



## Physicians *for a* Smoke-Free Canada

1226 A Wellington Street ♦ Ottawa ♦ Ontario ♦ K1Y 3A1 ♦ [www.smoke-free.ca](http://www.smoke-free.ca)  
Tel: 1 613 233 4878 ♦ Fax: 1 613 233 7797 ♦ [ncollishaw@smoke-free.ca](mailto:ncollishaw@smoke-free.ca)

### Board of Directors

#### President:

Atul Kapur, MD, FACEP,  
FRCPC  
*Ottawa*

#### Vice-Presidents:

Mark C. Taylor, MD,  
M.Sc., FRCSC, FACS  
*Oshawa*

David Esdaile, MD,  
CCFP  
*Ottawa*

#### Secretary-Treasurer:

James Walker, MD,  
FRCPC  
*Ottawa*

Meri Bukowskyj, MD  
*Kingston*

David Copeland, MD  
*Montreal*

David Davidson, MD  
*Ottawa*

Brian Morton, MD  
*Ottawa*

Andrew Pipe, MD  
*Ottawa*

Fernand Turcotte, MD,  
*Québec*

#### Regional Director:

Charl Els, MD  
*Edmonton*

#### Staff:

Cynthia Callard  
Neil Collishaw  
Flory Doucas

October 17, 2007

Mme Christine Belle-Isle  
Manager, Regulations Division  
Office of Regulations and Compliance  
Tobacco Control Programme  
Health Canada, A.L. 3507C1  
123 Slater Street, 7<sup>th</sup> floor  
Ottawa, Ontario  
CANADA K1A 0K9  
*Email: [pregs@hc-sc.gc.ca](mailto:pregs@hc-sc.gc.ca)*

Dear Mme Belle-Isle,

We wish to provide some comments on the draft tobacco control regulations entitled *Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)* published in the August 4, 2007 issue of *Canada Gazette Part I*.

On May 31, 2001, the Honourable Allan Rock asked tobacco companies to voluntarily remove "light" and "mild" terms from cigarette packages within 100 days and asked his Ministerial Advisory Council to recommend actions in the event the companies did not comply. The tobacco companies did not comply within 100 days and the Ministerial Advisory Council issued recommendations calling for a far more comprehensive approach to ending all the deception on cigarette packaging and related promotions. The tobacco companies, once they had figured out how to adapt their marketing practices did voluntarily agree to end the use of the word 'light' and 'mild' on packages. This agreement was accompanied by marketing campaigns directed to retailers and consumers to ensure that the deception continues. (An example of JTI-Macdonald's communication is shown below).

Now, more than 2200 days after the Minister of Health's May 31, 2001 announcement, the proposal to codify in regulation that which the tobacco industry has largely already done can most charitably be described as too little, too late.

The draft regulations propose to prohibit the use of a few words on packages when much, much more is needed to end the tobacco companies' long-standing practices of consumer deception.



**MISREPRESENTATION OF THE POSITION OF PHYSICIANS FOR A SMOKE-FREE CANADA AND OTHER HEALTH AGENCIES**

The Regulatory Impact Analysis Statement accompanying the draft regulations states:

*“The Canadian Coalition for Action on Tobacco Control [sic], the Non-Smokers’ Rights Association, Physicians for a Smoke-Free Canada and the Canadian Cancer Society have each presented submissions calling for the removal of ‘light’ and ‘mild’ from tobacco product packaging.”*

By omission, this statement misrepresents the advice that Health Canada has received on many occasions from health groups, expert groups, its own Ministerial Advisory Council and the Supreme Court of Canada during the last six years.

Here are just a few examples of advice offered to Health Canada by various groups over the years on this issue.

**August 28, 2001:**

**Findings of the International Expert Panel on Cigarette Descriptors**

*“We conclude that a complete prohibition of the use of deceptive descriptors such as ‘light’ and ‘mild’ on cigarette packaging and marketing is necessary to ensure that past deception is redressed and ongoing deception is prevented. In addition, in order to prevent future deception, the regulations should also restrict the use of other words, colours or devices that result in an erroneous perception of a difference in health risks and/or tar/nicotine deliveries. To be effective, these regulations should be accompanied by a substantial education component to correct this dangerous and persistent misperception and by a mechanism to implement further measures if warranted.”*

**Sept 7, 2001: Ministerial Advisory Council on Tobacco Control – Misleading Cigarette Descriptors: Recommendations**

*“After convening an international expert panel and considering the ‘light’ and ‘mild’ issue, the Ministerial Advisory Council made the following recommendations:*

- *Cigarette descriptors such as ‘light’ and ‘mild’ are a major public health problem that have already contributed to the deaths of thousands of Canadians. To reduce tobacco-caused illness and death, this problem must be corrected as quickly and as effectively as possible.*
- *An end to the ‘light’ and ‘mild’ deception can only be achieved through a complete ban on misleading descriptors, accompanied by appropriate public education efforts.*
- *The government must ensure that other terms and devices that have a similarly misleading effect, or that could have a misleading effect, are eliminated rapidly or are not allowed onto the market at all.*
- *The evidence base justifies strong, effective and rapid government action to correct the ‘light’ and ‘mild’ deception.*
- *The Minister should opt for the quickest and most effective route to achieve the public health objective. It is our considered opinion that new regulations under the Tobacco Act are the best course of action.*
- *Public education on the ‘light’ and ‘mild’ issue should focus specifically on the nature and the causes of the deception.”*

**January 31, 2005: Physicians for a Smoke-Free Canada. A Comprehensive Plan to End the 'Light' and 'Mild' Deception**

*"The following schedule is suggested for the adoption of regulations to implement the six steps in this comprehensive plan.*

**2005**

- *Step 1: Ban misleading brand descriptors*
- *Step 2: Remove misleading numbers from cigarette packages*
- *Step 3: Ban deceptive package imagery*
- *Step 6: Support regulatory requirements with good health programming*

**2006**

- *Step 4: Ban brand extensions*

**2007**

- *Step 5: Ban deceptive cigarette designs"*

**November 9, 2006: Physicians for a Smoke-Free Canada. News release: Anti-smoking group slams voluntary agreement reached with tobacco companies.**

In a news release issued on the occasion of the voluntary agreement that the big tobacco companies reached with the Competition Bureau, Physicians for a Smoke-Free Canada reiterated its call for a comprehensive plan to end tobacco industry deception and also suggested that plain packaging be added to the comprehensive plan.

*"PSC recommends that the government now implement a comprehensive set of measures to reduce deceptive cigarette marketing, and ban each of the deceptive practices used by tobacco companies, including:*

- 1. The use of misleading brand descriptors that falsely convey differences in 'strength,' such as 'light,' 'ultra-light,' 'mild,' 'ultra-mild,' 'smooth,' etc. (This is contained in today's voluntary agreement)*
- 2. The use of misleading colours and packaging elements that falsely convey differences in strength, such as the use of lighter colours or more white space to falsely imply that these products are less harmful.*
- 3. The display of numbers on packages that falsely convey differences in the amount of compounds inhaled between brands or sub-brands of cigarettes, and that fail to tell consumers how much they are inhaling.*
- 4. The marketing and display of cigarettes in ways that falsely conveys distinctions between types of cigarettes.*
- 5. The use of brand extensions (several types of one brand of cigarettes) that falsely convey distinctions between types of cigarettes.*

*6. The use of cigarette designs and related packaging that falsely convey a smoking experience of 'less hazardous' smoking, while in reality they are inhaling just as much poison as ever.*

*The implementation of this set of measures would be facilitated, the group suggests, by implementing plain or generic packaging."*

To suggest that the measures proposed in the regulatory statement is supported by health groups is like saying that a diet of stale bread is supported by Health Canada's Food Guide. Removing misleading descriptors is a necessary, but not a sufficient, measure to end the deception.

#### **THE LEGAL ROAD IS CLEARED FOR HEALTH CANADA TO DO MUCH MORE.**

On June 28, 2007, the Supreme Court of Canada upheld the Tobacco Act, 1997 against a challenge by the multinational tobacco companies operating in Canada. In its ruling, the Court firmly rejected a tobacco industry challenge to section 20 of the *Tobacco Act* which says that packaging cannot be "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions." In its ruling, the Supreme Court had harsh words for the tobacco industry practice of using package terms to reassure smokers:

*"61 The s. 1 inquiry into the justification of the ban imposed by s. 20 of the Act must be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The creative ability of the manufacturers to send positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as "additive free" and "100% Canadian tobacco" to convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. The wording chosen by Parliament in s. 20 and its justification must be evaluated with this context in mind. Parliament's concern was to combat misleading false inferences about product safety and to promote informed, enlightened consumer choice.*

*62 The specific objection is to the phrase "or that are likely to create an erroneous impression" in s. 20. The manufacturers argue that this phrase is overbroad and vague, and introduces subjective considerations. How, they ask, can they predict what is "likely to create an erroneous impression"? The words false, misleading or deceptive, used as legal terms, generally refer to objectively ascertainable facts. If "likely to create*

*an erroneous impression” adds something to “false, misleading or deceptive”, as presumably was Parliament’s intent, what is it?*

**63** *The answer is that the phrase “likely to create an erroneous impression” is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past.*

**64** *The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. Parliament has responded by banning promotion that is “likely to create an erroneous impression”. This constitutes a limit on free expression. The only question is whether the limit is justified under s. 1 of the Charter.*

**65** *Parliament’s objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament’s public health and consumer protection purposes.*

**66** *The impugned phrase does not impair the right of free expression more than is necessary to achieve the objective. The words false, misleading or deceptive do not do the work assigned to the additional phrase, “likely to create an erroneous impression”. Nor is it easy to find narrower words that would accomplish that task. The exact wording of the impugned phrase appears in the English version of Art. 11(1)(a) and 13(4)(a) of the WHO Framework Convention on Tobacco Control. The French version uses almost identical wording. The Convention mandates the use of such language in parties’ national law, subject to the application of domestic constitutional principles. At least three other Canadian statutes use similar wording: the Food and Drugs Act, R.S.C. 1985, c. F-27, s. 5(1); the Radiation Emitting Devices Act, R.S.C. 1985, c. R-1, s. 5(1); the Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.), s. 64. These examples lend weight to the conclusion that the ban on promotion “likely to create an erroneous impression” is not overbroad or vague, but on the contrary, falls within a range of reasonable alternatives.*

**67** *I would reject the manufacturers’ claim that the French wording “susceptible de créer une fausse impression” is significantly broader than*

*the English “likely to create an erroneous impression”. “Susceptible” is not equivalent to the English “susceptible”; it is often used as the equivalent of “likely”, including in the WHO Convention. When the English and French versions of the statute are considered together, the meaning is clear.*

**68** *Finally, the impugned phrase meets the requirement of proportionality of effects. On the one hand, the objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths and by invitation to false inference may help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attests to this. On the other hand, the expression at stake is of low value — the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional.*

**69** *I conclude that the ban on false promotion, and particularly on promotion “likely to create an erroneous impression”, is justified under s. 1 of the Charter as a reasonable limit on free expression and that s. 20 of the Tobacco Act is constitutional.”*

This 2007 Supreme Court Decision should give Health Canada confidence to implement a comprehensive plan to ban all practices by the tobacco industry that can reasonably be described as have the effect of “*inducing consumers to draw false inferences about the safety of the products.*”

#### **RECOMMENDATIONS:**

Accordingly, in the light of previous recommendations to Health Canada and the June 28, 2007 Supreme Court Decision, we recommend the following course of action:

- 1. Withdraw the regulatory proposal of August 4, 2007**
- 2. Publish a new comprehensive regulatory proposal as soon as possible in the *Canada Gazette Part 1, one which would effectively end tobacco industry deceptive practices.***

**Such a regulation would include, at the minimum, the following elements:**

- **A ban on brand extensions.** The creation of “brand families” serves to induce consumers to draw false inferences about a hierarchy of harmfulness among different members of “brand families. Tobacco companies should be limited to just one family member per brand name.
- **A ban on deceptive cigarette designs.** The widespread use of ventilation holes on cigarette filters is one cigarette design factor that

induces consumers to draw false inferences about the harmfulness of the product. Ventilation holes on cigarette filters should be prohibited. Other cigarette design features that could also lull consumers into thinking the cigarettes are less hazardous than they really are is elasticity. In this case elasticity refers to the increase in nicotine yield per cigarette for a given increase in puff volume. Sales should not be permitted of cigarette brands with a “reward for effort ratio” (the ratio of increase in nicotine yield to increase in puff volume) if the 95% confidence intervals on a two-tailed test of the estimate of this ratio includes 1.0. Regulatory power should also be reserved to permit the rapid prohibition of other deceptive design features as they are discovered.

- **A requirement for tobacco products to be sold in plain packaging.** Plain packaging would remove most opportunities for tobacco companies to draw false inferences about the relative safety of tobacco products. If such a measure were to be introduced, care should be taken to ensure the specifications for plain packaging included at least the following elements:
  - All legal requirements for information on tobacco packages would continue to be met.
  - No brand descriptors to be allowed.
  - The numerical information about yields of toxic substances now appearing on packages has been found by consumers to be confusing and uninformative. It should be removed. However, new, more salient and informative information about the poisonous nature of tobacco products would be required on the packages.
  - Except for the health and toxicity information, all packages should be the same neutral grey or brown colour and no deceptive or potentially deceptive information, colours or imagery of any kind would be allowed.
  - The name of each brand would appear on each package in a standard unappealing typeface.

### 3. **Support these new regulatory requirements with complementary programming and regulatory and legislative measures**

In addition to banning these deceptive practices of the tobacco industry, Health Canada can help ensure that Canadians are no longer deceived by:

- integrating messages about product design and marketing into its communication activities.

- making public which tobacco products are 'identical' (the government is provided with a list of identical products currently sold under different brand names, but has made the decision to keep this information secret. Du Maurier light, for example, is identical to Matinee, but the different packaging and marketing results in some smokers thinking that it is "stronger").
- banning retail displays. Tobacco companies display packages in ways which communicate false distinctions.
- using consumer protection law to hold tobacco companies accountable for deceptive marketing.

The government's regulatory proposal of August 4, 2007 offers little or no public health benefit. Our proposal for a more comprehensive approach to ending consumer deception about the tobacco products they consume would actually end the deception.

In addition our proposal is consistent with previous recommendation made by Physicians for a Smoke-Free Canada and other health agencies; it is consistent with the June 27, 2007 decision of the Supreme Court of Canada, and it would bring into compliance with Article 13.4(a) of the *Framework Convention on Tobacco Control*.

I hope our proposals can be given serious consideration.

Yours sincerely,

A handwritten signature in cursive script that reads "Neil E. Collishaw".

Neil E. Collishaw  
Research Director