

PUSHING THE “RESET” BUTTON GOVERNMENTS AND COMMUNITIES GRAPPLE WITH THE TEEN VAPING EPIDEMIC

In the 18 months since Parliament adopted a law which legalized the sale of nicotine vaping products, parents, teachers, coaches, physicians and organizations like our own have steadily pushed governments to curb the way that these products are being marketed to young people.

In May, all provincial governments and health organizations called on Health Canada to put vaping products under the same kind of promotional restrictions that are currently on tobacco products. In the summer the call for reforms had grown to include demands for controls on nicotine levels, effective warning labels and other reforms.

Research showing dramatic increases in teen vaping and dramatic reports of vaping-related respiratory illnesses in the U.S. and Canada have put a new urgency on these demands.

The assumptions on which Health Canada’s harm reduction approach were based have been challenged. Adult smokers in the USA have been slow to adopt these products, but use by non-smokers has exceeded expectations. (Data on Canadian adults are not available because Health Canada suspended surveillance in 2018 and 2019).

“We got it wrong”

Provincial and federal governments have close to equal authority to control vaping marketing. Many are now looking to strengthen their controls.

As B.C.’s health minister, Adrian Dix, put it: “Clearly, every government in Canada—and the federal government—got it wrong.” B.C. has said

it will impose limits on nicotine and prohibit the sale of flavoured products in convenience stores this spring unless the federal government has moved first.

In November, Prince Edward Island’s legislative assembly adopted a law proposed by Cory Deagle, MLA, which will ban flavoured e-cigarettes and make others available for sale only in specialty shops. It also increases the legal age for tobacco and e-cigarettes to 21.

The Ontario Minister of Health, Christine Elliott, rolled back permissions to promote e-cigarettes in retail stores. Other governments, including Alberta, Saskatchewan and New Brunswick, have also made commitments to reform their laws.

Until permanent regulations can be put in place, interim measures are needed

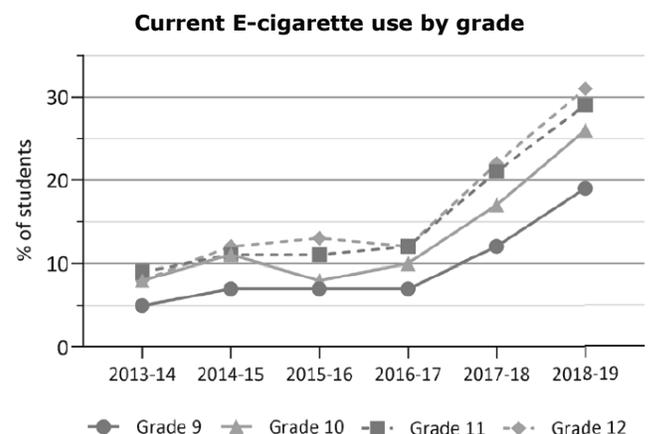
With each passing day, the problem has become more urgent. Federal regulations can require months or years to work their way through cabinet committees and departmental approvals. Leaving the current lax rules in place while this happen puts too many additional young people at risk.

This September the major national health groups united to call for the Minister of Health to use her powers under the *Department of Health Act* to put emergency interim measures in place until permanent rules are approved. The underpinning law (the Tobacco and Vaping Products Act) will need to be amended before strong regulations can be adopted. We will be working to encourage Parliamentarians to do this as quickly as possible.

Results for the 2018-2019 school year for the longitudinal COMPASS survey found that current (past 30-day) e-cigarette use had grown dramatically. The researchers concluded:

- E-cigarettes are expanding the tobacco market by attracting low-risk youth who would otherwise be unlikely to initiate use of cigarettes.
- E-cigarette use predicts subsequent cigarette use.
- E-cigarette use may contribute to the development of a new population of cigarette smokers.

Source: Leatherdale, Scott.
University of Waterloo COMPASS
Vaping Brochure. 2019.



Seven Urgently-Needed Measures ...

1 Flavour restrictions

Currently, all flavours are permitted under federal law, although they cannot be named after candies, desserts or drugs.

Most flavours should be removed from the market. Manufacturers could be permitted to request exceptions to a general prohibition on flavours if they can demonstrate that it is in the public health interest to do so.

2 Ban on additives which facilitate addiction

JUUL developed the use of "salted nicotine" to make it easier for novices to inhale nicotine (and to accelerate nicotine uptake). Other manufacturers have now converted to this youth-enticing version. All additives which facilitate inhalation or nicotine uptake should be banned (as they are for tobacco products in Europe).



3 Plain packaging

Like cigarettes and cannabis, vaping products should be sold without branded and ornamented packaging.

4 Taxes and higher prices

This fall, price competition among the manufacturers of the 'pod-mod' devices sold in convenience stores has resulted in starter kits being priced below \$10, and a daily dose for an addicted vaper is \$2.50 to \$5.00. (It is now cheaper to vape all day than to buy one specialty coffee.)

Governments can use taxes and/or minimum pricing laws to make it less affordable for young people to experiment with and become addicted to vaping.

5 Maximum nicotine levels

In Europe, vaping products cannot contain more than 20 mg of nicotine per ml.



This maximum level should apply in Canada. (British Columbia has indicated that it will implement this measure in 2020 if the federal government does not).

6 Mandatory health warnings

There is currently no mandatory health warning on vaping products. None of the manufacturers issues any warning other than regarding addiction. Consistently worded health warnings about addiction and other health effects should be required by regulation.

7 Advertising bans

Vaping product promotions should be placed under the same restrictions as cigarette promotions.



And 3 others that should soon follow.

8 Raise legal age to 21

One-third of U.S. states have raised the tobacco age to 21. Legislation adopted by PEI this November will make it the first Canadian province to do so. This reform will encourage educators and employers to adopt measures which make it easier for young adults to remain smoke-free.

9 Age-restricted stores

Restricting nicotine and tobacco products to adult-only stores (as is currently done with cannabis and specialty tobacco shops) will prevent companies from presenting them as normal consumer goods. It will make it easier to enforce sales to youth laws.

10 Reform wholesale distribution

Tobacco companies enter into contracts with each individual retailer. The terms of these contracts (like minimum orders and discounts for volume sales) put pressure on retailers to increase the amount they sell. Other countries have shown that independent wholesalers can curb this practice.

How the tobacco lawsuits can be used to protect health.

Over the past two decades, each of Canada's provincial governments has filed lawsuits against tobacco companies to recover the costs of treating smoking-related diseases. Injured smokers have also sought justice through class action suits certified in Quebec and British Columbia.

Like other health organizations, we have long supported these efforts. We recognize that they can help achieve justice for this corporate wrongdoing, compensation for the costs to the taxpayers that resulted from this behaviour, can expose the truth after decades of unscrupulous industry behaviour and can set higher standards for corporate actions. Importantly, these lawsuits can also serve to protect future generations from the ravaging harms of tobacco use by accelerating the end of the commercial tobacco trade.

Although some are now more than a decade old, none of the provincial lawsuits has been permitted to go to trial. As of March 2019, all of the lawsuits have been suspended. The tobacco companies faced a major defeat when the Quebec Court of Appeal upheld a \$13 billion ruling against them on March 1 this year. They responded by using federal insolvency law (the Companies' Creditors Arrangement Act, CCAA), convincing Ontario judges to stop the clock on all legal actions against them and to order all of their claimants to participate in settlement discussions. Instead of open trials, resolution of the provincial lawsuits is now being developed in closed-door negotiations.

Provincial governments have identified monetary objectives for their suits but have not articulated any health goals. There is a risk that the pursuit of financial returns could perpetuate or even increase tobacco sales. Canadians will be harmed if governments agree to terms which rely on the tobacco market continuing for decades to come. By contrast, if these suits are resolved in ways which radically alter the business practices and accelerate the end of tobacco sales, Canadians will see improvements in their health and in their economies.

How to resolve the tobacco lawsuits is one of the most important public policy issues of this decade. Yet governments are not applying the standards of transparency and public consultation that are expected and routinely applied

The companies should not come out of this process with the continued capacity to profit from tobacco sales, or the ability to perpetuate public relations, marketing, lobbying or legal activities aimed at maintaining tobacco use.

The lawsuits could and should accelerate reductions in tobacco use, and lead to a phase-out of commercialized combustible tobacco and recreational nicotine.

to much less significant issues. Not one of the provincial governments has yet consulted on how these cases should be resolved, and all of them have agreed to the secretive process initiated by the industry.

The insolvency orders which protect the companies will expire on March 12th 2020. On that date, a hearing will be held in Toronto regarding the future of the CCAA process. This is an opportunity to establish a more health-oriented and transparent process to resolve the suits.

Background

The provincial damage claims vastly exceed the capacity of the companies to pay

On March 1, 2019, the Quebec Court of Appeal upheld a \$13 billion order against the Canadian tobacco companies. Immediately following this ruling, each of the 3 tobacco companies involved filed for protection under Canada's insolvency law, effectively suspending this court ruling and all other legal actions against them.

Provincial government claims against the companies are now estimated to be in excess of \$500 billion. This is the equivalent of 250 years' combined annual profit of the companies in Canada, or 15 years' combined annual profit of their multinational owners across the world.

The provincial lawsuits were filed against both the multinational owners and their Canadian subsidiaries. The ability of the provinces to recover a court-ordered payment from overseas companies will be challenging given the complexities of their diffused corporate structure.

All but 2 provinces have out-sourced their cases to private sector law firms working on a contingency fee basis

Only Quebec and Ontario are using lawyers from their own Justice

departments and directly managing their lawsuits. The other eight provinces are represented by consortia of American and Canadian private law firms working on a contingency fee arrangement.

Under such a contingency fee arrangement, the provinces do not pay for the costs of going to trial, but instead agree to pay the firms with a percentage of any financial outcome. New Brunswick has agreed to pay the lawyers 18 cents on every dollar it receives, and Newfoundland and Labrador has agreed to pay the lawyers 30 cents per dollar. The contracts with the other 6 provinces have not been made public.

The lawyers representing the 8 contingency fee provinces have no incentive to negotiate non-monetary outcomes, and every incentive to maximize financial outcomes.

Recommendations

The provinces should reject any settlement that perpetuates the tobacco industry

Each province should recognize its responsibility to refuse to support an inadequate agreement, even if other parties support it.

No province or party should agree to a settlement which spreads financial compensation over several years or which otherwise distracts from the public health goal of eliminating tobacco use.

The provinces should recognize that any financial settlement will result in further injury to smokers

The companies do not have any money saved to pay even a small proportion of the billions of dollars spent by provincial governments as a result of the industry's wrongdoings. As a result, any payments made by the companies will be done as a result of future sales to smokers and be intrinsically connected with additional

health and economic harm to these individuals.

The Quebec courts have upheld demands for \$100,000 payment to smokers suffering from lung or throat cancer (and a lesser amount for emphysema) if these smokers started using cigarettes during the time that the companies were lying about the health effects.

A resolution which nullifies the class action suits of Quebec and British Columbia smokers will exacerbate the injustice done to them.

In resolving these lawsuits, the provinces should give priority to non-monetary outcomes which promote health

Litigation can result in non-monetary outcomes which are otherwise difficult to achieve.

The two main goals of a litigation outcome should be:

1. Significant and permanent changes to the foundation of the companies and their business practices.
2. A mandatory and enforceable timetable for the rapid phase-out of combustible cigarettes, followed by a phase-out of non-licensed nicotine products.

Physicians for a Smoke-Free Canada maintains a blog with timely information on tobacco trial developments.

Additional non-monetary goals can assist these primary health objectives:

3. An end to industry expenditures on promotion. The CCAA process has confirmed that these expenditures are significant: JTI-Macdonald spends \$2.5 million a week on promotion in Canada, about 20% of its sales revenue, exclusive of excise and sales taxes.
4. An end to industry interference with health policies (i.e. termination of lobbying, public relations, disinformation campaigns, etc.).

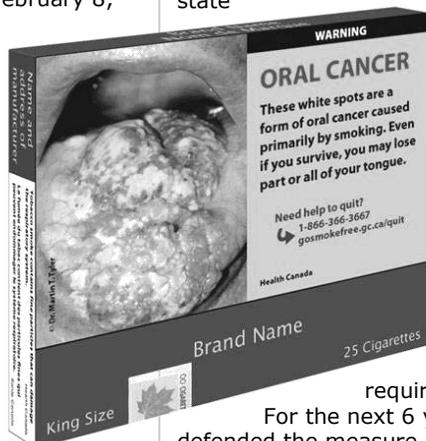
5. Disclosure of the industry documents produced during these lawsuits, as was done in the United States' court cases.
6. Establishment of an independent health trust dedicated to reducing tobacco use, similar to the American Legacy Foundation.

PLAIN PACKAGING IN CANADA: 25+ years in the making.

History records that the idea to put cigarettes in plain packaging originated in Canada. In a June 1986 meeting, the Canadian Medical Association supported the motion of Dr. Gerry Karr to call for this health innovation.

The first parliamentary support for the idea came 8 years later. On February 8, 1994, Prime Minister Jean Chrétien announced a reduction in federal tobacco taxes and promised a review of plain packaging as a way to compensate for the impact this would have.

Four months later, the Standing Committee presented its recommendation that plain or generic packaging is a reasonable component "of a tobacco control agenda and called for the legislative framework to be developed.



It took 25 years before plain packaging regulations came into force in Canada. This November, manufacturers were required to ensure that all shipments were in this format, and retailers have another few months to sell off existing inventory.

Why did it take so long?

Although the federal government officially never revealed its reason for delaying this regulation, it hinted that concerns about infringing international trade obligations were the stumbling block. In addition to justifying the measures under the investor dispute

provisions of NAFTA, there were also concerns about agreements managed by the World Trade Organization.

Ultimately, it was Australia that picked up the mantle. In 2012 it became the first country to require plain packaging.

For the next 6 years, Australia defended the measure in courts and trade

| Country | PP fully in place |
|----------------|--------------------|
| Australia | Dec 1, 2012 |
| France | Jan 1, 2017 |
| United Kingdom | May 2017 |
| New Zealand | June 6, 2018 |
| Norway | July 1, 2018 |
| Ireland | Sept 20, 2018 |
| Saudi Arabia | May 1, 2019 |
| Thailand | Dec 8, 2019 |
| Uruguay | Dec 21, 2019 |
| Slovenia | Jan 1, 2020 |
| Turkey | Jan 5, 2020 |
| Israel | Jan 8, 2020 |
| Canada | Feb 7, 2020 |
| Singapore | July 1, 2020 |
| Belgium | Jan 2, 2021 |
| Hungary | Jan 1 2022 |

tribunals. The World Trade Organization upheld the right of countries to use this measure in August 2018.

This winter, Canada will become the 13th country to have plain packaging fully in place. The Canadian measures are somewhat stronger than in most other countries, as cigarette appearance is also standardized and package shape will be too. By 2021, only slide-and-shell packages will be permitted.

Industry pricing strategies weaken tax impact

Standardizing cigarette prices would reduce smoking.

The laws of economics apply in the tobacco market as they do in others: higher prices reduce purchases, and lower prices increase them.

That's why tobacco taxes are such an effective way to nudge smokers into quitting and to discourage young people from experimenting (or continuing) with tobacco.

Historically, economists found that a 10% increase in the price of cigarettes results in a 4% decrease in consumption and reduced youth uptake. But tobacco companies have developed ways to blunt the power of tax policies.

1) They use political pressure to block tax increases.

The companies threaten that tax increases will increase the black market and that the unregulated market that results will be worse for health (and public finances).

2) They sell some products at little or no profit.

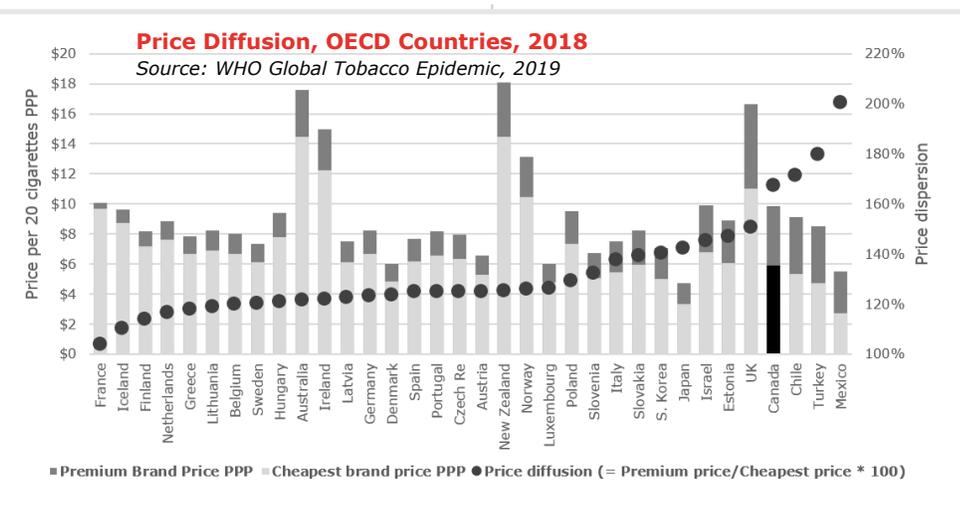
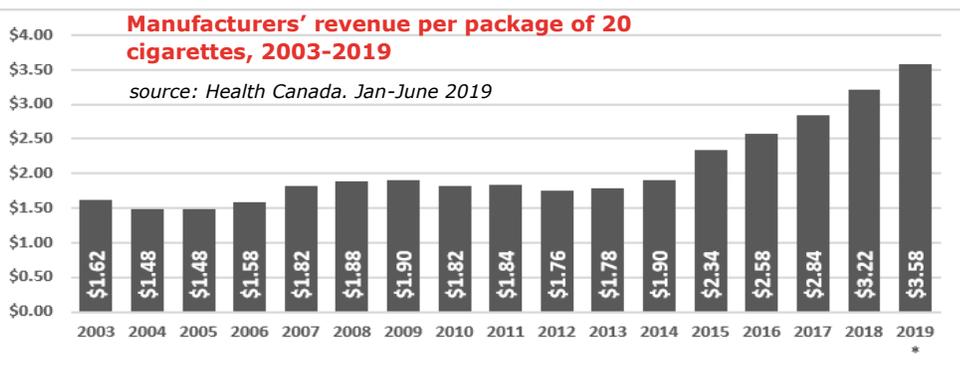
The companies price-segment their brands, making sure there are lower cost brands on the market. This allows a smoker who is faced with a price increase to shift down to a cheaper brand instead of quitting. This practice emerged in Canada in 2003, after lifestyle and image-based marketing were outlawed.

3) They cross-subsidize low profits in some neighbourhoods with higher revenues from others.

The companies price-segment their stores, making sure there are outlets which sell products at lower cost, so that smokers who are price sensitive will be able to find an outlet they can afford. This practice emerged in Canada in 2010, after the federal government changed the *Competition Act* to allow manufacturers to sell to different retailers at different prices.

The problems of price segmentation of brands exists across the world — but is more pronounced in Canada than in other OECD countries. The World Health Organization published data on cigarette pricing this summer:

- Canada had the 4th greatest spread between discount and premium brands.
- Canada had the 10th most affordable cigarettes (using Purchasing Power Parity).
- Canada had the 4th lowest proportion of taxes as a % of cigarette prices (64.4%, as opposed to the WHO recommendation of 75%).



Companies raise prices in ways that minimize impact on sales.

Over the past decade, the tobacco companies have implemented **direct contracts with retailers**. This allows them to charge a different price to each retail outlet, and to negotiate with retailers about the final price that customers will see. Retailers who get these special prices have to promise to keep their own mark-up low.

Using these contracts and the enormous amount of data that this system feeds them, the companies have been able to tinker with local prices in ways which have minimal impact on consumer behaviour. A sudden \$1 increase in the price of a package of cigarettes caused by a large tax increase will prompt many smoker to make a quit attempt. A series of 10 cent increases strategically inserted by the manufacturer may not—especially if the companies make sure there is an outlet where cheaper prices can be found.

In recent years, tobacco companies have been able to increase their prices dramatically and without any expressions of concern for the impact on contraband.

Companies increase revenues while blocking tax increases.

Health Canada data on the aggregate revenues of the companies show that since 2015, tobacco companies have almost doubled the revenue they receive from cigarette sales. The average pack which was wholesaled at \$1.90 in 2014 cost \$3.58 by 2019 — a 88% increase.

Meanwhile, many provinces have been persuaded that they cannot increase taxes without increasing crime. The province of Quebec, for example (where about one-quarter of cigarettes are sold), has not increased its taxes since 2014. Ontario has increased its taxes by 4 cents per cigarette since 2014, compared with the 8 cent per cigarette increase of the companies.

Standardized pricing.

By setting a standardized price for all cigarette brands in all stores, governments can enhance the health benefits of tax policies. They can prevent companies from using pricing as a promotional tool. They can prevent industry profiteering. Ideally, they can ensure that revenues from cigarette sales are directed to reduce smoking.

2019

The year in review

February

Quebec becomes first government to require a warning for any permitted vaping advertisements.



March

Quebec Court of Appeal unanimously upholds class action judgment against tobacco companies and orders them to pay \$13 billion in damages.

Tobacco companies seek protection in Toronto court under the federal insolvency laws (Companies' Creditors Arrangement Act).

European Union adopts a ban on single use plastics. Governments required to develop plans to manage cigarette filters.

April

Federal and provincial **Chief Medical Officers of Health** issue a statement expressing concern about growth in youth vaping.

We cannot stand by and watch a new generation of Canadians become dependent on nicotine or be exposed to products that could have significant negative consequences for their health.

Council of Chief Medical Officers of Health
October 11, 2019

May

Final **plain packaging** regulations are published.

All provincial governments call on Health Canada to put vaping products under similar regulations as tobacco products.

June

Health Canada proposes labelling and packaging regulations for vaping packages. Maximum nicotine level of 66 mg/ml is proposed (higher than is currently on the market).

City of **Beverly Hills** bans sale of tobacco products or e-cigarettes, effective January 2021.

July

U.S. Congress holds hearings to "examine JUUL's role in the youth nicotine epidemic."

August

Northwest Territories amends law to increase controls on vaping products.

September

U.S. health authorities report vaping-related illnesses and deaths. Some state governments respond with emergency bans on flavours. President Trump directs FDA to restrict marketing of flavoured e-cigarettes.

First suspected case of vaping-related respiratory disease reported in Canada. Health Canada and Chief Medical Officers of Health issue an advisory.

Class Action filed in Vancouver against **JUUL** on behalf of young adult vapers.

Tobacco companies provide vape shops with three year funding for a new trade organization, the **Vaping Industry Trade Association (VITA)**

October

Yukon adopts law to raise smoking age to 19 and impose restrictions on vaping and vaping promotions.

Ontario announces that vaping product promotions in convenience stores will be banned effective January 1.

Alberta budget promises a tax on vaping products in 2020.

JUUL suspends sale of most flavoured products in the USA (but not in Canada).

November

Plain packaging comes into effect at the manufacturer level. Retailers have 3 months to sell off remaining inventory.

Saskatchewan adopts legislation to restrict vaping in many public places and to prohibit advertising for vaping products in stores and billboards.

British Columbia announces comprehensive measures to restrict vaping promotions will come into effect in 2020, including higher HST on vaping and higher excise taxes on cigarettes.

Prince Edward Island passes legislation to set the legal minimum age for tobacco at 21 and to take e-cigarettes out of convenience stores.

New Brunswick Throne Speech promises "strategy to combat youth vaping."

Quebec establishes task force to recommend new vaping measures by April.

American Medical Association calls for a ban on all vaping devices that are not approved by the FDA as cessation products.

New York and **California** file suits against JUUL.

In a short number of years, vaping has shifted from being a smoking cessation tool for adults to an addiction trap for youth.

Adrian Dix,
B.C. Minister of Health
November 14 2019

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