

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

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

- by -

Canada Safeway Limited,

(the “Respondent”)

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

Helen Pinsky

Date of Hearing:

March 22, 2012

Place of Hearing:

Nelson, British Columbia

Date of Decision:

April 20, 2012

Appearing:

Canada Safeway Limited

Perry A. Mazzone, Esq.,
Counsel

For the Interior Health Authority:

Chasch Ray,
Tobacco Enforcement Officer,
Nelson Health Unit,
Interior Health Authority

Decision and Order

BACKGROUND

1. Canada Safeway Limited (“Safeway”) is a traditional supermarket chain, operating in Western Canada. It owns and operates 215 stores, of which Store #70, the store in question, operates in Trail, British Columbia.

2. On January 13, 2012, a Notice of Administrative Hearing was issued under the *Tobacco Control Act*, R.S.B.C. 1996, c. 451 (the “*Act*”), to Safeway in respect of Canada Safeway Limited Store #70 (Store #70), for a hearing to determine whether Safeway had committed a contravention of the Act, and allowing for an Order to be made.
3. In the Notice it was alleged that on October 22, 2011, an employee of Safeway sold a tobacco product to a minor, in contravention of section 2 (2) of the *Act*.
4. Personnel giving evidence on behalf of Safeway were Mr. Mike Nash, who is currently vice-president, retail operations in British Columbia; Mr. Jamie Simpson, who is currently store manager of Store #70; and [redacted] who is employed as cashier at Store #70. Ms. Julie Adams, a human resources staff member for Safeway was present in the hearing room as an observer only.
5. As a Tobacco Enforcement Officer and an Environmental Health Officer, Ms. Chasch Ray operates in the East and West Kootenays for the Nelson Health Unit, Interior Health Authority of the Ministry of Health. She represented the Authority in the hearing.
6. Presenting evidence on behalf of the Interior Health Authority were minor test shopper [redacted]; and minor test shopper [redacted].

ISSUES

7. Has the Interior Health Authority proven on a balance of probabilities that the respondent Safeway sold a tobacco product to a person under the age of 19 years, in contravention of the provisions of section 2(2) of the *Act*?
8. In the event that the Interior Health Authority is able to prove that the respondent sold tobacco to a person less than 19 years of age, has the respondent demonstrated to the satisfaction of the administrator the defence pursuant to section 12 of the *Regulations*, that they exercised due diligence to prevent the contravention?
9. In the event that a sale to a person less than 19 years of age is proved, and the respondent has not demonstrated the defence of due diligence, what is the appropriate penalty under the *Act* and *Regulations* for the contravention of Section 2(2)?

LAW

10. The *Act* sets out the manner in which a person may deal in, sell, offer for sale, distribute, provide, advertise or promote the use of tobacco in British Columbia. It establishes prohibitions and penalties for non-compliance. Specifically:
11. Section 2(2) prohibits the sale, offer to sell, provision or distribution of tobacco to an individual who has not reached the age specified by regulation.
12. Section 6.1(1) permits the administrator to make an order under Section 6.1(2) if satisfied that a person has contravened of a provision of the *Act* or regulations, or of an order of the administrator. Section 6.1(2) specifies that the order may be the imposition of

a monetary penalty on the person, or it may be a prohibition of that person from selling tobacco or offering to sell tobacco at retail from the location at which the contravention occurred, or under certain circumstances, from any other location.

13. The *Tobacco Control Regulation* (the “*Regulation*”) defines the age for the purposes of Section 2 (2) of the *Act* to be 19 years.
14. Section 12 of the *Regulation* establishes 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.*”
15. Section 13 of the *Regulation* sets out those considerations which must be taken by the administrator in imposing an administrative penalty on a person for contravention of a prescribed provision of the *Act* or regulations.

EVIDENCE

Interior Health Authority

16. [] gave evidence that since July, 2011, she has worked for the Interior Health Authority in the capacity of a minor test shopper (MTS). Her job is to work with a tobacco enforcement officer in testing retailers who are selling tobacco, for compliance with regard to signage showing restrictions on sale of tobacco to minors, and for compliance with the restrictions on selling tobacco to persons under age 19 years.
17. On October 22, 2011, [] was 16 years of age. She was working in a team with Chasch Ray and another MTS. She conducted a compliance test at Store #70. In that capacity, she left Ms. Ray’s vehicle, which was parked in the Store #70 parking lot, and entered the store, where she approached a cashier, and asked the cashier for a package of cigarettes.
18. [] was asked whether she wanted regular or king size cigarettes. She was then asked “Do you have ID?” [] stated to the cashier that she had no identification on her. The cashier then gave her cigarettes and rang up the sale. [] paid for them, and walked out of the store.
19. Upon leaving the store, the MTS returned to Ms. Ray’s vehicle and filled in a written report. This report was presented as a document in evidence. The report identified the store, the cashier, the transaction, and the cigarettes. The cigarettes were also bagged, labelled and presented as evidence at the hearing. The cashier was ultimately identified as [] by the nametag on her uniform, and by her physical description.
20. The evidence of the second witness for the Health Authority is of [], who is also employed as an MTS. On October 22, 2011, he was 15 years of age.
21. [] is hired to test retailers in the same manner as []. He also teams with Chasch Ray and sometimes another MTS, checking for compliance with the *Act*.

22. [] was working with Ms. Ray and [] on October 22, 2011. He was in a car with the other two, and they pulled into the Store #70 parking lot in Trail. He then accompanied [] into the store, and observed that she requested a package of cigarettes. He witnessed the cashier sell cigarettes to his team member. At the hearing he described the cashier, which physical description matched that of []. He personally made no notes of the event at the time of the purchase, and did not fill in or sign any forms or reports describing the incident.
23. The evidence of the Interior Health Authority is that in October 2009, they issued Store #70 a warning regarding a sale of tobacco to a minor. On February 14, 2010, they issued the same store a violation ticket issuing a \$575.00 fine. That ticket was personally served on the store. On January 27, 2011, a second violation ticket was issued and served on the store. That ticket is under dispute. It was determined in evidence and cross examination that in each of the mentioned incidents causing issuance of warnings and tickets, the cashier who sold tobacco products to an MTS was under the age of 19 years.

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24. Mr. Mike Nash is in charge of all but 3 stores in British Columbia, including Store #70. He has worked for Safeway for 39 years, and has been in his current position for twelve years. He is responsible for all aspects of retail operations, including the obligation to ensure that employees adhere to relevant laws. His office is in Calgary, but he spends one to two days per week in Vancouver, and he regularly visits retail stores in BC, and reviews matters in the stores that affect Safeway customers.
25. Mr. Nash submitted a book of documents for the respondent, and it was admitted as evidence in this hearing. He reviewed many of the documents in the book during his presentation of evidence, and he also indicated that those he described and reviewed were typical of the other documents therein, in that many of the documents were similar to each other, but were revised from time to time, updated, or dated differently.
26. The documents exemplify the practice of Safeway regarding compliance with tobacco sales laws and the informing and educating of its employees. The primary tool for education is the tobacco sales policy.
27. Mr. Nash described and referred to documents as being one of the vehicles for the distribution of information to Safeway staff from time to time. The documents include a bulletin describing company sales policy, and particularly as it relates to sale of tobacco to minors. A bulletin is distributed to staff on a semi-annual basis. Another document that was described is a newsletter called “Huddle Up”, which contains weekly discussion topics. The tobacco sales policy was a regular topic for discussion in “Huddle Up”.
28. Bulletins are updated to include new measures or innovations regarding sale of tobacco to minors. For example, it was updated when the Government of BC changed its driver’s license to include an identification of persons under 19 years of age. Bulletins specifically indicate that compliance with company policy will result in compliance with

the law as it exists. The policy has not changed since at least 1996, which is the date of the first bulletins in the book of documents.

29. Communications that are considered important, such as those that relate to tobacco policy or food safety issues, require a sign-off by employees. Sign-off sheets are included with the policy bulletins. All staff must sign to indicate that they have read and understood the policy, and then the sheet is returned to the legal department of the company.
30. Mr. Nash stated that stores also hold a morning meeting on a weekly basis, where topics are discussed by all staff. Tobacco sales policy is included as a topic in these discussions.
31. As to communication regarding tobacco sales policy generally, Mr. Nash testified that the stores employ the resources made available by the government, such as signs, which are posted appropriately. Store managers often post additional signs, or updates in the cashier binder.
32. Clerks are trained on tobacco sales policy. They are given one-on-one personal training with a training mentor. They are given web-assisted training, and they are informed and tested on policy. If they fail the test on tobacco sales policy, they have to re-read the material and be re-tested until they pass. In the case of Store #70, the store manager has personally held discussions with new hires regarding policy and procedures.
33. Store check stands have automatic prompts, which remind cashiers about the restriction of sales to those under 19 years of age. The prompt currently says “Don’t sell to anyone born after this date, 1993”. It changes every calendar year. As a cashier scans a tobacco item, the scanner brings up an alert, which must be physically cleared before proceeding to scan the next item for purchase.
34. Mr. Nash described the discipline process regarding non-compliance with the tobacco sales policy. Staff is unionized and the discipline process is negotiated between employer and union. The company is guided by a process of progressive discipline, starting with a verbal warning in Step 1, written warning in Step 2, a 1 day suspension in Step 3, and up to lengthier suspensions. Serious conduct is grounds for dismissal.
35. In the case involving the cashier on October 22, 2011, Safeway imposed a 3 day suspension, which was beyond the normal process for a first offence. The penalty was used as a method to capture the attention of all the employees of Store #70 regarding the violation.
36. Mr. Nash indicated that he became aware of the circumstances of the above case fairly recently. He indicated that he intends to give a lot of thought as to how to rectify violations like this in terms of education of staff. He has undertaken some steps to look at stores which have had violations and see what has been done to rectify situations. His evidence was that very few matters are as important as a breach by sale of tobacco to minors.

37. Mr. Nash learned of the February 14, 2010 ticket only recently due to a breakdown of communication between Store #70 and Safeway head office. Had the store manager informed the legal department in a timely fashion, Safeway would have filed a dispute. The January 2011 ticket has been disputed.
38. In cross-examination, Mr. Nash stated that he has been made aware of every sales violation in every store. In the last few years in his current position, he estimated two violations per year. When in cross examination he was presented with the number 5-6 violations per year over the last 5 years, he did not deny the possibility of those numbers, but indicated that he personally has had 6 violations in the stores in his area over the last 2 ½ years.
39. Questioned as to action plans for rectification of sales violations, Mr. Nash referred to the actions in Store #70: personal reviews being undertaken by the store manager, and discussions with each new hire, indicating personally that a violation could cost a person their job. Compliance with the *Act* is referred to as often as daily. Extra signage has been posted, and the penalties for non-compliance have been discussed as a deterrent to the other cashiers.
40. While Mr. Nash agreed that anecdotally all the recent sales violations in this store were conducted by cashiers who are under 19 years of age, he does not see this as an issue. He referred to the last two violations in his area. One was by a 40 year veteran employee, and another was by a 25-30 year veteran employee. He does not consider the option of selling tobacco from a dedicated service desk where minors do not work, because of the recent experience by two seasoned employees.
41. When asked whether he thinks a 16 year old can be held to the same level of accountability as an adult, Mr. Nash said he thinks the province of British Columbia takes that position by allowing 16 year olds to be hired for responsible positions, so retail stores may do so also.
42. Mr. Simpson became store manager of Store #70 in October, 2009, and has worked at Safeway for 15 years. His duties are to oversee the day to day operations of the store. He is responsible for direction, coaching, monitoring activities, and some grunt work.
43. Mr. Simpson is familiar with the cashier She began work in August 2011, and continues to work there. On October 22, 2011, she was working in the store as cashier, ringing in customer purchases. She is considered to be a good and reliable worker, and has taken training in the ordinary course.
44. Mr. Simpson described how information reaches the store manager and how it is passed along to employees. Material usually initiates with an email from head office or the legal department, but can also be via weekly newsletters or conference calls. The manager will raise issues in morning staff meetings, or “huddles”, or he will speak personally with everyone who is on the check stands that day. Every day he looks for the weakest links on the check stands and talks to them, just to check for understanding. He has many

coaching conversations. There are also signs posted in areas restricted to staff, that sales violations could cost them their job.

45. When the October 22, 2011 sales violation came to his attention, he interviewed his employee [] and completed an Employee Discipline Notice. His evidence was that [] told him that she didn't remember the incident and she acknowledged that she had full understanding of the tobacco sales policy.
46. Mr. Simpson testified that he was aware of prior store violations, and did "everything he could" to raise awareness in the store. He sat down personally with new cashiers and reminded violators at every possible opportunity about adherence to policy. The employees involved in the first two tickets are no longer employed at the store.
47. Mr. Simpson does not have a different training process for minor employees. He has concerns about employees being knowledgeable about tobacco sales policy, but not especially of hiring young people to sell cigarettes. He says that the nature of the job is that young people are in the applicant pool, and he does not consider the option of refusing to hire young people to sell tobacco.
48. [] gave evidence that she has been employed by Safeway since August 3, 2011. She was trained to work as a cashier. The training included a video on tobacco sales policy, with subsequent questions to answer. The store manager discussed it with her.
49. Her iteration of the tobacco policy is "ID everyone who looks under 25, don't sell to anyone under 19". She takes that to mean that she must ask for and inspect identification containing proof of age of anyone that looks to her to be under the age of 25 years. She must inspect the identification and then refuse to sell tobacco to anyone who is not yet 19 years old.
50. [] understood the company tobacco policy at the time of the offence. She was told about the violation notice by the assistant manager and then again by the manager. She was told that she would face consequences.
51. [] indicated that before October 22, 2011 and since then, she has had no hesitation in asking someone for proof of age, and that she has refused to sell tobacco before to someone who had no identification. On that day, she says that she must have believed that the MTSs were under 25 but over 19 years of age. She didn't remember the actual sale at the time she was told of it, and she still has no recollection of it.
52. [] indicated that she has never been intimidated into selling tobacco, and has not felt peer pressure to do so. She has refused to sell tobacco 2 or 3 times to customers. She understood the policy and received the suspension.
56. In cross examination, the witness repeated what her training process included, and said that other cashiers will monitor her from time to time, and that she has heard reminders about sales policies a couple of times. She didn't know about the existence of minor test

shoppers, but knew someone had been fired for selling cigarettes in the past. She does not smoke.

SUBMISSIONS

Interior Health Authority

57. Ms. Ray submitted that the sales violations that have occurred at Store #70 have been undertaken by cashiers who are minors themselves. Safeway is not being effective in the implementation of its policy statements, and there needs to be an updating of the hiring and training practices. If there is inadequate practical application of the policies set out by Safeway, then Safeway should consider changes to its methods, for example by looking at their policy regarding sales by minors to minors.
58. Ms. Ray submitted that the reason there is a hearing involving Safeway is because the Health Authority has had to take the lead in imposing accountability, and they would prefer that Safeway themselves assume more internal accountability and put together a better program for training and implementation of policy. She submitted that because the company's current efforts are not successful, the respondent has not achieved due diligence in their efforts.
59. The Health Authority submits that there should be maximum penalties imposed for the violation which occurred in this case, as a deterrent to retailers who are lax about selling tobacco to a minor.

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60. Mr. Mazzone submitted that the test for reasonable care was delineated in the Supreme Court of Canada case of *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 40C.C.C.(2d) 353. He submitted that Safeway had a policy regarding sale of tobacco to minors, since 1995, which employees are reminded of consistently and regularly. There is no evidence that communication is a problem. In that respect, Safeway shows that it meets the test of reasonableness. He argues that although the cashier in this transaction fully and clearly understood what she was supposed to do, she in fact did not comply with the policy.
61. There is no evidence before this hearing as to what actually happened in the prior events regarding alleged violations. A warning letter has been issued and two tickets have been issued. Each has prompted some follow up by Safeway. There can be no assumption that violations actually occurred.
62. Mr. Mazzone argued that there is not much more that Safeway could have done to prevent sales to minors. He submitted that it is not accurate to say that the cashier was intimidated or subject to peer pressure in this transaction. In his submission, the issue of age of the cashier is a red herring, and not based on evidence. There is no evidence of a propensity for young people to have problems with the sales policy.

63. Mr. Mazzone also submitted that there is overwhelming evidence that Safeway is committed, but despite their commitment, their employees can make mistakes, and a failure or two within their system does not mean that there is no commitment. He contended that there is no obligation for Safeway to meet a standard of perfection.

ANALYSIS AND FINDINGS

64. The first issue is whether on a balance of probabilities the Interior Health Authority has proven that a sale of tobacco took place to a person under 19 years of age at the time of sale, contrary to section 2(2) of the Act.
65. The MTS gave evidence from memory and without referring to the written report that was prepared immediately after the incident. Her evidence clearly identified the date, the Store, the cashier, the tobacco product, and the payment for the product. She was asked by the cashier if she had identification, and she answered in the negative. Still, she was able to purchase a tobacco product despite her clear statement that she had no identification or proof of age.
66. The second MTS, who accompanied the MTS into Store #70, corroborated the evidence that his partner was able to purchase a tobacco product despite her age and lack of ID. His evidence was also clear and unequivocal. The testimony of the two minor shoppers was not contradicted. The cashier who sold the product did not deny the evidence as it was given on behalf of the Health Authority, but had no recollection of the event.
67. I find that on a balance of probabilities, the Interior Health Authority has proven that the respondent Safeway, through an employee, sold a tobacco product to minor test shopper, contrary to the provisions of Section 2 (2) of the Act. This is a strict liability offence and no proof of intent is required. Liability flows from the breach.
68. Once a strict liability offence is proven, the burden shifts to the Respondent to demonstrate that it exercised due diligence to avoid committing the act, in accordance with section 12 of the Regulations. The burden, as set out in *R. v. Sault Ste. Marie (ibid)* requires that the party alleged to have committed an offence 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.(page 1331).

69. Safeway has a well-established program that is consistent with regard to preventing tobacco sales to minors. They have created a Tobacco Sales Policy, which contains directions for monitoring sales to minors. Compliance is mandatory and penalties flow from a violation of the policy. The policy is communicated to all Safeway stores on a semi-annual basis. Employees are required to review the policy at those times, and to sign off on the review, comprehension and compliance. In addition, the policy is reviewed and discussed on a regular basis at morning meetings in the individual stores, on a one-to-one

basis by the store managers, and is included in a newsletter called “Huddle Up”. Notices are posted on the walls of Safeway stores, reminding staff of the policy. Staff is reminded in writing that the consequences of a violation can be very serious, including discipline and possible termination. Signage in the store includes signs at cash registers and any signage that is provided by the relevant province.

70. Automatic prompts are built into Safeway’s cash registers, requiring the attention of the cashier to override a question regarding the age of a person purchasing tobacco products. Training of new personnel includes material and web based classes regarding the Tobacco Sales Policy. The individual must pass a test on this material as part of the training. Training and materials are updated when the practices of the province are updated. When B.C. began issuing a new form of drivers’ licence with a feature identifying persons under 19 years of age, this was posted and communicated to employees in the Safeway stores.
71. Not only is the policy established centrally, but the evidence of the manager of Store #70 was that he takes the policy seriously, that he takes many steps within his store to ensure that the policy is known by all employees, and that the consequences of violation are understood. He described his daily talks with the ‘weak links’ at the cash registers. He posted signage, administered training modules regarding tobacco policy, discussions at staff gatherings, and posted warnings of the consequences of non-compliance with the policy. This was not merely undertaken after the violation for which this notice was received, but was undertaken earlier.
72. The cashier testified that Mr. Simpson communicated the policy to her and that although she was well versed in the policy, she sold cigarettes to a minor.
73. Despite Safeway’s efforts, sales to minors have occurred at Store #70 with disturbing regularity in the past couple of years. This has not been taken lightly by Mr. Nash or by the store manager, and they have increased their attempts at reaching full compliance. They must continue to do so, if they are to succeed. On the other hand, the Health Authority has made certain suggestions, the adoption of which they believe will achieve better standard of care and that this can be put into effect by penalizing them for their recent sales to minors. Specifically, they are suggesting that the store should not allow minor cashiers to sell cigarettes. They need updating of hiring and training practices, and suggested that the hiring should not necessarily include minors. They suggested a separate desk for selling tobacco products, where minors would not work.
74. There is no evidence to suggest that minors are incapable of enforcing tobacco sales laws. Although the Health Authority provided anecdotal evidence that the four alleged improper sales to minors at Store #70 were committed by persons under the age of 19, there is no evidence that the alleged offences occurred. Furthermore, there was no evidence disputing Mr. Nash’s evidence that two recent violations were committed by 25 and 40 year veteran sales personnel in other Safeway stores. Finally, when was questioned about feeling pressure to sell to minors, or inadequacy of training on how to refuse sales, she responded that she felt no pressure, that she had been trained properly,

and that she knew policy and was able to follow through on refusal of sale to minors on more than one occasion during her employment.

75. It is not the responsibility of this hearing to speculate or conjecture whether minors are incapable of enforcing tobacco sales laws. It would be impossible to rule that minors should not sell tobacco, without interfering with employment regulations. In fact, the provincial labour laws allow 16 year olds to handle money, to deal with sensitive laws and regulations of all sorts. There is no objective evidence that they are incapable of following rules, and it is a false argument to suggest so.
76. I find that the Safeway Tobacco Sales Policy is thorough and adequate, and that it has been communicated and taught with reasonable diligence. Further, combined with the other safeguards that take place in the Safeway stores, I find that Safeway has exercised all reasonable care by establishing a proper system to prevent commission of the violation of sale of tobacco to minors, and by taking reasonable steps to ensure the effective operation of the system.
77. I find that Safeway has established a defence of due diligence. As a result I conclude that the Health Authority has not established that Safeway has contravened Section 2(2) of the *Act*. No penalty will be awarded against the respondent.