FUTURE OPTIONS FOR TOBACCO CONTROL

PERFORMANCE-BASED REGULATION OF TOBACCO

June 2010

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INTRODUCTION

At first glance, oil drilling and tobacco control would seem to have little in common. However, the example of new performance-based regulation of oil drilling not only gives hope of improved safety for oil drilling in the future, but it also sparks thinking of the application of performance-based regulation (PBR) to other fields of economic, social and health regulation, including tobacco regulation.

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New offshore drilling rules give freer rein

Environmental protection up to firms

BY ANDREW MAYEDA, CANWEST NEWS SERVICE; CITIZEN NEWS SERVICES MAY 11, 2010

OTTAWA — Canadian regulators relaxed offshore drilling regulations late last year, giving the energy industry more flexibility when putting in place safeguards against oil spills.

Previously, companies were required to install specific kinds of equipment, such as safety valves and blowout preventers. The old regulations outlined everything from how companies should cement the casing on an oil well, to how they should conduct pressure tests.

Under the new regulations, which came into force in December, well operators must set environmental-protection goals, list the equipment they will use to achieve those goals and disclose their plans for inspecting, testing and maintaining such gear. But they are not required to install specific equipment.

Traditionally, the most prevalent style of government regulation has not been performance-based regulation. It has been and continues to be design regulation. Design regulations specify in great detail what regulated industries are to do, what equipment they are to use and how that equipment is to be installed. However, in design regulations, final objectives are often unstated and it is often difficult to know whether or not objectives are being achieved. In contrast, performance-based regulation moves the objective of the regulation explicitly into the regulation itself. The onus is place squarely on the regulated companies to achieve the objective, but they are granted much more latitude and flexibility in how that objective is to be achieved. In the case of oil exploration companies in Canada, they will now concentrate their minds on achieving specific environmental protection objectives. They are much freer to determine how that will be done. (1)

This essay will review current thinking and practice with respect to performance-based regulation and examine the possible application of performance-based regulation to tobacco. This will be followed up with proposals for how such tobacco control regulations could be constructed, together with an analysis of their strengths and weaknesses. It is proposed that cost-recovery litigation for tobacco-related wrongs currently being pursued by several Canadian provinces would benefit from a shift in thinking towards requests for forward-looking performance-based remedies as preferable to requests for multi-billion dollar payouts. The coordination of performance-based remedies and performance-based regulation in litigation and legislation strategies, respectively, will also be discussed. The paper will conclude with a series of suggestions on how further progress can be made towards phasing out supply and demand for tobacco through judicious application of performance-based remedies and regulations.

EXPERIENCE WITH PERFORMANCE-BASED REGULATION

Early experience in the 1990s and early 21st century with performance-based regulations was in the areas of environmental protection and in the regulatory oversight of complex industrial systems, such as railroads, pipelines and nuclear energy production. In 2002, the John F. Kennedy School of Government at Harvard University hosted a workshop on performance based regulation. (2) The meeting brought together leading academics that had been studying performance-based regulation and experienced government regulators, some of whom were implementing performance-based regulation in their fields of endeavour, mainly environmental protection and management of complex industrial systems. Workshop participants were largely drawn from these fields of endeavour, and their discussion centred largely on engineering regulation.

The workshop thoroughly explored advantages and disadvantages of performance-based regulation. Importantly, participants noted that such regulations are not a panacea for what ails regulatory systems. When clear, agreed-upon quantitative measurements of the performance standards to be achieved are available, performance-based regulation may be an advantageous choice. In the absence of such measurement tools, other regulatory systems will be more appropriate. In other cases, a hybrid of performance-based and traditional design regulation may be appropriate. Workshop participants also noted that the world as we know it is largely design-based, which creates structural and institutional barriers to the implementation of performance-based regulation – a new way of doing things. Whether performance-based regulation is used or not, the future will always be uncertain. While, performance-based regulation would theoretically be more adaptable to unforeseen future circumstances, that proposition has yet to be demonstrated through widespread successful experience with performance-based regulation. While tobacco regulation was not discussed at this workshop, the lessons from this workshop will be useful to inform how performance-based regulation for tobacco control might be constructed.

Not all the experience with performance-based regulation has been positive. One researcher of this subject provides a cautionary tale of a performance-based regulatory system that did not work in the public interest. (3) After the adoption of performance-based regulations under the New Zealand Building Act, up to 18,000 new homes were built that were not weather-tight. Subsequent evaluation (4) revealed that the problem was not with performance-based regulation *per se*, but that some important necessary features to make a performance-based regulation system work well were not in place. The performance-based regulations afforded great flexibility to the building industry but the regulatory regime placed too much faith on self-correction of the marketplace as a means of control and too little emphasis on accountability for results. The lesson to be learned from this experience is that performance-based regulation must be accompanied by a strong, unambiguous means of monitoring performance that operates in the public interest with a very great emphasis on accountability of the regulated industry for achieving results.

Canadian provinces have been implementing performance-based regulations for a number of years, British Columbia has been a leader in this regard, both with respect to the number of performance-based regulations introduced and in bringing together the experience of federal and provincial officials to encourage coordinated efforts in the direction of performance-based regulation. Forest management, transportation and pest control are among the many areas of endeavour that are now subject to performance-based regulation in British Columbia. (5)

A thorough analysis of the effectiveness of British Columbia's new performance-based regulations for its integrated pest management program has been carried out. (6) It revealed that, on balance, the shift to the new performance-based regulatory system was effective. However, the process was not without growing pains as both the regulators and the regulated industry struggled to adapt to the new and unfamiliar system. While there is now a much greater emphasis on achieving compliance with new performance-based objectives, both government and industry officials continue to see objective-setting as a work in progress. It was also concluded that performance-based standards may not be appropriate if it is too difficult to verify compliance, and where the level of hazard is high. In these cases, prescriptive approaches may be more appropriate.

Nova Scotia has also introduced performance-based regulations for its electricity supply industry. These regulations will apply beginning in 2011. As of this writing, their effectiveness has not yet been tested. In each of 2011 and 2012, Nova Scotia Power must supply at least 5% of the power it delivers from specified renewable energy sources. In 2013, the threshold will rise to 10%. (7,8)

The principle of holding industry and government accountable through performance-based regulation features prominently in at least two laws recently introduced in the Canadian Parliament. One is the *Canada Consumer Product Safety Bill* (9) and the other is the *Climate Change Accountability Bill.* (10) Neither has yet become law.

The *Canada Consumer Product Safety Bill* proposes a general responsibility on manufacturers to ensure that no product covered by the new law would present any danger to human health or safety. Failure to meet this basic requirement could have resulted in immediate product seizure and/or recall and severe financial penalties – up to five million dollars. Summary conviction and imprisonment could also result from infraction. The basic responsibility to ensure product safety is a performance-based responsibility. Since the law has not yet been adopted, no regulations under it exist. However, the proposed regulation-making authority would allow for both performance-based and design-based regulations. The *Canada Consumer Product Safety Bill* has been before Parliament three times. It was most recently re-introduced in first reading on June 9, 2010. (9)

The *Climate Change Accountability Bill*, (10) should it ever become law, would set performance-based targets to be met by Canada for greenhouse gas emissions. It would require progressively lower national greenhouse gas targets to be set and met every fifth year from 2105 to 2045. It would confer broad regulation-making power on the federal government, permitting them the power to establish "performance standards designed to limit greenhouse gas emissions." Such standards could be required of provinces, of industries or any other entity. This Private Member's Bill received support from opposition parties, but not the governing Conservative Party. It was passed by the House of Commons on May 5, 2010 and, as of July, 2010, it was still awaiting consideration by the Senate.

In 2007, the Government of Canada issued a new directive on streamlining regulation. (11) The new directive seeks greater efficiency and effectiveness of regulation. To that end, departments and agencies are directed to "demonstrate that the regulatory response is designed to address policy objectives," and to "specify, particularly for technical regulations, regulatory requirements in terms of their performance rather than their design or descriptive characteristics." Despite the existence of this quite explicit directive, only slow progress is being made on transforming the regulatory system from one that is largely design-based to one that is largely performance-based. Slow progress in this endeavour was predicted by participants in previously-discussed 2002 workshop at Harvard University. The workshop report noted, "It was difficult to embed a new performance-based approach within a design-based world." It was also stated, "Participants suggested that expanding the use of performance-based regulation to new areas, even when appropriate, may prove difficult because of resistance from those who are comfortable with the status quo." (2)

While progress may be slow, systematic efforts are underway to implement the Cabinet Directive and shift the entire system in the direction of more performance-based regulation. A Government of Canada Regulation Web Site (12) has been established (http://www.tbs-sct.ca/ri-qr/index-eng.asp), where the commitment to performance-based regulation is emphatically restated:

> *"The Government of Canada is committed to creating a performance-based regulatory system that will protect and advance the public interest in the areas of health, safety and security, the quality of environment, and the social and economic well-being of Canadians."*

A Centre of Regulatory Expertise (CORE) has been established to assist government departments implement the new Cabinet Directive requiring a shift towards performance-based regulation. (13) CORE and their other colleagues in the Treasury Board Secretariat have been industrious, producing many educational and information products to help guide regulators through the new performance-based requirements. Among many other educational products is a "Handbook for Regulatory Proposals: Performance Measurement and Evaluation Plan," and related appendices "Performance Measurement and Evaluation Template" and "Developing a logic model for regulatory activities." (14)

To date, discussions of performance-based regulation have taken place mostly among public servants, with the occasional involvement of some academics interested in the topic. It has not been the subject of a great deal of media attention, nor has it been at the centre of any widespread public understanding, discussion and debate. To be fair, regulatory reform is not a subject that one would expect to easily fire the public's imagination. Nevertheless, slow progress towards performance-based regulation may be attributed in part to the absence of widespread public understanding and public discussion of the issue.

In practice, prescriptive regulation remains the norm. Nevertheless, the shift to performance-based regulation is underway in a few sectors. It has already been achieved to some extent in oil and gas exploration (1) and sincere efforts are underway towards performance-based regulation in other sectors. For example, certification and regulation of civil aviation flight training organizations in Canada is being revised in the direction of performance-based regulation. (15)

APPLICATION OF PERFORMANCE-BASED REGULATION TO TOBACCO

Stephen Sugarman, a Professor of Law at the University of California at Berkeley, has examined how performance-based regulation might be applied to health-threatening consumer products including cigarettes, alcohol, guns, junk food and motor vehicles. (16) Sugarman suggests that the ultimate performance-based measure for tobacco control would be reduced tobacco-caused disease and death, but its achievement would take too long to be a practical standard in a revised regulatory system. Instead, he proposes using reliable data on smoking rates as a satisfactory performance standard around which new tobacco control regulations could be built. Sugarman suggested that there be substantial financial penalties proposed if specified smoking prevalence reduction targets were not met. Sugarman expressed a preference for a penalty-only scheme as likely the most politically attractive. However, he also outlines a reward and penalty option that could be used, should the latter prove to be the more politically attractive. Under this scheme, firms would continue to be penalized for failing to meet targets. The added feature is that they would receive generous financial bonuses for surpassing their targets.

United States Senator Michael Enzi introduced a bill in the US Senate in 2007 that would have implemented performance-based regulations for the tobacco industry, very similar to Sugarman's proposed scheme, with a somewhat different approach to rewards and penalties. In order to avoid fines for under-achievement, under-achieving firms could balance off their under-achievement by purchasing over-achievement from their more successful competitors. This is also known as "cap and trade." (17) Overall, the industry would still meet its targets of prescribed reductions in smoking prevalence. Mr. Enzi's Bill did not have the support of the Executive Branch, nor did it receive widespread support from his fellow Senators. Lacking support, it was never voted into law. The United States, however, does have a new law governing tobacco – the Family Smoking Prevention and Tobacco Control Act of 2009. It did receive support of the Executive Branch and majority support in both the Congress and the Senate. While it represents an advance in legislative tobacco control in the United States, its provisions are prescriptive; they are not performance-based. (18) Perhaps performance-based regulation of tobacco, of the sort proposed by Senator Enzi, will receive more serious consideration by American legislators in a future round of tobacco regulation.

The United States Department of Justice (DoJ) was engaged in a lengthy trial against tobacco companies seeking redress under the United States statute on Racketeer Influenced and Corrupt Organizations. In their statement of claim, the Department of Justice asked for a performance-based remedy with respect to youth smoking rates. To buttress this claim DoJ lawyers asked Dr. Max Bazerman and Dr. Jonathan Gruber to testify about the issue.

Dr. Bazerman applied the theory and findings of behavioural decision research and concluded that decision making in the tobacco industry would continue to be in the direction of increasing profit, despite assertions by tobacco company executives that they would perform differently in the future. Among the remedies he proposed was "eliminating economic incentives for defendants to sell cigarettes to young people." (19)

Dr. Gruber pointed out that "outcome-based" remedies for reducing youth smoking would be superior to "input-based" remedies. Dr. Gruber's "outcome-based" remedies are equivalent to performance-based remedies while "input-based" remedies are more traditional restrictive remedies. He indicated that the number of possible inputs is too large to be effectively monitored and controlled. In contrast, making tobacco companies responsible for a future output of reduced youth smoking would be more easily monitored and place responsibility squarely on tobacco companies for achieving it. Failure to do so would result in substantial court-supervised penalties being imposed. (20)

In the court of first instance the case was decided in favour of the United States Department of Justice. (21) However, because of earlier Court of Appeal judgements, Judge Gladys Kessler was restrained in the kinds of remedies that she could impose upon the defendant tobacco companies. Accordingly, she was obliged to reject the solutions proposed by Professors Bazerman and Gruber. Judge Kessler's decision was largely upheld on appeal. The Supreme Court of the United States recently declined to hear further appeals of this case, so the Kessler judgement, as modified by the District Court of Appeal, stands. (22)

PBR and various proposals to restructure the tobacco industry

A 2005 publication, *Curing the Addiction to Profits* written by Cynthia Callard, David Thompson and Neil Collishaw, published by the Canadian Centre for Policy Alternatives (23) identified the legal obligation of tobacco companies to maximize profits as a very significant impediment to making progress in public health against the tobacco epidemic. Of course the same obligation to maximize profits applies to other regulated business corporations. However, for most other corporations, whether they make foods, drugs, airplanes, cars or are engaged in any other line of endeavour, there is at least some intersection between public interest and private interest. A food company that sold unsafe food, thereby losing the public trust, would quickly lose money and perhaps go out of business. In the case of tobacco companies, there is almost no intersection between public interest and private interest. While the public interest would want to strive to decrease and eventually eliminate tobacco products, tobacco companies continually strive to maximize sales and therefore profits. They can ignore widespread public opprobrium and count on youthful curiosity, followed by addiction, to keep their sales and profits high. To them, tobacco control regulations are an annoyance to be managed in the interest of maximizing sales. They do not cheerfully adopt tobacco control laws and regulations. Rather, they adapt to them and do all that is possible to minimize their effect. Whereas food companies have embraced current food labelling regulation as both good for public health and good for business, tobacco companies abhor effective tobacco product warning labels and do all that is possible to mitigate their effect.

Curing the Addiction to Profits proposed various options for replacing profit-making tobacco corporations with not-for-profit entities that would run the new non-profit entities in the public interest. These endgame solutions, while the logical consequence of the analysis that preceded their proposal, may be considered by some to be too far removed from the current reality to be politically feasible. After five years, they have not been implemented or even considered in any jurisdiction.

Yet the problem identified in this and other analyses (24) remains. Tobacco continues to addict and poison, while tobacco companies continue to maximize profits and sales. The analyses of Bazerman (19) and Callard *et al.* (23) indicate that the profit-making structure of the tobacco industry will continue to favour profit-maximization decisions that are also public health-denying decisions. What is needed is a solution set that can be built into existing structures and institutions. The world is not yet ready for wholesale replacement of institutions and structures by new ones. Performance-based regulation of tobacco offers the potential of a solution that is evolutionary rather than transformative. That is, while new ways of doing things will be needed, these can be accomplished by changes in behaviour of existing institutions. New institutions will not be required. Transformative solutions may be appropriate and acceptable some time in the future, but solutions to the tobacco problem that can be feasibly applied now or in the near future may require a more evolutionary approach, with performance-based regulation being at the centre of such an approach. The political acceptability of performance-based regulation is not in doubt; it is the current official policy of the Government of Canada for regulation-making. (11)

PROPOSED PERFORMANCE-BASED REGULATION OF TOBACCO IN CANADA

While some researchers have proposed the application of performance-based regulation to tobacco and other public health threats (16,19,20), this form of regulation is rare in the public health field and exists only in a minor way with respect to tobacco control.

Past experience with PBR of tobacco in Canada.

There are at least two examples of performance-based regulation of tobacco that have known some success.

The first of these is the regulation for cigarettes of reduced ignition propensity. (25) Tobacco companies are required to produce only cigarettes that reach a closely-specified standard of reduced ignition propensity. However, they are free to use whatever manufacturing method they choose to achieve this standard. With the exception of a few small licensed tobacco manufacturers and most or all of the illicit manufacturers, there has been monitoring by Health Canada. Currently, the big tobacco companies are complying with this standard.

The second was not a regulation but a voluntary agreement that operated from 1978 to 1984. (26) In the 1970s and early 1980s, in the absence of any tobacco control legislation, Health Canada officials proposed many tobacco control measures to the tobacco industry that, it was hoped, they would undertake voluntarily. The tobacco industry failed to implement all but about a dozen of these proposals that numbered over 100 in the period 1972-1986. Among the many proposals not adopted by the tobacco industry were proposals to hold the line, in real terms, on advertising expenditure, to reduce the amount of smoke taken in by smokers, to precisely report additive use, to demonstrate the safety of additives, and to limit average nicotine yield to a maximum of 1 mg per cigarette. Of the few that the tobacco industry did agree to implement, most were minor requests to supply information. There was, however, Health Canada made one proposal of note in 1978 that the tobacco industry did implement. It was, in fact, a performance-based measure. The tobacco industry agreed in 1978 to achieve a sales-weighted average tar level for each company of 12 mg per cigarette by 1984. At the time, it was thought that this would be a measure that would provide at least a small measure of public health benefit. Each tobacco company ran extensive monitoring programs of its own. In addition, Health Canada reported regularly to the companies on their progress towards the 1984 goal. Many brands were modified in many different ways to meet the target. All these modifications were done by the companies themselves with no input from Health Canada. Indeed Health Canada had no knowledge of what cigarette modifications were being made. Only the final result, the sales-weighted average tar (SWAT) was being monitored. All tobacco companies succeeded in achieving this target by the proposed date of 1984. What was not anticipated was that the companies would modify the engineering of the cigarettes so that nearly all smokers of medium and low-tar cigarettes would engage in conscious and unconscious behaviour to compensate for the lower yield, thereby negating any potential health benefit, while fooling the government and the customers, and maintaining sales. (27) The tobacco companies pursued the goal of sales-weighted average tar reduction with increasing zeal because, with the modifications they made to their cigarettes, lowering tar turned out to be good for business. So the distant objective of public health improvement was not achieved because of its faulty measurement using the proximate indicator of lowering sales-weighted average tar.

Despite this serious shortcoming, this example demonstrates that the government can request and the tobacco industry can achieve change based on performance-based measures, even in the absence of a legislative regime. Future application of performance-based measures on the tobacco industry would require greater certainty that the performance measure against progress would be measured would actually achieve an important public health objective, and that this objective could not be subverted by any possible countermeasure. In 1978, with no legislative authority, voluntary compliance was the only option available to Health Canada. Nowadays, with such legislative authority available, there is more scope for obliging tobacco companies to adhere to a government-proposed performance-based regulatory scheme.

Conditions for successful PBR

The main field of application of performance-based regulation has been to complex industrial systems. (2) The problem of how to apply performance-based regulation in a major way to tobacco control requires careful consideration. Our review of existing experience with performance-based regulations (2,3,6)leads to the conclusion that several conditions have to apply if performance-based regulations are to work well:

- The performance being sought has to be **measurable and reasonably easily measured** by an unambiguous standard that all interested parties accept as a valid measurement of the performance in question.

- **Strong tests of accountability** need to be regularly applied to the regulated industry. Swift and severe penalties need to be applied for failure to meet regulated standards of performance. These tests need to be applied by an independent body that is working in the public interest and is seen to be working in the public interest.

- The regulated industry must have some **motivation to meet the performance-based standard** that works in favour of the public interest. Typically, the motivation is that achieving high standard of public safety or environmental protection maintains credibility and trust in the regulated industry, thereby preserving and enhancing its profit-making potential.

When all three of these conditions are met, performance-based regulation can be expected to work reasonably well. Growing pains as people adapt to new ways of doing things can also be expected. Where performance-based regulations have worked less well in their application to industrial systems, it is typically because one or both of the first two conditions are not met. (3,4)

In the case of tobacco, the first condition is met because smoking prevalence is a well-accepted, unambiguous and valid measure of performance. For this reason, it has been proposed by Sugarman as a suitable performance measure in tobacco regulation. (16) Health Canada, which administers existing tobacco regulations, would be an appropriate body to administer new performance-based regulation.

Using PBR to reverse incentives and change industry behaviour

However, some significant change would have to happen for the tobacco industry to actually want to achieve significant public health purposes. In fact, careful analyses have shown that the tobacco industry wilfully acts to negate public health purposes and will continue to do so as long as they are obliged to maximize profits and maximizing sales continues to be their only possible route to maximizing profits. (19,20,23) Large-scale performance-based regulation cannot be contemplated for the tobacco industry unless motivation for them to work in favour of public health can be created. Several methods have been proposed for how this could be done (16,17,19,20), and all involve reversing profit-making incentives. Some judicious combination of rewards and penalties could be constructed that would penalize companies with profit-negating penalties if targeted reductions in smoking prevalence are not met and reward them if prevalence reduction targets are surpassed. This is one of the structures proposed by Sugarman. (16)

The penalties would need to be large enough to negate profit-making, and the rewards would need to be large enough to be a tempting profit-making goal to strive for. In this way, tobacco corporations could continue to fulfil their fiduciary responsibilities to make profits for their shareholders, but now they would be striving to accomplish tobacco prevalence reductions, a public health goal.

Payment of rewards and collection of penalties would need to be done swiftly to clearly tie the consequence of the action to the action itself. A government-administered revolving trust fund would seem appropriate to this purpose. However, other mechanisms are possible, including integration of a reward and penalty structure into the income tax system. Thorough analysis would be required to determine the size of penalties that would be needed to achieve their purposes. For illustrative purposes, an industry-wide penalty of $100,000,000 is proposed per annual excess of 100,000 smokers over the prescribed target. Similarly an industry-wide reward of $200,000,000 is proposed per annual decrease of 100,000 smokers, below the prescribed target. Meeting the target (plus or minus 150,000 smokers) would generate neither a reward nor a penalty. Both of these illustrative dollar amounts appear in Appendix A, which contains suggested draft regulations that could be used to implement a new tobacco control regulatory regime of performance-based regulations and reversed profit-making incentives. The trust fund would be partly self-financing, with penalty revenue being used to pay rewards. Shortfalls could be made up with payments into the fund from general revenues, payments that would be more than offset by existing tobacco tax revenue.

Some may argue that it would be unfair to require tobacco companies to discourage demand and reduce supply in order to reduce the number of smokers. However, they have been using supply and demand manipulation to maximize the number of smokers for decades. For sixty years or more, they have been regularly monitoring the number of smokers and engaging in elaborate and detailed market research to plumb the depths of their customers' psyches and tailoring their products and marketing strategies to appeal consciously and subconsciously to their customers and potential customers. (23,28) Under the new regime all of that accumulated marketing genius could be put to work to demarket tobacco, thereby achieving or surpassing targets and continue to make money for shareholders.

Of course, when tobacco is eventually phased out or nearly so, opportunities for making money from tobacco will have ended. However, it is anticipated that the phase-out process would take place over a quarter-century, sufficient time for accumulated capital from the tobacco industry to be converted into some other line of endeavour that will continue to keep these corporations profitable. With a quarter-century phase-out period, any economic disruption that may occur would be due only for failure to plan and adjust economic activities to the known phase-out schedule.

Motivating tobacco companies to use their economic power and keep the market under legal control.

Tobacco companies will argue that the scheme is inherently unfair because the illicit tobacco suppliers that currently hold about a 31% share of the market will continue to operate outside the law. (29) The playing field will not be level, it will be argued. On the other hand, the proposed performance-based regulatory scheme contains strong built-in incentives for the transnational tobacco companies to use their own resources to reduce contraband. The scheme imposes a strong incentive for companies to discourage illicit tobacco production, since contraband serves to keep the number of smokers higher than it would be otherwise. It may well be within the power of the major multinational tobacco companies to reduce the supply of raw tobacco to illicit manufacturers to a trickle, or, indeed, to choke it off entirely.

There are only three big tobacco leaf processors that control most of the world's supply of tobacco leaf (outside of China). (30) These three work closely with the four big tobacco companies. One of them, British-American Tobacco, is vertically integrated and is both a leaf processor and cigarette manufacturer. The oligopoly power of these six companies in the marketplace is such that, by the expedient of blacklisting tobacco farmers and leaf dealers that deal with illicit manufacturers and rigidly monitoring and enforcing the behaviour of farmers and leaf dealers, they may well be able to choke off the supply of tobacco to the illicit manufacturers that are fuelling the Canadian market for illicit tobacco products.

Despite the logic of this scenario, it is not certain that it would come to pass. Tobacco companies may not wish to use their oligopoly power in the way suggested here. For strategic reasons, they may prefer to use ongoing contraband sales of tobacco to force political change more to their liking. It may also be the case that their oligopoly power may not be sufficient to choke off supplies to illicit suppliers. Attempts to do so may motivate the creation, possibly successful, of alternate sources of supply. More study and analysis of the interaction between the illicit tobacco market and various options for performance-based regulation of tobacco is therefore recommended.

Should a performance-based regulatory scheme be fully implemented and effectively monitored and enforced, it could work well to gradually decrease smoking prevalence. The major problem will be that the tobacco industry will almost certainly pull out all the stops to prevent its implementation or to sufficiently weaken it to the point of pubic health ineffectiveness. Our pluralistic, democratic system of government may well bend, at least to some extent, to such pressure. It has certainly done so in the past.

Sound planning by public health strategists would recognize that strong and fierce opposition to such a scheme can be anticipated from the tobacco industry and their apologists. Accordingly, multiple lines of defence for such a scheme would be needed in the lead-up to implementation. Some of the lines of defence that could be used are discussed more thoroughly in the next section.

LEGISLATION TO IMPLEMENT PERFORMANCE-BASED REGULATIONS

The current *Tobacco Act* (31) has a broad stated purpose "to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases." A new scheme of performance-based regulation would certainly enhance achievement of this purpose. Some modification to the *Tobacco Act* may be necessary to create a legislative authority for new performance-based tobacco control regulations.

Any new regulations, however, need not replace existing or planned new regulations. Rather they would work in harmony with existing regulations and extend their reach into a new performance-based regime designed to phase out tobacco. Tobacco companies would still be expected to adhere to all of the provisions of the *Tobacco Act* (31)and its associated *Cigarette Ignition Propensity Regulations, Tobacco Products Information Regulations and Tobacco Reporting Regulations.* (25,32,33)

As already mentioned, tobacco companies would fiercely oppose performance-based regulations and related enabling legislative change. One of the more extreme tactics they might employ is to threaten to boycott Canada entirely and to withdraw all of their products from the Canadian market, leaving the government with the problem of how to satisfy the now unmet demand for tobacco products. In such a circumstance, the government would do well to have options available for alternative systems of tobacco supply. Such alternative systems have been proposed by Callard *et al.* (23)

Whether such an extreme measure is taken or not, the forces of public health would need to be marshalled as never before in order to support the proposed performance-based regulation and to counter tobacco industry opposition to such a measure. Such opposition should be expected to be stronger and more varied than ever before for any previous tobacco control measure.

ACHIEVING PERFORMANCE-BASED REMEDIES THROUGH LITIGATION

A performance-based approach to tobacco control will have a better chance of implementation if it is launched initially on multiple tracks, both via a legislative track and also a litigation track. If tobacco industry lobbying is successful in derailing it from one track, there will still be chance that it will still reach its destination of full implementation on another track. In addition to achievement of improved tobacco control through legislation and regulation, it is also possible to make progress through litigation. British Columbia is currently before the courts against the tobacco industry. The British Columbia government is seeking damages from the tobacco industry for excessive health care costs incurred over a period of decades because of the widespread supply of tobacco products by the tobacco industry. All other provinces have put in place legislation that would allow them to take similar action against the tobacco industry. Ontario has already filed its statement of claim. (34)

It is troubling to note, however, that thinking about possible remedies to wrongs caused by the tobacco industry has not yet extended beyond financial payments. Ontario has stated that it is claiming $50 billion. If other provinces follow this lead, the total of damages claimed could reach $150 billion. Tobacco has killed more than one million people in Canada since World War II and there can be little doubt the monetary value of the death and suffering caused by tobacco until now in Canada would amount to at least $300 billion and possibly more, depending on how one wishes to value each human life lost prematurely to tobacco. But serious questions must be asked. What purposes would be served by such money? Would payments of large sums of money solve the public health problem of tobacco use now and in the future? Where would the money come from?

- ***What purposes would be served by such money?***

To be sure, our systems of common law and civil law provide for redress. Those who wrong others are liable for restitution to those wronged. Punitive damages are also frequently awarded in such litigation. It would satisfy a desire to see the guilty punished. Were money paid to provinces for past excess costs due to tobacco use, the provinces could use the money to offset the future excess costs of future tobacco use. Damage payments might also bankrupt companies and put them out of business. Continuing demand for tobacco, however, would encourage new replacement tobacco suppliers to enter the tobacco marketplace.

- ***Would payments of large sums of money solve the public health problem of tobacco use now and in the future?***

Penalty payments may go some way to redress past wrongs, but they will not solve the present and future problems of continuing tobacco use. There are still five million smokers in Canada. Those that continue to smoke throughout their lives will face a one in two chance of dying from a tobacco-caused disease. Half of those will succumb before age 70. Absent a specific phase-out plan for tobacco, progress to discourage tobacco use will continue to be a slow, hit and miss affair, frequently thwarted by tobacco company countermeasures. No amount of money will fundamentally change these prospects for only slow progress in resolving the tobacco epidemic.

- ***Where would the money come from?***

Recent transfers of ownership of all the tobacco companies in Canada have given us an actual market value assessment of the worth of all of these companies. Their total value is about $15 billion. (23) Whether governments claim $15 billion, $150 billion or even more from tobacco companies, they are unlikely to ever get very much of it any time soon. The British Columbia case has been mired in procedural matters since 1998. While the trial on the main question is expected to begin in 2011, the end of the trial is not in sight. Tobacco industry lawyers are masters of litigious behaviour and will also spin out other trials out for long periods of time. But even if all claims were successful and all tobacco companies paid up to a total of $150 billion by drawing on their international resources, one would have to question where that money would come from. Tobacco companies make their money by selling cigarettes. To pay large court settlements in Canada, they would have to raise money in the only way they know how – by selling more cigarettes somewhere in the world. The whole exercise can be likened to a global Ponzi scheme. To pay for the wrongs to Canadian smokers, tobacco companies must recruit more smokers in other countries. Taken to its logical end, the system would spiral out of control. The requirement to pay more and more legal damages for past smoking would oblige the tobacco companies to create more and more present and future smoking – the source of the revenue needed to pay court-awarded damages. Massive financial payouts could therefore have the perverse effect of exacerbating the tobacco epidemic in other countries while doing little to bring it to an end in Canada.

The disappointing answers to these questions spawn another question:

- ***What could be done to achieve public health purposes through litigation against tobacco companies?***

While it is usual for civil actions to seek damages in the form of monetary compensation, and for judges to make such monetary awards, there is no requirement that this be so. Lawyers have considerable latitude in constructing their statements of claim to demand monetary or non-monetary redress, or both. Judges have similar wide latitude in the remedies that they impose in their judgements.

It is far more important that the remedies sought and obtained in these legal actions be forward-looking rather than backward-looking. The balance in remedies sought needs to be shifted towards creating a future end to the tobacco epidemic rather than backward-looking insistence on financial redress that never will bring people back to life, never will eliminate or even reduce past and present pain and suffering, nor solve the tobacco epidemic that exists now and will continue to exist in the future. It is therefore proposed that the monetary portion of settlement sought in formal statements of claim be limited to payment of legal expenses and some partial payment of past health care costs.

The key feature of statements of claim should be forward-looking remedies to bring the current and future tobacco epidemic to an end. The recommended approach to achieve this end would be to request performance-based remedies to phase out tobacco along the same lines as performance-based regulations suggested here. Lawyers developing statements of claim in the various provincial suits should give serious consideration to these proposals. Lawyers who have already filed statements of claim should give serious consideration to modifying them along the lines proposed here.

Legislation and litigation should not be seen as an either/or proposition. Both are complex undertakings and in both cases, achievement of the desired objective is not certain, albeit for different reasons. However, it is expected that the pursuit of the goal of phasing out tobacco through performance-based measures in both legislatures and courts will be mutually reinforcing, increasing the chance of success in at least one of these arenas.

CONCLUSION

Performance-based regulations are strongly endorsed by the Government of Canada. They have proved their worth in the regulation of complex industrial systems. Now may be the time to expand their field of application to tobacco control. Properly constructed and executed, performance-based measures, whether applied as court-imposed remedies or government-administered regulations, or both, offer real hope for phasing out tobacco use over a period of twenty-five years.

APPENDIX A

Draft performance-based regulations to phase out tobacco

- ***Introduction***

There are many ways that new performance-based tobacco regulations could be written in order to gradually phase out use of tobacco products intended for smoking. Similar regulations and schedules could be prepared for smokeless tobacco products. Since the use of these latter products is less common, it may be feasible to have shorter phase-out periods for them. Tobacco products of demonstrated public health benefit would be exempt from the application of these regulations. Here is a sample text that could be adapted for inclusion as new regulations under the *Tobacco Act,* the *Hazardous Products Act,* the *Excise Act* or the proposed new *Canadian Consumer Product Safety Act.* It would also be possible to phase out cigarettes and other tobacco products along the same lines proposed here by incorporating performance-based remedies into statements of claim and judgements of cases currently being developed by provincial governments that are seeking redress for past tobacco-related wrongs.

The Phasing Out Tobacco Products Intended for Smoking Regulations

INTERPRETATION

The definitions in this section apply in this Act and its regulations.

"Tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, cigar papers, tubes and filters, but does not include any food, drug or device that contains nicotine to which the Food and Drugs Act applies.

"Tobacco products intended for smoking" means a tobacco product, but does not include chewing tobacco or snuff, nor does it include any tobacco product containing a flavouring agent not listed in Schedule 1.

"manufacture", in respect of cigarettes, cigars and smoking tobacco, includes the packaging, labelling, distributing and importing of tobacco products for sale in Canada.

"manufacturer" , in respect of tobacco products, includes any entity that is associated with a manufacturer, including any entity that controls or is controlled by the same entity that controls the manufacturer.

PHASE-OUT OF TOBACCO PRODUCTS INTENDED FOR SMOKING

2. (1) Beginning on July 1, 2011, no manufacturer shall sell or offer for sale tobacco products intended for smoking if their sales of these products in the previous calendar year exceeded their sales of these same products in the second previous calendar year.

2. (2) Notwithstanding subsection (1), a manufacturer may continue to sell or offer for sale tobacco products intended for smoking if their sales in the previous calendar year exceeded their sales in the second previous calendar year by reason of the fact that there were fewer manufacturers in the previous calendar year than in the second previous calendar year.

2. (3) Beginning in July, 2011 and continuing every July thereafter, the Minister shall compare the number of current smokers of tobacco products estimated for the previous calendar year, as determined by the Canadian Tobacco Use Monitoring Survey (CTUMS), or another method of estimation determined by the Minister to be at least as accurate, to the target number of tobacco smokers for the same previous calendar year shown in Column 2 of Schedule 1.

a) If the number of current smokers estimated by CTUMS or another method as determined by the Minister, rounded to the nearest 100,000, exceeds the target number of smokers shown in Column 2 of Schedule 2 for the same year by 200,000 or more, then each tobacco manufacturer shall pay into a trust fund administered by the Minister, his or her share of $100,000,000 for each increment of 100,000 smokers, rounded to nearest 100,000, that is proportionate to the manufacturer's share of market, as determined by the calculation shown in subsection (4).

b) If the number of current smokers estimated by CTUMS or another method as determined by the Minister, rounded to the nearest 100,000, is less than the target number of smokers shown in Column 2 of Schedule 2 for the same year by 200,000 or more, then the Minister shall pay from the trust fund administered by the Minister and established for purposes of this subsection to each tobacco manufacturer a share of $200,000,000 for each decrement of 100,000 smokers, rounded to nearest 100,000, that is proportionate to the manufacturer's share of market, as determined by the calculation shown in subsection (4).

2. (4) For purposes of this section a manufacturer's sales of tobacco products intended for smoking shall be as reported to the Minister under the Tobacco Reporting Regulations pursuant to the Tobacco Act. The share of market of manufacturers shall be determined by the Minister by dividing the manufacturer's total sales of tobacco products intended for smoking in any calendar year by the total sales of tobacco products intended for smoking of all manufacturers of the same products in the same calendar year.

2. (5) The Minister may from time to time issue a regulation to amend Schedule 1 by:

a) replacing any entry for a future year in Column 2 of Schedule 1 by a number that is not larger than any number for a previous year.

b) adding one or more rows at the end of Schedule 1 so that it applies to additional and subsequent consecutive years.

EXCEPTION

3. The Minister may exempt a tobacco product intended for smoking from the application of any or all of Section 2 if the tobacco product has proven public health benefit.

COMING INTO FORCE

4. (1) Except for Section 2, this Act shall come into force on a date fixed by proclamation that is not more than sixty days following the date of Royal Assent to this Act.

4. (2) Sections 2 shall come into force on July 1, 2011.

SCHEDULE 1

Column 1	Column 2
Year	**Total targeted number of smokers**
[Entries for each of the number of years required to phase out tobacco (20-25 years in suggested)], beginning with the start date of the program]	[Number of smokers in year one of the program followed by targeted numbers of smokers in each subsequent year]

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