



Press Release

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

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

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

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

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

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

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

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

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

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

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

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

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Background

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

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

Second hand smoke

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

Labelling

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

Promotions*

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

Youth access and sales to youth

- Banning vending machines
- Banning candy cigarettes

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

International support

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

Leadership and accountability

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

Background

The Charter of Rights and Banning Tobacco Advertising

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

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

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

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

We say yes.

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

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

- **Between 1985 and 1987**, the Minister of Health maintained that the Charter did not allow tobacco advertising to be banned. A 1987 legal opinion from Justice Canada confirmed that view.[‡]
- **Between 1987 and 1995** (the date of the Supreme Court decision), the government maintained that the Charter allowed a total ban on tobacco advertising
- On **September 21, 1995** the Supreme Court ruled that the government had failed to prove the evidence which supported a total ban. The court did not rule that there

[†] FCTC, Article 13.

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

could not be a total ban on tobacco advertising, only that it had to be justified with evidence. The court was deeply split: four of the nine judges felt that the total ban on advertising was reasonable and justified.

- **In December 1995**, the Minister of Health issued a “Blueprint on Tobacco Control” which stated that the government was of the view that a comprehensive ban was required and justified, and that it could provide the evidence to support it. In the Blueprint, the government announced:

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

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

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

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

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

decision yet in Canada in favour of restricting tobacco promotions. The tobacco industry lawyers complained later that the judge had not addressed whether the Act allowed for advertising.** Instead the judge issued a ringing endorsement of the restrictions in the Tobacco Act. The judge ruled:

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

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

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

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

The Supreme Court of Canada.

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

Not likely.

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

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

By way of a reference.

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

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

By way of legislation.

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

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

Are there other constitutional principles which also suggest that Canada must adopt a comprehensive ban on tobacco advertising to ratify the FCTC?

The “Notwithstanding Clause” is a constitutional principle which would allow Parliament to easily legislate a comprehensive ban on tobacco advertising.

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

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

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

It is our view that a comprehensive ban on tobacco advertising is justified without the use of the notwithstanding clause. The inclusion of this principle in our constitution,

however, ensures that the government can implement a comprehensive ban even if the Supreme Court rules that it is an unjustified infringement of the Charter-protected rights of commercial expression for tobacco companies.

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

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

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

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

Yes and No.

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

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