

Commentary on

***A Regulatory Proposal To Include Warnings
in Tobacco Advertisements***

*A Consultation Paper of November 17, 2004 from the Tobacco
Control Programme of Health Canada*

20 December 2004



Physicians *for a* Smoke-Free Canada

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INTRODUCTION

This paper is the response of Physicians for a Smoke-Free Canada to the proposals for issued by Health Canada in November 2004 – “A Regulatory Proposal To Include Warnings in Tobacco Advertisements.”

In response to this consultation paper, we make three general recommendations:

- ▶ That Health Canada **broaden the scope of this regulatory proposal** to ensure that any promotion undertaken by tobacco companies is required to display a health warning of appropriate dimension.
- ▶ That the government **narrow the opportunities of Canadian tobacco companies** to promote their brands or products in Canada through appropriate government action (enforcement, regulatory or legislative reform).
- ▶ That the government **fulfill its obligations under the Framework Convention on Tobacco Control** with respect to the requirement to impose a comprehensive ban on tobacco promotions, and that this ban be put in force before the 5 year deadline imposed by the FCTC.

We will present our comments on this consultation paper in the form of (a) a discussion of Canada’s obligations under the Framework Convention on Tobacco Control, (b) the development of regulations requiring health warning or other messages on tobacco advertisements and promotions, (c) the nature of current tobacco advertising and promotion in Canada, (d) past recommendations to Health Canada.

THE FRAMEWORK CONVENTION ON TOBACCO CONTROL AND TOBACCO ADVERTISING

On November 26, Canada ratified the Framework Convention on Tobacco Control (FCTC), and undertook to implement its measures, including those measures related to the advertising and promotion of tobacco products.

Appendix 1 to this submission reprints relevant sections of the Framework Convention on Tobacco. It is important to note that this treaty:

- ▶ gives equal definition to advertising and promotion, namely “any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly” (Article 1)
- ▶ requires that each country that is a party to the treaty undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship in accordance within its constitution or constitutional principles within 5 years of the treaty coming into force for that country (Article 13).
- ▶ requires that each country that is a party to the treaty (including those that have not yet imposed a comprehensive ban on tobacco advertising and promotion) “require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship.” The treaty does not specify a minimum size for such messages.

Having ratified the treaty, Canada is therefore obliged to:

- ▶ impose a comprehensive ban on tobacco advertising, promotion and sponsorship by February 28, 2010.
- ▶ Require warnings or messages on all tobacco advertising and, where possible, promotion and sponsorship.

THE DEVELOPMENT OF TOBACCO ACT REGULATIONS.

On April 25, 1997, Royal Assent was given to Canada's Tobacco Act. This act, among other things, gives the government authority to regulate the advertisement and promotion of tobacco products and tobacco brands. These powers are spelled out in sections 22 (2) and 33(a) and (b) of the Tobacco Act (relevant extracts of the Act are reprinted in Appendix 2 to this submission), which state:

33. The Governor in Council may make regulations

(a) respecting the promotion of tobacco products and tobacco product-related brand elements and the packaging of tobacco products, including the form, manner and conditions of the promotion and packaging, and the promotion of services and non-tobacco products for the purposes of section 28;

(b) respecting the advertisement of tobacco products for the purposes of subsection 22(2);

Although Parliament was swift to pass the Tobacco Act (it took less than 5 months to move through both the House of Commons and the Senate, and closure was invoked more than once during its debate), the executive branch of government has not moved quickly to use its regulatory power over advertising and promotion.

Seven years and seven months have passed since parliament gave cabinet the authority to implement such regulations. The regulatory proposal issued on November 17, 2004 is the second consultation paper issued by Health Canada respecting requirements for health warning or other messages on tobacco promotions, but little other regulatory development (i.e. regulatory impact assessment, gazetting of notice of intent, etc) has been made public.

There are a number of regulations developed by Health Canada under the Tobacco Act - including regulations on tobacco access (registration 11 February, 1999), tobacco seizures and restoration (registration 11 February, 1999) , tobacco products information (registration 26 June, 2000) and tobacco reporting (registration 26 June, 2000). There have been a number of other regulatory initiatives, including:

- Proposed regulations for reduced ignition propensity cigarettes.
These were tabled in Parliament on December 2, 2004 and published in Canada Gazette Part 1 on May 1, 2004.
- Proposed renewal of tobacco products information regulations
A consultation paper was released in August 2004.
- Proposed regulations requiring toxicity testing and reporting.
These were published in Canada Gazette Part 1 on May 1, 2004.
- A proposed regulation to ban the use of the cigarette descriptors "light" and "mild."
This was published in Canada Gazette Part-I on December 1, 2001.

- Proposed amendments to the tobacco products information regulation.
This was circulated on April 7, 2001.
- Proposed amendments to the tobacco reporting regulations.
This was circulated on April 7, 2001.
- Proposed amendments to the tobacco seizure and restoration regulations.
This was circulated on April 7, 2001.
- Proposed options for tobacco promotion regulations.”
A consultation paper was released on January 18, 1999:

The regulations that have been passed have had a beneficial health impact, which has been measured and evaluated by Health Canada and others. For example, Canada’s ground-breaking package warning system has had a significant impact on smoker’s knowledge of health effects and on their attitudes towards and attempts to quit. (See, for example, the references cited in PSC’s response to Health Canada’s consultation on renewed tobacco products information regulations).

Less effort has been made to measure the impact of failing to develop Tobacco Act regulations. The cost to public health of delays to banning light and mild or other misleading descriptors, of banning or restricting retail displays, or of requiring health warning messages have not yet been documented. We are not aware of any studies which have attempted to measure how much lower cigarette consumption would be if more regulations had been put in place.

This knowledge gap is important to the context in which we respond to this regulatory proposal to require health warning labels on a small number of tobacco promotions.

This is not the first time that Health Canada has proposed requiring health warning message on advertisements. Six years ago, Health Canada gathered a number of options for tobacco promotion regulations in the January 1999 consultation paper "Options for Tobacco Promotion Regulations." The options presented were expansive, they covered a range of tobacco promotional activities, from retail displays to tobacco-branded services and a range of regulatory options, from health warning messages to limits on size of promotions. The only promotions for which health warning messages were not envisaged in this options paper were sponsorship promotions. No official explanation was provided for this decision, but ‘stakeholders’ were told in oral briefings that this was because these promotions were scheduled for a two-step phase out, beginning in October 2001 and ending in October 2003.

The 1999 proposals are mapped against those contained in the current options paper in Table 1 (below).

Health Canada has never made public the reasons that it did not advance the options it circulated in 1999, other than the following short reference in its 2000 “Report on Tobacco Control January – December 1999.

“In January, Health Canada issued a consultation document, "Options for Tobacco Promotion Regulations" to solicit comments on various options for tobacco promotion regulations under the Tobacco Act. Work is continuing on the development of a regulatory proposal in light of comments received.”

The current proposal “To include Warnings in Tobacco Advertisements” is the first initiative which furthers the work of the January 1999 paper. Yet this document does not explain why the broad scope of the 1999 proposals has been pared down to a regulation of such narrow ambit.

**TABLE 1:
COMPARISON OF 1999 AND 2004 CONSULTATION PAPERS
ON PROMOTIONAL REGULATIONS**

January 18, 1999

November 17, 1999

Requiring Health Warnings

Accessories

- requiring that accessories carry a health message

Not included

Non-tobacco products

- requiring that branded non-tobacco products carry a health messages
- requiring display of a health message sign immediately next to a display of a non-tobacco product

Not included

Services

- requiring display of a health message sign immediately next to a retail sign promoting a service that uses a tobacco product related brand element

Not included

Advertisement of Tobacco Products, Accessories, Non-Tobacco Products and Services Publications and signs

- requirement for a health message “clearly and prominently displayed.”

Tobacco advertisements, including advertisements for branded accessories

- requirement that a health warning in black text on white background, occupying no less than 20% of the total surface area.
- Suggested warnings are:
 - “For help to stop smoking, visit www.gosmokefree.ca”*
 - “Get help to stop smoking: consult your doctor or pharmacist”*
 - “Tobacco smoke hurts children”*
 - “Tobacco smoke causes fatal lung disease”*
 - “Smoking during pregnancy harms your baby”*
 - “Where there is smoke, there is hydrogen cyanide”*
- Four different warnings would have to be displayed on a rotating basis, i.e., one in each quarter of the year. “

**TABLE 1:
COMPARISON OF 1999 AND 2004 CONSULTATION PAPERS
ON PROMOTIONAL REGULATIONS**

January 18, 1999

November 17, 1999

Regulations other than health warnings

Accessories

- requiring that all branded accessories be displayed in a single location
- banning counter top displays of accessories

Not included

Availability signs

- limiting the placement of availability signs to customer entrances
- limiting number of availability signs
- limiting the size of availability signs
- limiting the information on availability signs to generic name, brand name, country of origin and price

Not included

Advertisement of Tobacco Products, Accessories, Non-Tobacco Products and Services Publications and signs

- requirement that advertisements be text only
- limiting the display of brand elements to bottom ten percent

Not included

Publications

- limitation of publications to printed (i.e. no electronic publications)

Not included

Signs

- limits on size of any signage for permitted advertising

Not included

Accessories

- no lifestyle advertising of permitted advertisements of accessories

Not included

Packaging

- plain packaging
- prohibition on packaging in ways which associate the product with a way of life or which have youth appeal.

Not included

Tobacco products

- requiring that all tobacco products be displayed in a single location
- limiting the total dimensions of the display of tobacco products at retail

Not included

**TABLE 1:
COMPARISON OF 1999 AND 2004 CONSULTATION PAPERS
ON PROMOTIONAL REGULATIONS**

<i>January 18, 1999</i>	<i>November 17, 1999</i>
<ul style="list-style-type: none"> • limiting the number of packages shown at retail. • Requiring that cigarette packages be displayed in such a way that only the sides of the package would be visible to customers • banning counter top displays 	

THE NATURE OF CURRENT TOBACCO PROMOTIONS IN CANADA.

Canada's Tobacco Act allows tobacco companies to promote their brands in a number of ways, many of which the companies have voluntarily refrained from doing.

We have identified in the following tables tobacco promotions which are either theoretically permitted or actually in place in Canada.

Table 2 illustrates examples of permitted promotions which are common place in Canada.

Table 3 illustrates examples of permitted promotions which are rare or non-existent in Canada.

Table 4 illustrates promotions which, in our view, are prohibited under the Tobacco Act, but which nonetheless continue to surface on a regular basis.

It is important to note that the proposed requirements for health warning labels would apply to only ONE of the categories of permitted promotions, and to none of the categories of prohibited (but existing) promotions. That is to say, the proposed regulation is one which might be useful in a world where the law had the effect is drafters intended – to allow tobacco companies to provide informational or brand preference advertising in limited venues to adult smokers. In the current context, the proposed regulation would have practically no impact. The advertisements which don't exist would have to carry health warnings; the promotions that actually exist would not.

TABLE 2: CONTEMPORARY CANADIAN TOBACCO PROMOTIONS THAT ARE PERMITTED BY THE TOBACCO ACT

- ▶ Promotion through branded accessories



- ▶ Promotion through display of packages at retail.



2004



- ▶ Promotion through price signs at retail



spring 2004

TABLE 3: TYPES OF TOBACCO PROMOTIONS THAT ARE PERMITTED BY THE TOBACCO ACT, BUT WHICH ARE NOT COMMON PLACE IN CANADA.

- ▶ Informational advertisements found in publications, in direct mail or displayed in places where children are not permitted
- ▶ Tobacco branded products which are not lifestyle oriented or likely to appeal to youth
- ▶ On services that are not lifestyle oriented or likely to appeal to youth.

TABLE 4: CONTEMPORARY CANADIAN TOBACCO PROMOTIONS THAT ARE PROHIBITED BY THE TOBACCO ACT

- ▶ Brand elements displayed on buildings



- ▶ Brand elements on lifestyle ads or sponsorship promotions displayed in retail stores



2004

- ▶ Brand elements displayed in broadcast media



spring 2004

Table 4(continued)

- ▶ Brand elements displayed in outdoor venues, including at sponsored events.



December 2004



summer 2004



summer 2004



summer 2004

- ▶ Promotions that are not 'informational' nor 'brand preference' (i.e. lifestyle promotions) that are contained in publications, direct mail, and in places where children are not allowed – Including lifestyle promotions which are evocative of tobacco brand elements.



web-site 2004

Table 4(continued)

- Promotions that are not 'informational' nor 'brand preference' (i.e. lifestyle promotions) that are contained in publications, direct mail, and in places where children are not allowed –



bar event post October 2003



e-mail 2004

Including lifestyle promotions which are evocative of tobacco brand elements.



bar event post October 2003



summer 2004



retail stores 2001 - 2004

- Brand elements displayed on goods which may be associated with a lifestyle or which may be appealing to youth.



2003

PAST RECOMMENDATIONS TO HEALTH CANADA

Previous suggestions to require health warning labels on tobacco promotions were strongly supported by the Canadian health groups in their response to the January 1999 consultation paper.

In our submission, dated March 12, 1999 (attached as Appendix 3), Physicians for a Smoke-Free Canada recommended that:

“Health warnings should:

- *appear wherever tobacco-related brand elements are used*
- *be developed in conjunction with those required for tobacco product packages*
- *include the use of graphic images or other non-textual forms of communication*
- *include the use of the marker word “warning” appropriate configured*
- *include rotation of text, position and background/framing.”*

It is important to note that this brief was written before the development of the FCTC, and before Canada had made an undertaking to implement the measures of the FCTC, including banning tobacco advertising if its constitutional principles allowed. Within that historic context, our other recommendations in the brief are also relevant to this current proposal, as they dealt with what types of regulations should be in force as long as tobacco promotions were present.

In 1999, we recommended:

Retail

- a phased-in constraint on the amount of money that could be spent on retail displays of cigarettes, branded cigarette accessories, branded non-tobacco products, promotions for branded services, ending within 36 months in a prohibition on payments or receipts of consideration for display of the cigarettes, accessories, non-tobacco products or promotions for branded services.
- a phased-in constraint on the display of tobacco products, branded accessories, branded non-tobacco products or promotions of branded services.
- a requirement that health warning messages appear whenever tobacco brand elements did (see above)
- a requirement that signs indicating the availability of tobacco products not be visible for the exterior of the retail establishment, together with a limit on the number of availability signs, a requirement that price information include taxes that must be paid, and a requirement for a health message that appears within 60 per cent of the display surface.
- Requirements that signs indicating the availability of tobacco products in vending machines be limited in size, be prohibited from using graphics or stylized text, would show only the generic name and price.

Advertisements

- All advertisements and all signs posted in places where young persons are not allowed by law for tobacco products, branded accessories, branded non-tobacco products or promotions for branded services be accompanied with health messages that appear within 60 % of the display surface and include graphics and non textual information.

- A prohibition on graphic or other visual, auditory, tactile or olfactory material or effects in any such advertisements or signs.
- A requirement that any brand element could only occupy the bottom 10% of the display service.
- A restriction on the places where advertisements for branded non-tobacco products may appear (limited to the same areas where tobacco advertisements are currently permitted).
- A restriction on any advertisements allowed in 'publication' to be allowed only in 'printed publications' (i.e. no electronic media).
- A restraint on the size and number of any advertisements or signs in places where young persons are not allowed by law.

The approach we recommended at that time continues to be a constructive one in the current context. The phased-in approach we recommended is a workable solution for the treatment of tobacco promotions in Canada in the period until tobacco advertising is comprehensively banned, as the FCTC will require it to be.

CONCLUSIONS:

1. Canada must implement a total ban on tobacco promotion by February 28, 2010 if it wishes to satisfy its obligations under the FCTC.

By unanimously adopting the FCTC, the world's nations have agreed that tobacco use is a problem requiring bold, unique and comprehensive governmental action. The vast majority of the world's countries (168) have signed and a significant number, including Canada (41), have ratified a treaty which acknowledges, with concern, "the impact of **all forms** of advertising, promotion and sponsorship aimed at encouraging the use of tobacco products." The treaty, nor the science or experience behind it, do not suggest that only direct product advertising is a problem that requires/justifies a regulation of the type proposed in this consultation paper, and that other forms of promotion do not require equally stringent measures.

Those who ratify the treaty are bound by its requirements. The requirement, forcefully negotiated, that "Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship..." does not allow Canada to walk away from this undertaking merely because Canada's tobacco companies have taken the view that a complete ban is unconstitutional, and because the Supreme Court has agreed with them that a complete ban must be justified with evidence that it is necessary and effective.

The Supreme Court, in its ruling on the Tobacco Products Control Act, did not say there was insufficient evidence to justify a complete ban on tobacco advertising – they said only that the evidence that a lesser measure would not have been sufficient was not presented in 1989.

The potential for a Supreme Court decision that there was no constitutional impediment to a comprehensive ban on tobacco promotion was signalled by Justice Andre Denis in December 2002, when he said:

The rights of the tobacco industry] cannot be given the same legitimacy as the government's right to protect public health." ... "A close reading of all the opinions handed down by the Supreme Court in

the first case, together with the evidence introduced at this trial, indicates that a total ban on tobacco advertising would be much more easily defended now than in 1989.”

Further explanation of this view is offered in Appendix 4, PSC’s press release on FCTC implementation, dated November 11, 2003.

2. Canada must require health or other messages on tobacco-product advertising in the period until a comprehensive ban is put into place if it wishes to satisfy its obligations under the FCTC. This includes a requirement that health or other messages appear on other promotions or sponsorship, as appropriate.

The FCTC does not state how the “appropriateness” of requiring health warning or other messages on indirect advertising and promotion can be determined. It appears to be left to the judgement of the country involved until such times as the Conference of Parties provides a greater level of guidance.

We suggest that the “appropriateness” of requiring health warning messages on other forms of promotion was identified by Health Canada in 1999, when it suggested that such message be required on virtually all forms of promotion (other than sponsorship promotion, which was deemed inappropriate as it was expected that it would disappear by 2003).

3. Canada must constrain current promotional activities of tobacco companies if it wishes to satisfy its obligations under the FCTC.

The FCTC was not developed with the intention that countries could develop a theoretical framework under which tobacco control measures are put in place, but one where they are not, in fact, implemented. The types of promotional activities we identified and illustrated in Table 4 are not included in the list of promotions permitted in the Tobacco Act, and yet they are allowed to continue. Failure to take action against this promotions will not only undermine the achievement of the Act’s objectives and the goals of reducing tobacco use, it will also create a circumstance where Canada does not conform with its FCTC obligations.

Appendix 1: Extracts from WHO Framework Convention on Tobacco Control

Article 1 *Use of terms*

For the purposes of this Convention:

(c) “tobacco advertising and promotion” means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly;

Article 13 *Tobacco advertising, promotion and sponsorship*

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

(a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

(b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;

(c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;

(d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;

(e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising,

promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and

(f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.

Appendix 2: Extracts from the Tobacco Act, 1997.

PART IV. PROMOTION

Definition of "promotion"	18. (1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.
Application	(2) This Part does not apply to (a) a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts a tobacco product or tobacco product-related brand element, whatever the mode or form of its expression, if no consideration is given directly or indirectly for that use or depiction in the work, production or performance; (b) a report, commentary or opinion in respect of a tobacco product or a brand of tobacco product if no consideration is given by a manufacturer or retailer, directly or indirectly, for the reference to the tobacco product or brand in that report, commentary or opinion; or (c) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.
Prohibition	19. No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.
False promotion	20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.
Testimonials or endorsements	21. (1) No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated.
Depiction of person	(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.
Exception	(3) This section does not apply to a trade-mark that appeared on a tobacco product for sale in Canada on December 2, 1996.
Advertising	22. (1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.
Exception	(2) Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in (a) a publication that is provided by mail and addressed to an adult who is identified

	by name;
	(b) a publication that has an adult readership of not less than eighty-five per cent; or
	(c) signs in a place where young persons are not permitted by law.
Lifestyle advertising	(3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.
Definitions	(4) The definitions in this subsection apply in this section.
"brand-preference advertising" « publicité préférentielle »	"brand-preference advertising" means advertising that promotes a tobacco product by means of its brand characteristics.
"information advertising" « publicité informative »	"information advertising" means advertising that provides factual information to the consumer about (a) a product and its characteristics; or (b) the availability or price of a product or brand of product.
"lifestyle advertising" « publicité de style de vie »	"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.
Packaging	23. No person shall package a tobacco product in a manner that is contrary to this Act or the regulations.
Prohibition -- sponsorship promotion	24. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility. 1997, c. 13, s. 24; 1998, c. 38, s. 1.
Prohibition -- name of facility	25. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity. 1997, c. 13, s. 25; 1998, c. 38, s. 2.
Accessories	26. (1) Subject to the regulations, a manufacturer or retailer may sell an accessory that displays a tobacco product-related brand element.
Promotion	(2) No person shall promote an accessory that displays a tobacco product-related brand element except in the prescribed manner and form and in a publication or place described in paragraphs 22(2)(a) to (c).
Non-tobacco product displaying tobacco brand	27. No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service

element	<p>(a) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or</p> <p>(b) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.</p>
Exception -- tobacco product	28. (1) Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or used with a service, if the non-tobacco product or service does not fall within the criteria described in paragraphs 27(a) and (b).
Exception -- non-tobacco product	(2) Subject to the regulations, a person may promote a non-tobacco product, other than an accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, to which section 27 does not apply.
Sales promotions	<p>29. No manufacturer or retailer shall</p> <p>(a) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest;</p> <p>(b) furnish a tobacco product without monetary consideration or in consideration of the purchase of a product or service or the performance of a service; or</p> <p>(c) furnish an accessory that bears a tobacco product-related brand element without monetary consideration or in consideration of the purchase of a product or service or the performance of a service.</p>
Retail display of tobacco products	30. (1) Subject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element.
Signs	(2) A retailer of tobacco products may post, in accordance with the regulations, signs at retail that indicate the availability of tobacco products and their price.
Communication media	31. (1) No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this Part.
Exception	(2) Subsection (1) does not apply to the distribution for sale of an imported publication or the retransmission of radio or television broadcasts that originate outside Canada.
Foreign media	(3) No person in Canada shall, by means of a publication that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this Part, or disseminate promotional material that contains a tobacco product-related brand element in a way that is contrary to this Part.
Report to	32. Every manufacturer shall provide the Minister, in the prescribed manner and

Minister within the prescribed time, with the prescribed information about any promotion under this Part.

Regulations

Regulations

33. The Governor in Council may make regulations

(a) respecting the promotion of tobacco products and tobacco product-related brand elements and the packaging of tobacco products, including the form, manner and conditions of the promotion and packaging, and the promotion of services and non-tobacco products for the purposes of section 28;

(b) respecting the advertisement of tobacco products for the purposes of subsection 22(2);

(c) and (d) [Repealed, 1998, c. 38, s. 3]

(e) respecting, for the purposes of subsection 26(1), the manner in which a tobacco product-related brand element may appear on an accessory;

(f) respecting the display of tobacco products and accessories at retail;

(g) respecting signs that a retailer may post under subsection 30(2), including the placement of the signs and their number, size and content;

(h) requiring manufacturers to disclose the particulars of their tobacco product-related brand elements and promotional activities;

(i) prescribing anything that by this Part is to be prescribed; and

(j) generally for carrying out the purposes of this Part.

1997, c. 13, s. 33; 1998, c. 38, s. 3.

Appendix 3:

PSC Submission to Health Canada, January 1999.



PHYSICIANS FOR A SMOKE-FREE CANADA
MÉDECINS POUR UN CANADA SANS FUMÉE

P.O. Box 4849 • Station E • Ottawa • Ontario • K1S 5J1
Phone (613) 233-4878 • Fax (613) 567-2730
www.smoke-free.ca

March 12, 1999

Mr. Luc Ladouceur
Director, Office of Tobacco Control
Health Canada
Brooke Claxton Building
Address Locator 0907D1, Tunney's Pasture
Ottawa, Ontario
K1A 0K9

Dear Mr. Ladouceur:

Please accept this letter and the accompanying comments as a response to your consultation paper "Options for Tobacco Promotion Regulations".

Health Canada is to be congratulated for embarking on this important regulatory round, and for opening discussion on the broad range of regulatory restrictions required to protect children from tobacco marketing and to ensure adequate public awareness of the dangers of tobacco product use.

Effective regulations in each of the promotional areas identified are needed for the *Tobacco Act* to achieve its legislative purposes:

- *"To protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases*
- *To protect young persons and others from inducements to use tobacco products and the consequent dependence on them*
- *To enhance public awareness of the health hazards of using tobacco."*

We have used the following general goals and principles in our suggestions for regulatory restraints on tobacco promotion:

1. The protection of children from all forms of tobacco marketing
 - Reduced visibility to youth of tobacco products and accessories
 - Reduced attractiveness to youth of tobacco products and accessories
 - Reduced visibility to youth of image-associated tobacco logos and brand names
 - Reduced attractiveness to youth of image-associated tobacco logos and brand names

- Reduced visibility to youth of tobacco promotional material
- Reduced attractiveness to youth of tobacco promotion material

2. Enhanced public awareness of the health hazards of using tobacco

- Consistent regulatory treatment of the use of tobacco logos and brand names
- Mandatory health warnings wherever tobacco brand-elements appear
- Enhanced health warnings, including the use of graphic images and non-verbal communications
- Application of effective risk communication and social marketing mechanisms, including novelty, repetition of message, refreshment of messages, etc.

In response to your invitation to comment on the proposed criteria in assessing tobacco promotion regulations, the following is observed.

Authority:

- All of the regulations proposed by Health Canada, and all of our recommendations for additions or amendments to these regulations, are clearly within the regulatory scope of the Tobacco Act and of federal jurisdiction.

Benefit:

- The benefits of plain packaging have been well established by expert review and parliamentary hearings. The expert panel concluded:
 - Plain packaging would likely decrease the incidence of teens taking up smoking and increase the incidence of teen and adult smokers quitting,
 - Denuding packages of their brand markings would curb the ability of consumers to associate positive images with particular brands
- Extensive research conducted by Health Canada and others on health warning messages on tobacco products strongly suggests the benefits of wider requirements for health warning messages where tobacco brand elements are used. Such messages will 'enhance public awareness of the health hazards of using tobacco' as such warnings are shown to
 - Have high recall (and thus contribute to public awareness) [1]
 - Be cited as "important information" [1]
 - Influence smokers' decisions to quit [1]
 - Be particularly effective with smokers trying to quit, and young adolescents [2]
- Protecting young persons from inducements to smoke is a benefit not easily reduced to (and not necessarily requiring) quantification. Health Canada should, as a matter of policy, provide the benefit of the doubt to children's health, as it does in regulatory measures to protect children from potential harm (such as the Hazardous Products Act regulations governing child-proof lighters, requirements for flame-proof nightwear or regulations for child-proofing pharmaceutical products).

¹ Cigarette packaging study. The evaluation of new health warning messages, Tandemar Research Inc. for Health Canada, March 1996

² J. Jordan. Health warnings and cigarette packaging: let the buyers beware., World Smoking and Health, 1993.

Nonetheless, the government could establish baseline measurements against which the future benefits of these regulations can be assessed. These might include:

- Reduced recognition and knowledge by young children of cigarette brand names, and brand elements.
- Reduced recall by children of tobacco promotion in stores

Options:

With respect to the options identified in the consultation paper, Physicians for a Smoke-Free Canada recommends:

- That regulations be implemented in a phased approach over 3 years.
- That the measures identified in Appendix A be adopted.

We emphasize the need to move quickly on these regulations, and the imperative of closing the options currently available (but not yet exploited) of promoting cigarettes through non-tobacco products and services.

Respectfully submitted

Cynthia Callard
Executive Director

Appendix A. Recommended Measures in response to “Options for Tobacco Promotion Regulations”

Options: 3.1 (a-f) Display of Tobacco Products at Retail

Implementation: Phase 1	Phase 2 (implementation 18 months after Phase 1)	Phase 3 (Implementation 36 months after Phase 1)
<ul style="list-style-type: none"> A manufacturer shall not spend more than 50% of the amount spent in 1997 on retail displays. No displays of tobacco products visible to customers permitted on counter tops, or within 2 m of any cash register or within 2 m of any product that could be construed on reasonable grounds to be appealing to young persons. All tobacco products must be displayed in a single location Display of tobacco products is limited to a surface area measuring no more than 2m² for all tobacco products The number of packages of tobacco products on display would be limited to one carton per brand of manufactured cigarettes, one unit per brand of fine-cut tobacco or tobacco sticks, or documented average daily sales per brand, whichever is greater The government should explore mechanisms to assist small retailers with the costs of reconfiguring their shelving requirements. These costs can be re-couped from excise and other taxes levied on tobacco products and manufacturers. 	<ul style="list-style-type: none"> A manufacturer shall not spend more than 25% of the amount spend in 1997 on retail displays. Display of tobacco products is limited to a surface area measuring no more than 1 m² for all tobacco products The number of packages of tobacco products on display would be limited to one package per brand, one unit per brand of fine-cut tobacco or tobacco sticks, or documented average daily sales per brand, whichever is greater 	<ul style="list-style-type: none"> No person shall provide or receive consideration for displaying a tobacco product. All tobacco products out of sight of customers. All tobacco products out of sight of customers.

Explanatory Notes:

In phase 1, retailers would continue to be able to display every brand of cigarettes currently sold in Canada with faces showing.

- 1.9 m² is sufficient area to display 200 brands of cigarettes with the largest size packages. There are approximately 150 brands offered for sale in any market area, with up to 50 brands of fine-cut, tobacco sticks, cigars, etc.*
- 1000 packages of cigarettes displayed with their sides only showing would require a display surface area of 1.8 m²*
- About 5 million packages of cigarettes are sold in Canada each day, representing an average sale of 125 packages per day for Canada’s tobacco retailers.*

Options: 3.1 (g-i) Display of Accessories at Retail

Implementation: Phase 1	Phase 2 (implementation 18 months after Phase 1)	Phase 3 (Implementation 36 months after Phase 1)
<ul style="list-style-type: none"> A manufacturer shall not spend more than 50% of the amount spent in 1997 on retail displays. No displays of accessories carrying a tobacco product-related brand element on counter top, or visible to customers within 2 m of any cash register or within 2 m of any product that could be construed on reasonable grounds to be appealing to young persons. All displays of accessories carrying a tobacco product-related brand element to be displayed in a single location Accessories would carry a health message, that could be attributed to its author (Health Canada). This health message would appear within 60 per cent of the display surface of the main panels Display of tobacco product brand name accessories limited to a surface area measuring no more than 1m² for all accessories carrying a tobacco-related brand element. 	<ul style="list-style-type: none"> A manufacturer shall not spend more than 25% of the amount spend in 1997 on retail displays. Display of tobacco product brand name accessories limited to a surface area measuring no more than 0.5 m² for all accessories carrying a tobacco-related brand element 	<ul style="list-style-type: none"> No person shall provide or receive consideration for displaying a tobacco product brand name accessory. All tobacco product brand name accessories out of sight of customers.

Explanatory Notes:

- Accessories include lighters, matches, papers, tubes, ashtrays, etc.*
- 100 packages of cigarette tubes can be displayed with a surface area of less than 0.5 m²*

Options: 3.1 (j-k) Display of Non-tobacco Products at Retail

Implementation: Phase 1	Phase 2 (implementation 18 months after Phase 1)	Phase 3 (Implementation 36 months after Phase 1)
<ul style="list-style-type: none"> • Non-tobacco products, other than accessories, showing a tobacco product-related brand element (“non-tobacco products”) would carry a health message that could be attributed to its author (Health Canada). This health message would appear within 60 per cent of the display surface of the main panels or surface area of the package. • A manufacturer shall not spend more than 50% of the amount spent in 1997 on retail displays. • No displays of non-tobacco products, other than accessories, showing a tobacco product-related brand element on counter top, or within 2 m of any cash register or within 2 m of any product that could be construed on reasonable grounds to be appealing to young persons. • All non-tobacco products showing a tobacco product-related brand element must be displayed in a single location • Display of all non-tobacco products showing a tobacco product-related brand element must be limited to a surface area measuring no more than 2m² for all tobacco products • The number of packages of non-tobacco products showing a tobacco product-related brand element on display would be limited to one unit, or documented average daily sales per product, whichever is greater • Signs indicating the availability of non-tobacco products showing a tobacco product related brand element would be restricted to one sign per retail outlet 	<ul style="list-style-type: none"> • A manufacturer shall not spend more than 25% of the amount spend in 1997 on retail displays. • Display of all non-tobacco products showing a tobacco product-related brand element limited to a surface area measuring no more than 1 m² for all such products 	<ul style="list-style-type: none"> • No person shall provide or receive consideration for displaying a non-tobacco product with a tobacco product brand name/element. • Display of all non-tobacco products showing a tobacco product-related brand element limited to a surface area measuring no more than 0.5 m² for all such products

Explanatory Note

Health warnings should

- *Appear wherever tobacco-related brand elements are used*
- *Be developed in conjunction with those required for tobacco product packages, include the use of graphic images or other non-textual forms of communication.*
- *include the use of the marker word “warning,” appropriately configured*
- *include rotation of text, position and background/framing*

Options: 3.1 (I) Display of Signs Indicating (Tobacco-brand name associated) Services at Retail

Implementation: Phase 1

- Any sign advertising a service that uses a tobacco product-related brand element would carry a health message, that could be attributed to its author (Health Canada). This health message would appear within 60 per cent of the display surface.
- Signs indicating the availability of a service or services that use a tobacco product related brand element would have a surface area of no more than .3 m². All text would be printed in plain, black and white letters only (no graphics or stylized text).
- A retail establishment could display no more than 1 sign indicating the availability of a service or services showing tobacco product related brand elements.

Explanatory Note

Health warnings should

- *Appear wherever tobacco-related brand elements are used*
 - *Be developed in conjunction with those required for tobacco product packages,*
 - *include the use of graphic images or other non-textual forms of communication.*
 - *include the use of the marker word “warning,” appropriately configured*
 - *include rotation of text, position and background/framing*
-

Options: 3.1 (m-p) Availability of Signs Displayed at Retail

Implementation: Phase 1

- Signs indicating the availability of tobacco products should not be visible from the exterior of the retail establishment.
 - A retail establishment could display no more than 1 sign indicating the availability of tobacco products, tobacco accessories showing tobacco product related brand elements or non-tobacco products showing tobacco product related brand elements.
 - Signs indicating the availability of tobacco products would have a surface area of no more than .3 m². All text would be printed in plain, black and white letters only (no graphics or stylized text).
 - Signs indicating the availability of tobacco products, accessories showing tobacco product related brand elements, or non-tobacco products or services showing tobacco product related brand elements would only show the generic name, the country of origin and the price per unit or quantity of such products. All text would be printed in plain, black and white letters only (no graphics or stylized text).
 - Signs indicating the availability of tobacco products would have to include price information including all federal and provincial sales taxes that will be paid by the time the sale to the consumer is complete.
 - Any sign indicating the available of tobacco products would carry a health message, that could be attributed to its author (Health Canada). This health message would appear within 60 per cent of the display surface.
-

Options: Availability Signs on Vending machines

Implementation: Phase 1

- Signs indicating the availability of tobacco products would have a surface area of no more than 500 cm². All text would be printed in plain, black and white letters only (no graphics or stylized text).
 - Signs indicating the availability of tobacco products would only show the generic name, the brand name, the country of origin and the price per unit or quantity of tobacco products.
 - Signs indicating the availability of tobacco products would have to include price information including all federal and provincial sales taxes that will be paid by the time the sale to the consumer is complete.
-

Options: 3.2 (a-f) Advertising of Tobacco Products, Accessories, Non-Tobacco Products and Services in Publications and on Signs

Implementation: Phase 1

- Advertisements for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that displays a tobacco product-related brand element or a service that uses a brand element would be accompanied by a health message, that could be attributed to its author (Health Canada). This health message would
 - (i) appear within 60 per cent of the display surface of the advertisement,
 - (ii) be in letters with a minimum type-height equal to the tobacco product-related brand element
 - (iii) be prominently displayed through the use of contrasting colours and/or black and white text and background
 - (iv) use graphics and non-textual information.
 - All advertisements for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that displays a tobacco product-related brand element or a service that uses a brand element would display the advertising material in a textual format without any graphic or otherwise visual, auditory, tactile or olfactory material or effects, except for the brand element.
 - A tobacco product-related brand element could only occupy the bottom ten percent of the display surface of any advertisement for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that display a tobacco product-related brand element or a service that uses a brand element.
 - All advertisements for non-tobacco products that display a tobacco product-related brand element or a service that uses a tobacco product related brand element are permitted only
 - (i) In a printed publication that is provided by mail and addressed to an adult who is identified by name
 - (ii) In a printed publication that has an adult readership of not less than eighty-five percent
 - (iii) On a printed sign in a place where young persons are not permitted by law.
 - All advertisements for tobacco products, accessories showing tobacco product related brand elements, non-tobacco products or services showing tobacco product related brand elements, that are distributed by mail and addressed to an adult who is identified by name may not display a tobacco brand-element on the exterior of the envelope.
 - Advertisements for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that displays a tobacco product-related brand element or a service that uses a brand element that appear in publications, would only appear in printed ones, and shall not appear on electronically transmitted media.
-

Options: 3.2 (e) Signs in places where young persons are not allowed by law

Implementation: Phase 1

- Advertising for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that display a tobacco product-related brand element or a service that uses a brand element appearing in places where young persons are not permitted by law, would appear on signs with a surface area of no more than 0.3 m²
- The total number of signs for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that displays a tobacco product-related brand element or a service that uses a brand element appearing in places where young persons are not permitted by law shall not exceed 1 per establishment.
- Advertisements for a tobacco product, an accessory that displays a tobacco product-related brand element, a non-tobacco product that display a tobacco product-related brand element or a service that uses a brand element appearing in places where young persons are not permitted by law would be accompanied by a health message, that could be attributed to its author (Health Canada). This health message would
 - (i) appear within 60 per cent of the display surface of the advertisement,
 - (ii) be in letters with a minimum type-height equal to the tobacco product-related brand element
 - (iii) be prominently displayed through the use of contrasting colours and/or black and white text and background.

Explanatory Note

Health warnings should

- *Appear wherever tobacco-related brand elements are used*
 - *Be developed in conjunction with those required for tobacco product packages,*
 - *include the use of graphic images or other non-textual forms of communication.*
 - *include the use of the marker word “warning,” appropriately configured*
 - *include rotation of text, position and background/framing*
-

Options: 3.2 (f) Accessories Only

Implementation: Phase 1

- Lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons, would not be permitted in an advertisement for an accessory that displays a tobacco product-related brand element.
 - Advertisements for an accessory that displays a tobacco product-related brand element, a non-tobacco product that display a tobacco product-related brand element or a service that uses a brand element appearing in places where young persons are not permitted by law would be accompanied by a health message, that could be attributed to its author (Health Canada). This health message would
 - (i) appear within 60 per cent of the display surface of the advertisement,
 - (ii) be in letters with a minimum type-height equal to the tobacco product-related brand element
 - (iii) be prominently displayed through the use of contrasting colours and/or black and white text and background.
-

Options: 3.3 (a-b) Tobacco Product Packaging

Phase 1	Phase 2	Phase 3
<ul style="list-style-type: none">• Tobacco products could not be packaged in a manner that would associate the product with a way of life or that could be construed on reasonable grounds to be appealing to young persons.• Images associated with a way of life or which might on reasonable grounds be appealing to young persons must not appear on cigarette packages.• No person will sell a tobacco product, other than a cigarette, that is in a package that contains fewer than:<ul style="list-style-type: none">• Five for cigars with a unit retail price including all taxes greater than \$10.00• Ten for cigars with a unit retail price including all taxes greater than \$5.00• 100 grams, for fine-cut tobacco• Twenty for all other cigars, tobacco sticks or other tobacco products.		<ul style="list-style-type: none">• Tobacco Products would only be furnished in standardized plain packaging so that the only differentiation between products is the brand name (same as generic packaging)

Appendix 4:

PSC Press Release, November 11, 2003



Press Release

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**UNFINISHED PARLIAMENTARY BUSINESS:
DOCTORS OFFER DRAFT LEGISLATION TO
IMPLEMENT GLOBAL TOBACCO TREATY.**

(November 11, 2003 – Ottawa) – Physicians for a Smoke-Free Canada (PSC) today called for the government to give parliamentary priority to making the necessary changes to Canadian law to allow Canada to ratify and implement the Framework Convention on Tobacco Control (FCTC).

“Rumours that the House may prorogue for a number of weeks add to our concerns that an important piece of parliamentary business has not only been left unfinished, but has not yet even begun,” said Dr. Atul Kapur, president of PSC.

Eight months have passed since the end of treaty negotiations with no apparent action by government to bring Canada into conformity with FCTC provisions and allow Canada to ratify the treaty,” he pointed out. “Because 40 nations must ratify this treaty before it can come into effect, any delay on Canada’s part could risk holding back the other nations in achieving better global protection against tobacco industry practice.”

The Framework Convention on Tobacco Control was negotiated through the World Health Organization between October 2000 and February 2003. It was approved by the WHO’s governing body in May this year. Seventy-seven countries (including Canada) have signed the treaty, and three (Norway, Sri Lanka and Fiji) have ratified it.

The FCTC calls for new national and international measures to curb tobacco use in areas such as smuggling, taxation, tobacco advertising, sponsorship and promotion, health warnings on tobacco packaging, product regulation and prevention and cessation programs. The Canadian government was widely acknowledged as a leader in the development of the treaty.

“Early hopes that Parliament would be given the opportunity this fall to ratify the FCTC have now faded,” said Dr. Kapur, an emergency physician at the Ottawa Hospital. “The

government has not tabled the changes it considers necessary for ratification, nor even circulated draft legislation to expedite legislative development.”

“We hope the government will move quickly to ratify the FCTC, and hope it will then ensure it goes further than meeting the minimal standards for ratification,” said Dr. Kapur. “The government could help improve global public health and the health of Canadians by working for a higher standard of implementation than the minimal requirements that it may currently be envisioning for ratification.”

To illustrate this higher standard, Physicians for a Smoke-Free Canada today released its own proposals for legislative amendments in the form of a draft bill, An Act to Implement the Framework Convention on Tobacco Control.

“The draft bill includes all of the key elements of the tobacco treaty,” outlined Dr. Kapur. “Passage of this bill would accelerate Canada’s implementation of the new treaty by improving Canada’s ban on tobacco promotions, requiring all tobacco products to display health warning messages and supporting international tobacco control initiatives.”

If the government fails to introduce its own legislation in the near future, PSC will seek the support of one or more Members of Parliament to have this bill introduced as a private member’s bill.

–30 –

For information: Cynthia Callard
 Executive Director
 613 233 4878

Background

Key provisions of an Act to Implement the Framework Convention on Tobacco Control

The bill proposes measures to bring Canada into compliance with the Framework Convention on Tobacco control by:

Second hand smoke

- Ensuring that all federally-regulated workers are protected from second hand smoke at work
- Banning smoking in all federally-controlled buildings.

Labelling

- Banning the use of “light,” “mild” and other misleading descriptors
- Increasing health warnings on cigars and pipe tobacco

Promotions*

- Banning tobacco promotions in publications, including the internet
- Banning tobacco promotions in direct-mail
- Banning tobacco promotions in bars
- Banning tobacco promotional lighters and matches
- Banning the sale and promotion of tobacco-branded goods and services
- Banning the display of tobacco products at retail.
- Require health warning labels on all allowable promotions
- Banning tobacco-branded promotions and contests
- Banning exports and imports of tobacco promotion.

Youth access and sales to youth

- Banning vending machines
- Banning candy cigarettes

* This Act would continue to allow promotions to distributors, growers, manufacturers and retailers, but not, directly or indirectly, at consumers. It is a similar measure (but slightly stronger) as that used under the Food and Drug Act to restrict direct-to-consumer marketing of prescription medicines.

International support

- Increase funding to global tobacco control to 1% of federal tax revenues from cigarettes, or 5% of tobacco industry earnings in Canada, whichever is greater
- Intersectoral collaboration
- Establishing a national focal point on tobacco

Leadership and accountability

- Requiring the Minister of Health to report to parliament on federal tobacco control programming, and measures taken to implement the treaty, including:
 - Funding for tobacco control
 - Health consequences of smoking
 - Reports on tobacco industry activities
 - Educational initiatives
 - Training programs
 - Support to smokers wishing to quit
 - Research and monitoring
 - Environmental monitoring
 - Legal action against tobacco companies

Background

The Charter of Rights and Banning Tobacco Advertising

Countries which sign and ratify the Framework Convention on Tobacco Control (FCTC) make the following commitment:

“in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory.”[†]

In the process of implementing the FCTC, the Canadian government will have to review the extent to which a comprehensive tobacco advertising ban is in accordance with Canada’s constitution, its constitutional principles (including the notwithstanding clause), and the legal environment and technical means available in Canada.

Is a comprehensive ban on tobacco advertising, promotion and sponsorship in accordance with Canada’s constitution or constitutional principles?

We say yes.

The Canadian Charter has been in effect since 1985, and the extent to which it protects the commercial freedoms of expression of tobacco companies is a complex issue on which there are many divergent views.

Since 1985, the federal government has taken several differing views:

- **Between 1985 and 1987**, the Minister of Health maintained that the Charter did not allow tobacco advertising to be banned. A 1987 legal opinion from Justice Canada confirmed that view.[‡]
- **Between 1987 and 1995** (the date of the Supreme Court decision), the government maintained that the Charter allowed a total ban on tobacco advertising

[†] FCTC, Article 13.

[‡] Exhibit RJR-47, Memorandum from Martin Low dated July 15, 1987.

- On **September 21, 1995** the Supreme Court ruled that the government had failed to prove the evidence which supported a total ban. The court did not rule that there could not be a total ban on tobacco advertising, only that it had to be justified with evidence. The court was deeply split: four of the nine judges felt that the total ban on advertising was reasonable and justified.
- **In December 1995**, the Minister of Health issued a “Blueprint on Tobacco Control” which stated that the government was of the view that a comprehensive ban was required and justified, and that it could provide the evidence to support it. In the Blueprint, the government announced:

The government believes that a complete ban on advertising is the most effective measure to achieve its health policy objectives. The government is committed to providing the necessary evidence to support the most comprehensive prohibition on advertising possible... The government is committed to introducing the most comprehensive restrictions on sponsorship possible.[§]

- **In December 1996**, a new Minister of Health presented a replacement act for the Tobacco Products Control Act which fell far short of the comprehensive ban promised in the blueprint. The new Tobacco Act did not comprehensively ban tobacco advertising, and allowed lifestyle promotions to continue through sponsorship until 2003, and currently through bar events.

The government never made public any legal or scientific opinions explaining this change of policy or its new view that a comprehensive ban could no longer be justified. Clouding the issue of legal concerns was the enormous political pressure that the government was under to weaken its proposed measures: the Blueprint had drawn heavy criticism from many in the business community, especially in the arts, entertainment and sporting sectors.

- **In April 1997**, the Tobacco Act came into effect and the tobacco companies launched a court challenge, arguing that the law was, de facto, a total ban and that it infringed the charter.
- **In January 2002**, the trial of the Tobacco Act began in Montreal. The Tobacco Companies argued that the government had imposed a defacto total ban on advertising (even though they continued to spend upwards of \$150 million per year in tobacco promotions).

[§] *Blueprint:* <http://www.hc-sc.gc.ca/english/media/releases/1995/85bke.htm>

- **In December 2002**, the Quebec Superior Court ruled on the tobacco industry challenge and upheld the law. Judge Andre Denis' judgment was the strongest decision yet in Canada in favour of restricting tobacco promotions. The tobacco industry lawyers complained later that the judge had not addressed whether the Act allowed for advertising.** Instead the judge issued a ringing endorsement of the restrictions in the Tobacco Act. The judge ruled:

"there is incontrovertible evidence that advertising and sponsorship encourage people, especially adolescents, to consume tobacco products." ... "it is important to look closely at how the tobacco companies have used their freedom of expression up to now and at the effects their messages have had on the health and lives of consumers."

- In our view, Judge Denis gave the green-light for the government to reconsider the justifiability of a comprehensive ban on tobacco advertising when he wrote:

The rights of the tobacco industry] cannot be given the same legitimacy as the government's right to protect public health." ... "A close reading of all the opinions handed down by the Supreme Court in the first case, together with the evidence introduced at this trial, indicates that a total ban on tobacco advertising would be much more easily defended now than in 1989."

Who can decide whether a comprehensive ban on tobacco advertising is now justified by scientific evidence?

The Supreme Court of Canada.

Will the Supreme Court of Canada be able to support a comprehensive ban on advertising when (or if) it hears an appeal of Judge Denis' ruling?

Not likely.

The court will only be asked to rule on whether the Tobacco Act goes too far. It will not be asked to rule whether a stronger law is justified.

How else can the Supreme Court rule that a comprehensive ban is justified?

** Gregory Borden of Ogilvy Renault quoted in the Canadian Medical Association Journal, April 1, 2003.

By way of a reference.

The federal government (or a provincial government) could ask the Supreme Court (or the highest provincial court) a “reference” question, seeking clarification on the constitutionality of a proposed measure. This is the procedure used by the federal government before bringing in legislation with respect to gay marriage, the ‘clarity bill’, anti-inflation measures. References have also been used by provincial governments.

By way of legislation.

By legislating a comprehensive ban on tobacco advertising, such as that required in the Framework Convention on Tobacco Control, Parliament would set a higher bench-mark for the Supreme Court to assess the tobacco company challenge.

There is little doubt that any marketing restrictions will be challenged by the tobacco companies operating in Canada. A stronger law (and the evidence to support it) could be the basis of a different reflection by the Supreme Court.

Are there other constitutional principles which also suggest that Canada must adopt a comprehensive ban on tobacco advertising to ratify the FCTC?**The “Notwithstanding Clause” is a constitutional principle which would allow Parliament to easily legislate a comprehensive ban on tobacco advertising.**

Section 33 of the Constitution allows legislatures to use the “notwithstanding clause” to establish that individual rights do not over-ride a democratic legislative decision. When this process is used, the legislature must refresh the decision every five years by re-enacting the measure in question.

The notwithstanding clause is a controversial constitutional provision, introduced into the Constitution at the request of provincial governments who were concerned about the potential clash between individual and collective rights.

The federal parliament has never yet used the notwithstanding clause, but it has been used as a general practice of the Quebec government until 1985, and in specific instances in Quebec regarding back-to-work legislation, pension plans, education, agricultural operations, language and same-sex marriage. Saskatchewan has used the notwithstanding clause in back-to-work legislation, and it was introduced in Alberta legislation to compensate victims of forced-sterilization.

It is our view that a comprehensive ban on tobacco advertising is justified without the use of the notwithstanding clause. The inclusion of this principle in our constitution, however, ensures that the government can implement a comprehensive ban even if the Supreme Court rules that it is an unjustified infringement of the Charter-protected rights of commercial expression for tobacco companies.

Does the “Act to Implement the Framework Convention on Tobacco Control” propose a total ban on tobacco advertising.

No. It proposes a comprehensive ban (as required by the FCTC).

Under this Act, tobacco companies would continue to be able to The Framework Convention calls for a comprehensive ban – not a total ban on advertising. Such an approach allows promotions directed at those who manufacture sell or distribute tobacco products, but not directly to consumers.

Does the proposed “Act to Implement the Framework Convention on Tobacco Control” infringe the Charter rights to freedom of expression?

Yes and No.

The proposed measure would restrict (but not eliminate) commercial expressions, but would not infringe political, individual, artistic or journalistic expression.

The Charter of Rights was not originally presented as conferring freedom of commercial expression on corporations. This expansion of rights came as a result of court decisions (notably in the Irwin Toy Case). The proposed law retains the right of companies to market their products to each other, as well as the rights to commentaries, artistic works, reports, etc – as long as they are not disguised promotions.