recently re-trained by the current store manager, Moira Hutchison;
- she read the Toolkit for Responsible Tobacco Retailers from Health Canada;
- she read the Tobacco Retailer Resource Kit from Island Health and completed the quiz;
- she signed off on a number of documents, including tobacco sales-orientation and refresher training checklist;
- she was taught by Fields to request identification for tobacco sales if a customer looked 35 years of age or under;
- acceptable ID must have a photo, valid expiry, date of birth and be government issued;
- the photo on the ID must match the customer;
- her employer told her that beneath the photo for a minor was a line “Under 19 until XXX”);
- She was told by her employer that sales of tobacco to a minor may result in being issued a fine.

38. Ms. Widenmaier told Mr. Severs that she requested ID and the MTS had provided it. She then asked him for his date of birth, and he responded that it was March 31, 1999. She then asked the MTS how old he was, and he replied “21.” She thought of her brother, who was also born on the same day but another year, and lost her focus. She acknowledged that she should have checked the line below the photo, and that the sale was her fault and she had no excuse.

39. Mr. Severs spoke with Ms. Hutchison about the sale and inquired into any corrective actions that had been put into place since the March 9, 2015 contravention. Ms. Hutchison said that the store had taken the following steps:

- All new sales associates go through tobacco sales training paperwork with her and do spot quizzes before they can go on the floor and sell tobacco;
- Staff review the Toolkit for Responsible Tobacco Retailers (Health Canada);
- Staff review the Tobacco Retailer Resource Kit (Island Health) plus do the quiz;
- Staff sign off on multiple documents and policies, copies of which Ms. Hutchison provided to Mr. Severs;
- She had retrained all staff at the store since the March 2015 sale;
- Store managers are in charge of tobacco sales training;
- Staff are to request ID for anyone who looks under 30 years of age and wants to purchase tobacco products;
- Staff are instructed not to reach for tobacco product until ID has been requested;
- Staff have been shown where to find the “Under 19 until XXX” on ID;
- Check photo ID (2015) decals are in place and used by staff.

40. Ms. Hutchison said that the following corrective actions had not been put in place:

- Daily, weekly and non-negotiable lists;
- Secret shopper program;
- “We ID under 30 years” signage;
- Calculator at cash till to determine age;
- New Point of Sale (POS) system that allows one to scan or swipe ID via card reader. That is expected to arrive in the fall or early winter.

41. At the hearing, Ms. Hutchison explained that Ms. Widenmaier had been trained appropriately and knew what steps she had to take but failed to take them. She said that when Ms. Widenmaier informed her that she had sold a tobacco product to a minor she was “flabbergasted” because Ms. Widenmaier was quite strict in asking for identification.

42. On August 25, 2015, a MTS purchased a package of cigarettes from Michelle Landry, the clerk on duty at Port Hardy Fields that day. After the sale, Mr. Riddell spoke with Ms. Landry, who informed Mr. Riddell that she recalled the MTS’s date of birth as 1994. Mr. Riddell informed Ms. Landry that the MTS’s date of birth was actually 1999 and that the MTS was 16 years of age. Ms. Landry identified herself as the store manager and informed Mr. Riddell as follows:

- she had been working at the store for approximately nine months;
- she had received tobacco sales training when she started;
- that tobacco sales training is refreshed monthly;
- the store’s policy is to request ID from customers who appear 35 years of age or younger;
- staff remind each other regularly to check ID if they see another staff member forgetting to request ID from someone who appears 35 years or under;
- staff must re-read the training binder and repeat the tobacco sales exam every three months;
- each store till has age reminder decals visible to assist clerks;
- tills do not have any reminders or date-of-birth prompts. Although new tills with ID scanners are planned, there have been delays;
- staff are advised to check the picture on any ID presented;
- Fields had recently advised her numerous times by e-mail that a sale to a MTS could result in the suspension of the store’s licence and to be extra vigilant in checking ID.

43. Mr. Riddell informed Ms. Landry about the “Under 19 until XXXX” line under the picture on government-issued ID of minors in British Columbia. Ms. Landry stated that she was previously unaware of that. Ms. Landry informed Mr. Riddell that she had worn new contact lenses that day which had irritated her eyes and that she had read 1994 on the MTS’s ID.

44. Ms. Landry began working for Fields in January 5, 2015. She had previous experience in retail, including approximately two months in tobacco sales. Ms. Landry said that she was trained in the sale of tobacco through Fields’ online training tools, including the Tobacco Resource Toolkit, and was aware that Fields did not want her to sell tobacco to minors. She also testified that Fields’ policy was that clerks were to ask all customers for identification and that she had received emails from Fields’ head office telling her about the importance of

asking for identification. She had also undertaken refresher training on a monthly basis, which included training on checking identification and ascertaining the age of the customer.

45. Ms. Landry testified that, on August 25, 2015, she misread the date on the MTS identification for the reasons she had explained to Mr. Riddell. Ms. Landry stated that she had not been trained to look at the line under the photo of the MTS indicating the customer was “under 19 until XXXX” and did not see it when she checked.
46. Mr. Petruk testified that the only Fields stores which have been found in contravention of tobacco laws are located on Vancouver Island and that it has received letters from several Health regions in Saskatchewan notifying it of successful youth test shopper inspections. It has also been notified in writing of successful inspections by Northern Health in British Columbia. Mr. Petruk said that, as a result, Fields believed that its policies and procedures were appropriate. However, Mr. Petruk was not aware how many MTS inspections might have been conducted in other areas, nor was he able to offer an explanation why the Vancouver Island stores failed the MST inspections.
47. Fields installed POS upgrades with enhanced verification models in a number of its stores in April 2015. The system, which was designed specifically for Fields’ needs, was fully implemented in all stores as of April 2016. The system, which consists of an enhanced scanning device, cannot be used due to some unique features in the British Columbia licence barcoding system. Consequently, in British Columbia, clerks are still required to manually enter a customer’s birthdate once the cash register prompts them to do so for regulated products. Mr. Petruk said that the software development and implementation took longer than anticipated and that Fields cannot alter the software to address the complications posed by the British Columbia barcoding system.
48. Mr. Petruk said that Fields rejected the use of “mystery shoppers” because the company is still assessing the legal ramifications of hiring a minor to carry tobacco around, as well as the practical reality of getting mystery shoppers to some of their remote stores.

SUBMISSIONS

49. The arguments of the parties are summarized below. It is not intended to be a comprehensive recitation of every point made by the parties.

VIHA

50. VIHA noted that one of the purposes of the *Act* is to prevent smoking among teens, since most Canadians who smoke began to do so in the teenage years and that the legislation must be interpreted in light of these purposes.
51. VIHA contended that Fields had not taken reasonable steps to establish a tobacco sales policy. It argued that Fields’ policy was inadequate because of the age inconsistency at which staff were to ask for identification. It contended that this internal inconsistency demonstrated Fields’ lack of care in policy development.

52. VIHA also argued that the policy failed to clearly set out how managers were to be trained, and that Mr. Petruk was unable to specify how training was to occur. VIHA says that Fields' training program consists entirely of checklists and forms from other agencies and has not developed any internal training documents of its own. Furthermore, VIHA argues, Fields' tobacco training policies lack coherence as they have no index or list of all training documents. VIHA argues that the key to successfully implementing a policy is to know what it consists of.
53. VIHA also argued that Fields had failed to establish that it had any system in place to monitor the implementation of its tobacco sales policy. VIHA argued that, at the Sooke store, Ms. Hutchison was simply told to review the policies contained on the intranet and implement them; that there was no evidence of any continuity of training. VIHA says that Ms. Widenmaier's sale of tobacco to a minor within days of her retraining demonstrates Fields' failure to monitor the implementation of its policy. VIHA says that, given that Fields knew there were problems, it should have taken steps to determine what more needed to be done.
54. VIHA contends that Fields' messages to its managers to review its policies was simply insufficient; that doing the same thing over and over after being notified of several sales to minors does not meet the test of being "scrupulous" in addressing the problem.
55. Further, VIHA argues that the fact that there were nine sales to minors in five different stores is evidence that Fields' policies were not effective. It also argues that, once Fields was notified of the contraventions, telling staff to be more careful does not meet the due diligence standards. VIHA also says that Fields cannot blame employees, that the issue is more widespread than a few individual clerks.

Fields

56. Counsel for Fields submitted that Section 2(2.1) of the *Act*, which provided a defence to a charge of selling tobacco to a minor, was applicable in all three of the sales. Counsel also contended that Fields exercised due diligence to prevent the contraventions. Fields contended that it had established policies and trained its clerks not to sell tobacco to persons under the age of 19 and that it was not liable for its employees' contraventions.
57. Fields argued that the cases relied on by VIHA involved an employees' failure to ask for identification and that the comments and suggestions made by the courts are inapplicable to the present facts, all of which involve human error. Fields contends that each of the employees made calculation errors and that there is nothing more that Fields could do to prevent this type of error.
58. Fields argues that its policies were adequately established; that the issue was how the policy was implemented at the store level. Fields says that all three clerks who sold the tobacco were aware of Fields' policy not to sell tobacco products to customers under the age of 19 and that all three had requested and inspected the customers' identification.

59. Fields says that, after being notified of the contraventions, it did “step up” its implementation activity. Fields says there is no authority to suggest it was required to re-write its policies.
60. Fields also argues that corporations are not liable for offences contrary to statute committed by their employees.

Law and Analysis

61. The *Act* prohibits the sale, distribution, provision, advertising and promotion of the use of tobacco except in accordance with the *Act* and *Regulation*.
62. Fields agreed that it sold tobacco products to a person under 19 years of age on March 9, 2015 and again July 22, 2015 in Sooke, and on August 25, 2015, in Port Hardy. However, it relies on Section 2 (2.1) of the *Act* as a defence to the charge.

Can Fields rely on section 2(2.1) of the *Act* as a defence?

63. Section 2(2.1) provides that it is a defence to a charge under subsection (2) if a person charged with the contravention demonstrates that, in concluding that the individual reached the age specified by regulation, the person
- (a) required the individual to produce a prescribed form of identification,
 - (b) examined the identification, and
 - (c) reasonably believed that the identification
 - (i) was that of the individual, and
 - (ii) had not been altered or otherwise falsified.
64. Without expressing any view of whether pursuing an administrative penalty for contraventions of the *Act* constitutes a “charge,” I conclude that Fields has not established a defence under Section 2(2.1).
65. In *R. v. Pourloftali* (2016) ONCA 490), the Ontario Court of Appeal upheld the conviction of a clerk in a convenience store who sold cigarettes to a 17 year old test shopper under the *Smoke-Free Ontario Act*. Section 3 of that *Act* prohibited sales or supply of tobacco to a person under 19 years of age, and Section 3(3) provided that it was a defence to a charge that “the defendant believed the person receiving the tobacco to be a least 19 years old because the person produced a prescribed form of identification showing his or her age and there was no apparent reason to doubt the authenticity of the document or that it was issued to the person producing it.” The court held that to interpret 3(3) as permitting a defence of honest mistaken belief of fact in the absence of reasonable belief or reasonable care is inconsistent with the statutory provisions read in context and would undermine their legislative purpose, which is to reduce the harm of tobacco by preventing the sale of tobacco products to minors.

66. Although the legislation is not identically worded, I conclude that Section 2(2.1), which is substantially similar to Section 3(3) of the Ontario legislation, must be read in light of the purposes of the *Act*, and that, as the Court found in *Pourlotfali*, to interpret 2(2.1) as permitting a defence of honest but mistaken belief is inconsistent with the *Act*.
67. Section 8 of the *Interpretation Act* ([RSBC 1996], c. 238) provides that all legislation must be construed as being remedial, and be given such fair, large and liberal construction as best ensures the attainment of its objects.
68. The purposes of the *Act* include the regulation of the sale of tobacco and to prohibit the sale of tobacco and tobacco products to persons who are minors. The harms caused by tobacco products, particularly to minors, are well established. As noted by the Ontario Court of Appeal, it is important to interpret this provision in the context of the entire scheme of the *Act* and specifically section 2, the goal of which is to “prevent the deliberate or inadvertent sale of tobacco products to minors.” Accordingly, as the Ontario Court of Appeal stated, “the only sensible interpretation of Section 3(3) is that the vendor, in forming the belief that the purchaser is at least 19 years old, must exercise reasonable care in reviewing the identification that provides proof of the purchaser’s age.” (at para 41)
69. In *Pourlotfali*, the Court added that:

An interpretation of s. 3(3) that would permit a mistake of fact based solely on “human error” without any other explanation demonstrating care and attention to the contents of the identification is inconsistent with one of the Act’s main purposes – to ensure that minors are not able to buy cigarettes. The essence of the statutory due diligence defence provided by s. 3(3) is verification of age by requiring the production of identification. To not require the exercise of reasonable care in the review of the identification and to allow a mistake of fact that is not objectively reasonable to constitute a defence would render hollow this important measure and would undermine the legislative purpose of preventing access to tobacco by minors. (para. 47)

70. In my view, given that British Columbia government identification documents issued since 2014 contain the words “under 19 until XXX” and the clerks in each of these sales either did not see these words or did not look for them, show that reasonable care was not exercised.
71. Consequently, I find that Fields has not established a defence to the charge under s. 2(2.1).

Has Fields established a defence of due diligence?

72. Section 12 of the *Regulation* provides that the defence of due diligence is available for the prohibition on the sale of tobacco products to a person under 19 years of age.
73. Section 12 of the *Regulation* provides that:

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.

74. Fields has the burden of demonstrating that it took all reasonable care to avoid the commission of the offence.

75. That burden, as set out in *R. v. Sault Ste. Marie* ((*Sault Ste. Marie* ([1978] 2 SCR 1299)) requires that the party alleged to have committed an offence to show that they:

... 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.

76. The Court continued:

...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.

77. In *Courtaulds Fibres Canada* (1992), 76, C.C.C. 93d) 68 (Ont. C.J.), reasonable care in due diligence cases was determined to be a high standard of awareness of a problem, and *decisive, prompt and continuing action*. (My emphasis)

78. The level of action required to establish due diligence also depends on the mischief the legislation is meant to address. In *R. v. Seaway Gas & Fuel Ltd.* (2000), 142 C.C.C. (3d) 213 (Ont. C.A.), the Court noted that legislation designed to prevent the sale of tobacco to minors was 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. In RJR-MacDonald Inc. v. Canada (Attorney General), [1994] S.C.R. 311 (SCC) the Supreme Court of Canada considered the Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.) and some of the regulations promulgated pursuant to it. Referring to the general purposes of the regulations, Sopinka and Cory JJ. said, at p. 353:

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good.

79. One of the goals of the National Strategy for Tobacco Control in Canada, which is supported by all jurisdictions in Canada, is the prevention of tobacco use among young

people. (*New Directions for Tobacco Control in Canada – A National Strategy*) British Columbia’s tobacco programs have placed a strong emphasis on youth issues.

80. Noting, in particular, the deleterious and long-lasting effects of nicotine on the adolescent brain, the Canadian Paediatric Society (“CPS”) has identified that one of the main factors contributing to smoking initiation amongst children and adolescents is access to tobacco. The CPS has found that one-quarter of smokers in grades six to nine obtain their cigarettes at stores, with a higher proportion of smokers between 15 to 18 year of age purchasing cigarettes at stores, despite legislation fixing the legal age to purchase cigarettes at 18 or 19 years. (*Preventing smoking in children and adolescents: Recommendations for practice and policy*, Canadian Paediatric Society, May 10, 2016)
81. The Court in *Seaway* found that this reasoning was equally applied to the Ontario *Tobacco Control Act* and concluded that the *Act* and regulations should be strictly interpreted in light of the public health purposes of the legislation, one of which was to ensure that minors are not able to purchase cigarettes.
82. The Court also commented on the merchants’ position of both privilege, that being the opportunity to sell products to the public and earn a profit, and even gain a livelihood, thereby, and responsibility, which was the merchants’ understanding and respect for the limits of its privilege to sell to the public:

As expressed by Dickson C.J. in Sault Ste. Marie..:

...The elements of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations that are designed to avoid that danger.

Applying this passage to the sale of tobacco products in Ontario, the message to vendors is a simple one: you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors. One of the ways a vendor fulfills this responsibility is by insisting that the young person seeking to buy cigarettes is in fact old enough to do so....

83. Fields relies on *Tesco Supermarkets Ltd. v. Natrass* [1972] AC 153, a House of Lords decision cited with approval by the Supreme Court in *Sault St. Marie* in support of its argument that a corporation cannot be responsible for the contraventions of employees who are properly instructed. The difficulty with this argument, in my view, is that the evidence establishes that Fields’ employees were not properly instructed. No fewer than nine different clerks working a Fields stores sold tobacco to minors over three year period. Given this number of contraventions over such a long period suggests that these problems went beyond one or two “rogue” employees. Although the clerks asked for identification and inspected it, none seemed to know about, or pay attention to, the line under the photo which indicated “under 19 until XXX.” Had they been properly instructed, in my view, they would not have made any errors in determining the appropriate age of the customer. There is no evidence any of the employees were disciplined, either verbally or in writing, although Fields’ policy indicates that clerks who violate the policy will be subject to disciplinary procedures.

84. Once a retailer has notice of past compliance issues in its stores, the level of action required to establish due diligence is higher. (*R. v. Sobey's Inc.* (2000), 181 N.S.R. (2d) 263 (S.C.), *R. v. C.C. Eric James Management Ltd.*, 2000 B.C.P.C. 178 and *R. v. Van Gard Drugs Ltd.* (1997), 242 A.R. 34 P.C.)
85. Between July 2012 and July 2014, Fields failed 6 out of 25, or 25%, MTS inspections. During that period, it also received no fewer than four written warnings about the ineffectiveness of its system of preventing sales of tobacco to minors. I accept VIHA's evidence that the failure rate is significant, particularly when compared to stores with similar number of locations.
86. Despite VIHA's educational efforts and those written warnings and the September 2014 meeting with VIHA officials, and despite Mr. Petruk's evidence that Fields realized in September 2014 that it had to "up its game," I find that Fields failed to take appropriate steps to both put in place, and to monitor, a system to avoid further contraventions. In my view, Fields' actions were neither decisive nor prompt. (*Courtalds*)
87. In *Westfair Foods Ltd.* ((2006) SKQB 87) a tobacco retailer was found to have demonstrated due diligence in the following circumstances:
- * provided each employee with a written copy of its Tobacco Sales Policy that required identification from persons who appeared to be 25 or under;
 - * participated in role-playing activities in which an experienced employee would act as a test shopper to allow cashiers to become comfortable with the store's policy and procedures regarding the sale of tobacco;
 - * installed software in each register that required the cashier to enter the customer's date of birth when a tobacco product was sold;
 - * conducted recognition tests every two to three weeks that included a review of the store's tobacco policy;
 - * conducted quarterly reviews of each cashier based on the tobacco sales policy;
 - * posted signs at each till stating it was illegal to sell tobacco to minors;
 - * provided training to call a supervisor if a customer was upset about not being asked for identification;
 - * conducted mystery shoppers once a year or every two years; and
 - * imposed mandatory punishments for employees that sold tobacco to minors.
88. At the September 24, 2014 meeting, VIHA and Fields discussed a number of measures that could be taken, including role plays, refresher training and education to employees, testing employees, the implementation of a mystery shopper program and installing point of sale software to ensure staff were aware of which dates they should be looking for identification. Given that the contraventions were a result of clerks' failure to ensure that customers were over 19 despite checking their identification, once notified of this specific flaw in its policies, Fields had a duty to take additional steps to train and monitor the clerks on this issue. I find that its efforts to do so fell far short of the standard required. As the Court noted in *Sobey's (ibid)*:

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 enough for the appellant to simply repeat that the policy must be reviewed with all employees. Something further is then required.

89. Similarly, in *R. C.C. Eric James Management Ltd. (ibid)* the Court held that:

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.

90. I accept that Fields has policies that instruct clerks to ask for identification and not to sell tobacco products to individuals under the age of 19 years of age. However, I have no evidence how Fields' policies and procedures changed as a result of VIHA warning them about the contraventions. Furthermore, although the employees involved in the sales after September 2014 were aware of Fields' policy of requiring customers to produce identification and in fact followed that policy, there was no evidence Fields, having knowledge of the specific nature of the contraventions, had a process for monitoring, testing or ensuring employee compliance with the *Act*.

91. In my view, the problem was not in the development or the communication of that policy (although the age of which customers would be asked for identification may have been inconsistent) but in the store clerks' inability to calculate the customers' age or their lack of training to look at the writing below the photo to determine if the customer was over 19 years of age.

92. Furthermore, although Fields has now installed point of sale software in Fields' stores, that initiative was only fully implemented in 2016, four years after Fields first became aware of issues its clerks had in calculating the age of its customers and two years after the meeting with VIHA. There is no evidence Fields properly instructed its clerks how to read the Government of British Columbia identification cards issued to young people.

93. While there is some evidence that some Fields stores had calculators at the till, it is not clear how many of the stores have a calculator or whether the clerks are trained on the use of such calculators. Certainly, there was no evidence any of the clerks used them during the MTS inspections. Fields has not invested in a "secret shopper" program for reasons that are not entirely clear to me. There is no evidence Fields disciplined any of the employees who miscalculated the age of the customer or rewarded any who did not. What Fields did was to amend its policies in a way that was not clearly identified at the hearing, and inform its staff to re-read the online material, without pointing out any specific changes that they were to be aware of.

What is the appropriate penalty?

94. Section 6.1 of the *Act* provides that the administrator may impose a monetary penalty in accordance with the prescribed schedule and/or prohibit the person from selling tobacco at

retail from the location at which the contravention occurred if satisfied on a balance of probabilities that a person has contravened a provision of the *Act* or of the Regulation.

95. Section 6 of the Regulation sets out the prescribed penalties for violations of Sections 2(3) and 2.4 of the *Act* while Section 13 outlines the factors to be considered in imposing administrative penalties. 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 to \$1,000 and the prohibition period is from 0 to 30 days.

96. VIHA sought a monetary penalty in the amount of \$1,000 and a 30-day licence suspension for each the contraventions in light of Fields' history of infractions. In the alternative, Fields sought a 30-day licence suspension for all six Fields stores on Vancouver Island to send a message that Fields' response to the problem was inadequate.(see *Kelland Foods Ltd.* Tobacco Control Act Decision February 8, 2016, Hugh McCall)

97. I am persuaded that both a monetary penalty and a license suspension are appropriate sanctions for the contraventions.

98. The factors to be considered in imposing administrative penalties are set out in Section 13 of the Regulation:

(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

...

(d) 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.

...

99. The *Regulation* enables me to consider other factors that may be relevant to imposing a penalty. In my view, those factors can include both mitigating and aggravating factors. Mitigating factors would include, for example, the Respondent's degree of cooperation, any admission of a contravention and steps taken. Aggravating factors would include, for example, a contravention involving dishonesty, whether the contravention is planned or premeditated, past history and the extent of the harm caused by the contravention.
100. I accept that Fields has been responsive to VIHA concerns, even though there was, in my view, significant delay in addressing those concerns.
101. Fields has now implemented point of sale software at all its stores which will be of assistance to sales clerks, even though the efficacy of that software in British Columbia will be dependent on the clerks' ability to key in correct dates of birth. I also accept that the training material, which is delivered by store managers, includes instructions on how to examine government-issued identification to determine if the customer is old enough to purchase tobacco products. Furthermore, I accept Ms. McClure's evidence that there have been 18 MTS inspections of Fields' stores on Vancouver Island since July 2015, and none of those inspections have failed.
102. Furthermore, given that these are Fields' first contraventions and there is no evidence the contraventions were deliberate, I am not persuaded that I ought to prohibit Field from selling tobacco at all of its stores. Furthermore, unlike the facts in *Kelland (TCA Kelland Foods Ltd.* February 8, 2016, Hugh McCall) I am not persuaded that there is a real and continuing public health risk if Fields continues to sell tobacco and tobacco products under its existing store policies and with the upgraded cash registers.

Penalty for Sooke store contravention

103. Despite VIHA's educational efforts, written warnings and September 2014 meeting designed to make it very clear to Fields that its tobacco policies were not effective in preventing tobacco sales to minors, Fields contravened the same section of the *Act* on two occasions within 10 months at the Sooke store. Given the number of contraventions at that store over a three year period, I find that a monetary penalty in the amount of \$1,000 and a 30-day licence suspension are appropriate for each of the contraventions.

Penalty for Port Hardy store contravention

104. In light of Ms. Landry's evidence that she was not trained to look below the photo on the customer's identification to determine if the customer was over 19 years of age and took no steps to properly calculate the age of the customer, whom she stated looked too young to purchase tobacco products, I find that a monetary penalty in the amount of \$1,000 is appropriate. Given that there were no prior contraventions at the Fields Port Hardy store, but that Ms. Landry was not trained on factors about which Fields had been specifically warned over a three year period, I find that a 30-day licence suspension is appropriate in the circumstances.

Order

105. **As I have found that** Fields contravened Section 2(2) of the *Act* on three separate occasions at two different stores, **I ORDER**, pursuant to Section 6.2(2) of the *Act*, that it pay a penalty of **\$3,000**, which sum is due and payable upon service of this Decision and Order.
106. **In addition, as I have found that** Fields contravened Section 2(2) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products at its Sooke, British Columbia location for a period of 60 days beginning March 30, 2017.
107. **In addition, as I have found that** Fields contravened Section 2(2) of the *Act*, **I FURTHER ORDER** that it be prohibited from selling tobacco products at its Port Hardy, British Columbia location for a period of 30 days beginning March 30, 2017.



Carol Roberts, Administrator's Delegate