

Over the last few days there has been a significant amount of activity around “what’s in the Bill?” In response to that, we have decided to publish a summary with points taken from a Legal Opinion and Assessment that was done for the ECTA back when it was first released. It highlights some of the concerns from a clarification and even constitutional standpoint.

The short answer:

Bill S-5, as written, creates a significant risk and potential for complete and total ban based on individual perception and ideology, not science or the best interests of public health. Additionally, presents a significant number constitutional conflicts.

A shorter summary of Talking Points can be found [here](#). Read on for the full details...

Throughout this review, keep in mind the stated overall purpose of the Act in its entirety:

Purpose of Act

4(1) The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases.

Definition concerns

We will start with the definition of a vaping product - S3(3)

vaping product means

- (a)** a device that produces emissions in the form of an aerosol and is intended to be brought to the mouth for inhalation of the aerosol;
- (b)** a device that is designated to be a vaping product by the regulations;
- (c) a part that *may be used with those devices; and***
- (d)** a substance or mixture of substances, whether or not it contains nicotine, that is intended for use with those devices to produce emissions.

Point **(c)** is far too vague and all inclusive. It should be limited to a part that **actually** is

used with the device. Is a battery or lanyard, any type of battery or lanyard that ‘may be used’ in a vaping device thus a ‘vaping product’?

Exclusions to point (c) can be created by using S2.1 (1) (b)

Regulations – little cigar and vaping product

2.1 (1) The Governor in Council may make regulations

(a) designating any tobacco product to be a little cigar for the purpose of the definition little cigar;

(b) designating any device to be a vaping product or not to be a vaping product for the purpose of the definition vaping product; and

(c) designating any substance or mixture of substances not to be a vaping product for the purpose of the definition vaping product.

But given that there are more things that “may” be used with a vaping product than actually “would” be used with a vaping product, starting with a more narrowed definition would greatly limit the need to use this section. Perhaps something more along the lines of this would be more appropriate:

(c) a part that *is intended to* be used with those devices; and

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Purpose conflict

Again, keeping the Purpose of the Act 4(1) in mind.

Vaping products

(3) The purpose of this Act with respect to vaping products is to support the objectives set out in subsection (1), to prevent vaping product use from leading to the use of tobacco products by young persons and non-users of tobacco products and, in particular,

(a) to protect young persons and non-users of tobacco products from inducements to use vaping products;

(b) to protect the health of young persons and non-users of tobacco products from exposure to and dependence on nicotine that could result from the use of vaping products;

(c) to protect the health of young persons by restricting access to vaping products;

- (d) to prevent the public from being deceived or misled with respect to the health hazards of using vaping products; and
- (e) to enhance public awareness of those hazards.

This subsection only looks at preventing harm from vaping. But this is inconsistent with the stated goal of supporting the objectives of 4(1). This is a failure to address the positive as well as the negative aspects of vaping, which permeates this bill and creates huge and unnecessary impediments to achieving the government's stated aim of a harm reduction option for those using nicotine.

If we are ***"to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases"*** a key element has to be to reduce the likelihood that Canadians using nicotine will obtain it from inhalation of the products of combustion. On best estimates ([RCP](#)) vaping is in the range of 95% less hazardous than smoking. But the bill fails to address the issue of how to facilitate Canadians who do use nicotine to get it in far less toxic ways.

Some changes to this section that should be considered are:

- (d) to prevent the public from being deceived or misled with respect to the health hazards of using vaping products ***and the relative hazards of these products compared to other products***; and
- (e) to enhance public awareness of those hazards ***and relative hazards***.

Also, in order to be consistent with the stated goal of 4(1) there should also be a subsection specifically addressing the goal of facilitating smokers moving to **less hazardous** products.

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Under 18 years of age concerns

As the ECTA has stated many times in the past, as a rule we agree with this approach. However...

14 (1) Subsection 8(1) of the Act is replaced by the following:

Furnishing products to young persons

8 (1) No person shall furnish a tobacco product or vaping product to a young person in a

public place or in a place to which the public has access.

Provisions should be made to allow a minor that is already smoking to receive some sort of exemption via parental or doctor consent to use the product if approved quit methods have failed.

For example, a 14 year old has been smoking since they were 12 years old (more common than you may think). They are now addicted to smoking and are unable to quit using NRTs or other quit methods. Do we put that youth in a position where they must continue to smoke for another four years when they can legally purchase vapor products?

There needs to be, at the least, another defence. Such as:

(3) A person shall not be found guilty of having contravened subsection (1) if it is established that the vaping product was furnished to a user of tobacco products in an effort to substitute vaping for smoking.

Section 9, on the delivery of a product, raises the same issue. The goal of the law in s. **4(1)** **is not met** if the law actually prevents the substitution of a less hazardous product for a more hazardous one.

15 (1) Section 9 of the Act is replaced by the following:

Sending and delivering to young persons

9 (1) No person shall send or deliver a tobacco product or vaping product to a young person.

There are many young Canadians currently smoking cigarettes, putting themselves and others at danger due to direct and indirect exposure to smoke, causing fire risks, impacting health through diversion of disposable income from food, lodging, etc. to a cigarette dependency, etc.

To preclude the option of a less hazardous product to such Canadians simply on the basis of age is discriminatory, a violation of human rights, and inconsistent with the goals of public health in general and this law specifically.

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Harm Reduction / Relative Risk / Tobacco Protection concerns

This section covers several points where the bill has significant concerns relating to not being recognized as a harm reduction product, lack of comparatives for relative risk of vaping products and/or apparent protection to tobacco products over public health.

There is continued failure to adhere to overall **Purpose of Act 4(1)** and to **Recommendation 3** of the Standing Committee by failing to clearly distinguish between relative risks presents itself in the sections on **information disclosure**. It, again focuses on hazards of vaping without addressing relative risks:

20 (1) Subsection 15(1) of the Act is replaced by the following:

Information – sale of tobacco products

15 (1) No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product and from its emissions.

2) Section 15 of the Act is amended by adding the following after subsection (1):

Information – packaging of tobacco products

(1.1) No manufacturer shall package a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

(3) Subsections 15(2) and (3) of the Act are replaced by the following:

Information – leaflet

(2) If required by the regulations, every manufacturer or retailer shall provide with a tobacco product, in the prescribed form and manner, a leaflet that displays the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

21 Section 16 of the Act is replaced by the following:

Information – sale of vaping products

15.1 (1) No manufacturer or retailer shall sell a vaping product unless the product and the

package containing it display, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Information – manufacture of vaping products

(2) No person shall manufacture a vaping product unless the product displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Information – packaging of vaping products

(3) No person shall package a vaping product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Information – leaflet or tag

(4) If required by the regulations, every manufacturer or retailer shall provide with a vaping product, in the prescribed form and manner, a leaflet or tag that displays the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

To be consistent with the purpose of the Act, by addressing the enormous health toll of the by-far greater risks of cigarette smoking, the sections should say something more along these lines:

20 (1) Subsection 15(1) of the Act is replaced by the following:

Information – sale of tobacco products

15 (1) No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

2) Section 15 of the Act is amended by adding the following after subsection (1):

Information – packaging of tobacco products

(1.1) No manufacturer shall package a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

(3) Subsections 15(2) and (3) of the Act are replaced by the following:**Information – leaflet**

(2) If required by the regulations, every manufacturer or retailer shall provide with a tobacco product, in the prescribed form and manner, a leaflet that displays the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

21 Section 16 of the Act is replaced by the following:**Information – sale of vaping products**

15.1 (1) No manufacturer or retailer shall sell a vaping product unless the product and the package containing it display, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

Information – manufacture of vaping products

(2) No person shall manufacture a vaping product unless the product displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

Information – packaging of vaping products

(3) No person shall package a vaping product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

Information – leaflet or tag

(4) If required by the regulations, every manufacturer or retailer shall provide with a vaping product, in the prescribed form and manner, a leaflet or tag that displays the

information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

This issue persists in the section directly below information disclosure dealing with ongoing obligations to warn:

For greater certainty

16 For greater certainty, this Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of the legislature of a province to warn consumers of the health hazards and health effects arising from the use of tobacco products or vaping products and from their emissions.

This section has an apparent unintended consequence of protecting cigarette companies from Canadian consumer protection laws. **Under our trade practices law, deception by omission is an offence.** But this section, by once again *only looking at risks* to the *exclusion of relative risks*, omits stipulation of an ongoing obligation to not deceive through omission of information on relative risks. Thus a cigarette company could deceive smokers by not informing them of the relative risks of alternative products and aggrieved consumers seeking to use trade practices laws could be stymied.

This bill should not be about protecting cigarettes, but about protecting health.

As such, an amendment is necessary. Perhaps more like this:

For greater certainty

16 For greater certainty, this Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of the legislature of a province to warn consumers of the health hazards and health effects, *and relative risks*, arising from the use of tobacco products or vaping products and from their emissions

There is also a significant presence of protection for the interest of cigarettes over public health in the following section:

22 Paragraph 17(a) of the Act is replaced by the following:

(a) respecting the information that must appear on tobacco product packages and in leaflets about tobacco products and their emissions and about the health hazards and health effects

arising from the use of the products and from their emissions;

(a.1) respecting the information that must appear on vaping products or on vaping product packages and in leaflets or on tags about vaping products and their emissions and about the health hazards and health effects arising from the use of the products and from their emissions;

(a.2) respecting, for the purposes of section 15.3, the manner of displaying or providing information, including the form and placement of the information

A similar amendment is necessary to put public health back into focus:

22 Paragraph 17(a) of the Act is replaced by the following:

(a) respecting the information that must appear on tobacco product packages and in leaflets about tobacco products and their emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the products and from their emissions;

(a.1) respecting the information that must appear on vaping products or on vaping product packages and in leaflets or on tags about vaping products and their emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the products and from their emissions;

(a.2) respecting, for the purposes of section 15.3, the manner of displaying or providing information, including the form and placement of the information

As well for this section:

26 Section 20 of the Act is replaced by the following:

False promotion

20 (1) No person shall promote a tobacco product, including by means of the packaging, in a manner that is false, misleading or deceptive with respect to, or that is likely to create an erroneous impression about, the characteristics, health effects or health hazards of the tobacco product or its emissions.

Considerations

(2) The general impression conveyed by a promotion and the literal meaning of any statement contained in a promotion shall be taken into account in determining whether a promotion is made in a manner that is misleading or deceptive with respect to, or is likely to create an erroneous impression about, the characteristics, health effects or health hazards

of the tobacco product or its emissions.

Deception needs to include deception by omission, **such as the failure to give information on relative risks**. Thus the same amendment is necessary:

26 Section 20 of the Act is replaced by the following:

False promotion

20 (1) No person shall promote a tobacco product, including by means of the packaging, in a manner that is false, misleading or deceptive with respect to, or that is likely to create an erroneous impression about, the characteristics, health effects or health hazards, *and relative risks*, of the tobacco product or its emissions.

Considerations

(2) The general impression conveyed by a promotion and the literal meaning of any statement contained in a promotion shall be taken into account in determining whether a promotion is made in a manner that is misleading or deceptive with respect to, or is likely to create an erroneous impression about, the characteristics, health effects or health hazards, *and relative risks*, of the tobacco product or its emissions.

The problem of failing to distinguish between risks, and thus protecting the cigarette business rather than the health of consumers becomes dramatic in the following section:

27 The Act is amended by adding the following after section 20:

Comparison and prohibited elements

20.1 No person shall promote a tobacco product, including by means of the packaging, (a) in a manner that could cause a person to believe that the product or its emissions are less harmful than other tobacco products or their emissions;

That section is anti-health, anti-consumer, pro-cigarette, and undoubtedly unconstitutional. It seeks to forbid truthful speech on relative risks; speech that could save a tremendous number of lives by accurately informing Canadian smokers about relative risks.

Such a section also gives cigarette companies undue protection from litigation. It provides a defence in lawsuits where they are accused of failing to adequately inform smokers of relative risks.

The protection of cigarettes from competition from far less hazardous products manifests itself again in this section:

DIVISION 2

Vaping Products

Advertising appealing to young persons

30.1 No person shall promote a vaping product, a vaping product-related brand element or a thing that displays a vaping product-related brand element by means of advertising if there are reasonable grounds to believe that the advertising could be appealing to young persons.

Lifestyle advertising

30.2 (1) No person shall promote a vaping product, a vaping product-related brand element or a thing that displays a vaping product-related brand element by means of lifestyle advertising.

Section **30.1** sets out what appears to be a very low threshold at which the promotion of a vaping products becomes illegal due to potential appeal to young persons. Under the section as drafted the appeal to young persons need only meet '*reasonable grounds*' and there is no effort to do a health-based trade-off with the impact on reducing risks for smokers. Hence, we are left with the absurd situation where a promotional effort that had a very high likelihood of getting hundreds of thousands of smokers to switch to vaping, thus preventing an enormous number of cigarette-caused diseases and deaths, would be in violation of the law simply because there were reasonable grounds to believe that the advertising could be appealing to a very few young people. Further, such advertising would be prohibited even in the case where each of the young persons to whom the ad might be appealing are themselves cigarette smokers.

Such a measure, by once again focusing only on the risks of vaping rather than the relative risks and hence the benefits to smokers of switching to vaping, stymies efforts to assist smokers in reducing their risks. It protects the cigarette business rather than the health of Canadians.

The failure to consider relative risks manifests itself again in the next subsection:

Exception

(2) Subject to the regulations, a person may promote a vaping product, a vaping product-related brand element or a thing that displays a vaping product-related brand element by means of lifestyle advertising that is in

- (a)** a publication that is addressed and sent to an adult 30 who is identified by name; or
- (b)** places where young persons are not permitted by law.

What if it is determined that some forms of lifestyle advertising is an effective way to get smokers to switch to vaping? This section would hobble health initiatives akin to other lifestyle harm reduction messaging on such topics such as safer sexual practices or less hazardous alcohol consumption.

To at least not preclude what could be effective marketing campaigns to promote harm reduction to smokers, this section can have an additional, final, subsection, such as:

Exception

(2) Subject to the regulations, a person may promote a vaping product, a vaping product-related brand element or a thing that displays a vaping product-related brand element by means of lifestyle advertising that is in

- (a)** a publication that is addressed and sent to an adult 30 who is identified by name; or
- (b)** places where young persons are not permitted by law.
- (c) or as allowed by regulations.**

The restrictions on the ability of vaping products to successfully compete with cigarettes continues with the sections on gifts or consideration:

Giving or offering to give

30.5 No manufacturer or retailer shall give or offer to give a vaping product.

Sales promotions – offering consideration

30.6 (1) No manufacturer or retailer shall, in a place to which young persons have access,

- (a)** offer to provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or

- (b)** offer to furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

Sales promotions – providing consideration

(2) No manufacturer or retailer shall, in a place other than a retail establishment where vaping products are ordinarily sold, 30

(a) provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or

(b) furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

In the absence of going back to Parliament for an amendment, this precludes a wide range of marketing practices that could be very effective at getting smokers to switch. A useful comparison can be made with the free distribution of condoms at Gay Pride events. Or of 'Quit and Win' contests for smokers that involve the use of alternative nicotine products. Surely, if the evidence shows that such measures can be effective in reducing the rate of cigarette smoking it should not be illegal to act on it.

Giving regulatory authority to authorise such promotional activities can ameliorate this problem. Such as:

Giving or offering to give

30.5 *Subject to regulation*, No manufacturer or retailer shall give or offer to give a vaping product.

Sales promotions – offering consideration

30.6 (1) *Subject to regulation*, No manufacturer or retailer shall, in a place to which young persons have access,

(a) offer to provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or

(b) offer to furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

Sales promotions – providing consideration

(2) ***Subject to regulation***, No manufacturer or retailer shall, in a place other than a retail establishment where vaping products are ordinarily sold,

(a) provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or

(b) furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

With respect to advertising, the required information needs to include information on relative risks or it risks misleading rather than informing Canadians.

Advertising – required information

30.7 No person shall promote a vaping product or a vaping product-related brand element by means of advertising unless it conveys, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

An amendment to address this problem could be as follows:

Advertising – required information

30.7 No person shall promote a vaping product or a vaping product-related brand element by means of advertising unless it conveys, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects, *and relative risks*, arising from the use of the product and from its emissions.

Testimonials or endorsements can be valuable tools in encouraging people to change lifestyles and reduce risks. This is why nicotine replacement products, various healthier food options, non-alcoholic beer and wine, etc., are often presented in packaging that shows endorsements by health organisations. Precluding such an option for products that have been found to be massively less hazardous than smoking cigarettes once again has the impact of protecting cigarettes rather than the health of Canadians.

DIVISION 3

Miscellaneous Provisions

37 The Act is amended by adding the following after section 30.2:

Testimonials or endorsements

30.21 (1) No person shall promote a vaping product through a testimonial or an endorsement, however displayed or communicated, including by means of the packaging.

At the very least, there needs to be a provision in this subsection that allows regulatory authority for such things when they are deemed to be in the interest of health.

This following section suffers from the same flaw as s.30.1:

Functions and sensory attributes

30.41 No person shall promote or sell a vaping product that has an appearance, shape or other sensory attribute or a function for which there are reasonable grounds to believe that it could make the product appealing to young persons.

As with **s30.1**, this would preclude something that could be effective at getting a very large number of smokers to switch to vaping simply because a very small number of young people, even if every one of them is already a smoker, might reasonably be expected to find it appealing. It protects cigarettes rather than Canadians.

This brings us to what is possibly the most ominous, anti-health based and **illegal** section of the bill:

Health benefits

30.43 (1) No person shall promote a vaping product, including by means of the packaging, in a manner that could cause a person to believe that health benefits may be derived from the use of the product or from its emissions.

Comparisons

(2) No person shall promote a vaping product, including by means of the packaging, by comparing the health effects arising from the use of the product or from its emissions with those arising from the use of a tobacco product or from its emissions.

This precludes not just completely truthful statements, but truthful statements that have a very real potential to prevent hundreds of thousands of premature deaths. The fact is, health benefits from switching from smoking to vaping are recognised by scientific authorities and major health bodies as being extraordinarily large.

Precluding statements on relative risks denies free speech, is an example of 'deception by omission' which is prohibited in consumer protection laws, and would be a huge benefit to the cigarette business.

The flaw in reasoning found in s30.1 shows up again here:

Indication or illustration

30.46 (1) No person shall display on a vaping product or on its package an indication or illustration, including a brand element, that could cause a person to believe that the product is flavoured if there are reasonable grounds to believe that the indication or illustration could be appealing to young persons.

This section depends on regulations, but it is ominous (and consistent with the overall problems in this bill) to have language that seeks to prevent Canadians from getting truthful, and potentially life saving, information on health benefits:

39 Subsection 30.43(1) of the Act is replaced by the following:

Health benefits

30.43 (1) No person shall promote a vaping product, including by means of the packaging, in a manner that could cause a person to believe that health benefits, within the meaning of the regulations, may be derived from the use of the product or from its emissions.

Having sought to preclude **'any person'** from communicating accurate information on relative risks (eg. s.30.43), we see that **the penalty for doing so is severe.**

General offence

47 Every person who contravenes subsection 9.1(1) or (2) or 20(1), section 20.1, subsection 21(1), 22(1), 23(1) or (2), 23.1(1) or (2), 23.2(1) or (2) or 24(1) or (2), section 25, 27 or 30.1, subsection 30.2(1), 30.21(1) or 30.3(1) or (2), section 30.4 or 30.41, subsection 30.42(1) or 30.43(1) or (2), section 30.44, subsection 30.45(1) or (2), 30.46(1) or (2), 30.47(1) or (2) or 30.48(1) or (2) or section 30.71 is guilty of an offence and liable on summary conviction to a fine not exceeding **\$500,000 or to imprisonment for a term not exceeding two years, or to both.**

There does not appear to be an exemption for truthful communications. Nor for non-commercial communications. So, if academics publish a paper and/or speak publicly about

the difference in risk between vaping products and cigarettes, something very likely to save lives, are they liable for prison sentences?

Cigarettes have caused extraordinary carnage in Canada for an exceptionally long time. It is time that we stopped protecting the cigarette business and focused squarely on reducing the death toll; on protecting Canadians.

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