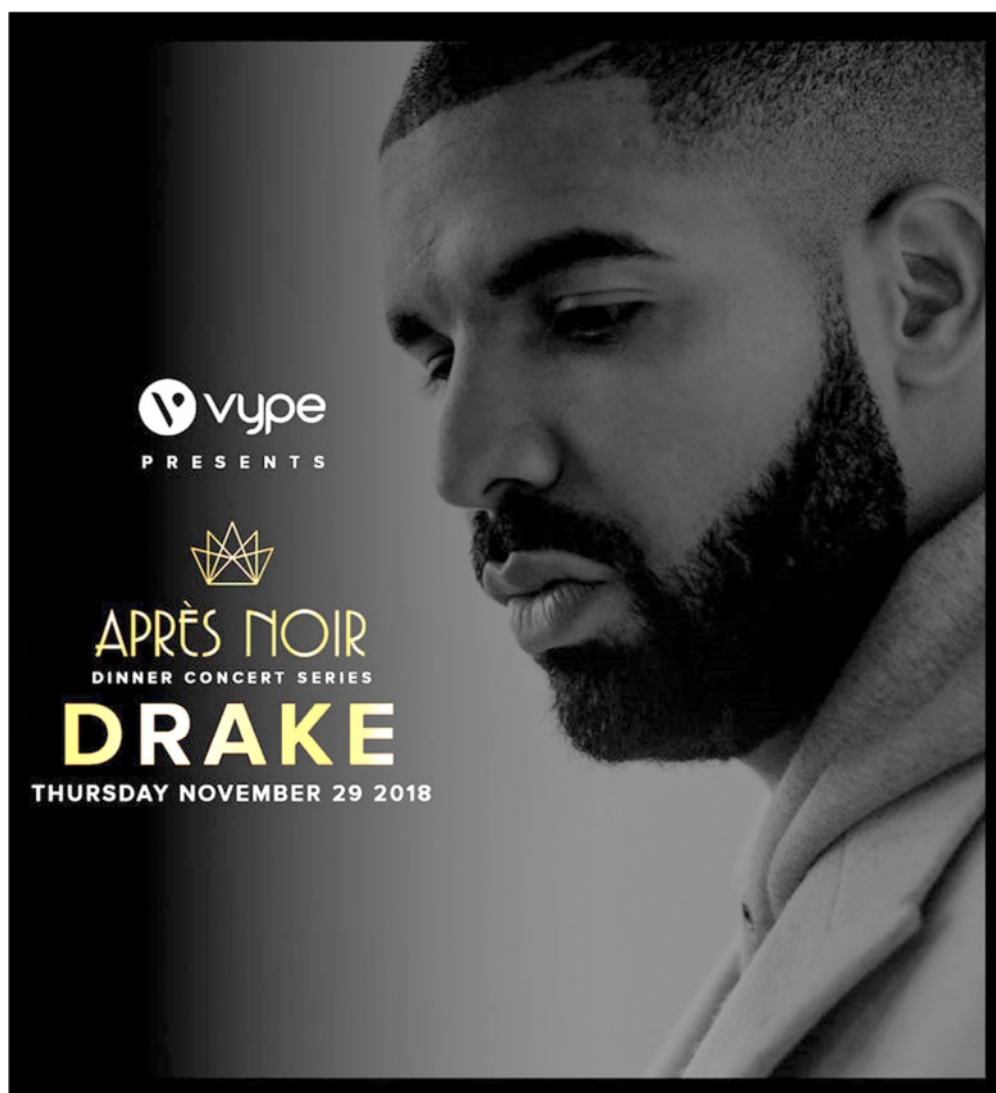


Enforcing the
Tobacco and Vaping Products Act
to protect young people from the current marketing
practices of the vaping industry in Canada.

May 2019



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Executive Summary

The purpose of this document is to assist Health Canada in its compliance and enforcement activities with respect to the *Tobacco and Vaping Products Act*. In particular, the document is intended to provide support for strengthened application of the law in response to recent developments in science and law. The three key developments which should impel a higher standard of enforcement are: a) recent decisions of Canadian courts with respect to wrongful advertising, b) recent scientific publications and c) recent promotional activities of vaping companies.

From our analysis of the law and our review of the current marketing activities, we have identified the following areas where stronger enforcement is justified and required:

Warnings on vaping devices are insufficient.

Health Canada currently imposes no regulatory requirements on manufacturers of vaping products to include specific warnings about the health effects of vaping (including, but not restricted to addiction). Nonetheless, the TVPA maintains the legal duty of manufacturers to provide adequate warnings. The inadequacy of current warnings creates a breach of the TVPA because the absence of warnings creates a misleading promotion.

Even in the absence of regulatory requirements for health warnings, Health Canada should interpret the ban on misleading promotions to imply the need for sufficient manufacturer-designed warnings.

The TVPA bans vaping devices whose design is appealing to young people.

There is strong evidence and widespread agreement that there is rapidly increasing use of vaping products among youth. There is also evidence that the surge in youth vaping is associated with the marketing of pod-based systems. This is especially true for the vaping systems which resemble USB keys that can be recharged using the USB port on a portable computer, all standard gear for youth.

Among these devices are Vype, JUUL, Logic and STLTH. We suggest that there are reasonable grounds to believe that the design of these products results in their having “an appearance, shape or other sensory attribute” which is appealing to young persons. Products which such appeal are banned under 30.41 of the TVPA.

The TVPA bans advertisements which associate vaping with risk and other lifestyles

The TVPA prohibition on lifestyle advertising uses a very broad definition of ‘lifestyle’, and bans ads which associate vaping products with “glamour, recreation, excitement, vitality, risk or daring.”

Health Canada continues to permit a number of ads which associate vaping products with glamour, especially in the social media. We believe most of the vaping ads seen in stores, billboards and other displays are also lifestyle ads because they explicitly or implicitly associate the product with risk.

Health Canada should formally review whether the promotion of vaping is inherently a message intended to evoke emotions about risky health behaviours.

The TVPA bans testimonial promotions.

The TVPA prohibits testimonial advertisements for vaping products (i.e. those which depict a person). Nonetheless, such advertisements for vaping products are widespread in Canada, especially on social

media. Health Canada should adopt effective measures to ensure that social media testimonial advertisements for vaping products are not tolerated.

False and misleading promotion

The TVPA prohibits false promotions, including those which are likely to create an erroneous impression about the health effects of vaping products. Recent judgments on tobacco from Quebec have provided guidance on interpreting false and misleading in the context of tobacco advertising. They have established that communications which lull consumers into a false sense of urgency about the health risks are misleading. The Quebec Court of Appeal recently applied the concept of misleading communications to the use of inadequate warnings (those which fall short of multiple large warnings with graphic elements in simultaneous use).

Health Canada should ensure that all promotions for vaping products under the TVPA do not mislead consumers about the health risks.

Offering consideration in sales promotions

Several cases have been documented of consideration being offered as part of sales promotions for Vype, STLTH and other devices. These and similar cases of consideration being offered need to be further investigated for their compliance with Section 30.6 of the TVPA.

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I. The duty of manufacturers to warn

All manufacturers, including tobacco manufacturers, have a duty to warn consumers of the dangers of the products offered for sale. Tobacco and vaping companies are not absolved of their duty to warn because of federal or provincial laws governing these products. The TVPA establishes this in section 16:

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

Vaping companies do provide warnings about the use of their products. In the case of Vype, there are both a long-form warning and short-form warning. Whichever warning is used, it always appears unobtrusively at the bottom of a web page or at the bottom of an advertisement. Many advertisements for Vype which are accessible via the product's home page (<https://govype.ca/>) bear no warning at all.

Some examples of Vype warnings in use are shown below, together with examples of how the warning is displayed in their marketing and communications:

Short form warning

May be harmful to health. May contain nicotine which is addictive. Only adults 18/19+.

Long form warning

Vype products may be harmful to health and contain nicotine which is addictive. VYPE PRODUCTS ARE NOT SUITABLE FOR USE BY: persons who are not adults; persons who are under the legal age to purchase vaping products; persons who are allergic/sensitive to nicotine; pregnant or breast-feeding women; persons who have been advised to avoid using tobacco or nicotine products for medical reasons; persons with reduced physical, sensory, mental capabilities or lack of experience/knowledge unless they are under supervision or have been given instructions concerning the use of the product by a person responsible for their safety; and persons with an unstable heart condition, severe hypertension or diabetes. Keep Vype products out of reach of children.

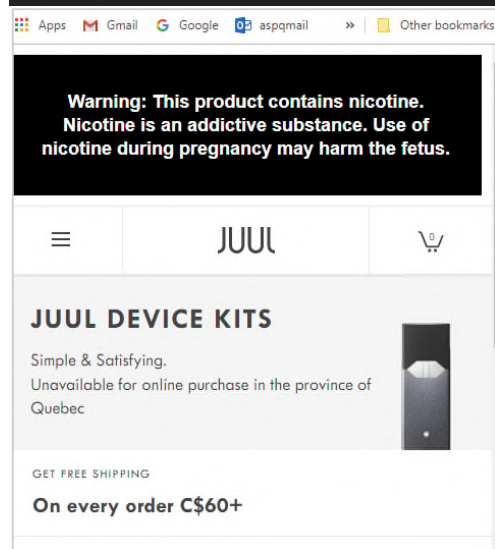
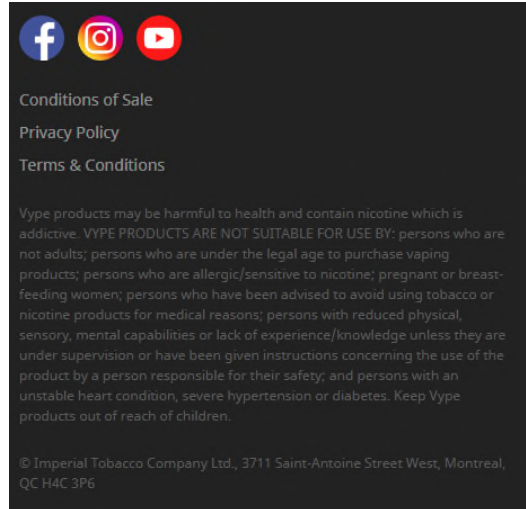
Package warning

This product may be harmful to health and contains nicotine which is addictive.

In the case of JUUL, a small skull-and-crossbones danger signal appears near the bottom of the front of the package. Another warning appears in small print on the bottom of the back of the package. The same warning appears in larger print at the top of the [JUUL web page](#).

Warning: This product contains nicotine. Nicotine is an addictive substance. Use of nicotine during pregnancy may harm the fetus.

The warning for JTI-Macdonald's LOGIC compact is so small as to be illegible.



The duty to warn about health risks

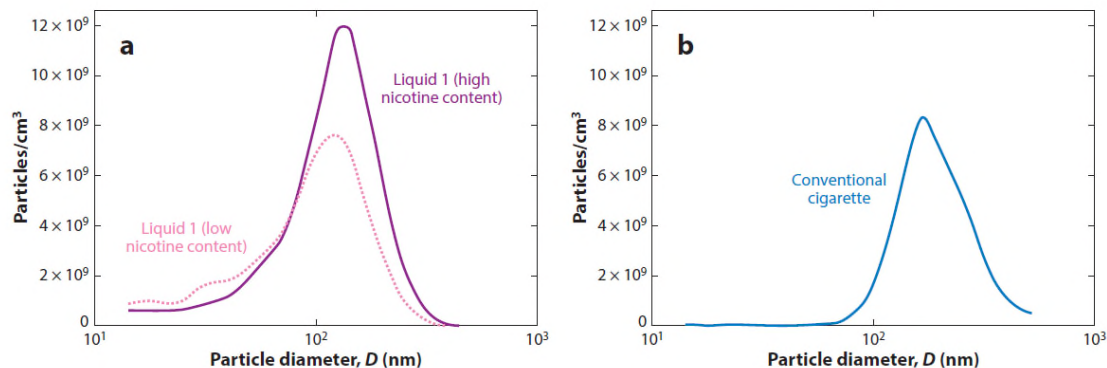
While the long-form warning associated with Vype products offers sound advice, the amount of information missing is sufficient to make the warning a form of misleading promotion, within the guidelines established recently by Canadian Courts. (The absence of any regulatory requirement for warnings is a secondary issue to this concern).

Heart disease and stroke

E-cigarette vapour produces ultrafine particles, as small or smaller than those produced by conventional cigarettes as shown in Figure 1. (1) These ultrafine particles carry nicotine deep into the lungs, triggering inflammatory processes that lead to cardiovascular disease. E-cigarettes damage the vascular endothelium, thereby inhibiting the ability of arteries to dilate in response to increased blood flow. (2,3) E-cigarette aerosol induces adverse changes to blood platelets, including activation, aggregation and adhesion. (4,5) These and other adverse biological changes lead to an increased risk of heart disease and stroke from e-cigarettes. (6,7,8,9) Dual use of both e-cigarettes and conventional cigarettes is the most common form of e-cigarette consumption. Dual use increases the risk of heart disease compared to exclusive use of one product or the other. (6)

To fulfil their duty to warn, vaping products manufacturers should be warning that use of vaping products increases the risk of heart disease and stroke.

Particle number distribution from (a) mainstream aerosol in e-liquid and from (b) conventional cigarette as a function of particle size (diameter, D) (1)



Lung diseases

E-cigarette vapour damages the epithelial cells that line airways, thereby interfering with their normal healthy functioning. (10,11,12) E-cigarette vapour also causes a number of other physiological changes that compromise the normal, healthy functioning of airways and lungs. (4,10,13) Consistent with these observations of biological changes as a result of exposure to e-cigarette aerosol, e-cigarette use also increases the risk of chronic obstructive pulmonary disease and other respiratory diseases. (14,15,16) Like the risk of heart disease, dual use of e-cigarettes and combustible cigarettes further increases the risk of lung disease compared to exclusive use of one product or the other. Decades of observation of the dangers of cigarette use has shown that cardiovascular diseases, related metabolic diseases and lung diseases account for two-thirds of deaths caused by smoking. (17) The weight of available evidence indicates that, compared to combustible cigarette use, using e-cigarettes does not reduce the risk of

cardiovascular diseases or lung diseases. Most e-cigarette users are dual users and for these people use of e-cigarettes increases the risk of cardiovascular and lung diseases.

To fulfil their duty to warn, vaping products manufacturers should be warning that use of vaping products increases the chronic obstructive pulmonary disease and other respiratory diseases. They should also be warning against dual use of e-cigarettes and combustible cigarettes.

Cancer

Cancer accounts for about one-third of smoking-related deaths. (17) E-cigarettes eliminate some carcinogens and greatly reduce the levels of others. However, there are still carcinogens in e-cigarette aerosol that damage DNA. (18) It has also been observed that e-cigarettes deregulate genes associated with cancer. (19) E-cigarettes deliver large amounts of nicotine. While not a carcinogen itself, nicotine speeds growth of cancerous tumours. (20)

While there are as yet no studies demonstrating increased risk of cancer in e-cigarette users, the biological evidence suggests very strongly that such evidence will appear when more people engage in prolonged use of e-cigarettes over many years. Dual users can also be expected to be at greater risk.

The duty to warn about the impact of vaping on smoking cessation

A great many studies over many years have shown in research settings that various preparations of low-dose nicotine, together with the drugs varenicline and bupropion increase the rate of successful smoking cessation. However, when these approved therapeutic drugs move from research settings to the real world their effectiveness declines dramatically. Among heavy smokers, the NRT three-month success rates was 9%, compared with 15% among those who quit unassisted. (21) So it is with e-cigarettes. A recent randomized control trial (RCT) of e-cigarettes as a quitting device found in a highly controlled research setting that 18% of e-cigarette users has successfully quit smoking after one year. (22) In real-world settings, however, the results are quite different. A meta-analysis of 37 real-world studies showed that, overall, users of e-cigarettes were less likely to quit smoking. (23) Some individuals using approved smoking cessation drugs do find them helpful, and some e-cigarette users have also found these devices helpful in quitting smoking. At a population level, however, the results are different. While neither approved therapeutic drugs for smoking cessation nor e-cigarettes are particularly effective in the real world for increasing rates of smoking cessation, at least the therapeutically-approved treatments do no harm. However, in the recent RCT of e-cigarettes, 80% were still using e-cigarettes with addictive levels of nicotine after one year. (22)

To fulfil their duty to warn, vaping products manufacturers should be warning that, for most people, use of vaping products decreases the likelihood of successful smoking cessation and carries substantial risk for prolonged addiction to nicotine.

The duty to warn young people.

Youth are being drawn to e-cigarettes in unacceptably large numbers. Dozens of studies have shown that youth who begin their careers of nicotine addiction on e-cigarette are more likely to go on to become cigarette smokers. One recent well-done study found youth who started on e-cigarettes were four times more likely to go on to become cigarette smokers. (24)

A May 2019 study concluded: "Use of e-cigarettes by US young adults, most of which is not intended to help reduce smoking, is related to more rather than less frequent and intensive cigarette smoking." (25)

Other studies have also shown that youth who vape misperceive the powerfully addictive nature of nicotine and are unaware of the increased risk they face for a lifetime of nicotine addiction and cigarette use. (26,27,28)

To fulfil their duty to warn, vaping products manufacturers should be warning young people away from vaping in ways that will be understood and effective and not undermined by other actions of the manufacturers. Among the risks that should be communicated is the greater likelihood of smoking cigarettes.

Summary of duties to warn

In addition to the warnings contained in the long-form warning on Vype products, manufacturers should also be warning people of the following adverse effects of vaping products:

- Vaping products increase the risk of cardiovascular diseases.
- Vaping products increase the risk of lung diseases.
- Vaping products are not effective smoking cessation devices for most people.
- Dual use of vaping products and combustible cigarettes increases the risk of disease compared to exclusive use of either product.

As discussed below, proper execution of the duty to warn requires that both the “what” and the “how” be addressed so that effective communication can be achieved.

The standards for warnings set by Quebec Courts.

Section 16 of the TVPA sets out a very clear duty to warn, but the entire duty is not precisely defined in any one federal or provincial statute. Rather, its legal meaning is derived from several statutes, plus dozens of common law and civil law precedents set in previous court rulings from many jurisdictions in Canada and elsewhere. In his judgment of 2015, Judge Brian Riordan (29) reviewed this jurisprudence and summarized manufacturers’ duty to warn concisely in eleven points:

[227] Our review of the case law and doctrine applicable in Quebec leads us to the following conclusions as to the scope of a manufacturer's duty to warn in the context of article 1468 and following:

- a. The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product";*
- b. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;*
- c. The manufacturer is presumed to know more about the risks of using its products than is the consumer;*
- d. The consumer relies on the manufacturer for information about safety defects;*
- e. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;*
- f. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform;*
- g. Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform;*

- h. *Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient; the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product;*
- i. *The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility;*
- j. *The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault; and*
- k. *The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.*

In 2019, the five appeal court judges (30) that reviewed Judge Riordan's 2015 judgment approvingly cited this eleven-point summary at paragraph 304 of the appeal court judgment, but not wishing to leave any precedent uncited,¹ nor any pertinent legal text unexamined, reviewed all jurisprudence on duty to warn in the greatest of detail, then finally concluded:

[393] ... But presumption or not, we can immediately say that in this case the Respondents [the class action plaintiffs] met the burden of proving by a preponderance of the evidence the fault of the Respondents [sic] [the tobacco companies], namely the breach of the manufacturer's duty to inform. That ends our discussion of this point.²

1 The judges cited dozens of precedents, including three from 19th century England – *George v. Skivington*, 1869 at paragraph 266, *Thomas v. Quartermaine*, 1887 and *Osborne v. L. & N.W.R.*, 1888, both at paragraph 335.

2 English language citations in the text from this judgment are taken from an unofficial English translation available here (begins at p. 357):
<https://www.insolvencies.deloitte.ca/en-ca/Documents/en-ca-insolv-JTI-RespondingMotionRecordoftheApplicantdated-April1,2019.pdf>.

II. Advertising restrictions for vaping products under the *Tobacco and Vaping Products Act*

The *Tobacco and Vaping Products Act* (TVPA) permits advertising for vaping products except as prohibited. There are several specific prohibitions in Section 30 of the TVPA. This report will invite evaluation of vaping advertisements with respect to six of these prohibitions:

1. Advertising appealing to young persons (defined as persons under 18)
2. Lifestyle advertising (Definition: lifestyle advertising means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.)
3. Testimonials or endorsements
4. Functions and sensory attributes
5. False promotion
6. Sales promotions — offering and providing consideration

The legal text in Section 30 of the TVPA creating these six prohibitions is shown below.

Vaping Products

Advertising appealing to young persons

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

Lifestyle advertising

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

Testimonials or endorsements

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

Depiction of person

(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

Functions and sensory attributes

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

False promotion

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

(b) by using terms, expressions, logos, symbols or illustrations that are prohibited by the regulations; or
(c) by using, in a manner that is contrary to the regulations, prescribed terms, expressions, logos, symbols or illustrations.

Considerations

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

Sales promotions — offering consideration

30.6 (1) No manufacturer or retailer shall, in a place to which young persons have access,
(a) offer to provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or
(b) offer to furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

Sales promotions — providing consideration

(2) No manufacturer or retailer shall, in a place other than a retail establishment where vaping products are ordinarily sold,
(a) provide any consideration, for the purchase of a vaping product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, draw, lottery or contest; or
(b) furnish a vaping product in consideration of the purchase of a product or service or the performance of a service.

A. Vaping products that are appealing to young persons

Unpublished 2018 Canadian data show that from 2017 to 2018, the rate of vaping in the past week among youth aged 16-19 increased by 79%. (31) The same study shows the heavily-promoted brands JUUL and Vype to have gained a following among youth. These products resemble elongated USB sticks. Like USB sticks, youth can plug them into their portable computers for recharging. They are appealing to youth. To further increase their appeal to youth, they are treated with benzoic acid or lactic acid. This lowers the pH, removes the harsh alkaline taste and makes these products easily inhalable. To further increase their appeal to youth, they come in a variety of kid-friendly flavours. While packaged in a kid-friendly way, they are particularly potent. JUUL delivers 59 mg/ml of nicotine while Vype delivers 57 mg/ml. In contrast the e-cigarettes used in the RCT discussed earlier delivered 18 mg/ml of nicotine. 80% of successful quitters in that study were still using their e-cigarettes one year later. (22)

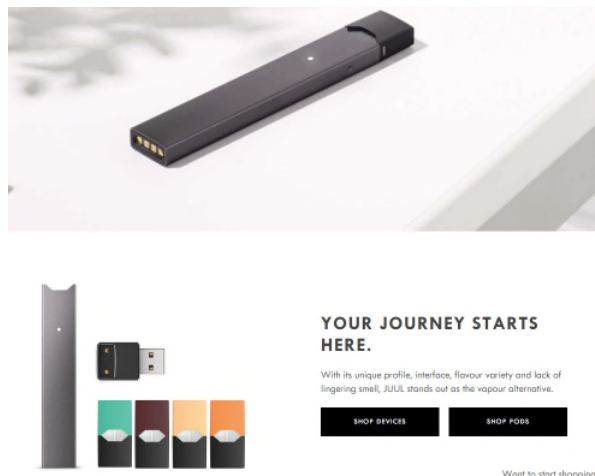
Section 30.1 makes it illegal to advertise a vaping product “if there are reasonable grounds to believe that the advertising could be appealing to young persons.” Section 30.41 repeats the prohibition on advertising and goes further to prohibit the sale of vaping products.

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

New pod-based e-cigarettes that resemble USB memory sticks, rechargeable on a computer, are particularly appealing to youth. Computers and memory sticks are standard gear for most young people. Kid-friendly flavours, low price, small size, powerful punch and the possibility of use by stealth all add to the youth appeal. Virtually all the advertising in Canada for e-cigarettes is for JUUL and Vype, both pod-based products. It was found that JUUL accounted for 68% of the increase in youth vaping between 2017 and 2018. (31) Health Canada acknowledges that these pod-based systems appeal to youth and is currently seeking suggestions on how to reduce “youth access and appeal of vaping products.” (32)



Vype ad from #govypeca, May 3, 2019



JUUL ad from www.juul.ca, May 3, 2019

Recommendation 1:

Since there is substantial evidence and widespread agreement that JUUL and Vype and similar pod-based vaping products appeal to youth, consideration should be given to using Section 30.41 to prohibit the advertising and sale of these products.

B. Lifestyle advertisements for vaping products

The definition of lifestyle advertising provided by section 2 the TVPA is very broad.

Lifestyle advertising means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

The same definition applies to both tobacco products and vaping products. The genesis of this definition was long and arduous. It was subject to exhaustive study in Health Canada and, in 2007, received the approval of all nine judges of the Supreme Court of Canada. The story of the development of this definition is told in **Annex A**.

Lifestyle ads that associating vaping with risk

According to its own warning, Imperial Tobacco states that Vype products are not suitable for use by “persons who have been advised to avoid using tobacco or nicotine products for medical reasons.” Since the entire population has been warned against use of tobacco products for over 50 years, it seems that Imperial Tobacco would consider use of Vype as risky for everyone.

In addition, to the health risks listed in the warning on Vype ads, e-cigarettes have other health risks, as described earlier, and summarized below:

- Vaping nicotine is addictive.
- For the population as a whole, vaping decreases the likelihood of quitting smoking.
- Never smokers who start vaping increase the risks to their health.
- Young people who start vaping are more likely to become cigarette smokers.
- Most vapers also smoke cigarettes and dual use increases risk compared to use of just one nicotine product.
- Vaping is a risk factor for heart and circulatory diseases.
- Vaping is a risk factor for lung diseases.
- Vaping reduces the effectiveness of cancer therapy.
- Vaping causes changes in human cells that can lead to cancer.

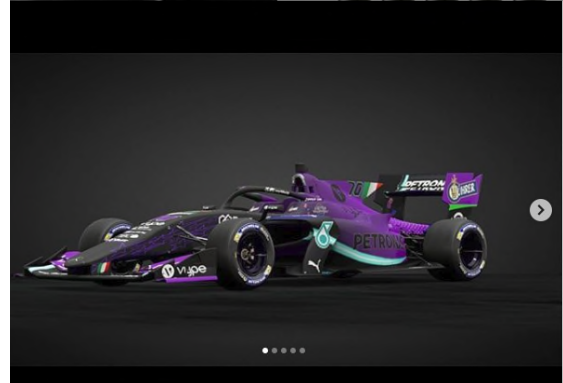


It therefore follows that any advertisement for a vaping product inherently associates the product with the risk of vaping. In some cases (i.e. the “Looks small. Hits Big” advertisement for Vype), the association with the ‘hit’ of drug use is made explicit. In other cases (i.e. the blue/green vype ad), the association with risk is made through the presence of a statement regarding the risks.

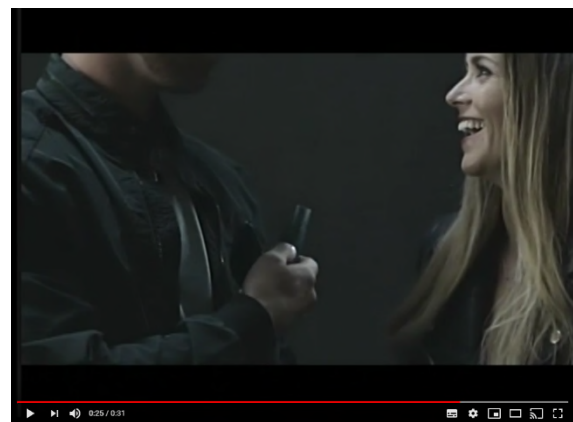
The logical (and legal) consequence is that any advertisement for these products should be interpreted as an ad which meets the definition of lifestyle advertising in the TVPA, and the prohibition on lifestyle advertising in section 30.2 of the TVPA.

Lifestyle ads that associate vaping with glamour, recreation, vitality

Examples and description of lifestyle vaping advertisements were provided to Health Canada in February 2019 (see Annex B). Illustrative of the ongoing presence of lifestyle promotions are the following images, downloaded from Instagram on May 3, 2019.



Other lifestyle promotions produced by Imperial Tobacco remain available on YouTube, even after Health Canada has issued cease and desist letters. According to reports provided to the Senate, on November 1, 2018, Health Canada issued a warning letter to Imperial Tobacco concerning a lifestyle ad for Vype that ran on television in the fall of 2018. (A detailed report on this advertisement's run on television appears at Annex C.). Despite this enforcement action, the ad was shown more than 1000 times after the warning letter was issued. (33) While not overtly sponsored by Imperial Tobacco, the offending ad continues to be available on YouTube.³



Recommendation 2: All advertisements for vaping products should be reviewed to determine if they are lifestyle ads that are not in conformity with Section 30.2 of the Tobacco and Vaping Products Act.

C. Testimonial advertisements for vaping products

Section 30.21 of the TVPA considers any ads with people, characters or animals, real or fictional, as prohibited testimonials. Many, but not all, ads for Vype on social media display ads with people in them. The govype.ca page has a prominent link to the Instagram account. Clicking on the icon will take you to the Instagram sites #govypeca, #govype, #vype or #epen3. There are thousands of ads at these sites with people in them, including the following examples downloaded on May 3, 2019:

³ <https://www.youtube.com/watch?v=s8i755Dgs8A>



One example of these was a promotion produced by VYPE which was brought to the attention of Health Canada in February 2019, but is still available to be seen on the corporate YouTube channel. This video profiles a number of Canadians who describe the reasons that they have tried Vype and their opinions on their experience. That these were paid testimonials is evidenced by text in the video which explains that “in consideration of providing product reviews, individuals were given a gift card.”⁴



“It’s easier more convenient than cigarettes.”



“smells better, tastes better”



“transforming the e-cigarette into something that is similar, but more high tech.”

In many cases, the individuals appearing in these ads are acting as paid influencers. One example was apparent in the fall of 2018, when “Mr. Hugs and Mrs. Kisses” (the performance name for influencers Glenn and Khay) were featured digital performers for Vype.

Recommendation 3: All advertisements for Vype with people in them that are on YouTube and Instagram at #govypeca, #govype, #vype and #epen3 should be reviewed. Those which are not in compliance with Section 30.21 of the Tobacco and Vaping Products Act should be removed.



Mr. Hugs and Mrs. Kisses (<https://xoxloveandfashion.com/>) were frequent digital performers for Vype on Facebook and Instagram in the fall of 2018.

⁴ https://www.youtube.com/watch?v=mKpxGudsj48&has_verified=1

D. False and misleading advertising for vaping products

In Quebec, the tobacco companies were found to be in violation of Section 219 of the Quebec Consumer Protection Act. (29,30) Its prohibition on false and or misleading claims resembles a similar prohibition in the TVPA.

Tobacco and Vaping Products Act

Section 30.42 (1) No person shall promote a vaping product, including by means of the packaging, (a) in a manner that is false, misleading or deceptive with respect to, or that is likely to create an erroneous impression about, the characteristics, health effects or health hazards of the vaping product or its emissions;

Quebec Consumer Protection Act

Section 219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

The judges went further to describe what false and misleading advertising was for tobacco products in the light of their expositions on the duty to warn. Judge Riordan found that most tobacco advertisements “contain a theme and sub-message of elegance, adventure, independence, romance or sport. As well, they use attractive, healthy-looking models and healthy-looking environments.” He further found:

[536] From the viewpoint of a "credulous and inexperienced" consumer, ads such as these would give the general impression that, at the very least, smoking is not harmful to health. In this manner, the Companies failed to fulfil one of the obligations imposed by Title II of the CPA. (29)

The Court of Appeal supported Judge Riordan’s finding and went further. The Court reviewed in detail all the warnings that had been on cigarette packages and found them all to be wanting, with one exception. The voluntary warnings in small print at the bottom of advertisements or on packages came in for particular criticism.

[496] Because the evidence on this point is more than compelling the Appellants failed throughout the period in question to fulfill their duty to inform, which was of a high intensity given the danger presented by cigarettes, a toxic and addictive product. Their failure was twofold, on the one hand, they either did not inform the public or users or only provided insufficient information; on the other hand, they actively disinform the public and users, using various means to attack the credibility of warnings, advice and explanations given and circulated by other governments, medical professionals, antitobacco groups, etc. about the harmful effects of smoking, and by using various misleading advertising stratagems. (30)

*[526] All of this is to say that, at least until 1988, the findings clearly arise from the evidence: the Appellants provide no real information about the dangers of smoking (dangers that they don’t claim that they never knew and that, in fact, they did know), thus failing to fulfill their duty to inform as required by law under s. 1053 C.C.L.C. and, as of 1980, under s. 53 C.P.A. and it would be difficult to justify any other finding given the minimalist and imprecise warning that they placed on their products. As explained above, when dealing with a dangerous product, intended to be ingested into the human body, “it will rarely be sufficient for manufacturers to give general warnings” and “the warnings must be sufficiently detailed to give the customer a full indication of each of the specific dangers arising from the use of the product”. These excerpts from Justice La Forest’s reasons in *Hollis v. Dow Corning Corp.*, already mentioned above, already coincide with Québec law on the subject for the period in question. The Appellants’ voluntary warnings clearly do not meet this requirement. (30)*

The Appeal Court judges also found that “the presence of warnings in small letters at the bottom of these advertisements does not counter the general impression which is received....” (30). In fact, the

only warning system they assessed as not false and misleading were those required by the government beginning in 2000.

[551] A new Tobacco Act was passed in 1997, followed, in 2000, after extensive consultation, by the Tobacco Products Information Regulations, which required even more explicit warnings, with graphic elements and informative messages. Since then, these warnings have become particularly clear and descriptive and can hardly leave anyone in doubt about the toxicity of tobacco and all its effects, as well as ways for consumers to protect themselves against the dangers of smoking: these messages encourage users to quite smoking, and indicate the symptoms to consider, while giving certain advice, etc. (30)

The Court of Appeal judges were very firm that government-ordered warnings do not absolve the tobacco companies of their duty to warn.

[553] To fulfill the duty to inform under common law (and, as of 1980, the C.P.A.) it was not sufficient for the Appellants – and this is recognized in subsection 9(3) of the 1988 Act, discussed earlier – to comply with the legislative and regulatory requirements. (30)

As we have seen vaping products are hazardous and have no redeeming benefits for most people. It is therefore not unreasonable to transpose the Court of Appeal findings on tobacco products onto vaping products. In order to fulfil their duty to warn, the vaping companies would have to provide warnings that fulfilled their duty to warn, were not false and misleading and effectively warned of many risks, similar to those used on tobacco beginning in the year 2000. In other words, there would have to be multiple warnings in simultaneous use, containing graphic elements, and occupying 50% or more of the packages and advertisements. The warnings would have to be clear, explicit, accurate and easily understood by a “credulous and inexperienced consumer.”

By this criterion, derived from judge-made law, all advertisements for vaping products currently posted may well be false and misleading. If they contain health warnings at all, the warnings are in small print, usually at the bottom of the advertisement, the very kind of warning severely criticized as inadequate by the Quebec Court of Appeal.

Such advertisements with small warnings appear in multiple settings and channels - including public places, points of purchase, on Facebook, Instagram and YouTube, as shown below.



Granville Transit Station, Vancouver, April, 2019



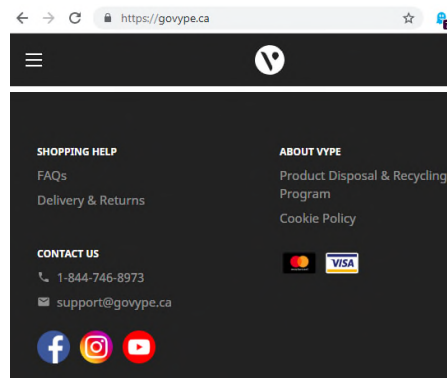
Vype ad from #govypeca, May 3, 2019



Ad in Circle K convenience store, Richmond Road, Ottawa, January 2019.

The extent of this problem is reflected in the number of ads on social media that can be reached by clicking the social media links on the Vype home page, govype.ca. The general impression of the health risks that would be taken by an ordinary consumer from any of these social media pages is one which would greatly understate the risks.

In addition to advertisements and social media, advertisements which create an erroneous impression about the health risks can be found in brand activations, direct mail and events.



Vype advertisements accessible through govype.ca on the internet and social media May 3, 2019

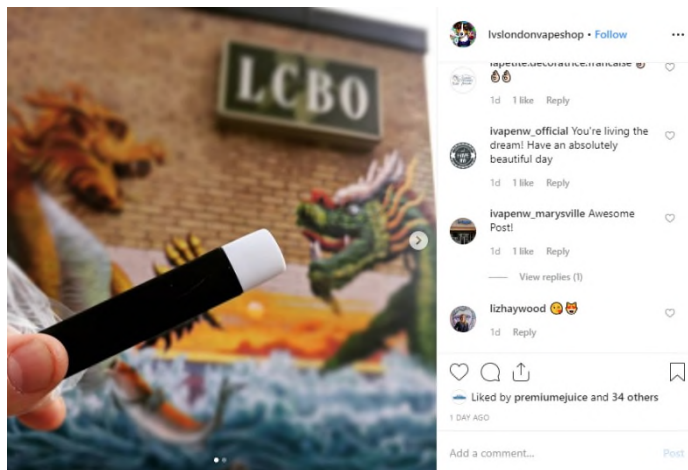
Location	URL or #	Number of ads
Vype home page	https://govype.ca	5
YouTube	https://www.youtube.com/user/GoVype	6
Facebook	https://www.facebook.com/pg/VypeCanada/photos/?ref=page_internal	52
Instagram	https://www.instagram.com/govypeca/	
	#govypeca	123
	#vype	8,891
	#govype	2,222
	#ePen3	2,588
Total		13,887

Recommendation 4: All advertisements and promotions for Vype, JUUL and other vaping products should be re-assessed in the light of recent judgments on tobacco from Quebec with respect to the courts' findings on manufacturers' duty to warn and the related requirements for advertising not to be false and misleading. Non-compliance of these advertisements with Section 30.42 of the Tobacco and Vaping Products Act should be assessed.

E. Consideration

Instances of vaping companies offering product to influencers or customers have been observed. Such offerings are not consistent with section 30.6 of the TVPA.

One instance was reported at a meeting between Health Canada officials and NGO representatives on April 17, 2019 when an NGO representative related that a young man (over 18, living in Quebec) of her acquaintance had been named a “distributor” by STLTH. As a “distributor,” he would receive free STLTH vaping products in consideration for him posting favourable images and information about STLTH on social media. An example of such a favourable promotion is one suggesting a vaping dragon, shown below. This was found among 1749 promotional pictures on the STLTH Instagram page (#stlth).



In addition, the STLTH website (<https://stlthvape.com>) advertises that services can be exchanged for product in other ways: “Free shipping on orders over \$25. Get a free STLTH t-shirt with a \$100+ order.” This offer should be further investigated for possible non-conformity with Sections 30.6(1) or 30.6(2), or both.

Recommendation 5: Use of digital performers on social media by Vype and other vaping product manufacturers should also be investigated. The practices of offering gifts in exchange for purchase and of appointing “brand ambassadors” or “distributors” by Vype, STLTH and possibly other vaping product manufacturers who are then expected to promote the vaping product in public places or on social media should be further investigated to ensure compliance with Sections 30.6 and 30.21 of the TVPA.

F. One promotion – multiple infractions. The case of the Vype give-away truck.

On April 21, 2019, with some publicity, Health Canada inspectors shut down a “Vype Tunnel” promotional display at Yonge and Dundas in Toronto for violations on Sections 30.2 and 30.21. News reports said this was because it was deemed a lifestyle promotion (30.2) and the young ladies in silver suits were deemed to be offering testimonials (30.21)

Nonetheless, on the following Thursday (April 24, 2019), a Vype promotion in a cube van was operating with impunity. Passersby were invited to step inside the truck. After showing identification to prove they were over 18, they were invited to enter their name address and email address into a data base, in return for which they would receive a delivery of a free Vype starter kit. The young men operating the promotion identified themselves as “brand ambassadors” and said the truck would be moving around Toronto for the following weeks.

This promotion contravenes the TVPA in a number of ways:

A personal account of the experience of first seeing and then participating in the promotion offered inside the Vype truck has been published on the blog maintained by Physicians for a Smoke-Free Canada. (34)



“Vype Tunnel” at Yonge and Dundas in Toronto shut down by Health Canada inspectors on April 21, 2019



Vype truck parked on Queen St. near Spadina, April 25, 2019

Inside the Vype truck. The two young men facing the camera are “Vype brand ambassadors” signing up people who would like to receive a free Vype starter kit by mail.



Table 2: Areas of non-conformity with the TVPA exhibited by the Toronto Vype truck		
Section	Description	Reasons for non-conformity
30.1	Could be appealing to young persons	Even though young people were carefully screened out from receiving free sample, the display itself could be appealing to young people many of whom walk by on Queen near Spadina.
30.2	Lifestyle advertising	Like the installation at Yonge and Dundas, the Vype truck meets the definition of lifestyle advertising. In this case, the brand ambassadors and the atmosphere they created met the dictionary definition of glamour “creating an attractive or exciting quality that makes certain people or things seem appealing.”)
30.21	Testimonials	Through their outreach to, and conversations and personal interactions with customers, the brand ambassadors offered implicit testimonials for vype products.
30.41	Functions or sensory attributes that could be appealing to young people	There is a great deal of evidence and widespread agreement that pod-based devices like Vype are appealing to young people.
30.42	False or misleading advertising	Except for the small, easy to miss health warning near the bottom of the side and back panels of the truck, the general impression given by the whole promotion was one of youth, fun and conviviality. The “brand ambassadors” made no mention of adverse health effects.
30.6 (1) (b)	Furnishing a vaping product in consideration of the performance of a service.	Vype customers received the promise of a Vype starter kit to be furnished a few days later in exchange for their contact information to be included in a data base.

Recommendation 6: The Vype trucks in Toronto and Vancouver should be investigated further for non-conformity with Section 30.6 and several other sections of the TVPA.

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Annex A

What is lifestyle advertising and how it came to be prohibited for tobacco and vaping products

Physicians for a Smoke-Free Canada

February 2019

The Tobacco Products Control Act

It was November 2, 1986. There had been back and forth correspondence between the tobacco industry and the Health Minister for most of the year. Health Minister Jake Epp was seeking major revisions to the tobacco industry's voluntary advertising and promotion code. The tobacco industry was slow to respond and offered only minor changes that would do little to protect public health. By November 2, Jake Epp had had enough of tobacco industry foot-dragging. He fired off a telex to the head of Canadian Tobacco Manufacturers' Council declining their request for a deadline extension to submit more proposals for revisions to their tobacco advertising voluntary code. It was time for him, the Health Minister, to shift gears and discuss other control options with his Cabinet colleagues.¹ The tobacco industry was sent into apoplexy. Their lobbying machine went into overdrive. On November 28, 1986, they put a proposal to the Minister, touting the virtues of continuing the past practice of self-regulation of tobacco advertising. They proposed a new regime of voluntary advertising restrictions that would be much tougher than the old one, or so they claimed. Among the new proposed restrictions was an undertaking to ban tobacco advertisements with people in them.² Jake Epp was having none of it. For him it was all too little and too late. He replied indicating he would still be pursuing discussions with his Cabinet colleagues.³

Those discussions in early 1987 led to a rejection of the tobacco industry proposals and the introduction of Bill C-51, the proposed *Tobacco Products Control Act*. After a long and dramatic parliamentary debate the *Tobacco Products Control Act* entered into force at the end of 1988.⁴ It banned most forms of tobacco advertising. There were some exceptions and some provisions that would only come into force at a later date. The exceptions, however, concerned the placement of advertisement, not their content.

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- 1 Letter dated October 29, 1986 from N.J. McDonald to the Honourable Jake Epp. Letter dated November 2, 1986 from Jake Epp to Norman J. McDonald. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/qtbx0149>.
 - 2 Letter from N.J. McDonald, CTMC to the Honourable Jake Epp. 1986 November 28. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/gqmv0223>.
 - 3 Letter from Jake Epp J, Minister of Health & Welfare Canada to N.J. McDonald, CTMC Re: Proposals to restrict tobacco advertising practices. 1986 December 22. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/xmdb0223>
 - 4 Parliament of Canada. Tobacco Products Control Act. 1988. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/ntdh0223>.

The ink was barely dry on the new *Tobacco Products Control Act* when the tobacco industry launched a legal challenge to it in the summer of 1988.⁵ They claimed it improperly infringed on provincial power. They claimed the TPCA violated their freedom of expression under the new *Charter of Rights and Freedoms*. In 1988 the Charter was only six years old and jurisprudence had not yet clearly defined the limits to the freedom of speech. Much more clarity would be established by the Supreme Court ruling on the TPCA in 1995.

In the early days of the Charter, the Supreme court had developed a four-part test, the Oakes Test, to help them determine whether a limit on free speech was reasonable and therefore a Charter-compliant law or regulation. Briefly the Oakes test, established in 1986, required that the contested limit on the freedom of expression had to pass these four tests:

- Importance
- Proportionality
- Rational connection
- Minimal impairment

During the trial on the TPCA, tobacco industry lawyers seized particularly on the minimal impairment requirement and argued forcefully that the TPCA, with its broad ban on tobacco advertising, failed to meet this test. They argued:

“For example, legislation could prohibit ‘lifestyle advertising’ or prohibit people from appearing in advertisements or even limit advertising to pictures of cigarette packages.”⁶

The ban on people in ads had already been rejected by Jake Epp in 1986.³ The tobacco industry call for a ban on lifestyle advertising would come back to haunt them.

The TPCA was ruled invalid by the Quebec Superior Court in 1991. That decision was reversed on appeal by the Quebec Court of Appeal. The law was finally struck down by a split decision of the Supreme Court of Canada in 1995. In the view of 5 of 9 Supreme Court judges, the TPCA had not met the test of minimal impairment. Writing for the majority, Madam Justice McLachlin stated:

“The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising;...”⁷

In other words, the Supreme Court accepted the tobacco industry argument that a prohibition on lifestyle advertising would better meet the minimal impairment test.

5 Applicant RJR-MacDonald Inc's Motion for Declaratory Judgment (Art. 453 C.C.P.). 1988 September 01. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/sxgx0149>.

6 Imperial Tobacco Canada Limited. Argument and Annexes I – VII Petitioner Imperial Tobacco Limited. 1990. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. Page 48781.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/qrbx0149>.

7 Supreme Court of Canada. RJR-MacDonald Inc. v. Canada (Attorney General), 1995 3 S.C.R. 199. 1995 September 21. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/hhgb0223>.

The interregnum: 1995 to 1997

There followed an interregnum from 1995 to 1997 when no law or regulation applied to tobacco products. However, the tobacco industry followed a voluntary code during this period that did not allow “lifestyle” advertising. However, their definition of lifestyle advertising was a narrow one that prohibited only “any advertising which features or depicts any people in whole or in part.”⁸

During that time, Health Canada officials, to their credit, did not simply moan about the loss of legislative control of tobacco products, but took seriously the 1995 Supreme Court judgment and viewed it as instruction for how a new law to control tobacco could be constructed that would be in full compliance with the Charter of Rights and Freedoms. They conducted a thorough and exhaustive analysis of the 1995 Supreme Court judgment.⁷ This analysis was used to guide the drafting of the replacement law, the *Tobacco Act*, that would come into force in 1997.⁹

This 1997 *Policy Analysis of Tobacco Product Promotional Activity Restrictions* took note of the guidance in the 1995 Supreme Court decision and concluded:

“To ensure that whatever advertising restrictions are proposed properly respect the right to freedom of expression protected by the *Charter*, tobacco product control policies will have to distinguish among ‘information’, ‘brand preference’ and ‘lifestyle’ elements of advertising.”

However, the Supreme Court did not provide complete guidance on just what lifestyle advertising was. The *Policy Analysis* thoroughly reviewed tobacco industry advertising standards and advertising practices in general. As a result of this review, this conclusion was formed:

“In their Voluntary Packaging and Advertising Code, the tobacco manufacturers define “lifestyle” as “the depiction of people in advertising”. Nonetheless, promotions derived from ‘lifestyle’ marketing analyses need not be keyed to explicit depictions of people or even exclusively to imagery. Objects, images, suggestive or persuasive slogans and even sounds or colours may have or may convey a ‘lifestyle’ implication relating to the appeal, desires or interests of identifiable social groupings or of how one might feel, be perceived or wish to present oneself in everyday life by using the advertised product. Such elements are associated with a product in order to ‘position’ that product in a way that is expected to promote its purchase by consumers in the targeted segments.”¹⁰

The Tobacco Act

Once again, the tobacco industry proposal of a narrowly-conceived ban on ads with people in them was rejected in favour of the broader view of lifestyle advertising in general use in the marketing profession.

8 Tobacco Industry Voluntary Packaging and Advertising Code. December 19, 1995.
Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/htlx0149>.

9 Parliament of Canada. Tobacco Act. S.C. 1997, c. 13.
Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/ytdh0223>.

10 Health Canada. *Policy Analysis of Tobacco Product Promotional Activity Restrictions - Mars 1997*
Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection.
<https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/yznx0149>

This generally accepted view of lifestyle advertising was put into words in the definition of lifestyle advertising that first appeared in the 1997 *Tobacco Act*. It has been in continuous use since then and survives to this day in the *Tobacco and Vaping Products Act*. Initially, lifestyle advertising was banned for tobacco products. The TVPA extends that ban to a ban on lifestyle advertising of both tobacco products and vaping products. The definition is:

“Lifestyle advertising means advertising that associates a product with or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring. (publicité de style de vie)”

But the tobacco industry was not done yet. Despite the fact that they had in 1990 proposed a ban on lifestyle advertising as an acceptable alternative to a total ad ban, and despite the fact the Supreme Court agreed with them in 1995, and despite the fact that their wished-for ban on lifestyle advertising was written into law in 1997, they once again challenged the new *Tobacco Act* as violating their constitutional freedom of expression. Central to their claim was the view that the definition of lifestyle advertising was so broad as to be tantamount to a total ban on advertising, an unreasonable restriction on their freedom of expression and therefore contrary to the *Charter*. In Imperial Tobacco’s Statement of Claim of 2001, it was stated:

“Virtually all tobacco product advertising risks being caught by the Tobacco Act’s definition of lifestyle advertising, a definition so vague and broad as to result in the prohibition extending far beyond what the legislative objective, set out in section 4 of the Tobacco Act, might on any reasonable view require.”¹¹

The tobacco industry should have been more careful in what it wished for. This time the ban on lifestyle advertising, as defined in the *Tobacco Act*, was upheld by the trial judge¹², two of the three Quebec Court of Appeal judges who examined it,¹³ and all nine Supreme Court judges,¹⁴ The trial judge, André Denis, mentioned in his judgment that it was the tobacco companies themselves, in contesting the *Tobacco Products Control Act*, who had proposed a ban on lifestyle advertising as an acceptable alternative to a total ban on advertising.

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- 11 Ogilvy Renault for Imperial Tobacco. 4th amended Declaration. 2001 February 08. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/ltnx0149>.
 - 12 Cour supérieure du Québec. André Denis. Numéros 500-05-031299-975, 500-05-031306-978, 500-05-031332-974. Le 13 décembre 2002.
http://citoyens.soquij.qc.ca/php/decision.php?ID=E9D29D587926CB66F1D7BC9C4C0157FB&captchaToken=03AF6jDqVv_p0Rbpj5XfaumZLWWejlcAtumxzprkNwJxPFUepuNkcQknVG0C_L6usQNhqeJ9v7v7cZ0Msyp5-K129XOw3Og4l4q8ckSXCaPPrkxzSWwoa1gLqSGRon9_gttPlkz45VcZwzoS_jLRe3ypBf48cfigi0-I9T2AtVNA_I29ow3C7_r66BW6WL_WVgT1AMpFcFink7Aa7uTdIL2XL77hUHC2pYLY29MCQt4ntoXeE3FMEpyhvdoeSepgd-e1cQ0jx1Cgtdi4LAfutkO7hzQyjiDPvyWrVFAF79ivNmuyzM1fC4mLMFEQUgix4Y6JKG9bMXk0K0Bm6noZ0EdbyYvR_Z96fQ1sA
 - 13 Cour d’appel du Québec. Marc Beauregard, André Brassard, Pierrette Rayle. Numéro 500-09-013033-030. Le 22 août 2005.
http://citoyens.soquij.qc.ca/php/decision.php?ID=95F9F1B2B174486638005717DBF33006&captchaToken=03AF6jDqVC_9F53YgCmJb9CVT81IA7loAVIm8zH1oiRM5v7WDdQAXgh0TvVlfhhCYc-ip6VPy1AynIVzYr-Hm1uKVFV022gVDC2ChsQFm7U0UyhPOoLGvvp_JPa9OS42T2FB-BYspm0MHWyBck3SglAeaBI9plBOtkv6H-fxcaZW38WlscYhLr4MuhpX88pKGT7YSdObgH_uTI1igBjHaOYGPfcRfuM5j6irgmrHtg1qVmy3IOmfYA1mLE0VVfnqA4T7n_a7ULrP-8VF3EGZVDS0obtcgmKWrkBFX-qNJ-nH1EU5MFRltxng9Hiyc5y7oJYXAxUEvU4MDV7HZV2dyPpU4Q_ZIGBeW4Q
 - 14 Canada (Attorney General) v. JTI-MacDonald Corp. 2007 SCC30. June 28, 2007.
<https://scc-csc.lexum.com/scc-csc/scc-csc/en/2369/1/document.do>

“[365] First, we should bear in mind that it was the tobacco companies themselves who suggested to the Court of Appeal and the Supreme Court that ‘lifestyle’ advertising and advertising ‘directed at children’ should be prohibited.”¹⁵

In 2007, Chief Justice Beverly McLachlin, writing for all nine Supreme Court judges, upheld the ban on lifestyle advertising.

“The ban on “lifestyle advertising” in s. 22(3), properly interpreted, also constitutes a justified limit on free expression. The first part of the definition of lifestyle advertising in s. 22(4), which, combined with s. 22(3), removes advertising that associates a product with a way of life from the broad ambit of s. 22(2), is unproblematic. As for the phrase “or evokes a positive or negative emotion about or image of, a way of life”, it is aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. However, this phrase should be interpreted in a way that leaves room for true information and brand-preference advertising, which s. 22(2) permits. Furthermore, the words “such as one that includes glamour, recreation, excitement, vitality, risk or daring” are to be read as illustrations of lifestyle advertising. As with the other challenged provisions, the pressing and substantial nature of Parliament’s objective is beyond challenge. The sophistication and subtlety of lifestyle advertising are reflected in the means Parliament has chosen to deal with it, and there is a rational connection between this provision and Parliament’s objective. Minimal impairment is also established. True information and brand-preference advertising continues to be permitted under s. 22(2). Such advertising crosses the line when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their tobacco use. Lastly, the proportionality of the effects is clear. The suppressed expression is of low value compared with the significant benefits in lower rates of consumption and addiction that the ban may yield.”¹⁶

Having claimed in 2001 that all advertising would be lifestyle advertising¹¹ and lost, one might have expected the tobacco industry to be consistent and refrain from tobacco advertising. Well, not quite. From 2007 to 2009, they placed advertisements in daily newspapers and entertainment weeklies, taking advantage of permission for advertising in publications with 85% or more adult readership. Here is an example of one such advertisement that appeared in the *Montreal Mirror* in December, 2007.

15 Denis, Andre. Judgment. 2002 December 13. Truth Tobacco Industry Documents. Canadian Tobacco Industry Collection. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/rlvj0149>

16 Canada (Attorney General) v. JTI-Macdonald. 2007 SCC 30. June 28, 2007. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2369/index.do?q=tobacco>.

While one may argue that this advertisement has some lifestyle elements, there is no evidence that any enforcement action was taken against this or similar ads that appeared in publications from 2007 to 2009.

Nevertheless, there was dissatisfaction with the operation of the permission to advertise in publications with 85% or more adult readership. As a result, in making a number of amendments to the *Tobacco Act* in 2009, the government removed the permission to advertise in publications with 85% or more adult readership.¹⁷ That 2009 amendment to the *Tobacco Act* went unchallenged by the tobacco industry.

Since then, the tobacco industry has lost enthusiasm for advertising. Instead, they have turned their attention to pricing, retailing and packaging as their marketing tools of choice. Today, there are few visible tobacco advertisements in any medium. Some advertisements, including lifestyle advertisement currently appear in side-slide packages. No apparent enforcement action has been taken against these in-package advertisements. However, their days may be numbered. New regulations that would preclude any kind of advertising on packages are expected soon. The new regulations would require plain and standardized appearance of packages and tobacco products.¹⁸



Concluding remarks

In 2018 we entered a new era. Lifestyle advertising for vaping products is prohibited in all media, but all other kinds of vaping products advertising are allowed everywhere. The definition of lifestyle advertising has had a long and difficult gestation and birth. It evolved over three decades, developed through two laws and major legal challenges to both of them. It received a strong endorsement in a unanimous decision of the Supreme Court in 2007. Now we have a law that is charter-compliant that has also virtually eliminated tobacco advertising. This is due in part to the broad reach of the ban on lifestyle advertising, as defined in the law.

Exactly the same definition of lifestyle advertising that applies to tobacco products also applies to vaping products and in the same law. To guarantee that the ban on lifestyle advertising continues to be an effective curb on the advertising of both tobacco and vaping products, close vigilance will be required to ensure full compliance with the ban on lifestyle advertising. This is especially so for vaping products since non-lifestyle advertising for them is allowed in all media. The risk that lifestyle advertising will creep in to vaping products advertising is high.

17 Cracking Down on Tobacco Marketing Aimed at Youth Act. S.C. 2009, c. 27. Assented to 2009-10-08. Canlii. <https://www.canlii.org/en/ca/laws/astat/sc-2009-c-27/latest/sc-2009-c-27.html?searchUrlHash=AAAAAQANQ3JhY2tpbmMcRG93bgAAAAAB&resultIndex=1>

18 Canada Gazette, Part I, Volume 152, Number 25: Tobacco Products Regulations (Plain and Standardized Appearance). June 23, 2018. <http://gazetteducanada.gc.ca/rp-pr/p1/2018/2018-06-23/html/reg9-eng.html>.

Interpreting Vype ads in the context of the legislative restrictions on promotions for vaping products

Physicians for a Smoke-Free Canada

February 2019

What is lifestyle advertising?

The Tobacco and Vaping Products Act defines lifestyle advertising as:

Lifestyle advertising means advertising that associates a product with or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring. (publicité de style de vie)

Although other kinds of advertising are allowed for vaping products in all venues, lifestyle advertising is allowed in none. This has been the case since May 23, 2018 when the TVPA received Royal Assent.

The definition of lifestyle advertising that is applied to vaping advertising is the same as the one that has been applied to bans on tobacco product advertising since 1997. Unlike vaping products, the TVPA imposes a general prohibition on advertising tobacco products. The only advertising for tobacco products permitted under the TVPA is “brand preference” and “information advertising”. These are restricted to specific venues, i.e. publications sent to named adults and places young people are not allowed to enter.

The ban on lifestyle advertising, so defined, was upheld as constitution and Charter of Rights compliant law by a unanimous 9-0 decision of the Supreme Court in 2007. For further information on this decision and the meaning given by the courts to such advertising, see *What is lifestyle advertising and how it came to be prohibited for tobacco and vaping products*.

Manufacturers are not the only ones who are prohibited from disseminating lifestyle promotions for vaping products. Broadcasters, owners of digital platforms and other persons are forbidden from publishing, broadcasting or otherwise disseminating prohibited promotions. (s. 31(1)). The exception to this rule are imported publication and retransmission of radio or television broadcasts. No exceptions are made for electronic communications.

Other restrictions on vaping advertisements include a prohibition on promotions “if there are reasonable grounds to believe that the advertising could be appealing to young persons” (s. 30.1). Advertising is also not allowed “through a testimonial or an endorsement, however displayed or communicated, including by means of the packaging” (s. 30.21(1) and (2)). Nor may anyone promote a vaping product in ways which suggest health benefits or which compare health effects with tobacco products (s. 30.43(1) and (2)).

Imperial Tobacco's advertisements for Vype-branded vaping products

Beginning in May 2018, Imperial Tobacco Canada Ltd. began marketing vaping devices under the Vype brand name. Marketing efforts for these products included:

- establishing a route to market through the convenience channel and revising contracts with retailers to establish pricing and sales conditions.
- providing point of sale displays, storage containers, signage and other promotional material to retailers (in provinces where such displays were legal)
- launching a digital marketing presence through branded Facebook, Instagram, YouTube and other accounts.
- Displaying, promoting and sampling products at events.
- Launching a television advertising campaign (from early September to mid-November, 2018).

Physicians for a Smoke-Free Canada registered a complaint with Health Canada in October 2018 about the television, convenience store and Facebook campaigns. For reasons not yet made public, Imperial Tobacco subsequently ceased advertising on television, scaled back its retail advertising and withdrew many posts from its Facebook page.¹

Lifestyle element of current Vype ads

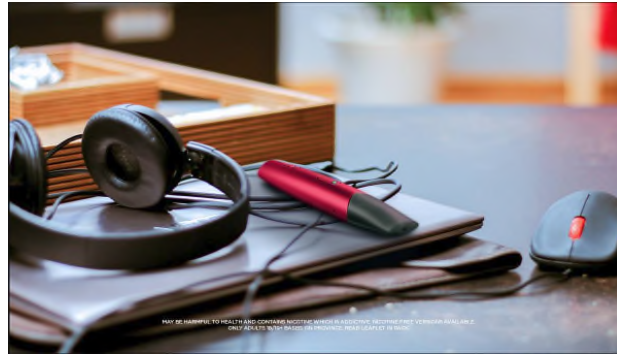
Vype advertisements continue to be delivered to Canadians through digital media, including Facebook, Instagram and YouTube. The legality of these ads has not been tested, but many would appear, on a prima facie basis, to associate the Vype product with ways of life that include glamour, recreation, excitement or vitality. Some very overtly appeal to drug effects, evoking and encouraging risk and daring. The following pictures of Vype ads were taken in January 2019.

¹ Many of these now discontinued advertisements are held in an archive by Physicians for a Smoke-Free Canada. They are available on request.

Advertisements that associate Vype with recreation



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1062234143957454/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1036991413148394/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/941192902728246/?type=3&theater>



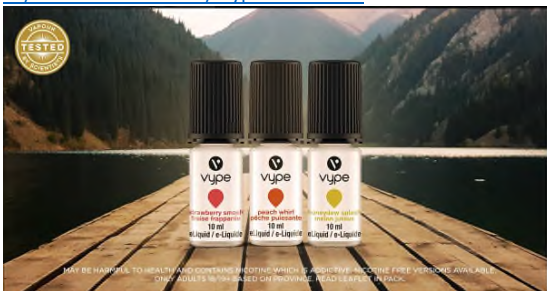
<https://www.facebook.com/VypeCanada/photos/a.941193406061529/941192902728246/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1052772904903578/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/956397991207737/?type=3&theater>

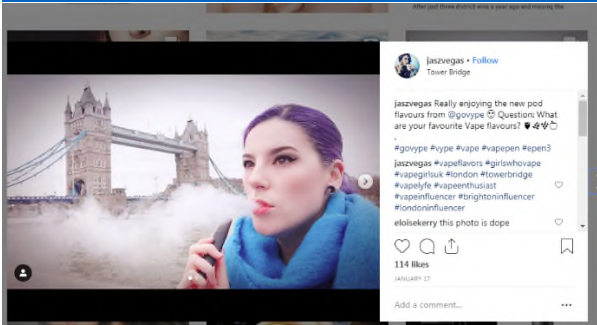


<https://www.facebook.com/VypeCanada/photos/a.941193406061529/946055542241982/?type=3&theater>

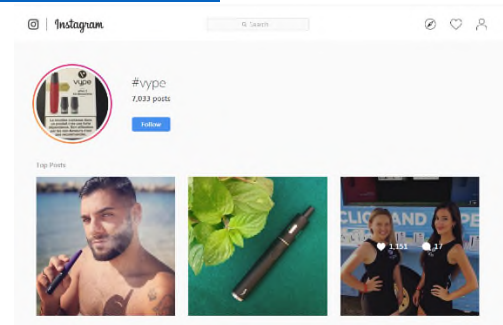
Advertisements that associate Vype with glamour



Canadian vype girls on #vype page (shown right). <https://www.instagram.com/p/BmRdqrageRH>



Influencer posts on branded instagram page.
<https://www.instagram.com/p/BsvrSPYBcFi/>



<https://www.instagram.com/explore/tags/vype/>

Advertisements that evoke excitement, risk or daring

The Vype “Looks Small, Hits Big” campaign promotes the higher drug impact of the Vype product made with nicotine salts (Vype ePod). The term “hit” is very commonly used to suggest a single serving or dose of a drug.”



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1095062350674633/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1081753012005567/?type=3&theater>



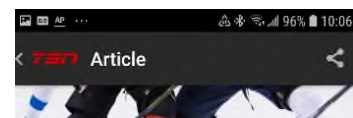
<https://www.facebook.com/VypeCanada/photos/a.941193406061529/1090321324482069/?type=3&theater>



<https://www.facebook.com/VypeCanada/photos/a.1038747822972753/1083733148474220/?type=3&theater>



[Circle K, Westboro, January 5, 2019](#)



Mark Masters - 24/12/2018 04:01:38PM

TSN reporter Mark Masters checks in daily with news and notes on Team Canada, which had an off day Monday following a 5-2 loss to Finland in the final world junior tune-up.

With only a couple days left before the start of the World Juniors, Tim Hunter was asked what he'll be focused on.



"Making sure our guys are aware of what

[TSN News cast.](#)


Advertisements that use testimonials (and thereby also convey lifestyle imagery).

A YouTube video of Canadians (including one wearing a maple-leaf bandana) to endorse Vype.



Advertisements that suggest Vype is less harmful than tobacco.

<https://www.youtube.com/watch?v=dNSbHdmLLuk>



Faites Connaissance Avec Le Nouveau Vype ePen 3.

1,469 views

LIKE DISLIKE SHARE

Vype Electronic Cigarettes
Published on Nov 13, 2018

SUBSCRIBE 656

The advertisements shown in this report are just the tip of the iceberg. There are hundreds more on Instagram and Deskgram, and they can change daily. As of January 27, 2019 Vype ads appeared on Instagram and Desgram as follows:

- #govypeca. 78 advertisements
- #vypesquad. 61 advertisements
- #vypesquad Webstagram. 60 advertisements
- #govype. 1726 advertisements
- #govypeca on Deskgram. 125 advertisements

Annex C

Televised advertisements for VYPE ePen3 in Canada.

September to December 2018.

Background:

Broadcasters are required under federal regulation to provide the Canadian Radio-Television and Telecommunications Commission (CRTC) with a program log for each licensed television station. These program logs must include the time of the broadcast, the duration, and in the case of commercial messages, the name of the advertiser.ⁱ We have observed that, despite the clarity of the regulation, some broadcasters (i.e. Bell Media) do not use the name of the broadcaster, but instead provide the name of the product or the advertisement campaign.

The CRTC makes these logs public four times a year.ⁱⁱ In January 2019, program logs which had been submitted for the months of September, October, November and December were made public. The total number of files for September, October and November exceeded 280, and the 163 program logs were released for December.

Methods:

Two methods were used to establish the frequency for which of broadcast of Vype ePen3 Advertisements appeared in the program logs.

- 1) Method 1: An automated text search program (File Seek) was used to identify the number of occasions that the term “Vype” or “Imperial Tobacco” appeared in the program logs
- 2) Method 2: Each of the program logs in which the term “Vype” or “Imperial Tobacco” appeared was imported into Excel to allow for detailed examination of the date and time of broadcast.

Results:

- The text search of logs for the four-month period revealed 4,332 occasions where the terms “Vype” and/or “Imperial Tobacco” appeared, none of which were in December.
- The detailed examination provided information on 4,180 occasions where Imperial Tobacco/Vype advertisements appeared. Improperly constructed program log files resulted in 152 unanalyzable records, of which most (65%) were for stations owned by one network (Rogers).
- Advertisements predominantly appeared in provinces where retail promotions for vaping products are allowed (Newfoundland, New Brunswick, Ontario, Saskatchewan, Alberta). Advertisements did not appear in most provinces which do not permit retail promotions or displays of vaping products (Nova Scotia, Prince Edward Island, Quebec, Manitoba). The exception to this general observation was British Columbia, which does not permit vaping displays at retail, but where Vype ads were broadcast.
- Advertisements predominantly appeared between 9:00 p.m. and 3 a.m. Very few ads (16) were broadcast before 9:00 p.m. and none appeared during daytime hours (before 7:00 p.m.).

- Advertisements were placed during a variety of program types, including news broadcasts, dramas, comedies, sports, mysteries, etc. The single program with the most ads (13% of total) was the *Late Late Show with James Corden*.
- Most ads (59%) appeared on stations owned by Bell Media. CORUS stations had 14% of ads, CBC and Rogers stations had 12% of ads each and 4% of ads were on independently-owned stations.
- The first ad appeared on September 3 and the last on November 18, 2018. Half the ads (47%) appeared in October.
- The average number of times the ad was broadcast by each station was 98 times. The median time was 81.
- All ads were broadcast during programs for which the intended audience was aged 18 or over.

The results are shown in the tables and figures below.

Limitations

Data Limitations:

- **Potential under-reporting:**
 - Stations which broadcast Vype commercials may not have identified them properly on the program logs or may have failed to have submitted these logs to the CRTC.
 - There are many stations for which December program logs are not yet available.
- **Improper coding against program name:**
 - The file structure issues identified (primarily in Rogers' programming) could result in incorrect attribution of program name.

Interpretive Limitations

- Additional data on audience viewership is required before inferences can be made about the actual exposure of Canadians (including non-smokers and young people) to these advertisements.

Figure 1: Proportion of televised ads by station owner

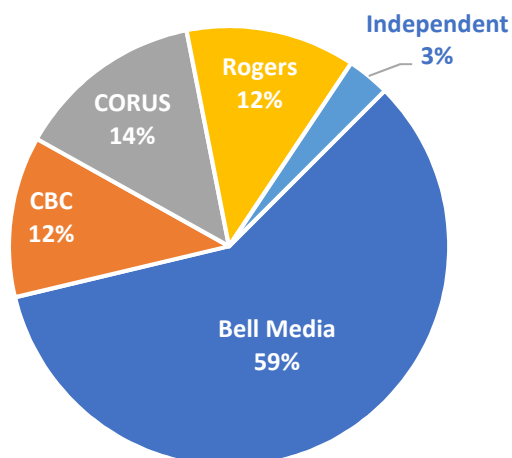


Figure 2: Proportion of televised ads by province

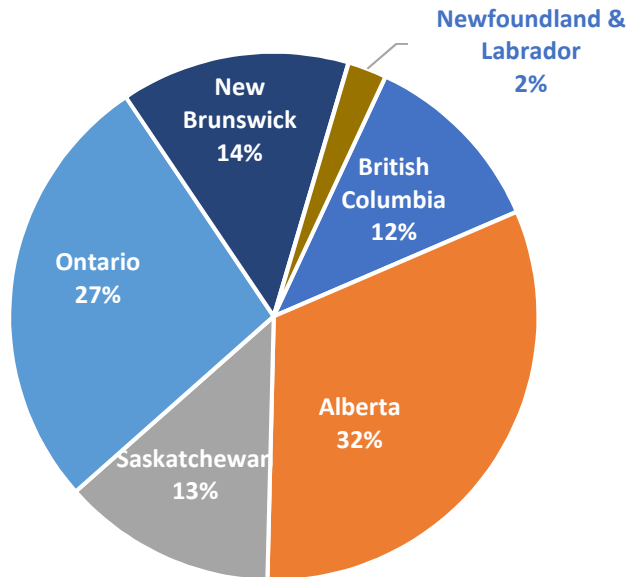


Figure 3: Proportion of televised ads by time of broadcast

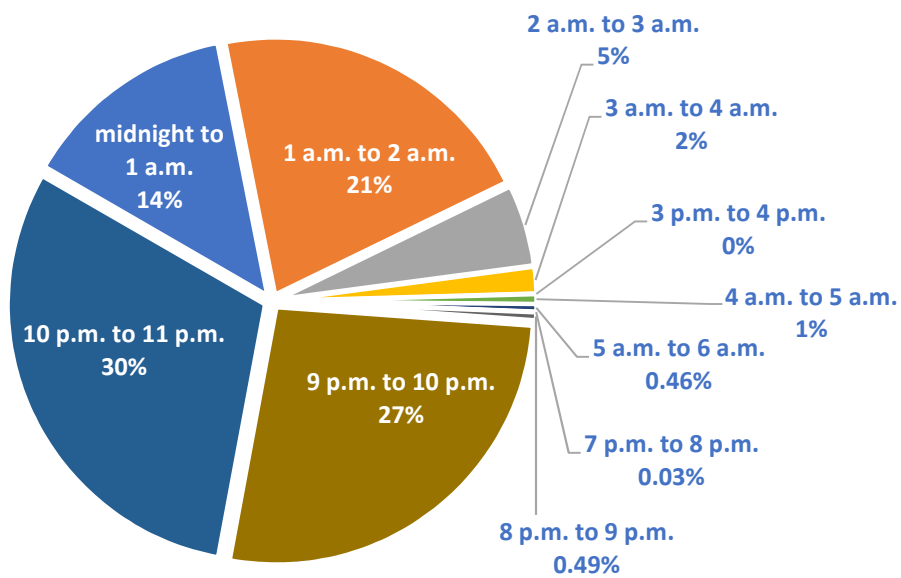


Table 1: Frequency of Vype Ads by television station

Station	Sep-	Oct	Nov	Dec	Total	Total	City	Province
Log 1						Log 2		
BELL MEDIA	640	1,183	723		2,546	2,546		
• CFCN	49	107	68		224	224	Calgary	Alberta
• CFCNL	49	106	68		223	224	Lethbridge	Alberta
• CFQC	39	79	63		181	181	Saskatoon	Saskatchewan
• CFRE	15	51	10		76	76	Regina	Saskatchewan
• CFRN	41	74	56		171	171	Edmonton	Alberta
• CFRN6	41	74	56		171	171	Red Deer	Alberta
• CHBX	18	56	31		105	105	Sault Ste Marie	Ontario
• CHRO	16	7	5		28	28	Pembroke	Ontario
• CICI	18	56	31		105	105	Sudbury	Ontario
• CIVI	16	10	9		35	34	Victoria	British Columbia
• CIVT	42	89	70		201	201	Vancouver	British Columbia
• CJOH	25	83	52		160	160	Ottawa	Ontario
• CKCK	52	89			141	141	Regina	Saskatchewan
• CKCO	18	56	31		105	105	Kitchener	Ontario
• CKCW	79	86	60		225	225	Moncton	New Brunswick
• CKLT	79	86	60		225	225	St. John, NB	New Brunswick
• CKNY	18	56	31		105	105	North Bay	Ontario
• CKVR	25	18	22		65	65	Barrie	Ontario
CBC	143	221	149		513	509		
• CBAT	30	18	19		67	67	Moncton	New Brunswick
• CBET	7	17	16		40	40	Windsor	Ontario
• CBKT	29	33	23		85	85	Regina	Saskatchewan
• CBLT	7	22	8		37	37	Toronto	Ontario
• CBNT	41	35	14		90	90	St. John	New Brunswick
• CBOT	7	20	8		35	35	Ottawa	Ontario
• CBRT		8			8	8	Calgary	Alberta
• CBUT	4	41	33		78	78	Vancouver	British Columbia
• CBXT	18	27	28		73	69	Edmonton	Alberta
CORUS	92	286	219		597	561		
• CFSK	10	40	24		74	75	Saskatoon	Saskatchewan
• CFTO	28	66	47		141	141	Toronto	Ontario
• CHAN	5	10	23		38	28	Vancouver	British Columbia
• CHBC	5	10	23		38	30	Kelowna	British Columbia
• CICT	6	20	15		41	39	Calgary	Alberta
• CIII	6	33	19		58	52	Toronto	Ontario
• CISA	6	20	15		41	40	Lethbridge	Alberta
• CITO	18	56	31		105	105	Timmins	Ontario
• CITV	8	31	22		61	51	Edmonton	Alberta
INDEPENDENT	12	115	9		136	136		
• Access	12	12	9		33	33	Edmonton	Alberta
• CJON		103			103	103	St. John's	Newfoundland
ROGERS	188	239	113		540	434		
• CITY	10	19	15		44	33	Toronto	Ontario
• CKAL	75	82	49		206	189	Calgary	Alberta
• CKEM	42	54	32		128	104	Edmonton	Alberta
• CKVU	47	53	12		112	89	Vancouver	British Columbia
• CSCN		7	3		10	6	Regina	Saskatchewan
• SN	14	24	2		40	33	Ontario	Ontario
Total	1,075	2,044	1213		4,332	4,186		

Table 2: Frequency of Vype Ads by program

Program name (as logged)	# ads
Late Late Show with James Corden	561
CTV National News	261
Criminal Minds	214
CTV News Atlantic	202
CityNews Tonight	188
CBC News: The National	170
Magnum P.I.	165
CTV News Calgary at 11:30	118
Blue Bloods	109
Station 19	105
Hockey Night in Canada	104
How To Get Away With Murder	98
Law & Order: Special V ictims Unit	79
CTV News Saskatoon	74
SEAL TEAM	66
CityLine	65
Blindspot	64
Grey's Anatomy	63
The Rookie	63
The Resident	61
Top 30	57
NCIS: Los Angeles	54
CTV News Vancouver at 11:30	51
Bull	50
Anger Management	48
CTV NEWS	43
CTV News Barrie	42
Chicago Fire	41
CTV News Regina	38
News-Nova Scotia (Late Night)	37
CTV News Edmonton at 11:30	34
etalk	33
Not Determined	35
Hawaii Five-0	30
S.W.A.T.	30
Hockey Central	27
Madam Secretary	27
New Amsterdam	27
Chicago PD	26
MacGyver	26
South Park	24
CTV Movie: The Nightmare Before Christmas (CTV)	22
CTV News Ottawa	20
Frankie Drake Mysteries	20
CBC News Late Night (Ontario)	18
Drunk History	18
The Gifted	18
CTV News Vancouver Island	16
The Half Hour	16

Program name (as logged)	# ads
CTV News Toronto	15
Lethal Weapon	15
Vancouver Late News (30 minutes)	15
Late Show with Stephen Colbert	14
Modern Family	14
Grand Designs - Australia	13
The Fifth Estate	13
Corporate	12
Late Night with Seth Meyers	12
Tonight Show Starring Jimmy Fallon	12
Edmonton Weekend News	11
Mike & Molly	11
A Dangerous Method	10
This Hour Has 22 Minutes	10
Workaholics	10
News-Edmonton (Late Night)	9
NTV LATENIGHT NEWS	9
Rick Mercer Report	9
Chicago Med	8
Extra	8
FBI	8
News-Ottawa (Late Night)	8
CBC Arts: Exhibitionists	7
Corner Gas	7
The Good Doctor	7
Toronto Blue Jays	7
Kroll Show	6
Murphy Brown	6
SURVIVOR 09/19	6
The Alec Baldwin Show	6
The Detectives	6
Will & Grace	6
Jeff Ross Presents Roast Battle	5
Jersey Shore: Family Vacation	5
MLB Baseball	5
NTV MOVIE PRESENTATION	5
The Good Place	5
9-1-1	4
CBC Winnipeg Comedy Festival	4
CityNews Weekend	4
The Investigators with Diana Swain	4
Burden of Truth	3
Coronation Street (2015-2022)	3
News-Vancouver (Late Night)	3
NTV ENTERTAINMENT NEWS2019	3
Power & Politics	3
Schitt's Creek	3
The Reckoning: Hollywood's Worst Kept Secret	3
A Million Little Things	2
Band Geeks	2

Program name (as logged)	# ads
CBC Music: First Play Live	2
CTV's Big Fall Preview	2
Finding the Secret Path	2
Global News Morning	2
Hell's Kitchen	2
Just For Laughs: All Access	2
Just For Laughs: Gags	2
Manifest	2
Mr. D	2
NCIS: New Orleans	2
Next of Kin	2
Prison Pump	2
This Is Us	2
14 & Muslim	1
Baroness Von Sketch Show	1
Canadian Country Music Awards 2018	1
CBC Docs Special Presentation	1
Celebrity Family Feud	1
Dancing with the Stars: Juniors	1
Escape to the Country	1

Program name (as logged)	# ads
Good Doctor, The	1
Hailey Dean Mysteries: 2+2=Murder	1
Halifax Comedy Festival	1
Happy Together	1
Harvest Wedding	1
In the Long Run	1
Know I'm Here	1
Motive	1
News-Calgary (Late Night)	1
News-Regina (Late Night)	1
Rel	1
Sportsnet Central	1
The \$100,000 Pyramid	1
The Filmmakers	1
The Goods	1
True North Calling	1
Vanity Fair	1
When Calls the Heart	1
Workin' Moms	1

Endnotes

- i Television Broadcasting Regulations, 1987. SOR/87-49.
<https://laws-lois.justice.gc.ca/PDF/SOR-87-49.pdf>
- ii Government of Canada. Open Government. Television program logs.
<https://open.canada.ca/data/en/dataset/800106c1-0b08-401e-8be2-ac45d62e662e>